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Theology in the Jury Room: Religious Discussion as "Extraneous Material" in the Course of Capital Punishment Deliberations

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NOTES

Theology in the Jury Room: Religious Discussion as “Extraneous Material” in the Course of Capital Punishment Deliberations

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I. INTRODUCTION

Why would a God concerned about justice in a matter of life and death be willing to delegate an absolute power over life and death to such fallible and morally benighted creatures?¹

In the landmark *Furman v. Georgia* decision,² Justice Brennan likened capital punishment to a mere game of chance: "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."³ Although Brennan's argument in *Furman* focused primarily on disparities across racial lines in death penalty implementation,⁴ the notion of arbitrariness⁵ applies

1. LLOYD STEFFEN, EXECUTING JUSTICE: THE MORAL MEANING OF THE DEATH PENALTY 154 (1998).

2. 408 U.S. 238 (1972) (per curiam).

3. *Id.* at 293 (Brennan, J., concurring). This Note addresses a "lottery system" in capital punishment jury deliberations, which is somewhat different than the system portrayed by Justice Brennan. *Id.* Whereas Brennan focused on the sentencing process as racially unbalanced in its outcomes, this Note examines the possibility of extraneous material, and particularly religious discussion as such extraneous material, invalidating the necessary fairness of death penalty deliberation. To expand upon Brennan's vernacular, religious discussion as an extraneous material may increase (or perhaps decrease, in certain instances) the odds of a jury sentencing a defendant to die. *Id.* Whatever a jury's ultimate decision may be, religious discussion has a substantially high potential to divert the jurors' attention from truly relevant considerations during the sentencing phase. See *infra* Part IV.

4. 408 U.S. at 238. The Court's split in *Furman* was particularly interesting given the enormity of the issue. As evidenced by the language used in the various opinions, there was no love lost amongst the Justices. For instance, Justice Douglas described the arbitrary nature of death penalty deliberation by declaring that "[p]eople live or die, dependent on the whim of one man [when a judge sentences] or of 12 [when a jury sentences]." *Id.* at 253 (Douglas, J., concurring) (emphasis added). Brennan and Marshall both expressly contended that capital punishment was *per se* unconstitutional, notwithstanding the possibility of detailed guidelines concerning its administration. *Id.*

In dissent, however, Justice Powell focused on the extensive consequences of the per curiam decision, calling it a "grave event for the Court to take from the States whatever deterrent and retributive weight the death penalty retains." *Id.* at 459 (Powell, J., dissenting). Chief Justice Burger countered the plurality's contention that juries arbitrarily sentence defendants to the death penalty by arguing that the "very infrequency of death penalties imposed by jurors attests their cautious and discriminating reservation of that penalty for the most extreme cases." *Id.* at 402 (Burger, C.J., dissenting).

Furman invalidated the death penalty statutes of both Georgia and Texas (from which the three consolidated cases arose), yet, by implication, reached far beyond those two states. See, e.g., GREGORY D. RUSSELL, THE DEATH PENALTY AND RACIAL BIAS: OVERTURNING SUPREME COURT ASSUMPTIONS 17-20 (1994). The decision also effectively overturned all state death penalty statutes that granted juries unlimited sentencing discretion. See *id.* at 17. States responded to *Furman* almost instantaneously by passing new statutes that provided the sentencing authority, whether judge or jury, with more detailed guidelines for imposing the death penalty. See *id.* at 19-20; see also BARRY LATZER, DEATH PENALTY CASES: LEADING U.S. SUPREME COURT CASES ON

equally well to our knowledge of the processes, discussions, and maneuvers that take place behind the closed doors of many capital punishment jury rooms.⁶ It is practically impossible, and indeed explicitly prohibited by the Rules of Evidence,⁷ to delve into jurors' thoughts and considerations pertaining to a particular sentencing

CAPITAL PUNISHMENT 45 (1998) (noting that thirty-five states rewrote death penalty statutes in an effort to conform to the Court's guidelines, "if anyone could determine what they were," following the confusing per curiam decision in *Furman*).

5. See, e.g., LOUIS J. PALMER, JR., *THE DEATH PENALTY: AN AMERICAN CITIZEN'S GUIDE TO UNDERSTANDING FEDERAL AND STATE LAWS* 146 (1998) (using the term "arbitrariness" to encompass both passion and prejudice, and explaining that judicial review for arbitrariness "is largely dependent upon the capital felon making an allegation that a specific arbitrary factor influenced the decision in the case"). But see *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961) (describing the presumption of impartiality on the part of jurors); *Wells v. Murray*, 831 F.2d 468, 472 (4th Cir. 1987) ("Jurors . . . are presumed to be impartial . . ."). This Note, in part, questions whether such presumptions of impartiality should extend to the delicate relationship between religion and the death penalty, particularly when the relationship arises in countless jury deliberations during the sentencing phase. See, e.g., Joseph L. Hoffmann, *Where's the Buck?: Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1154 (1995) (dictating interviews with jurors in completed capital punishment cases, as part of the Capital Jury Project, in which one juror said that "there were three occasions that the jury, as a group, prayed together," that "all fifteen of us [jurors] felt the need to [pray together]," and that "I believe that I, as well as the other jurors, were guided, that God guided us to the decision that we made").

6. Individual states must ensure that death penalty procedures comply with the Supreme Court's mandate that statutes 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.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (quoting *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) and *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976)). In practice, however, state death penalty procedures frequently fall short of meeting this requirement. See *infra* Part V.

7. Federal Rule of Evidence 606(b) prohibits substantive post-deliberation inquiry into jurors' thoughts and emotions as developed during trial. The rule reads as follows:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement 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, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

FED. R. EVID. 606(b).

Although courts once limited application of the Federal Rules of Evidence to the trial phase, the current trend favors extending the application of Rule 606(b) to sentencing hearings as well. See, e.g., *United States v. Jones*, 132 F.3d 232, 246 (5th Cir. 1998) (explaining that "the reasons [underlying Rule 606(b)] . . . apply with equal force to sentencing hearings" (citing *Silagy v. Peters*, 905 F.2d 986, 1009 (7th Cir. 1990) (barring use of jurors' statements in habeas corpus proceeding as means to impeach jury's sentencing determination))); see also *infra* Part III.

decision.⁸ This limitation assumes heightened significance when a jury delivers a death penalty sentence,⁹ given that it is the “ultimate punishment”¹⁰ and cannot be corrected after implementation.¹¹

The trial of Kevin Young¹² stands as one of many that illustrate the dangers¹³ inherent in erecting impenetrable barriers

8. See, e.g., *McDowell v. Calderon*, 107 F.3d 1351, 1367 (9th Cir. 1997) (holding that a juror’s post-deliberation statement concerning his personal belief about the death penalty and his reasons for voting in favor of its implementation is inadmissible under Rule 606(b)).

9. The statutory basis for the federal death penalty, which is typically mirrored by state death penalty statutes, resides in the Federal Death Penalty Act of 1994. 18 U.S.C. §§ 3591-3598 (1994). Section 3591(a) establishes the criteria for determining which crimes may subject a defendant to the death penalty. Section 3592 enumerates mitigating and aggravating factors that juries should consider in determining whether a sentence of death is warranted. Mitigating factors include such elements as a defendant’s impaired capacity to appreciate the wrongfulness of his or her conduct, duress, and the lack of a prior criminal record. § 3592(1)-(7). Aggravating factors include such elements as a defendant’s previous convictions for other serious offenses, the level of risk of death to others, pecuniary gain, and the vulnerability of the victim. § 3592(4)-(6), (8), (11). Section 3593 explains the requisite procedural safeguards in relation to prosecutorial pursuit of the death penalty. Acknowledging the need for parameters on the jury’s discretion, § 3593 specifically dictates that “the court . . . shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, *religious beliefs*, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, *religious beliefs*, national origin, or sex of the defendant or of any victim may be.” § 3593(f) (emphasis added).

Section 3595 describes the appellate process in death penalty sentencing. During review, [w]henver the court of appeals finds that—(A) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (B) the admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor; or (C) the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal . . . , the court shall remand the case for reconsideration under section 3593 or imposition of a sentence other than death.

§ 3595(c)(2)(A)-(C). If the prosecution “establishes beyond a reasonable doubt that [an] error was harmless,” however, the court of appeals cannot reverse or vacate a death penalty sentence. § 3595(c)(2).

10. CHRISTOPHER E. SMITH, *THE REHNQUIST COURT AND CRIMINAL PUNISHMENT* 71 (1997).

11. See, e.g., *Gregg*, 428 U.S. at 182 (Stewart, J.) (describing the death penalty as the “most irrevocable of sanctions”). For a brief history of the death penalty in the United States, see *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 3-25 (Hugo Adam Bedau ed., 1997) (dividing the history of the death penalty into a series of six epochs from the colonial period to the present, and noting the increased “[p]oliticization of the death penalty” during the most recent epoch, spanning from 1976 to the present) [hereinafter *THE DEATH PENALTY IN AMERICA*].

12. *Young v. State*, 12 P.3d 20, 29 (Okla. Crim. App. 2000).

13. Arbitrary imposition of the death penalty lies at the forefront of the many dangers lurking in modern capital punishment deliberations. See, e.g., ROGER HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 149 (1996) (questioning whether even-handed and nondiscriminatory administration of the death penalty is even possible).

around capital punishment jury deliberations.¹⁴ In 1997, Young faced a jury trial in the District Court of Oklahoma County,¹⁵ in which the jury sentenced Young to the death penalty for the charge of murder in the first degree, to twenty years imprisonment for attempted robbery with a firearm, and to thirty years imprisonment for shooting with intent to kill.¹⁶

Following the sentencing, Young's attorney filed an "Application for Evidentiary Hearing on Extraneous Information Relied Upon By the Jury"¹⁷ with the Court of Criminal Appeals of Oklahoma.¹⁸ Young's counsel alleged that several jurors incorporated at least one Bible into the sentencing deliberations and, as a result, prejudicially influenced the jury as a whole.¹⁹ The Court of Criminal Appeals remanded the case to the district court for an evidentiary hearing to determine whether one or more jurors physically brought extraneous material, specifically a Bible, into the deliberation room, and if so, whether jurors incorporated that extraneous material into their sentencing deliberations.²⁰ The trial judge found that one juror "*may or may not have had a New Testament inside his brief case during the second stage of trial.*"²¹

14. See, e.g., Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 514 (1988) (arguing that one of the implications of Rule 606(b) is that meaningful inquiry into jury misconduct may be curtailed, by necessity and without sufficient justification, at the jury room door).

15. *Young*, 12 P.3d at 29. Young, along with another suspect, had allegedly entered a "gambling operation" located in the back of an Oklahoma City restaurant and proclaimed, "[w]e come [sic] for the money," while brandishing a gun. *Id.* A shootout ensued, during which time Young allegedly shot the victim, Sutton, four times. *Id.* Sutton died as a result of a gunshot wound to the abdomen. *Id.* Police later found Young seeking medical treatment for his own gunshot wounds at a hospital in close proximity to the scene of the crime, and placed him under arrest. *Id.* at 30.

16. *Id.* at 29.

17. *Id.* at 47. The Application requested an evidentiary hearing in accordance with Title 22, Chapter 18, Rule 3.11(A) of the Rules of the Oklahoma Court of Criminal Appeals, which reads:

After the Petition in Error has been timely filed in this Court, and upon notice from either party or upon this Court's own motion, the majority of the Court may, within its discretion, direct a supplementation of the record, when necessary, for a determination of any issue; or, when necessary, may direct the trial court to conduct an evidentiary hearing on the issue.

OKLA. R. CT. CRIM. APP. 3.11(A) (1999).

18. *Young*, 12 P.3d at 47.

19. *Id.*

20. *Id.* (citing Order Granting Application for Evidentiary Hearing on Extraneous Information Considered by the Jury During Appellant's Sentencing Trial and Order Setting Due Dates for Record and Additional Briefing Schedule (Okl. Cr. Jan. 14, 2000) (F 98-703) (not for publication)).

21. *Id.* (emphasis added).

The court's uncertainty was due to inconsistencies in the testimony of a single juror discovered during the evidentiary hearing.²² In interviews with an investigator acting on Young's behalf, this juror contended that the jury foreperson brought a Bible into the jury room during the sentencing phase and, along with another juror, read verses from Psalms.²³ In addition, the juror stated that she had been considering voting for lifetime imprisonment without parole, but fellow jurors swayed her to vote for a death sentence after reading aloud verses from Romans during the sentencing deliberations.²⁴ At the evidentiary hearing, however, the juror contradicted her previous statement to the investigator and instead testified that she had read the passages from Romans alone at night during the voir dire process and that her fellow jurors did not actually read the Bible in the jury room.²⁵ The apparent inconsistencies, taken in context with other testimony presented at the evidentiary hearing, prompted the trial judge to conclude that there was no *credible* evidence that a juror either brought or used a Bible in the jury room during the sentencing deliberations.²⁶

Referring to the trial judge's findings as "clearly erroneous and/or unreasonable,"²⁷ Young's counsel implored the Court of Criminal Appeals to review the evidentiary hearing record *de novo* to determine whether jurors incorporated a Bible into their sentencing deliberations.²⁸ The Court of Criminal Appeals refused this request and, conversely, applied only a "deferential abuse of discretion" standard of review to the trial court's findings.²⁹ Thus, the appeals court upheld the trial judge's findings, which curtailed any inquiry into the possibility that the use of a Bible as extraneous

22. *Id.*

23. *Id.*

24. *Id.* The alleged biblical passage was Romans 13:1-8, which reads in part:

(1) Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. (2) Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. (3) For rulers hold no terror for those who do right, but for those who do wrong . . . (4) . . . [The ruler] is God's servant, an agent of wrath to bring punishment on the wrongdoer.

Romans 13:1-4 (New International Version).

25. *Young*, 12 P.3d at 47.

26. *Id.* at 47-48.

27. *Id.* at 48.

28. *Id.*

29. *Id.*

material in the deliberations ultimately led to Young's death sentence.³⁰

Despite this initial defeat in the appellate process, Young's counsel pursued a second argument under the "extraneous material" rubric.³¹ This novel contention posited before the Court of Criminal Appeals the idea that "the source of the extraneous information need not be literally external to the jury and in that vein . . . even *discussion* of biblical doctrine and scripture between jurors creates a rebuttable presumption of prejudice."³² In other words, notwithstanding the questionable findings of the lower court as to the actual physical presence of a Bible in the jury room during sentencing, any discussion of religion in and of itself may have been extraneous to such a degree that prejudicial decisionmaking possibly ensued.³³ The court tersely rejected Young's argument by revealing an understanding of the jurors' difficult charge: "We do not find it surprising that 'conscientious people who are faced with a life and death decision resort to their religious scruples in reaching such a decision. Such deep *introspection* neither violates principles of justice nor prejudices the defendant.'"³⁴ By assuming merely an introspective incorporation of religious principles by jurors in their individual capacities, however, the court overlooked Young's central argument: doctrinal discussion is necessarily extroverted, and may therefore incorporate extraneous material into jury deliberations that are supposed to focus upon balancing³⁵ the mitigating and aggravating factors³⁶ in a defendant's case.³⁷

30. *Id.*

31. *Id.* at 48-49.

32. *Id.* at 48 (emphasis added).

33. *Id.* Young's counsel submitted supplemental authorities after oral argument to the Court of Criminal Appeals referencing numerous cases dealing with "improper prosecutorial references to biblical doctrine," but the court distinguished these from the case at bar. *Id.* at 48 n.29; see also *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1991) (holding prosecutor's reference to biblical doctrine in argument constituted per se reversible error). *But see Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996) (holding prosecutor's reading of biblical passage to justify the morality of the death penalty to be highly improper, but not in violation of defendant's due process rights).

34. *Young*, 12 P.3d at 48-49 (quoting *Bieghler v. State*, 690 N.E.2d 188, 203 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998)) (emphasis added).

35. Oklahoma Rules of Criminal Procedure mandate a balancing test in death penalty cases:

The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not

Today, Kevin Young sits on death row in Oklahoma.³⁸ As Young awaits his ultimate punishment, one must ask, in the words of Justice Harlan in *McGautha v. California*,³⁹ whether the jurors who were “confronted with the truly awesome responsibility of decreeing death for a fellow human being act[ed] with *due regard* for the consequences of their decision?”⁴⁰ The converse may indeed be

be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life without parole or imprisonment for life.

OKLA. STAT. ANN. tit. 21, § 701.11 (West Supp. 2002).

36. Oklahoma rules specify eight aggravating factors, which, in substantial part, mirror those listed in the Federal Rules of Criminal Procedure § 3592(c). *See supra* note 9. Aggravating factors recognized in Oklahoma include:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
8. The victim of the murder was a peace officer . . . or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

OKLA. STAT. ANN. tit. 21, § 701.12 (West 2000).

37. *Young*, 12 P.3d at 48-49; *cf.* *Richmond v. Lewis*, 506 U.S. 40, 46-47 (1992) (“[I]n a ‘weighing’ State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain.”).

38. *Young*, 12 P.3d at 50 (“Finding no error which warrants reversal of the convictions for Attempted Robbery or Shooting with Intent to Kill or the conviction and sentence of death for First Degree Murder, the Judgments and Sentences entered in Oklahoma County District Court . . . are hereby AFFIRMED.”); *see also* Oklahoma Coalition to Abolish the Death Penalty, Oklahoma’s Death Row, at <http://www.ocadp.org/index.html> (last visited Jan. 19, 2002) (listing Kevin Young among the prisoners currently on Oklahoma’s death row).

39. 402 U.S. 183 (1971) (holding that the due process guarantee of the Fourteenth Amendment does not require states to establish mandatory sentencing guidelines for juries to follow in death penalty cases because, in part, formulation of intelligible criteria appears to be a task “beyond present human ability”).

On the heels of the *McGautha* decision, one commentator posed an interesting question in critique of the decision: “What does it mean about the nature of the death penalty that either it cannot, so we are told, be administered through a set of rules guiding its allocation or that no responsible organ of government is willing to take on the burden of allocating it?” Harry Kalven, *The Supreme Court, 1970 Term—Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 25 (1971). That this very question arose, Kalven proposed, revealed “a fatal flaw, a kind of *reductio ad absurdum* in the death penalty itself.” *Id.*

40. *McGautha*, 402 U.S. at 207-08 (emphasis added).

true, however, if the jury's sentencing decision turned upon religious discussion. To quote Justice Brennan's dissent in *McGautha*, the *Young* jurors may have acted with "unchanneled judgment,"⁴¹ as opposed to "judgment guided by *reason* and *kept within bounds*,"⁴² in voting for the death penalty.

This Note examines the unique concept of placing the "extraneous material" label on religious discussion in death penalty sentencing deliberations. Ultimately, this Note advocates reassessment and revision of the current capital punishment system in an effort to account for religious discussion behind jury room doors. It calls for changes to modern jury instructions and the capital punishment appellate process because both currently fail to recognize the potentially prejudicial impact of religious discussion in death penalty deliberations. Moreover, to the extent that rules of evidence, both federal and state, impose seemingly impenetrable barriers around jury deliberations, this Note argues that amendments accounting for religious discussion in the capital punishment context are critical.

Part II of this Note provides background information on the role of the jury, particularly with respect to capital punishment, and considers several problems that challenge the American commitment to trial by jury. It also offers a basic overview of the law concerning material extraneous to jury deliberations. Part III explores the principles embodied in Rule of Evidence 606(b), and thereafter, describes the manner in which one state court applied the rule to a capital punishment trial. Part IV addresses the need for placing the extraneous material label on religious discussion in capital punishment sentencing deliberations by emphasizing the theological and secular arguments often enlisted by the competing sides in the death penalty debate. Finally, Part V contends that both federal and state courts should clarify the capital jury-judge

41. *Id.* at 285-86 (Brennan, J., dissenting).

42. *Id.* (emphasis added); *see also* *Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."). Justice Brennan's dissent in *McGautha* calling for standards in respect to death penalty sentencing was arguably vindicated a mere one year later in *Furman v. Georgia*. 408 U.S. 238, 238 (1972) (holding all state death penalty statutes in force at time of decision to be invalid as violations of Eighth Amendment due to lack of guidance for juries in sentencing procedures); *see also* Hoffmann, *supra* note 5, at 1137 (explaining that states quickly crafted new death penalty statutes in the wake of *Furman* to satisfy the Supreme Court's Eighth Amendment concerns, and noting that the Court upheld three of these new statutes in 1976 (citing *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976))).

dynamic and amend their interpretations of Rule 606(b) in order to address the threat that extraneous religious discussion poses in capital punishment deliberations.

II. THE ROLE OF THE JURY IN DEATH PENALTY SENTENCING AND THE THREAT OF "EXTRANEOUS MATERIAL"

A. *Our Commitment to Trial by Jury*

The institution of the jury, a "mirror [of] the community's values and attitudes,"⁴³ has long served as the anchor of the criminal justice system in the United States.⁴⁴ The jury system is ingrained in the American criminal forum to such a degree that "administering our criminal law system without it is unthinkable."⁴⁵ Studies reveal that the majority of Americans perceive the jury system as fair.⁴⁶ In fact, if accused of murder, most would prefer trial by jury, as opposed to trial before a judge.⁴⁷

The Supreme Court has explicitly adhered to the commitment to trial by jury in criminal cases.⁴⁸ In *Duncan v. Louisiana*,⁴⁹ for example, the Court held that the Constitution guarantees adult

43. Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1052 (1991).

44. See, e.g., WILLIAM S. MCFEELY, PROXIMITY TO DEATH 76 (2000) (noting the "long tradition of the primacy of the jury"). *But cf.* Hon. Morris S. Arnold, *The Civil Jury in Historical Perspective*, in ROSCOE POUND FOUND., THE AMERICAN CIVIL JURY: FINAL REPORT OF THE 1986 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES 13 (1987) (explaining that the judicial system in the United States has historically been the "kind of world that allow[s] non-professionals to have . . . much power and authority").

45. Higginbotham, *supra* note 43, at 1047 (citing U.S. CONST. art. III, § 2, cl. 3 and U.S. CONST. amend. VI). Section 2 of Article III states that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed . . ." U.S. CONST. art. III, § 2, cl. 3. The Sixth Amendment assures that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI.

46. See Julian V. Roberts & Loretta J. Stalans, *Crime, Criminal Justice, and Public Opinion*, in THE HANDBOOK OF CRIME AND PUNISHMENT 47 (Michael Tonry ed., 1998) (noting that although certain high-profile cases such as the acquittal of the police officers charged with using excessive force against Rodney King have led to periods of discontent, the general public continues to support the jury system based on its perceived procedural fairness).

47. See generally Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 333-51 (1988).

48. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that the Sixth and Fourteenth Amendments guarantee a jury trial for defendant accused of misdemeanor punishable by a maximum of two years in prison and a fine).

49. *Id.* at 145.

criminal defendants the right to a jury trial as a means of guarding against government oppression and the potential miscarriage of justice.⁵⁰ Furthermore, the Court has consistently transposed its confidence in the jury system to the capital punishment setting by acknowledging that juries are reflections of community values⁵¹ in the death penalty decision.⁵² This respect and confidence in the jury system reflects the Court's desire for a system that " 'secure[s] unanimity by a comparison of views' " ⁵³ and subsequently lends credence to jury decisions.⁵⁴

B. Our Commitment Tested: Problems with the Jury Trial

One must not simply assume that a jury properly reflects community values and meets its expectations as a representative body of laypersons⁵⁵ charged with the duty of deciding life and death in many instances.⁵⁶ Even the Supreme Court has purpose-

50. *Id.* at 155, 158.

51. *See, e.g.,* *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (declaring that the jury serves as a "significant and reliable objective index of contemporary values"). *But see* *Furman v. Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting) (arguing that the result of the per curiam decision overturning three capital punishment sentences undermines "our basic trust in lay jurors as the keystone in our system of criminal justice . . . [because] we [are] tak[ing] the most sensitive and important of all decisions away from them").

52. *See, e.g.,* *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988) (declaring that the government has a "strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death' ").

53. *Jones v. United States*, 527 U.S. 373, 382 (1999) (holding that the Eighth Amendment does not require that a jury receive instructions as to the consequences of potential failure to reach unanimous sentencing decision) (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)).

54. *But see* James S. Leibman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, ch. X, available at <http://justice.policy.net/jpreport> (last visited Jan. 19, 2002) (concluding that "the capital punishment system revealed by our 23-year study is not a success, and is *not even minimally rational*") (emphasis added).

55. Most likely, it is impossible within the death penalty system for a jury to be a proper reflection and representation of society at large. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 67-68 (1986) (contending that the capital jury system does not provide an accurate index of societal values because, inter alia, prospective jurors with fervent opinions, particularly those against the death penalty, are systematically eliminated in the voir dire process); *see also* *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (holding that defendants possess the right to have defense counsel ask a prospective juror whether she would *always* impose the death penalty upon conviction and, if the answer is yes, to excuse the juror for cause).

56. Indeed, facing mounting numbers of necessary death row exonerations, some state governments are reconsidering their commitments to capital punishment in general. *See, e.g.,* Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1 ("Citing a 'shameful record of convicting innocent people and putting them on death row,' Gov. George Ryan of Illinois today halted all executions in the state, the first such moratorium in the nation."); Robynn Tysver, *Death Penalty Study OK'd*, OMAHA WORLD-HERALD, May 28, 1999, at 1 (reporting that Nebraska's unicameral legislature passed a death penalty moratorium bill and

fully stopped short of mandating jury sentencing in death penalty cases. Indeed, in *Proffitt v. Florida*, Justice Powell proclaimed the majority's belief that sentencing rendered by judges may result in "even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore, is better able to impose sentences similar to those imposed in analogous cases."⁵⁷

States that choose to employ capital punishment may decide to incorporate sentencing by either judge or jury. In Alabama, Florida, Delaware, and Indiana, for example, a jury's sentence in death penalty cases serves merely as a "suggestion" to the judge, who may thereafter impose the suggestion or sentence the defendant to an alternative punishment.⁵⁸ In several other states, including Arizona, Idaho, and Montana, a jury does not determine death penalty sentences at all; instead, sentencing is left solely to judges.⁵⁹

In addition, the Supreme Court's requirement that a capital jury meet "death-qualification" standards,⁶⁰ which supposedly prove that its members would fairly and impartially hear the evidence and render a verdict serving the interests of justice,⁶¹ arguably opposes the vital need for inclusion of societal differences in the jury system.⁶² In relation, according to one commentator, the context of

that, although the bill was vetoed by Governor Mike Johanns, the legislature unanimously overrode the veto with respect to a section allocating \$165,000 to study the distribution of death penalty imposition in Nebraska).

57. 428 U.S. 242, 252 (1976); *see also* *Spaziano v. Florida*, 468 U.S. 447, 448 (1984) (upholding judicial imposition of death penalty after jury returned recommendation of life imprisonment).

58. *See, e.g.,* MCFEELY, *supra* note 44, at 76.

59. *See id.*

60. *Lockhart v. McCree*, 476 U.S. 162, 163 (1986).

61. *See* PALMER, *supra* note 5, at 83.

62. Joined by Justices Brennan and Stevens, Justice Marshall's dissent in *Lockhart* implored the majority to recognize the inherent exclusivity within "death-qualifications" and the skewed decisions that necessarily result:

The perspectives on the criminal justice system of jurors who survive death qualification are systematically different from those of the excluded jurors. Death-qualified jurors are, for example, more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and *less concerned about the danger of erroneous convictions*. . . . This prosecution bias is reflected in the greater readiness of death-qualified jurors to convict or to convict on more serious charges. . . . And . . . the very process of death qualification—which focuses attention on the death penalty before the trial has even begun—has been found to predispose the jurors that survive it to believe that the defendant is guilty.

476 U.S. at 188 (Marshall, J., dissenting) (emphasis added).

In a similar vein, critics of the "death-qualified" jury requirement frequently argue that *Lockhart* reflects the Court's disturbing prioritization of efficient capital punishment functionality over adequate protection of capital defendants' rights. *See* WELSH WHITE, THE DEATH

the courtroom and the death penalty trial, combined with the "mystifying language of legal formality,"⁶³ may distort the moral sense of a jury in its effort to reach a justifiable sentencing decision.

A conglomeration of studies and scholarship has provided evidence that jurors frequently suffer from a lack of comprehension in two respects.⁶⁴ First, juries tend to misunderstand the complexities that underlie a variety of cases.⁶⁵ For instance, the issues involved in many civil suits, particularly in the fields of antitrust, intellectual property, and technology law, pose unique hurdles for jury comprehension.⁶⁶ In addition, jurors in tort cases may frequently fall subject to common psychological predispositions to attribute behavior and related responsibility according to a defendant's physical and personality traits (to the degree such traits may be gleaned during trial), rather than in accordance with evidentiary proof.⁶⁷

Concerns about jury miscomprehension⁶⁸ and psychological predispositions translate readily to the death penalty sentencing context. Arguably, jurors vote for the death penalty in accordance with a defendant's traits, particularly race, in an alarming number of cases. A 1990 report by the U.S. General Accounting Office to the Senate and House Committees on the Judiciary, for example, concluded: "The black defendant/white victim combination was the most likely to receive the death penalty."⁶⁹ Prosecutors arguably recognize this discrepancy in juries' death penalty sentences and, in

PENALTY IN THE NINETIES 207 (1994); cf. MARGARET C. JASPER, *THE LAW OF CAPITAL PUNISHMENT* 25 (1998) (contending that the result of a voir dire process through which "death-qualification" is assessed results in juries that are ready and willing to impose the death penalty).

63. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 392.

64. See David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480 (1976) (discussing study results that jurors may not understand and apply the law properly).

65. See, e.g., *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970) (explaining that the "legal" nature of an issue is determined by considering . . . the practical abilities and limitations of juries"); see also Steven I. Friedland, *Legal Institutions: The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 200-04 (1990) (explicating arguments against submitting complex cases to juries).

66. See, e.g., Friedland, *supra* note 65, at 200-04.

67. See Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 127-40 (1995). Feigenson refers to jurors' tendencies to attribute blame on the basis of supposed personality characteristics of defendants as the "fundamental attribution error." *Id.* at 127.

68. See, e.g., Shari S. Diamond, *Instructing on Death: Psychologists, Juries, and Judges*, 48 AM. PSYCHOL. 423, 423-30 (1993) (explaining the pervasive potential for jurors to miscomprehend capital punishment jury instructions).

69. DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, U.S. GEN. ACCOUNTING OFFICE, PUB. NO. 90-57, at Summary (1990).

many instances, pursue cases accordingly. A report in *The New York Times* revealed that: "[A]lthough whites represent 35% of murder victims, 85% of capital cases brought by local prosecutors involve white victims. Prosecutors have sought the death penalty in one of three murders of whites; with black victims the ratio drops to 1 in 17."⁷⁰

Furthermore, many jurisdictions require death penalty juries to weigh aggravating factors against mitigating factors in a defendant's case,⁷¹ yet jurors may not understand the various com-

70. David Margolick, *In Land of Death Penalty, Accusations of Racial Bias*, N.Y. TIMES, July 10, 1991, at A1. Nevertheless, even an elaborate five-year study showing that black defendants in the State of Georgia accused of killing white victims face the greatest likelihood of death penalty sentences did not withstand the Supreme Court's scrutiny in *McCleskey v. Kemp*, 481 U.S. 279, 286-313 (1987). The five-member majority held that the study proved neither arbitrary imposition of the death penalty in violation of the Eighth Amendment, nor discrimination in violation of the Equal Protection Clause. *Id.* at 297-308. Justice Brennan, joined by three of his colleagues in dissent, eloquently vented his frustration with the majority's position:

The judiciary's role in this society counts for little if the use of the governmental power to extinguish life does not elicit close scrutiny. . . . Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of "sober second thought."

Id. at 342-43 (Brennan, J., dissenting).

71. While adopting no official position on whether the death penalty should remain an authorized sentence in the United States, the American Law Institute (ALI) included detailed lists of both aggravating and mitigating circumstances in the Model Penal Code, which is mirrored in numerous state statutes, under section 210.6:

(3) Aggravating Circumstances.

- (a) The murder was committed by a convict under sentence of imprisonment.
- (b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
- (c) At the time the murder was committed the defendant also committed another murder.
- (d) The defendant knowingly created a great risk of death to many persons.
- (e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
- (f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
- (g) The murder was committed for pecuniary gain.
- (h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) Mitigating Circumstances.

- (a) The defendant has no significant history of prior criminal activity.
- (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

ponents⁷² that underlie this complex balancing test.⁷³ If confused, jurors may unjustifiably cast sentencing votes according to their individualized perceptions of a defendant's traits.⁷⁴ The disconcerting number of capital punishment sentences that ultimately require exoneration reflects, at least in part, the inherent possibility for life-threatening jury mistakes. For instance, between 1972 and the beginning of 1998, sixty-eight death row prisoners were released on the grounds that their convictions were faulty.⁷⁵ Even more disturbing, however, are contentions that innocent individuals have been executed.⁷⁶

A second reason that jurors frequently suffer from a lack of comprehension is that, as many studies suggest, jurors often fail to sufficiently comprehend jury instructions that courts currently

- (c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
- (e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
- (f) The defendant acted under duress or under the domination of another person.
- (g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirement of law was impaired as a result of mental disease or defect or intoxication.
- (h) The youth of the defendant at the time of the crime.

MODEL PENAL CODE § 210.6(3)-(4) & explanatory note (1980).

72. See ZIMRING & HAWKINS, *supra* note 55, at 80 (contending that the ALI opened a Pandora's Box in section 210.6 by including numerous fine distinctions and complex subdivisions). *But see* Walton v. Arizona, 497 U.S. 639, 652-56 (1990) (upholding a death penalty sentence in which one aggravating factor was "especially heinous, cruel or depraved murder" because the state's high court adequately clarified the factor's meaning and independently applied the factor to the circumstances of the case).

73. See generally Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1 (questioning jurors' abilities to adequately comprehend mitigation as a legal concept so as to incorporate mitigation into sentencing deliberations).

74. See Feigenson, *supra* note 67, at 127-40.

75. See Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 130-32 (1998); see also STAFF OF SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS, HOUSE COMM. ON THE JUDICIARY, 103D CONG., INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER OF MISTAKEN EXECUTIONS 3 (Comm. Print, 1993) (reporting to members of Congress that the "most conclusive evidence that innocent people are condemned to death under modern death sentencing procedures comes from the surprisingly large number of people whose convictions have been overturned and who have been freed from death row") [hereinafter INNOCENCE AND THE DEATH PENALTY].

76. See, e.g., CHARLES L. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 101 (1982) (suggesting that there have been executions of the innocent). Professor Hugo Adam Bedau, one of the nation's foremost campaigners against the death penalty, contends that it is beyond reasonable doubt that innocent persons have indeed been put to death, notwithstanding the lack of irrefutable empirical proof. HUGO ADAM BEDAU, IN SPITE OF INNOCENCE 43 (1992).

write and dictate.⁷⁷ In *Gregg v. Georgia*,⁷⁸ the Supreme Court explicitly required that sentencing schemes, expressed in jury instructions, inform the jury as to the factors that it can properly consider in deciding whether to impose the death penalty and how to weigh those factors in order to sentence rationally and consistently.⁷⁹ The Court, however, failed to account for the possibility that juries may not, in many instances, truly understand such instructions, notwithstanding the drafters' compliance with the Court's mandate.⁸⁰

In 1990, Professor Hans Zeisel conducted an experiment that ultimately provided the first empirical evidence that defense counsel have used to persuade a court that jury instructions might not meet the guidance constitutionally required⁸¹ in a capital punishment case.⁸² The Zeisel study involved jurors from actual cases listening and reading a description of the evidence from a capital punishment trial, as well as the jury instructions from the trial's sentencing phase.⁸³ The jurors were then asked to read a series of descriptions on hypothetical jurors' interpretations of specific evidence and their subsequent hypothetical votes either in favor of or against sentencing the defendant to the death penalty.⁸⁴ Finally, the participants were asked whether the hypothetical jurors had properly followed the jury instructions.⁸⁵

Zeisel formulated his study to test the respondents' understanding of key legal issues, such as the nature of mitigating factors and the process of balancing both the aggravating and mitigat-

77. See generally SHARI S. DIAMOND & JUDITH N. LEVI, IMPROVING DECISIONS ON DEATH 7-21 (Am. Bar Found., Working Paper No. 9506, 1995) (detailing an experiment focusing on juror comprehension with respect to instructions).

78. 428 U.S. 153 (1976).

79. *Id.* at 206-07 (holding that the death penalty is not per se cruel and unusual punishment under the Eighth Amendment, provided that the relevant death penalty statute provides sufficient guidance to the sentencing authority, whether judge or jury, so as to avoid arbitrary imposition of the punishment).

80. See *id.*

81. See *id.*

82. See generally DIAMOND & LEVI, *supra* note 77, at 3-7 (discussing the Zeisel study). Although attempts have been made to persuade courts about the potentially unconstitutional nature of some state jury instructions, none have succeeded. See generally Dan Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 LAW & HUM. BEHAV. 204 (1992) (describing research that compared juror comprehension of instructions formerly used with comprehension of instructions currently used and stating that this research failed to convince a state court that the former instructions were deficient).

83. See DIAMOND & LEVI, *supra* note 77, at 4.

84. See *id.*

85. See *id.*

ing factors in sentencing a defendant under Illinois capital punishment law.⁸⁶ Participants could respond with a "yes," "no," or "do not know" answer.⁸⁷ The majority of respondents answered only three of the sixteen questions correctly, and incorrectly answered eleven questions.⁸⁸ A mere thirty-five percent answered correctly as to Illinois law requiring jurors to balance the aggravating and mitigating factors, as opposed to voting against a death sentence only when mitigating factors are sufficient to overcome a supposed presumption that juries should always err on the side of imposing the death penalty.⁸⁹

Defense counsel in *United States ex rel. Free v. McGinnis*⁹⁰ presented the Ziesel study to a magistrate judge in the U.S. District Court for the Northern District of Illinois considering the habeas corpus petition of James Free, a death row inmate.⁹¹ The magistrate heard extensive testimony from psychologists, sociologists, statisticians, and a linguist to assess the quality of the Zeisel study.⁹² Finding that the jury instructions were not "intelligible and definite enough to provide even a majority of jurors hearing them with a clear understanding of how they are to go about deciding whether the defendant lives or dies,"⁹³ the magistrate held that the instructions violated the Eighth and Fourteenth Amendments.⁹⁴ Thereafter, a federal district court judge accepted the magistrate's findings and vacated Free's death sentence.⁹⁵ Although the Court of Appeals for the Seventh Circuit overturned the district court's decision,⁹⁶ both *Free* and the Zeisel study stand as proof that courts

86. *See id.* at 4-5.

87. *Id.* at 4. Zeisel asked questions such as, whether the existence of a mitigating factor bars a sentence of death, and whether the jury is free to consider mitigating factors not enumerated in the judge's instructions. *See id.*

88. *See id.*

89. *See id.*

90. 818 F. Supp. 1098 (N.D. Ill. 1992).

91. *Id.* at 1100-01.

92. *See id.* at 1104-13.

93. *Id.* at 1129.

94. *Id.* at 1129-30.

95. *United States ex rel. Free v. Peters*, 806 F. Supp. 705, 732 (N.D. Ill. 1992). Before the case reached the appellate level, however, the petitioner in another case, *Gacy v. Welborn*, posited the issues raised in the Zeisel study before the Seventh Circuit. 994 F.2d 305, 308-14 (7th Cir. 1993). Judge Easterbrook rejected the study on the basis of an irrefutable presumption that jurors understand and follow instructions as currently given. *Id.* at 310-13.

96. When the Seventh Circuit considered *Free*, the court voted two-to-one to reject the Zeisel study because defense counsel presented it only after finalization of the lower court judgment. *Free v. Peters*, 12 F.3d 700, 705 (7th Cir. 1993). Chief Judge Posner, however, in writing for the majority, did not reject the possibility that empirical evidence could provide sufficient proof that jury instructions in a capital case are constitutionally defective. *Id.* at 705-06. Instead, Posner

will, at least in certain instances, consider empirical evidence to assess the possibility of jury miscomprehension.

C. The Threat of Extraneous Material

In *Remmer v. United States*,⁹⁷ the Supreme Court summarized the threat that extraneous materials pose to the validity of criminal proceedings.⁹⁸ The Court deemed "presumptively prejudicial"⁹⁹ any form of communication, contact, or tampering, whether direct or indirect, with a juror in respect to a pending matter that is not made in conformance with court rules.¹⁰⁰ Although the presumption of prejudice is not conclusive, the prosecution bears the heavy burden of proving that such communication, contact, or tampering constitutes harmless error.¹⁰¹ The integrity of trial by jury under the Sixth Amendment was significant in the Court's reasoning in *Remmer*, as it remanded the case to the district court for a hearing regarding the potential harm caused by communication between a Federal Bureau of Investigation agent and the jury foreperson.¹⁰²

The Sixth Amendment, however, does not mandate a new trial every time a juror is placed in a "potentially compromising situation."¹⁰³ Trial courts may instead conduct an investigation into the possibility of prejudicial influence upon specific jurors by extraneous material.¹⁰⁴ An investigation typically takes the form of a hearing to evaluate juror bias potentially stemming from exposure

rejected the Zeisel study on two other grounds: (1) the respondents' lack of success on the survey questions may have only reflected their inability to take tests, not their capacity to comprehend and follow jury instructions; and (2) the absence of a control group prohibited postulation that a jury would perform better with rewritten instructions. *Id.*

97. 347 U.S. 227 (1954).

98. *Id.* at 229. See generally David M. Fragale, *Influences on the Jury*, 88 GEO. L.J. 1367, 1367-76 (2000) (providing background information on the extraneous material concept in the context of jury deliberations).

99. *Remmer*, 347 U.S. at 229.

100. *Id.*

101. *Id.* (citing *Mattox v. United States*, 146 U.S. 140, 148-50 (1892) and *Wheaton v. United States*, 133 F.2d 522, 527 (8th Cir. 1943)).

102. *Id.* at 229-30 (declaring that "[a] juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder" because "[t]he integrity of jury proceedings must not be jeopardized by unauthorized invasions"); see also *United States ex rel. Owen v. McMann*, 435 F.2d 813, 818 (2d Cir. 1970) ("The touchstone of decision [as to the harm of extraneous contact] . . . is thus not the mere fact of infiltration of some molecules of extra-record matter . . . but the nature of what has been infiltrated and the probability of prejudice.").

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

104. See *Remmer*, 347 U.S. at 230.

to extraneous material.¹⁰⁵ At this stage, the prosecution can argue that the presumption of prejudice stemming from the presence of extraneous material should be overcome.¹⁰⁶ Such arguments typically contend that the particular extraneous material is merely cumulative,¹⁰⁷ that the evidence of a defendant's guilt is overwhelming to such a degree that exposure to extraneous material did not affect the jury's decision,¹⁰⁸ or that the material in question is not extraneous at all.¹⁰⁹ If a court determines, however, that prejudice did indeed result from extraneous influence, the defendant is entitled to a new trial.¹¹⁰

III. BELIEFS BLOCKADED: RULE OF EVIDENCE 606(B) AND ITS CONSEQUENCES

A. The Parameters of Rule 606(b)

Federal Rule of Evidence 606(b)¹¹¹ and its equivalent state laws limit the scope of inquiry into the jury deliberation process.¹¹²

105. The scope of such investigative hearings is limited by Federal Rule of Evidence 606(b), which allows a juror to testify about extraneous material in the course of deliberations, but forbids testimony concerning one's emotional reactions or mental impressions. FED. R. EVID. 606(b); see also *infra* Part III.

106. See *Remmer*, 347 U.S. at 230.

107. Cumulative evidence is defined as "[a]dditional evidence of the same character as existing evidence and that supports a fact established by the existing evidence," particularly that which does not need further support. BLACK'S LAW DICTIONARY 577 (7th ed. 1999). For cases in which courts deemed certain extraneous material cumulative, see, for example, *United States v. Williams-Davis*, 90 F.3d 490, 503-04 (D.C. Cir. 1996) (holding that the presumption of prejudice resulting from a juror and an alternate juror driving through defendant's neighborhood was overcome because any information obtained during the drive was merely cumulative of evidence properly submitted at trial); *Sherman v. Smith*, 89 F.3d 1134, 1143 (4th Cir. 1996) (holding that the presumption of prejudice stemming from a juror's unauthorized visit to the crime scene was overcome because any information the juror obtained during the visit was merely cumulative of evidence properly submitted at trial); and *Gilliam v. Foster*, 75 F.3d 881, 899-900 (4th Cir. 1996) (rebutting the presumption of prejudice arising from the jury's consideration of photographs of crime scene that were not properly submitted as evidence because other crime scene photographs depicting same images had been admitted into evidence).

108. See, e.g., *Miller v. United States*, 135 F.3d 1254, 1256 (8th Cir. 1998) (holding that overwhelming evidence of defendant's guilt overcame the presumption of prejudice resulting from jury's exposure to inadmissible testimony about defendant's prior bad acts); *Williams-Davis*, 90 F.3d at 499-501 (holding that overwhelming evidence against defendant overcame presumption of prejudice stemming from jury's exposure to media reports about the trial).

109. See, e.g., *United States v. Kelley*, 140 F.3d 596, 608-09 (5th Cir. 1998) (holding that jury members' fears for their own safety, as well as that of their families, did not constitute extraneous influence on the jury); *United States v. George*, 56 F.3d 1078, 1083-84 (9th Cir. 1995) (holding that juror's use of magnifying glass to examine fingerprint and gun evidence was not prejudicial because the magnifying glass was not extraneous material).

110. See *Remmer*, 347 U.S. at 230.

111. For the text of the rule, see *supra* note 7.

More specifically, Rule 606(b) prohibits a juror from testifying about her emotional reactions or mental impressions during deliberations.¹¹³ Under the rule¹¹⁴ a juror may, however, testify as to the introduction of "extraneous prejudicial information,"¹¹⁵ or the pressure of "outside influence."¹¹⁶

Rule 606(b)¹¹⁷ arguably stands as a compromise between juror autonomy and finality of litigation, on the one hand, and protection against potential injustice, on the other.¹¹⁸ In *McDonald v. Pless*,¹¹⁹ the Supreme Court embraced the former aspect of the compromise in Rule 606(b) by forbidding post-deliberation inquiry.¹²⁰ In

112. FED. R. EVID. 606(b).

113. *Id.*

114. The Advisory Committee commented on the division between juror contemplation and extraneous material in Rule 606(b):

The trend has been to draw the dividing line between testimony to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room. . . . *The jurors are the persons who know what really happened.* Allowing them to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

FED. R. EVID. 606(b) advisory committee's note (emphasis added).

115. *Id.*

116. *Id.*

117. For a comprehensive analysis of how the Supreme Court has addressed Rule 606(b) in various contexts, see generally LILLIAN B. HARDWICK & B. LEE WARE, *JUROR MISCONDUCT: LAW AND LITIGATION* (1988).

118. "The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations." FED. R. EVID. 606(b) advisory committee's note (citing *McDonald v. Pless*, 238 U.S. 264 (1915)).

In contrast, the Senate Judiciary Committee Report reflects a concern almost solely aimed at jury independence: "Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors." S. REP. NO. 93-1277, at 7060 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7060; see also 120 CONG. REC. 2375 (1974) ("[T]o expand the permissibility of impeaching jurors . . . would create a Pandora's box of ill effects more than offsetting any benefit derived from mitigating the results of occasional incorrect jury deliberations. . . . [T]he essential goal of finality of decision would be further endangered . . . [if unchecked inquiry into jury deliberation were allowed].").

119. 238 U.S. 264 (1915).

120. *Id.* at 269 (holding that federal jurors may not impeach a quotient verdict through juror testimony). Justice Lamar, writing for the majority, stated:

[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part

relation, the protection that Rule 606(b) offers against potential injustice is, at least theoretically, embodied in its provision permitting jurors to testify "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."¹²¹ Such testimony sheds light on extraneous communication, contact, or tampering that may jeopardize the fairness of the entire trial.

In contrast, some commentators cynically contend that the actual aim of Rule 606(b) is to protect the American jury system against the loss of public faith that could potentially flow from substantive inquiry into the deliberation process and the mental impressions of individual jurors.¹²² Indeed, certain Supreme Court Justices may harbor similar concerns about the potential for undermining the jury system upon extensive examination of deliberations. Justice O'Connor, for instance, has spoken directly to the vulnerability of the jury system against post-deliberation attack: "There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it."¹²³

in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

Id. at 267-68; see also *Clark v. United States*, 289 U.S. 1, 13 (1933) ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.").

121. FED. R. EVID. 606(b).

122. See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 227 (1989) (contending that rules concerning jury inquiry embody a "refusal to know" the reality of deliberations because of "what we know already—that our system of jury controls frequently fails").

123. See *Tanner v. United States*, 483 U.S. 107, 120 (1987).

B. The Reality of Rule 606(b)

In *State v. DeMille*,¹²⁴ a unique case involving a juror's religious belief and the consequences levied upon a defendant as a direct result, the Supreme Court of Utah grappled with the practical implications of Rule 606(b).¹²⁵ At the trial stage, a jury found Leland DeMille guilty of the second-degree murder of a three-year-old child.¹²⁶ A juror's post-conviction affidavit revealed a disturbing occurrence during the deliberations that prompted DeMille's subsequent motions.¹²⁷ In the course of deliberations, a particular juror told fellow jury members that she had prayed for a sign relating to DeMille's guilt or innocence.¹²⁸ The juror claimed she had received a "revelation," instructing her that DeMille was guilty if the defense counsel did not make eye contact with her during the closing argument.¹²⁹ Indeed, the defense counsel failed to look this particular juror in the eye, and as a result, the juror later voted to convict DeMille.¹³⁰ DeMille moved for a new trial based on this possible misconduct, but the trial judge ruled that the juror affidavit was inadmissible under Utah Rule of Evidence 606(b) and denied DeMille's motion.¹³¹

On appeal to the Supreme Court of Utah, DeMille's counsel argued that the juror improperly introduced an outside influence by reporting the "answer to her prayer"¹³² to fellow members of the jury.¹³³ The court rejected this contention, and conversely, affirmed the lower court's decision on three grounds.¹³⁴ First, the court

124. 756 P.2d 81 (Utah 1988).

125. *Id.* at 84-85.

126. *Id.* at 81-82.

127. The affidavit reads, in relevant part:

5. Said juror, [juror's name], further stated to the affiant and the other jurors in said jury room during said deliberations, that while the defendant's attorney was giving his closing argument, she, [the juror], prayed, ". . . that if said attorney made eye contact with her she would know he was telling the truth, but if he did not she would know he was not telling the truth about defendant; that he did not make eye contact with her, so she knew said attorney was not telling the truth," concerning the defendant. . . .

7. Said juror, [name of juror], was one of the leaders, during the deliberations by the jury, of the faction seeking a speedy and early determination of guilt of the defendant.

Id. at 85.

128. *Id.* at 83.

129. *Id.*

130. *Id.*

131. *Id.* at 82.

132. *Id.* at 83-84.

133. *Id.* at 82-84.

134. *Id.* at 84.

stated that considering prayer, or even supposed answers to prayer, as falling under the exception to Rule 606(b)¹³⁵ would mistakenly imply that it is always improper for a juror to rely upon prayer as one aspect of her personal decisionmaking process.¹³⁶ The court expressed concern that an inquiry into prayer would infringe upon a juror's religious liberties and potentially lead to a "religious test" for jury service.¹³⁷ Second, the court found that a single juror's description of her own religious experience, even if used as a means to persuade fellow jurors to vote in favor of conviction, would not constitute an "illegitimate inter-juror dynamic."¹³⁸ According to the court, this particular juror, as well as her fellow jurors, maintained the presumption of impartiality.¹³⁹ Lastly, the court declared that, notwithstanding the potential evidence of a juror's incapacity to weigh the facts and apply the law impartially, Rule 606(b) barred DeMille's challenge because it was based on a post-conviction affidavit.¹⁴⁰ The affidavit, in the majority's view, did not fall under the exception for juror testimony concerning extraneous material in Rule 606(b).¹⁴¹ Instead, the court reasoned that defense counsel had sufficient opportunity during the voir dire process to raise any doubts as to the fitness of this individual to serve as a juror.¹⁴²

135. The exception allows a juror to "testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." UTAH R. EVID. 606(b).

136. Justice Zimmerman, in authoring the majority opinion, forged a defense around prayer during deliberations by noting that

[p]rayer is almost certainly a part of the personal decision-making process of many people, a process that is employed when serving on a jury. There is no necessary inconsistency between proper performance as a juror and reliance on prayer or supposed responses to prayer. So long as a juror is capable of fairly weighing the evidence and applying the law to the facts, one may not challenge that juror's decision on grounds that he or she may have reached it by aid of prayer or supposed responses to prayer.

DeMille, 756 P.2d at 84.

137. *Id.* The majority cited article 1, section 4 of the Utah Constitution, which provides that "no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof . . ." UTAH CONST. art. 1, § 4.

138. *DeMille*, 756 P.2d at 84. The majority acknowledged, however, that a juror may indeed rely upon religious experiences to such an extent that fairness would be compromised in some instances. *Id.* Specifically, the court said, "We recognize that a juror might so abandon his or her judgment to what he or she perceives to be oracular signs as to be unable to fairly consider the evidence and properly apply the law." *Id.*

139. *Id.*

140. *Id.* at 85.

141. *Id.*

142. *Id.* According to the court, because "defense counsel did not raise the matter [during voir dire], . . . any such claims were waived once the trial commenced." *Id.*

Refusing to regard Rule 606(b) as impenetrable, one justice vehemently dissented in *DeMille*.¹⁴³ The dissent contended that dependence on divine intervention in rendering a verdict is a "throw-back to the primitive days of trial by ordeal" in which judgment rested solely on perceived signs from God.¹⁴⁴ Although it acknowledged that Rule 606(b) is a critical safeguard for juror thought processes,¹⁴⁵ the dissent distinguished between instances in which a juror legitimately seeks divine assistance in contemplating the evidence and those instances in which a juror illegitimately abdicates her sworn duty to decide impartially and instead bases her vote solely on divine revelation.¹⁴⁶

The dissent offered interesting examples of illegitimate abdication: "Verdicts based on chance or bribery, for example, have long been subject to challenge, since they do not even purport to be based on the law and the evidence. . . . Thus, if jurors were to agree that a verdict would be based on a 'divine sign,' a Ouija board answer, or some fortuitous event, such a verdict, in my judgment, would constitute a denial of due process and the right to trial by jury."¹⁴⁷

The dissent's position, however, has faced criticism, charging that it establishes what is, in essence, a post-deliberation juror "litmus test."¹⁴⁸ Such arguments, and to a certain degree the majority's position in *DeMille*, however, fail to completely account for juror *interaction* following supposed answers to prayer or religious revelations. An individual juror's dependence upon religion or prayer is understandable and, perhaps, beneficial, provided that it does not become the sole criterion of judgment or sentencing. The true problem arises when that same individual juror attempts to *convince* other jurors of her position as grounded in religion instead

143. *Id.* at 85-86 (Stewart, J., dissenting) (declaring that "certainly verdicts are not absolutely inviolate").

144. *Id.* at 85.

145. *Id.* (recognizing that "[s]ound reasons support the general policy against allowing impeachment of jury verdicts by attacking the mental processes used by jurors to arrive at a verdict," and admitting that challenges are impermissible when jurors purport to decide on the basis of the facts under scrutiny of law, "even if jurors may have acted on the basis of some alleged error or misunderstanding").

146. *Id.*

147. *Id.* at 85-86.

148. See Michael Ariens, *Evidence of Religion and the Religion of Evidence*, 40 BUFF. L. REV. 65, 99-101 (1992) (arguing that Justice Stewart's dissenting view in *DeMille* would require a trial court to make factual inquiries into the decisionmaking process of a juror to determine "whether that juror used divine guidance to (rationally) assess the evidence in the case or whether the juror impermissibly (irrationally) decided the case based on a revelation from God").

of the relevant aspects of the case at hand. The following part of this Note addresses the impact that such religious discussion may have in the capital punishment jury room.

IV. RELIGIOUS DISCUSSION AS "EXTRANEIOUS MATERIAL"

A. Can Discussion Ever Be Extraneous?

Courts have faced numerous cases in which jurors consulted a Bible during deliberations. Some courts have overturned jury verdicts and sentences as a result of Bibles in jury rooms,¹⁴⁹ whereas others have considered similar occurrences to be harmless error.¹⁵⁰ Most likely, countless additional juries have turned to the Bible as well, but those religious consultations, for whatever reason, were never revealed.

When not properly admitted into evidence as part of a trial, Bibles in the jury room constitute extraneous material, which could potentially prompt judicial inquiry into the resultant impact on the jury.¹⁵¹ The actual presence of a Bible in a jury room, however, is not necessary for certain individual jurors to contemplate, or debate about, biblical scripture and principles.¹⁵² After all, one cannot "shrug[] off"¹⁵³ her religious faith and knowledge once the jury room doors are closed. Thus, the potential for extraneous biblical references in the course of jury discussion, notwithstanding consultation of an actual Bible, is pervasive.

Courts do retain a clear ability to preclude certain discussion in the jury room. For instance, courts have acknowledged that discussion, in and of itself, about parole laws as justification for levying either harsher or more lenient sentences can constitute misconduct in the course of jury deliberations.¹⁵⁴ Whether parole law dis-

149. *See, e.g.*, *Jones v. Kemp*, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989) (holding that lower court committed constitutional error, in part, by granting jurors' request to consult a Bible during sentencing deliberations).

150. *See, e.g.*, *Jones v. Francis*, 312 S.E.2d 300, 303 (Ga.) (holding that the trial judge erred by permitting the jury to consult a Bible during capital punishment deliberations, but the defendant did not suffer prejudicial harm even though the jury voted for a death sentence), *cert. denied*, 469 U.S. 873 (1984).

151. *See supra* Part II.

152. *See, e.g.*, Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 940 (1989) (contending that "[t]he very idea of devotion suggests a way of ordering all life and all knowledge, including, although not exclusively, moral knowledge").

153. *Id.*

154. *See, e.g.*, *State v. Sanders*, 496 S.E.2d 568, 601 (N.C. 1998); *Valdez v. State*, 893 S.W.2d 721, 724 (Tex. App. 1995); *Harris v. Virginia*, 408 S.E.2d 599, 601-02 (Va. 1991).

cussion constitutes reversible error, however, depends on the circumstances in the particular deliberations.¹⁵⁵ Similarly, religious discussion in the capital punishment context may have a significant impact on a defendant's fate. Despite the fact that jurors might never consult an actual religious text, courts overseeing capital punishment trials should regard the mere discussion of religion as extraneous and evidence of jury misconduct.

B. Why Religious Discussion?

An actual juror described deliberations in which she and her fellow jurors voted to sentence a defendant to the death penalty in the following way:

[A]ll fifteen of us [jurors] felt the need to [pray together]. And it seemed like . . . before our deliberation of the guilt phase, and then before our deliberation of the penalty phase, and then after the penalty phase deliberating, yeah, before each of the deliberations, [we prayed] . . . and then, prayed for [the defendant] after our deliberation of the penalty.¹⁵⁶

As evidenced in this statement, the distinctly influential power of religion,¹⁵⁷ regardless of the faith,¹⁵⁸ calls for close scrutiny when capital punishment sentencing decisions sway in the balance. 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.¹⁵⁹ The ultimate vic-

155. See, e.g., *Moore v. State*, 535 S.W.2d 357, 358 (Tex. 1976).

156. Hoffmann, *supra* note 5, at 1154.

157. See, e.g., GERALD A. MCHUGH, CHRISTIAN FAITH AND CRIMINAL JUSTICE: TOWARD A CHRISTIAN RESPONSE TO CRIME AND PUNISHMENT 1 (1978) (depicting the enormous impact that Christianity, in particular, has historically had on justice systems by explaining that "such phenomena as the popular acceptance of criminal law as a moral code, belief in the absolute right of the state to punish, belief in the ultimate justness of punishment, and the practice of imprisonment itself . . . have derived no small measure of force and legitimacy from Christian thought and practice").

158. For a review of Jewish perspectives on the death penalty, see Gerald J. Blidstein, *Capital Punishment: The Classic Jewish Discussion*, 14 JUDAISM 159, 159-68, reprinted in CAPITAL PUNISHMENT: A READER 107, 107-17 (Glenn H. Stassen ed., 1998) (concluding that Jewish theology holds two philosophies, "one that regards the enforcing of retribution as most just and hence most merciful, and an other, which finds mercy too divinely dynamic a quality to be forever defined and controlled by the demand for retribution"). For a similar review of Islamic perspectives on capital punishment, see Mohammed Arkoun, *The Death Penalty and Torture in Islamic Thought*, in THE DEATH PENALTY AND TORTURE 75 (Franz Bockle & Jacques Pohier eds., 1978), reprinted in CAPITAL PUNISHMENT: A READER 137, 144 (Glenn H. Stassen ed., 1998) (describing the often conflicting views regarding Islamic punishment, particularly in light of the ever-shifting political conditions in many Islamic countries).

159. See, e.g., Robert L. Young, *Religious Orientation, Race, and Support for the Death Penalty*, 31 J. SCIENTIFIC STUDY OF RELIGION 76, 78-80 (1992), reprinted in CAPITAL PUNISHMENT: A

tor 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.

It is then that the capital punishment sentencing process most clearly resembles a game of chance. Imagine, for example, a jury in the sentencing phase of a death penalty trial leaving its ultimate decision to a coin flip. Heads: life imprisonment. Tails: execution. Imagine further, for example, jurors basing their sentencing on a "flip" of biblical scripture. One juror quotes from the Book of Exodus 21: "(23) But if there is serious injury, you are to take life for life, (24) eye for eye, tooth for tooth, hand for hand, foot for foot, (25) burn for burn, wound for wound, bruise for bruise."¹⁶⁰ Another juror quotes Romans 12: "(17) Do not repay anyone evil for evil. Be careful to do what is right in the eyes of everybody. (18) If it is possible, as far as it depends on you, live at peace with everyone. (19) Do not take revenge, my friends, but leave room for God's wrath."¹⁶¹ If the former prevails, the defendant will likely face the death penalty. If the latter, the defendant may face life imprisonment. In such a scenario, Justice Brennan's concerned depiction of a death penalty "lottery system" becomes an unfortunate reality.¹⁶²

The following two subsections of this Note are intended to provide an overview of the capital punishment debate with a focus on several common religious contentions therein. The religious-based arguments, in particular, provide examples of what religious discussion as extraneous material in jury deliberations may entail.

1. The Case for Vengeance

Capital punishment advocates often cloak their arguments with religious passages and principles.¹⁶³ Indeed, aspects of Judaic,

READER 205, 207-09 (Glenn H. Stassen ed., 1998) (distinguishing between "fundamentalists," who reject moral relativism and tend to support direct punitive measures such as the death penalty on religious grounds, and "evangelists," who embrace the notion of conversion from sin and thus disagree with the death penalty in so far as it "puts the lost soul beyond the reach of those who might be able to lead him or her to a state of grace").

160. *Exodus* 21:23-25 (New International Version).

161. *Romans* 12:17-19 (New International Version).

162. See *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring).

163. See, e.g., GARDNER C. HANKS, *AGAINST THE DEATH PENALTY: CHRISTIAN AND SECULAR ARGUMENTS AGAINST CAPITAL PUNISHMENT* 25 (1997) (observing that Christians who defend capital punishment on scriptural grounds frequently make reference to the Old Testament, with particular focus on God's words to Noah following the flood: "Whoever sheds the blood of man, by man shall his blood be shed." (referring to *Genesis* 9:6 (New International Version))); HOWARD ZEHR, *DEATH AS A PENALTY: A MORAL, PRACTICAL AND THEOLOGICAL DISCUSSION* 18 (1998) (not-

Islamic, and Christian theologies¹⁶⁴ contain notions of retribution arguably in support of the death penalty. Such retributive beliefs have become more prevalent in recent years as justification for criminal punishment generally.¹⁶⁵ Many ardent retributivists have argued that the criminal justice system should serve a purely denunciatory purpose.¹⁶⁶ With decades of increasing crime rates serving as a catalyst,¹⁶⁷ numerous American politicians have sought to implement sweeping penal initiatives aimed at dispelling fear and answering the retributivist calls amongst their constituents.¹⁶⁸

The rise of retributive philosophy is reflected in the fact that the number of Americans favoring the death penalty for convicted murderers has steadily increased since 1936.¹⁶⁹ Coinciding with the

ing that supportive references are often grounded in the Old Testament, in which vengeance is a persistent theme).

164. See, e.g., REV. VIRGINIA MACKAY, PUNISHMENT IN THE SCRIPTURE AND TRADITION OF JUDAISM, CHRISTIANITY AND ISLAM, at viii-ix (1981) (explaining that Jewish, Christian, and Islamic supporters of capital punishment all offer variations on "a 'theology of retribution,' which maintains that God punishes and expects humans to punish in order to dignify human nature or modify human behavior").

165. Cf. Dario Melossi, *Gazette of Morality and Social Whip: Punishment, Hegemony and the Case of the USA, 1970-92*, 2 SOC. & LEGAL STUD. 259, 273 (1993), reprinted in THE SOCIOLOGY OF PUNISHMENT: SOCIO-STRUCTURAL PERSPECTIVES 483, 497 (Dario Melossi ed., 1998) (describing punishment as a symbolic and preventative societal activity that is "much more important for what it tells every member of that society about desirable behavior and threatened sanctions, than for the way it is applied to the individual offender").

166. See, e.g., Andrew Von Hirsch, *Penal Theories*, in THE HANDBOOK OF CRIME & PUNISHMENT 659, 676-77 (Michael Tonry ed., 1998) (noting that current penal trends, such as the "three-strikes" program, reflect a "popular resentment . . . expressive of fear and loathing of crime and of criminals" and often reap political benefits for proponents heralding "an ideology of purging 'undesirables' from the body politic").

167. See *id.*

168. See, e.g., THE DEATH PENALTY IN AMERICA, *supra* note 11, at 18 (noting that, in recent years, "it has been virtually impossible for any candidate for high elective office in the states—governor, attorney general, appellate court judge—to appear hesitant over (much less opposed to) the death penalty"); SMITH, *supra* note 10, at ix (contending that although politicians cannot actually control crime, "they can impose severe punishments on those individuals who are caught and convicted");

169. See Melossi, *supra* note 165, at 272 (describing the rising percentage of Americans answering "yes" when asked "Do you favor the death penalty for a person convicted of murder?" in Gallup polls between 1936 and 1985 and noting the increase from a low of 42% in 1966 to a high of 72% in 1985).

As early as 1958, the Supreme Court in *Trop v. Dulles* acknowledged that the phrase "cruel and unusual punishment" derives its meaning from "the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101 (1958). Over a decade later, the Court's plurality opinion in *Furman v. Georgia* stopped short of declaring the death penalty unconstitutional per se, but similarly indicated that public sentiment concerning the death penalty is an essential factor in determining whether the punishment should be absolutely barred (notwithstanding proper guidelines for the sentencing authority to follow) by the Eighth Amendment. 408 U.S. 238, 299-300 (1972). Four years later, in *Gregg v. Georgia*, the Court held death penalty imposition for murder convictions was per se constitutional provided that state

rise in public support, the number of executions in the United States has also risen abruptly.¹⁷⁰ Retributive perspectives regarding the death penalty often merge with the more instrumental view that capital punishment satisfies the public's sense of justice.¹⁷¹ Under this combination of theories, a defendant sentenced to the death penalty arguably serves as a "sacrificial lamb"¹⁷² upon which society and, more particularly, the jury expresses its outrage and releases its fears in a moment of "cathartic release."¹⁷³

death penalty statutes establish proper sentencing guidelines. 428 U.S. 153, 206-07 (1976). The Court based its decision, in part, on community sentiment as expressed in the fact that thirty-five states had passed revised death penalty statutes in the wake of *Furman*, including one statewide referendum in which the majority of the public voted in favor of the death penalty. *Id.* at 179-81.

Thus, societal views carry constitutional implications with respect to defining what constitutes "cruel and unusual punishment" under the Eighth Amendment. It therefore follows that a rise in public support for the death penalty, specifically, and retributive punishment, generally, may serve to entrench capital punishment further as a viable aspect of the American criminal justice system. See Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 90, 91 (Hugo Adam Bedau ed., 1997) (contending that, in the long term, "popular support may not be sufficient to guarantee the retention of the death penalty" but that "[o]n the other hand, popular support may well be necessary to the continued use of the death penalty in this country").

170. See James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at n.4, at <http://justice.policy.net/jpreport> (last visited Jan. 20, 2002). From 1984 to 1991, an average of fifteen individuals were executed annually in the United States. *Id.* The average rose to approximately thirty per year between 1992 and 1994, and to approximately sixty per year during the next four years. *Id.* In 1999, the number reached ninety-eight executions, the most in a single year since 1951. *Id.*

171. In *Furman v. Georgia*, Justice Brennan articulated (and subsequently argued against) the common prosecutorial view of the death penalty's retributive/instrumental worth:

The infliction of death, the States urge, serves to manifest the community's outrage at the commission of the crime. It is, they say, a concrete public expression of moral indignation that inculcates respect for the law and helps assure a more peaceful community. Moreover, we are told, not only does the punishment of death exert this widespread moralizing influence upon community values, it also satisfies the popular demand for grievous condemnation of abhorrent crimes and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hands.

408 U.S. at 303.

172. *Hearings on S. 1760 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong. 11 (1968) (statement of Hon. Michael V. DiSalle, former Governor of Ohio) ("[I]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society's sacrificial lamb . . .").

173. James McBride, *Capital Punishment as the Unconstitutional Establishment of Religion: A Girardian Reading of the Death Penalty*, in *CAPITAL PUNISHMENT: A READER* 189 (Glenn H. Stassen ed., 1998). McBride posits an interesting argument in this context. He contends that capital punishment maintains an inherently religious character by which "the condemned serves as a 'sacrificial lamb' who dies for us and thereby saves us from the spiral of violence which otherwise would surely ensue." *Id.* Justice Stewart, in the lead opinion in *Gregg v. Georgia*, expressed a similar sentiment. 428 U.S. at 183 (explaining that capital punishment, in part, "is an expression of society's moral outrage at particularly offensive conduct").

2. The Case for Mercy and Forgiveness

Coinciding with the rise of retributivism, the shift away from rehabilitation¹⁷⁴ within the criminal justice system has placed substantial pressure on death penalty opponents. In response, some have launched direct attacks on retributive philosophies of punishment, hoping to establish a "theology of restoration" in its place.¹⁷⁵ Instead of vengeance through execution, as related abolitionist arguments run, society should move beyond barbaric retribution¹⁷⁶ toward deeper understanding of the criminal condition.¹⁷⁷

Still others who oppose the death penalty launch unapologetic attacks against invocation of the ultimate punishment. Using religious principles as support, such arguments assert that the use of capital punishment necessarily entails human usurpation of divine power over life and death.¹⁷⁸ To execute an individual, according to this abolitionist viewpoint, is to infuse human fallibility¹⁷⁹

174. See, e.g., Von Hirsch, *supra* note 166, at 661 (citing disappointment with treatment efforts as the main reason rehabilitative models of punishment have declined since the early 1970s); Kevin Reitz, *Sentencing Guideline Systems and Sentencing Appeals: A Comparison of Federal and State Experiences*, 37 J. CHURCH & STATE 263, 272 (1995), reprinted in THE HANDBOOK OF CRIME AND PUNISHMENT 542, 542 (Michael Tonry ed., 1998) (observing that rehabilitation, "once the guiding theoretical light of American sentencing structures, has fallen by the wayside in the past two and a half decades, leaving policy makers scrambling for an alternative blueprint").

175. MACKAY, *supra* note 164, at 49. Mackey perceives religious faith as the key to solving many of the modern world's criminal problems. *Id.* (imploing the religious community to "re-interpret scriptural values for a world grown tired of the cycle of violence and vengeance").

176. In his concurring opinion in *Furman*, Justice Marshall stated that the Eighth Amendment protection from cruel and unusual punishment serves as "insulation from our baser selves." 408 U.S. at 345 (Marshall, J., concurring).

177. For the Christian faith, such understanding is rooted in the New Testament. See generally John H. Yoder, *Noah's Covenant, the New Testament, and Christian Social Order*, reprinted in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 429, 438-42 (Hugo Adam Bedau ed., 1997) (describing civil order as a derivative of events chronicled in the New Testament).

178. STEFFEN, *supra* note 1, at 156. Professor Steffen's stridently sarcastic argument speaks best for itself:

Human appropriation of such power [over life and death], and God's deputizing of human beings to exercise this power knowing that it cannot be exercised consistently with God's perfect justice, necessarily leads us to conclude that the religious meaning of the death penalty is that God is dead. God is dead because human beings have usurped a divine power. If human beings can do God's work as God would do it—perfectly—then God is emptied of meaning.

Id.

179. Human fallibility under abolitionist accounts would include imposition of the death penalty in an arbitrary and capricious manner. See, e.g., *Furman*, 408 U.S. at 293 (Brennan, J., concurring) ("When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied.")

into the properly divine decision as to who should live and who should die.¹⁸⁰

V. TOWARD BALANCED ODDS: ADDRESSING THE THEOLOGICAL LOTTERY GAME IN DEATH PENALTY SENTENCING

A. *The Need for Simple, Clear Jury Instructions*

When the door shuts behind a capital jury, seemingly impenetrable legal walls fortifying the ensuing deliberations instantly arise.¹⁸¹ Whether or not those jurors truly understand the instructions given to them only moments before,¹⁸² they bear the responsibility of determining life or death for a fellow human being.¹⁸³ Judges typically fail, however, to express the magnitude of such responsibility in capital punishment jury instructions.¹⁸⁴ In many instances, this failure invites jurors to depend on religious discussion, and leaves those on the outside concerned for defendants' fates struggling for a mere glimpse inside those intimidating jury room walls.

Thus, capital jury instructions,¹⁸⁵ as well as the very process by which judges dictate those instructions, should be changed in three basic respects. First, instructions should clearly express the subtleties and relevant legal terminology involved in a particular

180. See STEFFEN, *supra* note 1, at 154 (contending that human systems of justice are "beset with fallibility and an imperfect moral knowledge").

181. See, e.g., Higginbotham, *supra* note 43, at 1049 (referring to the jury as the "blackbox of the judicial system" because of the inscrutable defenses surrounding it).

182. Consider, for example, an actual juror's depiction of the confusion wrought by the instructions given to the capital jury on which she served:

They tried to prepare us, but were we prepared? No, I do not feel like we were. We understood what we were doing but the way we were supposed to come up with that verdict using these specific instructions were [sic] confusing, the manner in which those forty pages were [sic] written. It was very little use to us. The aggravating and mitigating factors were verbally presented, I read it to the jurors. It was not clear at all. When the bailiff brought all the evidence in, we all looked at each other and said, "Now what do we do?"

Hoffmann, *supra* note 5, at 1151.

183. *But see* Godfrey v. Georgia, 446 U.S. 420, 432-33 (1980) (holding that a jury may not impose the death penalty when instructions regarding aggravating factors are overly broad and vague).

184. *Cf.* Hoffmann, *supra* note 5, at 1158 (contending that instructions should encompass unequivocal language informing jurors that their roles are intentionally difficult, and that each must individually bear the responsibility for the death penalty sentencing decision).

185. Some have argued that altered jury instructions would still prove ineffective against widespread public biases, which constantly enter into the fray of deliberations and unjustifiably influence outcomes. See, e.g., Roberts & Stalans, *supra* note 46, at 38.

case, so as to account fully for modern linguistic understanding.¹⁸⁶ When the complexities of a given set of capital sentencing instructions overly burden a jury, the threat of religious discussion as extraneous material takes root, and may thereafter grow unfettered until it suffocates the entire dignity of the life or death decision. Consequently, judges should take the initiative to formulate clear, simple, and tailored jury instructions that,¹⁸⁷ at least in part, account for such an imposing potential problem in capital deliberations.¹⁸⁸ Pattern instructions are not the answer because judges cannot effectively recast their language to clearly reflect the details of specific cases.¹⁸⁹ Instead, judges should use case-specific instructions, organized in short, simple sentences, written in an active rather than passive voice, and void of legal jargon. Perhaps most significantly, such tailored instructions should explicitly inform jurors of their collective responsibility to avoid discussing extraneous matters, particularly their respective religious views.

Second, judges should foreshadow sentencing deliberation instructions by incorporating written *pre-instruction* to juries.¹⁹⁰

186. See generally; Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1321-58 (1979) (analyzing the results of psycholinguistic research on juror comprehension of various linguistic constructions); William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 739 (1981) (contending that typical jury instructions "abound with legal language and abstract concepts, both obstacles to juror comprehension"). Indeed, some commentators suggest that courts should provide *written* instructions to juries. See, e.g., Strawn & Buchanan, *supra* note 64, at 483 (suggesting that written instructions may alleviate confusion in the jury room).

187. To effectuate this change, however, judges must overcome their traditional reluctance to diverge from the safe harbor of pattern instructions. See Schwarzer, *supra* note 186, at 737. Judicial experimentation with jury instructions is rare, due in substantial part to fears of subsequent reversal on appeal. *Id.* Thus, to countervail these fears and prompt necessary changes in jury instructions, appeals courts should be willing to accept more judicial innovation.

188. This Note purposefully stops short of advocating that jury instructions must always and necessarily entail prescriptions against religion and religious influences, per se, as part of deliberations. To do so would usurp a court's prerogative in this respect, and this Note "in no way means to suggest that jurors cannot rely on their *personal* faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen." *Jones v. Kemp*, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989) (emphasis added). Any attempt to articulate a total bar on religion in the deliberation process could possibly infringe upon individual religious liberties. See, e.g., Carter, *supra* note 152, at 940 (contending that calls for abandonment of faith when religious citizens serve in public capacities are perverse because they "ask the devout citizen to become another person, to abandon the most important aspect of her life"). Therefore, this Note addresses the need for jury instructions, as well as other aspects of the capital punishment system, sufficiently to acknowledge and account for religious discussion that crosses the extraneous material line.

189. See Schwarzer, *supra* note 186, at 739 (suggesting that "despite their convenience, [pattern instructions] . . . are a poor vehicle for communicating with jurors").

190. Cf. DIAMOND & LEVI, *supra* note 77, at 21 (advocating pre-instruction).

The current practice of orally instructing jurors as to their sentencing duties only at the beginning of the sentencing phase is inadequate. Straightforward, written pre-instruction regarding the entire duties of jurors, before even the trial phase begins, would equip jurors with a modicum of knowledge, at a minimum, about important factors to anticipate during the course of the trial.¹⁹¹ Even more importantly, however, pre-instruction could serve to inform capital jurors as to the magnitude of their upcoming role as sentencers, thereby entrenching the notion of their responsibility to decide fairly and rationally a defendant's punishment.

Lastly, jurors must hold a viable right to ask questions to the court throughout the sentencing process. In turn, judges should willingly clarify any ambiguities.¹⁹² Instructions need to express the court's willingness to help jurors overcome any confusion as to their role in sentencing. Admittedly, answering a jury's questions concerning the method of balancing aggravating and mitigating circumstances, for example, could potentially decrease efficiency in the capital sentencing process. Nevertheless, the ultimate consequences of death penalty deliberations certainly warrant sufficient safeguards against, and ample opportunities to ameliorate, jury confusion. When judges provide little clarification and individual jurors have nowhere to turn for guidance, juries may then choose to commence the theological lottery game with odds stacked heavily against defendants. To counter this possibility, a juror should feel that she not only may, but rather, is *obligated* to disclose to the judge any religious discussion amongst jurors. By opening the lines of communication between judge and jury, the capital punishment game of chance may indeed become more predictable and just in its outcomes.

191. *Cf. id.* (contending that pre-instruction foreshadows the "legally relevant" factors in a trial).

192. During the "Capital Jury Project" interviews, one juror described the pervasive exasperation amongst the entire jury in respect to specific sentencing instructions:

[I]t was . . . very frustrating, because, they just kept tellin', y'know the bailiff, just kept sayin', "Read the instructions." And here are twelve people who really don't, y'know, and it's kind of left up to us to interpret them, and come to an agreement on that interpretation, and that's really scary, because you think, "Well what if we're wrong?" . . . "what if we can all twelve mutually agree and we're still wrong?" . . . I think I was more aware of just doing . . . what I thought, in my heart, was the right thing to do.

Hoffmann, *supra* note 5, at 1152.

B. Lessening the Impact of Rule 606(b)

Although appellate review¹⁹³ of death penalty sentences is automatic in all but one of the states allowing capital punishment,¹⁹⁴ Federal Rule of Evidence 606(b) and its comparable state statutes undermine the validity of appellate procedures with respect to determining whether religious discussion constitutes prejudicial influence in capital deliberations. When courts halt or, at a latter stage, deny admission of inquiries into the inner workings of juries, as did the Utah Supreme Court in *State v. DeMille*,¹⁹⁵ the consequences are often disturbingly measurable when they involve capital punishment sentencing deliberations. After all, a defendant's life may depend upon a court's interpretation and related application of Rule 606(b).

1. Interpretations and Applications

To abide truly by the concept of appellate review as the final safeguard for determining prejudicial errors committed at the trial level,¹⁹⁶ judicial interpretations and applications of Rule 606(b) should consistently account for the threat that religious discussions often pose in death penalty deliberations.¹⁹⁷ Whereas appellate courts review capital punishment sentences to determine whether the jury relied upon passion, prejudice, or any other arbitrary factor,¹⁹⁸ religious discussion usually escapes such labeling. If, by

193. In accordance with Eighth Amendment interpretation, appellate review must include a determination of whether a death penalty sentence was proportionate to the defendant's personal culpability or blameworthiness. See *People v. Hayes*, 564 N.E.2d 803, 829 (Ill. 1990). Proportionality determinations, however, need not extend beyond the facts in a particular case. See *Pulley v. Harris*, 465 U.S. 37, 45 (1984) (holding that the Eighth Amendment does not require appeals courts to compare capital cases involving identical convictions in order to determine if a death sentence is proportionate). While it may be possible to assess proportionality in a given defendant's case by examining death penalty sentences in isolated contexts, similar detection of the threat of religious discussion as extraneous material in capital punishment deliberations is virtually impossible under strict application of Rule 606(b).

194. See HOOD, *supra* note 13, at 120. Arkansas stands alone in not providing automatic appellate review. *Id.*

195. 756 P.2d 81, 83-84 (Utah 1988).

196. See generally Joseph M. Giarratano, *To the Best of Our Knowledge, We Have Never Been Wrong: Fallibility vs. Finality in Capital Punishment*, 100 YALE L.J. 1005 (1991) (outlining the capital punishment appellate process).

197. See, e.g., *DeMille*, 756 P.2d at 83-85.

198. The most commonly asserted arbitrary factors are race, gender, ethnicity, indigence, sympathy for the victim, adverse media publicity, and fear of community response to a lesser charge. See PALMER, *supra* note 5, at 146.

chance, an appellate court recognizes religious discussion amongst jurors as potentially problematic, Rule 606(b) still lurks formidably in the background.¹⁹⁹

Capital defendants, protected only by insufficient or ineffective counsel in many unfortunate instances,²⁰⁰ can rarely voice audible protests.²⁰¹ Rather than passively listening for such calls, however, courts should actively consider religious discussion as extraneous material under Rule 606(b).²⁰² Classifying religious discussion as extraneous material will not, however, necessarily mandate a new trial in every case.²⁰³ Instead, it would merely result in a presumption of prejudice, which is already reflected in the definition of other extraneous contact, communication, or tampering.²⁰⁴

2. Policy Implications

An amended interpretation of Rule 606(b), for which this Note advocates, need only address the threat of religious discussion as extraneous material in capital punishment deliberations. The policy justifications underlying Rule 606(b)—jury autonomy and finality of litigation²⁰⁵—would not suffer in the wake of change accounting for the potentially irreversible consequences stemming from prejudicial religious discussion among jurors.

On the one hand, including religious discussion in the extraneous material exception to Rule 606(b) would not substantially compromise jury autonomy. During the course of deliberations, an individual juror would, as always, be able to rely upon her own religious views,²⁰⁶ without even a modicum of concern about personally intrusive post-sentencing questions. If a defendant produces suffi-

199. See, e.g., Crump, *supra* note 14, at 514.

200. See JASPER, *supra* note 62, at 11 (noting that approximately 90% of prisoners facing execution cannot afford their own lawyers and, as a result, attorneys working for little or no compensation are assigned to protect their individual fates).

201. See *McCleskey v. Kemp*, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) (“Those whom we would banish from society or from the human community itself often speak in *too faint a voice* to be heard above society’s demand for punishment.” (emphasis added)).

202. See *id.* (Brennan, J., dissenting) (“It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.”); see also *supra* note 70 (discussing *McCleskey v. Kemp*, particularly Justice Brennan’s dissent).

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

204. See *id.*; cf. *Mallard v. State*, 661 S.W.2d 268, 278 (Tex. App. 1983) (holding that jury discussion of parole law constituted misconduct, but did not violate defendant’s right to a fair and impartial trial).

205. See *supra* Part III.

206. See *supra* note 187.

cient reason for inquiry under Rule 606(b) regarding the impact of any religious discussion, then subsequent investigation would focus solely on intrajury communication during the sentencing phase. Moreover, the need for inquiry would decrease tremendously with implementation of both clear jury instructions and procedural safeguards that contribute to overall juror comprehension.²⁰⁷

In addition, an amended reading of Rule 606(b) would not sacrifice the valuable policy goal of finality of litigation. Appellate courts need only realize that religious discussion, as one factor in passionate, prejudicial, or arbitrary sentencing, could lead to unjustified imposition of the death penalty. When reviewing capital punishment cases, appellate courts would thus examine jury deliberations with an additional red flag in mind. Only when deliberations are truly questionable would further inquiry into the prejudicial influence of religious discussion be necessary under the exception to Rule 606(b).

VI. CONCLUSION

"In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction."²⁰⁸ Ours is also a society that strongly affirms every individual's right to the free exercise of religion.²⁰⁹ When death penalty deliberations and religious discussion collide, however, the dual affirmations pose unique problems to the American justice system. From their respective cells on death row, Kevin Young²¹⁰ and Leland DeMille²¹¹ would willingly attest to that. For all its inherent worth in countless other contexts, religious discussion among jurors deciding whether a fellow human being should live or die only serves to undermine capital punishment in general and risk unjustified executions in specific. Tearing down the seemingly impenetrable walls of Rule 606(b) and recasting the critical dynamic between judge and jury would serve as important initial steps in

207. *See supra* Part V.A.

208. *Furman v. Georgia*, 408 U.S. 238, 286 (Brennan, J., concurring).

209. U.S. CONST. amend. I.

210. *See Young v. State*, 12 P.3d 20 (Okla. Crim. App. 2000).

211. *See State v. DeMille*, 756 P.2d 81 (Utah 1988).

clearing the dust that falls throughout our justice system each time religion and the death penalty collide.

*Gregory M. Ashley**

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