Denver Law Review

Volume 83 | Issue 2 Article 11

January 2005

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Recommended Citation
Cory Spiller, People v. Harlan: The Colorado Supreme Court Takes a Step toward Eliminating Religious Influence on Juries, 83 Denv. U. L. Rev. 613 (2005).

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People v. Harlan: The Colorado Supreme Court Takes a Step toward Eliminating Religious Influence on Juries

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PEOPLE V. HARLAN: THE COLORADO SUPREME COURT TAKES A STEP TOWARD ELIMINATING RELIGIOUS INFLUENCE ON JURIES

"An eye for an eye will only make the whole world blind."[1]

–Mahatma Gandhi

INTRODUCTION

Gandhi's familiar quote is a powerful response to the ancient maxim "an eye for an eye, a tooth for a tooth."[2] Death penalty opponents often cite Gandhi's quote to suggest that the death penalty is flawed and should be abolished.[3] Gandhi's quote reminds people that while American society allows the death sentence in murder cases, it does not do so blindly. A death sentence is not part of a simple equation as "an eye for an eye" suggests. Justice requires the courts to employ a rigorous, structured and exhaustive process before deciding whether a citizen must die for the crime he or she committed.

The court placed Robert Harlan's life in the hands of the jury.[4] The court admonished the jury to follow a strict process.[5] They were to listen to the evidence, follow the court's legal instructions, apply a four-step process, and not vote for the death penalty automatically.[6] A trial court found that the jury had not followed the court's strict legal instructions.[7] On appeal, the Colorado Supreme Court found that because jurors brought Bibles into the jury deliberation room, and discussed biblical passages such as "eye for an eye," the court could no longer trust that neither "pride or prejudice" influenced the jury's verdict.[8] Robert

1. *See* Gandhi Statue dedication Ceremony at Hermann Park (Oct. 2, 2004), http://www.indianembassy.org/amb/amb_gandhi_houston_04.htm.

2. The idea of an "eye for an eye" can be found in the Bible in *Leviticus* 24:20. It has been traced, however, to other ancient sources, most notably the Code of Hammurabi. *See* CODE OF HAMMURABI § 196 (Robert Francis Harper ed. & trans., Univ. of Chicago Press 2d. ed. 1904) (about 1750 B.C.).

3. *See, e.g.*, The Oklahoma Coalition to Abolish the Death Penalty, http://www.ocadp.org/speakers.htm (last visited Oct. 16, 2005).

4. *See* People v. Harlan, 109 P.3d 616 (Colo. 2000).

5. *See Harlan*, 109 P.3d at 629-30.

6. *Id.* at 620.

7. *Id.* at 619-20 ("The trial court concluded that there was a reasonable possibility that use of the Bible in the jury room to demonstrate a requirement of the death penalty for the crime of murder would have influenced a typical juror to reject a life sentence for Harlan.").

8. *See id.* at 633 (referring to COLO. REV. STAT. § 16-11-103(b)(2005) which requires the Colorado Supreme Court to overturn death penalty conviction is the sentence was imposed due to pride of prejudice).

Harlan's sentence was overturned and he was re-sentenced to life without the possibility for parole.[9]

The circumstances in *People v. Harlan* were not unique. Advocates on both sides of the issue frequently cite biblical passages and religious arguments.[10] However, challenges to sentences allegedly tainted by religion "often face formidable state evidentiary hurdles and rarely result in mistrials or reversals."[11] *Harlan* is unique because it is a rare example where a court has concluded that there was a sufficient likelihood that religion could have had a prejudicial effect on the outcome of the jury's deliberation.[12]

The court's decision sparked a harsh reaction from conservative and religious groups. Colorado Governor, Bill Owens, reacted by stating, "[t]oday's decision is demeaning to people of faith and prevents justice from being served . . . ."[13] The decision inspired one commentator to write, "[i]n sum, the anti-religious principle of *Harlan* categorically condemns a juror whose morality is informed by religion. God is dead, at least in the chambers of the Colorado Supreme Court."[14] The court's decision was understandably controversial; however, to claim that the decision was anti-religious is a mischaracterization. The decision in *Harlan* only prohibits the physical presence of the Bible in the jury deliberation room.[15]

In Part I, this article will discuss the facts of *Harlan* and how the Colorado Supreme Court came to its decision. In addition, it will discuss the Sixth and Fourth Circuit Courts of Appeals' decisions in *Arnett v. Jackson*[16] and *United States v. Bakker*[17] respectively. In Part II, the article will compare *Arnett* and *Bakker* to *Harlan* and discuss emerging standards courts have applied when analyzing religious influences in sentencing decisions. The article will then consider whether the Colorado Supreme Court was correct to assert that we live in a religious society that could be prejudiced by the presence of the Bible. Next, the article will discuss the court's narrow holding in light of the arguments made in Justice Rice's dissent. Part III will analyze the trial court's decision to impeach the jury's verdict, and dismiss the protection afforded by

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9. *Id.* at 617.

10. Gary J. Simson & Stephen P. Garvey, *Knockin on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV., 1090, 1092 (2001).

11. *Id.* at 1121.

12. *Harlan*, 109 P.3d at 619-20.

13. *Court: Jurors Erred by Consulting Bible in Death Penalty Case*, CHRISTIAN CENTURY, Apr. 19, 2005, at 16, *available at* 4/19/05 CHRSTNCTY 16 (Westlaw) [hereinafter *Jurors Erred*].

14. Bruce Fein, *Purging Religious Influence*, WASH. TIMES, April 19, 2005, at A14. The author makes the argument that the spoken word is more powerful than the written word. *See id.*

15. *See Harlan*, 109 P.3d at 632.

16. 393 F.3d 681 (6th Cir. 2004).

17. 925 F.2d 728 (4th Cir. 1991).

Rule 606(b).[18] Finally, in Part IV, this article will predict how the court would have ruled if the verdict had been challenged on Establishment Clause grounds.

In conclusion, this article will suggest ways courts and lawmakers could modify the conditions of jury deliberation and jury instructions in an effort to ensure defendants receive sentences free from prejudice. The Colorado Supreme Court and other courts across the country attempt to strike a balance between respecting religious views and limiting religious influence in the courtroom.[19] Courts are asking, "How much religion should we tolerate?" The Colorado Supreme Court in *People v. Harlan*[20] has taken a step towards answering that question: no Bibles in the jury deliberation room.

I. BACKGROUND

A. The Colorado Supreme Court's Decision in People v. Harlan[21]

In 1995, a jury convicted Robert Eliot Harlan of raping and murdering Rhonda Maloney and of shooting Jaquie Creazzo.[22] He shot Jaquie Creazzo as she attempted to rescue Rhonda Maloney; the injury Jacquie Creazzo suffered left her paralyzed for life.[23] Then, he seized Maloney and savagely beat, raped, and killed her.[24] The jury sentenced Robert Harlan to death, and the Colorado Supreme Court upheld the verdict.[25]

Subsequently, Harlan brought a motion to vacate his death sentence due to jury misconduct.[26] Harlan alleged that jurors brought Bibles into the jury room during deliberations and the Bibles presented them to "demonstrate . . . authoritative passage[s] commanding imposition of the death penalty."[27] The trial judge frequently warned the jury to ignore any and all extraneous information,[28] and told the jury that they were to consider the evidence brought forward by the trial and "nothing else whatsoever."[29] The court instructed the jury that Colorado law requires that they follow the instructions and guidelines the court had given.[30] Specifically, the court told the jury that their verdict could not be "the

18. *Harlan*, 109 P.3d at 625.
19. *See* cases cited *supra* notes 16-17.
20. *Harlan*, 109 P.3d at 616.
21. 109 P.3d 616 (Colo. 2000).
22. *Harlan*, 109 P.3d at 618.
23. *Id.* at 618.
24. *Id.* at 619.
25. *Id.*
26. *Id.*
27. *Id.*
28. *See id.*
29. *Id.* The court also warned the jury not to discuss the case with anyone, not to watch anything on television about the case, and to have someone scan the newspaper before they did to make sure they did not see anything that concerned the criminal justice system. *See id.*
30. *See id.*

result of passion, prejudice or other irrational or arbitrary emotional response."[31]

In an instruction that the dissent would later rely upon in its opinion, the court directed the jury that their decision to impose a death sentence would require them to "apply [their] reasoned judgment in deciding whether the situation calls for life imprisonment or the imposition of the death penalty."[32] The jury would "still make a further individual moral assessment of whether [they have] been convinced beyond a reasonable doubt that the death penalty . . . is appropriate."[33] Finally, the jury "should attempt to arrive at a reasoned judgment as to whether [they] have been convinced beyond a reasonable doubt that the mitigating factors do no outweigh the aggravating factor or factors."[34]

Three months after the jury sentenced Harlan to death, a defense counsel investigator interviewed five members of the jury.[35] The jurors revealed the physical presence and discussion of the Bible during the death penalty deliberations,[36] which prompted Harlan to file a motion to vacate the sentence.[37] His motion alleged juror misconduct, and the trial court granted an evidentiary hearing.[38]

According to facts brought forward at the hearing, the jury deliberated late into Friday evening, but did not reach a verdict.[39] That night, several jurors read passages from the Bible in their hotel rooms and searched for passages that related to the death penalty and the jury's role in sentencing the defendant.[40] One juror, Ms. Eaton-Ochoa, took notes on two particular Bible passages.[41] The first passage was *Leviticus* 24:20-21, "fracture for fracture, eye for eye, tooth for tooth, as he has caused disfigurement of a man, so shall it be done to him. And whoever kills an animal shall restore it, but whoever kills a man shall be put to death."[42] The second passage was *Romans* 13:1, "let every soul be subject to the governing authorities for there is no authority except from God and the authorities that exist are appointed by God."[43] The trial court

31. *Id.*
32. *Id.* at 622.
33. *Id.*
34. *Id.*
35. *See id.*
36. *See id.*
37. *See id.* at 619.
38. *See id.* at 620.
39. *See id.*
40. *See id.*
41. *See id.* at 622.
42. *Id.* The court noted:

> [T]hese quotations are taken from the record, in which counsel read from juror Yantis-Cumming's Bible, a New Scofield Study Version, [which] is the Bible that Eaton-Ochoa used on Friday night and from which she took her notes and may have been one of the Bibles present in the jury room.

Id. at 622 n.3.

43. *Id.*

concluded that these passages and the presence of the Bible in the jury room could have caused jury members to vote for the death penalty.[44] Therefore, the trial court reversed the jury's death sentence.[45]

On appeal, Rule 606(b) limited the Colorado Supreme Court's inquiry into whether the biblical passages could have prejudiced the jury.[46] Rule 606(b) precludes an inquiry into a jury verdict with the exception of inquiries into the improper introduction of extraneous evidence.[47] The court drew from Colorado Rule 606(b) case law and compiled a list of permissible factors to consider in such an inquiry.[48]

The Colorado Supreme Court considered evidence permissible under the compiled list and concluded, "[they] can no longer say that the death penalty verdict was not influenced by passion, prejudice, or some other arbitrary factor."[49] The Colorado Supreme Court upheld the trial court's order to vacate the death sentence and imposed a life sentence without the possibility of parole.[50]

Justice Rice authored a dissent in which Justice Kourlis joined.[51] Justice Rice argued that the only issue was whether the presence of the Bible caused Harlan's sentence to be prejudiced.[52] She stressed that there was no misconduct because the court did not instruct the jury against bringing Bibles into the deliberation.[53] Furthermore, she argued that defense counsel encouraged the jury to discuss the Bible because he

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44. *See id.* at 634.

45. *See id.* at 623.

46. *See id.* at 626 ("We must . . . determine whether the trial court's findings of fact are supported by evidence admissible under COLO. R. EVID. 606(b).") Rule 606(b) states:

> 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 his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jurors' attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

COLO. R. EVID. 606(b)

47. *See id.* (discussing the exception to COLO. R. EVID. 606(b)'s prohibition against impeaching a verdict with testimony from jurors).

48. *See id.* The court stated:

> Each of these factors is appropriate for inquiry . . . (1) how the extraneous information relates to critical issues in the case; (2) how authoritative is the source consulted; (3) whether a juror initiated the search for the extraneous information; (4) whether the information obtained by one juror was brought to the attention of another juror; (5) whether the information was presented before the jury reached a unanimous verdict; and (6) whether the information would be likely to influence a typical juror to the detriment of the defendant.

Id.

49. *Id.*

50. *See id.* at 633.

51. *See id.* at 634-39.

52. *See id.* at 636.

53. *See id.* at 635.

asked jurors about the concept of "eye for an eye" during voir dire,[54] and discussed Harlan's habit of reading the Bible during the closing argument.[55] She also argued that the court effectively instructed the jurors to consider the Bible when it asked them to apply their "reasoned judgment," and make an "individual moral assessment."[56] Furthermore she argued, the majority was unreasonable in assuming that the Bible prejudiced the jury and the majority opinion "exhibits a complete lack of faith in the jury system."[57] The Colorado Supreme Court's decision is in stark contrast to a recent decision by the Sixth Circuit Court of Appeals in which that court held that a Judge did not act inappropriately when she cited the Bible as the basis for her sentencing decision.[58]

B. *The Sixth Circuit Court's Decision in* Arnett v. Jackson[59]

In *Arnett,* the Sixth Circuit Court of Appeals declined to overrule an Ohio Supreme Court decision holding that a trial court judge's recitation of the Bible during her sentencing decision did not violate the petitioner's due process rights.[60] The Sixth Circuit overruled the district court's determination that the trial judge violated the petitioner's due process rights when she impermissibly referenced the Bible during the petitioner's sentencing hearing.[61] The petitioner, James Arnett, entered guilty pleas on ten counts of rape and one count of pandering obscenity involving a minor.[62] The victim of Arnett's sexual abuse was the daughter of his live-in girlfriend.[63] During the sentencing hearing, the Judge referenced the Bible as an explanation for the defendant's sentence.[64] The trial judge's monologue, which served as the basis for the petitioner's due process claim, reads in pertinent part:

> Trial Court: And in looking at the final part of my struggle with you, I finally answered my question late at night when I turned to one additional source to help me. And basically, looking at Rachel on one hand, looking at the photographs of you happily as a child, and looking at the photographs of downloading that came from your computer, I agree they're very sad photographs, they're pure filth, it just tells me how ill you are.

54. *Id.* at 635 n.3.
55. *Id.*
56. *Id.* at 637.
57. *Id.* at 638.
58. *See generally* Arnett v. Jackson, 393 F.3d 681 (2004).
59. *Arnett*, 393 F.3d at 681.
60. *See id.* at 683.
61. *Id.*
62. *Id.* at 682-83.
63. *Id.* at 683.
64. *Id.* at 684.

> Trial Court: And that passage where I had the opportunity to look is Matthew 18:5, 6. 'And whoso shall receive one such little child in my name, receiveth me. But, whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and he were drowned in the depth of the sea.'[65]

Arnett appealed the trial court's decision and the Ohio Court of Appeals vacated the sentence, "concluding that his due process rights were violated by virtue of the trial court 'factoring in religion' when imposing its sentence."[66] The Ohio Supreme Court unanimously concluded, "the judge's Biblical reference did not violate Arnett's right to due process because it was not the 'basis' of the sentencing determination, but rather 'one of several reasons' or an 'additional source' relied upon by the trial court."[67] Arnett filed a petition for writ of habeas corpus in district court alleging that the Ohio Supreme Court incorrectly applied Supreme Court precedent on the issue of whether the court can rely on religious passages in a sentencing decision.[68] Arnett's habeas petition also alleged that the trial court violated the Establishment Clause of the First Amendment; however, the United States magistrate judge held that the Establishment Clause claim was procedurally invalid because the defendant raised it for the first time in the Ohio Supreme Court.[69] The magistrate judge found that the trial court's reliance on the Bible as a "final source of authority" constituted an impermissible factor for sentencing, and granted Arnett's habeas petition on the finding of a denial of due process.[70]

On appeal, the Sixth Circuit recognized that although the United States Supreme Court has held that a fair trial in a fair tribunal is a basic requirement of due process,[71] the Court has not decided the narrow issue of whether citing a religious text during a sentencing hearing violates a defendant's due process rights.[72] The Court of Appeals held that the magistrate judge should not have granted the petition because the Supreme Court had not decided the exact issue at hand.[73] Furthermore, the Sixth Circuit held that the trial judge's reliance on the Bible was proper because "the principle embedded in the referenced Biblical passage (of

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65. *Id.*
66. *Id.*
67. *Id.* (quoting State v. Arnett, 724 N.E.2d 793, 803 (Ohio 2000)).
68. *Id.* at 684-85.
69. *See id.* at 685 n.2.
70. *Id.*
71. *See In re* Murchinson, 349 U.S. 133, 136 (1955).
72. *See Arnett,* 393 F.3d at 686 ("[T]he Supreme Court has never specifically decided whether a defendant's right to due process is violated if a religious text or commentary is cited during a sentencing hearing and/or considered by a trial court in reaching a sentencing determination.").
73. *See id.* at 686.

not harming young children) is fully consistent with Ohio's sentencing consideration to the same effect."[74]

The dissent argued that the Bible played a significant role in Arnett's sentence.[75] The dissent agreed with the district court's determination that the trial judge looked to the Bible as her "final source of authority,"[76] but it reasoned that the trial judge would not have employed the Bible to answer her dilemma unless it "carries special significance as a source of moral authority."[77] The dissent believed the trial judge accorded the biblical passages read at Arnett's sentencing hearing "constitutionally significant weight."[78] Therefore, the trial judge violated Arnett's rights to due process.[79] The dissent stated that the trial judge's motivation was identical to that of the sentencing judge in *United States v. Bakker*.[80] In that case, the Fourth Circuit vacated the defendant's sentence because the sentencing judge's "personal religious principles" were the basis for the sentencing decision.[81]

C. *The Fourth Circuit Court's Decision in* United States. v. Bakker[82]

In *United States v. Bakker*, James O. Bakker, a well-known televangelist, appealed his fraud and conspiracy convictions to the Fourth Circuit Court of Appeals.[83] Bakker challenged his sentence by claiming that the trial judge's "personal religious beliefs" impermissibly affected the sentence.[84] During sentencing, the trial judge stated that Bakker "had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests."[85] Bakker argued that the judge's comments constituted an abuse of discretion and a violation of Bakker's due process rights because the judge factored personal religious beliefs into the sentence.[86] The government argued that the judge was not speaking for himself but for society as a whole and was well within his discretion.[87]

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74. *Id.* at 686-87. The "Ohio Sentencing considerations" referred to by the Sixth Circuit Court of Appeals are enumerated in the OHIO REV. CODE ANN. § 2929.12(b)(1) (2005). *Inter alia*, the Code requires the sentencing judge to consider whether: "(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim;" and whether "(6) The offender's relationship with the victim facilitated the offense." *Id.*
75. *Arnett*, 393 F.3d at 689 (Clay, J., dissenting).
76. *Id.* at 690.
77. *Id.*
78. *See id.* at 692.
79. *Id.* at 692.
80. 925 F.2d 728 (4th Cir. 1991).
81. *Bakker*, 925 F.2d at 741.
82. 925 F.2d 728 (4th Cir. 1991).
83. *Id.* at 731.
84. *Id.*
85. *Id.* at 740.
86. *Id.*
87. *Id.*

The Circuit Court recognized that it was appropriate for a sentencing court to consider the social impact of the crimes the defendant allegedly committed and the opportunity to vindicate those crimes for the community.[88] And, "to a considerable extent a sentencing judge is the embodiment of public condemnation and social outrage."[89] In dicta, the court recognized that while the Constitution does not require a person to surrender her religious beliefs if they are appointed to judicial office, "[c]ourts . . . cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it."[90] The court held that the trial judge's comments had exceeded his discretion and the court vacated Bakker's sentence and remanded his case for re-sentencing.[91]

II. ANALYSIS

In *People v. Harlan*,[92] the Colorado Supreme Court concluded that the Bible might have prejudiced the death sentence the jury handed down.[93] In doing so, the court avoided following the dubious "vaguely in-line" standard espoused in *Arnett v. Jackson*[94] and argued for in Justice Rice's dissent.[95] The standards utilized in *Arnett* and *United States v. Bakker*[96] reveal standards courts have applied to sentences allegedly tainted by religious influence. Furthermore, the circuit court cases reveal the standards the Colorado Supreme Court may apply if it were reviewing a sentence decided by a judge. The *Harlan* decision correctly asserted that the Bible has a prejudicial effect on jurors because of the profound role religion plays in the average American life.[97] The majority's narrow holding took a big step towards limiting religious influence in jury deliberations. However, in reality it only prohibits the presence of the Bible in the jury deliberation room.[98]

A. A Questionable Standard

The Sixth Circuit majority opinion in *Arnett* attempted to establish the following standard: courts will tolerate biblical passages if they are "vaguely in-line" with state law.[99] Justice Rice employed the same logic

88. *Id.* (citing United States v. Torres, 901 F.2d 205, 246–47 (2d Cir. 1990)).
89. *Id.* (citing United States v. Madison, 689 F.2d 1300, 1314–15 (7th Cir. 1982)).
90. *Id.*
91. *Id.* at 741.
92. 109 P.3d 616 (Colo. 2005).
93. *Harlan*, 109 P.3d at 634.
94. 393 F.3d 681 (6th Cir. 2005).
95. *Harlan*, 109 P.3d at 634–39.
96. 925 F.2d 728 (4th Cir. 1991).
97. *See Harlan*, 109 P.3d at 633.
98. *See id.*
99. *See Arnett*, 393 F.3d at 686–87. The majority agues that the biblical quote cited by the judge was "fully consistent with Ohio's sentencing consideration," codified at OHIO REV. CODE ANN. § 2929.12(b)(1) (West 2005). *Id.* at 687.

in the *Harlan* dissent.[100] She argued the reading and discussion by the jury of *Romans* 13:1, "[e]veryone must submit himself to the governing authorities, for there is no authority except that which God has established," could not have been prejudicial to the jury because the passage merely "instructs individuals to follow the laws of Colorado."[101] The majority opinion in *Harlan* found Justice Rice's arguments unpersuasive[102] and correctly chose not to follow the Sixth Circuit's standard because it would force judges to take part in biblical interpretation.

The "standard" suggests that judges may allow the incorporation of biblical passages in sentencing decisions if they can find an interpretation of the biblical passage that resembles state law. For example, the Sixth Circuit found that *Matthew* 18:5, which calls for the punishment of child molesters by hanging a millstone around their necks and having them thrown in the sea,[103] "wholly consistent" with Ohio sentencing guidelines.[104] Ohio law instructs the sentencing court to consider "[t]he physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim."[105] *Matthew* 18:5 is only consistent with Ohio law in that it considers abuse to young children, and is even vague on that point. Does "offending," mean molesting? Does it mean raping? Alternatively, does it simply mean being rude to? *Matthew* 18:5 suggests that someone who commits the sexual assault of a child should be put to death by drowning.[106] The Ohio sentencing statue does not permit the court to consider capital punishment, and more importantly the Eight Amendment and the Supreme Court case law interpreting the amendment clearly state that the death penalty is inappropriate for any crime less than murder.[107] The biblical quote cited by the trial judge in *Arnett* was not consistent with state law and had no place in the trial judge's decision. The jury's discussion of *Romans* 13:1 in *Harlan* is unacceptable for the same reason: because our laws do not require a submission to authority, and our authority does not require the death penalty.[108]

Justice Rice argued that *Romans* 13:1 should be tolerated because "the well-accepted interpretation of [the] passage is that individuals are

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100. *See Harlan*, 109 P.3d at 637 (Rice, J., dissenting).

101. *Id.*

102. *See generally id.* at 618–34 (explanatory parenthetical needed – so might be able to reduce the pinpoint cite once he writes this).

103. *See Arnett*, 393 F.3d at 684 (quoting *Matthew* 18:5, 6).

104. *See id.*

105. OHIO REV. CODE ANN. § 2929.12(B)(1) (West 2002).

106. *Mathew* 18:5 (King James).

107. *See* U.S. CONST. amend. VIII. ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."); *see also* Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty was a grossly disproportionate punishment for the crime of rape of an adult woman).

108. *See Romans* 13:1 (King James).

to obey the laws of their nation."[109] Justice Rice reasoned that the biblical passage was not prejudicial because its effect would only lead a juror to follow the laws of Colorado, which require a four-step process to sentence a defendant to death.[110] The principles behind the Constitution are not in line with Justice Rice's interpretation of *Romans* 13:1. The First Amendment encourages people to question government officials, protest against inequality and impeach politicians if need be.[111] Furthermore, Justice Rice's argument in favor of *Romans* 13:1 was flawed because the biblical passage, like most biblical passages, is esoteric. *Romans* 13:1 does much more than just encourage jurors to follow the law; it suggests that jurors have a divine obligation to apply the laws of state, and an obligation to vote in favor of the death penalty.

Justice Rice's dissent also revealed another reason why the "vaguely in-line standard" is dangerous to our court system. Her dissent serves as an example of how judges would participate in biblical interpretation.[112] Judge Clay's dissent in *Arnett* warned that "[u]nder this approach, the judgments of trial courts could begin to resemble the fatwas of religious clerics, and the opinions of appellate courts echo the proclamations of the Sanhedrin."[113]

Justice Rice began her discussion of *Romans* 13:1 by stating: "the plain meaning and well-accepted interpretation of this passage is that . . . ."[114] Indeed Justice Rice is interpreting the Bible. She chose to employ a majority interpretation of the Bible, which presumes there are minority interpretations that she chose not to follow. She also states that her understanding of the passage was the "plain meaning" of the passage. This suggests that she applied the canons of construction common to statutory or contract interpretation to discern the intent of the author.[115] Religion does not have the force of law and judges do not have a duty to interpret it. Courts should abandon the standard established by the Sixth Circuit in *Arnett* and followed in Justice Rice's dissent in *Harlan*. The Colorado Supreme Court correctly decided against employing the "vaguely in-line" standard in its decision.

B. A Different Standard

In *Bakker,* the Fourth Circuit did not employ the "vaguely in-line standard" espoused by the Sixth Circuit.[116] Instead, the Fourth Circuit vacated the defendant's sentence because the trial court believed the trial

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109. *Harlan,* 109 P.3d at 637.
110. *See id.* at 630.
111. U.S. CONST. amend. I.
112. *See Arnett,* 393 F.3d at 691.
113. *Id.*
114. *Harlan,* 109 P.3d at 637.
115. *See, e.g.,* Richard A. Lord, *Rules of Interpretation, in* § 32:3 WILLISTON ON CONTRACTS (4th ed. 2005) ("The plain meaning of language will be given to the words of a contract.").
116. *See Bakker,* 925 F.2d at 741.

judge's "personal religious principles" played a decisive role in the court's sentencing determination.[117] The Fourth Circuit's approach is preferable to the "vaguely in-line" standard because it objectively considers whether religion has prejudiced a sentence.[118] The Colorado Supreme Court would likely have applied the *Bakker* standard if a judge had decided Harlan's sentence. Other reviewing courts should utilize the *Bakker* standard when a judge's "personal religious principles" taint their sentencing decisions.[119]

The Fourth Circuit based its decision on the following statement by the trial judge, "those of us that do have a religion are ridiculed as being saps."[120] The Sixth Circuit distinguished *Bakker* from *Arnett,* and incorrectly applied the "personal religiosity" standard by arguing that the trial judge in *Arnett* "made no reference whatsoever to her own religious beliefs in sentencing *Arnett.*"[121] The Sixth Circuit made this claim despite the trial judge's statement that she had been struggling to find an answer and found that answer in the Bible.[122] Why would the trial judge look for an answer in the Bible unless the Bible was an integral part of her "personal religious principles?" By using a quote from the Bible to make a decision on the length of a defendant's sentence, the trial judge's personal religiosity became a factor in the sentence.

Although *Bakker* and *Arnett* read together do not form a single-workable standard, one thing is evident: courts may be more willing to vacate a sentence if a trial judge explicitly references her religiosity during the sentencing hearing. If the Colorado Supreme Court chooses to review a judge-made sentence allegedly prejudiced by religion, the justices likely would consider whether the judge's personal religiosity played a role in the sentence, and whether the judge's comments express that prejudice.

The court in *Harlan* could not use the standard set forth in *Bakker* because Rule 606(b) restricts courts from considering whether the Bible and the biblical quotes discussed actually swayed the jury's decision.[123] Instead, the court could only inquire into "whether there is a reasonable possibility that . . . extraneous information influence[d] the verdict to the detriment of the defendant . . . ."[124]

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117. *See id.*
118. *See id.* at 740.
119. *Id.*
120. *Id.*
121. *Arnett,* 393 F.3d at 687.
122. *See id.* at 683.
123. *See Harlan,* 109 P.3d at 625 ("The court may not take into account testimony regarding the jury's deliberations, a juror's mental processes leading to his or her decision, or whether the extraneous information actually swayed any of the particular jurors' votes."); *see also* discussion *infra* Part II.
124. *Harlan,* 109 P.3d at 625 (citing Wiser v. People, 732 P.2d 1139, 1142 (Colo. 1987)).

C. Was There a Reasonable Possibility That the Jury Was Prejudiced?

Justice Rice's dissent stated, "there is no reasonable possibility that a typical jury would be prejudiced by exposure to the biblical passages at issue here."[125] The majority disputed this conclusion and stated, "there is a reasonable possibility that the extraneous biblical texts influenced the verdict to Harlan's detriment."[126] The majority reasoned that Americans live "[in] a community where Holy Scripture has factual and legal import for many citizens."[127] The majority's decision rested on an unconfirmed premise. It is only reasonable to assume that the Bible could have prejudiced Harlan's sentence if the United States is a highly religious society. Furthermore, the premise is correct only if the members of our highly religious society, the jurors, believe the Bible to be the Word of God.

According to a recent Gallup poll roughly six in ten American adults say that religion is "very important" in their lives,[128] twenty-eight percent of adults nationwide go to church at least once a week,[129] and ninety percent of adults nationwide believe in God while only four percent do not.[130] The same poll, reported in May 2004, observed that fifty percent of adults nationwide are Protestant, twenty-three percent of adults nationwide are Catholic, and nine percent of adults nationwide say they are Christian but have no specific church.[131] When asked specifically about the Bible, forty-two percent of adults nationwide said that they believe "[t]he Bible is the actual Word of God,"[132] and thirty-seven percent of adults nationwide believe that "[t]he Bible is the Word of God but not everything in it should be taken literally."[133] Although only forty-two percent of adults nationwide say they believe the Bible is the Word of God, sixty percent believe "[t]he story of Noah and the ark in which it rained for 40 days and nights, the entire world was flooded, and only Noah, his family and the animals on their ark survived," is literally true.[134] Moreover, sixty-one percent of Americans believe "[t]he creation story in which the world was created in six days," is literally true, and sixty-four percent of Americans believe "[t]he story about Moses

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125. *Id.* at 633.
126. *Id.* at 637.
127. *Id.* at 633.
128. Dr. Richard Land, *How religion defines America,* BBC News, UK Edition (Feb. 25, 2004), http://news.bbc.co.uk/1/hi/programmes/wtwtgod/3518221.stm. The BBC article contrasts the importance of religion in the United States to that of Canada and the United Kingdom where only 28 percent and 17 percent of those polled described religion as "very important" in their lives. *Id.*
129. The Gallup Poll, May 2-4, 2004, http://www.pollingreport.com/religion.htm.
130. *Id.*
131. *Id.*
132. Virginia Commonwealth University Life Sciences Survey, Sept. 3-26, 2003, http://www.pollingreport.com/religion.htm.
133. *Id.*
134. ABC News PrimeTime Poll, Feb. 6-10, 2004, http://www.pollingreport.com/religion.htm.

parting the Red Sea so the Jews could escape from Egypt" is also *literally* true.[135]

Furthermore, Cornell University Law Professor Sheri Lynn Johnson agrees with the Colorado Supreme Court's ruling, specifically that it recognizes the effect of the Bible in a religiously based society. She stated, "[t]he majority is correct in saying that in a heavily religious culture, to recite the Bible to someone could have a prejudicial effect on the sentencing."[136] The above poll numbers support Professor Johnson's statement. If ninety percent of Americans believe in God, twenty-eight percent of Americans attend church once a week, and roughly six in ten American adults say that religion is "very important in their lives," it is fair for Professor Johnson and the Colorado Supreme Court to characterize the United States culture as "heavily religious."

Furthermore, the poll numbers also support Professor Johnson's assertion, and the court's holding, that the Bible "could have [had] a prejudicial effect on the sentencing."[137] In the court's opinion, "The written word persuasively conveys the authentic ring of reliable authority . . . ."[138] The court further notes, "Some jurors may view biblical texts like the Leviticus passage at issue here as a factual representation of God's will."[139] The poll cited above states that forty-two percent of adults nationwide believe the Bible is the actual word of God.[140] Mathematically, out of a jury of twelve citizens it is fair to assume that five believe the Bible is the Word of God. It is also fair to assume that if an individual believes the Bible is the Word of God that they believe people should obey the Bible as well as passages directing capital punishment for the crime of murder.

Moreover, the poll numbers say that sixty percent of Americans believe the story of Noah's Ark.[141] Noah's Ark is a particularly interesting Bible story because of what some might consider its impossible qualities – a story in which a flood extinguished all life, and the world was repopulated only with the pairs of animals on Noah's Ark. Widely accepted scientific truths refute the biblical account. Nonetheless, a significant majority of Americans believe the story to be true – *literally* true.[142] While it is only fair to assume – based on the polling numbers – that five of twelve jurors believe the Bible is the Word of God, it is fair to say that seven of those jurors believe the story of Noah's Ark. If the

135. *Id.*
136. David L. Hudson Jr., *Making Biblical References at Trial May Be Grounds for Reversal*, A.B.A. J., July 2005 at 14, 14 (quoting Prof. Johnson).
137. *Id.*
138. *Harlan*, 109 P.3d, at 632.
139. *Id.*
140. Virginia Commonwealth University Life Sciences Survey, *supra* note 132.
141. ABC News Prime Time Poll, *supra* note 134.
142. ABC News Prime Time Poll, *supra* note 134.

American population is willing to believe, what some might consider, an impossible story such as Noah's Ark, it follows that they would be even more willing to believe biblical passages such as "eye for an eye, life for a life."[143] The story of Noah's Ark might seem far-fetched to some, but "eye for an eye" seems logical and requires a less significant suspension of the average American's disbelief. The above statistics reveal the propensity of biblical passages to prejudice an average juror.

The Bible can also have a profound effect on jurors who are not highly religious or non-religious. There is no doubt that the Bible plays an important role in civil ceremonies. For example, the Chief Justice of the Supreme Court swears the President of the United States into office with his hand over the Bible; and, witnesses offering testimony in court have traditionally sworn to tell the truth on the Bible. Interestingly, Professor Kevin O'Neil suggests that the Bible is just as prejudicial as any other learned text and courts should keep it out of the jury deliberation room for the same reason.[144] The hearsay exception for learned treatises allows "[a]n expert witness [to] refer to a passage in a treatise, but that treatise is not allowed inside the jury room for fear that jurors will roam at large through its pages, drawing unguided and possibly erroneous conclusions."[145] Professor O'Neil suggests that allowing the Bible in the jury deliberation room could cause a similar problem.[146] Jurors might roam through the Bible, find, and apply standards different from those given in the jury instructions.[147]

D. Harlan*'s Narrow Holding*

The *Harlan* majority held that the jury did not follow the instructions given to them before the deliberation.[148] Justice Rice disagreed.[149] She argued that the court's instructions actually "directed the jurors to consider their moral and religious precepts, as well as their general knowledge, when making a reasoned judgment about whether or not to impose the death penalty."[150] She argued that the following jury instructions called for the jury to consider biblical quotations: "[y]ou must still all make a further *individual moral assessment* of whether you've been convinced beyond a reasonable doubt that the death penalty instead of life in prison is the appropriate punishment; "[151] and "[t]his consideration

143. *See supra* note 42.

144. *See* Hudson, *supra* note 136, at 14.

145. *Id.* (quoting Prof. O'Neil).

146. *See id.*

147. *See id.*

148. *See Harlan*, 109 P.3d at 629 ("Because the trial court's admonitions were thorough and sufficient to instruct a capital sentencing jury, and because the written biblical materials used in the jury room were neither admitted into evidence nor permitted by court instruction, their use in this case was improper.").

149. *See id.* at 634-39 (Rice, J., dissenting).

150. *Id.* at 637.

151. *Id.* at 622 (emphasis added).

involves a process in which you must apply your *reasoned judgment* in deciding whether the situation calls for life imprisonment or the imposition of the death penalty."[152]

Justice Rice argued that these instructions called for the jury to consider their moral and religious precepts, which for many who believe that the Bible is the Word of God, calls for the consideration of biblical passages.[153] The majority essentially agreed with Justice Rice, stating, "[w]e do not hold that an individual juror may not rely on and discuss with the other jurors during deliberation his or her religious upbringing, education, and beliefs in making the extremely difficult 'reasoned judgment' and 'moral decision.'"[154] The majority opinion recognized that the jury instructions given might encourage jurors to consider and discuss their own religious thoughts during jury deliberation.[155] The majority opinion only held that it was "improper for a juror to bring the Bible into the jury room,"[156] and that the actual physical presence of the Bible has a powerful prejudicial effect on jurors.[157]

The majority's narrow holding indicates that the court was looking to draw a line. It was trying to determine how much to tolerate in a death sentence deliberation. The court was torn between the competing interests of providing a fair trial for Harlan and respecting the backgrounds and beliefs of the jury.[158] The Colorado Supreme Court essentially held that it would tolerate any presence of religion in the jury deliberation room except for the presence of a Bible.[159] The court may have desired to draw the line even further towards restricting religious influence; however, it was bound by Colorado Rule of Evidence 606(b).

III. COLORADO RULE OF EVIDENCE 606(B)[160]

Colorado Rule of Evidence 606(b) is identical to the Federal Rule of Evidence 606(b), which "incorporates the long-established policy of protecting the secrecy of jury deliberations."[161] The purpose of Rule 606(b) is to "encourag[e] the finality of jury verdicts," to "conserve[e] judicial resources by foreclosing lengthy adversary hearings on marginal claims of misconduct," and to "preserv[e] the dignity of the court."[162] Furthermore, the protections of 606(b) encourage open discussion in the jury

152. *Id.* (emphasis added).
153. *Id.* at 637 (Rice, J., dissenting).
154. *Id.* at 632.
155. *See id.*
156. *Id.*
157. *See id.*
158. *See id.*
159. *See id.*
160. *See supra* note 46 for text of COLO. R. EVID. 606(b).
161. Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?* 66 N.C. L. REV. 509, 509 (1988).
162. *Id.* at 512; *see also Harlan,* 109 P.3d at 624 (citing Stewart v. Rice, 47 P.3d 316, 322 (Colo. 2002)).

room, reduce juror harassment by those angry about the verdict, and "prevent[] minority jurors from agreeing to the verdict only to challenge it at a later time."[163] The operation of 606(b) raises a conflict "between the need for confidentiality of deliberation and verdict finality, and the requirement that the case be decided solely on the evidence presented to a fair and impartial jury."[164] The Colorado Supreme Court properly applied Rule 606(b) in *People v. Harlan*[165] according to its precedent; however, the threat of extraneous information prejudicing jury decisions remains. The Colorado Supreme Court should consider the arguments made by proponents of amending Rule 606(b)[166] and should amend the rule to allow the observation of jury conduct and to ensure defendants receive sentences free from religious prejudice.

A. *The Colorado Precedent:* Wiser v. People[167] *and* People v. Wadle[168]

Two Colorado cases have formed the standard by which Colorado courts determine whether jury misconduct has tainted a verdict. *Wiser* and *Wadle* established a two-part inquiry: "first, a court makes a determination that extraneous information was improperly before the jury; and second, based on an objective 'typical juror' standard, makes a determination whether use of that extraneous information posed the reasonable possibility of prejudice to the defendant."[169] In *Harlan,* the court found that the facts met the two-part test and impeached the verdict.[170]

In *Wiser,* the Colorado Supreme Court ruled that it was improper for a juror to consider a dictionary definition of the word "burglary," the crime with which the defendant was charged.[171] The court cited other cases in which juries had consulted dictionaries and held that "[j]urors are required to follow only the law as it is given in the court's instructions; they are bound, therefore, to accept the court's definitions of legal concepts . . . ."[172]

163. *See* Crump, *supra* note 161, at 512.

164. James W. Diehm, *Impeachment of Jury Verdicts:* Tanner v. United States *and Beyond,* 65 ST. JOHN'S L. REV. 389, 394 (1991).

165. 109 P.3d 616, 633 (Colo. 2005).

166. *See, e.g.,* Gregory M. Ashley, *Theology in the Jury Room: Religious Discussion as "Extraneous Material" in the Course of Capital Punishment Deliberations,* 55 VAND. L. REV. 127 (2002) (arguing that both federal and state courts should amend their interpretations of Rule 606(b) to address the effect of religious discussion in capital punishment deliberations); *Comments of Federal Magistrate Judges Association Rules Committee on Proposed Changes to the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence,* 2005 FED. CTS. L. REV. 2 (proposing amendment to 606(b) that would clarify whether juror statement can be admitted to prove a disparity between the verdict intended and the final verdict).

167. 732 P.2d 1139 (Colo. 1987).

168. 97 P.3d 932 (Colo. 2004).

169. *Harlan,* 109 P.3d at 624.

170. *Id.* at 629–31.

171. *Wiser,* 732 P.2d at 1141.

172. *Id.* (citing Alvarez v. People, 653 P.2d 1127 (Colo. 1982)).

In *Wadle*, the court affirmed the Colorado Court of Appeals finding that information retrieved from the Internet and subsequently shared with the jury was "improper" and "extraneous."[173] The jury had previously sent a note to the trial judge requesting a copy of the *Physician's Desk Reference*, looking for information on the anti-depressant drug Paxil.[174] The court informed the jury that "supplying reference materials of any kind to a jury was prohibited, and it referred the jury back to its instructions."[175] Although the court had admonished the jury against the consideration of extraneous information, it extended its ruling by holding that extraneous information is improper "whether or not . . . [it was] the result of deliberate juror misconduct."[176]

In *Harlan*, the majority stated, "our cases are clear that extraneous information is improper for juror consideration whether or not the court specifically warned against its use."[177] The court noted that this rule applies whether the improper evidence is factual as in *Wadle*, or if the evidence is legal as in *Wiser*.[178] Therefore, the presence, and the subsequent discussion, of the Bible in the jury deliberation room in *Harlan* were clearly "extraneous." The Bible provides alternative opinions about when to inflict the death penalty – just as the dictionary offered an alternative definition for "burglary" in *Wiser*. And, although the court did not expressly forbid the presence of the Bible, as the court held in *Wadle*, the court can find information "extraneous" whether the court forbids it or not.[179]

The Colorado Supreme Court combined factors considered in *Wiser* and *Wadle* and compiled a list to determine whether improper introduction of the extraneous information created a reasonable possibility that the jury's verdict was influenced to the detriment of the defendant.[180] The factors are: (1) how the extraneous information relates to critical issues in the case; (2) how authoritative is the source consulted; (3) whether a juror initiated the search for the extraneous information; (4) whether the information obtained by one juror was brought to the attention of another juror; (5) whether the information was presented before the jury reached a unanimous verdict; and (6) whether the information would be likely to influence a typical juror to the detriment of the defendant.[181]

173. *Wadle*, 97 P.3d at 933.
174. *See id.* at 934.
175. *Id.*
176. *Id.* at 935.
177. *Harlan*, 109 P.3d at 625.
178. *Id.*
179. *Id.*
180. *Id.* at 626. The court disclaims that this is not a formal test or an exhaustive list, but are "useful" and "persuasive." *Id.*
181. *Id.* (citing *Wadle*, 97 P.3d at 935; *Wiser*, 732 P.2d at 1142).

The court applied the facts of the jury's deliberation to the factors above and reasoned "we do not have confidence that the death penalty here was not influenced by extraneous information."[182] Justice Rice's dissent attacked the majority's list of factors appropriate for inquiry under 606(b) and exhorted, "neither *Wiser* nor *Wadle* support this kind of categorical approach when undertaking an analysis of extraneous information."[183] She argued that, "the sole inquiry upon which each case focuses is whether there is a reasonable possibility that exposure to extraneous information prejudiced the jury."[184] Justice Rice's argument was without substance because the majority's list of factors was simply a break down of her "sole inquiry." Justice Rice was simply arguing for a less probative investigation into the conduct of the jury. The majority's list of factors provides courts with a useful outline to focus their "extraneous information" inquiry.

B. The Loophole in 606(b)

The Colorado Supreme Court's holding in *Harlan* prohibits the presence of the Bible in jury deliberations,[185] but it does not prohibit the discussion of religion during deliberations.[186] The court actually expects that jurors will discuss religion.[187] The court's justification for prohibiting the actual text of the Bible and not other manifestations of religion, such as recitation of biblical passages, was that "the written word persuasively conveys the authentic ring of reliable authority in a way the recollected spoken word does not."[188]

The court's distinction is imperfect. Charismatic reverends, or even a well-schooled churchgoer could be as prejudicial as a Bible, and possibly even more so. A religious orator would be able to recite passages from memory, and his or her interpretations would carry with it the authority of a "Man of God." Moreover, some believe group prayer during jury deliberations is common,[189] and since no one but the jurors ever learns that group prayer has occurred, it is fair to assume that "the instances that find their way into judicial opinions represent only the tip of the iceberg."[190] The power of prayer could be just as, or more, prejudicial than the physical presence of a Bible; however, Rule 606(b) forbids courts from impeaching the Bible recitation and group prayer.[191] The rule precludes jurors from testifying as to any occurrences in the jury

182. *Id.*at 634.
183. *Id.* at 636 n.8.
184. *Id.* (citing *Wadle*, 97 P.3d at 935; *Wiser*, 732 P.2d at 1142).
185. *Id.* at 632.
186. *Id.*
187. *Id.* ("We expect jurors to bring their backgrounds and beliefs to bear on their deliberations but to give ultimate consideration only to the facts admitted and the law as instructed.").
188. *Id.*
189. Simson & Garvey, *supra* note 10, at 1125.
190. *Id.*
191. COLO. R. EVID. 606(b).

room, or to anything that affected the jurors mind during deliberation.[192] While the policy considerations behind Rule 606(b) are important, opening jury deliberations up to further scrutiny may be the only way to ensure defendants receive sentences free from prejudice.

The Colorado Supreme Court has left a loophole in which religion can still prejudice juries. Even if the ruling in *Harlan* prohibits Bibles in the future, religion can still prejudice juries in the form of Bible recitation from memory, group prayer and pre-prepared notes. Justice would best be served if the court could guarantee that every sentence decided by a jury is free from prejudice.

The court could regulate this conduct if the court recorded and reviewed jury deliberations. Opponents of this practice may claim that recording jury deliberation compromises the policy goals of Rule 606(b). The authors of Rule 606(b) designed the rule to encourage the finality of jury verdicts[193] and reviewing recorded jury deliberations would undermine this goal. Furthermore, the authors designed the rule to "conserve judicial resources by foreclosing lengthy adversary hearings on marginal claims of misconduct," to "preserve the dignity of the court," to encourage "free and frank discussions inside the jury room," to reduce juror harassment, and to "prevent minority jurors from agreeing to the verdict only to challenge it at a later time"[194] Concern over the effect recordings may have on the efficacy of the jury is valid; however, the court could take steps to mitigate the negative effects.

The court could withhold the recordings from the public so that those angry about the jury decision could not single out jurors for ridicule. Judges could simply call a mistrial if they found prejudicial information, which would forego lengthy hearings. Jurors would receive a warning in their instructions that the court will record their deliberation, only the judge will view the recording, and that they are encouraged to have a free and frank discussion. Ultimately, the policy considerations behind Rule 606(b) are less important than the need for a jury sentence free from prejudice – especially a death sentence. The court should review jury conduct consistently and objectively to ensure that we are not executing people because a jury was swayed by a Bible passage or a prayer session.

Recording deliberations raises many difficult issues. Courts and judges may not have the time or resources to review all jury deliberation recordings, but it is not necessary to review all jury deliberations. The court need only review the deliberations where there is a suspicion of

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192. *Id.*

193. Crump, *supra* note 161, at 512.

194. *Id.* (describing the policy considerations underlying Federal Rule of Evidence 606(b), which is the federal equivalent of Colorado Rule of Evidence 606(b)); *Harlan*, 109 P.3d at 624 (*citing* Stewart v. Rice, 47 P.3d 316, 322 (Colo. 2002)).

misconduct. Finally, legislatures and courts might find recordings too intrusive in every case, but they should at least record death penalty deliberations. Death penalty jury deliberations are unique. The result of jury misconduct is irreversible once the sentence is carried out. Death penalty juries should be held to a higher standard by recording their deliberations to ensure they sentence the defendant free from prejudice.

IV. FIRST AMENDMENT ISSUES

The Religion Clauses of the First Amendment provide, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[195] The Supreme Court has applied the Establishment Clause of the First Amendment to prohibit prayer in public school,[196] to prohibit the decoration of public buildings with religious symbols,[197] and to limit the delegation of governmental authority to religious organizations.[198] The Court should also apply the First Amendment to limit the influence of religion in the courtroom and the jury deliberation room. Religion plays a "prominent role"[199] in capital cases during peremptory challenges, closing arguments and jury deliberations.[200] Despite its frequent presence, questions as to its propriety "have almost always been framed and answered with little or no attention to" the First Amendment.[201] Harlan was no exception; he did not allege an Establishment Clause violation.[202] Interestingly, Arnett did claim an Establishment Clause violation;[203] however, the trial court denied it for procedural reasons.[204] The court did not deny Arnett's claim for substantive reasons. This suggests that attorneys are considering the effectiveness of Establishment Clause claims in cases where religion has influenced a sentence. The defense could have attacked Harlan's sentence on Establishment Clause grounds and this Part predicts the outcome of a hypothetical Establishment Clause claim, if Harlan's counsel had raised the issue.[205]

First, Harlan must successfully argue that the act of sentencing a defendant is state action.[206] On one hand, it can be argued that jurors are

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195. U.S. CONST. amend. I.

196. *See generally* Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding school led prayer at football game unconstitutional on Establishment Clause grounds).

197. *See generally* County of Allegheny v. ACLU, 492 U.S. 573 (1989) (holding that while Creche violated Establishment Clause, menorah next to Christmas tree did not).

198. *See generally* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (invalidating a separate school district created for a religious group).

199. Simson & Garvey, *supra* note 10, at 1092.

200. *See id.*

201. *Id.*

202. *See generally* People v. Harlan, 109 P.3d 616 (Colo. 2000).

203. *See infra* Part II.B.

204. *See* Arnett v. Jackson, 393 F.3d 681, 685 (2004).

205. 109 P.3d 616 (Colo. 2000).

206. *See* Terrence T. Egland, *Prejudiced by the Presence of God: Keeping Religious Material Out of Death Penalty Deliberations,* 16 CAP. DEF. J. 337, 358 (2004).

not state actors because they are private citizens and the state has no control over their decisions.[207] On the other, "they should be seen as state actors when serving as jurors because they are acting pursuant to a delegation of authority from the state."[208] The state pays jurors for their time and the Supreme Court has referred to them as "a government body."[209] Some argue that, "it is only a natural extension of current law governing the actions of court actors to find the jury to be similarly bound as judges and prosecutors."[210] If the court were to decide jurors are state actors, the court system might face serious and unperceived ramifications. An immeasurable variety of private actions "might be constrained and challenged."[211] We must deal with the ramifications. Otherwise, we allow the hollow fiction, that jurors are acting independently of the state, to dilute our justice system. The state summons jurors, subjects them to penalties, instructs them, and has them serve a function of the State. They are state actors and must follow the rules applied to the state.

If Harlan successfully argued that jurors were state actors, the next step would have been to argue that the presence of the Bible in the jury deliberations failed the three-pronged *Lemon v. Kurtzman* test.[212] Under the *Lemon* test, religious texts used in jury deliberations will be found unconstitutional if the texts' presence: (1) has no secular purpose; (2) has a principal primary effect that either advances or inhibits religion; or (3) fosters an excessive government entanglement with religion.[213] While the *Lemon* test has come under attack by members of the Court,[214] and its future role is "uncertain,"[215] it is still followed by lower courts.[216] The more recent Establishment Clause precedent only finds a violation of the Establishment Clause if "the government establishes a church, coerces religious participation, or favors some religions over others."[217]

The jury's conduct in *Harlan* would fail all three prongs of the *Lemon* test. First, the presence of the Bible during jury deliberation has no secular purpose. The Bible's presence and the discussion of biblical passages only tainted the secular procedure with religious standards and prejudices. The presence of the Bible also would violate the second prong, also known as the "effect" prong. If the Colorado Supreme Court

207. Simson & Garvey, *supra* note 10, at 1108.
208. *Id.*
209. *See id.* (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 626 (1991)).
210. Egland, *supra* note 206, at 144 ("Jurors are protected by common law immunity from prosecution, just as judges and prosecutors are, and should be held to the same standard.").
211. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 513 (2002).
212. *See id.* at 1158 (discussing the holding of the court in Lemon v. Kurtzman, 403 U.S. 602 (1971)).
213. *Id.* at 1159.
214. *See id.* ("[S]everal Justices have criticized the test and called for it to be overruled, this has not occurred.")
215. *Id.*
216. *Id.*
217. *Id.* at 1154 (discussing the holding in Mitchell v. Helms, 530 U.S. 793 (2000)).

allowed jurors to bring Bibles into the jury deliberation room, and to discuss the Bible during the deliberation, it would effectively promote religion over non-religion and Christianity over religions that do not consider the Bible holy. It would send a signal to jurors and the public that religion has a place in the criminal justice system. The United States Supreme Court has noted that the Establishment Clause "precludes [the] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."[218] If the Colorado Supreme Court had ruled that the discussion of *Leviticus* 24:20-21 and *Romans* 13:1 was permissible during Harlan's death penalty jury deliberations, it would have conveyed a message that those particular religious principles are preferred. Finally, the presence of the Bible during Harlan's sentencing deliberation would have impermissibly entangled the government with religion. Allowing jurors to bring Bibles into jury deliberations would have set a precedent that our civil justice system sentences defendants subject to the religious views of jurors.

Establishment Clause jurisprudence is in flux, and many Supreme Court Justices prefer other tests.[219] The "endorsement" test, formulated by Justice O'Connor in *Lynch v. Donnelly,*[220] asks whether the government action "endorses" religion.[221] Under the more recent and less strict *Mitchell v. Helms*[222] test, an Establishment Clause violation is found if the presence or function of religion amounts to "coercion."[223] The Court ruled that prayers during football games were impermissibly coercive in *Sante Fe Independent School District v. Doe.*[224] Justice Stevens argued that the practice "threatens the imposition of coercion upon those students not desiring to participate in a religious exercise."[225] Courts should apply the same standard in cases such as *Harlan* where jurors bring religious texts into jury deliberations. The presence of the Bible may coerce Jurors into believing that they are obligated to vote a certain way. The effect is possibly even more coercive than in *Santa Fe Independent School District*, where the court recognized that students could feel coerced by mass prayer.[226] In that scenario, at least some level of anonym-

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218. *County of Allegheny*, 492 U.S. at 593 (quoting *Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring)).

219. CHEMERINSKY *supra* note 211, at 1159.

220. 465 U.S. 668 (1984).

221. *See Donnelly*, 465 U.S. at 694 ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.").

222. 530 U.S. 793 (2000).

223. *Mitchell*, 530 U.S. at 870.

224. 530 U.S. 290 (2000). The Court noted:

> The Constitution, moreover, demands that the school may not force this difficult choice upon these students for it is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his of her rights and benefits as the price of resisting conformance to state-sponsored religious practice.

Id. at 312.

225. *Sante Fe Indep. Sch. Dist.*, 530 U.S. at 312.

226. *See generally id.*(discussing that adolescents are susceptible to pressure regarding social convention).

ity protected the students. The prayer may have compelled them to join in but they were not individually encouraged to participate. In the case of religious influence in jury deliberation rooms, some jurors may be insisting that others obey the Bible and demand full participation in group prayer. There is at least as much coercion in the scenario exemplified in *Harlan* as the Court found in *Sante Fe Independent School District* because a jury is more personal.

Trial attorneys also introduce religious influence into trials.[227] Ironically, in *Harlan*, the defense counsel that made the motion to vacate Harlan's death sentence due to jury misconduct for bringing a Bible into the jury deliberation room, was the same defense counsel that invoked the Bible in closing argument.[228] In closing argument, Harlan's defense counsel referenced the Bible several times by telling the story of Abraham and Isaac and mentioned Harlan's habit of reading the Bible.[229] Furthermore, the defense counsel asked a juror about the biblical quote, "eye for an eye"[230] possibly provoking the very discussion the defense counsel would later claim was misconduct on the level of requiring a new sentence.[231] It is common for both the defense counsel and the prosecution to invoke religion during closing arguments – "the Bible is a favorite source for both sides."[232] The frequent presence and injection of religion in trials raises the same question asked earlier: how much religion will the court tolerate?

Joe Freeman Britt, a notable trial attorney,[233] believes that there is a place for religion in the courtroom.[234] He states that, "'[b]iblical references [are] considered great works of literature . . . . They can be used with caution, just as any quotation of a great work, to make a particular point.'"[235] Religious tolerance in the courtroom receives varied treatment from state to state.[236] For example, North Carolina and Georgia courts are not as concerned as other states with the invocation of religion during closing arguments.[237] In North Carolina, the court will tolerate the religious arguments by prosecutors as long as they do not argue "the state law or its officers were divinely inspired."[238] Georgia does not allow prosecutors to suggest that religious authority mandates the death

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227. *See, e.g.*, *Harlan*, 109 P.3d at 635 n.3 (Rice, J., dissenting); Simson & Garvey, *supra* note 10, at 1110.
228. *See Harlan*, 109 P.3d at 619, 635 n.3.
229. *See id.* at 635 n.3.
230. *Id.*
231. *See id.*
232. Simson & Garvey, *supra* note 10, at 1110.
233. *See* Hudson, *supra* note 136, at 14 ("[O]nce called 'the deadliest prosecutor' by the *Guinness Book of World Records* for his success in capital cases . . . .").
234. *Id.*
235. *Id.*
236. *See* Simson & Garvey, *supra* note 10, at 1111.
237. *Id.*
238. *Id.* (quoting State v. Sidden , 491 S.E.2d 225, 231 (N.C. 1997)).

penalty.[239] Pennsylvania, on the other hand, "has adopted a rule that 'reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.'"[240]

As previously discussed, the Supreme Court may find an establishment violation where it finds an "endorsement of religion."[241] Furthermore, it has been suggested that prosecutors and public defenders are state actors because they are employees of the state.[242] If prosecutors and public defenders make arguments that utilize biblical passages, the State sends a message of endorsing religion. Prosecutors would in essence be arguing that the defendant ought to go to jail, or be executed, according to the Word of God. Allowing prosecutors to make religiously based arguments would not only send a clear statement that our government "endorses" and "prefers" religion over non-religion, but would erode the wall between church and state.

Private Defense attorneys also may violate the Establishment Clause when they invoke religion at closing argument.[243] It is more difficult to make the argument the private defense attorneys are state actors because they are not employees or agents of the state. However, they are still working within the system, and the court is a state actor.[244] Therefore, if a court allows defense counsel to make, or denies objections to, religiously based arguments, courts would in essence align themselves with the arguments at least, "in the sense of affirming that arguments of that type are valid and have a place in [the] courtroom."[245] By allowing private defense attorneys to make religiously based arguments and by affirming their place in the courtroom, judges, as state actors, are endorsing religion in violation of the Establishment Clause.[246]

CONCLUSION

Religion is not dead in the chambers of the Colorado Supreme Court,[247] and its decision is not demeaning to people of faith.[248] The court's decision is sensitive to the individual beliefs of jurors and only prohibits the physical presence of the Bible in the jury deliberation room.[249] As the law stands, jurors are free to discuss their own religiosity and personal beliefs.[250] The court has simply recognized the need to

239. *Id.* (citing Carruthers v. State, 528 S.E.2d 217, 222 (Ga. 2000)).
240. *Id.* (quoting Commonwealth v. Chambers, 599 A.2d 630, 644 (Pa. 1991)).
241. *See* discussion *supra* Part IV.
242. *See* Simson & Garvey, *supra* note 10, at 1113.
243. *Id.*
244. *See id.*
245. *Id.*
246. *See id.*
247. *Contra* Fein, *supra* note 14, at A14.
248. *Contra Jurors Erred*, *supra* note 13.
249. *See* People v. Harlan, 109 P.3d 616, 633 (Colo. 2005).
250. *Harlan*, 109 P.3d at 632.

provide defendants sentencing decisions free from religious influence; however, much more can be done to reach that end.

The court should provide jury instruction that clearly forbid Bibles during jury deliberations. The instructions should also include a prohibition against group prayer, recitation of biblical passages and religiously based arguments in favor or opposed to the death penalty. Jury instruction may not be enough, however, and death penalty sentences free from prejudice should be a higher priority than upholding the policy considerations behind Rule 606(b). Therefore, the Colorado Supreme Court should amend Rule 606(b) so that courts can record and review jury deliberations, while doing everything possible to protect jurors from public scrutiny.

Finally, allowing religion to play a role in our court system erodes the wall between church and state. Judges, attorneys, and jurors are all state actors in the court system and if their actions suggest an endorsement of religion they are in violation of the Establishment Clause.[251] Before asking if God is alive in the chambers of American courts, let us be sure that Justice is. Justice demands that defendants receive sentences free from religious influence.

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251. Simson & Garvey, *supra* note 10, at 1113.

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