A Juror's Religious Freedom Bill of Rights

*Antony Barone Kolenc**

The prosecution of Democrat Congresswoman Corrine Brown for campaign corruption was perhaps the most significant and dramatic political trial ever to hit Northeast Florida – and that was before the Holy Spirit showed up and spoke to Juror 13 during deliberations. The Brown case is the springboard for the article's focus on a juror's right to religious liberty, one of the nation's most precious constitutional rights. The article addresses first principles behind the process of jury selection in the United States, as well as the importance and safeguarding of religious liberty in the U.S. Constitution. It then proposes six tenets to be contained within a proposed bill of rights for jurors: (1) the right to a religious identity (or not); (2) the right to be free from religious discrimination; (3) the right to religious accommodations during jury service; (4) the right to commune with a higher power; (5) the right to religious privacy; and (6) the right and duty to follow the law and not do wrong against others, even for religious reasons. The article provides historical context and case examples that demonstrate the need for and exercise of the proposed rights, and it recommends adopting the bill of rights at all phases of jury selection and service.

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INTRODUCTION

The prosecution of Representative Corrine Brown for campaign corruption was perhaps the most significant political trial to ever hit Northeast Florida.[1] Not only was Brown a Democrat being prosecuted in a heavily Republican district, but she was also a powerful, popular, African American congresswoman facing fifty years in federal prison on eighteen counts of fraud and four tax counts related to her educational charity. In its case, the government alleged that Brown "raised hundreds of thousands of dollars to help needy students," but then "used the vast majority of the money on personal expenses and luxuries" for herself.[2] From the start, the trial was bound to be packed with plenty of drama—and that was *before* the Holy Spirit showed up and spoke to Juror 13 while he deliberated on the case.

During three days of jury selection before a federal magistrate judge, the venire was questioned on a variety of issues, including whether they had "any political, religious, or moral beliefs that

1. This introduction is drawn from United States v. Brown, 996 F.3d 1171 (11th Cir. 2021) (en banc).

2. En Banc Brief of the United States, at 1, 3, *Brown*, 996 F.3d 1171 (No. 3:16-CR-93-J-32JRK-1).

would preclude [them] from serving as a fair, impartial juror in this case"—to which Juror 13 indicated he had no such precluding beliefs.[3] Following nine days of trial—after the second day of jury deliberations—Juror 8 reported to the court that Juror 13 had said, "'A Higher Being told me Corrine Brown was Not Guilty on all charges,' [and] . . . later went on to say he 'trusted the Holy Ghost.'"[4]

The judge interviewed Juror 13 individually, asking extensive questions about the incident and about his ability to follow the law and deliberate without his religious beliefs interfering with "proper jury service."[5] Juror 13 stated repeatedly that he was following the judge's instructions and the law; however, he also stated that he had "prayed for and received divine guidance" from his "Father in Heaven."[6] The judge asked him, "Did you ever say to your fellow jurors . . ., ['JA higher being told me that Corrine Brown was not guilty on all charges['?" to which Juror 13 replied, "No. I said the Holy Spirit told me that[,]" and that the juror had "mentioned it in the very beginning when we were on the first charge."[7] Outside Juror 13's presence, government counsel asked the judge to dismiss the juror; however, the defense objected because the "threshold to discharge the juror" had not been reached and the juror was able to follow the court's instructions.[8]

The judge granted the government's motion and dismissed Juror 13, explaining that—although the juror was "sincere and earnest" in his belief that he was following the court's instructions—he had made a "disqualifying statement" by "injecting religious beliefs that are inconsistent with the instructions of the court."[9] The judge distinguished Juror 13 from someone merely "praying for guidance," stating that Juror 13 was someone who was being "'direct[ed] or t[old] . . . what disposition of the charges should be made' by [the] . . . 'Holy Spirit.'"[10] The judge concluded "'beyond a reasonable doubt' that there was 'no

3. *Brown*, 996 F.3d at 1175.
4. *Id.* at 1177.
5. *Id.* at 1178.
6. *Id.* at 1179.
7. *Id.* at 1180.
8. *Id.* at 1180–81.
9. *Id.* at 1181–82, 89.
10. *Id.* at 1181 (alterations in original).

substantial possibility that [Juror 13 was] able to base his decision only on the evidence and the law' and that the juror was 'using external forces to bring to bear on his decision-making in a way that [was] inconsistent with his jury service and his oath.'"[11] After replacing Juror 13 with an alternate juror, Corinne Brown was convicted the following day on 18 of the 22 counts.[12]

On appeal, a three-judge panel of the Eleventh Circuit affirmed the conviction, finding no error in the judge's decision to dismiss Juror 13.[13] An *en banc* Eleventh Circuit vacated that panel decision, however, receiving dozens of amicus briefs and garnering national attention for the case. The *en banc* court, which split 7-4, reversed Brown's conviction, finding that the judge had erred in dismissing Juror 13 based on the religious vernacular he had used to describe his internal deliberation.[14]

The *Brown* decision raises important questions about the role of faith during jury duty. Do jurors have religious liberty rights they take into their service, or do they check those rights at the courtroom door? Are attorneys entitled to strike prospective jurors because of concerns a juror might consult or reflect upon religious beliefs when deciding the case? Are jurors entitled to religious accommodations, and do they have any privacy rights while serving on a jury? These and other issues are addressed in this Article, which argues that jurors have a right to religious liberty and proposes a *Juror's Religious Freedom Bill of Rights*. These rights apply at all stages of the trial process, from the moment the jury selection process begins, to the empaneling of the jury, and all the way through to the questioning of jurors for the purpose of impeaching a final verdict already rendered.

Part I of this Article provides an overview of the trial process and presents a general discussion of first principles that undergird the jury system in the United States, as well as the religious freedoms protected by the U.S. Constitution and statutory

11. *Id.*

12. *Id.*

13. United States v. Brown, 947 F.3d 655 (11th Cir.), *vacated*, *reh'g en banc granted*, 976 F.3d 1233 (11th Cir. 2020). Ms. Brown later pleaded guilty to a single count of tax fraud and was sentenced to time served and restitution. *See* Ashley Harding & Jim Piggott, *Former Congresswoman Corrine Brown Pleads Guilty to Tax Fraud*, NEWS4JAX, https://www.news4jax.com/news/local/2022/05/18/former-congresswoman-corrine-brown-expected-in-federal-court-for-plea-hearing/ (last visited Mar. 15, 2023).

14. *See generally Brown*, 996 F.3d at 1171.

Religious Freedom Restoration Acts (RFRAs). Part II then discusses six tenets to be contained within the proposed bill of rights: (1) the right to a religious identity (or not); (2) the right to be free from religious discrimination; (3) the right to religious accommodations during jury service; (4) the right to commune with a higher power; (5) the right to religious privacy; and (6) the right and duty to follow the law and *not* do wrong against others, even for religious reasons. This Article concludes that the proposed rights strike a fair balance between proper jury service and individual religious liberty.

I. FIRST PRINCIPLES UNDERGIRDING THE JURY SYSTEM AND RELIGIOUS LIBERTY

The jury institution in the United States finds its roots in the common law developed in England over a span of centuries, stretching back to the days of William the Conqueror in 1066, and strengthened by Magna Carta in 1215.[15] The modern U.S. jury system relies upon ordinary civil participation in the trial process and protects the nation's citizens from government tyranny perpetrated through judicial power. The founders considered the jury to be "a fundamental safeguard of individual liberty."[16] Similarly, they affirmed the centrality of religious liberty in a free society, enshrining it as a fundamental right and recognizing the dignity of persons to hold, express, and exercise their religious beliefs free from government coercion.

This Part of the Article relates first principles critical to the discussion in Part II. It explains the historical roots of the common -law jury system, along with developments that have evolved to overcome chronic failures in the system and to respect the equality of all persons. This Part also recounts key aspects of empaneling a jury and sets forth the constitutional impetus of the founders to protect the right of religious freedom, as well as developments that courts and legislatures have taken to secure that liberty.

15. *See* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 815–19 (1997) (relating the history of the jury trial in England).

16. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017) (citing THE FEDERALIST NO. 83, p. 451 (Alexander Hamilton) (Benjamin Warner ed. 1818)).

A. First Principles of Juries and Trial Process

Juries are foundational to the American judicial process, both in civil and criminal cases. As the institution of jury service has developed through the centuries, the courts have affirmed the importance of using ordinary people to sit in fair and impartial judgment of their peers, with the unique and critical role of determining the existence of the adjudicative facts of the case and applying the law to those facts.[17] Although the high ideals of this admirable system often have gone unrealized due to prejudice and systemic inequality, its core beliefs rest on a firm foundation essential to continued freedom from tyranny.

1. Historical Overview

The first jury trials—used in rare civil matters—came to the shores of England through the Norman invasion of William the Conqueror.[18] It would take centuries before trial by one's peers would replace more primitive ways of adjudicating civil and criminal matters, such as resolving disputes through battle or subjecting an accused to trial by ordeal, where a person might be forced to carry a "red-hot iron for a specified distance," to "pluck an object from boiling water[,]" or to be "immersed into a pool of blessed water [where he would] s[i]nk if innocent . . . ."[19] Under judicial reforms implemented by King Henry II in 1166, juries in real property cases saw increased usage, but those jurors were typically members of the community familiar with the facts of the case, sitting more as empowered witnesses rather than as neutral factfinders.[20] In 1215, Magna Carta helped further the right to trial by jury; however, it was the actions of Pope Innocent III in forbidding trials by ordeal that eventually spurred the institution's largest growth, with juries flourishing in England as early as 1270.[21]

17. *See Brown*, 996 F.3d at 1183 (citing Peña-Rodriguez, 137 S. Ct. at 874–75 (Alito, J., dissenting) and United States v. Gaudin, 515 U.S. 506, 513–14 (1995)).

18. *See* Hoffman, *supra* note 15, at 816–22 (recounting the development of the English jury system).

19. Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 SYRACUSE L. REV. 109, 115–19 (2000) (explaining various trials by ordeal).

20. *See* CHRISTOPHER W. BEHAN & ANTONY B. KOLENC, EVIDENCE AND THE ADVOCATE: A CONTEXTUAL APPROACH TO LEARNING EVIDENCE 4 (2d ed. 2018) (discussing the history of juries).

21. *See* Hoffman, *supra* note 15, at 818–19.

By the mid-1400s, the common law considered the right to a jury "vital," including the right to unanimity in criminal trials.[22] Additionally, the "witness function" of the jury had been replaced by the concept that the jury was "a body of impartial men who come into court with an open mind[,]" leaving the parties to examine the witnesses in the jury's presence.[23] These developments transformed the English jury into an "adjudicative body" that could help administer matters for the king, while at the same time the jury's growing responsibility fueled notions of self-government[24] that would eventually percolate into democracy. During this time, jury service became associated with the middle class, but by the 1600s, sheriffs often had the responsibility to recruit jurors, sometimes resorting to "recruiting homeless people or reprobates" or corruptly seeking jurors to "favor one party to the trial . . . ."[25]

During the period of English colonization in America, the view of the jury in the New World grew beyond that in England. The right to a jury trial was "considered one of the natural rights of all people."[26] Further, colonial juries possessed both executive and judicial powers, supervising town government, setting tax rates, regulating prisons, and acting as "the chief assessors of legal claims and the primary enforcers of legal rights for their communities."[27] "By the time the Bill of Rights was written, American jurisprudence had developed an enlarged view of the role of jurors in the court system."[28]

When the U.S. Constitution and the Bill of Rights were drafted and ratified from 1787 to 1791, the nation's founders saw fit to place the right to a jury trial in three separate provisions. First, the

22. Ramos v. Louisiana, 140 S. Ct. 1390, 1391 (2020) (selectively incorporating the right to a unanimous jury against the states through the Fourteenth Amendment to the U.S. Constitution). *But see* Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (finding the rule of procedure announced in *Ramos* would not be applied retroactively).

23. Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 382–83 (1999) (quoting THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 129 (5th ed. 1956)).

24. *Id.* at 383.

25. BRIAN H. BORNSTEIN & MONICA K. MILLER, GOD IN THE COURTROOM: RELIGION'S ROLE AT TRIAL 18 (2009) (discussing the history of jury selection).

26. Joseph Czerwien, *Preserving the Civil Jury Right: Reconsidering the Scope of the Seventh Amendment*, 65 CASE W. RES. L. REV. 429, 437 (2014) (discussing the history of juries).

27. Harrington, *supra* note 23, at 386–87 (quoting Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 592 (1993)).

28. Czerwien, *supra* note 26, at 437.

Constitution provides that "[t]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes have been committed . . . ."[29] Second, it guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state . . . wherein the said crimes shall have been committed . . . ."[30] Third, it requires that, "[i]n [civil] suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined by any Court of the United States . . . ."[31] The Supreme Court since has called the jury "an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence."[32]

2. Jury Selection

While procedures vary at the federal and state level, most jurisdictions divide jury selection into three parts: (1) "the creation of a list from which names of potential jurors will be drawn"; (2) "the pre-trial questioning of potential jurors"; and (3) "the elimination of objectionable jurors through challenges for cause or peremptory challenges."[33]

a. Selecting a Venire. The "essential" goal of the jury-selection process, as informed by the U.S. Supreme Court's interpretation of the Sixth Amendment's requirement for an "impartial" jury, is that the pool be constituted "from a representative cross-section of the community . . . ."[34] The selection process must first gather persons from the community into a group of potential jurors—known as the jury pool, or *venire*—and summon them to the courthouse for jury service. This step is critical because, to achieve fair representation, the sources used for drawing this initial pool of prospective jurors must not improperly eliminate groups of persons from eligibility to serve.

29. U.S. CONST. art. III, § 2, cl. 3.

30. U.S. CONST. amend. VI.

31. U.S. CONST. amend. VII.

32. Sinclair v. United States, 279 U.S. 749, 765 (1929).

33. John P. Marks, *Bader v. State: The Arkansas Supreme Court Restricts the Role Religion May Play in Jury Selection*, 55 ARK. L. REV. 613, 620 (2002).

34. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

Under federal law, U.S. district courts select prospective jurors at random from lists of registered voters in the district or division, although "other sources" may supplement those lists when necessary to further the requirement for a "fair cross section of the community," and (per statute) to avoid exclusion "on the basis of 'race, color, religion, sex, national origin, or economic status.'"[35] The need for inclusiveness in the initial juror pool is punctuated by the long and distressing history of racial discrimination in many states, where strictly drawn juror qualification laws had systematically excluded black jurors.[36] The Supreme Court sought to curb such racial injustices as early as 1880; however, federal intervention was largely ineffective until key advances were made during the civil rights movement.[37]

Today, all states cast a similarly wide net to prevent exclusion on the basis of prohibited categories. Most states rely on lists of voter registration to gather potential jurors, while some states include the "local census, the tax rolls, city directories, telephone books, and drivers' license lists[,]" and others even consider names suggested by "political and civic leaders."[38] Often, prospective jurors selected to a venire must fill out a pretrial questionnaire that provides essential information intended to help the court and parties cull those who would be unable to sit as impartial jurors due to bias, actual or perceived conflicts of interest, or other considerations. For instance, courts often excuse prospective jurors from service based on the "inability to speak the English language, physical and/or mental infirmity, age, and occupation."[39]

b. Voir Dire. Once a venire is chosen and jury questionnaires are completed, attorneys pore over potential jurors' answers in preparation for the next stage of jury selection: *voir dire*. The theoretical purpose for allowing the parties to question prospective

35. Marks, *supra* note 33, at 621 (citing 28 U.S.C. §§ 1861−63).

36. *See* Hoffman, *supra* note 15, at 830–33 (discussing the Supreme Court's failure to end this discrimination).

37. *See id.* at 830–33 (discussing the Supreme Court's "naïve" methods in addressing discrimination, and noting that Congress enacted the Jury Selection and Service Act of 1968 to "prohibit[] the exclusion of federal jurors on account of race, color, religion, sex, national origin, or economic status").

38. Marks, *supra* note 33, at 621 (quoting WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 22.2, at 963 (2d ed. 1992).

39. Suzanne Bell Chambers, *Applying the Break: Religion and the Peremptory Challenge*, 70 IND. L.J. 569, 571 (1995).

jurors in this way is to help the court empanel an impartial jury and to assist the attorneys in "gather[ing] "the information they need to exercise intelligently [peremptory and for-cause] challenges," leading to a fairer trial.[40] In preparation for *voir dire*, practitioners often investigate the potential biases of prospective jurors on a wide array of issues, including their religious affiliations and beliefs, and their degree of religiosity.

The practice of *voir dire* can be clumsy and is sometimes even painful to watch. Some jurisdictions lessen this ungainliness by following the federal approach of placing *voir dire* questions primarily in the hands of the judge, and by limiting or preventing the parties from independently questioning prospective jurors.[41] Questions asked of the venire are referred to as "general *voir dire*," while specific questions to a prospective juror in the absence of the others are known as "individual *voir dire*."[42]

Questioning during *voir dire* can be particularly awkward when attorneys probe sensitive areas of religious belief with such inquiries as, "How often do you attend services?" and, "Is there anyone on the panel who does not believe in God?", to which some will be inclined to "either balk at responding, or respond while silently resenting the intrusion."[43] The liberty to ask these sensitive questions is generally left within the "broad discretion" of the trial judge, but in cases challenging such inquiries, appellate courts generally agree that these religion-based questions are appropriate "only if relevant to the particular case before the court."[44]

c. For-Cause and Peremptory Challenges. Once *voir dire* is complete, attorneys may attempt to persuade the judge to excuse "for cause" certain jurors in the venire, preventing them from being empaneled. Known as a "challenge for cause," this objection "allows a prospective juror to be struck only after showing a 'narrowly specified, provable and legally cognizable basis of partiality'" by the individual.[45] This concern about juror bias was captured by Sir William Blackstone's observations in 1769 that

40. *Id.* (explaining *voir dire*).

41. *See* Marks, *supra* note 33, at 621–22 (discussing *voir dire*).

42. BORNSTEIN & MILLER, *supra* note 25, at 18 (discussing *voir dire*).

43. Thomas Marten, *Politics, Religion, and Voir Dire*, 68 DRAKE L. REV. 723, 738 (2020).

44. *Id.* at 733–34.

45. *See* Marks, *supra* note 33, at 622 (quoting Swain v. Alabama, 380 U.S. 202, 220 (1965)).

jurors exhibit two types of partiality: (1) "manifest prejudice," involving such problems as actual bias, conflicts of interest, or knowledge of the parties, and (2) "bias on the favor," involving "prejudicial attitudes or beliefs that would make the juror partial."[46] The founders considered the challenge for cause part and parcel of the requirement for an "impartial jury" set forth in the Sixth Amendment.[47]

Even where no cognizable challenge for cause exists, most jurisdictions allow an attorney to raise a limited number of peremptory challenges against a prospective juror for any reason that does not violate federal or state law, such as an improper dismissal based on a juror's race or gender.[48] A peremptory challenge "fall[s] outside the rubric of trial procedures that are essential for a fair trial" because, "unlike the challenge for cause, [it] is not specifically designed to target unqualified jurors" but instead is used "as a strategic device to design a jury sympathetic to the particular litigant's case."[49]

The practice of making peremptory challenges arose during the thirteenth century, but was rarely used in England throughout its history, and was abolished entirely by Parliament in 1989.[50] In the Colonies, most American colonial courts allowed for some peremptory challenges, and the newly created U.S. Congress formally codified the practice in 1790.[51] There is no evidence that peremptory challenges were discussed by the nation's founders, however, and the Supreme Court has concluded that the U.S. Constitution does not require them.[52] Still, Congress and every state currently allow peremptory challenges in both civil and criminal cases.[53]

46. BORNSTEIN & MILLER, *supra* note 25, at 18 (italics omitted).

47. *See* Hoffman, *supra* note 15, at 824 (explaining the history of the Sixth Amendment).

48. BORNSTEIN & MILLER, *supra* note 25, at 19; *see also* Marks, *supra* note 33, at 625 (noting that most jurisdictions permit limited peremptory challenges).

49. Cheryl G. Bader, *Batson Meets the First Amendment: Prohibiting Peremptory Challenges that Violate a Prospective Juror's Speech and Association Rights*, 24 HOFSTRA L. REV. 567, 584 (1996).

50. *See* Hoffman, *supra* note 15, at 816–22 (detailing the English history of the peremptory challenge).

51. *See* Marks, *supra* note 33, at 624.

52. *See id.* (*citing* Stilson v. United States, 250 U.S. 583 (1919)).

53. *See* Hoffman, *supra* note 15, at 827.

The use of peremptory challenges in the United States has been severely criticized because, "[f]rom Reconstruction through the civil rights movement," their use allowed for the systematic exclusion of black jurors throughout the nation.[54] In 1965, in *Swain v. Alabama*,[55] the Supreme Court "held that the Equal Protection Clause prohibited state prosecutors from using their peremptory challenges in a racially discriminatory way[;]" however, that unwieldy decision had little impact on improper race-based challenges.[56] Eventually, the Court took more effectual action in *Batson v. Kentucky*,[57] which still governs today's handling of peremptory challenges based on race (and now those based on gender, also).[58] While it is an open question whether the U.S. Supreme Court will ever extend *Batson* to challenges based on a prospective juror's religion, "[n]ine states have determined that peremptory challenges based on religious affiliation violate either federal or state laws precluding restrictions on citizens' right to serve as jurors."[59]

3. Juror Dismissal During Trial

Once the judge has ruled on the parties' challenges to prospective jurors, the remaining persons are empaneled to fill all available seats on the jury, along with any alternate jurors, depending on the jurisdiction and the type and anticipated length of trial. Empaneling a jury, however, does not end the possible issues that can impact jury service. During trial, problems may arise with the jurors that require the judge (and the parties) to conduct additional *voir dire*, and could result in excusing one or more jurors due to misconduct or because of some issue that arises in the jurors' personal lives or with their health. Most state and federal courts use

54. *Id.* at 829.

55. 380 U.S. 202 (1965).

56. *See* Hoffman, *supra* note 15, at 830−33 (discussing *Swain*).

57. 476 U.S. 79 (1986). *Batson* mandated an orderly process for adjudicating peremptory challenges that might be motivated by race. It requires that a defendant make a prima facie showing of racial discrimination by demonstrating that the prosecutor removed members of the defendant's race from the venire on account of their race. Once this is done, the prosecutor has the burden to convince the judge that there was a valid, race-neutral reason for challenging the relevant jurors. *See id.* at 96–98.

58. *See* J.E.B., v. Alabama, *ex rel.* T.B., 511 U.S. 127 (1994) (applying *Batson* to gender-based challenges).

59. Marten, *supra* note 43, at 747.

a "good cause" standard for excusing jurors prior to deliberations.[60] In many cases, once the offending jurors are excused, alternate jurors can replace them and the trial can continue without resulting in a mistrial.

In criminal trials in most courts, a pivotal moment occurs when the case is submitted to the jury for deliberations.[61] At that time, most jurisdictions authorize the release of alternate jurors, and it is assumed no substitutions will be made once deliberations have begun, due to the accused's right to a unanimous jury under the Sixth Amendment.[62] In the federal system, once deliberations have begun, a judge may excuse a juror only with "good cause,"[63] but the standard is considered particularly "tough," permitting a judge to excuse a juror at that stage of the proceedings "only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence[,]" which is "basically" the equivalent of "a 'beyond-a-reasonable-doubt' standard."[64] Considering this kind of dismissal one with constitutional magnitude, those courts apply a highly demanding standard "[t]o guard against 'the danger that a dissenting juror might be excused under the mistaken view that the juror is engaging in impermissible nullification . . . ."[65]

4. Impeaching a Jury's Verdict

After a jury verdict is rendered, claims may arise against jurors alleging irregularities during deliberations. This attack on a verdict already delivered has the most potential to inflict damage on both

60. *See* David B. Sweet, Annotation, *Propriety, Under State Statute or Court Rule, of Substituting State Trial Juror with Alternate After Case Has Been Submitted to Jury*, 88 A.L.R. 4th 711 (1991).

61. *See generally id.*

62. *See* AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE Standard 15-2.7 and Commentary (3rd ed. 1996) (allowing trial judge to replace jurors prior to deliberations, but prohibiting substitution after the case is submitted to the jury). *See also, e.g.*, Wright v. State, 12 N.E.3d 314, 316 (Ind. Ct. App. 2014) (holding that judges in criminal cases have "broad discretion" in excusing jurors prior to deliberations, but that the Sixth Amendment governs removal after deliberations have begun).

63. FED. R. CRIM. P. 23(b)(3).

64. United States v. Brown, 996 F.3d 1171, 1184, 1192 (11th Cir. 2021) (en banc) (citing United States v. Abbell, 271 F.3d 1286, 1302 (11th Cir. 2001)); United States v. Thomas, 116 F.3d 606, 621−22 (2d Cir. 1997); United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1987); United States v. Kemp, 500 F.3d 257, 304 (3d Cir. 2007); United States v. Symington, 195 F.3d 1080, 1087 & n.5 (9th Cir. 1999).

65. *Brown*, 996 F.3d at 1184 (quoting *Abbell*, 271 F.3d at 1302).

the finality of the judicial process and the individual jurors themselves. As the Supreme Court has explained, jury deliberations need protection "from intrusive inquiry" because, "if attorneys could use juror testimony to attack verdicts, jurors would be 'harassed and beset by the defeated party,' thus destroying 'all frankness and freedom of discussion and conference.'"[66]

Under the common law, beginning in 1785, Chief Justice Lord Mansfield first embraced this need to exclude such evidence by creating the rule that now bears his name.[67] Confronted with a case where the jurors apparently reached a verdict by flipping a coin, Lord Mansfield found that the jurors "were not competent to impeach their own verdicts, and thus themselves, because 'a person testifying to his own wrongdoing was, by definition, an unreliable witness.'"[68] While Mansfield's Rule was followed for a hundred years, the Supreme Court of Iowa in 1851 created a new rule that later garnered a minority following, holding that "courts could receive juror affidavits for purposes such as proving 'that the verdict was determined by aggregation and average, or by lot, or game of chance, or other artifice or improper manner.'"[69]

The Federal Rules of Evidence, along with the rules in most states today, follow a variation of Mansfield's no-impeachment rule, where—"[d]uring an inquiry into the validity of a verdict or indictment"—a juror is prohibited from "testify[ing] about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment.[70]" "The court may not receive a juror's affidavit or evidence of a juror's statement on these matters."[71] The federal rule

66. Pena-Rodriguez v. Colorado, 580 U.S. 206, 220 (2017) (quoting Tanner v. United States, 483 U.S. 107, 120 (1987) (quoting McDonald v. Pless, 238 U.S. 264, 267–268 (1915))).

67. *See* Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 880–81 (2009).

68. *Id.* at 881 (quoting David A. Christman, *Federal Rule of Evidence 606(b) and the Problem of 'Differential' Jury Error*, 67 N.Y.U. L. REV 802, 815 n.78. (1992)).

69. *Id.* at 882−83 (quoting 20 Iowa 195, 195 (1866)).

70. *See Pena-Rodriguez*, 580 U.S. at 217–18 (quoting FED. R. EVID. 606(b)(1)) ("Some version of the no-impeachment rule is followed in every State and the District of Columbia. Variations make classification imprecise, but, as a general matter, it appears that 42 jurisdictions follow the Federal Rule, while 9 follow the Iowa Rule.").

71. FED. R. EVID. 606(b)(1).

allows three exceptions: (1) if "extraneous prejudicial information was improperly brought to the jury's attention"; (2) if "an outside influence was improperly brought to bear on any juror"; or (3) if "a mistake was made in entering the verdict on the verdict form."[72] In 2017, the Supreme Court created a fourth exception required by the Sixth Amendment, holding that a court must consider juror testimony impeaching the verdict if the juror "makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant . . . ."[73] The Court has not yet determined whether a fifth exception should be permitted where a juror relies on "religious stereotypes or animus" to convict a criminal defendant; however, that issue will be addressed in Part II of this Article.

B. First Principles of Religious Liberty

Religious liberty is an essential right belonging to jurors and every person protected under the U.S. Constitution.[74] It was no accident that religion was specially protected by the nation's founders, who professed that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . ."[75] Throughout history, near-universal human experience has drawn fundamental meaning from religion, which connects individuals to a "divine or transcendent authority."[76] In Western Civilization, religion has been the foundation for the basic secular rights and liberties recognized under the common law from

72. FED. R. EVID. 606(b)(2).

73. *Pena-Rodriguez*, 580 U.S. at 225.

74. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984) (discussing the Religion Clauses of the First Amendment).

75. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

76. *See* MIRCEA ELIADE, THE SACRED AND THE PROFANE (Willard R. Trask trans., Harcourt, Brace & World 1959) (discussing the universality of religious experience). *See also* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 218 (1991). For a more complete discussion on the unique importance of religion in history and society, see generally Antony Barone Kolenc, *Religion Lessons from Europe: Intolerant Secularism, Pluralistic Neutrality, and the U.S. Supreme Court*, 30 PACE INT'L L.J. 43 (2017).

which the U.S. jury system was shaped.[77] Before considering the proposed *Juror's Religious Freedom Bill of Rights* in Part II, this section will briefly set forth key principles of religious freedom to inform that discussion.

1. The Religion Clauses and Historical Practice

The nation's founders—well familiar with the history of religious persecution in Europe and again on the religiously diverse shores of America[78]—not only sought to protect the fundamental right of religious liberty but also viewed religion as a necessary component of a healthy constitutional democracy.[79] For this reason, they provided unique protections for religious freedom in both the text of the original Constitution and in the Bill of Rights drafted by the first Congress. Those protections provide the basis for this Article's proposal of another bill of rights (of sorts) to secure the rights of jurors.

The text of the Constitution preserves religious liberty by declaring that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[80] And the first ratified freedom in the Bill of Rights—which contains the essential liberties the founders valued in a free society—states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[81] These Religion Clauses of the First Amendment do not protect some generic right of "conscience," but rather a right to religious belief, expression, and practice.[82] Additionally, the fact

77. *See* Aaron R. Petty, *Religion, Conscience, and Belief in the European Court of Human Rights*, 48 GEO. WASH. INT'L L. REV. 807, 816-17 (2016) (discussing the role of Christianity in European human rights law).

78. *See* McConnell, *supra* note 74, at 1479 (explaining that the U.S. was religiously diverse by standards of day).

79. *See, e.g.*, Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798) (predicting the Constitution would succeed if it governed "a moral and religious People").

80. U.S. CONST. art. VI, cl. 3.

81. U.S. CONST. amend. I. "Religion" likely holds the same meaning in both of these clauses. *See* Greenawalt, *supra* note 74, at 758; Everson v. Bd. of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

82. Eduardo Peñalver, *The Concept of Religion*, 107 YALE L.J. 791, 803 (1997); McConnell, *supra* note 74, at 1481 (discussing how Congress rejected a version of the Religion Clauses that would have broadly covered all conscience rights). *See also* Lamb's Chapel v. Ctr.

that the First Amendment's free-speech protection "doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent."[83]

Generally speaking, the founders viewed the practice of religion as a "public good" that instilled critical values in the nation's citizens.[84] In addition to drafting the Bill of Rights, the first Congress passed laws that viewed "religion, morality and knowledge" as "necessary to good government and the happiness of mankind."[85] Further, throughout the nation's history, official actions in all branches of the federal government have affirmed the significance of religion in public life.[86] In the twentieth century, the Religion Clauses were again confirmed as conferring fundamental rights when the Supreme Court selectively incorporated them to be applied against state and local government through the Fourteenth Amendment's Due Process Clause.[87]

Moriches Union Free Sch. Dist., 508 U.S. 384, 400 (1993) (Scalia, J., concurring in judgment) (arguing that the "first freedom" of religious liberty was proof that the founders intended for religion to be given "preferential treatment").

83. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421 (2022) (citing *A Memorial and Remonstrance Against Religious Assessments*, *in* SELECTED WRITINGS OF JAMES MADISON 21, 25 (R. Ketcham ed. 2006)).

84. *Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring in judgment). *But see* McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 878–79 (2005) (disputing Scalia's position).

85. *See* An Act to Provide for the Government of the Territory Northwest of the River Ohio, 1 Stat. 50-53, Aug. 7, 1789 (reenacting the Northwest Ordinance of 1787, which contained the quoted language in its text). Congress also set up a system whereas tax dollars were used to pay for chaplains to serve the Legislative Branch. *See also* JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 67 (1820); 1 Stat. 70−71 (1845); Marsh v. Chambers, 463 U.S. 783 (1983) (referencing this system as a reason to uphold the practice of legislative prayer).

86. *See* Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring); McCreary Cnty., 545 U.S. at 885–912 (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting); Lynch v. Donnelly, 465 U.S. 668 (1984); Zorach v. Clauson, 343 U.S. 306 (1952) (cases where the Supreme Court or individual justices detailed the historical case for religion's accepted role in official government actions). *See also* Church of the Holy Trinity v. United States, 143 U.S. 457, 458–59 (1892) (outlining similar actions).

87. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (incorporating the Establishment Clause).

2. Judicial Inconsistency and the Rise of RFRAs

The Supreme Court has struggled to define a coherent set of tests and rules to govern the Religion Clauses.[88] In the context of the Free Exercise Clause, the Court has viewed that protection as a "tightly closed" door "against any governmental regulation of religious beliefs[,]" which receive absolute protection under the Constitution.[89] The Court has provided less clarity, however, when addressing the *practice* of religion.

On the one hand, the Court has explained that Congress can legislate "to reach actions . . . in violation of social duties or subversive of good order[,]"[90] and it has applied a deferential standard of review to "general law[s]" advancing a state's "secular goals," even where such rules have disproportionately impacted discreet religious groups.[91] On the other hand, the Court has ruled in favor of members of a minority religious sect objecting to reciting the Pledge of Allegiance at school,[92] and it has applied a strict standard of review when requiring a state to provide unemployment benefits to a Seventh-Day Adventist who objected to working on the Saturday sabbath.[93] For nearly three decades after that unemployment case, many believed the Free Exercise Clause required the application of "strict scrutiny" review whenever claimants could prove that government action placed a substantial burden on their ability to act on their sincere religious beliefs;[94] in other words, the government would be required to show the court that it was acting in furtherance of a compelling

88. For a more complete discussion on the difficulties in the Supreme Court's religion jurisprudence, especially regarding the Establishment Clause, see generally Kolenc, *Religion Lessons from Europe: Intolerant Secularism, Pluralistic Neutrality, and the U.S. Supreme Court*, *supra* note 76.

89. Sherbert v. Verner, 374 U.S. 398, 402 (1963) (emphasis omitted) (citing *Cantwell*, 310 U.S. at 303).

90. Reynolds v. United States, 98 U.S. 145, 164 (1879) (upholding bigamy laws despite their impact on some practitioners of the Mormon religion).

91. Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (upholding Sunday "blue laws" despite the impact on Orthodox Jews in the local community).

92. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

93. *See Sherbert*, 374 U.S. at 398.

94. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (granting the Amish an accommodation from compulsory school requirements).

state interest and had used the least restrictive means to achieve that interest.[95]

In a series of cases in the 1980s,[96] and then definitively in 1990 in its decision in *Employment Division v. Smith*,[97] the Supreme Court attempted to bring consistency to this chaotic precedent by applying the deferential "rational basis" test as the standard of judicial review whenever a government's neutral law of general applicability incidentally burdened religious practice.[98] Rational basis review requires only that the government seek to accomplish a matter "rationally related to the public health and welfare"; however, the test does not require a law to be "in every respect logically consistent with its aims[,]" but rather only "a rational way" to achieve those aims.[99] This is the same deferential standard of review that applies under the Equal Protection Clause when the government does not categorize persons in a protected class.[100] In a decision written by Justice Antonin Scalia, the *Smith* Court reasoned that the use of strict scrutiny in neutral free-exercise situations would be "courting anarchy" and would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . ."[101] The Court later affirmed, however, that laws targeting religion (i.e., those that were not neutral or generally applicable) would continue to require the use of strict judicial scrutiny.[102]

95. *Sherbert*, 374 U.S. at 403−04.

96. *See, e.g.*, United States v. Lee, 455 U.S. 252, 259 (1982) (upholding social security taxes despite argument that participating would violate Amish faith); Goldman v. Weinberger, 475 U.S. 503 (1986) (refusing to apply strict scrutiny in military cases); Bowen v. Roy, 476 U.S. 693, 702 n.7 (1986) (upholding assigned social security numbers despite argument that assigning child the number violated parents' Native American religious beliefs).

97. Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

98. *See id.* at 879.

99. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–89 (1955).

100. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

101. *Id.* at 888−89.

102. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U. S. 520 (1993) (applying strict scrutiny to facially neutral laws that targeted the practices of a specific religious sect). *See also* Brian Galle, *Free Exercise Rights of Capital Jurors*, 101 COLUM. L. REV. 569, 577–78 (2001) (noting that strict scrutiny applies against "statutes that target religion on their face" and those that are substantially "underinclusive").

The *Smith* decision was met with widespread criticism and concern that the Court's deferential new approach in Free Exercise cases would severely undermine the rights of religious persons, especially those practicing minority religions.[103] To remedy this concern, with the near-unanimous support of Congress, President William J. Clinton signed into law the Religious Freedom Restoration Act (RFRA) of 1993.[104] Seeking to restore strict scrutiny as the legal standard in free-exercise cases,[105] RFRA requires the government to demonstrate that its actions constitute the least restrictive means of furthering a compelling state interest whenever it imposes a substantial burden on sincere religious exercise.[106] Notably, the protection under the federal RFRA is "even broader" than that available under pre-*Smith* decisions, and it goes "far beyond what . . . is constitutionally required."[107]

Although originally intended to govern both state and federal acts, the Supreme Court limited the original RFRA to federal actions due to concerns with principles of federalism,[108] although the Court later allowed Congress to reach state action impacting religion in state prisons and in certain land-use cases.[109] While the federal RFRA does not govern most state and local acts, nearly half

103. The American Civil Liberties Union, Traditional Values Coalition, Christian Legal Society, and the American Jewish Congress all expressed disdain for the *Smith* decision and supported a national legislative solution that would raise the standard to strict scrutiny. *See* DAVID M. ACKERMAN, CONG. RSCH. SERV., THE RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS FREEDOM ACT: A LEGAL ANALYSIS, 20−22 (1993).

104. Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), codified at 42 U.S.C. §§ 2000bb, *et seq*. For a more complete discussion of the history and details of RFRA, see generally Michael Berry and Antony Barone Kolenc, *Born-Again RFRA: Will the Military Backslide on Its Religious Conversion?*, 87 MO. L. REV. 435 (2022).

105. *See* ACKERMAN, *supra* note 103, at 20−22.

106. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

107. *Hobby Lobby*, 573 U.S. at 695 n.3, 696, 706, 714, 748 (explaining that RLUIPA amended RFRA's definition of "exercise of religion" in a manner that "deleted the prior reference to the First Amendment" in "an obvious effort to effect a complete separation from First Amendment case law").

108. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that Congress had overstepped its constitutional authority in imposing RFRA on the states); *see also Hobby Lobby*, 573 U.S. at 695 (discussing *Boerne*'s holding).

109. *See* Cutter v. Wilkinson, 544 U.S. 709, 713–14 (2005) (upholding a facial challenge against the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc-1 (2000), which (like RFRA) applied strict scrutiny to free exercise cases arising in both federal and state prisons). *See also* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 430−31 (2006) (applying RFRA).

the states have passed their own RFRAs.[110] Thus, the religious rights of jurors in federal trials and many state trials are protected under a high level of judicial scrutiny, regardless of the minimum standards in the U.S. Constitution. Additionally, there may be protections for jurors under the Equal Protection Clause of the Fourteenth Amendment, although most religious questions have traditionally been resolved by reference to the Religion Clauses.[111]

3. The Difficulty in Defining Religion

When considering the proposed *Juror's Religious Freedom Bill of Rights* in Part II, one might wonder whether the difficulty in defining "religion" poses an insurmountable challenge to acknowledging such a set of rights.[112] As one commentator expressed on a related issue, "courts would be required to conduct inquiries into the nature of particular beliefs and to make decisions regarding whether such beliefs are religious in order to determine what meaning 'religion' has[,]" which "could very well constitute excessive entanglement and thus give rise to an Establishment Clause challenge under *Lemon*."[113] The problem with that commentator's position, however, is that it applies to every type of religion-related issue, including the interpretation of the Religion Clauses contained in the First Amendment. In other words, if courts have been able to navigate this thicket in other religion cases—and they have, although perhaps not very well—then this concern should not prevent the recognition of the religious rights of jurors.

110. *See* Ala. Const. Art. I, § 3; Ariz. Rev. Stat. Ann. § 41-1493.01; Ark. Code Ann. §§ 16-123-401 to -407; Conn. Gen. Stat. Ann. § 52-571b; Fla. Stat. Ann. §§ 761.01 to .05; Idaho Code Ann. § 73-402; 775 Ill. Comp. Stat. Ann. 35/1 to /99; Ind. Code Ann. § 34-13-9; Kan. Stat. Ann. §§ 60-5301 to -5305; Ky. Rev. Stat. Ann. § 446.350; La. Stat. Ann. §§ 13:5231 to 5242; Miss. Code Ann. § 11-61-1; Mo. Ann. Stat. § 1.302; N.M. Stat. Ann. §§ 28-22-1 to -5; Okla. Stat. Ann. tit. 51, §§ 251–58; 71 Pa. Stat. Ann. §§ 2403–08; R.I. Gen. Laws Ann. § 42-80.1-1 to -4; S.C. Code Ann. § 1-32-10 to -60; Tenn. Code Ann. § 4-1-407; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001 to .012; Va. Code Ann. § 57-2.02.

111. *See* Chambers, *supra* note 39, at 591−93 (suggesting that an Equal Protection framework could provide strict scrutiny protection in cases where religion is targeted, but noting that this would provide little added benefit to litigants because the analysis would "virtually mirror" the Free Exercise Clause in application).

112. For a more complete discussion on the various scholarly and judicial approaches to defining religion, see generally Antony Barone Kolenc, *Not "For God and Country": Atheist Military Chaplains and the Free Exercise Clause*, 48 U.S.F. L. REV. 395 (2014).

113. Chambers, *supra* note 39, at 607 (discussing the topic in the context of whether a *Batson* analysis should apply when striking jurors of particular religions).

Still, there is a valid concern about how to define religion in these types of inquiries.

The nation's founders almost certainly used the term religion to refer to either Christianity or at least some theistic form of religion, such as Judaism or Islam.[114] Over the years, however, there has been a growing scholarly debate about the term's meaning and how it should apply in religion cases.[115] The U.S. Supreme Court has spoken with several voices on this question, at one point defining religion as "reference to one's views of his relations to his Creator,"[116] but later stating in dicta that, "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[117] Some conclude that these statements by the Court mean that non-theistic religions must be treated on par with theistic ones.[118]

With the Supreme Court's precedent sending mixed signals on the matter, legal scholars began devising theories to help measure whether a system of belief is a religion. These methodologies take the form of both "single-factor" and "multi-factor" approaches. As a general rule, the reasoning behind these scholarly efforts is a desire to broaden the definition of religion beyond the founders'

114. *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 338 (1996) (conceding the founders viewed the common meaning of religion as theistic when they used the word in the First Amendment); Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1405 (2012) (concluding that the founders were not referring to nontheistic religions); Peñalver, *supra* note 82, at 803 (noting the founders may have defined religion as encompassing only theistic beliefs).

115. *See, e.g.*, Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 599 (1982); Greenawalt, *supra* note 74, at 771.

116. Davis v. Beason 133 U.S. 333, 342 (1890). *See also* Wisconsin v. Yoder 406 U.S. 205, 215−16 (1972) (noting that First Amendment "claims must be rooted in religious belief[,]" not secular ideas).

117. Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961). *See also* Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) (noting the Court used to think the right to choose a creed "would not require equal respect for the conscience of the infidel . . . [or] the atheist," but it had "unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all").

118. *See, e.g.*, Bradford S. Stewart, Comment, *Opening the Broom Closet: Recognizing the Religious Rights of Wiccans, Witches, and Other Neo-Pagans*, 32 N. ILL. U. L. REV. 135, 193−99 (2011) (arguing neo-paganism is part of the Court's "definition of religion" that "must be accepted . . . for all judicial purposes").

purely theistic one in an attempt to embrace the diverse religions now active under the auspices of the U.S. Constitution.[119]

The single-factor effort seeks one key factor to distinguish the religious from the non-religious.[120] A popular single-factor approach focuses on whether a system of belief has "faith that some higher or deeper reality exists than that which can be established by ordinary existence or scientific observation."[121] Another single-factor theory focuses on whether a person's beliefs center around an "ultimate concern" in their lives, similar to the Christian focus on the ultimate concern of spending eternity with God after one dies.[122] In contrast, multi-factor approaches consider several variables while attempting to isolate whether a system of beliefs qualifies as a religion. The most successful of these efforts is the "analogical approach"—begun in the 1950s and popularized in the 1970s—which identifies "instances to which the concept [of religion] indisputably applies" and then compares "in more doubtful instances how close the analogy is between these and the indisputable instances."[123] For example, some have used the analogical approach to observe that the concept of religion indisputably applies to the existence of a higher being, and thus an individual's belief in the *absence* of a higher being is sufficiently comparable to treat atheism as a religion.[124]

Whichever approach is ultimately adopted in these cases, it would seem that it must be narrow enough to preserve some distinction between religion and other non-religious philosophical beliefs. Otherwise, the noble and understandable desire to be

119. *See, e.g.*, Peñalver, *supra* note 82, at 803–04 (arguing against relying exclusively on the Founders' "original intent" when defining religion because it "would mandate the adoption of the Framers'' theistic definition of religion"). *See also* Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1132–35 (2011) (reviewing nonlegal theories on defining religion).

120. *See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 599 (1982) (discussing various single-factor theories, such as "ultimate concerns" and "extratemporal consequences").

121. *See* Greenawalt, *supra* note 74, at 805.

122. For an example of this approach, *see* Kaufman v. McCaughtry, 419 F.3d 678, 681 (7th Cir. 2005).

123. Greenawalt, *supra* note 74, at 763.

124. *See* Society of Separationists, Inc. v. Herman, 959 F.2d 1283 (5th Cir. 1992) (treating a juror's refusal to affirm to tell the truth due to her atheism as a religious belief). *See also* Laycock, *supra* note 114, at 326–27. Tebbe, *supra* note 119, at 1149 (arguing that atheism should be considered a religion); Schwartzman, *supra* note 114, at 1421–22 (advocating for an expansion of the term religion to include all types of secular views).

inclusive will result in fundamentally altering a value judgment made at the time the Bill of Rights was conceived and ratified: namely, that the First Amendment was intended to protect religion and was not intended as a generic protection for any type of secular philosophy. In any event, one's position in this debate should not prevent the recognition of the religious rights of jurors, as argued throughout the remainder of this Article.

II. A PROPOSED JUROR'S RELIGIOUS FREEDOM BILL OF RIGHTS

Part I of this Article sets forth the fundamental principles that govern jury selection and service at trial, as well as key constitutional and statutory standards that undergird a juror's religious liberty. Part II proposes six tenets that will constitute a *Juror's Religious Freedom Bill of Rights* to be applied at all stages of the trial process. First, jurors have the right to possess (or not possess) a religious identity. Second, jurors have the right to be free from religious discrimination while serving on a jury. Third, jurors have the right to religious accommodations during jury service. Fourth, jurors have the right to commune with a higher power and to receive divine guidance in keeping with their religious traditions. Fifth, jurors have a right to privacy regarding their religious beliefs and practices. Finally—because rights come with responsibilities—jurors also have an obligation to faithfully execute their duties and perpetrate no wrongs in the name of religion.

A. Tenet 1: The Right to Religious Identity

The first tenet of this proposed bill of rights is that jurors have the right to possess (or not possess) a religious identity without penalty to their potential jury service. Paraphrasing Justice Neil Gorsuch in a recent case, religious liberty under the U.S. Constitution means, "[a]t a minimum," that the jury system will not "treat[] religious exercises worse than comparable secular activities."[125] In the context of jury service, every person should have an equal opportunity to be chosen to serve as a juror regardless of their religious fervor or identity, or lack thereof. The precise contours of this protection may overlap with others in this

125. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993)).

bill of rights, but religious identity is so foundational to the human person that it deserves a special place of primacy.

1. The Blessings of Jury Service

When considering jury service, perhaps the first concept that comes to mind is the Sixth Amendment right of a criminal defendant to be tried by an impartial jury made up of "one's peers," meaning "a jury selected from a representative cross section of the entire community."[126] In this context, the main focus is on the right of the accused, *not* the rights of potential jurors. It is the accused who holds this fundamental due process guarantee, so critical in the unique U.S. system of criminal justice. Indeed, the accused holds a constitutional claim on this right to a fair trial; in contrast, "[t]he right to sit on a jury . . . is afforded no explicit protection in the Constitution."[127]

Still, being denied the honor of jury service as a member of the community is no small deprivation. The Supreme Court has called "serving on a jury . . . the most substantial opportunity that most citizens have to participate in the democratic process."[128] The Court also has affirmed the historical recognition that participation in this "process of government" is in fact a "raising" of the people to a place in the judiciary, "invest[ed] . . . with the direction of society."[129] Further, this honor and privilege to participate in civic life through jury service offers a person some security from the "arbitrary use or abuse" of judicial power.[130]

The Supreme Court has been especially clear on this matter in the context of race. Even a criminal accused with fundamental rights under the Sixth Amendment has no right to deprive a person of the privilege of jury service solely due to race because, "[w]hile '[a]n individual juror does not have a right to sit on any particular

126. Ramos v. Louisiana, 140 S. Ct. 1390, 1402 n.47 (2020).

127. Marks, *supra* note 33, at 655.

128. Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019).

129. Powers v. Ohio, 499 U.S. 400, 407 (1991) (quoting Alexis de Tocqueville, 1 Democracy in America 334–37 (Schocken 1st ed. 1961)). *See also* United States v. Brown, 996 F.3d 1171 (11th Cir. 2021) (*En Banc Brief of Nebraska, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, South Dakota, and Texas as Amici Curiae in Support of Defendant-Appellant and Reversal*, at 14) (discussing the dignity of jury service).

130. Melissa Roth Triedman, *Extending Batson v. Kentucky to Religion-Based Peremptory Challenges*, 4 S. CAL. INTERDISC. L.J. 99, 113–14 (1994) (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)).

petit jury, . . . he or she does possess the right not to be excluded from one on account of race,' [where] . . . the juror is subjected to open and public racial discrimination."[131] Therefore, the matter is more than just a question of due process for the accused or the parties to the litigation: it is a concern for the "dignity of persons"[132] (i.e., the potential jurors). Those who are systematically excluded from jury service based on identity alone will "suffer harms similar to the pre-*Batson* harms that excluded black jurors endured."[133] In the words of the Texas Court of Criminal Appeals, "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination."[134]

In sum, the "entire community"—which, of course, comprises persons of all races and genders—also includes those who identify as religious. As argued in the next section, these persons have dignity too, and they deserve to be treated as equal members of the community regardless of their religious identity.

2. Religious Identity and Systemic Exclusion

Jurors have the right to their religious identity, and any sensible bill of rights must first ensure that no person will be denied the privilege of jury service based solely on their religious affiliations, beliefs, or practices, nor on their decision to eschew religion.

Scholarly debate on whether religion is a proper basis to exclude a person from jury service is often raised in the context of peremptory challenges, where a juror is struck for no other reason than their degree of religiosity or their religious affiliation.[135] That issue will be dealt with further in Part II.B. But that same discussion can also apply to earlier stages of the selection process. Problems would arise, to be sure, if a jurisdiction were to use religious affiliation to excuse an entire class of persons from consideration when selecting the venire, or if potential jurors were expressly not

131. Georgia v. McCollum, 505 U.S. 42, 48–49 (1992).

132. *Id.* at 48 (quoting *Powers*, 499 U.S. at 402).

133. Triedman, *supra* note 130, at 104.

134. Casarez v. State, 913 S.W.2d 468, 481 (Tex. Crim. App. 1994) (finding no right to discriminate against jurors based on their religion).

135. *See generally, e.g.*, Marten, *supra* note 43, Chambers, *supra* note 39, and Triedman, *supra* note 130.

sought from a particular community of faith, such as an Orthodox Jewish enclave in New York. Such wholesale purgings of religious jurors have been attempted in the past at times.[136]

As a potential example, one scholar imagined a clearly improper policy excluding all Mormons from cases involving alcohol due to the assumption that Mormons "disapprove of alcohol consumption" and that this religious belief will "prevent [them] from viewing issues fairly."[137] Such a possibility is not so far-fetched as it sounds. During Reconstruction, Congress proposed an "incompetence" standard that targeted Mormon jurors, when a bill included language that,

> in all prosecutions for bigamy . . . no person shall be competent to serve, either as grand or petit jurors, who believes in, advocates, or practices, bigamy, concubinage, or polygamy, and upon that fact appearing by examination on *voir dire* or otherwise, such person shall not be permitted to serve as a juror.[138]

A more modern and less intentional form of this exclusion was considered in *U.S. v. Maskeny*, where a Georgia "ministerial exemption" to jury service excused "all ministers of the gospel and members of religious orders actively so engaged" if potential jurors made an "individual request."[139] The defendant alleged this provision had the effect of "exclud[ing] all Jehovah's Witnesses" because members of that "sect consider themselves ministers."[140] The challenge failed, however, when the court did not substantiate

136. *See* Juarez v. State, 102 Tex. Crim. 297, 277 S.W. 1091 (1925) (finding actions of county officers violated the Fourteenth Amendment by excluding Roman Catholics from a grand jury that was intended to indict a Catholic); Davis v. Arthur, 139 Ga. 74, 76 S.E. 676 (1912) (members of religious denominations permitted to raise claim that jury commissioners were discriminating against them in making grand jury and petit jury lists).

137. Triedman, *supra* note 130, at 106.

138. H.R. 1089, 41st Cong. § 10 (1870); S. 286, 41st Cong. § 17 (1869); H.R. 3097, 43rd Cong. § 4 (1874). *See also* Jonathan Bressler, *The Right of Jury Nullification in Reconstruction-Era Originalism: The Fourteenth Amendment and the Constitutionalization of Judicial Precedent* at 32, 77, 80 (Apr. 2009) (paper for seminar discussing the topic), available at https://dash.harvard.edu/handle/1/3335794?show=full.

139. United States v. Maskeny, 609 F.2d 183, 193 (5th Cir. 1980).

140. *Id.*

that all members of the sect had been relieved of jury duty in the district.[141]

Express, class-level exclusions based on religious identity would "insult" the fundamental "right to freedom of religion" under the First Amendment's Religion Clauses,[142] leading to strict scrutiny analysis,[143] as discussed in Part I. Further, that kind of policy of exclusion could have a chilling effect on potential jurors' decisions to exercise their constitutionally protected right to practice religion, which would go beyond the permissible bounds of government intrusion into private life.[144] Moreover, an express and systematic exclusion of a class of persons from jury service based on religious affiliation would also trigger strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment, along with constitutional standing to bring claims by those who are harmed by such exclusions.[145]

In addition to First Amendment and Equal Protection concerns, a broad policy of class exclusion would violate many state constitutions and statutes that expressly prohibit "religious tests as a qualification for jury service," such as state constitutions in Utah, Missouri, and Washington State, as well as statutes in states such as Kansas.[146] Gone are the days when classes of citizens are deemed

141. *Id. See also* Camp v. United States, 413 F.2d 419 (5th Cir. 1969), *cert. denied*, 396 U.S. 968 (1969) (rejecting a challenge to jury selection based on voter rolls where it was alleged that Jehovah's Witnesses do not register to vote).

142. Courtney A. Waggoner, *Peremptory Challenges and Religion: The Unanswered Prayer for A Supreme Court Opinion*, 36 LOY. U. CHI. L.J. 285, 322–24 (2004).

143. *See generally* Benjamin Hoorn Barton, *Religion-Based Peremptory Challenges After Batson v. Kentucky and J.E.B. v. Alabama: An Equal Protection and First Amendment Analysis*, 94 MICH. L. REV. 191, 198 (1995) (arguing that exclusions based on religious identity is subject to strict scrutiny analysis under the First Amendment).

144. Bader, *supra* note 49, at 599–601.

145. Chambers, *supra* note 39, at 588 (discussing Equal Protection possibilities). *See also* Strauder v. West Virginia, 100 U.S. 303 (1879) (finding violation of equal protection in racial discrimination against juror).

146. *See* Marten, *supra* note 43, at 730–31 (citing the Utah Constitution's provision that jurors are not "incompetent . . . on account of religious belief or the absence thereof," the Missouri Constitution's provision that "no person shall, on account of his or her religious persuasion or belief, . . . be disqualified from . . . serving as a juror," and Kansas law that "potential jurors cannot be excluded from service 'on account of . . . religion . . . .'"). *See also* Justin Dolan, *Thou Shall Not Strike: Religion-Based Peremptory Challenges Under the Washington State Constitution*, 25 SEATTLE U. L. REV. 451, 468–69 (2001) (citing the Washington Constitution's provision that "no person 'shall . . . be incompetent as a witness or juror, in consequence of his opinion on matters of religion . . . .'").

"incompetent" to participate in the trial process due to their religious backgrounds.[147]

Recognizing a juror's right to religious identity without penalty in jury selection does not, of course, mean that a juror is free to use religion to do wrong or cause harm, as discussed in the sixth tenet in Part II.F. As the Eleventh Circuit noted in *United States v. Brown*, "our jury system works only when both the judge and the jury respect the limits of their authority," and a juror would improperly "abdicate[] his 'constitutional responsibility' . . . and violate[] his solemn oath" by failing to follow "the law or . . . the court's instructions."[148]

B. Tenet 2: The Right to Be Free from Religious Discrimination

The second tenet of this proposed bill of rights is that jurors have the right to be free from religious discrimination while serving on a jury. In the post-Civil-Rights era, where discrimination due to race, gender, or religion is widely prohibited by statutes and constitutions, it should not take much space in a journal article to support a tenet that condemns overt discriminatory acts toward jurors based solely on their religion.[149] As the Supreme Court has noted, "[t]he Free Exercise Clause commits government itself to religious tolerance," and government must never act "from animosity to religion or distrust of its practices," nor may officials "devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."[150] Little exposition is needed, then, to conclude that no juror should be subjected to judicial humiliation, mockery, rudeness, or outright hostility due to their

147. *See* Edward J. Imwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 U. MIAMI L. REV. 1069, 1081–82 (1992) (explaining that "the common law rendered certain categories of persons per se incompetent as witnesses: . . . persons with aberrant religious beliefs[,] . . . on the theory that the integrity of these persons was questionable" and that "persons in the prohibited categories were 'liars.'"). *See also* Paul F. Rothstein, *Federal Rules of Evidence Rule 610*, Westlaw (database updated May 2021) (noting that atheists were "incompetent" witnesses under the common law because they were "deemed incapable of taking an oath").

148. United States v. Brown, 996 F.3d 1171, 1184 (11th Cir. 2021) (citing United States v. Abbell, 271 F.3d 1286, 1302 (11th Cir. 2001); United States v. Gaudin, 515 U.S. 506, 514 (1995); United States v. Boone, 458 F.3d 321, 329 (3d Cir. 2006)).

149. *See* Marten, *supra* note 43, at 730–31 (noting widespread prohibitions against religious discrimination).

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

religious beliefs or practices, or the lack thereof. Nor can the conduct of government actors in the judicial process rightly display prejudice against jurors in the areas to be addressed further: accommodations (Part II.C), prayer (Part II.D), and privacy (Part II.E).

For all these reasons, this section does not discuss overt acts of discrimination against jurors based on religion. Instead, it focuses on a more subtle and insidious form of discrimination that purports to be founded upon a genuine desire to prevent bias on juries, but that in reality is nothing more than base religious stereotyping and animus dressed up in the fancy garb of fairness and impartiality. Specifically, this Section addresses the belief that religious jurors—especially ones with a high degree of religiosity—should be purged from juries through peremptory challenges based on concerns that they would be unable to set aside their religious beliefs and act fairly toward the litigants.

1. Religiosity and Discrimination

Jurors' religious beliefs and practices have long been targeted by trial lawyers as a basis for exclusion from jury service. It has been said that the legendary attorney, Clarence Darrow, used to advise defense attorneys to avoid certain types of Christians as jurors,[151] and similar advice has been repeated in modern sources, with one text advising that, "[o]n the matter of religion, attorneys who are defending are advised that Presbyterians are too cold; Baptists are even less desirable; and Lutherans, especially Scandinavians, will convict. Methodists may be acceptable. Keep Jews, Unitarians, Universalists, Congregationalists, and agnostics."[152] One commentator recommends "detailed" questionnaires to "discover a prospective juror's beliefs about fundamental issues, like politics or religion," which could lead to "identifying and excluding potential jurors who are dogmatic, uncritical, and unmotivated to achieve a humane result in the controversy at issue."[153] Another secondary source suggests that practitioners "conduct a pretrial

151. *See* BORNSTEIN & MILLER, *supra* note 25, at 20 (discussing attorney folklore on religion during jury selection).

152. Chambers, *supra* note 39, at 589 (quoting REID HASTIE ET AL., INSIDE THE JURY 123 (1983)).

153. Marten, *supra* note 43, at 757.

investigation of prospective jurors selected for service in order to discover any facts, including religious belief or prejudice, that might render a particular prospective juror biased or prejudiced against the client."[154]

Similar advice by some trial advocates suggests that the degree of a person's religiosity may be key to keeping them off the jury. One treatise recommends that attorneys probe the "strength of a prospective juror's religious beliefs" because "an active churchgoer is . . . a dogmatic moralist and thus likely to identify with the prosecution."[155] With a similar ring, another text proclaims that "[r]eligious fanatics are almost always self-righteous and narrow. Fundamentalists are conservatively oriented. Devout church members tend to be conformists. However, some are very compassionate. Jurors with a strong Catholic faith may favor Catholic litigants."[156]

A typical example of this anti-religious litigation strategy is found in *Bader v. State*, where a criminal defendant sought permission to strike prospective jurors from the panel based solely on their religious beliefs after seeking to question them

> as to their (1) general religious classifications, such as whether they are Christian, Jewish, Muslim, Buddhist, or any of the other major religions, (2) denominational affiliations under those general religious classifications, such as whether they are Church of Christ, Lutheran, Presbyterian, etc., and (3) how many times in the average month that they attend any kind of religious services.[157]

The trial court refused to allow the questioning, although it would have permitted questions seeking "to educe information as to whether the venireperson had personal religious beliefs, convictions, or philosophical ideas that would impair his ability to serve as an impartial venireperson."[158] On appeal, the Supreme

154. Joel E. Smith, *Religious Belief, Affiliation, or Prejudice of Prospective Juror as Proper Subject of Inquiry or Ground for Challenge on Voir Dire*, 95 A.L.R.3d 172 (Originally published in 1979).

155. Chambers, *supra* note 39, at 589 (quoting JAMES J. GOBERT & WALTER E. JORDAN, JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY 269 (2d ed. 1990)).

156. *Id.* at 589–90 (quoting ROBERT A. WENKE, THE ART OF SELECTING A JURY 79 (2d ed. 1988)).

157. Bader v. State, 40 S.W.3d 738, 740 (Ark. 2001).

158. *Id.* at 742.

Court of Arkansas found no abuse of discretion, noting that "there are prohibitions against using religious tests as a qualification for holding office, voting, or exercising the rights of a citizen to participate fully in the instrumentalities of government," and that "principles of religious freedom and the prohibition against religious discrimination are well-grounded in this country."[159] Other courts seem to have little issue with striking jurors who seem too religious.[160]

When acted upon, these base religious stereotypes discriminate in a way that strips persons of their individual dignity, much as race-based challenges soiled the integrity of the judicial system for centuries.[161] "American history is replete with laws against specific religious groups, including . . . laws requiring religious oaths for jurors . . . ."[162] Unfortunately, the Supreme Court has inexplicably avoided cases where the *Batson* analysis for race-and-gender-based peremptory challenges could be extended to religion.[163] Yet the reasoning to use strict scrutiny review in religion cases is similarly strong to challenges based on race or gender. As the Second Circuit reasoned in *U.S. v. Brown*, excluding a prospective juror "because [she] affiliates herself with a certain religion is . . . a form of 'state-sponsored group stereotype[ ] rooted in . . . historical prejudice,' [and] . . . 'harm' . . . flows directly from 'the [government's] participation in the perpetuation of [these] invidious group

159. *Id.*

160. *See, e.g.*, People v. Malone, 570 N.E.2d 584, 590 (Ill. App. Ct. 1991) (accepting a prosecutor's race-neutral explanation for striking four venire members "who shared the characteristic of religion playing a major role in their lives").

161. Triedman, *supra* note 130, at 102–03 (noting similarity with race-based challenges when jurors are stricken because they are "different" or "presumed . . . to have certain characteristics as a result of [their] religious affiliation," or when they share a "defendant's religious affiliation").

162. Christie Stancil Matthews, *Missing Faith in Batson: Continued Discrimination Against African Americans Through Religion-Based Peremptory Challenges*, 23 TEMP. POL. & CIV. RTS. L. REV. 45, 64–65 (2013).

163. *See* Davis v. Minnesota, 511 U.S. 1115 (1994) (Thomas, J., dissenting from denial of certiorari) ("It is at least not obvious, given the reasoning in *J.E.B.*, why peremptory strikes based on religious affiliation would survive equal protection analysis."). *See also* Marks, *supra* note 33, at 630–32 (discussing the Court's denial of certiorari in *Davis*, which refused to extend *Batson* to religion).

stereotypes and the inevitable loss of confidence in our judicial system . . . ."[164]

The argument in favor of protecting religion is nearly self-evident. The Supreme Court has already decided that private litigants are engaged in state action when exercising peremptory challenges because

> a private entity becomes a government actor for the limited purpose of using peremptories during jury selection. The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race.[165]

With state action established, courts can conclude that heightened scrutiny applies in these cases because singling out a person's "exercise of religion" is classifying a person "on the basis of that person's exercise of a fundamental right," which triggers strict scrutiny analysis under both Equal Protection and Free Exercise case law.[166] Indeed, all variations of the bigoted trial advice detailed above explicitly target a person's religious affiliation or degree of religious belief and practice. In sum, striking jurors based on religion should not be privileged with the mere rational basis review accorded "neutral and generally applicable" actions under either the *Smith* or Equal Protection analyses discussed in Part I.[167]

Applying strict scrutiny review to a discriminatory peremptory challenge based solely on religious identity or religiosity will nearly always result in the nullification of that challenge.[168] The valid government interest furthered by exercising a peremptory challenge is to remove a person who might not be able to fulfill their

164. United States v. Brown, 352 F.3d 654, 669 (2d Cir. 2003) (citing J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127, 128 (1994)). *See also* Triedman, *supra* note 130, at 110−12, 120 (providing several arguments to support the notion that "[r]eligious affiliation and racial identity may be more similar than they initially appear," but also noting that extending *Batson* to religion might "create an administrative burden on the courts . . . [and] curtail counsel's free exercise of the peremptory challenge").

165. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627 (1991).

166. State v. Purcell, 18 P.3d 113, 120−21 (Ariz. Ct. App. 2001).

167. *See*, *infra* notes 96−111 and accompanying text (discussing *Employment Division v. Smith*).

168. Galle, *supra* note 102, at 584 (concluding strict scrutiny is the most appropriate form of review when jurors are targeted based on religion, even if attorneys claim they are focusing on a juror's conduct, not belief).

duties as a juror due to bias or inability to follow the law.[169] Assuming that this interest is "compelling" under the first prong of strict scrutiny, there are less restrictive ways to further that interest than to exclude a person based solely on the generic label of their religious affiliation or the degree of religiosity, as evidenced by the number of times they engage in religious conduct, such as attending services or praying. Questioning jurors in *voir dire* about their ability to follow the law, and basing challenges on their answers and demeanor, would be one such way.[170] Indeed, as the next section notes, religion-based stereotypes are often founded on a faulty premise and could disproportionately exclude black jurors.

2. Faulty Religious Stereotypes and Racial Discrimination

At the heart of equal protection is shelter from "the use of generalizations or stereotypes" of a class of persons that result in the government treating them differently than others.[171] For instance, in *U.S. v. Greer*, the defendants made a demand (unanimously rejected by the Fifth Circuit) that "all prospective jurors be asked whether they are Jewish," and "that the court strike for cause all . . . Jewish prospective jurors" merely because the defendants had been accused of hate crimes against Jewish citizens.[172] In other words, an entire class of religiously affiliated persons (i.e., Jews) could not be excluded from jury service on the assumption that they would not be impartial toward the defendants because of their shared faith with the victims.

Similarly, the common trial advice offered in the prior section smacks of bigoted stereotypes based on the faulty premise that religious persons are untrustworthy as jurors because they will exercise their duties in accord with the tenets of their religious affiliation instead of according to their oath as a juror. In fact, as the Eleventh Circuit has found, the opposite may be true: "it is more

169. *See* United States v. Brown, 996 F.3d 1171, 1184 (11th Cir. 2021) (en banc) (discussing the need for jurors to follow the law).

170. For instance, in a case decided after Corinne Brown's en banc reversal, the Eleventh Circuit reaffirmed that "'[c]ourts may exclude or remove jurors who make clear that they may not sit in judgment of others based on their religious beliefs,'" finding that a juror who could not affirm that she would follow the court's instructions was properly removed from the venire during *voir dire*. United States v. Lewis, 40 F.4th 1229, 1241–42 (11th Cir. 2022) (quoting *Brown*, 996 F.3d at 1190).

171. Waggoner, *supra* note 142, at 322−24 (citing *Batson* and *JEB*).

172. United States v. Greer, 968 F.2d 433, 434 (5th Cir. 1992).

than reasonable to doubt that a religious juror would have lightly violated his oath" because of the religious judgment that could come to that juror from such a violation.[173] Indeed, accepting "generic, assumed correlations between particular characteristics and attitudes in jurors"[174] would "ratify and perpetuate invidious, archaic, and overbroad stereotypes"[175] about persons of certain faiths. In fact, religious affiliation is not a reliable basis on which to measure any particular person's beliefs. One cannot assume that a potential juror "share[s] identical values" with the religion with which they identify, and "there is essentially no support for the notion that class membership alone is dispositive proof of a juror's potential biases."[176] Moreover, religion-based exclusions would be inappropriate, even if some of the stereotypes were accurate for the same reasons that exclusions based on race are not permitted "even in those cases where racism is a key issue at trial."[177] There is no one-size-fits-all approach to race or religion.

Even worse, excluding jurors who are more religious—as evidenced by participation in religious activities—may have the collateral consequence of perpetuating the exclusion of black jurors.

173. United States v. Brown, 996 F.3d 1171, 1191 (11th Cir. 2021) (en banc). The Eleventh Circuit cited three sources to support its conclusion: JAMES ENDELL TYLER, OATHS; THEIR ORIGIN, NATURE, AND HISTORY 57 (London, John W. Parker 1834) (explaining that the phrase "[so] help me God" invokes "God's vengeance" when a juror does not "fulfil [his] engagement to speak the truth, or perform the specific duty"); Thomas Raeburn White, *Oaths in Judicial Proceedings and Their Effect Upon the Competency of Witnesses*, 51 AM. L. REG. 373, 380 n.10 (1903) (stating that "So help me God" is shorthand for "So may God help me at the judgment day if I speak true, but if I speak false, then may He withdraw His help from me" (internal quotation marks omitted)); Pierce v. Commonwealth, 408 S.W.2d 187, 188 (Ky. 1966) (observing that "the use of the words 'So help me God' in the juror's oath" means that "the juror will, as God is his witness, decide the issues according to the evidence").

174. Bader, *supra* note 49, at 590−92 (discussing the common practice trial attorneys use to quantify these stereotypes into a methodology for jury selection).

175. J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127, 131 (1994) (discussing gender stereotypes). *But see* Kelly Lina Kuljol, *Where Did Florida Go Wrong? Why Religion-Based Peremptory Challenges Withstand Constitutional Scrutiny*, 32 STETSON L. REV. 171, 181–82 (2002) (arguing for the use of religious stereotypes because they "more accurately predict[] one's belief system and biases than does one's race or gender").

176. Waggoner, *supra* note 142, at 322−24 (noting that many Catholics support abortion rights). *But see* Chambers, *supra* note 39, at 593−601 (arguing that it is not "entirely irrational for an attorney, who has had little time and opportunity to learn about prospective jurors in any great detail, to act on the assumption that members of particular religious faiths share similar thoughts and philosophies linked to the particular belief system embraced by these faiths").

177. Matthews, *supra* note 162162, at 79.

Even if not intended, religion-based challenges could cause a disparate impact against black jurors because studies that show African Americans are "markedly more religious on a variety of measures than the U.S. population as a whole."[178] National surveys reveal that African Americans report formal religious affiliations in greater proportions than other groups, and they are "among the most likely of any religious group to say religion is very important in their lives."[179] Thus, excluding religious jurors may impact black jurors disproportionately, even if done without malice.

Unfortunately, a "permissive stance" toward allowing the "race neutral" exclusion of religious jurors would also make it easier for malicious attorneys to use religion as a "pretext for racial discrimination" and could "present a salient threat to the safeguards that *Batson* intended to erect."[180] The Supreme Court worried about a similar problem against black jurors if *Batson* was not extended to include gender, concluding that, "[b]ecause gender and race are overlapping categories, gender can be used as a pretext for racial discrimination."[181] This concern is well-illustrated in a pair of cases from New Jersey. In *State v. Fuller*, "the prosecutor used four of his first five peremptory challenges to excuse African American venirepersons," and then defended as race-neutral reasons for the excusals the fact that "the potential jurors he had excused were 'demonstrative about their religions,' and that in his experience, such persons 'tend to favor defendants to a greater extent than do persons who are, shall we say, not as religious.'"[182] Similarly, in *State v. Gilmore*, a prosecutor attempted to justify excluding all seven prospective black jurors by using religion as a "proxy," arguing that he was actually excluding "Baptists, a

178. *Id.* at 66–67. For instance, a 2007 survey found that "87% of black Americans reported a formal religious affiliation, a higher percentage than any other major racial or ethnic group in the United States," and that a "mere 1% of blacks identify as atheist or agnostic." *Id.* at 66.

179. *Id.* at 66–67.

180. *Id.* at 48. Matthews also notes the additional argument that religion-based challenges to black jurors could conjure up concerns that "religion has historically been misused against blacks for the purpose of racial subjugation and disenfranchisement" because "many proponents of slavery often framed Christian doctrine in a manner that facilitated the master-slave relationship central to the Antebellum economy." *See id.* at 82.

181. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145 (1994).

182. State v. Fuller, 862 A.2d 1130, 1131–32 (N.J. 2004).

religious group to whom he assumed Blacks predominantly belonged."[183]

C. Tenet 3: The Right to Religious Accommodations During Jury Service

The third tenet of this proposed bill of rights is that jurors have the right to religious accommodations during jury service—typically in the areas of dress and worship. For instance, Sikhs may request to carry a kirpan (small ceremonial sword) on their person; Muslims may ask the court for short recesses to pray five times a day; Jewish jurors may seek time off during the Sabbath; Catholics may request time off to attend Mass; and other Christians may ask to carry a Bible into the jury room for personal prayer and reflection. Like the two tenets discussed above, strict scrutiny is the appropriate level of judicial review for accommodation requests denied due to anti-religious animus or rules applied unequally to secular and religious interests. More likely—due to the *Smith* free-exercise standard—requests denied for neutral reasons would face rational basis review, unless a state or federal RFRA applies, as discussed in Part I.B.2.

1. Neutral Rules: Smith *versus RFRA*

This proposed bill of rights declares that jurors have the right to exercise their religion, even during jury service. As a practical reality, however, the current law in many jurisdictions makes it difficult for a juror to enforce that right against a truly neutral and generally applicable rule undergirding the denial of a religious accommodation request, such as in the examples above. Using the deferential rational basis review under either *Smith* or the Equal Protection Clause,[184] an accommodation denial would only need to be for a reason "rationally related to the public health and welfare," and it would need only to be "a rational way" to achieve its aims.[185]

183. State v. Gilmore, 862 A.2d 1150, 1167–68 (N.J. 1986). *See also* United States v. DeJesus, 347 F.3d 500, 501–02 (3rd Cir. 2003) (holding the government did not violate the Equal Protection Clause by excluding two Christian African-American jurors from the venire because the strikes "were based on the jurors' heightened religious involvement . . . and because they were not racially motivated").

184. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

185. Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 487–89 (1955).

For instance, in 2014, a Sikh summoned for jury service in a California courtroom sought an accommodation to wear his kirpan, but his request was denied due to a neutral rule barring weapons in the courtroom.[186] If able to sue, that juror would have had little hope of forcing the court to allow him to wear his kirpan. Few would disagree with the notion that it is "rational" for a court to keep weapons out of the courtroom, where they can be used to harm or intimidate court personnel, judges, or jurors. Likewise, most would agree that a "rational" way to keep weapons out of the courtroom is to enforce a complete ban on them. That simple argument would win under rational basis review.

Although *Smith* is a controversial case—perhaps in jeopardy of being overturned one day—the U.S. Supreme Court has not yet moved to do so, despite a majority of the justices expressing dissatisfaction with its holding.[187] Until then, the examples listed above could very well result in a denial of the accommodation based on neutral and general policies, such as judicial efficiency, regularly set days and hours for trial, and required courtroom attire. But *Smith* is not the only standard being applied to neutral rules. Some state constitutions and statutes may provide stronger rules for accommodations. In addition, at the federal level and in nearly half the states,[188] RFRAs protect a juror's religious liberty, requiring the application of strict scrutiny whenever a neutral and

186. Yasmine Hafiz, *California Sikh Man, Gursant Singh, Barred From Jury Duty For Carrying Religious Dagger, Kirpan*, HUFFINGTON POST (May 1, 2014), https://www.huffpost.com/entry/gursant-singh-jury-duty-dagger-kirpan_n_5246955 (last visited Feb. 15, 2023).

187. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring) (joined by Kavanaugh, J.) ("In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination. Yet what should replace *Smith*?"); *Id.*, 141 S. Ct. at 1883 (Alito, J., concurring) (joined by Thomas and Gorsuch, JJ.) ("Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.").

188. *See* ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01; ARK. CODE ANN. §§ 16-123-401 to -407; CONN. GEN. STAT. § 52-571b; FLA. STAT. § 761.01–.061; IDAHO CODE § 73-402; ILL. COMP. STAT. Ch. 775 35/1–99; IND. CODE ANN. § 1.IC34-13-9; KAN. STAT. ANN. § 60-5301 to -5305; KY. REV. STAT. ANN. § 446.350 (West); LA. STAT. ANN. § 13:5231–5242; MISS. CODE ANN. § 11-61-1; MO. REV. STAT. § 1.302; N.M. STAT. ANN. § 28-22-1 to -5; OKLA. STAT. tit. 51, § 251–258; PA. CONS. STAT. § 2403; R.I. GEN. LAWS § 42-80.1-1 to -4; S.C. CODE ANN. § 1-32-10 to -60; TENN. CODE ANN. § 4-1-407; TEX. CIV. PRAC. & REM. CODE ANN. § 110.001–012; VA. CODE ANN. § 57-2.02.

generally applicable rule creates a substantial burden on religion, as discussed in Part I.B.2. And in applying strict scrutiny under RFRA and similar laws, the U.S. Supreme Court has made it clear that the government's compelling interest must be measured to the particular person requesting the religious accommodation, and that denying the accommodation must be the least restrictive means possible to furthering the government's interest.[189]

Returning to the Sikh and the kirpan accommodation, if that juror brought a claim under RFRA instead of *Smith*, the analysis would be close, although it may be possible that the government would still prevail due to the seriousness of a weapons ban. A reviewing court would need to determine whether the government had made exceptions or accommodations in the past for other jurors (or courthouse visitors). For instance, has the courthouse permitted off-duty law enforcement officers to carry weapons into the building? Have other kinds of weapons been permitted in other circumstances, such as when a foreign delegation visited the building?

The analysis might be closer than one might think. In 2013, the Fifth Circuit reversed the government's motion to dismiss in a case where a Sikh employee of the Internal Revenue Service had been denied permission to enter a federal building wearing a kirpan due to a no-weapons policy similar to the one described above.[190] The Fifth Circuit remanded the Sikh's RFRA claim "for further development of evidence concerning the government's compelling interest in enforcing against *this plaintiff* the statutory ban on weapons with blades exceeding 2.5 inches. 18 U.S.C. § 930(a), (g)(2)."[191] On remand in June 2014, the trial court denied another motion to dismiss from the government, finding the Sikh's case was both ripe

189. *See* Holt v. Hobbs, 574 U.S. 352, 364−65 (2015) (applying strict scrutiny to a state prison policy that prohibited a Muslim inmate from growing a beard). *See also* Fulton, 141 S. Ct. at 1877 (explaining a law is "not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing' 'a mechanism for individualized exemptions.'") (citing *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (Burger, C. J., joined by Powell and Rehnquist, JJ)).

190. *See* Tagore v. United States, 735 F.3d 324, 325–26 (5th Cir. 2013).

191. *Id.* (emphasis in original).

and not moot.[192] By October 2014, the parties had announced a settlement in court.[193]

The Sikh example is a fairly extreme one, due to the compelling nature of keeping weapons out of court. In most other examples (i.e., Muslim prayer, Jewish Sabbath, and Catholic Sunday Mass), the government's interest in denying minor accommodations on the grounds of scheduling or judicial efficiency would likely ring hollow considering the number of delays in a typical trial for manifold other reasons. Indeed, the courthouse might very well have policies already permitting these and other types of secular accommodations for juror-related issues. If a request to attend a church service were made by a juror, perhaps the most compelling scenario favoring the government would involve jurors strictly sequestered to prevent any external influences, especially in high-profile capital criminal cases.

Shaw v. State illustrates one classic example of how attendance at a prayer meeting can become problematic. There, a bailiff disobeyed an order by the judge to sequester the jury after closing arguments in a capital case, instead escorting the jurors to a prayer meeting "conducted by the pastor, who was the active prosecutor in the case" in which they had been empaneled and who helped to seat the jurors at the meeting and prayed aloud that God might guide them in their duties.[194] The trial judge had found no prejudice to the defendant because affidavits from the bailiff and jurors had shown that they had been sequestered at the prayer meeting, that the defendant had not been mentioned, "nor was anything said to them . . . about the case."[195] The Supreme Court of Georgia reversed, noting the State had the "onus" to prove no prejudice and reasoning that the jury,

> seeing this prosecutor filled with religious zeal and fervor, may have reasoned in their minds . . . that this man, who was the active prosecutor of the defendant, who assisted in the selection of themselves as jurors in the case, and who testified before them as

192. *See* Tagore v. United States, No. CIV.A. H-09-0027, 2014 WL 2880008, *9 (S.D. Tex. June 24, 2014).

193. *See* Tagore v. United States, 4:09CV00027, 10/20/2014 ("Minute Entry for proceedings held before Judge Sim Lake. BENCH TRIAL held on 10/20/2014. Parties announce settlement.").

194. Shaw v. State, 9 S.E. 768, 768 (Ga. 1889).

195. *Id.*

> witness, by his conduct and declarations at the prayer meeting showed that he was a good and upright man, and that such a man would not prosecute the defendant unless he believed him to be guilty.[196]

In sum, where strict scrutiny applies due to either a RFRA or a policy that is not neutral or generally applicable, jurors are much more likely to prevail in asserting their right to religious accommodations during jury service. Where rational basis review is used, however, only irrational denials of accommodations would be actionable.

2. Accommodating Access to Religious Texts and Resources

An interesting line of cases has emerged involving jurors who bring religious texts such as the Bible into the jury room with them. Some courts have struggled with the propriety of this practice, concerned that a juror consulting a sacred text might bring to bear an unauthorized external influence into jury deliberations. One wonders, however, how courts can allow jurors to bring in other private reading material to pass dead time, such as a romance novel or a crossword puzzle, yet not allow religious texts. Indeed, it seems natural to expect that jurors would seek access to the support of their faith traditions while engaged in perhaps the most important civic task in their lives. As the Supreme Court of Colorado has explained, a juror may "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' he or she is called upon to make" during a trial because jurors are expected "to bring their backgrounds and beliefs to bear on their deliberations."[197]

The Fourth Circuit has similarly recognized that sacred texts are "moral" teachings that are part of a juror's identity,[198] likening scriptural quotes to "statements of folk wisdom or of cultural

196. *Id.* at 768–69. *See also* North v. State, 65 So.2d 77, 85–86 (Fla. 1952) (finding no prejudice when jurors given permission to attend church instead had the bailiff summon an unaffiliated preacher "to come into the room where they were eating to grace the table," but with the court "severely condemn[ing]" the "irregular" practice of "inviting preachers or other outsiders into a jury room").

197. People v. Harlan, 109 P.3d 616, 632 (Colo. 2005).

198. Robinson v. Polk, 438 F.3d 350, 364–66 (4th Cir. 2006).

precepts."[199] That court found no difference between a juror reading Bible passages to others in the jury room (even a passage referencing the concept of taking "an eye for an eye") from the instance "where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence."[200] That circuit is correct. Why should a court worry if a juror's knowledge of the ways of the world includes a faith-based understanding? Judge Wilkinson on the Fourth Circuit has provided another way of viewing the practice of taking a sacred text into the jury room, noting that its presence might serve as a "reminder of[] the [juror's] oath to uphold and apply the law," similar to "a trial participant[] solemniz[ing] his oath with a Bible," or "the President keeping a Bible in the Oval Office or a judge having one in chambers."[201]

Still, a line of cases at the federal level have struggled to navigate this issue. At one end of the spectrum are non-problematic cases, where jurors consult a religious text for general inspiration, such as by bringing a Bible into the jury room for their own private guidance or reflection.[202] This is the right of every juror, and it should be accommodated, especially if jurors are allowed to bring secular reading materials into the jury room for their personal use. More frequently, however, courts are concerned about the potential influence of a religious text on other jurors.[203] For instance, in *McNair v. Campbell*—during a capital case in the punishment phase of trial—a Christian minister (who happened also to be the jury foreman) read "innocuous" passages from the Bible and prayed in general with the other jurors.[204] There, however, the State successfully rebutted the "presumptively prejudicial" use of the

199. Burch v. Corcoran, 273 F.3d 577, 591 (4th Cir. 2001).

200. *Robinson*, 438 F.3d at 357–58.

201. *Id.* at 228 (Wilkinson, J., concurring in denial of *en banc* hearing).

202. *See, e.g.*, Jones v. Kemp, 706 F. Supp. 1534, 1558 (N.D. Ga. 1989) (distinguishing between court-sanctioned Bible use and permissible personal use of Scriptures). *See also* Fields v. Brown, 503 F.3d 755, 781–82 (9th Cir. 2007) (en banc) (finding that a juror who used Bible at home overnight to help decide case did not influence the other jurors in their verdict).

203. *See, e.g.*, United States v. Lara-Ramirez, 519 F.3d 76, 88–89 (1st Cir. 2008) (faulting the trial court for not inquiring about the potential impact of the Bible in the jury room when it received a "colorable claim of juror taint" in a motion for a mistrial after the jury consulted the Bible during deliberations).

204. McNair v. Campbell, 416 F.3d 1291, 1307–09 (11th Cir. 2005).

Bible, showing that it had caused no improper influence on the jury.[205]

Further along the spectrum are cases where the use of a sacred text is apparently court-sanctioned for purposes of consultation during jury deliberations. In *Jones v. Kemp*, the judge accommodated a juror who asked permission to take a Bible into the jury room; however, a federal court sitting in habeas review found this problematic because there was "at least implied court approval of group jury reference to an extra-judicial authority—here the Christian Bible—for guidance in deciding the explicit, statutorily mandated, carefully worded guidelines which must be followed by a jury deliberating during the sentencing phase of a death penalty case."[206] This concern seems overblown, however, when compared to the more tolerant view of the Fourth Circuit, as noted above.

At the far end of the spectrum are the facts of *Oliver v. Quarterman,* where "several jurors collectively consulted a Bible, in the jury room, and likely compared the facts of [the] case to the passage that teaches that capital punishment is appropriate for a person who strikes another over the head with an object and causes the person's death."[207] Finding this to be "a type of 'private communication, contact, or tampering' that is outside the evidence and law," the court reversed a sentence of death because the Bible's use "may have influenced the jurors . . . in a manner that would ensure a sentence of death instead of conducting a thorough inquiry into these factual areas."[208]

While cases on the extreme end of the spectrum, such as *Oliver*, will need to be addressed at times, as a general rule, courts should respect the religious rights of jurors and accommodate requests to

205. *Id.* at 1303, 1307-09. *See also Harlan*, 109 P.3d at 631−32 (acknowledging propriety of jurors discussing religion during deliberations, but distinguishing when a juror brings a "Bible into the jury room to share with other jurors the written Leviticus and Romans texts during deliberations" for the purpose of "demonstrat[ing] to another juror a command of death for murder," which "created a reasonable possibility that a typical juror would have been influenced to vote for a death sentence instead of life").

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

207. Oliver v. Quarterman, 541 F.3d 329, 339−40 (5th Cir. 2008) (citing to Numbers 35:16, where the King James Version of the Bible reads "And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death").

208. *Id.* (citing Remmer v. United States, 347 U.S. 227, 229 (1954)).

take religious texts into the jury room for guidance and reflection. Of course, as noted in Part II.E below, jurors should be instructed on the details of the law, and they should be able to assure the court that they can set aside any personal religious views to follow the law as instructed.

D. Tenet 4: The Right to Commune With God

The fourth tenet of this proposed bill of rights is that jurors have the right to commune with a higher power and to receive divine guidance in keeping with their religious traditions. This was the key issue in the Corinne Brown case that introduced this Article, which also will be the centerpiece of this section's analysis.[209]

In *Brown*, Juror 13 admitted to the judge on the second day of deliberations that he had "prayed for and received divine guidance" from his "Father in Heaven."[210] He claimed that "the Holy Spirit told" him "that Corrine Brown was not guilty on all charges."[211] But Juror 13 also insisted that he "followed all the things" that the judge had instructed: "My religious beliefs are going by the testimonies of people given here, which I believe that's what we're supposed to do, and then render a decision on those testimonies, and the evidence presented in the room."[212] The judge, however, viewed Juror 13's religious statement as "disqualifying" and "inconsistent with the instructions of the court."[213] The judge had no legal issue with a juror "praying for guidance" to the Holy Spirit; however, when the Holy Spirit allegedly answered that prayer by "direct[ing] or [telling]" Juror 13 "what disposition of the charges should be made," the judge found it impossible for the juror "to base his decision only on the evidence and the law" because there were "external forces" impacting "his decision-making in a way that[was] inconsistent with his jury service and his oath."[214]

On appeal, during *en banc* consideration, Brown agreed that "[j]urors who seek divine assistance, like all other jurors, must

209. *See supra* notes 1–14 and accompanying text (discussing the key facts in the *Brown* case).

210. United States v. Brown, 996 F.3d 1171, 1179 (11th Cir. 2021) (en banc).

211. *Id.* at 1180.

212. *Id.*

213. *Id.* at 1181.

214. *Id.*

follow the court's instructions on the law and the evidence"; however, she argued that "there is no conflict between a juror's duty to base his decision on the evidence and his reliance on divine aid in reaching that decision."[215] Brown was correct and had expressed a sentiment similar to a 2006 ruling by the Supreme Court of Minnesota, which found a defendant's argument to be "without merit" when he complained that a juror should have been removed because he had stated that he would "ask for divine wisdom," or pray, when making his decision about the case, which allegedly showed that the juror would not base his decision on the evidence and jury instructions.[216]

The lower court's ruling in *Brown* needed to be reversed by the Eleventh Circuit to respect the religious rights of jurors to commune with God for at least three reasons.

First, the ruling had categorically denied the possibility that God answers prayers. In an amicus brief, the American Center for Law and Justice (ACLJ) contended that the judge had inappropriately taken a "theological position" that the Holy Spirit "operates solely as an external force," as opposed to one influencing a person internally.[217] Another amici noted the double standard the trial judge had used against religious jurors because—if the juror had instead "announced that his 'gut' told him that" Corinne Brown was innocent—that secular expression of an internal process "surely would not have been disqualif[ying]."[218] The better view is for courts to understand prayer as "part of the personal decision-making process of many people, a process that is employed when serving on a jury."[219]

215. En Banc Brief for Defendant-Appellant on Rehearing at 36−37, *Brown*, 996 F.3d 1171 (citing McNair v. Campbell, 416 F.3d 1291, 1309 (11th Cir. 2005); State v. Williams, 832 N.E.2d 783, 790 (Ohio Ct. App. 2005)).

216. State v. Young, 710 N.W.2d 272, 283 (Minn. 2006). *See also* United States v. Hernandez-Escarsega, 886 F.2d 1560, 1579 (9th Cir. 1989) (finding no error in the trial court's refusal to hold an evidentiary hearing when a juror submitted a post-trial affidavit indicating that "one of the jurors used prayer and a belief in a sign from God as part of her mental process").

217. En Banc Brief of Amicus Curiae the American Center for Law and Justice in Support of Defendant-Appellant at 15, *Brown*, 996 F.3d 1171.

218. En Banc Brief of Nebraska, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, South Dakota, and Texas as Amici Curiae in Support of Defendant-Appellant and Reversal at 13-14, *Brown*, 996 F.3d 1171 (quoting Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017)).

219. State v. DeMille, 756 P.2d 81, 84 (Utah 1988).

Second, the trial court's reasoning had laid the groundwork for purging any juror who felt the movement of the divine in deciding a case. Citing various surveys and polls, the ACLJ amicus brief noted that adherents of religions making up more than 75% of the American population "both believe and engage in prayer" and "believe that God actually responds to their prayers"—a reality that "would automatically" get them "excluded from a jury anytime they thought their prayers about the case were answered."[220] Brown brought out an additional racial dimension to this concern by noting that the trial judge's rule would have a disparate impact on excluding future African American jurors because "60% of members of historically black Protestant traditions believe that prayer is 'a two-way street' and that 'God[] talks directly with them.'"[221] These concerns echoed the Utah Supreme Court's analysis in a 1988 case, which had identified a troubling problem with treating "supposed responses to prayer" as "outside influences" under the rules of evidence: "we would implicitly be holding that it is improper for a juror to rely upon prayer, or supposed responses to prayer, during deliberations. Such a conclusion could well infringe upon the religious liberties of the jurors by imposing a religious test for service on a jury."[222]

Third, the trial judge's ruling could lead to future pretextual strikes against religious jurors by other jurors. Some amici worried that other jurors during deliberations might use the *Brown* ruling to disqualify "holdout" jurors in the jury room by baiting a person into talking about "divine guidance that they think they received" and then going to the judge and get them disqualified.[223] "To avoid these disqualification risks, people of faith will be chilled in their deliberations in ways that secular jurors are not," even though "deliberations are supposed to be 'honest, candid, [and] robust.'"[224]

The Eleventh Circuit agreed with the concerns raised by Brown and the amici supporting her position. Quoting Judge Wilkinson

220. En Banc Brief of Amicus Curiae the American Center for Law and Justice in Support of Defendant-Appellant at 20–21, *Brown*, 996 F.3d 1171.

221. En Banc Brief for Defendant-Appellant on Rehearing at 15–16, *Brown*, 996 F.3d 1171.

222. DeMille, 756 P.2d at 84.

223. En Banc Brief of Nebraska, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, South Dakota, and Texas as Amici Curiae in Support of Defendant-Appellant and Reversal at 17–18, *Brown*, 996 F.3d 1171.

224. *Id.* (quoting Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017)).

from the Fourth Circuit, the court noted that "[t]o ask that jurors become fundamentally different people when they enter the jury room is at odds with the idea that the jury be 'drawn from a fair cross section of the community.'"[225] It held that "[t]he district judge was wrong to conclude that Juror No. 13's statements that he received guidance in response to prayers were categorically 'a bridge too far,'" and concluded that "Juror No. 13's statements were compatible with his sworn duty."[226] The Eleventh Circuit reasoned:

> Juror No. 13's vivid and direct religious language—read in the light of his other statements—suggests he was doing nothing more than praying for and receiving divine guidance as he evaluated the evidence or, in secular terms, provided an explanation of his internal mental processes—all consistent with proper jury service."[227] At its most technical level, the court found the judge had erred based on the "tough legal standard" that "[i]n these kind[s] of circumstances, a juror should be excused only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence.[228]

The Eleventh Circuit affirmed the arguments of Brown and her amici on the points raised above. The court noted that "[p]eople talk about religion in different ways," and that, "for many contemporary Americans, to call prayer a conversation with God is more than a metaphor."[229] The court extensively discussed the cultural and anthropological evidence supporting the notion that, for some religious persons, talking about receiving guidance from God is equivalent to describing an inner mental process. As one

225. *Brown*, 996 F.3d at 1190 (en banc) (quoting Robinson v. Polk, 444 F.3d 225, 228–29 (4th Cir. 2006) (Wilkinson, J., concurring in the denial of rehearing *en banc*) (quoting Taylor v. Louisiana, 419 U.S. 522, 527 (1975)).

226. *Id.* at 1190–91.

227. *Id.* at 1191. The court explained that Juror 13 indicated that he had considered the evidence when he stated that he had "looked at the information," before then mentioning that he had "'received information' from '[his] Father in Heaven,'" which the juror had "tied" back to "the testimony he heard in the courtroom over the course of the trial." *Id.*

228. *Id.* at 1184 (citing United States v. Thomas, 116 F.3d 606, 621 (2d Cir. 1997)).

229. *Id.* at 1191–92 (citing Webb Keane, *Religious Language*, 26 ANN. REV. ANTHROPOLOGY 47, 49, 64 (1997) ("[D]ifferent religious practices seem to select from among the entire spectrum of linguistic possibilities. . . . [L]inguistic form alone cannot tell us what people take their words to be doing[or] where they believe those words originate.") and PEW RSCH. CTR., WHEN AMERICANS SAY THEY BELIEVE IN GOD, WHAT DO THEY MEAN? 27 (2018)).

example, the court explained that American evangelicals "'learn to identify some thoughts as God's voice, some images as God's suggestions, some sensations as God's touch or the response to his nearness,'" yet "both their addresses to him and his replies—if any—are 'inner mental phenomena.'"[230] It concluded that "Juror No. 13's vernacular that the Holy Spirit 'told' him Brown was 'not guilty on all charges' was no more disqualifying by itself than a secular juror's statement that his conscience or gut 'told' him the same."[231]

The court also punctuated Brown's point regarding African Americans, worrying that "[m]embers of some religious groups are more likely than others to report two-way communication with God, underscoring that different people are used to thinking and talking about their prayer life in different ways—and that courts may not conclude that their vernacular alone disqualifies them from jury service."[232] The court stated, "We must guard against the removal of a juror who, in vernacular commonly used by religious and racial minorities, expresses a view among jurors who 'may well come to view the 'holdout' . . . not only as unreasonable, but as unwilling to follow the court's instructions on the law.'"[233]

The Eleventh Circuit got it right, and its *en banc* decision correctly affirmed jurors' rights to commune with God in accordance with their own religious traditions, and to communicate that to other jurors as part of the candid discussions expected to occur during jury deliberations. Anything less than that would chill religious speech and result in the improper exclusion of religious persons from the privilege and right of jury service.

E. Tenet 5: The Right to Religious Privacy

The fifth tenet of this proposed bill of rights is that jurors have a right to privacy regarding their religious beliefs and practices. The Supreme Court has long recognized that juror privacy is essential

230. *Id.* at 1192 (quoting T.M. LUHRMANN, WHEN GOD TALKS BACK: UNDERSTANDING THE AMERICAN EVANGELICAL RELATIONSHIP WITH GOD xxi, 47 (2012)). The court went on to say, "Religious believers commonly describe God's guidance less as 'an outward voice' than as 'an inward whisper, a deep speaking into the heart, an interior knowing.'" *Id.* (quoting RICHARD J. FOSTER, SANCTUARY OF THE SOUL: JOURNEY INTO MEDITATIVE PRAYER 11 (2011)).

231. *Id.* at 1193.

232. *Id.* at 1192.

233. *Id.* at 1193 (citing United States v. Thomas, 116 F.3d 606, 622 (2d Cir. 1997)).

to the proper functioning of the trial process. As early as 1929, the Court declared hiring private detectives to surveil jurors on a case would "obstruct the honest and fair administration of justice" because a juror who suspects "that he, his family, and friends are being subjected to surveillance" will be unable to "exercise . . . calm judgment" in a case, and will "either shun the burdens of [jury] service or perform it with disquiet and disgust," making it an "impossibility" to have "[t]rial by capable juries."[234] As one scholar put it, "[P]rospective jurors do not seek out the public forum; they are summoned; often unwillingly, to fulfill a public duty in the justice system."[235]

A similar negative impact could arise if jurors feel that perhaps the most intimate and cherished aspect of their private lives—divine belief and relationship—is being subjected to public scrutiny and derision, potentially even leading to their exclusion from the jury. In addition to religion, other sensitive topics include such areas as sexuality, intimate relations, and family dysfunctions.

Of course, no juror chosen to sit in judgment on a case can expect complete security from embarrassing or invasive questioning. The parties have a right to fair process and consideration by an impartial jury willing to follow the law, and even a right to religious privacy cannot overcome that duty.[236] Still, the private areas of a juror's life warrant—if not total protection—at least exceptional consideration and great delicacy before delving into them. Nor is it too much for jurors to expect that such private explorations would only be done under the direst of needs using the most sensitive procedures.

This is especially the case when subjecting a juror's religious beliefs and practices to intense scrutiny, due to the specter of creating an improper "religious Test . . . as a Qualification to [a] . . . public Trust. . . ."[237] For that reason, "[m]any courts have thus held that, as a general rule, questioning a prospective juror

234. Sinclair v. United States, 279 U.S. 749, 764–65 (1929). *See also* Marten, *supra* note 43, at 728–29 (discussing the *Sinclair* case).

235. Michael R. Glover, Comment, *The Right to Privacy of Prospective Jurors during Voir Dire*, 70 CAL. L. REV. 708, 712 (1982). *See generally* Brandborg v. Lucas, 891 F. Supp. 352 (E.D. Tex. 1995) (providing a general history of a juror's expectation of privacy).

236. *See infra* Part II.F.1 (discussing a juror's duty to follow the law and be impartial).

237. U.S. CONST. art. VI, cl. 3. *See also supra* Part I.B.2 (discussing bans on juror religious qualification tests).

about his religious beliefs is improper."[238] In addition, religious questions should never be gathered as mere background information, but reserved for cases "involving [religious] issues directly, or where a juror has volunteered some information on the subject which raises the issue of whether he or she cannot be impartial, and thus is subject to a challenge for cause."[239]

The invasiveness of questions about religion increases when done involuntarily by "an attorney or a judge directly interrogat[ing] a juror in open court," rather than voluntarily during jury deliberations in the "'black box' of the jury room."[240] While jurors may press each other during deliberations to "give reasons for their opinions"—which could "expose[]" a "juror's religious thinking"—any religious views revealed in the privacy of the jury room would be done within the confines of private deliberations under the control of the jurors themselves.[241] This makes all the difference in whether jurors perceive their privacy as being violated from the outside or shared by internal choice.

Because the right to religious privacy is so critical, a court should preemptively resolve issues regarding uncomfortably intrusive questions about religious beliefs when the judge deems such inquiries absolutely necessary for fair process. This can be done by balancing "the privacy interests of potential jurors versus the interest in the parties of obtaining the sensitive information . . . on a question-by-question basis . . . before the questions are posed."[242] In other words, religious questions should not be asked at all in most cases, and only in minimal amounts where absolutely needed in fairness to the parties.[243] Further, when questions *must* be asked, they should be done so using a "less intrusive" approach, such as by "[a]sking questions implicating privacy interests *in camera*" and then sealing private portions of the record.[244] Some recommend the use of juror questionnaires in these limited

238. Chambers, *supra* note 39, at 603.

239. Marten, *supra* note 43, at 727–28.

240. Triedman, *supra* note 130, at 131.

241. *Id.* at 130.

242. Marten, *supra* note 43, at 738–39.

243. *See, e.g.*, Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 636 N.E. 2d 503 (Ill. 1994) (finding that a juror's religious affiliation may be asked about during *voir dire* when that affiliation is relevant to potential prejudice).

244. Marten, *supra* note 43, at 739–40 (quoting Michael R. Glover, Comment, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CALIF. L. REV. 708, 717 (1982)).

circumstances to "avoid[] the damage or embarrassment potentially associated with open court announcements," because "panelists may be more willing to answer sensitive questions candidly and honestly if they are permitted to privately write their responses rather than openly declare them in front of a panel of peers."[245]

In short, while jurors' rights to religious privacy may not be absolute, they should be taken seriously by courts and impinged on only when absolutely necessary. As the Second Circuit put it

> [O]ur jury selections system was not designed to subject prospective jurors to a catechism of their tenets of faith, whether it be Catholic, Jewish, Protestant, or Mohammedan, or to force them to publicly declare themselves to be atheists. Indeed, many a juror might have a real doubt as to the particular religious category into which they could properly place themselves.[246]

Thus, in those rare cases where inquiry is necessary, every means should be taken to reduce the impact of this religious privacy violation.

F. Tenet 6: The Right (and Duty) NOT to Do Wrong

The sixth and final tenet of this proposed bill of rights focuses on the obligation of jurors to faithfully execute their duties under the law and to perpetrate no wrongs, even if based in religious belief or practice. In this sense, this tenet is not so much a right belonging to jurors but rather a duty that accompanies jury service, regardless of belief. Viewed another way, however, this sixth tenet gives jurors the right to opt out of jury service when their sincere religious beliefs or practices would prevent them from fulfilling their duty on the jury. This includes the obligation to follow the court's instructions on the law—especially in criminal cases, where defendants have heightened protections—and to refrain from illegal discrimination, even if based on religion.

1. Religion and the Jury's Duty to Follow the Law

While the jury developed in Colonial America, as noted in Part I.A, judges continued to view jurors as possessing lawmaking

245. Triedman, *supra* note 130, at 131.

246. United States v. Barnes, 604 F.2d 121, 141 (2d Cir. 1979).

authority, consistent with the jury's traditional role of providing a check on "oppressive prosecutions."[247] For most of the eighteenth century, this view meant that juries could disregard a judge's instructions; however, by 1820, judges and lawyers had successfully restrained the power of the jury in civil cases by requiring "new trials to reverse verdicts where juries had brought in a verdict contrary to their instructions."[248] The U.S. Supreme Court later affirmed that juries did not have the right to "nullify the law" even in criminal cases because "an unfettered power in the jury to declare the law would essentially render the court mere surplusage."[249] Still, there is little a court can do in a criminal case to restrain a jury's verdict in favor of the accused because juries are tasked to deliver "general" verdicts, leaving them "a residual—and essentially unreviewable—power over law," especially because double jeopardy makes an acquittal nonreversible.[250] Despite this reality in criminal cases, modern courts have made it clear that a juror's duty today in all cases includes the obligation to follow the law as instructed by the judge.

Nor is the notion that religious jurors must follow the law a contentious idea, even by those advocates who argue for an expansive right of free religious exercise.[251] For instance, in Corinne Brown's case discussed in the Introduction and Part II.D, religious groups filing *amicus curiae* briefs defending the excluded juror went out of their way to make clear that they were not suggesting that religious jurors could use their beliefs to supersede the law. The American Center for Law and Justice stated that it did "not contend that any religious belief, or any juror or prospective juror's statements describing such beliefs, that, beyond a reasonable doubt, would make a juror unable to consider the evidence, should be immune from challenge or judicial supervision."[252] Similarly, eight states in support of Brown declared that they were "not

247. Harrington, *supra* note 23, at 379.

248. *Id.*

249. *Id.* at 433 (discussing Sparf v. United States, 156 U.S. 51 (1895)).

250. *Id.* at 434.

251. *See* Dolan, *supra* note 146, at 477 ("[I]t would be permissible to strike a member of the venire when a particular personal belief derived from religion would completely interfere with the juror's ability to remain impartial.").

252. *En Banc* Brief of *Amicus Curiae* The American Center for Law and Justice in Support of Defendant-Appellant at 18, United States v. Brown, 996 F.3d 1171 (11th Cir. 2021) (No. 17-15470).

suggesting that trial courts must allow religious people to serve on a jury if they insist on following what they believe they hear from God 'irrespective of the evidence,' . . . or worse yet, contrary to the evidence."[253] Brown's position, itself, affirmed that "a juror may be disqualified if her religious beliefs preclude her from performing the duties of a juror."[254] Brown further agreed that, "if a juror claims to be deliberating properly but . . . the evidence as a whole establishes beyond a reasonable doubt that he is not deliberating properly, the court may discharge the juror despite his assurances, whatever his religious beliefs may be."[255]

The consistency in this position stems from longstanding case law, as stated by the court in *Brown*, that "[r]eligious beliefs may provide the basis for removal when those beliefs do not permit jurors to complete their jury service."[256] For instance, in a capital case, if a religious person states "that they could not impose the death penalty in any circumstance," then that juror may be excluded "not because of his religion, but because of his views."[257] The government accurately summed up the law in its brief in *Brown*, that "jurors must decide cases based on the evidence and the court's instructions, and the court must intervene when jurors instead decide a defendant's guilt or innocence based on matters external to that evidence," such as by randomly placing a finger on Scripture verse to determine guilt.[258] This is not religious discrimination, however, because the reason for the court's intervention under these circumstances is not the juror's religious

253. En Banc Brief of Nebraska, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, South Dakota, and Texas as Amici Curiae in Support of Defendant-Appellant and Reversal at 9, United States v. Brown, 996 F.3d 1171 (11th Cir. 2021) (No. 17-15470).

254. En Banc Brief for Defendant-Appellant on Rehearing at 17, United States v. Brown, 996 F.3d 1171 (11th Cir. 2021) (No. 17-15470).

255. En Banc Reply Brief for Defendant-Appellant on Rehearing at 21–22, United States v. Brown, 996 F.3d 1171 (11th Cir. 2021) (No. 17-15470). *See also* Barton, *supra* note 143, at 211 ("If the *voir dire* establishes that a juror's religious beliefs will bias her significantly in a particular case, then a removal for cause is proper.").

256. United States v. Brown, 996 F.3d 1171, 1189 (11th Cir. 2021) (citing United States v. Whitfield, 590 F.3d 325, 360 (5th Cir. 2009)); United States v. Decoud, 456 F.3d 996, 1003, 1005, 1016–17 (9th Cir. 2006); United States v. Burrous, 147 F.3d 111, 115, 117–18 (2d Cir. 1998); United States v. Pappas, 639 F.2d 1, 3–4 (1st Cir. 1980); Morgan v. Illinois, 504 U.S. 719, 728–29 (1992); and Miles v. United States, 103 U.S. 304, 310 (1880)).

257. Galle, *supra* note 102, at 577–78.

258. En Banc Brief of the United States at 44 (citing JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 16 (2008)), United States v. Brown, 996 F.3d 1171 (11th Cir. 2021).

affiliation, or even the religious belief itself, but rather the juror's demonstrated inability to follow the law in light of that belief.[259] As the Supreme Court has noted, "even the religious zealot may 'nonetheless subordinate his personal views to what he perceive[s] to be his duty to abide by his oath as a juror and to obey the law of the State.'"[260] Contrast this clear ability to subordinate beliefs to the law with the juror in *State v. Hodge* who was properly excluded by peremptory challenge after he "expressly indicated that, in the event of a conflict between the court's instructions and his religious beliefs, he would seek guidance from his religious leader about how to handle the situation."[261] Similar problems can arise when a juror's religious beliefs make it impossible to sit in judgment upon another person.

Perhaps the quintessential case demonstrating this principle is *United States v. Geffrard*, where the jury in a criminal case was instructed that entrapment was *not* a defense to the charges, but a juror whose religious beliefs were "based on the teachings of Emanuel Swedenborg" wrote a five-page letter to the judge explaining why she could not follow those instructions.[262] She stated that her beliefs were "above all" that

> real truth and yes logic comes from the heart and the soul first and then to the mind, I am afraid that my definition of truth may be different from your definition, and I don't mean to be unkind but to discuss the teachings of Emanuel Swedenborg with the other jurors in relation to this case and how I interpret truth would be like discussing the theory of relativity with my cocker spaniel dog.[263]

Her letter went on to explain why she believed the defendants had been entrapped and how

259. *See, e.g.*, *Miles*, 103 U.S. at 310 (finding no error in bigamy trial where triers found the presence of actual bias and excluded jurors who "believed that polygamy was ordained of God," because "a jury composed of men entertaining such a belief could not have been free from bias"); Wolf v. Sundquist, 955 S.W.2d 626 (Tenn. Ct. App. 1997) (finding that exclusion of a Methodist minister who could not consider the death penalty was not discrimination against a juror based on religious belief).

260. Galle, *supra* note 102, at 578 (quoting Witherspoon v. Illinois, 391 U.S. 510, 514 n.7 (1968)).

261. State v. Hodge, 726 A.2d 531, 554 (Conn. 1999).

262. United States v. Geffrard, 87 F.3d 448, 451 (11th Cir. 1996).

263. *Id.*

> [d]eep within my heart and soul I could not live with a verdict of guilty for any of the accused on any of the charges, as I believe deep within my heart and soul and mind that they were unjustly led into this so called transaction by a more intelligent and powerful figure . . . .[264]

The Eleventh Circuit found no error in excluding her even though deliberations had begun in the case.[265]

As far as remedies go, courts traditionally have exercised several options when dealing with jurors who are unwilling or unable to follow the court's instructions, the law, or generally proper conduct. The court may give the jury "a strong charge to . . . negate the potential for prejudice"; it may leave the offending jurors in place while individually sanctioning (or threatening a personal sanction); it may replace the offending jurors with alternate jurors, if available; or it may order a mistrial (or a new trial if the verdict has already been given).[266] These types of remedies are permissible under the law and often will not offend the principles in Tenet 6.

2. Jury Duty and the Special Case of Criminal Defendants

Nowhere is the right to a fair and impartial jury stronger than when criminal defendants are guarding their life, liberty, and property from the machinations of the State. Those accused of crimes are in a class by themselves in this regard. The U.S. Constitution provides manifold unique protections for criminal defendants, including the right not to incriminate themselves, the right "to be informed of the nature and cause of the accusation," the right to a "speedy and public trial, by an impartial jury," the right to call and confront witnesses, and the right not to be tried twice for the same offense.[267] In recognition of the singular position of the accused, the Federal Rules of Evidence similarly accord protections unavailable to other litigants.[268] To give but a few examples, the rules give criminal defendants extra rights at procedural

264. *Id.*

265. *Id.* at 452.

266. § 24.9(f) Jury misconduct, 6 Crim. Proc. § 24.9(f) (4th ed.).

267. U.S. CONST. amends. V, VI.

268. *See* Antony B. Kolenc, "No *Help You God" – Religion, the Courtroom, and a Proposal to Amend the Federal Rules of Evidence*, 91 MISS. L.J. 1 (2022) (discussing every unique rule for criminal defendants).

hearings,[269] special treatment regarding character evidence,[270] unique protections for plea discussions,[271] greater leeway admitting evidence about a victim's sexual behavior,[272] and more protective rules regarding hearsay evidence.[273]

At times, a criminal defendant's weighty interest in a fair trial by an impartial jury may come into "tension" with "the right of potential jurors both to participate in the administration of justice and to be free from intrusions upon their own constitutional rights" to freely exercise their religion.[274] Considering that "the outcome of a criminal trial may affect the defendant's liberty interest forever," some have advocated for greater leeway for criminal defendants in striking religious jurors.[275] Specifically, some suggest that a criminal defendant's mere subjective "perception of impartiality" about a juror should be sufficient to exclude that juror due to religion "[b]ecause of the presumably strong correlation between having a particular religious affiliation and adopting its associated beliefs."[276] That suggestion should be resisted as blatant stereotyping and discrimination, as previously discussed in this Article.

Not only does the above suggestion harm the dignity of jurors, but it also turns on its head the Sixth Amendment's requirement that criminal defendants be tried by a jury comprised of a fair "cross-section" of the community.[277] The Constitution does not permit criminal defendants to exclude community members of protected classes simply because of the defendant's fear of the

269. *See* FED. R. EVID. 104(c)(2), (d) (allowing hearings outside of the jury's hearing when criminal defendants testify, and offering limits on cross-examination by the prosecutor).

270. *See* FED. R. EVID. 404(a)(2) (giving criminal defendants the keys to evidence about their own character). *See also* FED. R. EVID. 609(a)(1)(B), (d) (offering stronger evidentiary protection from prior convictions).

271. *See* FED. R. EVID. 410.

272. *See* FED. R. EVID. 412.

273. *See* FED. R. EVID. 803(8) (making some law-enforcement hearsay inadmissible against criminal defendants); FED. R. EVID. 804(3) (allowing a hearsay statement against interest only if supported by corroborating circumstances that clearly indicate its trustworthiness).

274. Marten, *supra* note 43, at 731–32.

275. Marks, *supra* note 33, at 655–56.

276. *Id.* at 655.

277. Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (citing Williams v. Florida, 399 U.S. 78 (1970)).

possibility that a juror "may be more susceptible to bias against a particular defendant."[278] For instance, in one Utah case, a criminal defendant desired to purge all members of the Church of Jesus Christ of Latter Day Saints (LDS) from a jury because the victim of the crime happened to be an LDS bishop.[279] The court disagreed, finding that the victim's position "did not make religion 'clearly relevant' to this case" because "[t]here was no apparent religious motivation for the crime."[280]

Still, some concession can be made in the context of criminal trials to address the extra due-process interests of the accused. For instance, that interest may be accommodated through a more targeted use of *voir dire*. Thus, in cases where religion is pertinent, a criminal defendant may be given greater latitude than parties in civil cases to have jurors questioned about their religious beliefs, leading perhaps to challenges for cause if the responses indicate the *actual* presence of improper bias[281] (but *not* the accused's mere subjective "perception of impartiality").[282]

3. No Right to Engage in Unlawful Discrimination

Not only must jurors follow the substantive law and remain impartial despite their religious beliefs, but they also have an obligation not to engage in illegal discriminatory conduct based on their religious views. Where such discrimination is revealed, the offending juror may be stricken from the jury or the verdict may be reversed.

In some cases, a juror's religious affiliation or beliefs may influence how that juror perceives a witness or party in the case.

278. Matthews, *supra* note 162, at 79 (discussing Hale v. United States, 710 F.3d 711 (7th Cir. 2013), which found no ineffective assistance of counsel when a defense attorney refused to strike black jurors based on race in a case involving a defendant who was a white supremacist).

279. Mulder v. State, 385 P.3d 708, 721 (Utah Ct. App. 2016).

280. *Id.*

281. *See* Marten, *supra* note 43, at 732–33 (discussing cases where challenges to jurors was based not "solely on potential jurors' religious beliefs, but because the jurors could not be fair and impartial in their jury service").

282. For example, a juror who believes that adultery is a serious sin may be capable of separating that belief from the judgments to be made in a criminal trial for prostitution. If the judge in the case finds that such a juror has no "actual" bias on the issue, then an accused should not be able to dismiss a juror for-cause merely because the accused is uncomfortable with the juror's religious belief and feels that some bias is "implied" in the juror's being due to that belief.

For instance, courts have recognized that, historically, adherents of certain religions have run a higher risk of unfair prejudice from jurors due to religious affiliation.[283] This has been a special concern for Muslim witnesses and parties since the horrendous terrorist attacks on September 11, 2001, which created a "political climate" where beliefs may be used "to prey on the prejudices of some jurors against certain religions."[284] Similarly, members of some minority religions such as Wicca may experience prejudice from jurors who are shocked by their beliefs.[285] In a case involving a Wiccan defendant, one court explained that "witchcraft has generated terror and contempt throughout American history," noting that, "[e]ven in our culture today, satanic imagery associated with witchcraft continues," and that "our culture associates witchcraft with Satanic worship and other evil practices," making "[a]ny mention of a defendant's involvement with witchcraft . . . highly prejudicial." [286]

In those cases where jurors' religious beliefs make them unable to fairly assess the credibility of a witness or victim, or to impartially judge a party's cause, they should be excused from service. This is especially true in criminal cases, where a discriminating juror can result in a reversal. As the Supreme Court of Wisconsin has explained,

> Whenever it comes to a trial court's attention that a jury verdict may have been the result of any form of prejudice based on race, religion, gender or national origin, judges should be especially sensitive to such allegations and conduct an investigation to 'ferret out the truth.' . . . For even if only one member of a jury

283. *See, e.g.*, Redman v. Watch Tower Bible & Tract Soc'y of Pa., 630 N.E.2d 676, 678 (Ohio 1994) ("When . . . the witness belongs to a minority sect, which may or may not be viewed with disdain or misunderstanding, the risk of unfair prejudice is high.").

284. Katharine Traylor Schaffzin, *Is Evidence Obsolete?*, 36 REV. LITIG. 529, 563 (2016). *See, e.g.*, Shelton v. Bledsoe, No. 11-0368, 2017 WL 2906560, at *8–9 (M.D. Pa. July 7, 2017) (refusing to reveal a party's Muslim identity to the jury after the party argued that "the anti-Muslim political climate that has emerged since September 11, 2001, and the attacks carried out by terrorist groups such as ISIS," could "lead to unfair prejudice with members of the jury" if his religious affiliation became known).

285. *See* Stewart, *supra* note 118, at 192–99. As one example of potentially shocking Wiccan beliefs, the prosecution in *Kansas v. Leitner* attempted to explore a female defendant's "witchcraft," to include that she "was using a black caldron, she cooked flowers in there, seeds, and did chants of some sort, and she slept with some type of tree branch . . . over her bed . . . as protection . . . from the [police]." Kansas v. Leitner, 34 P.3d 42, 52 (Kan. 2001).

286. *Leitner*, 34 P.3d at 55–56.

> harbors a material prejudice, the right to a trial by an impartial jury is impaired.[287]

Some states have taken aggressive steps to ensure that juries do not base their verdicts on these kinds of prejudice.[288]

One unanswered question in this area involves Federal Rule of Evidence 606(b), the "no-impeachment" rule discussed in Part I, which prohibits jurors from "testify[ing] about any statement made or incident that occurred during the jury's deliberations" in any post-verdict inquiry.[289] The Supreme Court has created an exception to that rule where a juror "makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant."[290]

The no-impeachment rule should be expanded to include jurors who discriminate based on gender and religion, as some scholars have argued.[291] Failing to expand the rule to include religious prejudice would result in the unjust situation where, if jurors stated "during deliberations that they believed all Muslims were prone to violence because of their faith, and therefore believed the Muslim defendant guilty of assault, other jurors would not be able to testify to those statements after the verdict because they demonstrate religious, not racial, prejudice."[292] And like racial bigotry, this is a

287. After Hour Welding, Inc. v. Laneil Mgmt. Co., 324 N.W.2d 686, 690 (1982) (*quoting* Morgan v. United States, 399 F.2d 93, 97 (5th Cir. 1968), *cert. denied* 393 U.S. 1025 (1969)).

288. For instance, California requires its juries to "return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be." Mitchell v. United States, 958 F.3d 775, 781 (9th Cir. 2020).

289. FED. R. EVID. 606(b)(1).

290. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

291. *See generally* Jason Koffler, *Laboratories of Equal Justice: What State Experience Portends for Expansion of the* Pena-Rodriguez *Exception Beyond Race*, 118 COLUM. L. REV. 1801 (2018) (discussing state expansion of the no-impeachment and arguing in favor of extending *Pena-Rodriguez* to religious and other juror biases). *See also* Jazmine Adams, *The Intersectionality of Juries, Race, and Gender: Extending the* Peña-Rodriguez v. Colorado *Decision to Protect Against Gender Discrimination in Jury Deliberations*, 10 ALA. C.R. & C.L. L. REV. 95, 110 (2019) (quoting *J.E.B.* to explain the Supreme Court feared that "gender can be used as a pretext for racial discrimination" unless *Batson* was extended, and worrying the same could occur if *Pena* were not extended).

292. Sharon Finegan, *An Ounce of Prevention: Educating Jurors to Avoid Investigating the Verdict*, 12 NE. U. L. REV. 502, 530 (2020).

prejudice unlikely to be revealed during *voir dire* because "[t]here is no reason to think that potential jurors are somehow less likely to voice racial bigotry during *voir dire* than they are to voice . . . religious bigotry, as these positions are all socially loathsome."[293]

In sum, when jurors betray their oaths to decide cases based on the law—especially where they resort to discriminatory practices, even if based on sincerely held religious beliefs—they have forfeited their privilege and right to serve on a jury. Indeed, if a juror hopes to rely on the religious freedom bill of rights proposed in this Article, that juror must also be willing to respect the legal rights of others. If unable to do so, the best course of action is to candidly admit to an unresolvable conflict between faith and jury service and to opt out of that particular jury duty.

CONCLUSION

The unique jury system in the United States relies on ordinary jurors drawn from the community to engage in the most important civic function that most persons will ever have the privilege to perform. Those communities include in large numbers jurors of all religious traditions (or none at all) who deserve to have their religious liberties affirmed in the selection process for juries, as well as during their time of service. Those liberties have been protected at least since the founding of the nation, and are enshrined in both the text and amendments to the U.S. Constitution, as well as in state constitutions and statutes, including Religious Freedom Restoration Acts that seek to apply the highest level of scrutiny to government actions that substantially burden religious practice.

To safeguard the religious liberties of ordinary persons performing jury duty, this Article has proposed a *Juror's Religious Freedom Bill of Rights* consisting of six tenets. First, jurors have the right to possess (or not possess) a religious identity. This means that the jury selection process will not categorically exclude prospective jurors from any religion. Second, jurors have the right to be free from religious discrimination while serving on a jury. This includes being free from targeted peremptory challenges by attorneys who are suspect of a person merely because of their religious beliefs, or

293. Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713, 752–53 (2019).

lack thereof. Third, jurors have the right to religious accommodations during jury service, typically regarding dress, appearance, and time to engage in religious observances. These accommodations should be granted, when possible, even if they result in minor inconveniences to the court.

Fourth, jurors have the right to commune with a higher power during jury service and to receive divine guidance in keeping with their religious traditions. Jurors who reference receiving direction from a higher being during deliberations should not be excluded from the jury based on the religious vernacular they have used to describe their internal mental processes. Fifth, jurors have a right to privacy regarding their religious beliefs and practices. This would include avoiding intrusive and unnecessary questions during *voir dire*. Finally—because rights come with responsibilities—jurors also have an obligation to faithfully execute their duties under the law and to perpetrate no wrongs against the parties in the case, even if based in religious belief or practice. This means that jurors must follow all of the court's instructions about the law and refrain from illegal discrimination, regardless of religious belief.

In a nation that cherishes both due process of law and religious liberty, the bill of rights proposed in this Article strikes a fair balance between proper jury service to the community and the right affirmation of a fundamental human right. Our laws require religious tolerance in all aspects of public life, and our jury system should demand nothing less than that in both its design and in its everyday practice.