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# Prejudiced by the Presence of God: Keeping Religious Material Out of Death Penalty Deliberations

Terrence T. Egland\*

“Like many touched by this case, I have sought guidance through prayer. I have concluded judgment about the heart and soul of an individual on death row are best left to a higher authority.”  
– Governor George W. Bush<sup>1</sup>

## I. Introduction

The stakes are exceedingly high in cases involving the imposition of the death penalty. So high, in fact, that the United States Supreme Court has decreed that when it comes to examining the imposition of the ultimate punishment, “death is different.”<sup>2</sup> Being different, special questions are raised when examining the role of the jury and the method by which it reaches its verdict. The jury, occupying an exalted position in the American justice system as an independent and unbiased finder of fact, is protected by an elaborate set of rules and common law principles.<sup>3</sup> The jury system, however, is not perfect. Some

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\* J.D. Candidate, May 2005, Washington & Lee University School of Law; B.A., University of Washington, June 2002. The author would like to thank his wife, Hannah Eglan, without whose support he would not succeed. The author is also indebted to Professors Roger Groot, Ronald Krotoszynski, Daryl Brown, and the members of the Virginia Capital Case Clearinghouse, especially Janice Kopec and Meghan Morgan, whose dedication and willingness to help never ceases to amaze. And, as always, the author is grateful for the love and support of his parents through years of questionable decisions and aimless wanderings.

1. Michael Graczyk, *Texas Executes Karla Tucker: Texas Gov George Bush and the U.S. Supreme Court Refused to Stop the Execution*, YORK DAILY REC, Feb. 4, 1998, at A4, available at 1998 WL 6211038. This line was delivered by then-Texas Governor George W. Bush in an announcement denying Karla Faye Tucker's request for a pardon. *Id.* Governor Bush concluded by saying, “May God bless Karla Faye Tucker and God bless her victims and their families.” *Id.*

2. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (citing *Furman v. Georgia*, 408 U.S. 238, 313 (1972)) (recognizing “that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice”).

3. See Gregory M. Ashley, Note, *Theology in the Jury Room: Religious Discussion as “Extraneous Material” in the Course of Capital Punishment Deliberations*, 55 VAND. L. REV. 127, 136 (2002) (“The jury system is ingrained in the American criminal forum to such a degree that administering our criminal law system without it is unthinkable.” (internal quotation marks omitted)). The United States Supreme Court, through a long line of cases, has protected the primacy of the jury as finder of fact except in the two following instances: (1) the presence of extraneous material in deliberations; and

of the issues troubling the jury system as a whole include juror miscomprehension of law and fact, racial bias, wrongful convictions, and faulty jury instructions.<sup>4</sup>

One area of special concern is the reliance by the jury during capital sentencing deliberations on extraneous religious material, most notably the Bible. A recent and controversial example of this phenomenon is the case of *People v Harlan*,<sup>5</sup> which garnered national attention in the summer of 2003.<sup>6</sup> Robert Harlan ("Harlan") was convicted in a Colorado state court for the kidnapping, rape, and murder of Rhonda Maloney, the circumstances of which the trial judge found to be "among the most grievous, heinous and reprehensible this Court in its 18-year judicial career has ever had occasion to review."<sup>7</sup> During Harlan's sentencing proceeding, two jurors researched biblical passages for guidance during a nightly recess from deliberations.<sup>8</sup> When sentencing deliberations resumed the next day, at least one Bible made its way into the jury room with several other jurors possessing notes from the previous night's study.<sup>9</sup> Biblical passages were read aloud in the jury room, most importantly Romans 13:1 and Leviticus 24:20-21.<sup>10</sup> The selected passages mandated that believers trust in the

(2) outside influence on the jury. See *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (finding outside influence when the bailiff commented to the jury on the convictability of the defendant); *McDonald v. Pless*, 238 U.S. 264, 266-68 (1915) (holding that jurors may not impeach their verdict by evidence that it was a quotient verdict); *Mattox v. United States*, 146 U.S. 140, 149 (1892) (holding that jurors may not testify so as to impeach their verdict except to testify as to any fact showing the existence of an extraneous influence); FED. R. EVID. 606(b) (governing the inquiry into whether a jury considered improper material or was subjected to outside influence).

4. Ashley, *supra* note 3, at 139 (noting that "the courtroom and the death penalty trial, combined with the 'mystifying language of legal formality,' may distort the moral sense of a jury in its effort to reach a justifiable sentencing decision"). Ashley noted a report by the U.S. General Accounting Office to the Senate and House Committees on the Judiciary, published in 1990, that concluded that in cases in which a black defendant is on trial for killing a white victim there is a higher likelihood that the defendant will be sentenced to death. *Id.* Ashley also discussed the difficulty jurors have when considering mitigating and aggravating factors during capital sentencing as well as their misapprehension of jury instructions. *Id.*

5. No. 94 CR 187 (Adams Co., Colo. Dist. Ct. May 23, 2003).

6. See *People v. Harlan*, No. 94 CR 187 (Colo. Dist. Ct. May 23, 2003) (on file with author) (reversing death sentence due to the use of the Bible in jury deliberations); Sue Lindsay, *Harlan Sentence Tossed: Killer's Death Penalty Thrown Out Because Jurors Used Bibles*, ROCKY MTN. NEWS, May 24, 2003, at 4A, at 2003 WL 6364306.

7. *Harlan*, No. 94 CR 187, at 33; Lindsay, *supra* note 6, at 4A.

8. Lindsay, *supra* note 6, at 4A. Several of the jurors testified at an evidentiary hearing on the matter that they used the Bible available at the hotel where they were sequestered. *Id.* Another juror testified that her parents brought her personal study Bible to the hotel. *Id.*

9. *Id.*

10. See *Romans* 13:1 (King James) ("Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God."); *Leviticus* 24:20-21 (King James) ("Breach for Breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again. And he that killeth a beast, he shall restore it: and he that killeth a

law of the government, the government having been appointed by God, and that anyone who takes another's life must forfeit his life.<sup>11</sup>

After holding an evidentiary hearing, Judge John J. Vigil ("Judge Vigil") ordered that Harlan be resentenced due to the jury's inappropriate use of biblical texts to guide its verdict.<sup>12</sup> Judge Vigil found that the biblical passages referenced by the jurors "not only encouraged the death penalty but required that it be imposed when another life is taken."<sup>13</sup> Because the jurors were left with no discretion by the selected passages, under Colorado law there was "a reasonable possibility that the jurors' exposure to these biblical passages affected one or more juror's decision to return the death penalty verdict."<sup>14</sup>

This article will first provide an explanation of why religious material should be excluded from the jury room in capital punishment deliberations.<sup>15</sup> Second, this article will provide an overview of the common law rules in Virginia for determining whether a jury was influenced by extraneous material.<sup>16</sup> Third, an outline of the traditional methods for limiting the possibility of religion-based verdicts will be offered.<sup>17</sup> Emphasis will be placed on the procedural mechanisms of a jury trial as well as post-verdict direct attacks under the Sixth Amendment guarantee of an impartial jury and the Eighth Amendment prohibition against cruel and unusual punishment.<sup>18</sup> Finally, this article will explore the viability of challenging religion-based verdicts under the Establishment Clause of the First Amendment.<sup>19</sup>

## II. *Why Religious Material Should Be Excluded from the Jury Room*

At the outset, it might not be entirely clear *why* a capital defense attorney would want to exclude religious material from the jury room.<sup>20</sup> After all, the

man, he shall be put to death.")

11. *Harlan*, No. 94 CR 187, at 29.

12. *Id.* at 33; Lindsay, *supra* note 6, at 4A.

13. *Harlan*, No. 94 CR 187, at 29.

14. *Id.* The court cited the test in *Wiser v. People*, 732 P.2d 1139, 1143 (Colo. 1987) (en banc), holding that the objective test for determining if a new trial should be granted is "whether there is a reasonable possibility that the verdict was tainted by the introduction of outside information or influence into the jury deliberations." *Harlan*, No. 94 CR 187, at 28 (alteration in original) (quoting *Wiser*, 732 P.2d at 1142).

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part IV.

18. *Id.*

19. *See infra* Part V.

20. It is also worth noting that this article deals with the exclusion and review of cases in which the actual physical religious text was the source of the influence and not religious discussion in general. For an argument advocating for the treatment of religious discussion in general as

Bible contains many merciful and “defense friendly” passages that can be found amongst the fire and brimstone requirement of an “eye for eye, tooth for tooth.”<sup>21</sup> Nonetheless, controlling which passages that a jury peruses is beyond the ability of anyone not in the jury room itself. Without this ability, the safest and surest way to eliminate the pro-death passages is to throw out the pro-life passages as well. Seeking the exclusion of religious texts from the jury room during deliberations does not equate to a prohibition against religiously based arguments at trial.<sup>22</sup> Exclusion of religious material from the jury room simply mitigates the prejudicial effect that biblical passages and other religious texts can have on the outcome in capital cases.<sup>23</sup> There are several compelling reasons why the exclusion of religious material is important and should be pursued by the capital defense attorney.

#### A. *The Bible, Koran, and Other Religious Texts Are Inconsistent Sources of Law*

Unlike state and federal law, religious law is temporally fixed from the moment that it is written. When society evolves and social mores become less or more stringent, legislatures and courts are able to pass new legislation or render legal decisions that adapt the civil law to the changing culture. As Justice Brennan opined:

[T]he Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee. To be truly faithful to the Framers, “our use of

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extraneous material, *see generally* Ashley, *supra* note 3.

21. *Compare Romans* 12:17–19 (King James) (“Recompense to no man evil for evil. Provide things honest in the sight of all men. If it be possible, as much as lieth in you, live peaceably with all men. Dearly beloved, avenge not yourselves, but *rather* give place unto wrath: for it is written, Vengeance is mine; I will repay, saith the Lord.”), *with Exodus* 21:23–25 (King James) (“And if *any* mischief follow, then thou shalt give life for life, Eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.”), *and Genesis* 9:5–6 (King James) (“And surely your blood of your lives will I require; at the hand of every beast will I require it, and at the hand of man; at the hand of every man’s brother will I require the life of man. Whoso sheddeth man’s blood, by man shall his blood be shed: for in the image of God made he man.”). *See generally* Jill Jones, Comment, *The Christian Executioner: Reconciling “An Eye for An Eye” with “Turn the Other Cheek,”* 27 PEPP. L. REV. 127 (1999) (discussing the positions on the death penalty found in the Old and New Testaments).

22. For a discussion of the use of religious arguments during closing argument, *see infra* Part IV.B.2.

23. *See, e.g., Harlan*, No. 94 CR 287, at 33 (reversing death sentence and ordering a new trial based on the jurors’ use of the Bible to determine penalty); *Grooms v. Commonwealth*, 756 S.W.2d 131, 145 (Ky. 1988) (Stephens, C.J., concurring in part and dissenting in part) (“What the Bible says about the appropriateness of a death penalty in a particular case is not a legitimate concern of a penalty phase jury.”).

the history of their time must limit itself to broad purposes, not specific practices.<sup>24</sup>

Although an argument still ferments over whether the original intent of the Framers should control current constitutional interpretation, there can be no doubt that our form of government and the laws promulgated under it are adaptable and amenable to changing times.

For the most part, religious texts are not temporally adaptable as are the Constitution, statutory law, and the common law.<sup>25</sup> From the moment that the original text for Leviticus 24:20-21 was promulgated as a part of Jewish law, the penalty for taking someone's eye was the taking of the offender's eye.<sup>26</sup> However, although religious texts are not amendable, they are subject to interpretation by any number of ministers, rabbis, and imams, each of whom potentially could advocate a different interpretation. Indeed, twelve Christian jurors could have twelve different interpretations of a particular Biblical passage or rely on any number of different passages to find support for, or opposition to, the death penalty.<sup>27</sup> The same critique applies to the Koran, which is itself subject to widelyvaried interpretation.<sup>28</sup> The flexible nature of religious legal interpretation makes it unsuitable for application in the modern American justice system. However valuable the teachings and mandates of the Bible or other sacred texts in the personal lives of church members, the one-size-fits-all nature of the retributive justice found in Christian, Jewish, and Islamic law has no place in the application of constitutional, statutory, and common law.

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24. *Marsh v. Chambers*, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring)).

25. One prominent exception is the Roman Catholic Church, which publishes Papal teachings and official church positions as modifications to the official church interpretation of the Bible. See Jones, *supra* note 21, at 131 ("Unlike papal teachings and official church positions, the biblical text has not changed much in the seven hundred plus years since . . . [Thomas] Aquinas' death.").

26. *Leviticus*, 24:20-21 (King James) ("[E]ye for eye, tooth for tooth . . .").

27. Ashley, *supra* note 3, at 152-53. Ashley states:

Although some posit religious justifications for abolishing the death penalty, countless others base their competing arguments in favor of the punishment on religious grounds as well. The ultimate victor in a specific capital punishment deliberation may fall on either side of the dichotomy, yet only the latter perspective has the potential actually to end an individual's life.

*Id.*

28. Seth Stevenson, *Islam A Peaceful Religion? George W. Bush Says Yes, Osama Bin Laden Says No. Who's Right?*, at <http://slate.msn.com/id/117525> (last modified Oct. 24, 2001) ("Any debate based on Quranic [interpretation] could go back and forth forever without end."). Stevenson wrote this comment in the context of a discussion of whether or not Islam promotes violence, but the basic thrust of his comment applies equally to legal interpretations.

### B. *Creation of a Philosophical Stand-Off*

If religious texts are allowed in the jury room during sentencing deliberations, is a juror allowed to consider any moral philosophy as a basis for sentencing the defendant? Imagine that an atheist is chosen for one of the twelve seats in a capital trial. After having found the defendant guilty, the jury retires to the jury room to begin deliberations. After another juror has produced a Bible and quoted scripture in support of the death penalty, the atheist refers to a pocket volume of the works of Gandhi in an effort to persuade fellow jurors to vote for life. The atheist would expound on Gandhi's theory of nonviolence and his belief that "wherever you are confronted with an opponent, conquer him with love."<sup>29</sup> Clearly, a fundamentalist who is an avowed believer of the "eye for eye" philosophy would have a difficult time reasoning with a follower of Gandhi's philosophy.

This exchange could lead to a philosophical stand-off with jurors debating justifications for or against the death penalty rather than the evidence and law of the case. The result is ineffectual jury deliberations and a breakdown of the entire jury system. Moreover, the jury is deliberating whether or not to impose the death penalty in a particular case, but the actual debate over the validity of the death penalty has already occurred in the state or federal legislature with an answer in the affirmative.<sup>30</sup> The only job for the jury is to determine if that particular defendant is deserving of the ultimate punishment provided under the applicable civil law.

### III. *The Law of Extraneous Evidence in Virginia: A Common Law Aside*

Before a discussion of the larger federal constitutional questions, it is prudent to explore the law concerning extraneous material as it now exists under the Virginia common law. The Commonwealth of Virginia, as Justice Compton made clear, "has been more careful than most states to protect the inviolability and secrecy of jury deliberations, adhering to the general rule that the testimony of jurors should not be received to impeach their verdict, especially on the ground of their own misconduct."<sup>31</sup> Further, the Supreme Court of Virginia has

29. Mohandas K. Gandhi, *My Faith in Non-Violence*, in SOCIAL AND POLITICAL PHILOSOPHY 542 (John Sommerville & Ronald E. Santoni eds., Doubleday 1963).

30. See, e.g., VA. CODE ANN. § 18.2-31 (Michie Supp. 2003) (providing the death penalty in the Commonwealth of Virginia as an available penalty for capital murder if an aggravating factor has been proven).

31. *Kasi v. Commonwealth*, 508 S.E.2d 57, 67 (Va. 1998), *cert. denied*, 527 U.S. 1038 (1999); see *Caterpillar Tractor Co. v. Hulvey*, 353 S.E.2d 747, 750 (Va. 1987) (stating the general rule that testimony indicating juror misconduct should not be received to impeach the jury's verdict); *Phillips v. Campbell*, 104 S.E.2d 765, 768 (Va. 1958) ("It has long been settled in Virginia that the affidavits or the testimony of jurors to impeach their own verdicts are to be received with great caution and only in exceptional cases, and in order to prevent a failure of justice."); *Bull v. Commonwealth*, 55 Va. (14 Gratt.) 613, 632 (1857) ("[T]he testimony of jurors ought not to be received to impeach

limited the investigation into allegations of juror misconduct to events that occurred outside the jury room.<sup>32</sup> Thus, a Virginia court cannot inquire into a jury's misbehavior if the conduct was confined to the jury room.<sup>33</sup> The rule against permitting juror testimony to impeach a verdict exists primarily to ensure the finality of verdicts, but is also justified as a means to limit post-trial harassment of jurors and promote frank discussion in the jury room.<sup>34</sup> Justice O'Connor of the United States Supreme Court has expressed concerns that an effort to perfect the jury system by conducting postverdict investigations might reveal improper juror behavior, but it might also destroy the jury system itself.<sup>35</sup> There are, however, exceptions to the general rule against peering into jury deliberations.

The Virginia courts allow an exception for cases in which jurors received and considered extraneous material during deliberations.<sup>36</sup> In the case of extraneous material, testimony from jurors is appropriate and required to investigate adequately the alleged misconduct because "there is strong public policy and legal precedent which mandates the interrogation of jurors to determine if an impropriety has tainted the verdict."<sup>37</sup> Jury consideration of evidence not presented at trial violates public policy because a defendant has a right to confront the witnesses arrayed against him, and its consideration violates the rule against the presentation of hearsay evidence.<sup>38</sup> Even if misconduct is shown to have oc-

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their verdict, especially on the ground of their own misconduct."); *Butler v. Commonwealth*, 525 S.E.2d 58, 61 (Va. Ct. App. 2000) (finding that the trial court did not err in refusing to examine jurors upon allegations of juror misconduct because the alleged conduct was confined to the jury room and there were no allegations that extraneous material was injected into the deliberations); *Evans-Smith v. Commonwealth*, 361 S.E.2d 436, 447 (Va. Ct. App. 1987) (finding reversible error when an almanac not entered into evidence or judicially noticed was in part the basis for a jury's conviction of the defendant).

32. See *Caterpillar Tractor Co.*, 353 S.E.2d at 751 ("Generally, we have limited findings of prejudicial juror misconduct to activities of jurors that occur outside the jury room.").

33. *Id.* (citing *Phillips*, 104 S.E.2d at 767-68).

34. *Evans-Smith*, 361 S.E.2d at 446; see also *Tanner v. United States*, 483 U.S. 107, 119-20 (1987) (stating reasons for the "necessity of shielding jury deliberations from public scrutiny").

35. *Tanner*, 483 U.S. at 120.

36. See *Evans-Smith*, 361 S.E.2d at 446 (finding reversible error in a case in which a juror researched an almanac for the time of sunset and the jury used that information in convicting the defendant).

37. *Id.*

38. *Id.*; see U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him."); 19 MICHIE'S JURISPRUDENCE, Verdict § 34 (2003) ("An exception to the general rule limiting post-verdict examination of jurors is recognized when it appears that matters not in evidence may have come to the attention of one or more jurors so as to violate the defendant's constitutional right to be confronted with the witnesses against him.").



curred during deliberations, a defendant must prove that he was prejudiced as a result of the alleged misconduct.<sup>39</sup>

#### A. Finding Misconduct

The first step in seeking a remedy for the jury's use of extraneous material is making a showing that the juror misconduct actually occurred.<sup>40</sup> For the reasons mentioned above, Virginia guards the door to the jury room with extraordinary care.<sup>41</sup> However, there are circumstances in which peering into the jury room for impropriety is important and necessary. In *Evans-Smith v Commonwealth*,<sup>42</sup> which involved a home invasion robbery, the defendant claimed that the actual perpetrators were seen by him, with the aid of his vehicle's headlights, outside his home approximately 300 to 400 feet away at 5:00 a.m.<sup>43</sup> Just days after the jury rendered a verdict of guilty, a juror came forward explaining how another juror had consulted an almanac outside the jury room to determine the time of sunrise on the day in question to aid in the jury's assessment of the defendant's credibility.<sup>44</sup> The juror who consulted the almanac reported his findings to the other members of the jury, and the jury, in part, based its decision to convict the defendant on the fact that the sun, according to the almanac, had already risen when the defendant said he had turned on his headlights.<sup>45</sup> The trial court denied Evans-Smith's motion to set aside the verdict on the ground that a juror should not be allowed to impeach the jury's verdict based on its own misconduct.<sup>46</sup>

The *Evans-Smith* court relied on *Commercial Union Insurance Co v Moorefield*,<sup>47</sup> in which the Supreme Court of Virginia outlined the procedure for dealing with allegations of juror misconduct.<sup>48</sup> When the issue of juror misconduct is raised, "the trial court has the affirmative duty 'to investigate the charges and to ascertain whether or not, as a matter of fact, the jury was guilty of such miscon-

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39. See *Frazier v. Beard*, 201 F. Supp. 395, 396 (W.D. Va. 1962) ("Before a verdict or judgment can be set aside because of misconduct of the jury in the jury room, it must affirmatively appear that the substantial rights of the complaining party have been prejudiced thereby.").

40. See *Evans-Smith*, 361 S.E.2d at 446 (stating that the court has a duty "to investigate the charges and to ascertain whether or not, as a matter of fact, the jury was guilty of such misconduct").

41. See *supra* note 31 and accompanying text.

42. 361 S.E.2d 436 (Va. Ct. App. 1987).

43. *Evans-Smith*, 361 S.E.2d at 445.

44. *Id.*

45. *Id.*

46. *Id.* at 446. The trial court based its determination on *Bull v Commonwealth*. See *Bull*, 55 Va. (14 Gratt.) at 632 (concluding that a juror who alleges jury misconduct is subject to heightened scrutiny and treated with great caution).

47. 343 S.E.2d 329 (Va. 1986).

48. *Commercial Union Ins. Co. v. Moorefield*, 343 S.E.2d 329, 333 (Va. 1986).

duct.’<sup>49</sup> In conducting its investigation, the trial court may call jurors to the stand “to testify under oath in open court and to answer relevant questions propounded by the court and counsel about what had transpired.”<sup>50</sup> Allowing jurors to testify concerning misconduct is an exception to the general rule against accepting testimony to impeach a jury’s verdict.<sup>51</sup> Further, testifying jurors are not allowed “‘to explain their verdict by stating the reasons upon which their conclusions are based,’” but must limit their testimony to the alleged misconduct.<sup>52</sup>

The *Ewars-Smith* court applied these principles and found that the trial court abused its discretion and violated the defendant’s Sixth Amendment guarantee to an impartial jury when it refused to investigate the alleged juror misconduct based on the affidavits of eight jurors affirming that misconduct occurred.<sup>53</sup> The court found that the alleged misconduct was proper grounds for further investigation because the alleged misconduct did not involve an exploration of the juror’s mental processes, a prohibited form of inquiry, but rather the effect outside evidence had on the juror’s mental processes.<sup>54</sup> The court then considered whether the defendant was prejudiced by the alleged misconduct.<sup>55</sup>

### B. Determining Prejudice

In Virginia, a juror’s use of extraneous material will be found to be harmless error unless “there is sufficient ground to believe that . . . an accused . . . has been prejudiced by receipt of the information.”<sup>56</sup> The *Ewars-Smith* court found

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49. *Id.* (quoting *Kearns v. Hall*, 91 S.E.2d 648, 653 (Va. 1956)); *see also* *Haddad v. Commonwealth*, 329 S.E.2d 17, 20 (Va. 1985) (finding that the trial court abused its discretion in refusing to investigate a juror who expressed bias to a third party during trial). The *Ewars-Smith* court noted that affidavits alone cannot support a claim of juror misconduct, but the affidavits can serve as cause for the trial court to investigate further. *Ewars-Smith*, 361 S.E.2d at 447.

50. *Commercial Union Ins. Co.*, 343 S.E.2d at 333 (citing *Dozier v. Morrisette*, 92 S.E.2d 366, 368 (Va. 1956)).

51. *Id.*

52. *Id.* (quoting *Federal Deposit Ins. Corp. v. Mapp*, 37 S.E.2d 23, 28 (Va. 1946)). The prohibition against searching the juror’s minds for the rationale for their verdict is similar to that found in Federal Rule of Evidence 606(b), which provides that a juror may not testify concerning matters “occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith.” FED. R. EVID. 606(b).

53. *Ewars-Smith*, 361 S.E.2d at 448.

54. *Id.*

55. *Id.*

56. *Brittle v. Commonwealth*, 281 S.E.2d 889, 890 (Va. 1981); *see also* *Hinton v. Gallagher*, 57 S.E.2d 131, 136 (Va. 1950) (“One essential concept of a fair trial is that no outside influence shall be brought to bear upon the jury, and that no evidence shall be considered by them other than that

that the test for determining prejudice “is not whether the jurors were actually prejudiced . . . but whether they might have been so prejudiced.”<sup>57</sup> Moreover, the court found that the production of even “slight evidence of influence or prejudice” warrants a new trial.<sup>58</sup>

The *Evans-Smith* court, in considering the prejudicial effect the sunrise data from the almanac had on the verdict, concluded that the inappropriate evidence held a great probability of prejudice to the defendant because it “went to an ultimate issue in the case.”<sup>59</sup> Evans-Smith’s credibility was called into question by the almanac information; therefore, “it was absolutely essential that [he] be given an opportunity to confront and cross-examine this evidence against him.”<sup>60</sup> Further, in light of the eight affidavits alleging misconduct and probable prejudice, the trial court erred in not conducting an investigation to collect the testimony of the remaining four jurors regarding the alleged misconduct.<sup>61</sup> The court reversed Evans-Smith’s conviction and remanded the case for a new trial.<sup>62</sup>

#### IV. Traditional Objections and Direct Attacks on Religion-Based Death Sentences

##### A. Procedural Mechanisms to Prevent Religion-Based Death Sentences

Prior to any direct challenges to jury misconduct during capital punishment sentencing deliberations, there are ways to mitigate the effects that religion can have on the outcome of a criminal trial.<sup>63</sup> Several stages of the jury trial offer opportunities to set roadblocks to limit the intrusion of religious dogma into the confines of the jury room. These opportunities present themselves during voir dire, closing argument, and jury instructions.

##### 1. Voir Dire

The voir dire process provides the capital defense attorney with an opportunity to shield his client from judgment by jurors who would be likely to vote for death based on their religious convictions. The United States Supreme Court

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presented and admitted on the trial of the case.”); *Crockett v. Commonwealth*, 47 S.E.2d 377, 386 (Va. 1948) (“It is always improper for a juror to discuss a cause which he is trying as a juror or to receive any information about it except in open court and in the manner provided by law . . .” (internal quotation marks omitted)).

57. *Evans-Smith*, 361 S.E.2d at 447 (quoting *Thompson v. Commonwealth*, 70 S.E.2d 284, 290 (Va. 1952)).

58. *Id.* (quoting *Crockett*, 47 S.E.2d at 386).

59. *Id.* at 448.

60. *Id.*

61. *Id.* at 449.

62. *Id.*

63. For a discussion concerning how to mount a direct challenge against a religion-based verdict, see *infra* Part IV.B.

ruled in *Batson v. Kentucky*<sup>64</sup> that it is constitutionally impermissible to use a peremptory strike to remove potential jurors based on their race.<sup>65</sup> *Batson* has been extended also to prevent the peremptory strike of potential jurors based on gender.<sup>66</sup> However, it is still unclear whether the *Batson* principles apply to a potential juror's religion.<sup>67</sup> In *State v. Davis*,<sup>68</sup> the Supreme Court of Minnesota refused to extend *Batson* to peremptory strikes based on religion.<sup>69</sup> In a 7-2 decision, the United States Supreme Court refused to issue a writ of certiorari.<sup>70</sup> Justice Ginsburg, concurring in the denial, noted the Supreme Court of Minnesota's observation that race- and gender-based peremptory strikes, forbidden under *Batson*, are more self-evident and more readily ascertained during voir dire than are religion-based strikes.<sup>71</sup> This recognition indicates that the Court will extend the *Batson* rationale only to cases in which peremptory strikes are used to vet potential jurors based on outwardly ascertainable criteria. The Court's refusal to take up the case arguably renders *Batson* challenges to religion-based strikes illegitimate and allows a capital defense attorney peremptorily to strike potential jurors if it becomes apparent that their religious views would make them more likely than not a pro-death juror.

Other courts have come to different conclusions than the court in *Davis*. Two United States Courts of Appeals have visited the issue and found that *Batson* does prevent counsel from using a peremptory strike based on religious affiliation.<sup>72</sup> However, these courts suggested that strikes may be used on

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64. 476 U.S. 79 (1986).

65. See U.S. CONST. amend. XIV, § 1 (stating in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that it is a violation of the Equal Protection Clause of the Fourteenth Amendment to strike a potential juror based on race).

66. See *J.E.B. v. Alabama*, 511 U.S. 127, 128-29 (1994) (extending the rationale of *Batson* to peremptory strikes based on gender).

67. See *United States v. DeJesus*, 347 F.3d 500, 509-10 (3d Cir. 2003) (holding that a peremptory strike based on a potential juror's religious beliefs is not unconstitutional); *United States v. Brown*, 352 F.3d 654, 668 (2d Cir. 2003) (stating that "[r]eligion, like race and gender, is an 'impermissible consideration' in government decision-making," but striking a juror because of religious activities does not violate *Batson*). It remains an open question whether the United States Supreme Court will take up the Second and Third Circuit's challenge and resolve the issue. At least one state court has found that *Batson* does apply to religion-based peremptory challenges. See *People v. Martin*, 75 Cal. Rptr. 2d 147, 151 (Cal. Ct. App. 1998) (holding that *Batson* applies to religion-based challenges).

68. 504 N.W.2d 767 (Minn. 1993).

69. *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993).

70. *Davis v. Minnesota*, 511 U.S. 1115, 1115 (1994) (mem.) (refusing to grant a writ of certiorari to decide a case allowing peremptory strikes of venirepersons based on their religion).

71. *Id.* at 1115 (Ginsburg, J., concurring).

72. See *DeJesus*, 347 F.3d at 509-10 (finding that "[t]he distinction drawn by the District Court between a strike motivated by religious beliefs and one motivated by religious affiliation is valid and

venirepersons who engage in particular religious activities that indicate inordinately strong beliefs—beliefs counsel views as bearing on their suitability as jurors. In *United States v DeJesus*,<sup>73</sup> the United States Court of Appeals for the Third Circuit held that although *Batson* prevented the exclusion of jurors based solely on their religious affiliation, the peremptory strikes did not violate *Batson* if they were exercised to exclude a potential juror due to heightened religious activities indicating strong beliefs that would prevent an unbiased verdict.<sup>74</sup> The jurors in question in *DeJesus* were struck based on their responses to a jury questionnaire.<sup>75</sup> The heightened religious activities that the court considered proper grounds for dismissal included: (1) civic activities with a church; (2) reading the *Christian Book Dispatcher*; (3) holding several biblical degrees; (4) being a deacon and Sunday School teacher; (5) serving as an officer and trustee in a church; (6) reading the Bible and related literature; (7) and stating that their sole hobbies are church activities.<sup>76</sup>

In the case of *United States v Brown*,<sup>77</sup> the United States Court of Appeals for the Second Circuit came to a similar, if more limited, conclusion as the court in *DeJesus*.<sup>78</sup> The *Brown* court reasoned that “[r]eligion, like race and gender, is an ‘impermissible consideration’ in government decision-making” and therefore religion-based strikes violate the Equal Protection Clause principles represented by the decision in *Batson*.<sup>79</sup> However, the court did not base its decision on the same distinction between affiliation and belief as did the *DeJesus* court; rather, the court held that “differentiating among prospective jurors on the basis of their activities does not plainly implicate the same unconstitutional proxies as distinctions based solely on religious identity.”<sup>80</sup> The facts in *Brown* did not implicate the affiliation/belief distinction because at trial the prosecutor explained his strikes in terms of the jurors’ activities alone and not on the strong beliefs that such activities represented.<sup>81</sup>

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proper”); *Brown*, 352 F.3d at 668 (stating that “[r]eligion, like race and gender, is an ‘impermissible consideration’ in government decision-making,” but striking a juror because of religious activities does not violate *Batson*). The United States Court of Appeals for the Seventh Circuit addressed the issue in dictum and expressed a similar opinion, stating that strikes based on affiliation were impermissible, but that it was “proper to strike [a juror] on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing.” *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998).

73. 347 F.3d 500 (3d Cir. 2003).

74. *DeJesus*, 347 F.3d at 509–11.

75. *Id.* at 502.

76. *Id.*

77. 352 F.3d 654 (2d Cir. 2003).

78. *Brown*, 352 F.3d at 668.

79. *Id.*

80. *Id.* at 669–70, 670 n.19.

81. *Id.* at 670.

It may become apparent during voir dire that a potential juror's religious views may make it more likely than not that the potential juror will vote for death under any circumstances after a finding of guilt. In such a case, the potential juror can be excused for cause. In *Green v Commonwealth*,<sup>82</sup> a potential juror revealed upon questioning from the court that he "only believed in the Bible, an eye for an eye, tooth for a tooth."<sup>83</sup> The *Green* court found that the trial court erred in seating this potential juror.<sup>84</sup> Clearly, the potential juror was a candidate for being excused for cause based on his inability to consider a punishment less than death if capital murder were proven beyond a reasonable doubt.<sup>85</sup> Further, under the prevailing law of various circuits, the peremptory strike of a juror with such religious views could be defended from a *Batson* attack under *Davis*—the juror demonstrated a willingness to impose the ultimate punishment based on his fervent religious views.<sup>86</sup> Also, stating that he believes only what he has read in the Bible qualifies as a strongly held belief, rather than a particular religious affiliation, which fits within the more limited religious peremptory strike model of *DeJesus*, but perhaps not within the "activities" strike model of *Brown*.<sup>87</sup> Defense counsel should take the opportunity to strike overtly religious venirepersons with support from *Davis*, *DeJesus*, and *Brown*, or dismiss potential jurors for cause based on *Green*.

## 2. Closing Argument

Religiously grounded closing arguments by prosecutors are generally challenged as a violation of a defendant's due process rights under the Fifth and Fourteenth amendments.<sup>88</sup> However, rarely do courts find that the prosecutor's

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82. 546 S.E.2d 446 (Va. 2001).

83. *Green v. Commonwealth*, 546 S.E.2d 446, 448, 451 (Va. 2001) (finding that the trial court committed manifest error by seating challenged jurors who showed evidence of bias).

84. *Id.* at 451.

85. See *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968) ("[A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death."). The *Witherspoon* Court indicated that the State could exclude potential jurors who "made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." *Witherspoon*, 391 U.S. at 522 n.21. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Court extended *Witherspoon* to defense challenges of potential jurors predisposed to vote for death. *Wainwright*, 469 U.S. at 423–24.

86. See *Davis*, 504 N.W.2d at 771 (refusing to extend *Batson* to peremptory strikes based on a venireperson's religion).

87. See *DeJesus*, 347 F.3d at 509–10 (finding that a peremptory challenge based on a venireperson's heightened religious activity was constitutional); *Brown*, 352 F.3d at 668 (stating that striking a juror because of religious activities does not violate *Batson*).

88. 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, 1111 (2001) (noting that objections at

comments rise to the level of a due process violation.<sup>89</sup> The Supreme Court has held that the comments must have “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”<sup>90</sup>

At least one court has held that religious arguments by prosecutors to justify the sentence of death violated the Eighth Amendment of the United States Constitution.<sup>91</sup> In *Sandoval v Calderon*,<sup>92</sup> the United States Court of Appeals for the Ninth Circuit held that “the prosecution’s invocation of [religious] higher law . . . violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict.”<sup>93</sup> The *Sandoval* court found that the prosecutor’s arguments during closing “did not recognize such a refined approach.”<sup>94</sup> The prosecutor in *Sandoval* warned:

[Defense counsel] says don’t play God. Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for noth-

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trial or on appeal to such religious closing arguments are usually brought under the Due Process Clause or similar state provision).

89. *Id.*; see, e.g., *Boyd v. French*, 147 F.3d 319, 328–29 (4th Cir. 1998) (finding that the prosecution’s use of biblical quotations in closing argument did not result in an unfair trial).

90. *Donnelly v. DeCristoforo*, 416 U.S. 637, 643 (1974); see *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996) (citing *Donnelly* in holding that the prosecutor’s use of biblical passages in closing argument to justify imposition of the death penalty did not rise to the level of a due process violation).

91. See U.S. CONST. amend. VIII (prohibiting the infliction of “cruel and unusual punishment”); *Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2001) (finding that biblical references in closing argument by the prosecutor violated Eighth Amendment).

92. 241 F.3d 765 (9th Cir. 2001).

93. *Sandoval*, 241 F.3d at 776 (citing *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).

94. *Id.*; see *Jones v. Kemp*, 706 F. Supp. 1534, 1559–60 (N.D. Ga. 1989) (stating that “[t]he jury which sentenced the petitioner had a duty to apply the law of the State of Georgia as given by the trial judge, not its own interpretation of the law or its own interpretation of precepts of the Bible, in determining whether the petitioner should live or die”); cf. *Tison v. Arizona*, 481 U.S. 137, 180–81 (1987) (Brennan, J., dissenting) (noting the “crude proportionality of ‘an eye for an eye’”); *Coker v. Georgia*, 433 U.S. 584, 620 (1977) (Burger, C.J., dissenting) (“As a matter of constitutional principle, [the Eighth Amendment proportionality] test cannot have the primitive simplicity of ‘life for life, eye for eye, tooth for tooth.’”).

ing for it is a minister of God an avenger who brings wrath upon one who practices evil.<sup>95</sup>

This prosecutor clearly advocated for the jury to abandon consideration of the evidence and instructions of the court and instead indicated that it is ordained by God to return a verdict of death. The court found that “[t]he obvious danger of such a suggestion is that the jury will give less weight to, or perhaps even disregard, the legal instructions given it by the trial judge in favor of the asserted higher law.”<sup>96</sup>

To support its Eighth Amendment ruling, the Ninth Circuit cited *Godfrey v. Georgia*,<sup>97</sup> which held that “if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”<sup>98</sup> The *Sandoval* court found that the prosecutor’s inclusion of a religious justification for the infliction of the death penalty was prohibited by the Eighth Amendment because it moved the jury to consider factors beyond those offered into evidence and governed by the applicable law.<sup>99</sup> Further, the court found that an “[a]rgument involving religious authority also undercuts the jury’s own sense of responsibility for imposing the death penalty.”<sup>100</sup> The court noted that the Supreme Court has disapproved of arguments that indicate to the jury that its responsibility is lessened due to eventual review by a higher court.<sup>101</sup> The *Sandoval* court ruled that the same logic applies to arguments transferring responsibility to a higher religious authority.<sup>102</sup> The court concluded by affirming the district court’s grant of a writ of habeas corpus to *Sandoval* based on the improper religious argument of the prosecutor.<sup>103</sup>

Defense counsel must be ready to object to religion-based arguments made by the prosecution during closing arguments. The trial judge should recognize

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95. *Sandoval*, 241 F.3d at 775 n.1.

96. *Id.* at 776.

97. 446 U.S. 420 (1980).

98. *Godfrey*, 446 U.S. at 428.

99. *Sandoval*, 241 F.3d at 776.

100. *Id.* at 777.

101. *Id.*; see *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985) (holding that it is unconstitutional for a death sentence to be imposed in cases in which the sentencer “has been led to believe that responsibility for determining appropriateness of defendant’s death rests elsewhere”).

102. *Sandoval*, 241 F.3d at 777. The court noted that religion-based arguments have been condemned by nearly all federal and state courts that have ruled on the subject. *Id.* (citing *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998); *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996); *Cunningham v. Zant*, 928 F.2d 1006, 1019–20 (11th Cir. 1991); *United States v. Giry*, 818 F.2d 120, 133 (1st Cir. 1987); *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1991); *People v. Eckles*, 404 N.E.2d 358, 365 (Ill. 1980); *State v. Wangberg*, 136 N.W.2d 853, 854–55 (Minn. 1965)).

103. *Sandoval*, 241 F.3d at 780.



such arguments as a violation of the defendant's constitutional rights under the Eighth and/or Fifth Amendment. If the objection is not sustained, the issue is not procedurally defaulted and it is preserved for appeal.

### 3. *Jury Instructions*

A capital defense attorney can help mitigate the effect that a jury's religiosity will have on a potential determination of guilt or sentence with an appropriate jury instruction admonishing the jury to limit its deliberations to the evidence and facts presented at trial. In Virginia, there is no specific model jury instruction addressing the issue of extraneous material.<sup>104</sup> The lack of a model instruction leaves it in the hands of defense counsel to provide an instruction to the court that admonishes the jury not to use or discuss religious justifications for the death penalty. For example, in *Keil v Commonwealth*,<sup>105</sup> the Supreme Court of Virginia noted the trial court's instruction to the jury to refrain from reading any newspaper accounts of the trial while deliberating.<sup>106</sup> Protecting the verdict from the influence of the pro-death rhetoric of religious texts is an ongoing pursuit throughout trial. Defense counsel should always make a request for an instruction informing the jury of its duty to consider only the law and evidence of the case before it.

#### B. *Traditional Direct Attacks on Religion-Based Death Sentences*

The jury does not always follow the admonitions of the court and can still deliberate or deliver a verdict based on religious doctrine. In such cases, defense counsel must attack the religion-based deliberations or verdict directly on appeal. Two provisions of the United States Constitution have proved only marginally effective in challenging the jury's use of extraneous material: the Sixth Amendment guarantee of an impartial jury, and the Eighth Amendment prohibition

104. The only model jury instruction that comes close to addressing the issue is Instruction No. 2.700, which addresses the jury's duty in "Fixing Punishment." VA. MODEL JURY INSTRUCTIONS, CRIM., 2.700 (2003).

105. 278 S.E.2d 826 (Va. 1981).

106. *Keil v. Commonwealth*, 278 S.E.2d 826, 831 (Va. 1981). The court in *Keil* recounted the trial court's instruction to the jury in a footnote:

Now, I would admonish you you're not to discuss this matter with anyone, nor allow anyone to discuss it with you, nor will you discuss it among yourselves unless and until you're all together and present in the jury room . . . Now, I'm going to instruct you again not to read any account in the newspapers of any of the proceedings in this Court. There are things that are discussed out of the hearing of the jury, which the newspaper may or may not report, but, in any event, it is not to be considered by you as evidence. I told you many times that you can consider only evidence that you hear in this Courtroom. And by the same token, I don't want you reading any of the articles which you may see and can tell from the headlines it involves this case.

*Keil*, 278 S.E.2d at 831 n.\*.

against cruel and unusual punishment.<sup>107</sup> In the discussion that follows, it should be remembered that the Virginia requirements of (1) actual misconduct and (2) probable prejudice are similar to other states and the federal system.<sup>108</sup>

### 1. Sixth Amendment Right to an Impartial Jury

The traditional challenge to juror misconduct is made under the Sixth Amendment right to an impartial jury or similar state provision.<sup>109</sup> The United States Supreme Court in *Remmer v. United States*<sup>110</sup> held that “[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial.”<sup>111</sup> The Court found that a Federal Bureau of Investigation inquiry revealed that a member of the jury had been inappropriately contacted by an outside party offering a bribe for a favorable verdict.<sup>112</sup> The Court, however, qualified this conclusion and stated that “[t]he presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.”<sup>113</sup> Limiting the potential remedy offered by the *Remmer* Court’s reasoning, the Court in *Smith v. Phillips*<sup>114</sup> held that due process did not require a new trial “every time a juror has been placed in a potentially compromising situation.”<sup>115</sup> The *Phillips* Court used a harmless-error analysis in deciding that a juror’s application for employment to the district

107. See U.S. CONST. amend. VI (providing in pertinent that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to be confronted with the witnesses against him”); U.S. CONST. amend. VIII (providing that “cruel and unusual punishments [shall not be] inflicted”).

108. See, e.g., *United States v. Olano*, 507 U.S. 725, 738 (1993) (finding that the Court “generally ha[s] analyzed outside intrusions upon the jury for prejudicial impact”); *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (illustrating that “due process does not require a new trial every time a juror has been placed in a potentially compromising situation”); *People v. Danks*, 8 Cal. Rptr. 3d. 767, 795 (Cal. 2004) (finding that when investigating potential juror misconduct, “[i]f we conclude there was misconduct, we then consider whether the misconduct was prejudicial”); *Wiser v. People*, 732 P.2d 1139, 1143 (Co. 1987) (en banc) (holding that a defendant’s conviction must be reversed “where there is a reasonable possibility that the verdict was tainted by the introduction of outside information or influences into the jury deliberations”).

109. See U.S. CONST. amend. VI (providing in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to be confronted with the witnesses against him”).

110. 347 U.S. 227 (1954).

111. *Remmer v. United States*, 347 U.S. 227, 229 (1954).

112. *Id.* at 228.

113. *Id.* at 229 (citing *Mattox*, 146 U.S. at 148–50).

114. 455 U.S. 209 (1982).

115. *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

attorney's office during the trial did not prejudice the defendant and that a post-trial hearing on the matter satisfied the requirements of due process.<sup>116</sup> The United States Court of Appeals for the Sixth Circuit has held that the *Phillips* holding switched the burden of proof from the prosecution to the defendant, and other courts have found that the *Remmer* presumption of prejudice applies only to a limited set of circumstances.<sup>117</sup>

In interpreting the bounds of the Sixth Amendment guarantee in matters of extraneous material, the court in *Jones v Kemp*<sup>118</sup> was confronted with a jury that had been allowed to consult the Bible during deliberations.<sup>119</sup> The court first remarked how the Bible could be subject to varied interpretation and how it conflicted with the Georgia statutory scheme by disallowing the consideration of mercy as a sentencing factor.<sup>120</sup> In analyzing the contours of the Sixth Amendment guarantee of a fair trial, the *Jones* court cited the United States Court of Appeals for the Fifth Circuit:

The Sixth Amendment guarantees that the accused shall enjoy the right to a trial by an impartial jury and shall be confronted with the witnesses and evidence against him. . . . The most general interpretation of a fair trial is that it be conducted before unprejudiced jurors under the superintendence of a judge who instructs them as to the law and advises them as to the facts. Judicial control of the juror's knowl-

116. *Id.* at 215-16 ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.")

117. *See* United States v. Walker, 1 F.3d 423, 431 (6th Cir. 1993) (finding that *Phillips* switched the burden of proof from the prosecution to the defense (citing *Phillips*, 455 U.S. at 215-16)); *see, e.g.*, United States v. Kelley, 140 F.3d 596, 608 (5th Cir. 1998) (concluding that the *Remmer* presumption applies only when extrinsic matter has actually influenced the jury); United States v. Blumeyer, 62 F.3d 1013, 1016-18 (8th Cir. 1995) (ruling that the *Remmer* presumption applies only when outside material relates to factual issues of the case); United States v. Boylan, 898 F.2d 230, 261 (1st Cir. 1990) (concluding that the *Remmer* "presumption is applicable only where there is an egregious tampering or third party communication which directly injects itself into the jury process").

118. 706 F. Supp. 1534 (N.D. Ga. 1989).

119. *See* *Jones v. Kemp*, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989) (finding reversible error when the trial court allowed the jury to consult the Bible during capital sentencing deliberations).

120. *Id.* The *Jones* court remarked as follows:

Georgia's death penalty statute lays out specific guidelines for separating "the many" from "the few." The Bible, however, in some places explicitly rejects the drawing of distinctions in murder cases: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." [*Genesis* 9:6]. Whereas the Bible commands that "thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot," [*Deuteronomy* 19:21], it is the law in this Circuit that arguments which disparage mercy as a valid sentencing consideration "strike at the most important component of a capital jury's discretion favoring capital defendants."

*Id.* at 1559-60; *see* GA. CODE ANN. § 17-10-30(b) (2003) (listing the crimes for which the death penalty is an applicable punishment); *Godfrey*, 446 U.S. at 427 ("A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'") (internal citations omitted).

edge of the case pursuant to the laws of evidence is fundamental to the prevention of bias and prejudice.<sup>121</sup>

The *Jones* court used the Fifth Circuit standard as its guide.<sup>122</sup>

The *Jones* court found that the use of the Bible could carry such weight with a layman juror that "the effect may be highly prejudicial to the defendant, and the confidence in the reliability of the jury's decision which must guide imposition of the death penalty may be undermined."<sup>123</sup> The court likened the use of the Bible during deliberations to the prohibition against the use of a dictionary or legal texts.<sup>124</sup> The court found that "[i]t is well settled that religion may not play a role in the sentencing process" and that the Bible has the potential to influence the jury in a way that far exceeds that of dictionaries and other legal texts.<sup>125</sup> The court concluded that the use of a Bible by the jury violated the Sixth Amendment guarantee to a fair and impartial jury.<sup>126</sup> The court recognized that the parties did not raise an Establishment Clause claim and it refused to address those implications.<sup>127</sup> By mentioning that the parties did not raise the issue of the Establishment Clause, the court implied that the clause might be a bar to the presence of a Bible in the jury room.<sup>128</sup>

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121. *Jones*, 706 F. Supp. at 1560 (quoting *Farese v. United States*, 428 F.2d 178, 179-80 (5th Cir. 1970)).

122. *Id.*

123. *Id.*

124. *Id.* at 1558.

125. *Id.* at 1559 ("To the average juror, Webster's Dictionary maybe no more than a reference book, and The Reader's Digest nothing more than a diverting periodical; but the Bible is an authoritative religious document and is different not just in degree, although this difference is pronounced, but in kind."). The *Jones* court cited numerous cases for the proposition that religion may not play a role in the sentencing process. See *Giry*, 818 F.2d at 133 ("The prosecutor's reference to [the defendant's] denial of Christ constituted an irrelevant and inflammatory appeal to the jurors' private, religious beliefs."). The Supreme Court of Tennessee has held that a jury foreman's reading of Biblical passages to the jury during deliberations in the penalty phase of a capital case was error that required new sentencing. See *Tennessee v. Harrington*, 627 S.W.2d 345, 350 (Tenn. 1981), *cert. denied*, 457 U.S. 1110 (1982).

126. *Jones*, 706 F. Supp. at 1560 ("A situation in which a jury, unsupervised by the court and unobserved by counsel, could reach a conclusion by consulting sources other than the legal charge of the court and evidence actually received by the court is not permitted.")

127. *Id.* ("There is thus no issue raised here involving the . . . Establishment clause, such as is involved in the school prayer cases.")

128. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion."); *infra* Part V (discussing the use of the Establishment Clause to exclude religious texts from jury deliberations).

## 2. *Eighth Amendment Prohibition Against Cruel and Unusual Punishment*

The Eighth Amendment can serve as another ground for challenging a religion-based verdict. In *Jones*, the petitioner raised his claim not only on Sixth Amendment grounds, but also under the Eighth Amendment and claimed that a verdict based partially on the Bible was arbitrary and capricious and therefore violated the prohibition against cruel and unusual punishment.<sup>129</sup> The *Jones* court quoted *Godfrey*, in which the Supreme Court stated:

[I]f a State wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty . . . . It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that make rationally reviewable the process for imposing a sentence of death.<sup>130</sup>

Thus, "a capital sentencing scheme must . . . provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many in which it is not.'"<sup>131</sup> Under this reasoning, a verdict based on religious material is not only unfair under the Sixth Amendment, but is arbitrary and capricious under the Eighth Amendment. The *Jones* court concluded that the trial court committed constitutional error under both the Sixth and Eighth Amendments in allowing the use of the Bible.<sup>132</sup>

## V. *Analysis Under the Establishment Clause of the First Amendment*

The Establishment Clause of the First Amendment raises another barrier to the inclusion of religious texts in jury deliberations.<sup>133</sup> The United States Supreme Court has stated "that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense."<sup>134</sup> Further, "[i]t was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."<sup>135</sup> The Establishment Clause has been the basis for

129. *Jones*, 706 F. Supp. at 1558; see U.S. CONST. amend. VIII (providing that "cruel and unusual punishments [shall not be] inflicted").

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

131. *Id.* at 427 (alteration in original) (internal quotation marks omitted) (quoting *Gregg*, 428 U.S. at 188).

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

133. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

134. *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 216 (1963).

135. *Everson v. Bd. of Educ.*, 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting).

prohibiting prayer and the reading of Bibles in public schools, as well as limiting the delegation of public authority to a religious organization.<sup>136</sup> Further, the Establishment Clause is incorporated by the Fourteenth Amendment and is applicable to state and local government.<sup>137</sup> The same principles should forbid the jury from consulting and relying on the Bible to impose a sentence of death.

An Establishment Clause claim raised by a defendant, however, is not certain to succeed. Professors Gary J. Simson and Stephen P. Garvey have noted that a more difficult question arises when determining whether a defendant can challenge the use of religious texts during deliberations on Establishment Clause grounds than when a challenge is raised by a member of the jury.<sup>138</sup> They state, in the case of group prayer conducted by the jury, that due to the "very confining nature of the jury room during deliberations, the objecting juror experiences significant emotional, psychological, and constitutional harm by the forced exposure to the group prayer and by the express or tacit pressure to join in the prayer."<sup>139</sup> Although speaking in the context of student-led prayer, Justice Stevens could have been talking about religious texts in the jury room when he stated that "[s]uch a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise."<sup>140</sup> Of course, a capital defendant does not suffer an immediate and direct impact from the use of religious texts during deliberations,

136. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310–16 (2000) (invalidating student-led prayer at high school football games on Establishment Clause grounds); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 709–10 (1994) (finding that the creation of a separate school district for a religious group in order for it to regulate the schools according to its faith was prohibited by the Establishment Clause); *Schempp*, 374 U.S. at 223 (holding that a beginning-of-the-day Bible reading and recitation of the Lord's Prayer in unison were violations of the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (finding the recitation of the "Regent's Prayer" by schoolchildren to be a violation of the Establishment Clause).

137. See U.S. CONST. amend. XIV, §1 (stating in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"); *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985) ("[W]hen the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress [s] power."); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (applying the First Amendment to an analysis of the Due Process Clause of the Fourteenth Amendment).

138. Simson & Garvey, *supra* note 88, at 1126. An analogy could be drawn between the vindication of the Free Exercise Clause rights of a juror by a defendant and a challenge under *Batson*, in which the Fourteenth Amendment rights of a juror are vindicated by a defendant. See *Batson*, 476 U.S. at 89 (holding that it is a violation of the Equal Protection Clause of the Fourteenth Amendment to strike a potential juror based on race). However, this possibility will not be discussed in this article.

139. Simson & Garvey, *supra* note 88, at 1126.

140. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 317.

but the impact is presumably absorbed through a higher likelihood of a sentence of death.

When raising an Establishment Clause claim, the court must first find that the capital sentencing jury is a state actor.<sup>141</sup> Next, the defendant must determine which claim or claims to raise in order to challenge successfully the jury's verdict. Professors Simson and Garvey suggest two claims for a defendant to advance when attacking an adverse verdict reached by use of the Bible or other religious text: (1) the verdict was religion-based in violation of the United States Supreme Court's test from *Lemon v. Kurtzman*,<sup>142</sup> or (2) the use of the religious text created a religiously charged atmosphere in violation of the Court's reformulated "endorsement" test.<sup>143</sup> A third possible claim is that the use of religious texts violates the First Amendment because "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"<sup>144</sup> Such a claim avoids the application of the *Lemon* test, and substitutes in its place a prima facie violation standard.<sup>145</sup> Finally, under the harmless-error doctrine espoused in *Chapman v. California*,<sup>146</sup> the Government must show beyond a reasonable doubt that the use of religious texts by the jury did not prejudice the outcome.<sup>147</sup>

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141. See U.S. CONST. amend. I (prohibiting Congress from creating laws designed to inhibit or endorse religion). The United States Supreme Court has noted that "[t]he Fourteenth Amendment imposes [the] limitations [of the First Amendment] on the legislative power of the States and their political subdivisions." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 301 (citing *Jaffree*, 472 U.S. at 49-50).

142. 403 U.S. 602 (1971).

143. Simson & Garvey, *supra* note 88, at 1127-28; see *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (finding an Establishment Clause violation unless the government action had a secular purpose, a principal or primary effect that did not inhibit or advance religion, and did not result in excessive government entanglement with religion); *Lynch v. Donnelly*, 465 U.S. 668, 691-92 (1984) (O'Connor, J., concurring) (reformulating the *Lemon* test to find an Establishment Clause violation in cases in which "the government intends to convey a message of endorsement or disapproval of religion," or "the government practice [has] the effect of communicating a message of government endorsement or disapproval of religion").

144. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch*, 465 U.S. at 678).

145. See *id.* (refusing to apply *Lemon* in cases in which "[t]he government involvement with religious activity . . . is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school").

146. 386 U.S. 18 (1967).

147. *Chapman v. California*, 386 U.S. 18, 24 (1967) ("[W]e hold . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

### A. *The Jury as Government Actor*

The first hurdle to finding an Establishment Clause violation is to determine whether the violation is committed by a state actor within the meaning of the First Amendment.<sup>148</sup> When a citizen acquiesces to serve as a juror, he sheds his role as a citizen and accepts the role of a state actor.<sup>149</sup> Indeed, the Supreme Court has declared that “the objective of jury selection proceedings is to determine representation on a governmental body.”<sup>150</sup> The Court also noted that “[t]he jury exercises the power of the court and of the government that confers the court’s jurisdiction.”<sup>151</sup> As “a governmental body,” all of the legal restrictions and privileges of being a state actor are similarly accepted. Jurors are protected by common law immunity from prosecution, just as judges and prosecutors are, and should be held to the same standard.<sup>152</sup> Further, because they receive pay for their service, jurors are paid employees of the state.<sup>153</sup> It is only a natural extension of current law governing the actions of court actors to find the jury to be similarly bound.

Ancillary to a claim that a jury verdict based on Biblical teachings is a violation of the Establishment Clause is a claim by the jurors themselves that any attempt to remove the Bible from deliberations is a violation of their Free Exercise Clause protections.<sup>154</sup> This argument is fruitless, however, under established Virginia law. In *Rice v Commonwealth*,<sup>155</sup> the Supreme Court of Virginia held that protection of a citizen’s right to freedom of religion does not provide them with immunity from complying with reasonable requirements

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148. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

149. *Simson & Garvey*, *supra* note 88, at 1108 (“Although the members of the jury are private citizens for purposes other than their jury service, they should be seen as state actors when serving as jurors because they are acting pursuant to a delegation of authority from the state.”).

150. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (emphasis added).

151. *Id.* at 624.

152. See *Andrews v. Ring*, 585 S.E.2d 780, 785 (Va. 2003) (noting that prosecutorial immunity is a matter of state common law and finding that a prosecutor is immune from prosecution when his actions are “intimately connected with the prosecutor’s role in judicial proceedings”); see also *Imbler v. Pachtman*, 424 U.S. 409, 418 n.12 (1976) (“Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction.”); *Yaselli v. Goff*, 12 F.2d 396, 403 (2d Cir. 1926), *aff’d*, 275 U.S. 503 (1927) (“[A] petit juror is not liable for any statements made by him during the deliberations of the jury after it has retired to consider a verdict, and that his privilege in this respect is not limited to the words which are shown to be pertinent to the questions arising for decision.”).

153. *Simson & Garvey*, *supra* note 88, at 1108.

154. See U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion].”).

155. 49 S.E.2d 342 (Va. 1948).



imposed by the State.<sup>156</sup> When applied to the jury context, *Rice* prevents a juror from claiming a free exercise right to convict a defendant on religious grounds.<sup>157</sup> Because jury service is quite obviously a “reasonable civil requirement[] imposed by [the] State” that comes with explicit rules of conduct, a juror is obligated to set aside textual teachings and specific religious arguments when deliberating during sentencing.<sup>158</sup>

It is also equally clear that a jury room is not a traditional public forum that entitles the jurors to discuss freely and openly any religious or political justifications for imposing the death penalty.<sup>159</sup> The Court has found that “[i]t is undeniable . . . that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State.”<sup>160</sup> Moreover, the Court found that “[t]he right to use government property for one’s private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses.”<sup>161</sup> The jury room is not one of those traditional public forums where freedom of speech is paramount; rather it is a forum “reserved for specific official uses.”<sup>162</sup> Therefore, a juror’s Free Exercise Clause rights must yield to the command of the Establishment Clause.

### B. Applying the Lemon Test

As a state actor, a jury cannot impose the death penalty based on religious grounds without violating the Establishment Clause. Whether the Establishment Clause has in fact been violated has traditionally been determined by applying the

156. *Rice v. Commonwealth*, 49 S.E.2d 342, 347 (Va. 1948) (“The constitutional protection of religious freedom, while it insures religious equality, on the other hand does not provide immunity from compliance with reasonable civil requirements imposed by the State.”). The relevant Virginia constitutional provision states:

No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities.

VA. CONST. art. I, § 16.

157. See *Rice*, 49 S.E.2d at 347 (finding that religion does not provide any person immunity from complying “with reasonable civil requirements imposed by the State”).

158. *Id.*

159. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (finding “that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State”).

160. *Id.*

161. *Id.*

162. See *id.* (outlining the test for determining a public forum).

test established in *Lemon*.<sup>163</sup> For jury deliberations based on religious text to be found unconstitutional, it must be shown that the use of the religious text during deliberations had: (1) no secular purpose; (2) no principal or primary effect to promote or inhibit religion; or (3) not represented an excessive entanglement of government and religion.<sup>164</sup> The use of the Bible in jury deliberations fails all three prongs of the *Lemon* test.

As for the first of *Lemon's* requirements, there can be no serious argument made that the inclusion of religious texts in jury deliberations has a secular "purpose." Religious texts by their nature are sacred and sectarian. A juror would only make reference to a religious text during deliberations to inject an improper spiritual element into the deliberations. The United States Supreme Court has ruled that the stated purpose of the government action need not be completely free from religious effect, but must be free from sectarian purpose.<sup>165</sup> The act of using a religious book to guide decision-making during jury deliberations cannot have a secular purpose.

A strong case could also be made challenging tainted verdicts under the "effect" prong of the *Lemon* test. Under this prong of the test, a government action violates anti-establishment principles if it has the principal or primary effect of promoting or inhibiting religion.<sup>166</sup> Allowing jurors to rely on religious passages in order to reach a verdict has the primary effect of turning a verdict based on both law and evidence into a religious edict calling for the execution of the convicted defendant. The Supreme Court has "noted that the prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'"<sup>167</sup> Allowing a jury verdict wherein the Bible was used as a justification for the death sentence is an impermissible grant of approval to the particular religious beliefs. As such, it must be found to have the primary or principal effect of furthering those religious beliefs.

The threat of government entanglement with religion is also high if religiously tainted verdicts are allowed to stand. The United States Supreme Court stated that "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn."<sup>168</sup>

163. See *Lemon*, 403 U.S. at 612-13 (restating tests for determining a violation of the Establishment Clause).

164. *Id.*

165. *Id.* at 612.

166. *Id.* (holding that a government action is valid if "its principal or primary effect [is] one that neither advances nor inhibits religion").

167. *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (emphasis in original) (quoting *Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring)).

168. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) (quoting *Lemon*, 403 U.S. at 625).

The danger to avoid is “‘a fusion of governmental and religious functions.’”<sup>169</sup> Imposing the death penalty for religious reasons is “a fusion of governmental and religious functions” that violates the Establishment Clause. The United States Supreme Court has stated that a “mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.”<sup>170</sup> The same principle should apply to a mixing of judicial and religious authority because nothing can provide a larger “symbolic benefit to religion” than the appearance that the criminal justice system is governed by religion.

Government can no sooner allow Bible-based verdicts than it can Koran-based verdicts. Indeed, the numerous cases cited throughout this article, which exclusively deal with improper uses of the Bible, indicate that it is a confluence of Christianity and government functions that influence verdicts in American courts.<sup>171</sup> The jury and the Bible are already entangled. What is needed is for the Bible to be disentangled from the American justice system.

### C. Government Endorsement of Religion

In recent years, the United States Supreme Court’s Establishment Clause jurisprudence has been in a state of flux.<sup>172</sup> Largely, the conflict has been based on the continued vitality of *Lemon* and the purpose of the Establishment Clause itself.<sup>173</sup> One reformulation of the “purpose” and “effect” prongs of the *Lemon* test currently employed by the Court has been the creation of what has been termed the “endorsement” test. Formulated by Justice O’Connor in *Lynch v Donnelly*,<sup>174</sup> the endorsement test inquiry seeks to determine whether: (1) “the government intends to convey a message of endorsement or disapproval of religion”; or (2) “the government practice [has] the effect of communicating a message of government endorsement or disapproval of religion.”<sup>175</sup> “An affirmative answer to either question . . . render[s] the challenged practice unconstitutional.”<sup>176</sup> Four of the Justices currently sitting on the United States Supreme

169. *Id.* (quoting *Schempp*, 374 U.S. at 222).

170. *Id.* at 125–26.

171. *See supra* Part IV (discussing cases involving the improper use of religion during various stages of trial).

172. *See* Simson & Garvey, *supra* note 88, at 1102 (stating that “the Establishment Clause has been a source of considerable doctrinal turmoil in recent years”).

173. *See Lee*, 505 U.S. at 644 (Scalia, J., dissenting) (citing disapproval of the *Lemon* test by several Justices). As the Court indicated in *Lemon*, much of the confusion is because it “can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.” *Lemon*, 403 U.S. at 612.

174. 465 U.S. 668 (1984).

175. *Lynch v. Donnelly*, 465 U.S. 668, 691–92 (1984) (O’Connor, J., concurring) (re-interpreting *Lemon* and finding that a nativity scene did not violate the Establishment Clause).

176. *Id.*

Court disagree with the current state of affairs.<sup>177</sup> Rather than follow *Lemon* and its progeny, the dissenting four Justices would find the Establishment Clause offended only upon a showing of coercion by the questioned state practice.<sup>178</sup>

The effect of a religion-based verdict, especially one grounded in the “eye for eye” rhetoric of the Old Testament, is to eliminate the discretion that the jury has to impose life rather than death. As explained by the courts in *Jones* and *Sandoual*, a reliance on the Bible could eliminate the possibility of mercy and could lead to the jury laying down its burden as the finder of fact and passing the burden on to a higher biblical authority.<sup>179</sup> This passing of the burden is an endorsement of religion just as surely as is the creation of a school district for the benefit of a particular religious sect.<sup>180</sup> In *Board of Education of Kiryas Joel Village School District v. Grumet*,<sup>181</sup> the United States Supreme Court found that “‘the Free Exercise and the Establishment Clause compels the State to pursue a course of neutrality toward religion,’ favoring neither one religion over others nor religious adherents collectively over nonadherents.”<sup>182</sup> More simply, “civil power must be exercised in a manner neutral to religion.”<sup>183</sup> The Court invalidated a New York statute that granted authority over a newly created school district to the religious sect which comprised the residents of the district.<sup>184</sup> The Court found that “there is ‘ample room under the Establishment Clause for benevolent neutrality that will permit religious exercise to exist without sponsorship and without interference.’”<sup>185</sup>

177. See *Lee*, 505 U.S. at 640–44 (Scalia, J., dissenting) (stating dissenting opinion that was joined by Chief Justice Rehnquist and Associate Justices White and Thomas); *County of Allegheny*, 492 U.S. at 659–63 (Kennedy, J., concurring in judgment in part and dissenting in part) (stating a concurring and dissenting opinion that was joined by Chief Justice Rehnquist and Associate Justices White and Scalia). Simson and Garvey state that Justice Kennedy may be more comfortable with the endorsement test, as indicated by his later agreement with the majority in *Santa Fe Independent School District v. Doe*. Simson & Garvey, *supra* note 88, at 1102 n.67; see *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 317 (invalidating student-led prayer at high school football games on Establishment Clause grounds).

178. See *Lee*, 505 U.S. at 641–42 (Scalia, J., dissenting) (“[T]here is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction . . . — with no one legally coerced to recite them— violated the Constitution of the United States.”)

179. *Jones*, 706 F. Supp. at 1558; *Sandoual*, 241 F.3d at 776.

180. See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.*, 512 U.S. at 705 (finding that the State of New York impermissibly delegated governmental authority to a religious sect in violation of the Establishment Clause).

181. 512 U.S. 687 (1994).

182. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.*, 512 U.S. at 696 (quoting Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 792–93 (1973)).

183. *Id.* at 704 (citing *Larkin*, 459 U.S. at 120–21).

184. *Id.* at 710.

185. *Id.* at 705 (internal quotation marks omitted) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987)).

To allow the jury to predicate the infliction of the most severe and irrevocable punishment our justice system provides on Biblical verse is a violation of the principle of neutrality reiterated time and again by the United States Supreme Court.<sup>186</sup> The delegation of sentencing authority to the capital jury is of such importance to the integrity and continued vitality of the American system of justice that it cannot be seriously argued that a religiously tainted verdict does not amount to government endorsement of religion. Allowing the jury's verdict to stand with evidence that it was Biblically influenced is tacit "sponsorship" of religion. If a delegation of governmental authority to a religious group can be invalidated on Establishment Clause grounds, then the delegation of governmental authority to a jury must be subject to the same scrutiny.<sup>187</sup>

#### D. *Avoiding Lemon: Prima Facie Violation*

Occasionally, the United States Supreme Court refuses to apply the *Lemon* or endorsement test to an alleged Establishment Clause violation.<sup>188</sup> Instead, the Court found the challenged action to be inconsistent on its face with traditional Establishment Clause principles.<sup>189</sup> In *Lee v Weisman*,<sup>190</sup> the Court found that a prayer given by a rabbi which preceded a graduation ceremony represented pervasive government involvement in religious activity "to the point of creating a state-sponsored and state-directed religious exercise in a public school."<sup>191</sup> Further, the Court held that "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."<sup>192</sup>

Unlike prayer at the opening of every Congressional legislative session, using the Bible or other religious texts during jury deliberations is not part of the "unique history" of the United States justice system, and is thus not exempt from the application of traditional Establishment Clause principles like those from

186. See, e.g., *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.*, 512 U.S. at 710 (invalidating state delegation of authority to religious sect because statute was not religion-neutral); *Nyquist*, 413 U.S. at 792-93 ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."); *Larkin*, 459 U.S. at 125-26 ("[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.").

187. See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.*, 512 U.S. at 710 (invalidating state delegation of authority to religious sect because statute was not religion-neutral).

188. See, e.g., *Lee*, 505 U.S. at 586 ("This case does not require us to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens.").

189. *Id.* at 598.

190. 505 U.S. 577 (1992).

191. *Lee*, 505 U.S. at 587.

192. *Id.*

*Lee*.<sup>193</sup> The Court in both *Lee* and *Santa Fe Independent School District v Doe*<sup>194</sup> recognized that a primary purpose of the Establishment Clause is to prohibit the coerced religious participation of those who do not wish to participate.<sup>195</sup> The defendant on trial for capital murder is not only coerced into participating, but is required to participate and accept punishment from a jury that formulates a decision around a religious dogma found in religious text. A defendant should be able to challenge a religion-based verdict by citing his inability to avoid the infliction of the religious punishment imposed by the jury. Even the four members of the current Supreme Court who believe there must be a finding of coercion should recognize the unacceptable result of a death sentence grounded on religious principle.

### *E. Harmless Beyond a Reasonable Doubt*

Whether or not an Establishment Clause violation is grounds for reversal of conviction depends on whether the reviewing court finds that the error was harmless beyond a reasonable doubt.<sup>196</sup> It is incumbent upon the State to overcome this burden.<sup>197</sup> Although the *Chapman* standard is applied for other constitutional violations, when raising a tainted verdict claim under the Establishment Clause it should be much more difficult for the State to prove that the error was harmless.<sup>198</sup> In cases in which the claim involves an improper closing argument, the consideration of prejudicial evidence, or other guilt phase issues, the determination of whether the error was harmless can be negated by a showing that the evidence of guilt was already overwhelming.<sup>199</sup> In *Satterwhite v Texas*,<sup>200</sup> the United States Supreme Court recognized this fact and stated:

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193. See *Simson & Garvey*, *supra* note 88, at 1126; *Marsh v. Chambers*, 463 U.S. 783, 790–91 (1983) (finding that prayer preceding the opening of a congressional session was not a violation of the Establishment Clause).

194. 530 U.S. 290 (2000).

195. See *Lee*, 505 U.S. at 594 (“[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.”); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312 (“The constitutional command will not permit the District ‘to exact religious conformity from a student as the price’ of joining her classmates at a varsity football game.” (quoting *Lee*, 505 U.S. at 596)).

196. See *Chapman*, 386 U.S. at 24 (“[W]e hold . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”).

197. *Id.* This standard is more lenient than the State-friendly standard used in federal habeas corpus proceedings, which requires that the State show that the error 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).

198. See, e.g., *Satterwhite v. Texas*, 486 U.S. 249, 256–58 (1988) (applying harmless-error doctrine in a capital case involving a Sixth Amendment violation).

199. *Id.* at 256.

200. 486 U.S. 249 (1988).

In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury.<sup>201</sup>

In other words, there are countervailing considerations that can be presented to the reviewing court from the guilt phase record to show that the outcome would or would not have been different without the constitutional error.

In contrast, during sentencing proceedings, the factors to be considered are not susceptible to the same type of weighing as the guilt phase evidence because there is no record of the jury deliberations. Even in untainted jury deliberations, at sentencing an independent weighing of the aggravating and mitigating factors by the court is not possible. Moreover, by rule, whether common law or statutory, the trial or reviewing court may not inquire into the basis of the jury's decision, but only into whether the jurors considered outside material.<sup>202</sup> This limitation prevents the court from creating a record following challenged proceedings. The State has a nearly impossible burden to show beyond a reasonable doubt that the jury deliberations, as conducted, were not prejudicial to the defendant. This difficulty should render the inclusion of religious texts *per se* prejudicial.

#### VI. Conclusion

It is essential that the jury not be allowed to consult the Bible or any other religious text in the confines of the jury room during capital sentencing deliberations. The consultation of the Bible can lead to the justification and imposition of death without the jury giving due weight and consideration to the evidence and law governing a particular case. Defense counsel should be vigilant at trial as well, constantly on guard during all phases of a capital trial to ward off the injection of religiously charged rhetoric or material that may prejudice the jury against the defendant. Traditional attacks against verdicts predicated on the consideration of extraneous material by the jury may often times be ineffective due to the ability of the prosecution to rebut the presumption of prejudice. If so, a reliance on the Establishment Clause of the First Amendment may represent an increased chance for obtaining a new trial or new sentencing proceeding.

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201. *Satterwhite*, 486 U.S. at 256 (quoting *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978)).

202. See FED. R. EVID. 606(b) (governing the inquiry into whether a jury considered improper material or was the subject of coercion); *Caterpillar Tractor Co.*, 353 S.E.2d at 751 ("Generally, we have limited findings of prejudicial juror misconduct to activities of jurors that occur outside the jury room."); *Evers-Smith*, 361 S.E.2d at 446 (restating Virginia law concerning extraneous material and noting an exception allowed for determining whether the jury considered extraneous material).