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QUOTING THE BIBLE: THE USE OF RELIGIOUS REFERENCES IN JUDICIAL DECISION-MAKING

Sanja Zgonjanin*

INTRODUCTION

The use of religion in judicial decision-making is the subject of an ongoing debate.¹ Whether and to what extent a decision is based on religious argument or influenced by religious convictions is a difficult question to answer. While scholars disagree on the appropriateness of religious arguments or influences in judicial decision-making,² they commonly recognize that explicit reference to religious authority in a written opinion is problematic.³ Many

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¹ See Constitution Restoration Act of 2005, S. 520, 109th Cong. (2005); H.R. 1070, 109th Cong. (2005).

² Scholars differ on the issue of the appropriateness of religion in judicial decision-making. However, most legal literature on the issue is written from the perspective advocating the use of religion in judicial decision-making. That viewpoint is shared by moderates and conservatives alike. See generally MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 102-04 (1999); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 239-41 (1988) [hereinafter GREENAWALT, RELIGIOUS CONVICTIONS]; Scott C. Idleman, *The Concealment of Religious Values in Judicial Decisionmaking*, 91 VA. L. REV. 515 (2005) [hereinafter Idleman, *Concealment*]; Teresa S. Collett, *"The King's Good Servant, but God's First": The Role of Religion in Judicial Decisionmaking*, 41 S. TEX. L. REV. 1277 (2000); Mark B. Greenlee, *Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges*, 26 U. DAYTON L. REV. 1 (2000); Daniel G. Ashburn, *Appealing to a Higher Authority?: Jewish Law in American Judicial Opinions*, 71 U. DET. MERCY L. REV. 295 (1994).

³ GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 2, at 239 ("Judicial opinions are formalized justifications for decisions. Opinions are supposed to refer only to what is legally relevant What is legally relevant is generally conceived to be the same for all judges, so neither personal religious convictions nor any other idiosyncratic convictions are legally relevant. Given this understanding about judicial opinions, it follows that opinions should not contain direct references to the religious premises of judges."); Mark C. Modak-Truran, *Reenchanting the Law: The Religious Dimension of Judicial Decision Making*, 53 CATH. U. L. REV. 709, 814 (2004) ("In addition, judges are not insincere by leaving their religious or comprehensive justifications out of their opinions but consistent with the Establishment Clause (i.e., the 'rule of law') and a proper understanding of religious pluralism. Leaving out religious justifications also facilitates [sic] consensus on legal results and lower-level legal rules and principles without raising the thorny philosophical, theological, and hermeneutical [sic] questions implicated by religious justifications."); Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537, 542-43 (1998) ("In fact, given that religious bases may be less than universal in their acceptance among the relevant audiences to the opinion, it is quite sensible that the judge would not necessarily

judges are religiously active and outspoken about the impact of religion on their work.⁴ Some well-known Supreme Court justices were, and are, deeply religious.⁵ Unlike the past, today's Supreme Court Justices, such as Antonin Scalia, speak publicly about their religious faith.⁶ Some judges have explicitly stated in their opinions that "[c]ourts must recognize that the state is but one of several spheres of government, each with its distinct jurisdiction and

make reference to them in the act of justification."); Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 35 (1997) ("One would expect that a savvy judge who bases his or her decision on personal morality will not do so explicitly, but will cite only legally relevant grounds for the decision."); Kent Greenawalt, *Religious Expression in the Public Square—The Building Blocks for an Intermediate Position*, 29 LOY. L.A. L. REV. 1411, 1419 (1996); see generally David Barringer, *Higher Authorities*, A.B.A. J., Dec. 1996, at 68.

⁴ See, for example, Raul A. Gonzalez, *Climbing the Ladder of Success—My Spiritual Journey*, 27 TEX. TECH. L. REV. 1139, 1157 (1996), in which Texas Supreme Court Justice Gonzalez describes his religious re-awakening and the impact his faith had on his decisions, including *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984); *Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984); *In re Unnamed Baby McLean*, 725 S.W.2d 696 (Tex. 1987); *Jilani v. Jilani*, 767 S.W.2d 671 (Tex. 1988); *Cox v. Thee Evergreen Church*, 836 S.W.2d 167 (Tex. 1992), *Speer v. Presbyterian Children's Home*, 847 S.W.2d 227 (Tex. 1993); *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993); *Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996); and *Krishnan v. Sepulveda*, 916 S.W.2d 478 (Tex. 1995). He concludes:

In each of the above cases, my relationship with God impacted the way I considered and wrote about the issues presented. How we experience God and our level of religious commitment (or lack of commitment) impacts our work. One's views on how the world began, sin, forgiveness, and redemption influences our attitudes, behavior, and everything that we do.

Gonzalez, *supra*, at 1157.

⁵ See generally James W. Gordon, *Religion and the First Justice Harlan: A Case Study in Late Nineteenth Century Presbyterian Constitutionalism*, 85 MARQ. L. REV. 317 (2001); Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383 (1998); Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989). Some judges believe that they have a right to use religious references in justifying their decisions. Judge Griffen, who is also a Baptist pastor, explains why he thinks he has that right:

Finally, devout judges must remain sensitive to the important role that religious values and their proper expression serve within a pluralistic society. If the devout judge does not remind society that certain conduct is condemned as offensive to domestic tranquility, contrary to the laws of nature, or inconsistent with truth, then society is denied the value of that information and judgment in its pursuit of justice. The give-and-take of competing moral, behavioral, intellectual, and cultural philosophies is how a pluralistic society operates. The devout judge, as a citizen of two societies, helps society remain pluralist by thinking and acting in a holistic way, not by trivializing religious conviction.

Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQ. L. REV. 513, 520 (1998).

⁶ See Joan Biskupic, *Scalia Makes The Case for Christianity; Justice Proclaims Belief in Miracles*, WASH. POST, Apr. 10, 1996, at A1; see also, e.g., Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863 (1997).

limited authority granted by God,”⁷ and “that God, not the state or any government established by man, is the source of all our rights.”⁸ Some judges use religion as an alternative to traditional sentencing such as jail or rehabilitation for drug and alcohol offenders.⁹ Other judges go as far as prohibiting the parents in a divorce decree from exposing their child to “non-mainstream” religious beliefs and rituals.¹⁰ Despite the unprecedented presence of religion in the lives of ordinary American citizens,¹¹ some scholars¹² continue to maintain “a modern myth that religion is somehow persecuted in American life.”¹³

Responding to the argument that explicit religious references are rare or absent from judicial opinions,¹⁴ this Article will demonstrate that judges’ personal religious beliefs and religious education very often find a place in decisions they write.¹⁵ A quick

⁷ *Ex parte* G.C., No. 1040001, 2005 WL 1793345, at *22 (Ala. July 29, 2005) (Parker, J., dissenting).

⁸ *Id.* at *14 (Bolin, J., concurring specially).

⁹ See Alan Maimon, *Judge Lets Some Defendants Attend Worship as Sentencing Option*, COURIER-J. (Louisville, KY), May 31, 2005, at A1. Michael Caperton, a Laurel district judge since 1994 and a devout Christian, offered the option of attending worship for ten services “about 50 times to repeat drug and alcohol offenders.” *Id.*

¹⁰ See Kevin Corcoran, *Father Appeals Anti-Wicca*, INDIANAPOLIS STAR, May 26, 2005, at A1.

¹¹ See generally Faith Based and Community Initiatives, <http://www.whitehouse.gov/government/fbci/index.html> (last visited Jan. 24, 2006). In the field of legal theory, one author suggested it is time to develop a Christian jurisprudence. Jonathan Edward Maire, *The Possibility of a Christian Jurisprudence*, 40 AM. J. JURIS. 101, 101-02 (1995).

¹² Paulsen & Johnson, *supra* note 6, at 867 (commenting that Justice Scalia’s speech at a prayer breakfast at the First Baptist Church in Jackson, Mississippi, on April 9, 1996, was “about the clash of world views between Christianity and today’s dominant culture. It was about the difficulties of being a Christian in a secular world—our culture and, especially, our legal culture.”).

¹³ Biskupic, *supra* note 6, at A7 (quoting James Dunn, executive director of the Baptist Joint Committee on Public Affairs).

¹⁴ Idleman, *Concealment*, *supra* note 2, at 520 (“To most observers of the American legal system, including its participants, the absence of overt religious language or reasoning in judicial decisionmaking is unremarkable. In all likelihood, it is not even noticed.”); Modak-Truran, *supra* note 3, at 786-87 (“[e]xplicit religious references rarely appear in judicial opinions.”); Berg & Ross, *supra* note 5, at 387 (“Note, however, the limits on the importance of religious arguments. First, such arguments do not appear as often as one might expect in an age of pervasive Christianity: one can basically count them on two hands.”); Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law*, 81 U. DET. MERCY L. REV. 751, 752 (2004) (“Biblical texts occasionally are even cited as authority in judicial opinions.”).

¹⁵ See generally J. Michael Medina, *The Bible Annotated: Use of the Bible in Reported American Decisions*, 12 N. ILL. U. L. REV. 187 (1991). This annotation collects cases where a court directly cites a biblical passage, and the author lists the following doctrines for which the Bible is cited as the foundation: “the sequestration rule, punitive damages, forgiveness of debts, due process, forfeiture, alien rights, statutory construc-

Westlaw online survey of federal and state cases for the use of biblical books, such as *Genesis*, *Exodus*, *Leviticus*, and *Deuteronomy*, produces a high number of results.¹⁶ Interestingly, courts of the nineteenth century rarely quoted the Bible, despite the fact that many judges were devoutly religious and active in their local congregations.¹⁷ Quoting the Bible is much more characteristic of twentieth-century American courts and is a matter of great concern to anyone who believes that judicial decision-making should not be based on comprehensive doctrines such as religion.¹⁸

The first part of this Article discusses the judicial use of the Bible in criminal sentencing by trial courts. The second part examines some of the ways in which courts undermine the religious character of biblical quotations. The third part examines the variety of purposes for which courts use biblical quotations. The fourth part is a case study of judicial use of two specific biblical

tion, basic agency doctrine, tenancy by the entirety, the two-witness rule, the right of confrontation, judicial impartiality, criminalization of sodomy, the necessity defense to criminal charges, the right of free travel, usury, eminent domain, impeachment of witnesses, the law of apportionment, property tax exemptions, double jeopardy, and various elements of past and present domestic relations law." *Id.* at 189-91.

¹⁶ For example, a Westlaw search performed on February 10, 2006 resulted in the following: *Genesis* 1 is quoted in 10 state and 11 federal cases; *Exodus* 21 is quoted in 59 state and 27 federal cases; *Leviticus* 24 is quoted in 5 state and 8 federal cases; *Deuteronomy* 19 is quoted in 16 state and 7 federal cases. In the same search, the word *Leviticus* appeared in 126 state, 89 federal, and 4 Supreme Court cases; the word *Deuteronomy* appeared in 173 state, 100 federal, and 5 Supreme Court cases. This author's review of search results showed that only a small number of quotations are part of the facts of a case. Due to the lack of more precise search methods in Westlaw and Lexis databases that would allow comprehensive inquiries of biblical quotations, this Article was limited to a discussion of a very narrow scope of biblical quotations in judicial opinions.

¹⁷ See *infra* Appendix.

¹⁸ John Rawls based his theory of justice on the concept of public reason shared by all citizens, "independent of opposing and conflicting philosophical and religious doctrines," and "an overlapping consensus of reasonable religious, philosophical, and moral doctrines." He said:

The religious doctrines that in previous centuries were the professed basis of society have gradually given way to principles of constitutional government that all citizens, whatever their religious view, can endorse. Comprehensive political and moral doctrines likewise cannot be endorsed by citizens generally, and they also no longer can, if they ever could, serve as the professed basis of society.

JOHN RAWLS, *POLITICAL LIBERALISM* 9-10 (1993). Rawls viewed the Supreme Court as the best exemplar of public reason in a society of constitutional regime with judicial review and argued that public reason is "well suited to be the court's reason in exercising its role" *Id.* at 231. But see generally GREENAWALT, *Publicly Accessible Grounds of Decision and Religious Convictions*, in *RELIGIOUS CONVICTIONS*, *supra* note 2, at 49-84; and Richard Posner, *The Problematics of Moral and Legal Theory*, 111 *HARV. L. REV.* 1637 (1998).

passages, *Matthew* 6:24 and *Luke* 16:13. The fifth part considers the judicial use of religious references other than the Bible. The Article concludes that the use of religious references in judicial decision-making should be prohibited.¹⁹

“The *Christian* state knows only *privileges*.”²⁰ Christian faith is privileged in the United States.²¹ Because a privilege is not a right, the government is under no obligation to confront the injustice and discrimination created by it.²² On the contrary, since the religious beliefs of a majority of Americans are associated with Christianity,²³ such privilege is largely invisible and sustained by the power it creates.²⁴ As is often the case, the characteristics of the majority become so internalized that they are considered the social norm.²⁵ In a way, they “domesticate” the minority.²⁶ Additionally,

¹⁹ “The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people’s religious or philosophical views.” RAWLS, *supra* note 18, at 236.

²⁰ KARL MARX, *On The Jewish Question*, in 3 KARL MARX & FREDERICK ENGELS: COLLECTED WORKS 1843-44, at 146, 146 (Jack Cohen et al. trans., 1975).

²¹ Joseph R. Duncan, Jr., *Privilege, Invisibility, and Religion: A Critique of the Privilege that Christianity Has Enjoyed in the United States*, 54 ALA. L. REV. 617, 626 (2003). See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (upholding a New York City program permitting public schools to release students to attend religious instruction and stating, “[w]e are a religious people whose institutions presuppose a Supreme Being.”); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (holding that a statute prohibiting the contracting of foreigners to perform labor and services did not apply to clergy, and stating that “this is a Christian nation”).

²² See Duncan, *supra* note 21, at 621.

²³ See BARRY A. KOSMIN ET AL., THE GRADUATE CENTER OF THE CITY UNIVERSITY OF NEW YORK, AMERICAN RELIGIOUS IDENTIFICATION SURVEY 12 (2001), http://www.gc.cuny.edu/faculty/research_studies/aris.pdf (on file with the author). According to the most comprehensive study of religious identification of American adults, done by the Graduate Center of the City University of New York, 76.5% of the U.S. population self-identifies as Christians. *Id.* See also Largest Religious Groups in the United States of America, http://www.adherents.com/rel_USA.html (last updated Jan. 24, 2006).

²⁴ Duncan, *supra* note 21, at 622. See also *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 283 (4th Cir. 2005). Applying *Marsh v. Chambers*, 463 U.S. 783 (1983), the court held that the county board’s invocation policy excluding a county resident’s Wiccan religion was constitutionally sound and that the Wiccan religion was not monotheistic, did not “fit broadly within ‘the Judeo-Christian tradition,’” and lacked “the unifying aspects of our heritage.” *Id.*

²⁵ See Stephanie M. Wildman with Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 890 (1995). See also STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 141 (1996).

[O]ur social system is not supposed to privilege organized religion or religious belief over the secular realm. But this protection of the secular creates a peculiar vacuum, in which religion is supposed to be invisible, yet Christmas is a national holiday. Even the phrasing ‘church [but

religious practices and expressions are widely accepted and sanctioned by courts based on their context²⁷ or tradition.²⁸ It is now accepted that religious practices and expressions that are deeply embedded in the nation's history and tradition do not violate the Constitution.²⁹ They include, among others, opening the Supreme Court session with "God save the United States and this honorable

not synagogue or mosque] and state' privileges Christianity as the defining religion for constitutional drafting. Systems of privilege and the religious/secular dichotomy intertwine with the rule of law to contribute to the undermining of justice. Systemic privileging and oppression remain invisible and undiscussed, in accordance with the unwritten rules of our society. The rule of law does nothing to end this invisibility and may even contribute to its continuation. Thus the very act of seeing that the rule of law and systems of privilege undermine justice is itself problematic. A full attack on privileging and oppression can begin in earnest only when the legal profession recognizes this privileging dynamic. But this reality—privilege—that we must see has not even found articulation in legal vocabulary.

Id.

²⁶ The term "domestication" is borrowed from lesbian legal theory. "Domestication also describes a process of substituting one way of thinking for another. Domestication has occurred when the views of the dominant culture, in this case legal culture, are so internalized they are considered common sense." Ruthann Robson, *Mother: The Legal Domestication of Lesbian Existence*, 7 *HYPATIA* 172, 172 (1992).

²⁷ See *County of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989) (holding that a display of the crèche in a county courthouse violates the Establishment Clause while the display of a menorah in front of a county building, in a particular setting next to a Christmas tree, does not); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (holding that "notwithstanding the religious significance of the crèche," its display by the city did not violate the Establishment Clause). Justice Burger stated:

It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so "taint" the city's exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings.

Id. at 686.

²⁸ See *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247, 269 (3d Cir. 2003) (holding that a Ten Commandments plaque affixed to a courthouse is not a real threat to the Establishment Clause). The court noted that "the *age and history* of the plaque provide a context which changes the effect of an otherwise religious plaque." *Id.* at 264 (citing *County of Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring)).

²⁹ See *Marsh*, 463 U.S. at 788-89. Justice Burger held that a century-old practice of opening legislative sessions with a prayer by a chaplain paid with public funds does not pose a real threat to the Establishment Clause. *Id.* at 795.

Court,”³⁰ opening a legislative session with a prayer;³¹ recognizing the nation in the pledge of allegiance as “one Nation under God;”³² and printing “In God We Trust” on our money,³³ and posting it in court rooms, Congressional chambers, and other places of government business. After all, “In God we trust” is our national motto,³⁴ and Thanksgiving and Christmas are national holidays.³⁵ President Reagan even once proclaimed 1983 the year of the Bible.³⁶

The privilege of Christian religion is also affirmed and supported by Congress. For example in 2005, members of Congress introduced a House resolution directing the Speaker of the House to display the Ten Commandments in the House Chamber in case the Supreme Court was to rule that the government display of the Ten Commandments in public places is unconstitutional.³⁷ Advanced by Representatives King, Chabot, Bartlett, Norwood, Pitts, Westmoreland, Blackburn, Fox, Gingrey, Hostettler, Goode, and Alexander, the resolution was introduced in anticipation of the Supreme Court ruling on two Ten Commandment cases argued during the April 2005 term: *Van Orden v. Perry*³⁸ and *McCreary County v. ACLU*.³⁹ The resolution states, among other things, that the House “recognizes that posting the Ten Commandments in the House Chamber is a constitutionally protected expression of our Nation’s heritage and the foundation of our laws.”⁴⁰ The statement that biblical commands are the foundation of our laws may come as a surprise to law school students who, upon entering law school, first

³⁰ *County of Allegheny*, 492 U.S. at 630 (O’Connor, J., concurring) (reaffirming the secular purpose of “ceremonial deism” of the phrase, “God save the United States and this honorable Court,” which, despite its religious roots, does not convey endorsement of a particular religious belief).

³¹ *Marsh*, 463 U.S. at 795. See also *Simpson*, 404 F.3d at 282 (applying *Marsh*, which “teaches[] legislative invocations perform the venerable function of seeking divine guidance for the legislature”). But see *Wynne v. Town of Great Falls*, 376 F.3d 292, 301-02 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 2990 (2005) (holding that the Town Council’s invoking of Jesus Christ while excluding deities associated with other faiths was “not constitutionally accepted legislative prayer like that approved in *Marsh*”).

³² 4 U.S.C. § 4 (2000).

³³ 31 U.S.C. § 5112 (2000).

³⁴ 36 U.S.C. § 302 (2000).

³⁵ 5 U.S.C. § 6103 (1990).

³⁶ S.J. Res. 165, 97th Cong., 96 Stat. 1211 (1982).

³⁷ H.R. Res. 214, 109th Cong. (2005).

³⁸ 125 S. Ct. 2854, 2864 (2005) (holding that the display of a monument inscribed with the Ten Commandments on the Texas state capitol grounds did not violate the Establishment Clause).

³⁹ 125 S. Ct. 2722, 2745 (2005) (holding that displaying the Ten Commandments at a Kentucky county courthouse violated the Establishment Clause).

⁴⁰ H.R. Res. 214, 109th Cong. (2005).

learn about the history and sources of American law. One of the most popular law school books on this topic is the *Historical Introduction to Anglo-American Law in a Nutshell*.⁴¹ In tracing American legal history, this book starts by pointing out that most of the concepts of Anglo-American law were developed in the last eight hundred years,⁴² thus excluding the Bible as a direct source of our laws. The book also lays out two main sources of law upon which the American legal system relies: cases and statutes.⁴³ The Bible is not mentioned as a source of American law.

The privilege of Christianity as the predominant religion in the United States is vigorously supported by the media. While the author was working on this Article, Pope John Paul II died on April 2, 2005.⁴⁴ Shortly thereafter, on April 11, 2005, Maurice Hilleman, one of the greatest scientists of modern times, died.⁴⁵ While Pope John Paul II was considered by many to be one of the most important “spiritual leaders and moral teachers of the Modern Era”⁴⁶ and probably one of the most famous people in the world, microbiologist Maurice Hilleman remained “the world’s best kept secret.”⁴⁷ The discrepancy in the print media coverage of the deaths of these two important persons speaks for itself and is stunning. A search of the term “Pope John” in the “Major Newspapers” section of the *Lexis News & Business* online database produced 1086 entries for the period between April 2, 2005, when the Pope died, and April 3, 2005, when the news was announced. In contrast, a search for “Maurice Hilleman” in the same database for the period between April 11, 2005, when the scientist died, and April 12, 2005, when the news was released, produced only four results: the *Balti-*

⁴¹ FREDERICK G. KEMPIN, JR., *HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW IN A NUTSHELL* (3d. ed. 1990).

⁴² *Id.* at 2.

⁴³ *See id.* at 95-125. For a detailed explanation of sources of Anglo-American law, see generally CARLETON KEMP ALLEN, *LAW IN THE MAKING* (1927); and SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* (2d ed. 1923).

⁴⁴ *See After 26-Year Reign, Pontiff Dies at 84*, CNN, Apr. 2, 2005, <http://www.cnn.com/2005/WORLD/europe/04/02/pope.dies/index.html>; Ian Fisher, *Pope John Paul II Dies at 84*, N.Y. TIMES, Apr. 3, 2005, at A1.

⁴⁵ Lawrence K. Altman, *Maurice Hilleman, Master in Creating Vaccines, Dies at 85*, N.Y. TIMES, Apr. 12, 2005, at A1.

⁴⁶ S. Res. 95, 109th Cong. (2005). *See also* S. Res. 94, 109th Cong. (2005); H.R. Res. 186, 109th Cong. (2005).

⁴⁷ Patricia Sullivan, *Maurice R. Hilleman Dies; Created Vaccines*, WASH. POST, Apr. 13, 2005, at B6. Maurice Hilleman “invented over 40 vaccines, including those for mumps, chickenpox, measles, rubella, hepatitis A and B, meningitis, and countless variants of the flu virus.” Caroline Richmond, *Obituary, Maurice Hilleman; Inventor of More than 40 Vaccines*, INDEPENDENT (London), Apr. 20, 2005, at 35.

more Sun, the *New York Times*, the *Orlando Sentinel*, and the *Seattle Times*.

While religious expression is recognized as part of American tradition and history, no court has yet provided a reasonable explanation of how the passage of time makes religious expression less religious and more secular so that it becomes a primary source of constitutional legitimacy.⁴⁸ The proposition that religious practices and expressions do not violate the Constitution because they are accepted by a majority of society or are somehow “secularized” is a dangerous one.⁴⁹ The government’s endorsement and use of religion encourages the oppression of minorities because it makes religious privilege invisible, allowing the majority in power to use the law according to its own beliefs.⁵⁰

Congress is the biggest threat today to both judicial independence from religion and the court’s traditional role as the interpreter of the law. Members of Congress introduced the Constitution Restoration Act of 2005:

Notwithstanding any other provision of this chapter, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any matter to the extent that relief is sought against an entity of Federal, State, or local government, or against an officer or agent of Federal, State, or local government (whether or not acting in official or personal capacity), concerning that entity’s, officer’s, or agent’s acknowledgment of God as the sovereign source of law, liberty, or government.⁵¹

⁴⁸ Charles Gregory Warren, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court’s Establishment Clause Jurisprudence*, 54 *MERCER L. REV.* 1669, 1691-92 (2003). See also *State v. Ceballos*, 832 A.2d 14, 55 (Conn. 2003) (Zarella, J., concurring in part and dissenting in part).

[N]ot all religious references, including allusions to the Bible, God or other biblical characters, are impermissible. This is because many words and phrases traditionally viewed as religious in nature or derived from religious sources have become, over time, an integral part of the English language, and no longer may be recognized by either prosecutors or jurors as having purely religious connotations or derivations. Consider, for example, the phrases “raising Cain” and “for whatever a man sows, that he will also reap.” Both phrases are common expressions derived from the Bible. Still other expressions, such as “an eye for an eye,” have both religious and secular origins.

Id. (citation omitted).

⁴⁹ Warren, *supra* note 48, at 1692-93.

⁵⁰ See generally Duncan, *supra* note 21.

⁵¹ S. 520, 109th Cong. (2005); see also H.R. 1070, 109th Cong. (2005). The Constitution Restoration Act was first introduced during the 108th Congress. See S. 2082, 108th Cong. (2004); S. 2323, 108th Cong. (2004); H.R. 3799, 108th Cong. (2004). During the 108th Congress, many other bills and resolutions were introduced recog-

By imposing its own religious values, the conservative religious right movement is destroying two of the most important values of American society: tolerance and pluralism.⁵² Attempts by conservative members of Congress to deprive the Supreme Court and the federal courts of their jurisdiction in solving disputes with religious subject matter are without precedent in our history. These attempts undermine the long-standing principle of judicial review articulated in *Marbury v. Madison*.⁵³ At the same time, courts' use of religious references and religious convictions in their decision-making is on the rise.⁵⁴

It is hardly worth noting that, in a society with a Christian majority, the majority of judges are Christians.⁵⁵ The power of the

nizing the privilege of Christianity. *See also* H.R.J. Res. 39, 108th Cong. (2004) (constitutional amendment proposing “[a] law that prescribes the Pledge of Allegiance or provides for United States coins or currency is not a law respecting an establishment of religion because it refers to God in the Pledge or includes a reference to God on coins or currency.”); S. 1558, 108th Cong. (2003) (Religious Liberties Restoration Act proposing: the power to display the Ten Commandments on government property; the power to recite the Pledge of Allegiance on government property; the power to recite the national motto “In God We Trust” on government property; and the power to except this subject matter from the jurisdiction of federal courts inferior to the Supreme Court); S. Con. Res. 91, 108th Cong. (2004) (proposing to designate April 2005 as American Religious History Month and requesting that “the President issue a proclamation calling upon the people of the United States to observe the year with appropriate ceremonies and activities”).

⁵² Abraham H. Foxman, *Foreword* to ANTI-DEFAMATION LEAGUE, *THE RELIGIOUS RIGHT: THE ASSAULT ON TOLERANCE AND PLURALISM IN AMERICA*, at iii-iv (1994). This book provides an insight into the grassroots organizing and political commitment of the religious right that led to its enormous power and influence over all three branches of the government in the 1990s. The author defines the religious right as an:

array of politically conservative religious groups and individuals who are attempting to influence public policy based on shared cultural philosophy that is antagonistic to pluralism and church/state separation. The movement consists mainly of Protestants, most of them evangelical or fundamentalist, a far smaller number of Catholics, and a smattering of Jews.

Id. at 7.

⁵³ *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). “It is emphatically the province and duty of the judicial department to say what the law is.” *Id.*

⁵⁴ *See infra* Appendix.

⁵⁵ The first Jewish Justice of the Supreme Court, Louis D. Brandeis, was appointed in 1916 by President Wilson. *See* Ruth Bader Ginsburg, *From Benjamin to Brandeis to Breyer: Is There a Jewish Seat?*, 41 *BRANDEIS L.J.* 229, 233 (2002). *See also Religious Affiliation of the U.S. Supreme Court*, http://www.adherents.com/adh_sc.html (last modified Jan. 31, 2006) (noting that with the confirmation of Samuel Alito, the Supreme Court consists of seven Christian (Alito, Kennedy, Roberts, Scalia, Souter, Stevens, and Thomas) and two Jewish (Breyer and Ginsburg) justices). Statistics show that the Supreme Court is 78% Christian, with a Catholic majority of 56%; while 76.5% of the total U.S. population is affiliated with Christianity. *Id.*

courts to use religious references as they see fit should not be underestimated. Speaking about the power of judicial review, Alexander Bickel once said, “[t]he least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known.”⁵⁶ Judges should be mindful of the power they are vested with and the public trust in their impartiality and refrain entirely from using religious references in their decision-making. Judges are bound by the Code of Judicial Conduct, which, in addition to its canons requiring that judges uphold the integrity, independence, and impartiality of the judiciary,⁵⁷ clearly states:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.⁵⁸

The arbitrariness, inconsistency, and lack of law on the use of religious references in decision-making are some of the main reasons why such use should be proscribed.

I. RELYING ON THE BIBLE IN CRIMINAL SENTENCING

While the use of religious references in judicial decision-making is generally unjustified and inappropriate, the most disturbing and harmful invocation of the Bible takes place in criminal sentencing decisions. The Bible is regularly quoted during the criminal sentencing phase of trials by prosecutors and defense attorneys. In their closing arguments, both sides often invoke the Bible in order to convince juries that defendants deserve or do not deserve punishment. Even those defendants who do not wish to use biblical passages in their closing arguments, or for whom such use may be inappropriate, are coerced into doing so in response to prosecutorial use of religion. Such biblical invocation poses a great threat to a defendant’s constitutional rights.⁵⁹ However, attorneys

⁵⁶ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1 (2d. ed. 1986).

⁵⁷ ANNOTATED MODEL CODE OF JUDICIAL CONDUCT CANONS 1 & 3 (2004).

⁵⁸ *Id.* at Canon 3 (B)(5).

⁵⁹ See generally Marcus S. Henson, *Carfuthers v. State: Thou Shalt Not Make Direct Religious References in Closing Argument*, 52 *MERCER L. REV.* 731 (2001). But see Elizabeth A. Brooks, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments*, 33 *GA. L. REV.* 1113 (1999).

are not alone in quoting the Bible. They are increasingly joined by trial judges, who use religious references in their decision-making process and their written opinions.⁶⁰

While no court has yet specifically addressed whether judicial reliance on religious convictions in written opinions violates the Establishment Clause,⁶¹ some courts have considered the issue of whether a defendant's due process rights are violated when judges rely on religious convictions or religious texts during the sentencing phase. In one well-publicized case, televangelist James O. Bakker, convicted of fraud and conspiracy, challenged his forty-five-year sentence claiming a due process violation because the trial judge made personal religious remarks during sentencing.⁶² The Fourth Circuit held that the trial judge's comment, "[h]e had no thought whatever about his victims and *those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests,*" made during sentencing, violated Bakker's due process.⁶³ The *Bakker* court recognized that the Constitution does not require judges to relinquish their religious beliefs when they assume the office, but it stated that "[c]ourts, however, cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing."⁶⁴ While *Bakker* does not involve explicit religious reference by a judge, it serves as a good example of a decision validating the utmost importance of judicial impartiality. However, judges differ on their approach to the use of religious references by their colleagues.

The Ohio case of James Arnett is illustrative of the opposing views that judges hold about the use of religious references in judicial decision-making. James Arnett was sentenced to fifty-one years in prison after pleading guilty to ten counts of rape and one count of pandering obscenity to the minor daughter of his live-in girl-

⁶⁰ See Lis Wiehl, *Judges and Lawyers Are Not Singing from the Same Hymnal When It Comes to Allowing the Bible in the Courtroom*, 24 AM. J. TRIAL ADVOC. 273, 274 (2000).

⁶¹ Modak-Truran, *supra* note 3, at 783. For a discussion about the lack of Establishment Clause violation challenges in capital cases involving religion during the penalty phase, closing arguments, and jury deliberations, see Gary J. Simson & Stephen P. Garvey, *Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV. 1090, 1104-30 (2001).

⁶² *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991).

⁶³ *Id.* at 740-41.

⁶⁴ *Id.* at 740.

friend.⁶⁵ On appeal, the court remanded for resentencing, holding that the trial judge acted outside the state's sentencing guidelines and that she violated the defendant's due process when she used a specific text from the Bible as a determining factor in sentencing.⁶⁶ The trial judge explained to the defendant that when she had recently imposed a twenty-year sentence for a murder, at least the victim was gone and there was no pain to suffer, but in his case the victim would hurt for the rest of her life.⁶⁷ The judge proceeded by describing her struggle the night before the sentencing decision about what sentence to impose when she found the answer in a biblical passage.⁶⁸ The judge then quoted a passage from *Matthew* 18:5-6:

“And whoso shall receive one such little child in my name, [*sic*] receiveth me. But, [*sic*] whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that [*sic*] he were drowned in the depth of the sea.”⁶⁹

It is interesting to note that Judge Painter, who wrote the Ohio Court of Appeals opinion, added a footnote after the above quotation, in which he noted:

We must quote from the trial transcript, which is not entirely consistent with the Bible, King James Version. The notation “*sic*” indicates instances where words should have been italicized and where commas should not have been added. We assume that the court reporter added these errors and that the judge read the passage correctly.⁷⁰

The apologetic tone of this footnote about quoting from a non-authoritative version of the Bible and the care taken to achieve compliance with the King James Version is most striking. The authoritativeness of the King James Version⁷¹ appears to be self-evident for readers familiar with Christian religious texts, but this is most peculiar for someone who does not belong to that majority. It is not entirely clear why the judge took such care to correct the

⁶⁵ *State v. Arnett*, Nos. C-980172, C-980173, 1999 WL 65632, at *1 (Ohio Ct. App. Feb. 5, 1999), *cert. denied* 126 S. Ct. 207 (2005).

⁶⁶ *Id.* at *2.

⁶⁷ *Id.* at *1.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at *1 n.1.

⁷¹ More than fifty English translations were printed before the King James Bible was published in 1611. DAVID CRYSTAL, *THE STORIES OF ENGLISH* 271-75 (2004). The King James Version, popularly known as the “Authorized Version,” was selected to be read in churches. *Id.* Most of its vocabulary and phrasing derived from the first English translation by William Tyndale, printed in 1525-1526. *Id.*

errors, namely italics and misplacement of commas, or why there was a concern with whether the judge read the passage correctly. It seems almost as if there was a legal requirement that when a court cites the Bible, the King James Version must be used.

After the state appealed, the Ohio Supreme Court reinstated the sentence, holding that a sentencing judge's quotation of a religious text and the acknowledgement of its use during the deliberation process is not impermissible per se and does not violate a defendant's due process.⁷² The defendant petitioned for a writ of habeas corpus claiming a violation of the First Amendment Establishment Clause and his due process rights.⁷³ The district court held that the First Amendment claim was waived due to failure to include it in a brief and argument before the state appellate court, but that the judge's reliance on a biblical passage as the final source for determining the sentence warranted conditional habeas relief until resentencing by a different judge.⁷⁴

Subsequently, the Sixth Circuit dismissed the habeas petition, holding that the trial judge's quotation of *Matthew* 18:5-6⁷⁵ in determining the sentence did not violate the defendant's due process right because the biblical passage relied upon was just an "additional" source, rather than the "final" source of the decision.⁷⁶ However, the dissent noted that the trial judge's reliance on the New Testament provision to determine the sentence was dispositive because, according to the record, the judge admitted that her struggle over the final sentence was answered by this biblical passage.⁷⁷ Relying on *Bakker*, the dissent concluded that the use of a religious text as an authoritative source for reaching a legal result violated the defendant's fundamental expectation of due process and expressed this related concern:

If the Constitution sanctions such direct reliance on religious sources when imposing criminal sentences, then there is nothing to stop prosecutors and criminal defense lawyers from regularly citing religious sources like the Bible, the Talmud, or the Koran to justify their respective positions on punishment. The

⁷² *State v. Arnett*, 724 N.E.2d 793, 804 (Ohio 2000), *cert. denied* 126 S. Ct. 207 (2005).

⁷³ *Arnett v. Jackson*, 290 F. Supp. 2d 874, 875 (S.D. Ohio 2003). The court found that the Magistrate Judge correctly applied the standard of review set forth in the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d). *Id.* at 877-78.

⁷⁴ *Id.* at 878.

⁷⁵ *Arnett v. Jackson*, 393 F.3d 681, 684 (6th Cir. 2005), *cert. denied* 126 S. Ct. 207 (2005).

⁷⁶ *Id.* at 688.

⁷⁷ *Id.* at 689 (Clay, J., dissenting).

judge would be placed in the position of not only considering statutory sentencing factors, but also deciding which religious texts best justify a particular sentence. Under this approach, the judgments of trial courts could begin to resemble the fatwas of religious clerics, and the opinions of appellate courts echo the proclamations of the Sanhedrin.⁷⁸

The Sixth Circuit's conclusion that "[t]here is nothing in the totality of the circumstances of Arnett's sentencing to indicate that the trial judge used the Bible as her 'final source of authority,' as found by the district court,"⁷⁹ is contrary to the trial judge's own words:

Because I was looking for a source, what do I turn to, to make, to make that determination, what sentence you should get And in looking at the final part of my struggle with you, I finally answered my question late at night when I turned to one additional source to help me.⁸⁰

Although the trial judge said she turned to "one additional source," she used the words "make that determination" when she referred to the sentence to impose.⁸¹ More importantly, she used the words "final part" and "finally answered" which clearly emphasized that the finality of her sentencing decision was solved by that one additional source.⁸² The plain meaning of the language "final" and "finally" was simply dismissed by the Sixth Circuit. The court justified its conclusion by reasoning that, "The [b]iblical principle of not harming children is fully consistent with Ohio's sentencing consideration to the same effect."⁸³ The fact that the judge did not impose the maximum sentence commanded by the Bible proved that she did not actually sentence the defendant based upon her religious belief.⁸⁴

As is obvious from the *Arnett* case, courts often justify the use of religious references on the grounds of consistency with the statutory law applied in the case. That is an unnecessary and disturbing practice. In considering the defendant's due process

⁷⁸ *Id.* at 691 (Clay, J., dissenting).

⁷⁹ *Id.* at 688.

⁸⁰ *Id.* at 684.

⁸¹ *Id.* In discussing what constitutes reliance on religious convictions, Kent Greenawalt states, "[t]he clearest instances of reliance on religious convictions occur when the person is certain that he would make a different choice if he disregarded those convictions. . . . A person is clearly not relying on religious convictions when his choice rests firmly on independent grounds." GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 2, at 36.

⁸² *Arnett*, 393 F.3d at 684.

⁸³ *Id.* at 688.

⁸⁴ *Id.*

violation claim in *Arnett*, the Sixth Circuit used the Supreme Court rule that a defendant's due process rights are violated when the death sentence is based on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion or political affiliation of the defendant."⁸⁵ The Sixth Circuit then said, without any additional explanation, that the trial judge in *Arnett* did not base her decision on an impermissible factor, and that the factor used was not "totally irrelevant" because it was consistent with the sentencing statute.⁸⁶ Nevertheless, before it reversed and remanded the case, the Sixth Circuit recognized the following: "We reach this conclusion despite the fact that reasonable minds could certainly question the propriety of the trial judge making mention of the Bible at all in her sentencing decision."⁸⁷ Whether the biblical passage quoted in an opinion is consistent or inconsistent with the statutory provision governing the case is irrelevant and, as such, should not be considered or included in a written opinion justifying a decision.

Another example of the judicial use of biblical passages in criminal sentencing is the Nebraska case *State v. Pattno*.⁸⁸ In *Pattno*, the defendant pled guilty to the sexual assault of a child and was sentenced to a minimum of twenty months and a maximum of five years in prison by the trial court judge.⁸⁹ Before he imposed the sentence, the trial judge recited an extensive biblical scripture against homosexuality⁹⁰ followed by the comment that he also con-

⁸⁵ *Id.* at 686 (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)).

⁸⁶ *Id.* at 686-87.

⁸⁷ *Id.* at 688.

⁸⁸ 579 N.W.2d 503 (Neb. 1998).

⁸⁹ *Id.* at 506.

⁹⁰ *Id.* at 505-06.

Ever since the creation of the world his invisible nature, namely, his external power and deity, has been clearly perceived in the things that have been made. So they are without excuse; for although they knew God they did not honor him as God or give thanks to him as God, but they became futile in their thinking and their senseless minds were darkened. Claiming to be wise, they became fools, and exchanged the glory of the immortal God for images resembling mortal man or birds or animals or reptiles. Therefore God gave them up in the lusts of their hearts to impurity, to the dishonoring of their bodies among themselves, because they exchanged the truth about God for a lie and worshiped and served the creature rather than the Creator, who is blessed for ever [sic]. Amen. For this reason God gave them up to dishonorable passions. Their women exchanged natural relations for unnatural, and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in their own persons the due penalty for their error.

sidered the “nature . . . of the defendant.”⁹¹ The Nebraska Supreme Court held that a reasonable person could have questioned the trial judge’s impartiality because he relied upon his personal religious beliefs in deciding the sentence.⁹² The court also pointed out that the defendant was convicted of having sexual contact with a minor, which is a crime, and not of having sexual contact with a person of the same gender, which is not a crime in the state of Nebraska.⁹³

It is not unusual for judges to inject biblical passages in their opinions as justification for supporting the harsh punishment of certain crimes such as child sexual abuse. In *People v. Jagnjic*, the defendant pleaded guilty to aggravated sexual abuse of a child and was sentenced to no less than five and no more than fifteen years in prison.⁹⁴ However, the New York Appellate Division found that, absent a professional psychiatric evaluation, the sentence was excessive.⁹⁵ In a dissenting opinion, Justice Lupiano pointed to the heinous nature of the crime, arguing that the sentencing decision should not be disturbed and quoted a biblical passage to support that view:

The condemnation of crimes against the young is deeply ingrained in the ethical and moral history of western civilization. Indeed, the bible is replete with references to this universal condemnation as, for example, the following scriptural passage concerning children—“Whosoever shall offend one of these little ones . . . it were better than a millstone were hanged about his neck, and that he were drowned in the depth of the sea” (*Matthew* 18:6).⁹⁶

Quoting the Bible in support of a judicial decision is in clear violation of the judicial code, and it prejudices defendants not only by the content of the religious reference, but by the very fact that an irrelevant, extralegal source is used in the decision-making process.

Id. (quoting the Bible).

⁹¹ *Id.* at 506.

⁹² *Id.* at 509.

⁹³ *Id.* at 508.

No statute in this state criminalizes sexual contact between consenting adults of the same gender. Thus, Pattno’s crime is that he had sexual contact with a minor; not that he had sexual contact with another male. Therefore, the biblical scripture which the judge read was not relevant to the crime to which Pattno pled guilty, and it should not have been considered by the judge in determining an appropriate sentence.

Id.

⁹⁴ 447 N.Y.S.2d 439, 439 (App. Div. 1982).

⁹⁵ *See id.* at 439-40.

⁹⁶ *Id.* at 443 (Lupiano, J., dissenting).

As the *Arnett*, *Pattno*, and *Jagnjic* cases illustrate, any reliance on the Bible as a direct or supporting source of authority in the decision-making process jeopardizes the integrity of the criminal justice system and, if not proscribed, encourages further use of the Bible by judges and other officers of the court.

II. UNDERMINING THE RELIGIOUS CHARACTER OF RELIGIOUS REFERENCES

There are many cases where judicial reference to a biblical passage is justified by the use of language that undermines the religious character of the text or its authority.⁹⁷ This type of qualifying statement is in direct contradiction to the actual meaning of the text and to courts' use of the Bible to support their arguments in countless cases in which the biblical references are used in their proper meaning. It is only logical to conclude that any use of biblical references in judicial decision-making, especially in written opinions, must be entirely arbitrary. On one hand, judges invoke the Bible as serious support for their propositions, and, on the other, their use of the Bible is trivialized. Judge Hildebrandt, who dissented in the *State v. Arnett* Ohio Court of Appeals decision finding a violation of due process, used the "mere"⁹⁸ language justifica-

⁹⁷ By qualifying a statement with "mere" or "merely," courts undermine the religious value of the source from which the quotation is taken, despite the fact that the Bible is cited as the authority. This trend is consistent with the Supreme Court's "secularization" of religious expressions. See generally Ashley M. Bell, "God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions, 50 AM. U. L. REV. 1273 (2001). Bell criticizes the Supreme Court's secularization approach to religious expression:

In addition to being an inconsistent solution, secularization does a great disservice to both religion and society. . . . Moreover, the Court seems more apt to secularize practices derived from Christianity, thus preferring Christianity over other religions. This consequence results in 'religious divisiveness, violating the fundamental principles behind the religion clauses.' Thus, the entire purpose of secularization backfires in its process. While attempting to neutralize religious influence, the Court in actuality prefers some religions, namely Christianity, over others.

Id. at 1305-07. This critique is consistent with the famous quote of the Supreme Court that, "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone v. Graham*, 449 U.S. 39, 41 (1980).

⁹⁸ The Oxford English Dictionary defines "mere" and "merely" as follows: "mere—Having no greater extent, range, value, power, or importance than the designation implies; that is barely or only what it is said to be; [] insignificant, ordinary, foolish, inept" and "merely—Without any other quality, reason, purpose, view, etc.; only (what is referred to) and nothing more." SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1750 (5th ed. 2002).

tion twice in a very short opinion. Hildebrandt stated that “[t]he language quoted from the Bible merely reflects society’s interests in protecting its most vulnerable citizens, a laudable goal that is incorporated into the sentencing guidelines enacted by the General Assembly.”⁹⁹ The dissent concluded, “[t]he mere citation of scriptural material in pronouncing the sentence should not be permitted to obscure the fact that the trial judge based her decision on the proper statutory considerations and that the defendant has failed to demonstrate that any prejudice resulted from the judge’s statements.”¹⁰⁰

In reinstating the sentence, Supreme Court of Ohio Judge Cook used the “mere” language to distinguish general principles from personal beliefs: “Several state supreme courts, though they cite *Bakker* with approval, have declined to vacate sentences where the judge’s religious comments merely acknowledge generally accepted principles, as opposed to highly personal religious beliefs that become the basis for the sentence imposed.”¹⁰¹ In conclusion, the court found that “Arnett’s sentencing judge cited a religious text merely to acknowledge one of several reasons—‘one additional source’—for assigning significant weight to a legitimate statutory sentencing factor.”¹⁰² The court’s distinguishing of *Bakker* from *Arnett* is unpersuasive when it states that “*Bakker* merely prohibits a judge’s personal religious principles from being ‘the basis of a sentencing decision.’”¹⁰³ There is no explanation of how the trial judge’s personal religious principles in *Arnett* were not implicated within the general principles when she turned to the book of *Matthew* for final help in determining the sentence.

A judge’s personal perception of the meaning of biblical passages seems to be crucial in determining whether the use of the Bible is authoritative or symbolic. A judge’s use of the word “mere” often determines whether a defendant’s due process challenge succeeds. For example, in *State v. Cribbs*, the Tennessee Supreme Court affirmed the death sentence of a defendant convicted of premeditated first degree murder.¹⁰⁴ On appeal, the defendant argued that the prosecution’s use of biblical references to justify the death sentence violated his due process rights.¹⁰⁵ The state argued

⁹⁹ *Arnett*, 1999 WL 65632, at *3 (Hildebrandt, J., dissenting).

¹⁰⁰ *Id.*

¹⁰¹ *Arnett*, 724 N.E.2d at 803.

¹⁰² *Id.*

¹⁰³ *Id.* at 804.

¹⁰⁴ 967 S.W.2d 773, 776 (Tenn. 1998).

¹⁰⁵ *Id.* at 783.

that although biblical quotations were impermissible, the prosecutor's use of the language "whatever a man sows, so shall he reap" was merely a metaphor for individual accountability, rather than a justification for imposition of the death penalty.¹⁰⁶ Noting that a biblical reference in this case was inappropriate, the court nevertheless accepted the state's argument finding that it did not prejudice the defendant.¹⁰⁷ The court justified its finding by calling attention to the consistency of the biblical principle with the statute: "[W]e view the comments by the prosecutor which implied that Tennessee law embraced the principle of 'reap what you sow' as merely an extension of that metaphor."¹⁰⁸

Similarly, the dissent in *People v. Harlan* used the "merely" phraseology to point out the trial court's misquoting of biblical passages in the trial record. Harlan was sentenced to death for first-degree murder, but his sentence was vacated because the jury was permitted to bring "the Bible into the jury room to share with others the written *Leviticus* and *Romans* texts during the deliberation."¹⁰⁹ According to the dissent, the trial court concluded that one of the jurors used *Romans* 13:1, "which requires that one look at government authorities as God's representative on earth and follow their lead as agents of 'wrath to bring punishment to the wrongdoer.'"¹¹⁰ The dissent did not contest that the juror used *Romans* 13:1, but it explained that the passage "merely states 'Let every soul be subject to the governing authorities for there is no authority except from God and the authorities that exist are appointed by God.'"¹¹¹ The judge said that the trial court actually imported the language "wrath to bring punishment to the wrongdoer" from *Romans* 13:4 and criticized the majority for not correcting "these overstatements."¹¹² The thrust of the *Romans* passage is an absolute submission to the authorities—and only those established by God. The trial court's use of language from

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 784.

¹⁰⁸ *Id.*

¹⁰⁹ 109 P.3d 616, 632 (Colo. 2005). This case immediately caught the attention of the media. See Kirk Johnson, *Colorado Court Bars Execution Because Jurors Consulted Bible*, N.Y. TIMES, Mar. 29, 2005, at A1; Thane Rosenbaum, *Is Court a Place for Morals?*, L.A. TIMES, Mar. 30, 2005, at B11; Eric Gorski, *Book, Not Faith, Broke Court Rules*, DENV. POST, Mar. 30, 2005, at 1A; Suzanne Goldenberg, *US Jury's Bible Death Sentence Quashed*, GUARDIAN, Mar. 30, 2005, at 11; *Bible-Influenced Death Penalty Ruling Rejected*, IRISH TIMES, Mar. 30, 2005, at 10.

¹¹⁰ *Harlan*, 109 P.3d at 635 (Rice, J., dissenting).

¹¹¹ *Id.*

¹¹² *Id.*

Romans 13:4 about the consequences of wrongdoing that would be imposed by God's appointees neither changed the nature of the command from *Romans* 13:1 nor undermined the main idea of divine authority this biblical passage conveyed. The juror's reference to *Romans* 13:1 alone was sufficient as an improper invocation of an extra-legal authority and cannot be undermined by the dissent's language "merely states." This case exemplifies how a judge's personal view and interpretation of the Bible may affect the outcome of a case.

There are many other ways courts qualify the use of religious references in order to find it justifiable or to undermine the impact of such references. One example of the characterization of the use of a biblical passage is found in *Bussard v. Lockhart*.¹¹³ In that case, the court denied a habeas petition for a defendant who escaped from arrest after committing murder, remaining at-large for four years.¹¹⁴ The prosecutor in *Bussard* used a biblical passage to support the inference of guilt from the escape: "Proverbs 28:1 fits it just as clear as it can be. 'The guilty flee when no man pursueth while the righteous stand bold as a lion.' He fled to avoid coming to trial. That shows guilt."¹¹⁵ In addressing the use of the biblical passage, the court stated:

The prosecutor did not use the Bible to invoke the wrath of God against Bussard or 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 of a common-sense connection expressly recognized by Arkansas law: flight suggests consciousness of guilt.¹¹⁶

The court cited two cases *Killcrease v. State*¹¹⁷ and *Ward v. State*¹¹⁸ in support of the proclamation that Arkansas law expressly recognizes that flight suggests consciousness of guilt.¹¹⁹ A careful reader will notice, however, that only in the *Killcrease* case was there an issue of flight from arrest.¹²⁰ Although in *Ward* the court discussed the fact that the defendant fled the scene upon the arrival of the police, nowhere did the court indicate that the flight was an issue in the case, nor did it state a particular rule related to flight other than "it

¹¹³ 32 F.3d 322 (8th Cir. 1994).

¹¹⁴ *Id.* at 323.

¹¹⁵ *Id.* at 324.

¹¹⁶ *Id.*

¹¹⁷ 836 S.W.2d 380, 382 (Ark. 1992) (flight from arrest corroborates other evidence of guilt).

¹¹⁸ 816 S.W.2d 173, 175 (Ark. Ct. App. 1991) (flight from scene of crime).

¹¹⁹ *Bussard*, 32 F.3d at 324.

¹²⁰ *Killcrease*, 836 S.W.2d at 381.

may be considered with other evidence in determining guilt.”¹²¹ In *Killcrease*, the defendant was convicted of raping his minor daughter and sentenced to life in prison. On appeal he contended that the evidence of his arrest in Louisiana was irrelevant because no warrant was issued or any charges filed when he left Arkansas.¹²² The court held that it was up to a jury to determine whether the defendant fled to avoid arrest and that “[f]light to avoid arrest may be considered by the jury as corroboration of evidence tending to establish guilt.”¹²³ In support of this rule, the *Killcrease* court cited two opinions, *Riddle v. State* and *Ferguson v. State*.¹²⁴

The long line of cases using this rule leads to *Stevens v. State*, the first case that formulated it as follows: “Flight of the accused is admissible as a circumstance in corroboration of evidence tending to establish guilt.”¹²⁵ Although many courts followed the rule as articulated in *Stevens*,¹²⁶ the court in *Ferguson* changed the language by omitting the word “circumstance” from its holding that flight may “be considered as corroboration of evidence tending to establish guilt.”¹²⁷ The difference between the biblical proverb used by the prosecutor in *Bussard* to support the demonstration of guilt and the rule as originally formulated by the Supreme Court of Arkansas is evident. The language in the proverb sends the message that fleeing is evidence of guilt, while the language of the court’s rule states that fleeing may be considered as a circumstance in corroboration of evidence tending to prove guilt. Even if one compares the modified language of the rule that fleeing suggests consciousness of guilt, the difference is still insufficient for the court to conclude that the biblical passage was a “poetic version” of the rule. The *Bussard* case is an illustration of the judicial slippage from biblical text to legal rules without realizing the impact such conflation actually has on the life of a human being. Concerned with the confounding of morality and law, Justice Oliver Wendell Holmes said in his famous essay *The Path of the Law*, “[t]he law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the

¹²¹ See *Ward*, 816 S.W.2d at 175.

¹²² *Killcrease*, 836 S.W.2d at 382.

¹²³ *Id.*

¹²⁴ *Id.* (citing *Riddle v. State*, 791 S.W.2d 708 (Ark. 1990), and *Ferguson v. State*, 769 S.W.2d 418 (Ark. 1989)).

¹²⁵ 221 S.W. 186, 188 (Ark. 1920).

¹²⁶ See *Smith v. State*, 238 S.W.2d 649, 655 (Ark. 1951); *Mason v. State*, 688 S.W.2d 299, 300 (Ark. 1985); *Yedrysek v. State*, 739 S.W.2d 672, 675 (Ark. 1987).

¹²⁷ *Ferguson*, 769 S.W.2d at 419.

boundary constantly before our minds.”¹²⁸

However, there are a variety of ways in which religious references are used in the decision-making process and in reasoning justifying decisions. Courts quote the Bible in order to support their propositions and to show that they are consistent with traditional morality. They sometimes use biblical passages as metaphors or to illuminate a particular common law principle. The Bible often becomes part of the historical explanation of a particular law or practice. In some instances, a biblical passage appears as a rule upon which a decision is based or accompanies a common law or statutory rule as a confirmation of the consistency of our law. The next part will show different ways in which the Bible is used in judicial opinions.

III. QUOTING THE BIBLE FOR VARIOUS PURPOSES

In some instances, judges use the Bible to express their personal religious and moral beliefs, and former Chief Justice Moore of the Supreme Court of Alabama may be the best example of this practice. In *Ex parte H.H.*, a lesbian ex-wife was denied custody of her children despite the fact that there was evidence of her ex-husband’s excessive disciplinary punishment of children.¹²⁹ Justice Moore’s special concurring opinion is an illustration of inappropriate judicial decision-making using the Bible as law. He starts his opinion with a strong statement:

[T]he homosexual conduct of a parent—conduct involving a sexual relationship between two persons of the same gender—creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others.¹³⁰

Justice Moore’s perspective that a parent’s homosexual conduct is unfit per se is founded entirely on religious teachings against same-sex sexual relationships.¹³¹ Unlike the gender-based tender years presumption that the Supreme Court of Alabama found unconstitutional,¹³² the sexual orientation-based presumption is still valid in some states.¹³³ The main justification for the per se rule is ex-

¹²⁸ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-60 (1897).

¹²⁹ 830 So. 2d 21, 25-26 (Ala. 2002).

¹³⁰ *Id.* at 26.

¹³¹ See *Romans* 1:18-32 (New International).

¹³² See *Ex parte Devine*, 398 So. 2d 686, 696-97 (Ala. 1981).

¹³³ See, e.g., *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985). Some courts require that a

plained by Justice Moore: "Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated."¹³⁴ Justice Moore finds support for his proposition in Blackstone's *Commentaries*¹³⁵ and proceeds to quote from the Bible and various other sources condemning homosexuality.¹³⁶ He concludes his opinion with the following words: "The common law adopted in this State and upon which our laws are premised likewise declares homosexuality to be detestable and an abominable sin. Homosexual conduct by its very nature is immoral, and its consequences are inherently destructive to the natural order of society."¹³⁷

By quoting biblical passages in support of their decisions, judges like Justice Moore perpetuate homophobia and the legitimacy of laws based on religious morality¹³⁸ without any concern for the parties involved and the actual legal standards governing our society. One of those standards directly disregarded by Justice Moore in the *Ex parte H.H.* case is the best-interest-of-the-child standard. This case demonstrates the judicial misconduct present in invoking personal religious beliefs and morality as a basis of judgment. It is most interesting that Justice Moore was never disciplined for basing his decisions on his personal religious beliefs, but was actually removed when he refused to comply with a court order to remove the Ten Commandments monument he displayed in the rotunda of the state judicial building.¹³⁹ In commenting on the controversy around Justice Moore, one author contrasted the invisibility of the judicial use of religious references to the physical appearance of impropriety, making the following point:

parent involved in a same-sex relationship prove absence of harm. See, e.g., *Thigpen v. Carpenter*, 730 S.W.2d 510, 513-14 (Ark. 1987). Other courts use a "nexus test" requiring only proof that a parent's sexual conduct will have or has had an adverse impact. See, e.g., *A.C. v. C.B.*, 829 P.2d 660, 664 (N.M. Ct. App. 1992).

¹³⁴ *Ex parte H.H.*, 830 So. 2d at 26.

¹³⁵ *Id.* at 32, 34, 37.

¹³⁶ *Id.* at 33-37 (quoting biblical passages *Genesis* 1:27, 2:24; *Leviticus* 20:13).

¹³⁷ *Id.* at 38.

¹³⁸ See *Bowers v. Hardwick*, 478 U.S. 186 (1986). Upholding a Georgia sodomy statute, the Court stated that "[p]roscriptions against that conduct have ancient roots," referring to Judeo-Christian moral standards. *Id.* at 192. Concurring Justice Burger reiterated that, "Condemnation of those practices is firmly rooted in Judeo-Christian [sic] moral and ethical standards," *id.* at 196, validating the state's invocation of the biblical books of *Leviticus* and *Romans* to justify the sodomy statute, *id.* at 211 (Blackmun, J. dissenting).

¹³⁹ See *Glassroth v. Moore*, 278 F. Supp. 2d 1272, 1275 (M.D. Ala. 2003), *aff'd* 335 F.3d 1282 (11th Cir. 2003), *cert. denied* 540 U.S. 1000 (2003).

While the plaintiffs, media, and judicial ethicists were earnestly setting their sights on this highly conspicuous jurist, they were devoting little if any attention to the question of the proper relationship between religion and the decisions judges actually render, including religiously devout judges like Chief Justice Moore. To be sure, the Chief Justice's fundamental mistake, at least from a job retention perspective, appears *not* to have been his firm and guiding belief that God's law ought to inform human law, or even his clear expression of that belief in judicial opinions, which is to say that he was not and would not obviously have been removed from office for actually implementing and manifesting his religious beliefs in his judicial capacity. His apparent mistake, instead, was to manifest them by erecting a granite monument in his administrative, and in many respects less important or less influential, role.¹⁴⁰

Often courts use biblical references to explain the historical background of a legal concept. For example, tracing the origin of an in rem forfeiture proceeding by the government against the property involved in or acquired by crime, the Supreme Court cited *Exodus* 21:28: "[i]f an ox gore a man or a woman, and they die, he shall be stoned and his flesh shall not be eaten."¹⁴¹ After locating the original source of this legal concept in the Bible, the Court traced the development of the forfeiture further to the common law concept of "deodand," citing to Blackstone's *Commentaries on the Laws of England* and Holmes's *The Common Law*.¹⁴² While it is a fact that Blackstone cited *Exodus* in his Commentaries,¹⁴³ Holmes and other authors did not go that far.¹⁴⁴ Other federal and state courts have also used the biblical passage *Exodus* 21:28 to explain not only the origin of the law of forfeiture, but also other tort actions, despite the availability of other sources of legal history upon which American law is actually founded.¹⁴⁵

¹⁴⁰ Idleman, *Concealment*, *supra* note 2, at 517-18.

¹⁴¹ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.17 (1974). *See also* *United States v. Bajakajian*, 524 U.S. 321, 330 n.5 (1998).

¹⁴² *Calero-Toledo*, 416 U.S. at 681 (citing to "O. Holmes, the Common Law, c. 1 (1881)" and "I. W. Blackstone, Commentaries *300"). *See also* *Bajakajian*, 524 U.S. at 330 (citing to "I W. Blackstone, Commentaries on the Laws of England 290-292 (1765); O. Holmes, The Common Law 10-13, 23-27 (M. Howe ed. 1963)").

¹⁴³ WILLIAM BLACKSTONE, 1 COMMENTARIES *291.

¹⁴⁴ *See* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1-38 (45th printing 1923, 1909, 1881); FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW*, 473-74 (2d ed. 1923).

¹⁴⁵ Federal courts citing or quoting *Exodus* 21:28: *United States v. All Funds in Account Nos. 747.034/278*, 295 F.3d 23, 25 (D.C. Cir. 2002); *United States v. Gilbert*, 244 F.3d 888, 918 (11th Cir. 2001); *United States v. One Parcel Prop.*, 74 F.3d 1165, 1168 (11th Cir. 1996); *United States v. 785 St. Nicholas Ave.*, 983 F.2d 396, 401 (2d

The controversial Justice Moore of Alabama provides another example of biblical invocation in support of a historical analysis of a particular concept. Dissenting in *Yates v. El Bethel Primitive Baptist Church*, he engaged in a historical discussion of the concept of separation between the church and state, quoting from numerous biblical passages.¹⁴⁶ Other judges also turn to the Bible in order to solidify the idea that a particular law is rooted in history. In a case involving a defamation suit, the West Virginia Supreme Court used *Exodus* 20:16, *Deuteronomy* 19:16-21, and *Ecclesiastes* 7:1 as historical evidence that slander was prohibited since the beginning of time.¹⁴⁷ After quoting the Bible as its first source, the court proceeded by listing numerous legal sources on defamation, libel, and slander. The historical concept of subjecting “illegitimate” children to legal discrimination is also explained using *Deuteronomy* 23:2: “Throughout history, illegitimate children were precluded from, among other legal rights, entering certain professions. The Book of *Deuteronomy* states: a bastard shall not enter into the congregation of the Lord; even to this tenth generation shall he not enter into the congregation of the Lord. Deut. 23:2.”¹⁴⁸

Supreme Court justices join lower court judges in quoting the Bible when they resort to providing a historical review of certain

Cir. 1993); *United States v. Seifuddin*, 820 F.2d 1074, 1076 (9th Cir. 1987); *United States v. Sandini*, 816 F.2d 869, 872 (3d Cir. 1987); *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1218 n.4 (10th Cir. 1986); *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 454 (7th Cir. 1980); *United States v. Funds from Prudential Sec.*, 362 F. Supp. 2d 75, 79 (D.C. Cir. 2005); *United States v. Croce*, 334 F. Supp. 2d 781, 786 n.13 (E.D. Pa. 2004); *United States v. Funds From Prudential Sec.*, 300 F. Supp. 2d 99, 100 n.1 (D.C. Cir. 2004); *United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173, 177 (E.D.N.Y. 1990); *United States v. Haro*, 685 F. Supp. 1468, 1473 (E.D. Wis. 1988). State courts citing or quoting *Exodus* 21:28: *Allen v. State*, 605 A.2d 994, 998 n.3 (Md. Ct. Spec. App. 1992); *Prop. Clerk of N.Y. City Police Dep't v. Molomo*, 583 N.Y.S.2d 251, 253 (App. Div. 1992); *Duren v. Kunkel*, 814 S.W.2d 935, 937 n.3 (Mo. 1991); *Commonwealth v. One 1988 Ford Coupe*, 574 A.2d 631, 636 (Pa. Super. Ct. 1990); *Holtzman v. Samuel*, 495 N.Y.S.2d 583, 585 n.1 (Sup. Ct. 1985); *Dist. Attorney of Queens County v. McAuliffe*, 493 N.Y.S.2d 406, 411 (Sup. Ct. 1985); *Dir. of Fin. v. Cole*, 465 A.2d 450, 456 n.2 (Md. 1983); *New Jersey v. One 1977 Dodge Van*, 397 A.2d 733, 734 n.1 (Middlesex County Ct. 1979); *Prince George's County v. Blue Bird Cab Co.*, 284 A.2d 203, 205 (Md. 1971); *Magrine v. Spector*, 241 A.2d 637, 639 n.2 (N.J. Super. Ct. App. Div. 1968); *Robidoux v. Busch*, 400 S.W.2d 631, 639 (Mo. Ct. App. 1966); *Johnson v. Olson*, 67 P.2d 422, 425 (Kan. 1937).

¹⁴⁶ 847 So. 2d 331, 350-53 (Ala. 2002) (quoting the following chapters from King James: 2 *Chronicles* 26:16-21, 2 *Chronicles* 26:18, 1 *Samuel* 13:13-14, *Ezra* 7:21-24, *Matthew* 22:21, *Matthew* 18:15-20, *Matthew* 16:19, 1 *Corinthians* 6).

¹⁴⁷ *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 76 (W. Va. 1984).

¹⁴⁸ *Miscovich v. Miscovich*, 688 A.2d 726, 728 n.2 (Pa. Super. Ct. 1997). See also *Kohler v. Bleem*, 654 A.2d 569, 572 n.1 (Pa. Super. Ct. 1995).

legal principles. While such biblical references are usually placed in footnotes, occasionally they are prominently displayed in the main body of the opinion. For example, in *Payne v. Tennessee*, holding that the Eighth Amendment does not prohibit the admission of victim impact evidence in jury sentencing,¹⁴⁹ Chief Justice Rehnquist quoted *Exodus* 21:22-23, proscribing “[a]n eye for an eye, a tooth for a tooth” to demonstrate how the guiding principles in criminal sentencing varied over time.¹⁵⁰ In his review of the historical principles guiding criminal sentencing, Justice Rehnquist started with the Bible before he moved on to the English law and legislative enactments.¹⁵¹

Sometimes, a court quotes the Bible as support for a proposition using a “*cf.*” as a citation signal. “*Cf.*” is an abbreviation for the Latin word “confer,” which means “compare.”¹⁵² *Black’s Law Dictionary* states, “As a citation signal, *cf.* directs the reader’s attention to another authority or section of the work in which contrasting, analogous, or explanatory statements may be found.”¹⁵³ Such support was used in the *United States v. Ryan* case by a dissenting judge to interpret the statutory meaning of “the building used . . . in . . . any activity affecting interstate . . . commerce.”¹⁵⁴ The dissenting judge argued that the statutory requirement of “activity” was missing in respect to the building in question.¹⁵⁵ The dissent cited the Bible, stating, “The building here was just cumbering the ground. *Cf. Luke* 13:7 (King James). It was not being ‘used’ in any ‘activity.’”¹⁵⁶ The biblical passage cited states: “So he said to the man who took care of the vineyard, ‘For three years now I’ve been coming to look for fruit on this fig tree and haven’t found any. Cut it down! Why should it use up the soil?’”¹⁵⁷ The judge used this citation assuming the reader’s familiarity with a biblical passage of this length and on this particular topic, which was listed under the chapter “Repent or Perish” in *Luke*. This assumption seems to be a long stretch if the extralegal authority was used as an analogy to show that there was no use for the building in question.

Another example of the use of a biblical citation with a *cf.* citation signal is in the *Conklin v. Anne Arundel County Bd. of Educ.*

¹⁴⁹ 501 U.S. 808, 827 (1991).

¹⁵⁰ *Id.* at 819.

¹⁵¹ *Id.*

¹⁵² BLACK’S LAW DICTIONARY 243 (8th ed. 2004).

¹⁵³ *Id.*

¹⁵⁴ 41 F.3d 361, 369 (8th Cir. 1994) (Arnold, C.J., dissenting).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Luke* 13:7 (New International).

case.¹⁵⁸ Parents of a dyslexic child challenged the county's program as not being in compliance with the Education of the Handicapped Act.¹⁵⁹ In a footnote, discussing the fact that the board took advantage of the child's temporary progress (which was actually due to private tutoring) to show its compliance with the statute, the court quoted this passage from the Bible when it said: "Annual grade promotion may, as a result, be a reasonable barometer for measuring the progress that this handicapped child can achieve in the coming years. . . . Cf. Matthew 26:52 (King James) ('[A]ll they that take the sword shall perish with the sword.')." ¹⁶⁰ The court took the board's argument and created a standard to which the board should adhere in the future, consisting of annual grade promotion and additional tutoring provided by the board.¹⁶¹ The court assumed that the reader was familiar with the biblical passage it partially quoted. The passage is part of the chapter on Jesus's arrest and its idea only becomes clear if one knows its entire context:

Then the men stepped forward, seized Jesus and arrested him. With that, one of Jesus' companions reached for his sword, drew it out and struck the servant of the high priest, cutting off his ear. "Put your sword back in its place," Jesus said to him, "for all who draw the sword will die by the sword."¹⁶²

The fact that judges resort to citing the Bible in support of their arguments shows the privilege that Christianity enjoys in our society. The invisibility of that privilege is enhanced by the judges' assumptions of their audience's familiarity with the Bible and by their disregard of the need for a full explanation of a cited source and its relation to the proposition at hand.

Courts also use the Bible to explain the origins of a word. For example, in *Bok v. McCaughn*, the court explained that "[c]harity, derived from the Latin *caritas*, originally meant love. In the thirteenth chapter of first *Corinthians* the revised version uses the word 'love' in defining the third of the three cardinal virtues, which, in King James' version read 'Faith, Hope and Charity.'" ¹⁶³ The term "sodomy" also finds its origin in the Bible, as the court noted in *Stone v. Wainwright*, citing *Genesis* 13:13 and 18:20 and quoting *Leviticus* 18:22: "Thou shalt not lie with mankind, as with womankind:

¹⁵⁸ 946 F.2d 306 (4th Cir. 1991).

¹⁵⁹ *Id.* at 309.

¹⁶⁰ *Id.* at 315 n.6.

¹⁶¹ *Id.*

¹⁶² *Matthew* 26:50-52 (New International).

¹⁶³ 42 F.2d 616, 618-19 (3d Cir. 1930).

it is abomination.”¹⁶⁴

Similarly, Justice Breyer quoted the Bible to explain the origin of the word “carries” in a drug trafficking case where the statute included the phrase “carries a firearm.”¹⁶⁵ Arguing that the word includes “conveyance in a vehicle,” he said, “[t]he greatest of writers have used the word with this meaning. See, *e.g.*, The King James Bible, 2 *Kings* 9:28 (‘[H]is servants carried him in a chariot to Jerusalem’); *id.*, *Isaiah* 30:6 (‘[T]hey will carry their riches upon the shoulders of young asses’).”¹⁶⁶

The Bible has also been called upon to determine the meaning of seemingly simple words such as “daytime.” In a criminal prosecution, a defendant moved to quash a search warrant because it was not served during daytime as required by law.¹⁶⁷ He claimed that the warrant was served at 7:15 p.m. and that the sun set at 6:53 p.m. on that day.¹⁶⁸ Before citing Shakespeare, *Webster’s Dictionary*, and finally federal and state courts, the court resorted to the Bible as its first source of interpretation: “In the Bible, *Genesis* 1:5, we find ‘And God called the light day and the darkness he called night.’”¹⁶⁹ The court dismissed the motion to quash the warrant, concluding that it had no merit because of the general rule that daytime is determined by the presence of light.¹⁷⁰

While today’s courts are comfortable using biblical passage as a rule, the courts in the past refrained from actually quoting the Bible. For example, in a famous 1872 case, the Supreme Court held constitutional Illinois’s refusal to admit a woman to practice law, stating, “[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”¹⁷¹ The Court did not specify what exact legal source it was referring to when it invoked “the law of the Creator.”¹⁷² Modern courts, however, are more explicit in the invoca-

¹⁶⁴ 478 F.2d 390, 393 n. 14 (5th Cir. 1973). The text of the cited passages state, “Now the men of Sodom were wicked and were sinning greatly against the LORD,” *Genesis* 13:13 (New International), and “Then the LORD said, ‘The outcry against Sodom and Gomorrah is so great and their sin so grievous,’” *Genesis* 18:20 (New International).

¹⁶⁵ *Muscarello v. United States*, 524 U.S. 125, 128-29 (1998).

¹⁶⁶ *Id.*

¹⁶⁷ *United States v. Liebrich*, 55 F.2d 341, 342 (M.D. Pa. 1932).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 343 (stating “it is reasonable to hold that it is daytime for at least thirty minutes after the time when the sun sets, and it is nighttime from then until thirty minutes before the time when the sun rises”).

¹⁷¹ *Bradwell v. State*, 83 U.S. 130, 141 (1872).

¹⁷² *Id.*

tion of biblical passages when formulating rules upon which they decide cases. The Second Circuit, in a suit for a securities violation, discussed the doctrine of “offensive collateral estoppel (more recently called offensive issue preclusion),” pointing to judicial efficiency as a primary “virtue” of the doctrine.¹⁷³ It then indicated its disadvantage:

Its virtues do not come without a price, however. Just as occasionally ‘the race is not to the swift, nor the battle to the strong . . . but time and chance happeneth to them all,’ *Ecclesiastes* 9:11 (King James ed.), so too the results of an earlier resolution of an issue may simply be wrong.¹⁷⁴

Some courts, when formulating standards, go directly to the Bible for support. In a dual adultery divorce suit, the husband filed a counterclaim alleging that the wife’s lesbian relationship constituted adultery.¹⁷⁵ The court started its inquiry this way:

To better understand the underlying issue it is helpful to briefly review both the legal and social standards and to distinguish between adultery as a crime as opposed to a private civil wrong. The [S]eventh [C]ommandment states that “Thou shall not commit adultery” *Exodus* 20:14. A biblical definition of “Adultery” is “the lying with a woman married to a husband.” *See Deuteronomy* 22:22 and *Leviticus*, 20:10. . . . If a married man be “lying with a woman not betrothed” the biblical crime was fornication and punishment by a fine of 50 shekels of silver. *Deuteronomy* 22:29 (The commentators generally opine that even the thought of adultery was an offense under the biblical code, an issue which we need not deal with today.)¹⁷⁶

After the court quoted the above biblical passages, it proceeded with common law and New Jersey statutory treatment of adultery. Despite announcing that it would review “legal and social standards,” the court started with religious moral authorities on the issue, assuming that religious morality is a synonym for a social standard. These are just some of the various ways in which courts use biblical references in written opinions. The next part of this Article will demonstrate the many different forms in which a particular biblical passage enters judicial opinions.

¹⁷³ *Sec. Exch. Comm’n v. Monarch Funding Corp.*, 192 F.3d 295, 303 (2d Cir. 1999).

¹⁷⁴ *Id.* at 303-04. *See also* *Liberty Mut. Ins. Co. v. Fag Bearings Corp.*, 335 F.3d 752, 763 (8th Cir. 2003) (quoting the same biblical passage from *Monarch Funding*, 192 F.3d at 303-04).

¹⁷⁵ *S.B. v. S.J.B.*, 609 A.2d 124, 124 (N.J. Super. Ct. Ch. 1992).

¹⁷⁶ *Id.* at 125.

IV. REFERENCING “NO MAN CAN SERVE TWO MASTERS”¹⁷⁷

While the Supreme Court has never cited either *Matthew* or *Luke*, federal and state courts prominently do so when using the phrase “no man can serve two masters” to express the rule against an attorney’s dual representation.¹⁷⁸ In *Hartford Accident & Indemnity Co. v. Foster*, a state court invoked the following sources of authority: “The [b]iblical mandate that ‘No man can serve two masters’ has its modern-day application in cases of this nature. See Canon 6, Canons of Professional Ethics, 31 F.S.A.”¹⁷⁹ Canon 6 of Professional Ethics, entitled Adverse Influences and Conflicting Interests, imposes a duty on a lawyer to disclose to a client any potential interest that might adversely affect the client.¹⁸⁰ Contrary to biblical mandate, Canon 6 does not prohibit a lawyer from representing two clients, but instead permits such representation by express consent of all parties after full disclosure of the facts.¹⁸¹ The invocation of a biblical mandate in this case is unclear because the court held that the insured who was represented by the insurer’s attorney was not harmed by any breach of fiduciary duty in failing to provide information about settlement offers.¹⁸² Thus it follows that not only can a man serve two masters, but even when such servitude constitutes a breach of fiduciary duty, the attorney will only be liable when the plaintiff who is suing suffered harm.

Some judges are willing to disregard existing legal standards, instead quoting biblical teaching as a primary source of the authority for their decision. In *People v. Williams*, a case charging a husband and wife for sex offenses upon their minor adopted child, a court held that there was no conflict of interest that would make joint representation of the defendant and codefendant improper.¹⁸³ Dissenting in an extensive opinion, Justice Pincham stated:

Civilization’s most sacred, learned, dedicated and staunchest advocate of all times, centuries ago, admonished: “No one can serve two masters; for either he will hate the one and love the other, or he will hold to the one and despise the other.” The advocate was the Christ Jesus; the admonition was to his disci-

¹⁷⁷ See *infra* Appendix.

¹⁷⁸ See *infra* Appendix.

¹⁷⁹ 528 So. 2d 255, 277 (Miss. 1988) (citing *Spadaro v. Palmisano*, 109 So. 2d 418 (Fla. App. 1959)).

¹⁸⁰ CANONS OF PROF’L ETHICS Canon 6 (2004).

¹⁸¹ *Id.*

¹⁸² *Foster*, 528 So. 2d at 276.

¹⁸³ 538 N.E.2d 564, 566 (Ill. App. Ct. 1989).

ples and the multitude during His Sermon on the Mount; the admonition is cited in the most dynamic, accurate and prestigious of all law books, The Holy Bible, at *Matthews* the 6th Chapter and the 24th Verse.¹⁸⁴

After citing the highest authority to support his argument, the dissenting judge then proceeded to cite Canon 5 (5-1, 5-14, 5-15, 5-17) of The Model Code of Professional Responsibility of the American Bar Association.¹⁸⁵

A significant number of cases state that the biblical mandate “no person can serve two masters” is consistent with the Restatement of the Law on Agency and reflects the current legal framework within which courts operate. Contrary to what many judges state in their opinions, however, the Restatement of the Law of Agency does not prohibit dual servitude. The rules regulating the relation of agency explicitly provide that “[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.”¹⁸⁶ The comments for this section further elaborate on this issue, allowing for a servant to be employed by joint masters.¹⁸⁷ The most important issue in the servant’s relationship with a master is the master’s consent to service¹⁸⁸ and not, as the courts suggest, whether there is one or multiple masters. The same is true for the law governing lawyers. The Restatement of the Law Governing Lawyers clearly establishes that a lawyer may not represent a client if the representation involves a conflict of interest¹⁸⁹ unless the client consents to such representation.¹⁹⁰ Consent, and not the number of clients or masters, is the key element in a lawyer’s representation of a single or multiple clients in civil and criminal litigation.¹⁹¹ Similarly, the ABA Model of Professional Conduct Rule 1.13 allows an attorney to represent an organization and “its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.”¹⁹² It is also worth noting that the Federal Rules of Civil Procedure include one of the most important rules allowing for

¹⁸⁴ *Id.* at 569 (Pincham, J., dissenting).

¹⁸⁵ *Id.* at 569-570.

¹⁸⁶ RESTATEMENT (SECOND) OF AGENCY § 226 (1958).

¹⁸⁷ *Id.* § 226(b).

¹⁸⁸ *Id.* § 221.

¹⁸⁹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2001).

¹⁹⁰ *Id.* § 122.

¹⁹¹ *See id.* §§ 128, 129.

¹⁹² MODEL RULES OF PROF’L CONDUCT R. 1.13(g) (2004).

multiple representation: Rule 23 governing class action.¹⁹³

The Restatement of the Law of Agency and the Law Governing Lawyers, together with the ABA Rules of Conduct, represent legal authorities upon which judges should rely. Any extralegal authorities, especially those that conflict with legal standards established by the accepted authoritative legal sources of statutory or common law, are constitutionally suspect and their invocation in judicial opinions is unsound.

V. USING OTHER RELIGIOUS REFERENCES

While citations to the King James version of the Bible are numerous, courts rarely use other religious authorities. A search for the word “Talmud,” a collection of Jewish civil and canonical laws,¹⁹⁴ returns only three results in the Supreme Court cases database in Westlaw: *County of Allegheny v. ACLU*,¹⁹⁵ *School District of Abington Township, Pennsylvania v. Schempp*,¹⁹⁶ and *Permoli v. Municipality No. 1 of New Orleans*.¹⁹⁷ The word “Torah,” the first five books of the Old Testament, appears only five times in Supreme Court opinions: *Board of Education of Kiryas Joel Village School District v. Grumet*,¹⁹⁸ *Lee v. Weisman*,¹⁹⁹ *County of Allegheny v. ACLU*,²⁰⁰ *Hernandez v. Commissioner of Internal Revenue*,²⁰¹ and *Miranda v. Arizona*.²⁰² The word “Halakhah,” a Jewish law book consisting of the

¹⁹³ FED. R. CIV. P. 23(g).

¹⁹⁴ BLACK'S LAW DICTIONARY 1494 (8th ed. 2004).

¹⁹⁵ 492 U.S. at 583-84 (using the Talmud in describing certain Jewish practices).

¹⁹⁶ 374 U.S. 203, 273 (1963). “There was ample precedent, too, for Theodore Roosevelt’s declaration that in the interest of ‘absolutely nonsectarian public schools’ it was ‘not our business to have the Protestant Bible or the Catholic Vulgate or the Talmud read in those schools.’” *Id.* (citation omitted).

¹⁹⁷ 44 U.S. 589, 604-05 (1845). “In the case of *The Commonwealth v. Abram Wolf*, 3 Serg. & Rawle, 48, Chief Justice Tilghman affirmed the validity of an ordinance of Philadelphia, imposing a fine for working on a Sunday, against a Jew; though under the teachings of the Jewish Talmud and the Rabbinical Constitutions, the Jew deemed Saturday as the Jewish Sabbath, and felt it both as a privilege and a duty to labour for six days, and to rest on the seventh, or Saturday.” *Id.*

¹⁹⁸ 512 U.S. 687, 691 (1994) (part of the facts).

¹⁹⁹ 505 U.S. 577, 639 (1992) (Scalia, J., dissenting).

²⁰⁰ 492 U.S. at 584 n.24. “A Torah scroll—which contains the five Books of Moses—must be buried in a special manner when it is no longer usable. App. 237-238.” *Id.*

²⁰¹ 490 U.S. 680, 701 (1989). “We also assume for purposes of argument that the IRS also allows taxpayers to deduct ‘specified payments for attendance at High Holy Day services, for tithes, for torah readings and for memorial plaques.’” *Id.* (quoting *Foley v. Comm’r of Internal Revenue*, 844 F.2d 94, 96 (1988)).

²⁰² 384 U.S. 436, 458 n.27 (1966). “Thirteenth century commentators found an analogue to the privilege grounded in the Bible. ‘To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.’

Torah and the law instituted by the rabbi, appears in only one opinion: *Garrity v. New Jersey*.²⁰³

The Supreme Court used the words “Koran,” “Kuran,” “Qur’an,” or “Qor’an,” a Muslim book of revelations, in *Zelman v. Simmons-Harris*,²⁰⁴ *O’Lone v. Estate of Shabazz*,²⁰⁵ *Clay v. United States*,²⁰⁶ and *Lemon v. Kurtzman*.²⁰⁷ The Book of Mormon, a Mormon scripture, is cited in two decisions: *Zelman v. Simmons-Harris*²⁰⁸ and *Hernandez v. Commissioner of Internal Revenue*.²⁰⁹

Statistical evidence demonstrates that the appearance of references from Jewish or Muslim religious authorities is rare. Federal and U.S. Supreme Court case law mentions “Talmud” in 63 cases, “Torah” in 155 and “Halakhah” in 4 cases.²¹⁰ The same search in the state case law database produces “Talmud” in 151 cases, “Torah” in 306 cases, and “Halakhah” in 2 cases, a pale comparison with the words “King James,” which produce 599 cases in state case law, and the word “Bible,” which is not possible to search due to an extremely high number of cases in which it appears.²¹¹ The various versions of the word “Koran” produce 499 cases in federal law and 349 cases in state law, but in most of those cases the word actually appears as a personal name.²¹²

One needs go no farther than statistical data to conclude that the Bible is by far the most bellowed religious authority that judges use in their decision-making process and their written opinions. The apparent disparity in the use of different religious sources re-

Maimonides, *Mishneh Torah* (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 6, III Yale Judaica Series 52-53.” *Id.*

²⁰³ 385 U.S. 493, 497 n.5 (1967) (comparing Jewish law with the Fifth Amendment).

²⁰⁴ 536 U.S. 639, 713 n.24 (2002) (quoting the New Testament, the Book of Mormon, the Pentateuch, and the Koran).

²⁰⁵ 482 U.S. 342, 345 (1987). “Jumu’ah is commanded by the Koran and must be held every Friday after the sun reaches its zenith and before the Asr, or afternoon prayer. See Koran 62:9-10; Brief for Imam Jamil Abdullah Al-Amin et al. as *Amici Curiae* 18-31.” *Id.*

²⁰⁶ 403 U.S. 698, 708 n.2, 709 (1971) (quoting the Koran 61:10-13 to define “*jihād* as an injunction to the believers to war against non-believers”).

²⁰⁷ 403 U.S. 602, 630-31 (1971) (Douglas, J., concurring). “The advantages of sectarian education relate solely to religious or doctrinal matters. They give the church the opportunity to indoctrinate its creed delicately and indirectly, or massively through doctrinal courses. Many nations follow that course: Moslem nations teach the Koran in their schools” *Id.*

²⁰⁸ *Zelman*, 536 U.S. at 713 n.24.

²⁰⁹ 490 U.S. at 709.

²¹⁰ Westlaw search performed on February 10, 2006.

²¹¹ Westlaw search performed on February 10, 2006.

²¹² Westlaw search performed on February 10, 2006.

affirms the privileged status that Christianity enjoys in the United States. It is a constant reminder of the composition of the judiciary and the lack of diversity that contributes to the ongoing proliferation of the use of biblical references by the courts.

CONCLUSION

Language analysts recognize that the Bible had a substantial impact on standard English language.²¹³ Many biblical passages, having been read at home and in church for generations, entered the popular linguistic milieu of the majority of Americans. However, not all of them became independent lexical units:

A usage has to have achieved some degree of linguistic autonomy; it must be capable of being meaningful outside of its original biblical context, usable by English speakers who do not read (or even know) the Bible as well as those who do. (The same point applies to expressions derived from Shakespeare or any other author.) . . . A usage that does not meet this criterion is really only a quotation.²¹⁴

One of the standard English expressions derived from the King James version of St. Matthew's Gospel is, "No man can serve two masters."²¹⁵ However, courts continue to quote the Bible when referring to this expression. The variety of ways in which courts use biblical passages from *Matthew* and *Luke* is impressive.²¹⁶ If the biblical passage that "no man can serve two masters" is part of folk wisdom, there would seem to be no need to quote the Bible. If, on the other hand, it is important to cite the ultimate source of this proverb, referencing the Bible seems logical. While this biblical quotation and citation to *Matthew* or *Luke* by courts may be trivial, the continuous use of the Bible by judges to support their arguments in written opinions is unjustified and should be barred. The Bible contains many passages as simple as the one above, but the scope of their impact on decision-making is impermissibly broad, including such decisions as life or death in capital cases. The arbitrariness of judicial choice to use some biblical passages as traditional folk expressions and to quote others as authoritative sources

²¹³ CRYSTAL, *supra* note 71, at 274. See also Ashburn, *supra* note 2, at 343-47 (citing examples of courts using aphorisms from Jewish law).

²¹⁴ CRYSTAL, *supra* note 71, at 276. "The King James Bible . . . has contributed far more to English in the way of idiomatic or quasi-proverbial expressions than any other literary source. . . . Matthew's Gospel alone, for example, yields over forty locutions which, directly or indirectly, are part of Modern English." *Id.*

²¹⁵ *Id.* at 277.

²¹⁶ See *infra* Appendix.

is analogous to the arbitrariness in which some biblical passages entered the everyday speech.²¹⁷ Additionally, the use of the same biblical passage as a folk expression by some courts and as a biblical quote by the others creates a sense of arbitrariness and subjectivity, bringing into question judicial impartiality.

The use of religious references in judicial decision-making is not rare and cannot be underestimated. The numerous ways in which the Bible finds its way into judicial opinions are a direct result of judges' willingness to disregard the rules of judicial conduct and apparent constitutional violations stemming from such misuse. Since there is no bright line between a common expression such as "eye for eye, tooth for tooth"²¹⁸ and the biblical mandate "[i]f anyone takes the life of a human being, he must be put to death,"²¹⁹ courts should never use either text, especially not during a sentencing phase. Courts should be prohibited from using religious references in judicial decision-making because any reliance on extralegal sources of authority is contrary to the basic principles of the American justice system. Using religious references in judicial opinions is an impermissible exercise of a privilege that coerces the minority to accept the norms of the majority. Whether disguised as morals, proverbs, principles, tradition, or history, religious references undermine judicial integrity and impartiality. Long ago, Justice Holmes expressed one of the most creative ideas in respect to delineating morality and law. Although his idea may sound radical today to moderate and conservative proponents of the use of religion in decision-making, it is one that should resonate with any person who is genuinely concerned with the American justice system:

*For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law.*²²⁰

²¹⁷ See CRYSTAL, *supra* note 71, at 278.

What is really intriguing, of course, is why some expressions entered English in this way, and others did not. Why did such similes as *wise as serpents* or *harmless as doves* ([*Matthew*] 10:16) not become everyday phrases? As always, when we consider lexical innovation, the bigger puzzle is to explain why so many apparently vivid or useful items did *not* appeal.

Id. See also BARTH D. EHRMAN, *MISQUOTING JESUS: THE STORY BEHIND WHO CHANGED THE BIBLE AND WHY* (2005) (discussing intentional and accidental alterations of the Bible made by translators throughout history).

²¹⁸ *Leviticus* 24:20 (New International).

²¹⁹ *Leviticus* 24:17 (New International).

²²⁰ Holmes, *The Path of the Law*, *supra* note 128, at 464.

APPENDIX

CASES USING “NO MAN CAN SERVE TWO MASTERS”²²¹

“No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve both God and Money.” *Matthew* 6:24 (New International).

“No servant can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve both God and Money.” *Luke* 16:13 (New International).

Terms Used by Courts to Refer to “No Man Can Serve Two Masters”

Admonition	Familiar scriptural quotation
Ancient admonition	Fundamental law
Ancient axiom	Fundamental rule
Ancient injunction	Fundamental truth
Ancient maxim	Fundamental proposition
Ancient principle	General rule
Ancient truth	General principle
Authority of Holy Writ	Good Authority
Authoritative declaration	Gospel
Axiom	Hallowed petition
Biblical admonition	High authority
Biblical advice	Highest Authority has said
Biblical expression	Infallible declaration
Biblical doctrine	Infallible truth
Biblical mandate	Injunction
Biblical quote	Jesus said
Biblical teaching	Law for two thousand years
Christ said	Legal maxim
Christian morality	Maxim
Centuries-old scriptural passage	Moral maxim
Common experience	Moral rule
Declaration	Old adage
Divine declaration	Old as Holy Writ
Divine injunction	Old principle
Divine precept	Old proverb
Doctrine of the Holy Writ	Philosophy
Divine saying	Philosophy of the Galilean
Eternal truth	Phrase from the Bible
Expression	Principle
Fact	

²²¹ Westlaw search performed on February 10, 2006 using a search phrase “can serve two masters.”

Proposition of the Highest and best authority	Scriptural references Scriptural teaching
Proverb	Statement
Public policy rule	Theory
Quoted from the Bible	Truth
Rule	Truth of the biblical admonition
Rule of the moral law	Truth of the Scriptural injunction
Rule of law	Unanimous verdict of mankind
Saying	Universal moral rule
Scriptural maxim	Utterance of the divine Nazarene
Scriptural pronouncement	Very high authority has said
Scriptural quotation	Wisdom of the ages

SUPREME COURT CASES

NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 595 n.14 (1994) (Ginsburg, J., dissenting) (“No man can serve two masters. If you are negotiating a contract, a lawyer does not represent both clients. That is all that is involved here.”)

Sec. & Exch. Comm’n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 197 n.50 (1963) (Justice Goldberg quoting from *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 550 n.14 (1961))

United States v. Miss. Valley Generating Co., 364 U.S. 520, 550 n.14 (1961) (Warren, J.) (“The reason of the rule inhibiting a party who occupies confidential and fiduciary relations toward another from assuming antagonistic positions to his principal in matters involving the subject matter of the trust is sometimes said to rest in a sound public policy, but it also is justified in a recognition of the authoritative declaration that no man can serve two masters; and considering that human nature must be dealt with, the rule does not stop with actual violations of such trust relations, but includes within its purpose the removal of any temptation to violate them.” (quoting *Mich. Steel Box Co. v. United States*, 49 Ct. Cl. 421, 439 (1914)))

Supreme Lodge Knights of Pythias v. Withers, 177 U.S. 260, 269 (1900) (Brown, J.) (“But if the insured is to be now bound as having thus contracted, there must be mutuality in the contract. No man can serve two masters.”)

CITING TO MATTHEW

Federal Court Cases

Freund v. Butterworth, 117 F.3d 1543, 1572 n.67 (11th Cir. 1997)

United States v. Mett, 65 F.3d 1531, 1538 (9th Cir. 1995)

Sanjour v. EPA, 56 F.3d 85, 100-01 (D.C. Cir. 1995)

Chapman v. Klemick, 3 F.3d 1508, 1512 (11th Cir. 1993)

Sanjour v. EPA, 984 F.2d 434, 447 (D.C. Cir. 1993)

United States v. \$124,570 U.S. Currency, 873 F.2d 1240, 1247 (9th Cir. 1989)

United States v. Gambino, 864 F.2d 1064, 1074-1075 n.1 (3d Cir. 1988)

U.S. Fid. & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n.5 (8th Cir. 1978)

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976)

Phelan v. Middle States Oil Corp., 220 F.2d 593, 619 (2d Cir. 1955)

Armstrong Cleaners, Inc. v. Erie Ins. Exch., 364 F.Supp. 2d 797, 815 (S.D. Ind. 2005)

Rocchigiani v. World Boxing Counsel, 82 F.Supp. 2d 182, 189 (S.D.N.Y. 2000)

Union Ins. Co. v. Knife Co., 902 F. Supp. 877, 881 (W.D. Ark. 1995)

ESM Gov't. Sec., Inc. v. ESM Group, Inc. 66 B.R. 82, 84 (S.D. Fla. 1986)

United States v. Bergmann, 47 F. Supp. 765, 767 (S.D. Cal. 1942)

In re BH & P, Inc., 103 B.R. 556, 560 (Bankr. D.N.J. 1989)

In re Tampa Chain Co., 35 B.R. 568, 579 n.10 (Bankr. S.D.N.Y. 1983)

United States v. Short, 50 M.J. 370, 374 (C.A.A.F. 1999) (phrase from the Bible)

United States v. Nabisco, Inc., 117 F.R.D. 40, 44-45 (E.D.N.Y. 1987)

Kamean v. Local 363, 109 F.R.D. 391, 396 (S.D.N.Y. 1986)

United States v. Agosto, 528 F. Supp. 1300, 1310 (D. Minn. 1981)

United States v. Garafola, 428 F. Supp. 620, 621 (D.N.J. 1977) (Biblical teaching)

Vance Trucking Co. v. Canal Ins. Co., 249 F. Supp. 33, 38 n.2 (D.S.C. 1966)

United States v. Kawakita, 96 F. Supp. 824, 836 (S.D. Cal. 1950)

State Court Cases

Office of Consumer Counsel v. Conn. Dep't of Pub. Util. Control, No. CV020513718S, 2002 WL 31319517, at *3 (Conn. Super. Ct. Sept. 24, 2002)

Wis. Patients Comp. Fund v. Physicians Ins. Co. of Wis., 620 N.W.2d 457, 461-62 (Wis. Ct. App. 2000)

Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 998 P.2d 856, 877 (Wash. 2000)

State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 634 (Tex. 1998)

In re Estate of Koch, 849 P.2d 977, 993 (Kan. Ct. App. 1993)

Geauga County Bar Ass'n. v. Psenicka, 577 N.E.2d 1074, 1074 (Ohio 1991)

Friends of La Vina v. County of L.A., 284 Cal. Rptr. 171, 178 n.1 (Ct. App. 1991) (Gates, Acting P.J., dissenting)

Ex parte Weaver, 570 So.2d 675, 682 (Ala. 1990)

J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Morris, 776 S.W.2d 271, 284 (Tex. Ct. App. 1989)

People v. Williams, 538 N.E.2d 564, 569 (Ill. App. Ct. 1989) (admonition)

Collins v. Citizens & S. Trust Co., 373 S.E.2d 612, 617 (Ga. 1988)

Swartz v. State, 429 N.W.2d 130, 132 (Iowa 1988)

SHV Coal, Inc. v. Cont'l Grain Co., 545 A.2d 917, 921 (Pa. Super. Ct. 1988)

Brickner v. Normandy Osteopathic Hosp., Inc., 746 S.W.2d 108, 113 (Mo. Ct. App. 1988)

Jim Royer Realty, Inc. v. Moreira, 363 S.E.2d 10, 12 (Ga. Ct. App. 1988)

Pearl River Valley Water Supply Dist. v. Hinds County, 445 So.2d 1330, 1356 n.25 (Miss.1984)

In re Conduct of Samuels and Weiner, 674 P.2d 1166, 1171 (Or. 1983)

Webb v. State, 433 So.2d 496, 499 (Fla. 1983)

Ellis v. Flink, 374 So.2d 4, 5 n.4 (Fla. 1979)

Conn. Comm'n on Special Revenue v. Conn. Freedom of Info. Comm'n, 387 A.2d 533, 537 (Conn. 1978)

Harford County v. Tatar, Lininger, Clark & Wood, Inc., 363 A.2d 501, 505 (Md. 1976)

In re Runals' Estate, 328 N.Y.S.2d 966, 978 (Sur. Ct. 1972)

Onorato v. Wissahickon Park, Inc., 244 A.2d 22, 25 (Pa. 1968)

Spratlin, Harrington & Thomas, Inc. v. Hawn, 156 S.E.2d 402, 407 (Ga. Ct. App. 1967) (Biblical expression)

State v. 62.96247 Acres of Land, More or Less, in New Castle, 193 A.2d 799, 806 n.7 (Del. Super. Ct. 1963)

State v. Brewer, 129 S.E.2d 262, 277 (N.C. 1963)

Martin v. Hieken, 340 S.W.2d 161,165 (Mo. Ct. App. 1960)

Hughes v. Robbins, 164 N.E.2d 469, 473 (Ohio Ct. Com. Pl. 1959)
("It has been well written that 'no servant can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other.'")

Powers v. Johnson, 306 S.W.2d 616, 624 (Mo. Ct. App. 1957)

Fruchtl v. Foley, 84 So.2d 906, 909 (Fla. 1956) (admonition)

Lexington Insulation Co. v. Davidson County, 90 S.E.2d 496, 498 (N.C. 1955)

City of Miami v. Benson, 63 So.2d 916, 920 (Fla. 1953)

Ridgway v. Super. Ct. of Yavapai, 245 P.2d 268, 271 (Ariz. 1952)

Safeway Stores v. Retail Clerks Int'l Ass'n, 234 P.2d 678, 682 (Cal. Dist. Ct. App. 1951)

State ex rel. Young v. Niblack, 99 N.E.2d 839, 845 (Ind. 1951)

Bossler v. Wilson, 65 Pa. D. & C. 164, 171 (Phila. Mun. Ct. 1949)

City of Jackson v. McLeod, 24 So.2d 319, 325 (Miss. 1946) ("The public interest requires the undivided loyalty of police officers to the public service and we were told long ago by One whose judgment was infallible that 'no man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.'")

Barr v. Sun Life Assurance Co. of Can., 200 So. 240, 244 (Fla. 1941)

Century Indem. Co. v. Carnes, 138 S.W.2d 555, 560 (Tex. Civ. App. 1940)

Moffett Bros. P'ship Estate v. Moffett, 137 S.W.2d 507, 511 (Mo. 1939)

Caudle v. Sears, Roebuck & Co., 182 So. 461, 464 (Ala. 1938)

Whitlow v. Patterson, 112 S.W.2d 35, 41 (Ark. 1937) ("No man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one and despise the other.")

Hood ex rel. N.C. Bank & Trust v. N.C. Bank & Trust, 184 S.E. 51, 62 (N.C. 1936)

Olson v. Gaddis Inv. Co., 39 P.2d 744, 747 (Utah 1935)

City of Leesburg v. Ware, 153 So. 87, 89 (Fla. 1934)

State ex rel. Union Elec. Light & Power Co. v. Pub. Serv. Comm'n, 62 S.W.2d 742, 746 (Mo. 1933)

Harris v. United Serv. Co., 32 S.W.2d 618, 619 (Ark. 1930) (general principle)

Robson v. Hahn, 277 P. 507, 508 (Cal. Dist. Ct. App. 1929)

Schwartzman v. London & Lancashire Fire Ins. Co. of Liverpool, Eng., 2 S.W.2d 593, 602 (Mo. 1927)

Castellanos v. Castro, 289 S.W. 104, 105 (Tex. Civ. App. 1926) (“It was said by the Great Teacher that ‘no man can serve two masters’”)

Rezos v. Zahm & Nagel Co., 246 P. 564, 565 (Cal. Dist. Ct. App. 1926)

Carolina Bagging Co. v. Byrd, 116 S.E. 90, 92 (N.C. 1923)

Hume v. Baggett & Baggett, 221 S.W. 1002, 1003 (Tex. Civ. App. 1920) (“This rule of law not only rests on an understanding of human nature but on the utterance of the Divine Nazarene, when he said: ‘No man can serve two masters; for either he will hate the one and love the other; or else he will hold to the one, and despise the other.’”)

Murray v. Lizotte, 77 A. 231, 238 (R.I. 1910) (“No matter how high his motives or how honorable his intention, ‘no man can serve two masters; for either he will hate the one, and love the other; or he will hold to the one, and despise the other.’”)

Shamokin Mfg. Co. v. Ohio German Fire Ins. Co., 39 Pa. Super. 553, 556 (Super. Ct. 1908) (“It involves a question whether the same person may be an agent in a private transaction for both parties, without the consent of both, so as to entitle him to compensation from both or either. We have the authority of Holy Writ for saying that ‘no man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.’ All human experience sanctions the undoubted truth and purity of this philosophy, and it is received as a cardinal principle in every system of enlightened jurisprudence.”)

U.S. Tel. Co. v. Middlepoint Home Tel. Co., 19 Ohio Dec. 202, 208 (Ct. Com. Pl. 1908) (“It is as true today as when first spoken in the

parable, and has become a fundamental rule that ‘No servant can serve two masters; for either he will hate the one and love the other; or else he will hold to the one and despise the other.’”)

Gann v. Zettler, 60 S.E. 283, 283 (Ga. Ct. App. 1908) (Powell, J.) (“It is recorded of Him ‘who spake as never man spoke’ that, ‘seeing the multitudes, he went up into a mountain, and when he was set his disciples came unto him; and he opened his mouth and taught them; saying: “No man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.”’ So, also, is our law. Whoso, having undertaken the service of his master, counsels with another and agrees also to serve him in those same things wherewith he has been trusted, cannot claim the reward promised by his master unless he makes it plain that he has not acted privily, but that his master was consenting thereto.” (internal citations omitted))

City of Philadelphia v. Durham, No. 1, 1907 WL 3343, at *13 (Pa. Ct. Com. Pl. Jan. 30, 1907) (“We have the authority of Holy Writ for saying that ‘no man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.’ All human experience sanctions the undoubted truth and purity of this philosophy, and it is received as a cardinal principle in every system of enlightened jurisprudence.”)

McDowell v. First Nat’l Bank of Sutton, 102 N.W. 615, 617 (Neb. 1905)

Nat’l Tube Co. v. Eastern Tube Co., 13 Ohio Cir. Dec. 468 (Cir. Ct. 1902)

Home Bldg. & Loan Ass’n v. Evans, 53 S.W. 1104, 1105 (Tenn. Ct. Ch. App. 1899)

Moore v. Grow, 1 Pa. Super. 125, 127 (Super. Ct. 1896)

Northrup v. Phillips, 99 Ill. 449, 454 (1881)

Dickson v. People ex rel. Brown, 17 Ill. 191, 193 (1855)

CITING TO LUKE

State Court Cases

Nationwide Mut. Fire Ins. Co. v. Bournon, 617 S.E.2d 40, 60 (N.C. Ct. App. 2005)

Barefield v. DPIC Cos., 600 S.E.2d 256, 281 (W. Va. 2004)

Rose ex rel. Rose v. St. Paul Fire & Marine Ins. Co., 599 S.E.2d 673, 688 (W. Va. 2004)

People v. Graham, 794 N.E.2d 231, 236 (Ill. 2003)

Myer v. Preferred Credit, Inc., 117 Ohio Misc. 2d 8, 24 (Ct. Com. Pl. 2001)

State v. Reddick, 534 S.E.2d 473, 477 (Ga. Ct. App. 2000)

Brooks v. Zebre, 792 P.2d 196, 200 (Wyo. 1990)

Watkins v. Floyd, 492 S.W.2d 865, 870 (Mo. Ct. App. 1973)

Wise v. S. Pac. Co., 77 Cal. Rptr. 156, 160 (Ct. App. 1969)

Pac. Indem. Co. v. Indus. Accident Comm'n, 81 P.2d 572, 575 (Cal. Ct. App. 1938)

Smith v. Harvey-Given Co., 185 S.E. 793, 796 (Ga. 1936)

Jordan v. Austin Sec. Co., 51 P.2d 38, 58 (Kan. 1935)

State v. Gautier, 147 So. 240, 246 (Fla. 1933)

Never Fail Land Co. v. Cole, 149 S.E. 585, 588 (N.C. 1929)

Patterson v. De Haven, 263 P. 568, 572 (Cal. Dist. Ct. App. 1928)

Chippewa Power Co. v. R.R. Comm'n of Wis., 205 N.W. 900, 902 (Wis. 1925)

Reserve Loan Life Ins. Co. v. Phillips, 119 S.E. 315, 317 (Ga. 1923)

Pagel v. Creasy, 6 Ohio App. 199, 206 (Ct. App. 1916)

McCudden v. Brockmeyer, 26 Ohio Dec. 432, 436 (Ct. Com. Pl. 1915)

Carr v. Ubsdell, 71 S.W. 112, 113 (Mo. Ct. App. 1902)

Bell v. McConnell, 37 Ohio St. 396, 399 (1881)

NO QUOTATION MARKS

Federal Court Cases

United States v. Freyer, 333 F.3d 110, 112 (2d Cir. 2003) (no lawyer can serve two masters)

United States v. Levine, 794 F.2d 1203, 1205 (7th Cir. 1986)

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