NOTE

MURDER, MULTIPLE VALUES, AND HARMLESS FREE EXERCISE ERROR

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INTRODUCTION

Happily, ours is a country dedicated to religious toleration. Among the "crucial principles of our liberal democracy" is that "Americans should freely practice their religions, and government should not establish any religion."[1] Not content to let those principles remain aspirational, we give them legal force in the form of the Free Exercise and Establishment Clauses

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[1] 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 1 (2006).

of the First Amendment.[2] Unhappily, however, ours is also a country with a long history of religious discrimination, from anti-Catholic Blaine Amendments[3] to modern antisemitism[4] and Islamophobia.[5] Religious toleration has not been a triumphant victory but rather a "long struggle."[6]

Perhaps just as happily, ours is a country dedicated to the principle that "it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned."[7] Reflections of that judgment are scattered throughout the Constitution, most notably in the Fifth, Sixth, and Fourteenth Amendments.[8] But it too is often subjugated: police extract confessions, prosecutors bury evidence, defense lawyers hang their clients out to dry, and the innocent are convicted.[9]

Sometimes, these values reinforce each other and promote American liberty. The privilege against self-incrimination, for instance, developed largely as a prophylactic to protect freedom of religious beliefs.[10] But their neglect can also be mutually reinforcing—the Salem Witch Trials come to mind.[11] One instance of such a phenomenon is when courts admit evidence of a criminal defendant's religious beliefs, affiliations, and activities for no purpose other than to show the defendant's bad

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2 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

3 *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 301–05 (2001).

4 *See, e.g.*, Kestenbaum v. President & Fellows of Harvard Coll., No. 24-10092-RGS, 2024 WL 3658793, at *1 (D. Mass. Aug. 6, 2024) (describing "an outburst of antisemitic behaviors on the Harvard University campus following the October 7, 2023 terrorist attack by Hamas on Israel").

5 *See generally* ERIK LOVE, ISLAMOPHOBIA AND RACISM IN AMERICA (2017).

6 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940), *overruled by* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

7 Furman v. Georgia, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring).

8 U.S. CONST. amends. V, VI, XIV.

9 *See generally* BRANDON L. GARRETT, CONVICTING THE INNOCENT (2011).

10 *See* Williams J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 411–12 (1995) ("The privilege entered the law in response to practices that were troubling in large part because of the crimes being prosecuted—crimes of religious belief or political expression.").

11 *See* Richard W. Painter, *Ethics and Government Lawyering in Current Times*, 47 HOFSTRA L. REV. 965, 967 (2019) ("The Puritans who had escaped Great Britain for their own religious freedom were not too tolerant—look at the history of the Salem Witch Trials."); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 135 (1995) ("Salem showed the dangers in a system where the accused could do little to affect the factual developments at criminal trials.").

character.[12] This phenomenon is perhaps most pernicious when a jury exercises its discretion over the fate of a capital defendant.[13] Using religion to decide who lives and who dies is hardly the mark of "a Nation of unparalleled pluralism and religious tolerance."[14]

Fortunately, courts have recognized that this practice violates the First Amendment.[15] That does not mean, however, that they are willing to invalidate any criminal proceeding conducted without "the religious neutrality that the Constitution requires."[16] Instead, they may employ the doctrine of harmless error[17] to affirm convictions and sentences even where the prosecution stoked the flames of religious animus. The harmless error doctrine permits convictions or sentences to be sustained, even in the face of constitutional error, if the error was "harmless beyond a reasonable doubt."[18] Thus, a reviewing court can ignore a constitutional error if it determines that the error was "unimportant and insignificant."[19]

The Supreme Court has noted, however, that "some constitutional rights [are] so basic . . . that their infraction can never be treated as harmless error."[20] However, it has never provided a precise test for determining which rights fit that category.[21] Nevertheless, it has suggested that one rationale is when "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest."[22]

In this Note, I argue that unconstitutional reliance on a defendant's religious beliefs, associations, or activities—what

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12 *See, e.g.*, Flanagan v. State, 846 P.2d 1053, 1055–56 (Nev. 1993).

13 *See* Glossip v. Gross, 576 U.S. 863, 902 (2015) (Thomas, J., concurring) ("[T]he choice between life and death, within legal limits, is left to the jurors and judges who sit through the trial."); *cf.* Graham v. Collins, 506 U.S. 461, 484 (1993) (Thomas, J., concurring) ("It cannot be doubted that behind the Court's condemnation of unguided discretion lay the specter of racial prejudice—the paradigmatic capricious and irrational sentencing factor.").

14 Salazar v. Buono, 559 U.S. 700, 723 (2010) (Alito, J., concurring).

15 *See, e.g.*, United States v. Fell, 531 F.3d 197, 228 (2d Cir. 2008). However, not *all* introduction of this evidence is constitutionally forbidden. *See infra* note 49 and accompanying text.

16 Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 625 (2018).

17 *See* Chapman v. California, 386 U.S. 18 (1967).

18 *Id.* at 24.

19 *Id.* at 22.

20 *Id.* at 23.

21 *See infra* text accompanying notes 73–89

22 Weaver v. Massachusetts, 582 U.S. 286, 295 (2017).

I will refer to as *Dawson-Flanagan* error[23]—is within the category of errors that can never be properly treated as harmless. In Part I, I outline the history of the *Dawson-Flanagan* doctrine in the context of the Nevada Supreme Court's several decisions in *Flanagan v. State*, which together present the most extensive discussion of the doctrine and the application of harmless error review to it. In Part II, I give an overview of the harmless error doctrine. Subpart II-A explains the doctrine in general terms, with a focus on determining which types of errors are subject to it. Subpart II-B examines the case law on whether *Dawson* error (of which *Dawson-Flanagan* error is a subset) is amenable to harmless error review and concludes that the normal criminal procedure analysis is unsuited to answering the question. In Part III, I ask whether the First Amendment can pick up the slack where criminal procedure doctrine falls short. After a brief exploration in subpart III-A of the possibility that the First Amendment categorically forbids harmless error review, I turn in subpart III-B to a more promising approach, which considers the values underlying particular First Amendment violations and maps them on to the values protected by criminal procedure decisions for which the harmless error question has already been resolved. Finally, in Part IV I apply this framework to *Dawson-Flanagan* error, focusing on two free exercise values: equality and autonomy. Ultimately, I conclude that these values (and their criminal procedure analogues) support refusing to analyze *Dawson-Flanagan* error for harmlessness.

I
THE MOORE & FLANAGAN SAGA

At Randolph Moore and Dale Flanagan's 1985 murder trial, their codefendant presented evidence that they participated in Satan worship.[24] He called a witness who testified that Moore was "the leader of" a coven, while Flanagan was his "second in command."[25] The witness also explained that the coven engaged in "two different kinds" of magic.[26] The white magic used by Moore, the witness explained, could be used to "manipulate people to do things they wouldn't normally otherwise do."[27]

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23 *See* Dawson v. Delaware, 503 U.S. 159 (1992); Flanagan v. State, 846 P.2d 1053 (Nev. 1993).

24 Flanagan v. State, 930 P.2d 691, 693–94 (Nev. 1996).

25 *Id.* at 694.

26 *Id.* at 693.

27 *Id.* at 694.

The black magic used by Flanagan, on the other hand, was used to "put a hex on" someone, causing them to "feel pain that they wouldn't normally feel."[28]

The prosecutor seized on this testimony during his closing argument, referring to Moore and Flanagan as "devil worshippers" who "hatch[ed] a diabolical plot."[29] He explained that "[t]hey didn't only lead the coven," but also "let their black and their white magic spill over into" the conspiracy to kill Flanagan's grandparents.[30] And he speculated that they would "[p]robably divvy [the inheritance and insurance money] up in the middle of a coven proceeding."[31] The jury convicted Moore and Flanagan and sentenced them to death.[32] On appeal, the Nevada Supreme Court affirmed their convictions but reversed their sentences due to unrelated prosecutorial misconduct.[33]

At their resentencing in 1989, the state relied even more heavily on evidence of Moore and Flanagan's Satan worship, presenting "detailed evidence" of their "participation in a cult," including an initiation ritual "in which each member stated 'Satan is my [g]od.'"[34] The prosecutor put this evidence at the center of his closing argument, invoking the then-contemporary zeitgeist of the Satanic Panic:

> And how about devil worship. You have read books, you have seen movies, you heard the terminology coven. It exists. They happen. Sort of tried to play down the whole deal but it happens and this coven, the evidence suggests, worshipped [S]atan. It is as anti[-]Christ as it can get. It flies in the face of most people's deepest most dearest held beliefs and they warmly embraced it. . . . I mean, think about that in terms of the character of the persons who you are sentencing. Think about what they did and what they believed in.[35]

When Moore and Flanagan challenged their sentences on appeal, the Nevada Supreme Court was faced with tension between two Supreme Court precedents. On the one hand, the Court had held that an aggravating factor may not be based on

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28 *Id.*

29 *Id.* at 695.

30 *Id.*

31 *Id.*

32 *Id.* at 693.

33 *See* Flanagan v. State, 754 P.2d 836, 840 (Nev. 1988); Moore v. State, 754 P.2d 841, 841 (Nev. 1988).

34 Flanagan v. State, 846 P.2d 1053, 1056–57 (Nev. 1993).

35 *Id.* at 1055 n.1.

"constitutionally impermissible" factors like religion.[36] On the other hand, *Barclay v. Florida*[37] held that, although racist ideas are protected by the First Amendment,[38] the racial motivation for a murder can be considered when deciding whether to impose the death penalty.[39] The Nevada Supreme Court treated Moore and Flanagan's case more like *Barclay*; it noted that the Satanism evidence was used only as "character evidence."[40] Thus, the court affirmed their death sentences.[41]

While Flanagan and Moore's petitions for certiorari were pending, the Supreme Court decided *Dawson v. Delaware*.[42] In *Dawson*, the Court held that the First Amendment prohibited introducing evidence of the defendant's membership in a racist prison gang "where the evidence ha[d] no relevance to the issues being decided in the proceeding."[43] The Court relied on the First Amendment "right to join groups and associate with others holding similar beliefs."[44] It acknowledged that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."[45] However, it emphasized that—unlike in *Barclay*—the evidence of the defendant's beliefs and associations "had no relevance to the sentencing proceeding" because "elements of racial hatred were . . . not involved in the killing."[46] Three weeks later, the Court granted certiorari in Moore and Flanagan's cases, vacated the Nevada Supreme Court's judgments, and remanded for reconsideration in light of *Dawson*.[47]

On remand, the Nevada Supreme Court "derive[d] the following rule" from *Dawson*: "Evidence of a constitutionally protected activity is admissible only if it is used for something

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36 Zant v. Stephens, 462 U.S. 862, 885 (1983).

37 463 U.S. 939 (1983).

38 *See, e.g.*, Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978).

39 *Barclay*, 463 U.S. at 948–50.

40 Flanagan v. State, 810 P.2d 759, 761 (Nev. 1991).

41 *Id.* at 763.

42 503 U.S. 159 (1992).

43 *Id.* at 160.

44 *Id.* at 163.

45 *Id.* at 165.

46 *Id.* at 166.

47 Flanagan v. Nevada, 503 U.S. 931 (1992); Moore v. Nevada, 503 U.S. 930 (1992).

more than general character evidence."[48] The limitation to general character evidence is important: evidence of beliefs or activities—including religious ones—protected by the First Amendment can be introduced for other purposes.[49] The court also recognized that, beyond the freedom of association, Moore and Flanagan's case "implicate[d] the First Amendment's Free Exercise Clause."[50] Like in *Dawson*, the evidence presented at their trial was "not relevant to help prove any aggravating circumstance," and was used only as character evidence.[51] This, the court held, violated the First Amendment as construed by *Dawson*.[52] The court also concluded that constitutional violations of this type (which this Note will refer to as *Dawson-Flanagan* error) "leave[] no room for a harmless-error analysis."[53] Thus, it remanded for resentencing.[54]

While awaiting resentencing, Moore and Flanagan filed a petition for habeas corpus with the state court alleging that their *convictions* were also unconstitutional because of *Dawson-Flanagan* error.[55] Analyzing the Satanism argument from the guilt phase, the court found that it, like the sentencing phase argument, violated the First Amendment.[56] This time, however, the court "conclude[d] that this error does not require automatic reversal."[57] It distinguished sentencing, where it had held that harmless error analysis was inappropriate, from the guilt phase of trial, on the grounds that character evidence was relevant in the former (and thus not easily disregarded by the jury) but irrelevant in the latter.[58] Applying harmless error re-

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48 Flanagan v. State, 846 P.2d 1053, 1056 (Nev. 1993).

49 For example, it may be introduced if it is "related to the commission of the crime charged" or is "used to show a person's possible bias or motive." State v. Leitner, 34 P.3d 42, 55 (Kan. 2001); *see also* United States v. Abel, 469 U.S. 45, 52–53 & n.2 (1984) (rejecting First Amendment argument against use of a witness's membership in the Aryan Brotherhood to impeach him for bias); FED. R. EVID. 610 advisory committee's note (the rule prohibiting use of "[e]vidence of a witness's religious beliefs or opinions . . . to attack or support the witness's credibility" does not include "an inquiry for the purpose of showing interest or bias because of" the religious beliefs).

50 *Flanagan*, 846 P.2d at 1056.

51 *Id.* at 1055 (quoting Dawson v. Delaware, 503 U.S. 159, 166 (1992)).

52 *See id.* at 1057.

53 *Id.* at 1058.

54 *Id.* at 1059.

55 Flanagan v. State, 930 P.2d 691, 696 (Nev. 1996).

56 *Id.* at 697.

57 *Id.*

58 *Id.*

view, the court held the *Dawson-Flanagan* error harmless on the grounds that the evidence of guilt was "overwhelming."[59]

The Supreme Court denied certiorari.[60] Despite a growing circuit split on the applicability of harmless error review to *Dawson-Flanagan* errors,[61] it has not subsequently addressed the issue.[62]

II
THE HARMLESS ERROR DOCTRINE

A. The Doctrine

The harmless error rule is "probably the most cited rule in modern criminal appeals."[63] Between 1979 and 1994, somewhere between 1.38% and 2.15% of federal appellate decisions mentioned the doctrine.[64] The Supreme Court's first brush with the doctrine in a constitutional case came in *Fahy v. Connecticut*.[65] However, the Court avoided the difficult questions (to Justice Harlan's dismay) about whether constitutional errors could ever be harmless (and, if so, what standard would apply) by finding that the error there was not harmless under any standard.[66]

But "[t]he Court answered the question[s] it danced around in *Fahy* four years later"[67] when it decided *Chapman v. California*.[68] The *Chapman* Court first decided that federal

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59 *Id.* at 698.

60 Flanagan v. Nevada, 523 U.S. 1083 (1998); Moore v. Nevada, 523 U.S. 1083 (1998). In denying certiorari, the Court may have been influenced by its "usual hesitance to grant certiorari in state post-conviction cases." Josiah Rutledge, *With Great (Writ) Power Comes Great (Writ) Responsibility: A Modified* Teague *Framework for State Courts*, 59 CRIM. L. BULL. 480, 498 (2023); *see* Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring).

61 *See infra* notes 92–105 and accompanying text.

62 *See infra* notes 92–105 and accompanying text.

63 William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 161 (2001).

64 Harry T. Edwards, *To Err is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1181 n.52 (1995).

65 375 U.S. 85 (1963).

66 *Id.* at 86; *see id.* at 92 (Harlan, J., dissenting) ("The only question in this case which merits consideration by this Court, and which alone accounts for the case being here at all, is that which the majority does not reach: Does the Fourteenth Amendment prevent a State from applying its harmless-error rule in a criminal trial with respect to the erroneous admission of evidence obtained through an unconstitutional search and seizure?").

67 Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2133 (2018).

68 386 U.S. 18 (1967).

(rather than state) law controlled the harmless error questions when constitutional rights are involved.[69] Next, it decided that constitutional errors can be subject to harmless error review in at least some circumstances, "end[ing] an aged assumption that constitutional error would always require reversal."[70] Finally, it concluded that a constitutional error cannot be held harmless unless "it was harmless beyond a reasonable doubt."[71]

Along the way, however, the *Chapman* Court noted that not all errors would be subject to harmless error review.[72] The question of which errors fall in this category—which Professor Epps calls the "*Chapman* Step Zero" question[73]—has plagued the Court ever since. A directed verdict for the prosecution (in violation of the right to trial by jury) is the classic example.[74] And, in a footnote, the *Chapman* Court pointed to the right to counsel and the right to an impartial judge.[75] However, "the Court has applied harmless error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless."[76] But it has never identified a consistent theory for why certain errors are subject to harmless error review and others are not. In *Arizona v. Fulminante*, the Court gestured toward an "epistemic" approach,[77] asking whether the error "occurred during the presentation of the case to the jury" and thus could be "quantitatively assessed in the context of other

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69 *Id.* at 21.

70 Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 15 (1976); *see Chapman*, 386 U.S. at 22.

71 *Chapman*, 386 U.S. at 24. In the postconviction context, however, errors can be declared harmless if they did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

72 *Chapman*, 386 U.S. at 23.

73 Epps, *supra* note 67, at 2153. The reference is to the use of "*Chevron* Step Zero" to refer to "the initial inquiry into whether the *Chevron* [U.S.A., Inc v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)] framework applies at all." *Id.* at 2154 n.240 (quoting Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006)).

74 *See, e.g.*, Sullivan v. Louisiana, 508 U.S. 275, 280 (1993); Rose v. Clark, 478 U.S. 570, 578 (1986).

75 *Chapman*, 386 U.S. at 23 n.8. The footnote also listed coerced confessions, but the Court subsequently held that admission of a coerced confession could be harmless. Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

76 *Fulminante*, 499 U.S. at 306.

77 Epps, *supra* note 67, at 2154.

evidence presented."[78] In *Sullivan v. Louisiana*,[79] by contrast, the Court seemingly looked to "the nature of the constitutional right at issue."[80]

The Court's most recent (and most systematic) inquiry into the *Chapman* Step Zero question came in *Weaver v. Massachusetts*,[81] which addressed the question of whether an error that is not subject to harmless error review can nevertheless be subject to *Strickland v. Washington*'s prejudice requirement[82] when it is embedded within an ineffective-assistance-of-counsel claim.[83] The *Weaver* Court explained that there are "at least three broad rationales" that justify exempting an error from harmlessness review.[84] First, harmless error review is inapplicable when "the right at issue was not designed to protect the defendant from erroneous conviction but instead protects some other interest."[85] In such cases, harmless error review would be senseless because "harm is irrelevant to the basis underlying the right."[86] Second, harmless error review does not apply when "the effects of the error are simply too hard to measure."[87] In such cases, "the efficiency costs" of the *Chapman* inquiry "are unjustified" because it will be "almost impossible to show that the error was 'harmless beyond a reasonable doubt.'"[88] Finally, harmless error review does not apply when "the error always results in fundamental unfairness," because it "would be futile for the government to try to show harmlessness."[89]

B. *Dawson* and Harmless Error

Dawson itself did not indicate whether the errors it addressed were subject to harmless error review, instead concluding that the question was not before it and leaving the

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78 *Fulminante*, 499 U.S. at 307–08.

79 508 U.S. 275 (1993).

80 Epps, *supra* note 67, at 2154.

81 582 U.S. 286 (2017).

82 466 U.S. 668, 694 (1984) ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

83 *Weaver*, 582 U.S. at 290.

84 *Id.* at 295.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* at 295–96 (quoting Chapman v. California, 386 U.S. 18, 24 (1967).

89 *Id.* at 296.

question for the Delaware Supreme Court on remand.[90] Justice Blackmun, however, wrote separately to note the "substantial argument that harmless error analysis is not appropriate" based on "the potential chilling effect that consideration of First Amendment activity at sentencing might have."[91]

On remand, the Delaware Supreme Court concluded that harmless error review was appropriate.[92] It did so, however, based solely on a strained reading of the *Dawson* opinion as indicating that harmless error review did apply,[93] despite the Court's insistence that the issue was "not before" it.[94] While the Delaware Supreme Court's position has become the majority view, most of the opinions adopting it have been unreasoned. In fact, only the Ninth Circuit has exhibited any awareness of the *Chapman* Step Zero question, though it too resolved it in an unreasoned footnote.[95] Meanwhile, the Fourth[96] and Eighth[97] Circuits, along with the California,[98] Kansas,[99] Louisiana,[100] and Missouri[101] Supreme Courts have all applied harmless error review without pausing to consider whether that analysis is appropriate for *Dawson* errors.

The only reasoned opinions determining whether harmlessness analysis is appropriate for *Dawson* errors are the Nevada Supreme Court opinions in Moore and Flanagan's cases. As mentioned above, the Nevada Supreme Court concluded that *Dawson-Flanagan* error committed during the sentencing phase was not subject to harmless error review, relying on the fact that it was used to prove nonstatutory aggravating factors.[102] Later, however, it distinguished the guilt phase from the sentencing phase, holding that *Dawson-Flanagan* errors committed during the former *are* subject to harmless error review.[103] It argued that, because the defendant's character is at

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90 Dawson v. Delaware, 503 U.S. 159, 168–69 (1992).

91 *Id.* at 169 (Blackmun, J., concurring).

92 Dawson v. State, 608 A.2d 1201, 1203–04 (Del. 1992).

93 *Id.*

94 *Dawson*, 503 U.S. at 169.

95 Kipp v. Davis, 971 F.3d 866, 876 n.5 (9th Cir. 2020).

96 United States v. Runyon, 707 F.3d 475, 496 (4th Cir. 2013).

97 Wainwright v. Lockhart, 80 F.3d 1226, 1234 (8th Cir. 1996).

98 People v. Young, 445 P.3d 591, 611, 624 (Cal. 2019).

99 State v. Leitner, 34 P.3d 42, 56 (Kan. 2001).

100 State v. Cooks, 720 So. 2d 637, 650–51 (La. 1998).

101 State v. Driscoll, 55 S.W.3d 350, 356 (Mo. 2001).

102 Flanagan v. State, 846 P.2d 1053, 1058 (Nev. 1993).

103 Flanagan v. State, 930 P.2d 691, 697 (Nev. 1996).

issue at the sentencing phase, presentation of improper character evidence carried "a tremendous risk" of influencing the jury.[104] By contrast, it argued that the defendant's character is not relevant during the guilt phase, making it unlikely the jury would be influenced by it.[105]

This distinction has a certain superficial appeal: character is indeed highly relevant at sentencing, and in capital cases sentencing *must* be individualized.[106] And it is indeed generally forbidden at the guilt phase.[107] However, it is mistaken to say that it is not *relevant* at the guilt phase: at least as far back as Thayer, evidence scholars have recognized that character evidence is, strictly speaking, relevant.[108] The issue with character evidence is not, as the Nevada Supreme Court suggested, its lack of relevance to a jury, but rather, as Justice Jackson wrote, its tendency "to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[109] As Wigmore explained, it is excluded "not because it has no appreciable probative value, but because it has too much."[110] In addition to potentially being overvalued by jurors, character evidence may also "improperly diminish the regret the jurors would feel if they reached a false guilty verdict or increase their regret at a false *not* guilty verdict," causing them to subtly depart from the burden of proof.[111] Thus, it is surely wrong to say that such evidence is likely to be harmless because of its lack of probative value: if prosecutors did not believe it made the jury more likely to convict, they would not bother presenting the evidence, and certainly would not waste time emphasizing it during their closing arguments.

At bottom, the standard criminal procedure framework is unsuited for determining whether *Dawson-Flanagan* errors

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104 *Id.*

105 *Id.*

106 *E.g.*, Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990).

107 *See* FED. R. EVID. 404(a).

108 *See* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 525 (1898) ("Undoubtedly, as a mere matter of reason, it often affords a good basis of inference."); *see also* ROGER C. PARK, DAVID P. LEONARD, AVIVA A. ORENSTEIN, & STEVEN H. GOLDBERG, EVIDENCE LAW 128 (3d ed. 2011) ("It has long been accepted that character evidence is relevant in the minimal sense of having the tendency to make a fact of consequence more or less likely than without the evidence.").

109 Michelson v. United States, 335 U.S. 469, 476 (1948).

110 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2 (Peter Tillers rev., 1983).

111 RICHARD O. LEMPERT ET AL., A MODERN APPROACH TO EVIDENCE 350 (5th ed. 2014).

should be subject to harmlessness analysis. Although that framework leaves room to consider whether "the right at issue . . . protects some other interest" rather than "protect[ing] the defendant from erroneous conviction,"[112] it gives no explanation for how to determine whether such a right is subject to harmlessness analysis. Even the question asked by the typical *Chapman* Step Zero analysis seems beside the point when the First Amendment is at issue: it asks whether rights are "so basic *to a fair trial* that their infraction can never be treated as harmless error."[113]

III
A First Amendment Framework

If the law of criminal procedure cannot provide an answer, perhaps the First Amendment—the source of the right violated by *Dawson-Flanagan* error—can lend a hand. After all, several scholars have suggested that harmless error analysis should be keyed to the nature of (and values behind) the right at issue.[114] And the "substantial argument" Justice Blackmun noted in his *Dawson* concurrence sounded in First Amendment values, speaking of "the potential chilling effect that consideration of First Amendment activity at sentencing might have."[115]

A. A Categorical Argument?

It is tempting to suggest a rule of automatic reversal for First Amendment error in criminal trials. After all, the First Amendment clearly "protects some other interest" beside the right to a free trial.[116] And the rule of *Stromberg v. California*[117] requires reversal "[i]f, under the instructions to the jury, one way of committing the offense charged is to perform an act protected by the Constitution . . . even if the defendant's unprotected conduct, considered separately, would support the verdict."[118] That argument, however, runs headlong into *Pope v. Illinois*, in which the Court held that a jury instruction that violated the First Amendment could be held harmless under

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112 Weaver v. Massachusetts, 582 U.S. 286, 295 (2017).

113 Chapman v. California, 386 U.S. 18, 23 (1967) (emphasis added).

114 *See, e.g.*, Epps, *supra* note 67; Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 Harv. L. Rev. 1791 (2017).

115 Dawson v. Delaware, 503 U.S. 159, 169 (1992) (Blackmun, J., concurring).

116 *Weaver*, 582 U.S. at 295.

117 283 U.S. 359 (1931).

118 Zant v. Stephens, 462 U.S. 862, 883 (1983).

Chapman.[119] *Pope* expressly rejected the argument that the government "should not be allowed to preserve any conviction under a law that poses a threat to First Amendment values."[120]

Though *Pope* forecloses the broadest form of this argument, a slightly lower level of generality yields a stronger argument: even if the First Amendment, considered as a whole, does not always require automatic reversal, perhaps the Free Exercise Clause does. That argument has at least some basis in Free Exercise doctrine. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Court found that members of the state agency charged with adjudicating claims under Colorado's public accommodations law violated the free-exercise rights of a baker who refused to make a cake for a same-sex wedding by exhibiting hostility toward his religious beliefs.[121] Rather than consider whether the hostility changed the outcome, the Court held that the agency's order "must be set aside."[122]

This failure to consider whether the hostility changed the outcome was peculiar. In religious animus cases like *Masterpiece Cakeshop*, the Court has borrowed heavily from the test it laid out in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*[123] for identifying discriminatory government purposes in the equal protection context.[124] Under *Arlington Heights*, however, the government has the opportunity to show "that the same decision would have resulted even had the impermissible purpose not been considered"[125]—an opportunity akin to the government's opportunity under *Chapman* to prove that an error was harmless beyond a reasonable doubt. In *Masterpiece Cakeshop*, however, the Court afforded Colorado no such opportunity, essentially "ignoring the requirement of 'but-for' causation."[126] If it had applied the but-

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119 Pope v. Illinois, 481 U.S. 497, 502 (1987).

120 *Id.* at 501.

121 584 U.S. 617, 625 (2018).

122 *Id.*

123 429 U.S. 252 (1977).

124 *See* Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171, 177 (2019); Steven D. Mirsen, *Political and Judicial Incorrectness: The Case for Modifying the* Arlington Heights *Test to Disincentivize Discriminatory Appeals*, 108 CORNELL L. REV. 675, 695 (2023) (noting that *Masterpiece Cakeshop* "applied the *Arlington Heights* factors").

125 *Arlington Heights*, 429 U.S. at 270 n.21.

126 Sager & Tebbe, *supra* note 124, at 177; *see also* Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 MICH. L. REV. 1307, 1313 n.30 (2022) ("Even if those remarks had expressed an illegitimate motive, they would not have sufficed to invalidate the government action under ordinary

for causation test, the case may well have come out differently: as Justice Ginsburg pointed out, "[t]he proceedings involved several layers of independent decisionmaking," each of which ruled against the baker, and only one of which was infected by religious animus.[127] In *Kennedy v. Bremerton School District*, the Court reiterated its refusal to apply the *Arlington Heights* but-for causation standard in the free-exercise context, noting that no "further inquiry" is required when "'official expressions of hostility' to religion accompany laws or policies burdening religious exercise."[128]

B. A Values-Based Approach

In light of Free Exercise doctrine's rejection of something akin to harmless error review, there is reason to think that Free Exercise Clause violations always warrant reversal. However, there is also reason to pause before importing such a broad reading of *Masterpiece Cakeshop* into criminal appeals. *Masterpiece Cakeshop* might reasonably be read in light of its specific facts.[129] What the baker there was entitled to was, in the Court's words, "a neutral decisionmaker."[130] As some have observed, "[t]he Court's decision might also have turned on the adjudicative nature of the agency proceeding and on special concerns about bias in such proceedings."[131]

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antidiscrimination law, which would have allowed the agency to show that it would have taken the same action even absent the discriminatory motive.").

127 Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 673 (2018) (Ginsburg, J., dissenting); *cf.* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 153 (2018) ("In *Masterpiece*, however, the Court did not apply either strict scrutiny or a burden-shifting framework. And it is not difficult to see why. Had the Court pursued either inquiry, it would have been forced to confront the very substantive questions that its animus determination had avoided.").

128 597 U.S. 507, 525 n.1 (2022); *see also* Stephanie H. Barclay, *The Religion Clauses After* Kennedy v. Bremerton School District, 108 IOWA L. REV. 2097, 2111 (2023) ("[T]he Court has now made explicit what was implicit in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*: The government is categorically prohibited from burdening religious exercise when it is doing so based on '"official expressions of hostility" to religion.' . . . The action will simply be per se invalid.").

129 Sager & Tebbe, *supra* note 124, at 171 (noting that the *Masterpiece Cakeshop* opinion was "specific to the peculiar facts in Colorado and therefore limited in its precedential effect").

130 *Masterpiece Cakeshop*, 584 U.S. at 640.

131 Tebbe & Schwartzman, *supra* note 126, at 1313 n.30; *see also* Tingley v. Ferguson, 47 F.4th 1055, 1086–87 (9th Cir. 2022) ("The Court in *Masterpiece* acknowledged the distinction between hostile comments made by an adjudicatory body when deciding a case in front of it, and comments made by a legislative body when debating a bill."), *reh'g en banc denied*, 57 F.4th 1072 (9th Cir. 2023), *cert.*

The requirement of a neutral decisionmaker is right at home in constitutional criminal procedure. A defendant has a right to an impartial judge[132] and to a "panel of impartial, 'indifferent' jurors."[133] And denial of either requires automatic reversal; neither is subject to harmless error review.[134] Viewed through this lens, *Masterpiece Cakeshop* is markedly similar to *Williams v. Pennsylvania*,[135] which was decided just two years prior. Both adjudicatory bodies—the Colorado Civil Rights Commission and the Pennsylvania Supreme Court—consist of seven members.[136] And in both cases, indications of bias (hostile comments in *Masterpiece Cakeshop*, prior involvement with the case in *Williams*) were present in only some members.[137] In *Williams*, the Court held that the bias of one member requires reversal "even if the judge in question did not cast a deciding vote."[138] Although *Masterpiece Cakeshop* never cited *Williams*,[139] it may well have been based on a similar rationale.

But not all free-exercise violations implicate the right to a neutral decision maker. In a *Dawson-Flanagan* case, for instance, neither the judge nor the jury is the hostile actor; the prosecutor is.[140] We should pause before equating a right to a neutral decision maker with a right to a neutral adversary—even

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denied, 144 S. Ct. 33 (2023); Kendrick & Schwartzman, *supra* note 127, at 153 n.119 ("Another explanation might rest on distinguishing between animus in legislative action and animus, or the appearance of it, in adjudication.").

132 Tumey v. Ohio, 273 U.S. 510, 535 (1927).

133 Irvin v. Dowd, 366 U.S. 717, 722 (1961); *see* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury").

134 *Tumey*, 273 U.S. at 535; United States v. Martinez-Salazar, 528 U.S. 304, 316 (2000).

135 579 U.S. 1 (2016).

136 *Compare* Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 628 (2018) (the "full Commission" is "a seven-member appointed body") *with* PA. CONST. art. V, § 2(b) ("The Supreme Court . . . shall consist of seven justices.").

137 *Compare Masterpiece Cakeshop*, 584 U.S. at 634–36 (detailing commissioners' hostile comments) *with Williams*, 579 U.S. at 5–6 (describing Chief Justice Castille's personal involvement with petitioner's case while serving as a prosecutor).

138 *Williams*, 579 U.S. at 14.

139 *Cf.* Kendrick & Schwartzman, *supra* note 127, at 153 n.119 ("But the Court did not invoke such a distinction for this purpose, and even if it had, there would have remained questions about the need for mixed-motive analysis and the nature of appropriate remedies.").

140 *See* Flanagan v. State, 846 P.2d 1053, 1055 (Nev. 1993) (noting that "the *prosecution* presented evidence detailing appellants' belief in the occult" and "[t]he *prosecution* used the evidence to establish appellants' bad character" (emphasis added)).

where that adversary is the state, who "may strike hard blows" but "is not at liberty to strike foul ones"[141] and who "[t]he Free Exercise Clause commits . . . to religious tolerance."[142]

The analogy between *Masterpiece Cakeshop* and *Williams* suggests a useful lens for evaluating whether *Chapman* analysis is appropriate for a free-exercise violation: analogizing to "true" criminal procedure cases implicating similar values. While not every Free Exercise case will find as close a match as *Masterpiece Cakeshop* has in *Williams*, there are numerous criminal procedure cases that implicate similar values to those embodied in the Free Exercise Clause.[143] Using such analogies allows us to use traditional criminal procedure rules (for which the traditional *Chapman* Step Zero analysis is designed and for which it is, as a result, best adapted) as scaffolding to answer the more difficult *Chapman* Step Zero questions that arise in the free-exercise context.

IV
HARMLESSNESS OF *DAWSON-FLANAGAN* ERROR THROUGH A FIRST AMENDMENT LENS

While something like the right to a neutral decision maker in criminal cases can be boiled down to one value—fairness—the right to free exercise of religion is not so simple. Attempts to boil the Free Exercise Clause down to one value "almost inevitably" lead to one of two problems.[144] On the one hand, they may be underinclusive, failing to capture important aspects of free exercise doctrine and the principles behind them.[145] On the other, they may be so overinclusive that they "yield[] little help in resolving practical problems."[146] As a result, "overall decision making seldom can be reduced to a single standard without unacceptable cost."[147]

Rather than attempt to sail between Scylla and Charybdis, a First Amendment harmless error framework should recognize

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141 Berger v. United States, 295 U.S. 78, 88 (1935).

142 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993).

143 *See infra* Part IV.

144 GREENAWALT, *supra* note 1, at 5.

145 *Id.*; *see also Nelson Tebbe, Nonbelievers*, 97 VA. L. REV. 1111, 1128 (2011) ("Although these views have powerful appeal, they generally ignore or undervalue important factors.").

146 GREENAWALT, *supra* note 1, at 5.

147 Tebbe, *supra* note 145, at 1128.

instead that "[m]ultiple values count."[148] Under such a framework, decision makers must "consider and apply a range of values," rather than just one.[149] Though there is no definitive or exhaustive list, one scholar (writing in the nonestablishment context) gave the following list of relevant values:

> [R]eligious conscience, the promotion of autonomy, the withdrawal of civil government from an area in which it is markedly incompetent, the removal of one source of corruption of religion and deflection from religious missions, the removal of one source of corruption of government, the prevention of unhealthy mingling of government and religion, the avoidance of political conflict along religious lines that could threaten social stability, and the promotion of a sense of equal dignity among citizens.[150]

One objection to multiple values approaches is that such "all things considered" approaches "make[] it too easy for courts to smuggle in personal preferences."[151] As Justice Scalia observed, "[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."[152] Indeed, "[d]oubts about the legitimacy of what he saw as intrinsically subjective, value-based balancing were one of Justice Scalia's central concerns when he wrote the majority opinion in *Employment Division v. Smith*," a key free-exercise case.[153] I share those doubts, but offer three responses to the argument that they counsel against the framework I adopt here.

First, formalist versions of the *Chapman* Step Zero analysis have been rejected by the Court. Justice Scalia proposed such a framework[154] (and briefly garnered a majority for it),[155]

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148 *Id.* at 1115; *see also* 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 1 ("Neither free exercise nor nonestablishment is reducible to any single value; many values count.").

149 Tebbe, *supra* note 145, at 1127.

150 GREENAWALT, *supra* note 148, at 6–7.

151 Tebbe, *supra* note 145, at 1130.

152 Crawford v. Washington, 541 U.S. 36, 67–68 (2004).

153 Alan Brownstein, *Why Conservatives, and Others, Have Trouble Supporting the Meaningful Enforcement of Free Exercise Rights*, 33 HARV. J.L & PUB. POL'Y 925, 926–27 (2010); *see* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 889 n.5 (1990) ("[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.").

154 *See* Carella v. California, 491 U.S. 263, 267–73 (1989) (Scalia, J., concurring in the judgment).

155 *See* Sullivan v. Louisiana, 508 U.S. 275 (1993).

but the Court subsequently abandoned it, noting that the *Chapman* Step Zero jurisprudence "has not been characterized by [an] 'in for a penny, in for a pound' approach."[156] Instead, the prevailing theory of harmless error doctrine is that it is governed by the common law of constitutional remedies.[157] And the Court views its role in such cases as "fashioning the necessary rule" "in the absence of appropriate congressional action."[158] It is no wonder that such a policymaking task—even when conducted by judges—should be undertaken with reference to the "fundamental principles of American liberal democracy."[159]

Second, the approach I adopt here does not balance values against each other in a way that "involve[s] difficult tradeoffs that are not resolvable by any higher metric."[160] Mine is not an approach that "abstracts from the right to its purposes, and then eliminates the right."[161] Instead, it uses those values to analogize and build upon the "known commodities" of harmless error analysis and fashion the appropriate remedy to enforce the right. Those sorts of analogies are—for better or worse—part and parcel of the common-law method.

Finally, insistence on bright-line rules can "do violence to the[] design" of constitutional rights just as much as "[v]ague standards"[162] when that design does not admit of bright lines. Free Exercise doctrine may be one significant example: the *Smith* bright-line rule has been maligned by many as inconsistent with the purposes and history of the Free Exercise Clause.[163] Although we should be hesitant to adopt vague,

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156 Neder v. United States, 527 U.S. 1, 17 n.2 (1999).

157 *See* Craig Goldblatt, Comment, *Harmless Error as Constitutional Common Law: Congress's Power to Reverse* Arizona v. Fulminante, 60 U. CHI. L. REV. 985, 986 (1993); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 26 (1994).

158 Chapman v. California, 386 U.S. 18, 21 (1967); *see id.* at 46 (Harlan, J., dissenting) ("The harmless-error rule now established flows from what is seemingly regarded as a power inherent in the Court's constitutional responsibilities rather than from the Constitution itself.").

159 GREENAWALT, *supra* note 148, at 1.

160 GREENAWALT, *supra* note 1, at 6; Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("[T]he scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.").

161 Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting).

162 Crawford v. Washington, 541 U.S. 36, 68 (2004).

163 *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. 522, 544–618 (2021) (Alito, J., concurring in the judgment).

values-based rules that take the value-balancing task from the people and give it to unelected judges,[164] we can hardly say that a Bill of Rights that uses the words "unreasonable,"[165] "just,"[166] "cruel,"[167] and "excessive"[168] totally forswears any values-based thinking.

Among the various free-exercise values, two are particularly relevant to *Dawson-Flanagan* errors. The first is equality, which has taken center stage in many recent religious freedom cases.[169] The second—autonomy—is less frequently invoked, but nevertheless has a strong pedigree in free-exercise jurisprudence and scholarship.[170]

A. Equality

The Free Exercise Clause "protect[s] religious observers against unequal treatment."[171] The Establishment Clause "command[s] . . . that one religious denomination cannot be officially preferred over another."[172] And the Equal Protection Clause regards religious classifications as "inherently suspect."[173] These rules reflect the view that "it is undesirable for some citizens to feel they are specially 'in' because they adhere to a religion or religions that the government favors" while others "feel like 'outsiders,' not fully accepted into the society."[174] *Dawson-Flanagan* error fits comfortably within an equality-based view of religious freedom for exactly this reason: when the government infers bad moral character from one's religion, it tells members that they are disfavored.

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164 *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

165 *See* U.S. CONST. amend. IV.

166 *Id.* amend. V.

167 *Id.* amend. VIII.

168 *Id.*

169 *See, e.g.*, Carson v. Makin, 596 U.S. 767, 781 (2022) (disapproving of exclusions from a school voucher program because they amounted to "discrimination against religion").

170 *See, e.g.*, Shawn P. Bailey, *The Establishment Clause and the Religious Land Use and Institutionalized Persons Act of 2000*, 16 REGENT U. L. REV. 53, 53 (2003) (discussing "the autonomy of religious individuals and institutions that the First Amendment preserves").

171 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).

172 Larson v. Valente, 456 U.S. 228, 244 (1982).

173 *E.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).

174 GREENAWALT, *supra* note 148, at 12.

In considering this value within a *Chapman* Step Zero analysis, we should be mindful that "arguments about equality can confuse."[175] We should be careful, for instance, to not conclude that equality values are satisfied merely by applying the same harmlessness rule to *Dawson-Flanagan* errors involving one religion that we would apply to *Dawson-Flanagan* errors involving other religions. In that case, principles of religious equality would do "no work."[176] And, given that the majority of such violations will undoubtedly come at the expense of disfavored minority religions,[177] it would be akin to saying, as did Anatole France, that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges."[178] Instead, equality principles should be part of how we determine the rule to apply.

The law of criminal procedure offers several equality-based analogues. Perhaps the closest factually is *Buck v. Davis*, where an expert testified that the capital defendant was more likely to commit future acts of violence because of his race.[179] The Court acknowledged that race was referenced only twice at trial, but recognized that "[s]ome toxins can be deadly in small doses" and reversed the defendant's sentence.[180] However, *Buck*'s procedural posture prevents us from extracting a clear *Chapman* Step Zero data point from it: the claim was that defense counsel was ineffective for presenting this testimony[181]—a claim that would be (and was) evaluated through the lens of *Strickland* prejudice regardless of whether the introduction of the testimony would, standing alone, be subject to harmlessness analysis.[182] Moreover, the analogy is imperfect:

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175 GREENAWALT, *supra* note 1, at 4.

176 *Id.* at 5.

177 *Cf.* 72 AM. JUR. 3D *Proof of Facts* 89 § 10 (2003) (noting that often in a criminal trial a "lawyer (usually the prosecutor) compares the defendant to a Biblical figure (not usually Jesus)").

178 Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring in the judgment).

179 580 U.S. 100, 107–08 (2017).

180 *Id.* at 122.

181 *Id.* at 104.

182 *See* Weaver v. Massachusetts, 582 U.S. 286 (2017). An even closer factual analogue (and one that does not present these procedural complexities) would be a case involving a *prosecutor* (or prosecution witness) who unconstitutionally invokes a defendant's race. *See* McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987) ("The Constitution prohibits racially biased prosecutorial arguments."). However, the Supreme Court has never decided whether such violations are subject to harmless error review, and the lower courts are split on the issue. *Compare, e.g.*, State v. Zamora, 512 P.3d 512, 525 (Wash. 2022) ("[W]hen a prosecutor

Buck relied in part on the fact that the expert's testimony was "directly pertinent,"[183] while *Dawson-Flanagan* error generally occurs where the evidence is irrelevant.[184] Nevertheless, *Buck* at least vaguely points towards a no-harmlessness rule.

Another equality-based analogy is the right of prospective jurors and grand jurors not to be unconstitutionally discriminated against.[185] These constitutional violations have invariably been held not to require harmlessness analysis.[186] And they share an important feature with *Dawson-Flanagan* errors: they are based in part on the rights of the defendant and in part on the rights of third parties. What is violated by

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flagrantly or apparently intentionally appeals to a juror's potential racial or ethnic prejudice, bias, or stereotypes, the resulting prejudice is incurable and requires reversal."), *and* Weddington v. State, 545 A.2d 607, 614–15 (Del. 1988) ("In our opinion, the right to a fair trial that is free of improper racial implications is so basic to the federal Constitution that an infringement upon that right can never be treated as harmless error."), *with* United States v. Anderson, 560 F.3d 275, 281 (5th Cir. 2009) ("Testimony from a prosecution witness stating or implying that persons of the same race as the defendant are more likely to commit certain crimes is impermissible . . . . We conclude, however, that the error was harmless."), *and* Smith v. Farley, 59 F.3d 659, 664 (7th Cir. 1995) ("The cases hold that one or two isolated references to race or ethnicity, wholly unlikely to sway a jury, do not compel a new trial on federal constitutional grounds when the defendant's guilt is established by overwhelming evidence."). As a result, these situations do not provide the scaffolding necessary to answer the *Dawson-Flanagan* harmlessness question.

183 *Buck*, 580 U.S. at 122.

184 *See, e.g.*, State v. Brumwell, 249 P.3d 965, 975 (Or. 2011).

185 *See, e.g.*, Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1879) (racial exclusion from jury pool); Neal v. Delaware, 103 U.S. (13 Otto) 370 (1880) (racial discrimination in selection of grand jury); Batson v. Kentucky, 476 U.S. 79 (1986) (race-based exercise of peremptory challenges). Although such discrimination is most commonly race-based, gender-based discrimination is also prohibited. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975) (gender-based exclusion from jury pool); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (gender-based exercise of peremptory challenges). Justice Thomas has argued for extending the prohibition on discriminatory use of peremptory challenges to religious discrimination, *see* Davis v. Minnesota, 511 U.S. 1115, 1116–18 (1994) (Thomas, J., dissenting from denial of certiorari), and Justice Alito recently made the same argument regarding discriminatory use of for-cause challenges, *see* Mo. Dep't of Corr. v. Finney, No. 23-303, 2024 WL 674657, at *3 (U.S. Feb. 20, 2024) (Alito, J., statement respecting denial of certiorari).

186 *See* Vasquez v. Hillery, 474 U.S. 254, 262 (1986) (grand jury discrimination). Although the Court has yet to reject harmlessness analysis for discriminatory peremptory challenges "in express terms," it has nevertheless "granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury." *Weaver*, 582 U.S. at 301; *see also* Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 95 (1996) ("[T]he Supreme Court has assumed, but never formally ruled, that the appropriate appellate remedy [for a *Batson* violation] is automatic reversal of the conviction.").

discriminatory jury selection "is actually a package of equal protection rights: rights of the defendant to a fair trial free of the stigma of racial prejudice, and rights of prospective jurors both to be free of that stigma and to participate fully in the criminal justice system."[187] And *Dawson* is concerned in part with the defendant's First Amendment rights and in part with "the potential chilling effect" on others' exercise of those rights.[188] This "chilling effect" concern takes on new dimensions in the religious context because of our concern with making minority religious groups feel like "outsiders."[189] Thus, discrimination in jury selection also counsels applying a no-harmlessness rule to *Dawson-Flanagan* errors.

A final equality-based analogy is selective prosecution. The Court has recognized that "a conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of his race."[190] Notably, the ban on selective prosecution also encompasses religious targeting.[191] Although not as pronounced, *Dawson-Flanagan* errors share one key feature with selective prosecution: the defendant is unconstitutionally targeted *by the prosecutor*. This is potentially significant given the possibility, discussed above, of distinguishing *Masterpiece Cakeshop* on precisely this basis.[192]

Each of the equality-based analogies supports applying a no-harmlessness rule to *Dawson-Flanagan* error. However, because religious freedom is not "reducible to any single value,"[193] I proceed to discuss a second important value: autonomy.

B. Autonomy

In addition to ensuring equal citizenship, the religion clauses promote "the self-realization and self-actualization" of individuals.[194] Religion is at the center of many people's lives and is thus "inextricably connected with the human dignity of

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187 Muller, *supra* note 186, at 95.

188 Dawson v. Delaware, 503 U.S. 159, 163 (1992); *id.* at 169 (Blackmun, J., concurring).

189 GREENAWALT, *supra* note 148, at 12.

190 *Hillery*, 474 U.S. at 264.

191 *See* United States v. Batchelder, 442 U.S. 114, 125 n.9 (1979).

192 *See supra* notes 140–42 and accompanying text.

193 GREENAWALT, *supra* note 148, at 1.

194 Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1473 (2016).

the autonomous person."[195] To some, religion is an important part of their identity: "[m]any people care deeply about their religious beliefs and practices, and they feel that their religious obligations supersede duties to the state if the two collide."[196] Thus, freedom "to adopt religious beliefs and engage in religious practices . . . is one vital aspect of personal autonomy."[197] Free-exercise jurisprudence recognizes this by guaranteeing an "absolute" freedom of religious belief.[198]

Even where one is permitted to believe and worship as she sees fit, autonomy can still be undermined when the government attaches penalties or disadvantages to certain beliefs or modes of worship.[199] One scholar has thus defined autonomy as the "*unfettered* freedom to choose among various options."[200] *Dawson-Flanagan* error fits just as comfortably within an autonomy-based framework as it does within an equality-based framework. When the government uses one's religious conviction as an argument for imposing the death penalty, it surely fetters the freedom to choose those convictions.

Autonomy-related rights are present in constitutional criminal procedure, but less prevalent than equality-related rights. Before discussing the autonomy-based analogues, however, it is necessary to first dispense with a red herring. One could argue that the law of confessions and the privilege against self-incrimination are autonomy-based, and that because these types of constitutional violations are subject to harmlessness analysis, *Dawson-Flanagan* errors should be as well. Three types of violations are relevant here.[201] First, both the Fifth Amendment Self-Incrimination Clause and the Fourteenth Amendment Due Process Clause prohibit introducing involuntary confessions.[202] Second, *Miranda v. Arizona* prohibits introducing confessions obtained during custodial interrogations

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195 *Id.*

196 GREENAWALT, *supra* note 1, at 3.

197 *Id.*

198 Braunfeld v. Brown, 366 U.S. 599, 603 (1961).

199 GREENAWALT, *supra* note 148, at 7–8.

200 *Id.* at 9 (emphasis added).

201 In addition to the three rules discussed here, confessions may be excluded if they are obtained in violation of the Sixth Amendment right to counsel. *See* Massiah v. United States, 377 U.S. 201, 205–06 (1964). These confessions are excluded for reasons not related to autonomy, so they are not relevant here. However, they too are subject to harmless error review. *See* Milton v. Wainwright, 407 U.S. 371, 372 (1972).

202 Dickerson v. United States, 530 U.S. 428, 433 (2000).

unless its famous warnings are administered.[203] Finally, the Fifth Amendment prevents the prosecution from commenting on the defendant's choice not to testify.[204] Violations of each of these prohibitions are subject to harmlessness review.[205]

There is some basis for thinking that these rights are autonomy-based. The common-law confession rule forbid admitting confessions that were "forced from the mind by the flattery of hope, or by the torture of fear."[206] *Miranda* spoke of the "inherently compelling pressures" of custodial interrogations[207]—language markedly similar to the Establishment Clause cases of that era[208]—and "references the concept of free choice nine times."[209] And the rule barring prosecutorial comment on a defendant's silence is based on the idea that such comments are "a penalty imposed by courts for exercising a constitutional privilege."[210]

That autonomy rationale for these prohibitions has been badly undercut by subsequent developments, however—especially the Court's 1986 decision in *Colorado v. Connelly*.[211] *Connelly* held that involuntary confessions are admissible if their involuntariness does not result from "coercive police activity."[212] In doing so, it subjugated rationales that focused on the defendant's autonomy to rationales that focus on deterring police misconduct.[213]

By contrast, defendants' rights to make certain choices about their representation by counsel is truly autonomy-based. Criminal defendants have the constitutional right to choose not

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203 384 U.S. 436, 444 (1966).

204 Griffin v. California, 380 U.S. 609, 612 (1965).

205 Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (involuntary confessions); *id.* at 292 n.6 (White, J., dissenting) (collecting cases holding that *Miranda* violations are subject to harmlessness review); Chapman v. California, 386 U.S. 18 (1967) (prosecutorial comment on defendant's failure to testify).

206 King v. Warickshall, 168 Eng. Rep. 234, 235 (K.B. 1783).

207 Miranda v. Arizona, 384 U.S. 436, 467 (1966).

208 *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, *the indirect coercive pressure* upon religious minorities to conform to the prevailing officially approved religion is plain." (emphasis added)).

209 Lisa Kern Griffin, *Silence, Confessions, and the New Accuracy Imperative*, 65 DUKE L.J. 697, 705 (2016).

210 Griffin v. California, 380 U.S. 609, 614 (1965).

211 479 U.S. 157 (1986).

212 *Id.* at 167.

213 *See* George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 288–314 (1988).

to be represented by counsel—i.e., to represent themselves.[214] And, where they choose not to exercise that right, nonindigent defendants have a right to choose their own counsel.[215] Both rights have deep autonomy roots. The Court has explicitly recognized that "the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy."[216] The "core" of the right is a defendant's right "to make his voice heard."[217] The right to counsel of choice, too, is based on "an appreciation that a primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense."[218] Thus, a defendant's right is to "be defended by the counsel he *believes* to be best," not the counsel who actually will provide the best representation.[219]

Where either right is violated, reversal is automatic—harmlessness analysis does not apply.[220] And in both cases, reversal is automatic precisely because of the purposes of the right.[221] Both rights are "based on the fundamental legal principle that a defendant must be allowed to make his own choices."[222] Harmlessness analysis is inappropriate, the Court has explained, "[b]ecause harm is irrelevant" to this purpose.[223]

While harm is not completely *irrelevant* to the purposes behind the *Dawson-Flanagan* rule—*actually* being convicted or sentenced because of one's religious beliefs is surely a greater infringement on religious autonomy than the mere *possibility* of being convicted or sentenced because of one's religious beliefs—attacks on autonomy can be potent even without actual effect. As one scholar explained, "autonomy of choice is limited if the government 'stacks the deck' in favor of one religion or

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214 Faretta v. California, 422 U.S. 806, 819 (1975).

215 United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006).

216 McKaskle v. Wiggins, 465 U.S. 168, 178 (1984); *see also* State v. Reddish, 859 A.2d 1173, 1192 (N.J. 2004) ("*Faretta*, ultimately, is about respecting a defendant's capacity to make choices for himself, whether to his benefit or to his detriment.").

217 *McKaskle*, 465 U.S. at 177.

218 Wheat v. United States, 486 U.S. 153, 165 (1988) (Marshall, J., dissenting).

219 *Gonzalez-Lopez*, 548 U.S. at 146 (emphasis added).

220 *McKaskle*, 465 U.S. at 177 n.8 (self-representation); *Gonzalez-Lopez*, 548 U.S. at 150 (counsel of choice); *see also* McCoy v. Louisiana, 584 U.S. 414, 427 (2018) ("Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review.").

221 *See* Weaver v. Massachusetts, 582 U.S. 286, 295 (2017).

222 *Id.*

223 *Id.*

all religions," even absent actual punishment or even an actual effect on behavior.[224] There is also another critical resemblance between the rights to self-representation and counsel of choice, on the one hand, and religious freedom, on the other. Just as the latter need not be based on beliefs that are "acceptable, logical, consistent, or comprehensible to others,"[225] the former can be invoked even when doing so would affirmatively harm a defendant's chances at acquittal.[226]

CONCLUSION

The normal *Chapman* Step Zero analysis of criminal procedure rights is not up to the task of deciding whether *Dawson-Flanagan* errors should be evaluated for harmlessness. And, though it is tempting to suggest that *all* free exercise errors in criminal trials are subject to automatic reversal, one need not go so far. Instead, by keying in on the values behind Free Exercise doctrine as a whole (and the *Dawson-Flanagan* rule in particular), courts can arrive at the correct conclusion: that harmless error analysis is inappropriate for *Dawson-Flanagan* errors.

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224 GREENAWALT, *supra* note 148, at 9.

225 Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981).

226 *See* McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984) ("[T]he right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant."); United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006) ("[T]he right to counsel of choice . . . is the right to a particular lawyer regardless of comparative effectiveness.").