

## CATHOLIC JURORS AND THE DEATH PENALTY

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### INTRODUCTION

Let me start by saying that I share the judgment of Clarence Darrow that Catholics make great jurors.<sup>1</sup> Back in the days when jurors were selected based upon the racial and ethnic stereotypes of lawyers (and I am not so naïve as to believe those days are over), Clarence Darrow authored his famous essay, “Attorney for the Defense.”<sup>2</sup> Here’s what he had to say about Catholic jurors:

Let us assume that we represent one of “the underdogs” . . . because of an indictment brought by what the prosecutors name themselves, “the state.” Then what sort of men will we seek? An Irishman is called into the box for examination. There is no reason for asking about his religion; he is Irish; that is enough. We may not agree with his religion, but it matters not; his feelings go deeper than any religion. You should be aware that he is emotional, kindly and sympathetic. If he is chosen as a juror, his imagination will place him in the dock; really, he is trying himself. You would be guilty of malpractice if you got rid of him, except for the strongest reasons.<sup>3</sup>

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<sup>1</sup> Clarence Darrow, *Attorney for the Defense*, ESQUIRE, May 1936, at 37.

<sup>2</sup> *Id.* at 36.

<sup>3</sup> *Id.* at 37. Darrow’s enthusiasm for Catholic jurors was not universally shared. One of the “trial manuals” recommended to me when I was a student at Georgetown Law School offered this advice for picking juries to try an insanity defense:

Least desirable [as a juror] would be the Roman Catholic with his emphasis on free will, moral responsibility and payment for his sins. In addition, all fundamentalist faiths would be generally non-receptive to the defense . . . . For once, the sentimental Irish and sympathetic Italians are to be avoided because of their affinity for Catholicism. More receptive strains may be found among the Scandinavian backgrounds. . . . Negroes are generally ill equipped to evaluate psychiatric testimony.

Darrow even liked German jurors, as long as they were Catholics. He wrote:

The German is not so keen about individual rights except where they concern his own way of life; liberty is not a theory, it is a way of living. Still, he wants to do what is right, and he is not afraid. . . . If he is a Catholic, then he loves music and art; he must be emotional, and will want to help you; give him a chance.<sup>4</sup>

If the German was Lutheran though, Darrow said:

Beware of the Lutherans, especially the Scandinavians; they are almost always sure to convict. Either a Lutheran or Scandinavian is unsafe, but if both-in-one, plead your client guilty and go down the docket. He learns about sinning and punishing from the preacher, and dares not doubt. A person who disobeys must be sent to Hell; he has God's word for that.<sup>5</sup>

Darrow, who was agnostic himself, had a stereotype for every religion he encountered.<sup>6</sup> He thought that Presbyterians were a "bad lot" and that Baptists were even more "hopeless."<sup>7</sup> If you were sitting between a Methodist and a Baptist, Darrow explained that you should "move toward the Methodist to keep warm."<sup>8</sup> He advised keeping Unitarians, Universalists, Congregationalists, and Jews without asking them too many questions.<sup>9</sup> As for women, Darrow concluded, "Luckily . . . my services were almost over when women invaded the jury box."<sup>10</sup>

Are Catholic jurors more likely to have qualms about the death penalty? The demographics would suggest that they are. It is not a coincidence that those states which do not utilize the death penalty include the states with the highest proportion of Catholics in their population.<sup>11</sup> The few available polls seem to

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LAW AND TACTICS IN FEDERAL CRIMINAL CASES 265–66 (George W. Shadoan ed., 1964).

<sup>4</sup> Darrow, *supra* note 1, at 37.

<sup>5</sup> *Id.* at 211.

<sup>6</sup> See *infra* text accompanying notes 7–9.

<sup>7</sup> See Darrow, *supra* note 1, at 37.

<sup>8</sup> *Id.* at 211.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Adherents.com, Religion by Location (2000), [http://www.adherents.com/adhloc/Wh\\_199.html](http://www.adherents.com/adhloc/Wh_199.html) (stating the population of Massachusetts is 49% Catholic); Adherents.com, Religion by Location (2000), [http://www.adherents.com/adhloc/Wh\\_284.html](http://www.adherents.com/adhloc/Wh_284.html) (stating the population of Rhode Island is 63% Catholic); Adherents.com, Religion by Location (2000), [http://www.adherents.com/adhloc/Wh\\_359.html](http://www.adherents.com/adhloc/Wh_359.html) (stating the population of Wisconsin

confirm growing Catholic opposition to the death penalty. The Gallup poll regularly asks, “[W]hich do you think is the better penalty for murder—the death penalty or life imprisonment, with absolutely no possibility of parole?”<sup>12</sup> In 1999, the national answer indicated that 56% of the population chose the death penalty while only 38% chose life imprisonment.<sup>13</sup> The Catholic answer, in a poll conducted that same year for the Missouri Catholic Conference, was 40% death and 60% life imprisonment.<sup>14</sup> A recent Zogby International poll of more than 1,500 Catholics in the United States found 49% agreed with the statement that “capital punishment is wrong under virtually all circumstances,” while 48% disagreed.<sup>15</sup> In general, national polls indicate declining support among all Americans for the death penalty in instances of murder.<sup>16</sup>

This article will address four issues raised by the position of the Catholic Church opposing the use of the death penalty. First, can jurors be asked their religion? Is it a relevant question in jury selection? Second, can Catholics even serve as jurors in death penalty cases? Are they “death qualified” jurors within the meaning of *Witherspoon v. Illinois*,<sup>17</sup> and *Wainwright v. Witt*,<sup>18</sup> or

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is 32% Catholic); Death Penalty Info. Ctr., Facts About the Death Penalty (June 30, 2005), <http://www.deathpenaltyinfo.org/FactSheet.pdf> (listing the twelve states, including Massachusetts, Rhode Island, and Wisconsin, without the death penalty); see also Adherents.com, Largest Religious Groups in the United States of America (2005), [http://www.adherents.com/rel\\_USA.html](http://www.adherents.com/rel_USA.html) (asserting the population of the United States is 26% Catholic).

<sup>12</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 143 tbl.249, available at <http://www.albany.edu/sourcebook/pdf/t249.pdf> (last visited Oct. 28, 2005).

<sup>13</sup> *Id.* The Gallup poll does not track responses by religion, but the 2003 poll reflects that Republicans (84%) are much more likely to prefer death than Democrats (51%), and men (70%) are more likely than women (58%). *Id.* A strong preference for life is expressed by Blacks (54%) and those with post-graduate education (50%). *Id.*

<sup>14</sup> Ctr. for Soc. Sci. & Pub. Policy Research, Telephone Survey of Missouri Residents’ Opinions on the Death Penalty (Nov. 1999), <http://www.umsl.edu/divisions/artscience/forlanglit/mbp/poll.html>.

<sup>15</sup> Death Penalty Info. Ctr., Summaries of Recent Poll Findings, <http://www.deathpenaltyinfo.org/article.php?scid=23&did=210> (last visited Oct. 28, 2005) (click on “Zogby International” hyperlink).

<sup>16</sup> See PollingReport.com, <http://www.pollingreport.com/crime.htm> (last visited Oct. 28, 2005). For example, The Gallup Poll indicates that when asked whether they support the death penalty for a person convicted of murder, Americans now register 71% in favor, down from the high of 80% in 1994. See *id.*

<sup>17</sup> 391 U.S. 510 (1968).

<sup>18</sup> 469 U.S. 412 (1985).

can they be challenged and removed for cause? Third, will our system of peremptory challenges permit the systematic exclusion of Catholics from juries in death penalty cases without running afoul of the constitutional limits on the use of peremptory challenges to engage in unlawful discrimination? Finally, the question William F. Buckley, Jr., writing in the *National Review*, posed for Justice Antonin Scalia: Should Catholics allow their faith to affect their reasoning on whether a defendant should be executed?<sup>19</sup>

### I. VOIR DIRE QUESTIONING<sup>20</sup>

I will start with the easiest issue. The test for what may be asked of prospective jurors is simple: Is the question relevant to whether the juror has a bias or predisposition?<sup>21</sup> Would you not want to know if your jurors were Catholic if you were on trial for an illegal abortion?<sup>22</sup> Would you not want to know if your jurors were Mormons if you were on trial for drunk driving?<sup>23</sup> In a death penalty trial, jurors will ordinarily be asked if they hold any religious views that might affect their decision whether to impose a sentence of death.<sup>24</sup> Frequently, this question is asked in a written questionnaire before the juror is seated. The

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<sup>19</sup> William F. Buckley, Jr., *Can Catholics Decree Death?*, NAT'L REV., Mar. 11, 2002, at 58, 59.

<sup>20</sup> Voir dire is a phrase that "denotes the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors. Peremptory challenges or challenges for cause may result from such examination." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

<sup>21</sup> Because the purpose of voir dire questioning is to assemble an impartial jury, parties may only elicit information from potential jurors if that information is relevant to establishing a juror's impartiality or fitness. See Douglas M. Bates, Jr., *Voir Dire Examination in Criminal Jury Trials: What is the Proper Scope of Inquiry?*, FLA. B.J., Jan. 1996, at 64, 64.

<sup>22</sup> See *State v. Barnett*, 445 P.2d 124, 125 (Or. 1968) (finding that voir dire questioning about a potential juror's religion would be "obviously relevant" in a case involving an illegal abortion).

<sup>23</sup> See *State v. Ball*, 685 P.2d 1055, 1060 (Utah 1984). The Utah Supreme Court ruled it was error to disallow an inquiry to prospective jurors whether their choice not to drink was "a personal conviction or a religious one?" because such a question might have bearing upon the impartiality of the jury. *Id.* at 1056-60.

<sup>24</sup> See, e.g., *State v. Davis*, 504 N.W.2d 767, 772 (Minn. 1993) (allowing generalized religious inquiries to be made during voir dire, such as whether the potential juror could anticipate "any reason" she would be biased during trial). *But see Bader v. State*, 40 S.W.3d 738, 741-43 (Ark. 2001) (finding that specific questions regarding jurors' religious denominations and attendance rates at religious services exceeded the bounds of appropriate inquiry).

lawyers, and often the judge, will then follow up with additional voir dire questions, and the religious affiliation of the juror will emerge. So, let us assume, in response to a question about religious views, a juror reveals that he or she is a practicing Roman Catholic. The Catholic juror could then be asked whether he or she agrees with the position espoused in the latest version of the *Catechism of the Catholic Church*, which says:

The traditional teaching of the Church does not exclude, presupposing full ascertainment of the identity and responsibility of the offender, recourse to the death penalty, when this is the only practicable way to defend the lives of human beings effectively against the aggressor.

“If, instead, bloodless means are sufficient to defend against the aggressor and to protect the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.

“Today, in fact, given the means at the State’s disposal to effectively repress crime by rendering inoffensive the one who has committed it, without depriving him definitively of the possibility of redeeming himself, cases of absolute necessity for suppression of the offender ‘today . . . are very rare, if practically non-existent.’<sup>25</sup>

Would agreement with this position automatically disqualify a potential juror in a death penalty case?

## II. CHALLENGE FOR CAUSE

We should begin by noting that the position taken in the *Catechism of the Catholic Church* does not automatically preclude a death penalty in every case, nor does it preclude the adherent from participating in the decision-making process to determine if the death penalty is necessary in a particular case.<sup>26</sup>

In *Witherspoon v. Illinois*,<sup>27</sup> the United States Supreme Court assessed the constitutionality of a death penalty imposed

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<sup>25</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 2267, [http://www.vatican.va/archive/ENG0015/\\_P7Z.HTM](http://www.vatican.va/archive/ENG0015/_P7Z.HTM) (last visited Oct. 28, 2005) (quoting JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶ 56 (1995)). The Vatican’s website contains recent modifications to the Catechism by Pope John Paul II, which are currently not available in print.

<sup>26</sup> See *supra* note 25 and accompanying text.

<sup>27</sup> 391 U.S. 510 (1968).

by a jury selected pursuant to an Illinois statute.<sup>28</sup> The statute provided: “ ‘In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.’ ”<sup>29</sup> At the defendant’s trial, nearly half of the prospective jurors were eliminated under the authority of this statute.<sup>30</sup> The Court struck down the death sentence imposed by the surviving jurors, and held that a “sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding [potential jurors] for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.”<sup>31</sup> In a footnote, the Court added that prospective jurors *could* be excluded if they made it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them.<sup>32</sup> Many courts subsequently adopted the standard expressed in the footnote, to rule that a potential juror could not be excused *unless* he stated with unmistakable clarity that he would never vote to impose the death penalty under any circumstances.

In *Wainwright v. Witt*,<sup>33</sup> the Court clarified the *Witherspoon* standard,<sup>34</sup> dispensing with the reference to “automatic” decision-making, as well as unmistakable clarity in the juror’s position.<sup>35</sup> In *Witt*, the Court upheld the exclusion of a juror who simply had been asked whether her personal objections to the death penalty would interfere with judging the guilt or innocence of the defendant.<sup>36</sup> She had responded, “I think it would.”<sup>37</sup> The Court ruled that a juror may be excluded for cause in a death penalty case if the juror’s views would “ ‘prevent or substantially impair

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<sup>28</sup> *Id.* at 513.

<sup>29</sup> *Id.* at 512 (quoting ILL. REV. STAT., ch. 38, § 743 (1959) (reenacted 1961)).

<sup>30</sup> *See id.* at 513.

<sup>31</sup> *Id.* at 522.

<sup>32</sup> *See id.* at 522 n.21.

<sup>33</sup> 469 U.S. 412 (1985).

<sup>34</sup> *See supra* text accompanying note 32.

<sup>35</sup> *Witt*, 469 U.S. at 424–26.

<sup>36</sup> *Id.* at 415–16, 430.

<sup>37</sup> *Id.* at 416.

the performance of his duties as a juror in accordance with his instructions and his oath.’”<sup>38</sup>

Thus, unless a Catholic juror believes the death penalty is never appropriate under any circumstances—which is neither the position of the *Catechism of the Catholic Church*<sup>39</sup> nor the position of the U.S. Catholic Bishops<sup>40</sup>—he or she should not be excluded from sitting on a jury in a death penalty case. Under the *Witherspoon* standard,<sup>41</sup> the Pope and every Catholic bishop in America could be “death qualified” jurors.<sup>42</sup> Even under the limitations of the *Witt* standard,<sup>43</sup> a Catholic juror who embraces the *Catechism of the Catholic Church* can truthfully state that his or her view would not “‘prevent or substantially impair the performance of his [or her] duties as a juror. . . .’”<sup>44</sup> As the death penalty is currently administered under the “guided discretion” laws enacted in the wake of *Furman v. Georgia*<sup>45</sup> and *Gregg v. Georgia*,<sup>46</sup> the jury is called upon to weigh the mitigating and aggravating circumstances of the case and determine whether death is the appropriate penalty under the law.<sup>47</sup> Personal

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<sup>38</sup> *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

<sup>39</sup> *See supra* note 25 and accompanying text.

<sup>40</sup> *See* U.S. Bishops, *Statement on Capital Punishment*, ORIGINS, Nov. 27, 1980, at 373. Although the Statement calls for the abolition of death penalty laws, it does not suggest that the death penalty is never appropriate under any circumstances. *See id.*

<sup>41</sup> *See supra* text accompanying note 32.

<sup>42</sup> Under *Witherspoon*, any person that might *consider* the death penalty as a possible punishment, even under extremely limited circumstances, would be deemed a death qualified juror. *See Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968). The *Catechism of the Catholic Church* indicates that the death penalty may be appropriate under certain circumstances. *See supra* text accompanying note 25. Consequently, any Catholic that subscribes to this doctrine could be deemed a death qualified juror.

<sup>43</sup> *See supra* note 38 and accompanying text.

<sup>44</sup> *Witt*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)); *see also supra* notes 27–28 and accompanying text (discussing the *Catechism*).

<sup>45</sup> 408 U.S. 238 (1972) (per curiam). The *Furman* Court reversed three state court decisions that previously affirmed petitioners’ death sentences pursuant to their state statutes. *See id.* at 239–40 (per curiam). These statutes gave the jury unguided discretion to choose between imposing the death sentence and lesser punishments. *See id.* at 240 (Douglas, J., concurring). The Court held that the death penalty imposed pursuant to these state statutes “constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” *Id.* at 239–40 (per curiam).

<sup>46</sup> 428 U.S. 153 (1976). The *Gregg* court upheld petitioner’s death sentence under a state statute that was amended after *Furman*. *Id.* at 196–98, 207.

<sup>47</sup> “In the wake of *Furman*, Georgia amended its capital punishment statute . . .” *Id.* at 196. Accordingly, “the jury is authorized to consider any other

objections to the death penalty law, or even a predisposition to rarely utilize it, does not disqualify a juror *either* if he is willing to set aside his own beliefs in deference to the rule of law, *or* his beliefs would not actually preclude him from engaging in the weighing process and returning a verdict of death.<sup>48</sup>

Certainly, during voir dire questioning, one who espouses the view of the *Catechism of the Catholic Church* may be asked whether his conclusion that today “absolute necessity” is very rare<sup>49</sup> actually means that he would never impose the death penalty under any circumstances. One could truthfully answer “no” to that question. For example, the execution of a fanatic terrorist bomber who is motivated to continue his terrorist plotting even while confined to a jail cell could well justify a death sentence consistent with the principles set forth in the *Catechism of the Catholic Church*.<sup>50</sup>

If a Catholic juror truly believes that there are no circumstances that could *ever* justify a sentence of death, he or she would, and probably should, be disqualified as a juror.<sup>51</sup> But

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appropriate aggravating or mitigating circumstances.” *Id.* at 197. “The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion . . .” *Id.* at 222.

<sup>48</sup> See, e.g., *People v. Stewart*, 93 P.3d 271 (Cal. 2004). The Supreme Court of California voided a death judgment because five jurors were excluded simply upon the basis of their affirmative response to one or more of the following questions:

- (1) Do you have a conscientious opinion or belief about the death penalty which would prevent or make it very difficult for you:
  - (a) To find the defendant guilty of first degree murder regardless of what the evidence might prove? ( ) Yes ( ) No
  - (b) To find a special circumstance to be true, regardless of what the evidence might prove? ( ) Yes ( ) No
  - (c) To ever vote to impose the death penalty? ( ) Yes ( ) No.

*Id.* at 284 (quoting the juror questionnaire). The court concluded that even a juror who would find it very difficult to impose a death penalty would not be “substantially impaired” in performing his or her duties as a juror. *Id.* at 287.

<sup>49</sup> See *supra* note 25 and accompanying text (discussing the *Catechism*).

<sup>50</sup> See *supra* note 25 and accompanying text (explaining that although cases of absolute necessity are very rare, they may exist).

<sup>51</sup> *But see Witherspoon v. Illinois*, 391 U.S. 510, 528 (1968) (Douglas, J., concurring).

In such instance, why should not an accused have the benefit of that controlling principle of mercy in the community? Why should his fate be entrusted exclusively to a jury that was either enthusiastic about capital punishment or so undecided that it could exercise a discretion to impose it or not, depending on how it felt about the particular case?

I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. Exclusion of them means the selection of jurors who are either protagonists

he or she is not obligated to hold that view as a Catholic. A Catholic is not even obligated to hold the view espoused in the *Catechism of the Catholic Church* because it does not represent *ex cathedra* teaching.<sup>52</sup>

### III. PEREMPTORY CHALLENGES

The fact that a Catholic juror survives a challenge for cause does not automatically put him in the jury box. Counsel for each side is given the opportunity to exercise peremptory challenges, and the number of peremptory challenges allowed is usually increased in capital cases.<sup>53</sup> That leads us to our third question: Does our system of peremptory challenges permit the systematic exclusion of Catholics from juries in death penalty cases?

In *Batson v. Kentucky*,<sup>54</sup> the United States Supreme Court limited the exercise of peremptory challenges by ruling that the exclusion of potential jurors solely on account of their race violates the Equal Protection Clause.<sup>55</sup> Where a prima facie showing is made that a prosecutor has exercised peremptory challenges on the basis of race, he or she is required to articulate a race-neutral explanation for striking the jurors in question.<sup>56</sup>

In a string of recent cases, courts have been asked to extend *Batson* to discrimination on the basis of religion.<sup>57</sup> Significantly,

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of the death penalty or neutral concerning it. That results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment.

*Id.* (Douglas, J., concurring).

<sup>52</sup> For a description of *ex cathedra* teaching, see CATHOLIC ENCYCLOPEDIA 378–79 (Peter M. J. Stravinskias ed., 1991) (“Literally ‘from the throne,’ this Latin expression is used to designate papal pronouncements of the greatest solemnity and authority. Teachings pronounced *ex cathedra* are understood to be infallible.”).

<sup>53</sup> In a death penalty case, federal law allows each side twenty peremptory challenges, compared to six for the government and ten for the defendant in ordinary felony cases. See FED R. CRIM. P. 24(b). In California, each side is allowed twenty peremptory challenges in death penalty cases, compared to the ten allowed each side for any other offense punishable by imprisonment of greater than ninety days. See CAL. CIV. PROC. CODE § 231(a) & (b) (Deering 2005).

<sup>54</sup> 476 U.S. 79 (1986).

<sup>55</sup> See *id.* at 89. It is important to note that the *Batson* rule was later extended to prohibit discrimination on the basis of gender. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994).

<sup>56</sup> See *Hernandez v. New York*, 500 U.S. 352, 358–59 (1991). The ultimate burden of proving racial discrimination, however, remains on the defendant. See *id.* at 359 (“[T]he trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.”).

<sup>57</sup> See *infra* notes 58–94 and accompanying text.

many of these cases arise where black jurors have been excused, and the prosecutor responds to the *Batson* challenge by citing the juror's religious views. A good example is the decision of the Virginia Supreme Court in *James v. Commonwealth*.<sup>58</sup> After the prosecutor, in a prosecution for cocaine distribution, used peremptory challenges to remove two black jurors, he explained that the reason one of these jurors was excused was not because the juror was black, but because he was wearing a crucifix that was approximately two inches long and wearing this visible religious symbol was "indicative of a sympathetic disposition."<sup>59</sup> The Virginia Supreme Court upheld the conviction, refusing to consider an argument, since it was not raised at trial, that discrimination on the basis of visible religious affinity violates both the Equal Protection Clause and the First Amendment.<sup>60</sup> Similar arguments, however, have been considered in a number of subsequent decisions of both state and federal courts.<sup>61</sup> The consensus that emerges from these decisions draws a sharp distinction between discrimination on the basis of religious affiliation, which is generally not permitted, and discrimination on the basis of religious beliefs, which is allowed.<sup>62</sup>

Two of the decisions, however, seem to countenance discrimination on the basis of religious affiliation. In *State v. Davis*,<sup>63</sup> the Supreme Court of Minnesota upheld a conviction for aggravated robbery despite the defendant's objection that the

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<sup>58</sup> 442 S.E.2d 396 (Va. 1994).

<sup>59</sup> *See id.* at 397.

<sup>60</sup> *Id.* at 398 n.\*.

<sup>61</sup> *See* United States v. Brown, 352 F.3d 654 (2d Cir. 2003); United States v. DeJesus, 347 F.3d 500 (3d Cir. 2003), *cert. denied*, 541 U.S. 1086 (2004); United States v. Stafford, 136 F.3d 1109 (7th Cir. 1998); State v. Purcell, 18 P.3d 113 (Ariz. Ct. App. 2001); Thorson v. State, 721 So.2d 590 (Miss. 1998), *reh'g denied*, No. 2002-DP-01420-SCT, 2005 Miss. LEXIS 83, at \*1 (Miss. Feb. 3, 2005); State v. Fuller, 812 A.2d 389 (N.J. Super. Ct. App. Div. 2002), *rev'd*, 862 A.2d 1130 (N.J. 2004).

<sup>62</sup> *See* Brown, 352 F.3d at 669-70 & n.19; DeJesus, 347 F.3d at 510 ("Even assuming that the exercise of a peremptory strike on the basis of religious affiliation is unconstitutional, the exercise of a strike based on religious beliefs is not."); Stafford, 136 F.3d at 1114; Purcell, 18 P.3d at 122 ("[W]e believe that *Batson* and *J.E.B.*, pursuant to the First and Fourteenth Amendments, prohibit the use of peremptory strikes based upon one's religious affiliation but not based upon one's relevant opinions, although such opinions may have a religious foundation."). *But see* Thorson, 721 So.2d at 594 ("We find that Mississippi Constitutional and Statutory law prohibit exercising peremptory challenges based solely on a person's religious beliefs.").

<sup>63</sup> 504 N.W.2d 767 (Minn. 1993).

prosecutor's only explanation for excusing a black juror was that the juror was a Jehovah's Witness.<sup>64</sup> The prosecutor explained:

I have a great deal of familiarity with the sect of Jahovah's [sic] Witness. I would never, if I had a preemptory [sic] challenge left, . . . fail to strike a Jahovah Witness from my jury.

. . .

In my experience . . . that faith is very integral to their daily life in many ways, many Christians are not. That was reenforced at least three times a week he goes to church for separate meetings. The Jahovah Witness faith is of a mind the higher powers will take care of all things necessary. In my experience Jahovah Witness are reluctant to exercise authority over their fellow human beings in this Court House.<sup>65</sup>

Over the dissent of Chief Justice Wahl and Justice Page, the majority ruled that *Batson* should not be extended to religious bigotry, because it is not as prevalent, flagrant, or historically ingrained in the jury selection process as is race.<sup>66</sup> Apparently, they never read Clarence Darrow's advice for picking juries.<sup>67</sup> The United States Supreme Court later denied certiorari in the *Davis* case over the dissents of Justices Thomas and Scalia.<sup>68</sup>

The other decision dealing with religious affiliation came from the Texas Court of Criminal Appeals, in *Casarez v. Texas*.<sup>69</sup> There, the prosecutor argued for the removal of two African-American jurors, not because they were African-Americans, but because they were members of the Pentecostal Church.<sup>70</sup> He explained:

It's been my experience . . . that people from that religion often have a problem in passing judgment on other persons, and that they often believe that that is a matter for God and not for man. And that they have trouble not so much, Your Honor, although some do, with the guilt phase of the trial, but especially the punishment phase of the trial, and they are want to—want probation rather than to be responsible, in their eyes, for sending someone to the penitentiary, thereby judging them.<sup>71</sup>

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<sup>64</sup> See *id.* at 767–68 (quoting the trial record).

<sup>65</sup> *Id.* at 768 (alteration in original).

<sup>66</sup> See *id.* at 771.

<sup>67</sup> See *supra* notes 3–9 and accompanying text.

<sup>68</sup> *Davis v. Minnesota*, 511 U.S. 1115, 1115–16 (1994).

<sup>69</sup> 913 S.W.2d 468 (Tex. Crim. App. 1994).

<sup>70</sup> See *id.* at 470.

<sup>71</sup> *Id.* at 496–97 (Mansfield, J., concurring).

Again, over a vigorous and cogent dissent by Justice Baird—who, not incidentally, lost his bid for reelection to that Court in the next election—the majority ruled that *Batson* should not apply to discrimination on the basis of religious affiliation.<sup>72</sup> The majority declared that “[b]ecause all members of the group share the same faith by definition, it is not unjust to attribute beliefs characteristic of the faith to all of them.”<sup>73</sup> These judges *were* familiar with Clarence Darrow’s advice for picking juries, as evidenced by the fact that they quoted him in their opinion!<sup>74</sup>

The decisions reached in both *Davis* and *Casarez* are deeply disturbing. They implicitly suggest that if a particular religious sect is known to take their dogma seriously, then individual members can be excluded as jurors simply by virtue of their membership, without inquiry as to their individual views.<sup>75</sup> Some courts have given explicit approval to such a generalization, even while saying that they reject discrimination on the basis of mere affiliation. In *State v. Fuller*,<sup>76</sup> for example, the Appellate Division of the New Jersey Superior Court upheld a defendant’s conviction, despite the exclusion of an African-American Muslim man from a jury.<sup>77</sup> The court concluded that the exclusion was not solely because he was a member of the Muslim faith, but because he also *dressed* like a Muslim.<sup>78</sup> The prosecutor inferred from the juror’s name and attire that he was a Muslim and that he was “devout in his faith.”<sup>79</sup> He explained that “people who tend to be demonstrative about their religions tend to favor defendants to a greater extent than do persons who are, shall we say, not as religious.”<sup>80</sup>

Catholics, of course, are not known to be demonstrative about their religion, nor are they a sect that is known for taking its dogma too seriously, at least in America.<sup>81</sup> Judge Baird took note of this in his dissent in *Casarez*, arguing that a court should

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<sup>72</sup> *See id.* at 496.

<sup>73</sup> *Id.*

<sup>74</sup> *See id.* at 492.

<sup>75</sup> *See id.* at 496 (declaring that it is reasonable to attribute beliefs characteristic of a faith to all members of that faith).

<sup>76</sup> 812 A.2d 389 (N.J. Super. Ct. App. Div. 2002).

<sup>77</sup> *Id.* at 397.

<sup>78</sup> *See id.* at 392–93 (describing the juror as wearing a long black outer garment and a skull cap).

<sup>79</sup> *Id.* at 395.

<sup>80</sup> *Id.* at 393.

<sup>81</sup> *See infra* notes 82–83 and accompanying text.

not assume every member of a religion subscribes to all of that religion's teachings.<sup>82</sup> He wrote:

The Catholic Church officially condemns the use of artificial contraceptives, but 84% of the members of the Catholic Church believe Catholics should be allowed to use artificial contraceptives. Consequently, if a party peremptorily challenged a Catholic [juror] because the party attributed to the [juror] the Catholic Church's condemnation of the use of artificial contraceptives, the party would be wrong 84% of the time.<sup>83</sup>

Distinguishing between fundamentalists who take their dogma seriously and other religious groups smacks of the unworkable sectarian/non-sectarian distinction the United States Supreme Court previously drew in cases involving school funding.<sup>84</sup> Similarly, we should not permit jurors to be dismissed on the basis of broad generalizations about their churches or sect memberships with no inquiry as to their individual views, simply because we attribute particularly fervent or pervasive religious views to that church or sect.<sup>85</sup>

On the other hand, if a particular viewpoint or opinion would interfere with the performance of a person's duties as a juror, it should receive no greater protection simply because it is labeled a "religious" viewpoint or a "moral" opinion.<sup>86</sup> This brings us back

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<sup>82</sup> Casarez v. Texas, 913 S.W.2d 468, 501–02 (Tex. Crim. App. 1995) (Baird, J., dissenting).

<sup>83</sup> *Id.* at 501 (citations omitted).

<sup>84</sup> See Mitchell v. Helms, 530 U.S. 793, 826 (2000) (explaining that "there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school . . . [b]ut that period is one that the Court should regret, and it is thankfully long past"). "[T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. . . . [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." *Id.* at 828.

<sup>85</sup> See, e.g., Thorson v. Mississippi, 721 So.2d 590, 595 (Miss. 1998) (reversing a death judgment because the only explanation offered by the prosecutor for striking a juror was because she was a member of the Holiness faith). The *Thorson* court declared: "Unlike race and gender, religious beliefs are not ordained at birth. A person may belong to a particular religious group without adopting all of the tenets and dogma of that religion. The critical determination is an individual's beliefs, not the doctrines or dogma espoused by her religion." *Id.*

<sup>86</sup> See Arizona v. Purcell, 18 P.3d 113, 122 (Ariz. Ct. App. 2001) ("[W]e believe that . . . the First and Fourteenth Amendments . . . prohibit the use of peremptory strikes based upon one's religious affiliation but not based upon one's relevant opinions, although such opinions may have a religious foundation."); Minnesota v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) ("A juror's religious beliefs are inviolate,

to the issue of death penalty cases. The only decision to address the use of a peremptory challenge to exclude a Catholic juror from a death penalty trial comes to us from Arizona, in the case of *Arizona v. Purcell*.<sup>87</sup> The juror in question was not just a member of the Catholic Church, but also a secretarial employee of the Catholic Diocese of Phoenix.<sup>88</sup> During voir dire questioning, she stated that she did not believe in capital punishment, but she told the judge that her opinion would not affect her ability to be fair and impartial.<sup>89</sup> Thus, she was not subject to a challenge for cause, but the prosecutor did exercise a peremptory challenge to remove her.<sup>90</sup> When a *Batson* objection was raised, the prosecutor offered the following explanation for his peremptory challenge:

[S]he works for the Diocese of Phoenix. The Bishop come [sic] out specifically on Good Friday and said you Catholics should start to be against the death penalty. The Pope has spoken about that.

I feel that the pressure of whatever she may have said, her work pressure and those kinds of pressures would be really too much for her when it really came down to it to completely be objective with regard to premeditated murder if she felt that would then make an option for this defendant to be sentenced [to death].

[T]here are specifically two specific statements [in her questionnaire]: "I can say that I am against the death penalty." And then again . . . "I am against the death penalty."

I feel that the pressure for her being employed by the diocese would be too much for her. And that's my articulated reason.<sup>91</sup>

The Court then inquired, "So you're saying, you said being employed by the diocese, being Catholic and being employed, not just being Catholic; is that correct?" The prosecutor responded, "Correct."<sup>92</sup>

The Arizona Court of Appeals upheld the exercise of the peremptory challenge, because it was based upon her

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but when they are the basis for a person's moral values and produce societal views . . . it would not seem that a peremptory strike based on these societal views should be attributed to a pernicious religious bias.").

<sup>87</sup> 18 P.3d 113.

<sup>88</sup> *Id.* at 118.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 118–19 (quoting juror questionnaire).

<sup>92</sup> *Id.* at 119.

employment relationship and her personal views concerning the death penalty, not her religious affiliation.<sup>93</sup> Thus, Catholics may not be systematically excluded from death penalty juries by peremptory challenges, but can certainly be selectively excluded, depending upon their individual views toward the death penalty.<sup>94</sup>

This means that a good many Catholics have sat on death penalty juries, and we can anticipate they will continue to do so. First, their individual views on the death penalty may not reflect the current position of the *Catechism of the Catholic Church*.<sup>95</sup> Second, even if they accept the current position of the *Catechism*, they might get past the peremptory challenge stage because the prosecutor feels they can be trusted to put their personal beliefs aside and follow the jury instructions, or because the prosecutor simply ran out of peremptory challenges.<sup>96</sup> Juror Number Two in the California murder trial of Scott Peterson, which resulted in a verdict of death, was “a devout Catholic who needed to consult his priest after receiving his jury summons because he was troubled by the thought of sentencing someone to die.”<sup>97</sup> This leads us to the final question, the one which William Buckley posed for Justice Scalia: Should the faith of Catholic jurors affect their reasoning on whether a defendant should be executed?<sup>98</sup>

#### IV. DEATH DELIBERATIONS

Another way to ask this question is to inquire whether jurors should “compartmentalize” their religious or moral views and attempt to ignore them in reaching their decision? Although I think President Bill Clinton deserves the heavyweight title for being the “Great Compartmentalizer,”<sup>99</sup> Justice Antonin Scalia

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<sup>93</sup> See *id.* at 122–23.

<sup>94</sup> See *id.* (“Although Juror 8’s religious views were intertwined with these other factors, her religious membership was not the basis for striking her from the jury panel, and her opposition to capital punishment was a legitimate basis for exercising a peremptory strike.”).

<sup>95</sup> See *supra* note 25 and accompanying text.

<sup>96</sup> See JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 139–75 (1977).

<sup>97</sup> abc7news.com, *Who Are the Peterson Jurors?*, [http://abclocal.go.com/Kgo/news/peterson/052804\\_nw\\_peterson\\_trial.html](http://abclocal.go.com/Kgo/news/peterson/052804_nw_peterson_trial.html) (last updated May 28, 2004).

<sup>98</sup> See Buckley, *supra* note 19, at 59.

<sup>99</sup> See Gerald F. Uelman, *The Great Compartmentalizer*, *SAN JOSE MERCURY NEWS*, Jan. 24, 1999, at C1; see also Gerald F. Uelman, *Compartmentalizing the*

certainly comes in a close second. He describes his role as a Justice of the Supreme Court as follows:

I try mightily to prevent my religious views or my political views or my philosophical views from affecting my interpretation of the laws, which is what my job is about.

I read texts. I'm always reading a text and trying to give it the fairest interpretation possible. That's all I do. How can my religious views have anything to do with that? They can make me leave the bench if I find that I'm enmeshed in an immoral operation, but the only one of my religious views that has anything to do with my job as a judge is the seventh commandment—thou shalt not lie. I try to observe that faithfully, but other than that I don't think any of my religious views have anything to do with how I do my job as a judge.<sup>100</sup>

Clearly, the role assigned to a juror in our system is very different from the role assigned to a Justice of the Supreme Court. A Supreme Court Justice interprets the meaning of the constitution and statutes, but does not engage in the kind of normative determination jurors are expected to make in a death penalty case.<sup>101</sup> Here is how the jurors' task is described in the instructions given to the jury in every death penalty case tried in California:

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison

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*Presidency; Impeachment: The Public is Willing to Separate the President's Achievements from his Immorality*, L.A. TIMES, Jan. 13, 1999, at B7.

<sup>100</sup> Antonin Scalia, Pew Forum Conference: A Call for Reckoning: Religion & the Death Penalty, Session Three: Religion, Politics, and the Death Penalty (Jan. 25, 2002) (transcript available online at <http://pewforum.org/deathpenalty/resources/transcript3.php3>).

<sup>101</sup> See SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 177–79 (2005) (highlighting the difference between having a jury composed of twelve persons decide a verdict versus a single judge).

with the mitigating circumstances that it warrants death instead of life without parole.<sup>102</sup>

Justice Scalia suggests that jurors deliberating the death penalty *should* compartmentalize and ignore their religious beliefs, as should governors in reviewing clemency petitions:

[I]f I were in that position as either a juror or a governor I wouldn't feel free to act upon my own religious beliefs. I'm there representing the community. If I were a governor, as to whether I should commute a sentence, I would want standards. I would say it seems to me the sentence ought to be commuted if these factors exist, but not because I'm a bleeding-heart Christian. That ought to have nothing to do with it.<sup>103</sup>

While Justice Scalia's point may have limited relevance to a governor considering a pardon application,<sup>104</sup> it is an inaccurate characterization of the juror's role, at least in a death penalty case.<sup>105</sup> While jurors are drawn from a cross-section of the community, they are not put in the jury box to "represent" anyone.<sup>106</sup> They have no constituency, and are not answerable to the "community" for how they vote.<sup>107</sup> As Judge Learned Hand famously observed:

The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. . . . [S]ince if they acquit their verdict is

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<sup>102</sup> COMM. ON STANDARD JURY INSTRUCTIONS, CRIMINAL, OF THE SUPERIOR COURT OF L.A. COUNTY, CAL., CALIFORNIA JURY INSTRUCTIONS—CRIMINAL § 8.88 (2005).

<sup>103</sup> Scalia, Pew Forum Conference, *supra* note 100.

<sup>104</sup> The power to pardon is most often characterized as the power to dispense mercy, very different than the power of a reviewing court, but governors are elected officials who are answerable to the public. See KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC EXPERIENCE 213 (1989). Moore concludes that "[g]ranting a pardon is a duty of justice that follows from the principle that punishment should not exceed what is deserved." *Id.* at 12.

<sup>105</sup> See RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 283 (2001) (discussing the important role that juries play in capital punishment cases).

<sup>106</sup> See VAN DYKE, *supra* note 96, at xiv (explaining that "[e]ach person comes to the jury box as an individual, not as a representative of an ethnic, racial, or age group").

<sup>107</sup> See *id.* at xi–xiii (noting the importance of impartiality in the jury selection process).

final, no one is likely to suffer of whose conduct they do not morally disapprove. . . .<sup>108</sup>

The relevance of jurors' religious views to death deliberations was recently presented to the California Supreme Court in *People v. Lewis*.<sup>109</sup> In this case, the defendant challenged his sentence of death on the grounds of juror misconduct, establishing that all twelve jurors held hands and prayed at the beginning of their deliberations, and that the jury foreperson told one reluctant juror that "he did not know if it would help her, but what had helped him make his decision was that [defendant] had been exposed to Jesus Christ and if that was in fact true [defendant] would have 'everlasting life' regardless of what happened to him."<sup>110</sup> The Court rejected the contention that the jurors relied upon outside sources or "extraneous law" in reaching their verdict.<sup>111</sup> In an opinion authored by Justice Ming Chin, a Roman Catholic, the Court concluded:

That jurors may consider their religious beliefs during penalty deliberations is also to be expected. . . . Given the collective nature of jury deliberations, we do not find it unusual, much less improper, that jurors here may have shared their beliefs with other jurors either through conversations or prayers.

We find nothing in the record, moreover, that suggests the jurors disregarded the law or the court's instructions, and instead imposed a higher or different law. The fact that some jurors expressed their religious beliefs or held hands and prayed during deliberations may have reflected their need to reconcile the difficult decision—possibly sentencing a person to death—with their religious beliefs and personal views. But it does not show that jurors supplanted the law or instructions with their own religious views and beliefs.<sup>112</sup>

Last year, the California Supreme Court, relying on *Lewis*, upheld a death verdict despite the fact that two jurors shared Bible quotations with fellow jurors and consulted their pastors for advice during the jury deliberations.<sup>113</sup> Although the court found that this conduct violated the jurors' instructions, it

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<sup>108</sup> United States *ex rel.* McCann v. Adams, 126 F.2d 774, 775–76 (2d Cir. 1942).

<sup>109</sup> 28 P.3d 34 (Cal. 2001).

<sup>110</sup> *Id.* at 71 (alteration in original).

<sup>111</sup> *Id.* at 72–73.

<sup>112</sup> *Id.* at 73 (citations omitted).

<sup>113</sup> See *People v. Danks*, 82 P.3d 1249, 1268–69, 1274–75, 1281 (Cal. 2004).

concluded that the misconduct was not prejudicial.<sup>114</sup> In the majority opinion, Justice Janice Rogers Brown emphasized that:

[N]othing in our opinion is intended to convey that a juror's consideration of personal religious, philosophical, or secular normative values is improper during penalty deliberations. As we have repeatedly stated, the task of jurors at the penalty phase is qualitatively different from that at the guilt phase. At the penalty phase, jurors are asked to make a normative determination—one which necessarily includes moral and ethical considerations—designed to reflect community values.<sup>115</sup>

Although there is some variance in how different states' death penalty laws define the role of the jury in deciding between death and life imprisonment, the insistence that the jury's decision is a normative judgment which will be strongly influenced by the religious, moral, and ethical views of the jurors resonates in the decisions of many courts.<sup>116</sup> In Georgia, prosecutors take great delight in quoting *Eberhart v. Georgia*,<sup>117</sup> an 1873 Georgia Supreme Court decision, to jurors in death penalty cases.<sup>118</sup> In *Eberhart*, a Reconstruction-era justice authored a diatribe against "that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime."<sup>119</sup> He wrote, "We have had too much of this mercy. It is not true mercy. It only looks to the criminal. . . ."<sup>120</sup> In eight separate opinions, the United States Court of Appeals for the Eleventh Circuit has condemned the reading of *Eberhart* to jurors.<sup>121</sup> In the most recent of these rulings, the Court declared:

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<sup>114</sup> See *id.* at 1274–75.

<sup>115</sup> *Id.* at 1277 (citations omitted).

<sup>116</sup> See *infra* notes 121–25 and accompanying text.

<sup>117</sup> 47 Ga. 598 (1873).

<sup>118</sup> See, e.g., *Hardy v. State*, 371 S.E.2d 849, 849 (Ga. 1988).

<sup>119</sup> *Id.* at 610.

<sup>120</sup> *Id.*; see also *Nelson v. Nagle*, 995 F.2d 1549, 1555–58 (11th Cir. 1993) (discussing the *Eberhart* opinion and its subsequent use); *Drake v. Kemp*, 762 F.2d 1449, 1467–69 (11th Cir. 1985) (Hill, J., concurring) (discussing the *Eberhart* opinion and its subsequent use).

<sup>121</sup> See *Romine v. Head*, 253 F.3d 1349, 1366–67 (11th Cir. 2001); *Nelson*, 995 F.2d at 1555–56; *Presnell v. Zant*, 959 F.2d 1524, 1529 (11th Cir. 1992); *Wilson v. Kemp*, 777 F.2d 621, 624 (11th Cir. 1985); *Bowen v. Kemp*, 769 F.2d 672, 680–81 (11th Cir. 1985), *aff'd on reh'g*, 832 F.2d 546 (11th Cir. 1987); *Drake*, 762 F.2d at 1467–69 (Hill, J., concurring); *Potts v. Zant*, 734 F.2d 526, 535–37 (11th Cir. 1984), *vacated*, 478 U.S. 1017 (1986); *Drake v. Francis*, 727 F.2d 990, 995–96 (11th Cir. 1984).

The *Eberhart* argument is wrong on the law, because mercy is acceptable in post-*Furman* capital sentencing regimes, and if anything, is particularly favored under Georgia's statute, which permits the jury in its unbridled discretion to impose a life sentence regardless of the number or strength of aggravating circumstances. Telling a Georgia capital sentencing jury that the state supreme court, or a justice of it, or some judge or legal scholar has decided that they should not even consider mercy misleads the jury about one of its central tasks, which is to decide whether the individual, convicted murderer standing before it should receive mercy.<sup>122</sup>

Many courts have expressed strong disapproval of prosecutors who quote the Bible in an effort to persuade jurors to impose the death penalty.<sup>123</sup> Some courts have even held that

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<sup>122</sup> *Romine*, 253 F.3d at 1367–68 (citations omitted).

<sup>123</sup> See *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1991) (declaring that prosecutors who recite Bible quotations in support of the death penalty commit per se reversible error and may be subject to disciplinary action); see also *Carruthers v. State*, 528 S.E.2d 217, 221–23 (Ga. 2000) (indicating its disapproval of prosecutors that quote the Bible to support the death penalty); *Commonwealth v. Brown*, 711 A.2d 444, 456–58 (Pa. 1998) (applying *Chambers* to reverse a death judgment). *But cf.* Gerald F. Uelmen, Op-Ed., *The Nincompoops Aren't in the Jury Box; The Law: A Pennsylvania Court Bars Even Oratorical References to the Bible, a Further Distancing of Justice from Intelligent Real Life*, L.A. TIMES, Nov. 19, 1991, at 7 (criticizing the *Chambers* decision of the Pennsylvania Supreme Court).

The best cure for Bible-thumping prosecutors is Bible-thumping defense lawyers. If Karl Chambers were being defended by Clarence Darrow, there wouldn't have even been an objection to the prosecutor's argument. Darrow would simply have pulled a Bible out of his beat-up briefcase and turned to Exodus. He would have reminded the jurors that the same Bible that commands the death of murderers also commands the execution of adulterers, witches, those who have sex with animals, and anyone who reviles or curses his mother or father.

He would have noted that the Bible contains some curious exceptions, such as the one for a man who beats his slave to death. . . . Finally, Darrow would have turned to the New Testament, and read to the jurors the words of Jesus Christ when he was invited to participate in an execution: "Let anyone among you who is without sin be the first to cast a stone at her."

The point is not whether the Bible supports or condemns capital punishment. The point is that jurors are intelligent enough to give the Bible the weight it deserves, and lawyers should be free to address jurors as though they are intelligent human beings.

*Id.* For a discussion on whether religious arguments should be made before juries, see generally Elizabeth A. Brooks, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Argument*, 33 GA. L. REV. 1113 (1999). Few cases have discussed the use of Biblical quotations by defense attorneys. *But cf.* *State v. Haselden*, 577 S.E.2d 594, 608–09 (N.C. 2003) (overruling a claim of error based on Bible quotations by the prosecutor, and noting

jurors who consult the Bible in the jury room commit misconduct.<sup>124</sup> This strict prohibition against referencing extraneous sources has never, however, been extended to a juror's religious convictions. As noted by one court in an oft-quoted passage: "The court in no way means to suggest that jurors cannot rely on their personal faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen."<sup>125</sup>

I find a striking parallel between the way that our courts deal with the injection of religion into death deliberations and the way that they deal with the issue of jury nullification. Both are treated like crocodiles in the bathtub. We are constantly aware of their presence, but make a studied effort to ignore them. While a jury has the undeniable power to ignore the law and acquit a defendant simply because they believe the law under which the defendant is being prosecuted is unjust, Courts consistently refuse to instruct juries that they have this power, and will not permit lawyers to urge juries to exercise it.<sup>126</sup> Some courts have even permitted the removal of individual jurors who seem intent upon exercising their power of nullification, to the dismay of their fellow jurors.<sup>127</sup> But jurors who consider their personal religious values in a death penalty case are *not* engaged in jury nullification. They are not choosing to ignore the law. They are following it. Why not tell them that, by instructing them: "You may consider your personal religious, moral, and ethical values and beliefs in weighing the aggravating and

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that "prosecutors are forced to anticipate and address the potential Biblical arguments that defendants often make in death cases").

<sup>124</sup> See *Jones v. Kemp*, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989).

<sup>125</sup> *Id.*

<sup>126</sup> See *United States v. Dougherty*, 473 F.2d 1113, 1136-37 (D.C. Cir. 1972) ("The fact that there is widespread existence of the jury's prerogative, and approval of its existence as a 'necessary counter to case-hardened judges and arbitrary prosecutors,' does not establish as an imperative that the jury must be informed by the judge of that power.") (footnote omitted).

<sup>127</sup> See *People v. Cleveland*, 21 P.3d 1225, 1231-32 (Cal. 2001) (holding that the need to keep jury deliberations secret does not prohibit reasonable inquiry by the court into allegations of jury misconduct, and thus making it easier for trial courts to eliminate jurors who refuse to deliberate). *But see* *United States v. Thomas*, 116 F.3d 606, 621-22 (2d Cir. 1997) (holding that a deliberating juror can only be excused if it is beyond possibility that the juror's opinions rest on the sufficiency of the government's evidence, thus, making it harder for courts to dismiss jurors who refuse to deliberate).

mitigating factors and deciding whether death or life imprisonment is justified as the punishment in this case.”

Perhaps one reason defense lawyers do not request such an instruction, and oppose it if it is requested by the prosecution, is because they fear that more jurors will rely upon religious views that favor the death penalty. The process by which we select jurors for death penalty trials fully justifies that fear.<sup>128</sup> Jurors whose religious views disfavor death are less likely to make it through the selection process than jurors whose religious views encourage its use.<sup>129</sup>

There are many deeply-held beliefs that may influence a Catholic juror's decision whether to impose a sentence of death, apart from the church's position on the death penalty. Belief in personal redemption for one's sins might persuade one that life without the possibility of parole is a more appropriate sentence because it provides an opportunity for redemption. Belief in a final judgment to be rendered by God might also influence a juror to exercise mercy. Additionally, acceptance of the presence of Christ in every other person, even a murderer, could have a profound impact on the choice between death and life imprisonment. Catholics who serve as jurors in death penalty cases need not “compartmentalize” and ignore such beliefs. Being a “bleeding-heart Christian” should have much to do with the way that a Catholic makes the momentous choice that our death penalty laws place in the hands and hearts of jurors.

#### CONCLUSION

Preparing this article led me to ask myself: How much does my being a Catholic have to do with my opposition to the death penalty? I started out in my legal career after eighteen years of Catholic education—eight of them with the Jesuits—as a prosecutor. I had no qualms about the death penalty, although I never had to ask a jury for a death sentence. Fifteen years later, I concluded that the death penalty is unethical, immoral, and unacceptable under any circumstances. I would not be a “death qualified” juror, and if I were a judge, I would have to recuse myself in a death penalty case. I reached that conclusion not because of anything that the Pope or any bishop had to say about

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<sup>128</sup> See *supra* Parts II, III.

<sup>129</sup> See *supra* Parts II, III.

it, although giving respectful consideration to those views has certainly reinforced my own. I must confess that I was most impressed by what Mother Theresa had to say after she came to California and visited our death row at San Quentin. After surveying the rows of cells in which we now confine more than 640 men to await a final walk to the death chamber, she poked her bony finger into the chest of the burly guard who escorted her and said, "Remember, what you do to these men, you do to God."<sup>130</sup>

I reached my judgment about the death penalty because, both as a prosecutor and a defense lawyer, I have seen first hand the imperfections of our system of justice. I still believe it is the best system of justice in the world. But nevertheless, it simply cannot be trusted to reliably, fairly, and consistently sort out who should live and who should die. I think a lottery would be a better system. If we sentenced every murderer to life imprisonment and a lottery ticket, then once a year we conducted the "big spin" to pick sixty or seventy to be executed, we would save billions of dollars and achieve approximately the same result that our current system of appeals and habeas corpus petitions and writs of certiorari accomplish. Now, is that a position based upon an ethical or moral judgment? I suppose it is. And I really cannot compartmentalize it and separate it from my religious faith. What I am really saying is that it is morally wrong for the state to take the life of a criminal, unless the state has a flawless system of justice to reliably, fairly, and consistently determine who should and who should not be executed. I believe it is simply impossible for human beings to devise a flawless system of justice. If you reject my "big spin" as immoral, you should reject the death penalty on the same grounds of immorality.

I am not advocating or suggesting that Catholics should misrepresent their views opposing capital punishment in order to get on juries and "sabotage" the administration of the death penalty. Catholics who fully agree with my views should openly express them, and accept the consequences of dismissal as jurors. Catholic judges who agree with me should recuse themselves in death cases. Catholic prosecutors who agree with me should

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<sup>130</sup> Gerald F. Uelmen, *Capital Punishment: Looking the Condemned in the Eyes Brings New View*, SANTA CLARA MAG., Summer 1990, at 47.

decline to accept assignments as prosecutors in death cases. As the proportion of jurors, judges, and prosecutors who refuse to participate in the continued administration of a morally bankrupt law continues to grow, more and more states will reconsider the wisdom of continuing this folly, and will join with the civilized nations of the world in rejecting laws that permit death as a penalty.