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THE GIDEONS AND THE GALLOWS: AGAINST THE "TYPICAL JUROR" STANDARD IN CAPITAL CASES

"[I]t makes no jurisprudential sense to utilize an artificial legal device in order to assess the prejudicial impact of the biblical passages upon the jury's verdict. Indeed, since we know from the record that the extraneous evidence was not actually prejudicial... insistence on reversing [the] death sentence by finding a reasonable probability of prejudice with reference to a "typical" jury is unwarranted."  

INTRODUCTION

The Gideons almost killed Robert Eliot Harlan. Or so the Colorado Supreme Court thought. Without the court's intercession, Harlan faced the death penalty for his murder of Rhonda Maloney and paralyzing assault on her would-be rescuer Jacquie Creazzo. After post-verdict interviews revealed that jurors consulted a Bible in the jury room, the Colorado Supreme Court reduced Harlan's sentence to life. The court thought the presence of the Biblical text posed a "reasonable possibility" of bias against Harlan to the "typical juror." The Colorado Supreme Court used this test despite evidence that the Biblical passages did not actually bias the actual jurors against Harlan, and despite its previous approval of Harlan's death sentence. Harlan's case, like many others, highlights inherent tensions between the personal morality of jurors and the public administration of

1 People v. Harlan (Harlan II), 109 P.3d 616, 634 n.1 (Colo. 2005) (Rice & Kourlis, JJ., dissenting).
3 People v. Harlan (Harlan I), 8 P.3d 448 (Colo. 2000).
justice. This tension peaks in capital cases, like Harlan’s. There, sentencing jurors must make an “independent moral assessment” of whether the considerations in favor of imposing death (“the aggravating factors”) outweigh the considerations against imposing death (“the mitigating factors”).

This Note will discuss the merit of the typical juror test the Colorado Supreme Court used in Harlan’s case. The evidence rules in most states require this approach. Most have a rule modeled after Federal Rule of Evidence 606(b), barring inquiry into the substance of jury deliberations, including the effect of extraneous information. Rule 606(b) forecloses an alternative approach—considering how the evidence “actually affected” the jury.

The typical juror test works as follows. If the court finds out the jury used extraneous information, it holds a hearing (referred to below as the “prejudice hearing”), and questions the jurors to determine what information they used. A court then overturns the jury’s decision (including a death sentence, in capital cases) if the jury used extraneous information and the court decides that the information posed an objectively reasonable likelihood of prejudice to the defendant in the mind of a typical juror. In the hearing, the court bars evidence of how that information actually affected the jury, but admits evidence that merely characterizes the information. Even if

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4 In a capital sentencing proceeding before a jury, the jury is called upon to make a “highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.” Caldwell v. Mississippi, 472 U.S. 320, 340 n.7 (1985) (quoting Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring)). The Supreme Court has described the jurors’ role in weighing aggravating and mitigating factors as a “reasoned moral response.” Smith v. Texas, 543 U.S. 37, 46 (2004) (per curiam) (quoting Penry v. Johnson, 532 U.S. 782, 796 (2001)); McKoy v. North Carolina, 494 U.S. 433, 442 (1990) (holding that the Constitution necessitates individualized moral assessments such as the one in Harlan’s case). Jurors are supposed to “make the difficult and uniquely human judgments that defy codification and that ‘build[d]’ discretion, equity, and flexibility into a legal system.” McCleskey v. Kemp, 481 U.S. 279, 311 (1987) (quoting HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 498 (1966)). In other cases, the Court has explained that jurors personally tie the “conscience of the community” to the penal system. See, e.g., Booth v. Maryland, 482 U.S. 496, 504 (1987) (noting that the juror’s job is to tie the moral outrage of the community to the administration of justice), overruled on other grounds, Payne v. Tennessee, 501 U.S. 808 (1991); Witherspoon v. Illinois, 391 U.S. 510, 519 (1968) (noting that a jury in a capital case is left to “express the conscience of the community on the ultimate question of life or death.”). I will use the term “independent moral assessment” for the remainder of this Note to mean the juror’s process of attempting to balance the aggravating and mitigating factors and deciding whether or not to choose death.

5 This Note will not discuss the impact of extraneous information on the guilt phase of a capital trial, but rather on the sentencing phase. There, the jury weighs aggravating and mitigating factors and decides whether to sentence the defendant to die.

6 See, e.g., FED. R. EVID. 606(b); COLO. R. EVID. 606(b). Throughout this Note, I will refer to the federal rule and state rules mirroring it as “Rule 606(b).”
questioning the jurors elicits "actual effect" testimony, the evidence is inadmissible. Therefore, the court cannot judge the validity of the sentence based on the actual effect of the extraneous information on the jury.

Lack of admissibility, not lack of availability forecloses the actual effect approach. Jurors often testify freely as to the actual effect of extrinsic evidence at prejudice hearings. Attorneys typically do not phrase their questions in these hearings so narrowly as to prevent the jurors from doing so. The backstop of Rule 606(b) prevents admission of these answers from the jurors. So, courts could review the sentence to see whether the information in question actually influenced a juror's deliberations, if Rule 606(b) did not bar the court from considering this evidence.

The unique nature of capital trials both helps explain why jurors consult extraneous information, and (in part), why reviewing courts should seek and use their testimony in assessing its effect. The independent moral assessment requirement in capital cases asks the jurors to refer to an external reference point—their own moral sense—to balance the evidence in the record for and against death. The instructions the court gives the jurors thereby invites each one to seek out extraneous, potentially religious, material. The independent moral assessment instruction also requires each juror to make an intimately personal choice. Yet, when a court reviews that choice, it cannot seek meaningful testimony from the chooser. It must instead

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7 See 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 248 (2d. ed 1994).
8 This may not be the attorneys' fault. Actual effect testimony may come from questions not designed to adduce it. A juror, in describing their experience in the jury room will likely include details that describe the actual effect of extraneous information. See Fields v. Brown, 431 F.3d 1186, 1207 (9th Cir. 2005) ("[Defendant] presented a number of juror declarations that the district court ultimately struck to the extent that the information contained in them was inadmissible under Rule 606(b)."; McNair v. Campbell, 416 F.3d 1291, 1308 (11th Cir. 2005) (juror testimony showed that readings from the bible and prayers merely encouraged juror to take their responsibility seriously); People v. Wadle, 77 P.3d 764, 771 (Colo. Ct. App. 2003) ("In summary, we discern a reasonable possibility that the introduction of extraneous information about Paxil, in direct violation of the court's denial of the same request by the jury, may well have influenced the verdict.").
9 FED. R. EVID. 606(b).
10 See Gregg v. Georgia, 428 U.S. 153, 222 (1976) (plurality opinion) (White & Rehnquist, JJ., Burger, C.J.) (arguing that mercy in capital cases involves "factors too intangible to write into a statute"). Some object to this feature of capital sentencing because it deviates from the "rule of law" when its protection is arguably needed most. For a defense of this feature, see Laura S. Underkuffler, Agentic and Conscientic Decisions in Law: Death and Other Cases, 74 NOTRE DAME L. REV. 1713, 1734 (1998) (describing the death penalty decision as one based on a "conscientic" model, where the judicial system (here the voice of the jury) must speak what the law "should be" (rather than what it "is"), and that this is required because the defendant's life is at stake).
hypothesize about the juror’s resolve and belief structure. Courts facing a sentencing jury potentially tainted by extraneous information may lament that they cannot use the jury’s actual testimony about the effect of it because of Rule 606(b). This Note represents a first attempt to describe and to justify using an actual prejudice test that is bolstered by testimony from the actual jury about their deliberations in capital sentencing.

By actual effect I mean the following: extraneous evidence that “actually prejudice” the defendant in a capital case when the jury finds an inappropriate aggravating factor from the extraneous information, or the jury abandons altogether the task of weighing aggravators and mitigators and substitutes them with the extraneous information.

In sum, this Note’s reasoning proceeds as follows. First, the independent moral assessment instruction in capital cases both vests each juror with an intimately personal choice and invites each juror to consider extraneous information for moral guidance. If the jury views extraneous information, the court then must decide whether that evidence prejudiced the defendant. Presently, courts test this by

11 See, e.g., Harlan II, 109 P.3d 616 (Colo. 2005) (Rice & Kourlis, JJ., dissenting). Actual prejudice/effect can be surmised by a court without subjective effect testimony. Some courts use an actual prejudice standard in cases of jury tampering where no new information is introduced to the jury (e.g., an ex parte contact). See, e.g., Rushen v. Spain, 464 U.S. 114, 116 (1983) (per curiam) (denying habeas relief after deeming a judge’s contact with a juror was harmless); United States v. Maree, 934 F.2d 196, 201 (9th Cir. 1991), superseded by statute on other grounds, as stated in U.S. v. Adams, 432 F.3d 1092, 1095 (9th Cir. 2006) (granting a new trial for a defendant convicted of conspiracy to distribute cocaine based upon ex parte contacts a juror had with two friends, but still excluding evidence of the subjective effect on the juror’s deliberations). These cases did not admit evidence bearing on subjective effect. However, this Note is the first argument for “actual prejudice” review in a capital sentencing, and the first to attempt to justify admitting juror testimony on how the evidence affected their deliberations in such cases. Throughout the Note, when I refer to the “actual effect test,” etc., I mean actual effect review through the mouthpiece of actual effect testimony.

12 This Note will not consider the case of extraneous information leading the jury to mercy in a capital sentence when it should not have. The prosecution cannot appeal a life sentence to seek the death penalty for Double Jeopardy. See Sattazahn v. Pennsylvania, 537 U.S. 101, 106–07 (2003) (holding that Double Jeopardy protection extends to capital sentencing that require the prosecution to prove facts beyond a reasonable doubt to support a sentence of death, and that life imprisonment is tantamount to “acquittal” in these circumstances). Sattazahn dealt with the state’s ability to seek the death penalty on retrial. Sattazahn’s jury hung during the sentencing phase. The trial judge entered a life sentence. The state sought death on retrial, and got it. The majority held that this did not violate double jeopardy. However, even the dissenters in Sattazahn noted: “[t]he sentencing question can be retried—if retrial is not barred by the Double Jeopardy clause—only if the defendant successfully appeals the underlying conviction and is convicted again on retrial.” Id. at 118 (Ginsburg, Stevens, Souter, and Breyer, JJ., dissenting). Thus, even in rare cases like Sattazahn’s, appeal, the defendant must first appeal to open the door for the state to seek death.

13 Thus, the case studies this Note cites represent the most common scenarios of the extraneous information problem in capital cases.
asking whether the information posed a reasonable likelihood of prejudice to the defendant in the mind of a typical juror. Asking the jurors how the information actually affected them more precisely tests prejudice. But other values are at stake. Courts use the typical juror test because they value preventing harassment to the jury, the finality of the jury’s verdict or sentence, and seek to prevent damaging the integrity of the jury system. Because the current evidence rules value these principles more than the accuracy of the prejudice inquiry, they prohibit jurors from testifying as to the actual effect the potentially prejudicial information had on them.

From that background, this Note will argue that capital cases warrant actual effect review and testimony from the jury about actual effect. It will contends that because:

1. the capital jury’s task is a moral one and capital cases require extra scrutiny because the stakes are so high;
2. attorneys at evidentiary hearings often ask questions and obtain evidence sufficient to measure actual effect;
3. actual effect analysis avoids the practical aversions (of extra hearings and dilatory tactics) courts usually have to “subjective” tests;
4. reviewing courts cannot fully isolate extraneous information, especially when it is religious;
5. reviewing courts always screen capital trials with heightened scrutiny;\(^ {14} \)
6. actual effect review reduces arbitrary sentences; AND
7. ignoring the actual jury’s testimony threatens judicial legitimacy,

...courts should employ an actual effect test when reviewing a death sentence rendered when extrinsic information was before the jury.\(^ {15} \)

\(^ {14} \) “The Court ... has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.” California v. Ramos, 463 U.S. 992, 998–99 (1983).

\(^ {15} \) This article will not assess, among many other things, the merits of such a test in non-capital sentencing, nor potential First Amendment Free Exercise Clause claims jurors may have, nor Establishment Clause claims prisoners may have against jurors because they are “state actors.” For a thorough and insightful student note analyzing the Free Exercise Clause issue, see Brian Galle, Note, Free Exercise Rights of Capital Jurors, 101 COLUM. L. REV. 569 (2001). For
These favorable reasons might lead one to the conclusion that religious sources should be permitted (i.e., not considered improper "extrinsic" evidence). This Note does not argue that. As it mentions later, this would lead to (among other things) problems of taxonomy (i.e., what does and does not count as a religious source). As such, this Note will not explore that possibility.

This may require a partial exception to Rule 606(b), but the exception would be limited to the subset of capital cases where the jury accesses extraneous information, and the purposes of the Rule would be preserved. Further, because the independent moral assessment requirement dictates that extraneous information used for moral guidance may not have the avoidable detrimental effect on the sentence one would expect in regular cases, courts should reject an irrebuttable presumption of prejudice for extraneous information.

To expand this line of reasoning, Part I (A) will discuss briefly the role of Christianity in the U.S. legal culture and its impact on capital sentencing. Part I(B) will review relevant capital trial and sentencing law, set by state and federal law and the Constitution. Rather than offer an exhaustive account, it will instead emphasize the boundaries of judicial control of jury discretion and decision making, and the ways courts bend and shape traditional procedural and evidentiary doctrines in capital cases. Part I(C) will further define the problem by describing Robert Harlan’s trial at some length.

Then, Part II(A) will describe the actual effect test, and its benefits and detriments. Part II(B) will describe two potential solutions to the problem—carving out an exception from Rule 606(b) and establishing an irrebuttable presumption of prejudice from extraneous information in capital cases.

I. BACKGROUND

A heightened moral atmosphere pervades capital trials. In America, Christianity often takes center stage. This section will seek to explain the role of Christianity in U.S. legal culture, and how it influences capital trials.

the view that the death penalty itself violates the Establishment Clause, see Gregory M. Ashley, Note, Theology in the Jury Room: Religious Discussion as "Extraneous Material" in the Course of Capital Punishment Deliberations, 55 Vand. L. Rev. 127, 155 (2001).
A. Christianity's Role in the Capital Jury Room

Christianity played a prominent role in the founding of America and its legal system, from substance to procedure, to the ethics of the profession. Almost all American criminal prohibitions derive from religious prohibitions. Contemporary combatants in the contentious "church/state" dispute quarrel over how Christianity's influence should be memorialized, not whether the influence exists. In spite of this influence, the Supreme Court has held that the Constitution requires a schism between religious influences and government structure. While the Christian influence pervades the nation's early legal history, so does respect for individual religious experiences and limits on government religious favoritism. The Establishment Clause and the Free Exercise Clause, the chief protectors of these values, together do not envisage a freedom from religion, but instead protect a freedom of religious exercise. Because of Christianity's early and continuous influence, where government acts to accommodate religious beliefs, it will most often have to do so for Christians, since Christianity is the numerically predominant religion in the United States.

16 See generally PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); see also Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 212-13 (1963) (discussing the historical associations between Christianity and the government); Gordon J. Beggs, Challenges in Judging: Some Insights From the Writings of Moses, 44 CLEV. ST. L. REV. 145 (1996) (noting that education of lawyers in the early period of the country's history in legal ethics was largely based on the Bible, and that the first official canons of judicial ethics, written in the early 1900s, were based on Biblical precepts).

17 See Schempp, 374 U.S. at 303 (Brennan, J., concurring).

18 Van Orden v. Perry, 125 S.Ct. 2854, 2894 (2005) (Souter, J., dissenting) ("[Permissible state-sanctioned displays of religion should show the] background from which the concept of law emerged, ultimately having a secular influence in the history of the Nation. Government may, of course, constitutionally call attention to this influence, and may post displays or erect monuments recounting this aspect of our history no less than any other, so long as there is a context and that context is historical."); Schempp, 374 U.S. at 294 (Brennan, J., concurring) ("Specifically, I believe that the line we must draw between the permissible and the impermissible [vis-à-vis the Free Exercise and Establishment Clauses] is one which accords with history and faithfully reflects the understanding of the Founding Fathers.").

19 Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (enshrining in the First Amendment the idea from Thomas Jefferson's letter to the Danbury Baptists that the Constitution erects a "wall of separation between Church and State" (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879))).

20 U.S. CONST., amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"); McCreary County v. ACLU, 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.") (emphasis added).

21 Van Orden, 125 S.Ct. at 2860 n.3 (citing cases).

22 76.5%, according to a 2001 survey. Barry A. Kosmin & Seymour P. Lachman,
However, the Due Process Clause guarantees a "fair trial in a fair tribunal."23 Religiously-grounded sentences seem intuitively to violate this fairness requirement.24 But, the Supreme Court of the United States has not decided if religious references by courts are unconstitutional.25 And, courts generally instruct jurors to make credibility determinations in both civil and criminal trials based on their life experiences and backgrounds, including their religious upbringing.26

Despite these potential limits, courts appear more tolerant of religious references in capital cases. This may be because religion plays such a prominent role.27 Courts give capital jurors much more

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24 However, juries sometimes acquit a defendant, even when the law compels a conviction. Such jury nullification may flow from any reason (religious or not), or no reason at all. See Andrew D. Leipold, Rethinking Jury Nullification, 82 VA. L. REV. 253 (1996) (providing an excellent discussion of the subject, and an argument that courts and legislators should abandon or rescind the many procedural protections thrown around the power of nullification). Fears of nullification at the guilt phase of capital trials helped spur state legislatures to largely avoid, and the Supreme Court of the United States to reject mandatory death penalty statutes. See, e.g., Woodson v. North Carolina, 428 U.S. 280 (1976).
25 Arnett v. Jackson 393 F.3d 681, 686 (6th Cir. 2005) ("The Supreme Court has never specifically decided whether a defendant's right to due process is violated if a religious text or commentary is cited during a sentencing hearing. . . . "). reh'g en banc denied No. 03-4375, 2005 U.S. App. LEXIS 6618 (6th Cir. Apr. 6, 2005). Claimants challenging religious references usually cite United States v. Tucker's command that a sentencing judge who relies on "erroneous information" violates due process. Id. (citing United States v. Tucker, 404 U.S. 443 (1972)).
26 See, e.g., COLORADO JURY INSTRUCTIONS: CRIMINAL 3:01 (1983) ("[Y]ou should consider all the evidence in the light of your observations and experience in life."); OHIO JURY INSTRUCTIONS § 405.20 (2005) ("To weigh the evidence, you must consider the credibility of the witnesses (including the defendant). You will apply the tests of truthfulness which you apply in your daily lives.").
27 For an exhaustive recitation of examples, see John H. Blume & Sheri Lynn Johnson, Don't Take His Eye, Don't Take His Tooth, and Don't Cast the First Stone: Limiting Religious Arguments in Capital Cases, 9 WM. & MARY BILL RTS. J. 61, 62 (2000–2001); see also David L. Hudson Jr., The Bible Tells them so: Making Biblical References at Trial May Be Grounds for Reversal, 91 A.B.A.J. 14 (July 2005), for an example of one particular prosecutor who frequently employed quotes from the Bible "to make a particular point." See also Killer of Girl, 11, Sentenced to Die, CH. TRIB., Mar. 16, 2006, at 7. (quoting the defendant as testifying during the mitigation phase "Every day I think about what I did and beg God for forgiveness."); State v. Haselden, 577 S.E.2d 594, 609 (N.C. 2003) ("Considering the atrocity of the present murder and the few defense strategies available to defendant in his closing argument, it seems reasonable for the prosecution to anticipate that defendant might offer religious sentiment during his closing argument."). The Haselden court also cited State v. Bond, 478 S.E.2d 163,
discretion than their non-capital criminal and civil counterparts. Death penalty jurors must weigh aggravating and mitigating circumstances to decide if the defendant lives or dies, and this choice is a moral one.\textsuperscript{28} Thus, courts in some locations permit the jury to pray and discuss religious matters during deliberation.\textsuperscript{29} Though this might seem surprising, courts (and the drafters of evidence rules) worry more about limiting discussions of "case-specific" facts that are not in the record than discussion of more general information each juror has learned from their life experiences.\textsuperscript{30} Though the jury's capital sentencing decision is both individual (unanimity requirements for mitigators are unconstitutional),\textsuperscript{31} and moral, some courts forbid the jury from using religion in weighing aggravators and mitigators and look with disfavor on the injection of religion into the trial.\textsuperscript{32}

This Note will not judge the wisdom of granting this much power to capital juries.\textsuperscript{33} In weighing aggravators and mitigators, religion is as legitimate for a juror to use as any other system of thought. As a practical matter, American jurors will likely reference Christian teachings more than any other religion for help.

With that said, this Note is not meant as a paean to Christianity or an assertion of or argument for its political or theological supremacy. Instead, the above historical information, and the discussion to come highlight what in American capital trials will be a very common iteration of the extraneous information problem. In capital cases, the independent moral assessment requirement and frequent references to

\begin{itemize}
\item \textsuperscript{28} See McKoy v. North Carolina, 494 U.S. 433, 442 (1990); \textit{supra} note 4.
\item \textsuperscript{29} See, e.g., Young v. State, 12 P.3d 20, 48–49 (Okla. Crim. App. 2000) (quoting Bieghler v. State, 690 N.E.2d 188, 203 (Ind. 1997) ("We do not find it surprising that 'conscientious people who are faced with a life and death decision resort to their religious scruples in reaching such a decision. Such deep introspection neither violates principles of justice nor prejudices the defendant.'")); McNair v. Campbell, 416 F.3d 1291, 1308–09 (11th Cir. 2005) (upholding jury's verdict where evidence showed jurors prayed together during deliberations).
\item \textsuperscript{30} As this Note points out below, many jury instructions ask the jury to think about the evidence and discuss it in light of their own experiences.
\item \textsuperscript{31} McKoy, 494 U.S. at 435 ("North Carolina's unanimity requirement violates the Constitution by preventing the sentencer from considering all mitigating evidence.").
\item \textsuperscript{32} See, e.g., Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989) (vacating a capital sentence when the jury was specifically authorized by the trial judge to use the Bible at sentencing); Commonwealth v. Chambers, 599 A.2d 630 (Pa. 1991) (vacating a capital sentence when the prosecutor made religious references during closing argument, and banning all religious discussion at trial); cf. State v. Haselden, 577 S.E.2d 594, 617 (N.C. 2003) (noting that reversible error has not occurred when a prosecutor anticipates that the defense will use Biblical references about capital punishment being "contrary to Christian ethics," and offers counterarguments).
\item \textsuperscript{33} For an exposition of this view, see Woodson v. North Carolina, 428 U.S. 280, 308–324 (1976) (Rehnquist, J., dissenting); Ashley, \textit{supra} note 15, at 136–38.
\end{itemize}
religion produce moral inquisitiveness from the jury. That inquisitiveness may inspire the jury to consult extraneous evidence. Many will look to the Bible.

The arguments in this Note, however, can apply to any instance of extraneous information. This Note's thesis is strongest when the jury uses extraneous evidence for moral guidance, based on the following logic.

First, I will define "prejudice" from extraneous evidence as a negative impact on the defendant that would not have occurred in that evidence's absence. Second, assume that the jury consults extraneous evidence. That evidence has some innate tendency to cause prejudice. That tendency can be mapped along a spectrum of prejudice.

Evidence regarding the "case-specific" facts (e.g., a newspaper report controverting defendant's proffered "child abuse" mitigating evidence) is at the "high-prejudice" end. At the opposite end is evidence most likely to be used purely for the moral response of weighing evidence (e.g., a Bible verse telling jurors not to kill). This evidence poses a reduced threat of prejudice because a juror could permissibly have possessed this information as part of their suite of background experience, and used it in their personal moral response, so long as it is not in tangible form. "Case-specific" evidence regarding the dry facts of the case is at the opposite, "high-prejudice" end.

The closer that a piece of extrinsic evidence is to the "low-prejudice" end, the more this Note's arguments apply to it. The judge might ask the juror, "did this piece of extraneous information change your mind about the sentence?" If the source provides mostly moral guidance, the juror is more likely to be able to give an earnest "no" reply—she could have come to the same conclusion, and permissibly so, by reading the extraneous passage on her own, or by remembering it from her Sunday School days.\(^3\)

Thus, one solution would be to simply admit moral guidance information as evidence relevant to sentencing. However, this Note does not conclude from the above reasoning that this makes "moral" information in any sense not "extraneous," nor automatically proper. Attempting to classify a source as moral or not moral would compound the difficulties courts have in determining what moral inference a juror would draw from extraneous information with primarily moral content.\(^3\) Guarantees of judicial religious neutrality

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\(^3\) See Harlan II, 109 P.3d 616 (Colo. 2005).

\(^3\) It might also create Constitutional havoc if one attempts to decide what sources can
might guarantee open-ended admission of evidence jurors claim helps them. These interpretive difficulties also increase the more "moral" the source is; another reason why this Note’s arguments strengthen in proportion to the moral content of the source.

As discussed above, a religious ethos animates capital trials. The arguments are more spirited and more emotionally charged, because the final stakes are so high, and the offense charged so severe. Reflecting this difference from the criminal norm, the Eighth Amendment and other Constitutional prerogatives force courts to depart from the usual procedural model used in a criminal case, as the next section will discuss.

B. Relevant Capital Law and Procedure

As noted above, even capital jurors do not enjoy carte blanche power to impose their philosophy, Christian or other, on defendants. At each, courts attempt to prevent erroneous or arbitrary capital sentences. This judicial scrutiny is one trade-off made for the wide latitude the Constitution guarantees to capital jurors. The judiciary also guards that latitude with a nearly flat prohibition of post-trial inquiry into deliberations. Capital and non-capital proceedings differ in many substantial respects, including jury selection, judicial review, and evidentiary standards. Death’s “difference,” both as a punishment and in the procedure used to mete it out is a common thread woven

36 The trial judge may give a death sentence even if the jury recommends life in only five states: Alabama, Delaware, Florida, Montana, and Nebraska. Only in Nebraska do judges actually determine the sentence free of any jury input about its suitability; a three-judge panel has the option of imposing death if the jury unanimously decides on aggravating factors. The Death Penalty Information Center, State by State Information, www.deathpenaltyinfo.org/state (last accessed Feb. 7, 2006). The Supreme Court has held that judges can make this decision—the Constitution does not give defendants a right to a jury determination of life or death. Clemons v. Mississippi, 494 U.S. 738, 738 (1990). Thus, this Note will focus instead on the role capital jurors play, which the Constitution guarantees will be substantial, even in the above states. Ring v. Arizona, 536 U.S. 584, (2002) (requiring aggravating circumstances to be found by the jury, and discussing the jury’s role in capital sentencing generally). However, in the event that a particular state vested the judge with the sort of moral discretion jurors have, this Note’s arguments would apply equally to the judge.

37 State systems for quality control may differ but still be constitutional. The day that the Supreme Court of the United States decided Gregg v. Georgia, 428 U.S. 153 (1976), approving Georgia’s capital punishment scheme, it also approved Florida’s scheme, Proffitt v. Florida, 428 U.S. 242 (1976), and Texas’s scheme, Jurek v. Texas, 428 U.S. 262 (1976), even though the three systems take very different approaches to (for example) aggravating and mitigating factor instructions.

38 See FED. R. EVID. 606(b).
throughout the following description.\textsuperscript{39} States choose the specifics of their death penalty system. However, the Supreme Court of the United States has set many baseline limitations to prevent arbitrary imposition of the death penalty and ensure individualized sentencing.\textsuperscript{40} Voir dire, restrictions on aggravators, liberal mitigating evidence standards, and automatic judicial review are just some of the features of death penalty trials and sentencing that differentiate capital trials from criminal trials.

1. Capital Voir Dire

Voir dire is the process of questioning and seating jurors for a trial or capital sentencing.\textsuperscript{41} Capital voir dire differs from non-capital voir dire because the Constitution guarantees defendants a right to ask

\textsuperscript{39} The Supreme Court of the United States frequently sounds this refrain, that “death is different,” when justifying departures from standard criminal procedure in capital trials. \textit{See}, \textit{e.g.}, Schriro \textit{v.} Summerlin, 542 U.S. 348, 363 (2004) (Breyer, J., dissenting) (5–4 decision) (contending that the rule in \textit{Ring v. Arizona}, 536 U.S. 584 (2002), that a jury, not the judge must find all aggravators, should be applied retroactively); \textit{Gregg}, 428 U.S. at 187 (plurality opinion) (Stewart, Powell, & Stevens, J.J.).


\textsuperscript{41} Though the process of voir dire itself is not constitutionally guaranteed, it plays a “critical function” in guaranteeing defendants their Sixth Amendment right to a fair and impartial jury. \textit{Rosales-Lopez v. United States}, 451 U.S. 182, 188 (1981). The State and the Defendant can limit the jury pool in two ways. First, they can employ “for cause” challenges, where the party offers the judge a particular reason (usually statutory) for removing the juror. Typically these include lack of qualification, previous service on a related matter or offense, personal relation to a participant in the case, or prejudiced state of mind. \textit{Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, Criminal Procedure § 22.3 at 1054–55 (4th Ed. 2004).} The judge retains discretion over whether to remove. Or, second, they can remove a juror by using a limited number of “peremptory challenges,” where little or no rationale need be offered and the attorney’s power to remove remains essentially plenary. An attorney cannot use peremptories to remove jurors because of race, \textit{Batson v. Kentucky}, 476 U.S. 79 (1986), or gender, \textit{J.E.B. v. Alabama ex rel. T.B.}, 511 U.S. 127 (1994), and the judge may require a party to give a neutral reason for a peremptory if it appears they are using peremptories in a discriminatory manner.
certain questions about each juror’s willingness to impose death. It requires courts to remove jurors who would never vote for the death penalty, and those who would always vote for the death penalty. The Supreme Court articulated the current constitutional for-cause exclusion standard in capital trials in Wainwright v. Witt. Witt held that the court should excuse a capital juror for cause if that juror’s beliefs will “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”

Voir dire buttresses the constitutional rights of defendants. In close cases, or where potential prejudice from a particular extraneous source is at issue, reviewing courts may see voir dire quality as one indicator of prejudice. The additional procedural protections that gird capital voir dire should engender additional trust from reviewing courts. Yet, courts fear arbitrary jury sentences in capital cases. As discussed below, they attempt to give rigorous instructions both at the guilt and sentencing phases to “channel” the jury’s discretion.

42 See Witherspoon v. Illinois, 391 U.S. 510, 520 (1968) (holding that the state’s removal from the jury pool of all members with “conscientious or religious scruples against capital punishment” was improper because it produced a jury “uncommonly willing to condemn a man to die”). The petitioner in Witherspoon also advanced the argument that there was an empirical connection between those who favor the death penalty and conviction, but the court deemed it too uncertain. Id. at 517. For experimental evidence to show that this is true, see James Luginbuhl & Kathi Middendorf, Death Penalty Beliefs and Jurors’ Responses to Aggravating and Mitigating Circumstances in Capital Trials, 12 LAW & HUM. BEHAV. 263, 264 (1988). For other cases highlighting the rights of defendants to question prospective jurors, see Morgan v. Illinois, 504 U.S. 719 (1992) (allowing defendants to ask the “reverse-Witherspoon” question—whether the juror would automatically vote for death); Turner v. Murray, 476 U.S. 28 (1986) (allowing the defendant, upon request, to ask jurors whether the racial alignment of the victim and the defendant will prejudice their decision), disapproved on other grounds by O’Dell v. Netherland, 521 U.S. 151 (1997).

43 See Wainwright v. Witt, 469 U.S. 412 (1985) (articulating the standard for when a juror may be removed for cause to the juror’s views on capital punishment).

44 Id. For a nice description of how the exclusion standard evolved over time, see Ronald C. Dillehay & Marla R. Sandys, Life under Wainwright v. Witt: Juror Dispositions and Death Qualification, 20 LAW & HUM. BEHAV. 147, 147–48 (1996).

45 Witt, 469 U.S. at 420 (quoting Adams v. Texas, 448 U.S. 38 (1980)). Some commentators argue, however, that Witt exclusion biases the jury in favor of conviction and a death sentence, and there is some evidence to confirm this. For the view that this is a weakness of Witt, because jurors cannot accurately project themselves into the future to know whether they’ll be able to discharge their duty, see Dillehay & Sandys, supra note 44, at 148; Mike Allen, Edward Mabry, & Drue-Marie McKelton, Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis, 22 LAW & HUM. BEHAV. 715, 716 (1998) (“Thus, asking prospective jurors to consider hypothetically a guilty verdict forms a category of experience about the trial that labels the defendant guilty even before the trial begins. The consequence is to poison the well (juror’s mind) as a precondition of jury service.”).

46 Arbitrariness doomed the death penalty in Furman v. Georgia, where Justice Potter Stewart famously likened it to being “struck by lightning.” 408 U.S. 238, 306 (1972) (Stewart, J., concurring).
2. Capital Sentencing

Once the jury is impaneled, it remains a passive participant in the trial until both sides have rested. The judge then instructs the jury, and the jury departs to determine the verdict.

As noted above, states are generally free to fashion the specifics of their capital regime. Colorado's approach is typical of most states. In Colorado, the road to a death sentence begins when the prosecution decides to seek the death penalty. First, during the "guilt phase" of the trial, a unanimous jury must find the defendant guilty beyond a reasonable doubt.

After this, the sentencing phase begins. The sentencing proceeding is like a trial unto itself. Both sides put on evidence and make opening and closing statements. Once the sentencing proceeding concludes, the jury departs to deliberate. For the defendant to then be "death-eligible," the jury must find specifically that the defense proved no "special" mitigators beyond a reasonable doubt and that the prosecution proved at least one aggravating factor unanimously beyond a reasonable doubt. Then, each juror independently decides whether any other mitigating factors exist. Juries must find aggravators and mitigators based on evidence from the hearing. However, courts must take a very lenient view of admissibility in

47 This Note (and this section) will use the specific example of Colorado because the exemplary case (Harlan, infra) hails from that jurisdiction. Some jurisdictions may not have a jury instruction that mirrors the "independent moral assessment" instruction for weighing. However, there is ample suggestion from Supreme Court jurisprudence suggesting that states should tell their jurors to make such an assessment, if not in so many words. See supra note 4. Granted, the Court may not be issuing a normative command to the states. If not, they have still tacitly sanctioned this role for the jury in capital cases.


49 What happens next may vary. Some states, such as Colorado, have a list of special mitigators that, if proved, prevent the imposition of death.


51 This is true in almost all states, either as a liability question (an element of the actual offense) or as a sentencing question. Galle, supra note 15, at 590.

52 Some states prescribe specific mitigating factors. But the Constitution requires that jurors be able to give effect to any potential mitigating factor they can find from the evidence presented. See Hitchcock v. Dugger, 481 U.S. 393, 398–99 (1987) (reversing death sentence where advisory jury was instructed not to consider, and sentencing judge refused to consider, any mitigating factor outside of those enumerated in the sentencing statute). Jurors also can consider a defendant's unsworn statement of allocution. See Green v. United States, 365 U.S. 301, 304–05 (1961) (recognizing the right of a defendant to speak on his or her own behalf). The right to allocate is recognized in most jurisdictions by court rule or statute, or in the state constitution. Its form and judicial control vary according to jurisdiction; some restrict the allocation to statements of historical fact, others allow outright pleas for mercy. LAFAVE ET AL., supra note 41, at 1246–47.
sentencing proceedings.\textsuperscript{53} Blurring standard evidence rules, courts must admit \textit{any} mitigating evidence the defendant offers, as part of the Constitutional requirement of individualized capital sentencing.\textsuperscript{54} Indeed, the Constitution only requires the jury to consider proffered mitigating evidence, not to decide that it mitigates the defendant’s blame.\textsuperscript{55}

If the jury decides unanimously that aggravating factors outweigh mitigating factors\textsuperscript{56} beyond a reasonable doubt, then the court sentences the defendant to die.\textsuperscript{57} The court can override a death sentence if the jury’s decision has been influenced by “passion,

\textsuperscript{53} See, e.g., Gregg v. Georgia, 428 U.S. 153 (1976) (noting that the best system is one where the sentencing authority is given the necessary information and guidance on how to use this information); PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F.1 (2005).

\textsuperscript{54} Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113–15 (1982); Lockett v. Ohio, 438 U.S. 586, 604–05 (1978). The one potential exception is evidence of jurors’ “residual doubt” about the defendant’s guilt. The Supreme Court has repeatedly noted that the proposition that the Eighth Amendment protects the right to introduce residual doubt evidence is “quite doubtful.” See, e.g., Oregon v. Guzek, 126 S.Ct. 1226, 1231–32 (2006) (quoting Franklin v. Lynaugh, 487 U.S. 164, 173 n. 6 (1988)). However, they have never had to explicitly hold that the right exists.

\textsuperscript{55} McKoy v. North Carolina, 494 U.S. 433, 442 (1990) (“The Constitution \textit{requires} States to allow consideration of mitigating evidence in capital cases.”); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (“Capital cases \ldots [require] consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”); Lockett, 438 U.S. at 604–05 (“We conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a \textit{mitigating factor}, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”); Eddings v. Oklahoma, 455 U.S. 104, 113–14 (1982) (“Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a \textit{matter of law}, any relevant mitigating evidence.”); Johnson v. Texas, 509 U.S. 350, 368 (1993) (“As long as the mitigating evidence is within ‘the effective reach of the sentencer,’ the requirements of the Eighth Amendment are satisfied.”) (quoting Graham v. Collins, 506 U.S. 461 (1993)).

\textsuperscript{56} See Kansas v. Marsh, 126 S.Ct. 2516, 2524 (2006) (holding that the Constitution permits states to put the risk of non-persuasion on the defendant).

\textsuperscript{57} On this, death penalty states fall into two categories: “weighing” and “non-weighing.” The term is really a misnomer. The “non-weighing” states draw less of a distinction between the aggravating and mitigating circumstances. The jury is charged to view the entire set of the defendant’s circumstances, rather than viewing aggravators and mitigators \textit{qua} aggravators and mitigators. Metaphorically, the process is more like a bathroom scale than the scales of justice. The latter exemplifies “weighing” states. In those states, (Colorado is one), the jury finds aggravators and mitigators separately and tries to balance them. However, the distinction lacks any real probative force. For one, the Supreme Court of the United States has recently abandoned the distinction, at least when determining whether they must vacate a defendant’s sentence because the defendant’s jury considered an invalid aggravating factor. Brown v. Sanders, 126 S.Ct. 884 (2006). Relevant to this Note, \textit{both} require the juror to make a moral judgment about propriety of the death penalty for the defendant before them, based on the legally cognizable aggravators and mitigators.
This scheme, while perfectly constitutional, does not tell jurors how to weigh the factors. It might be a Constitutional requirement for the scheme not to tell jurors how to do this. Indeed, Colorado and other states' jury instructions offer similarly little guidance. In run-of-the-mill criminal cases, jurors are instructed to view all the evidence against the backdrop of their own experiences.

In capital cases, the jurors must take recourse to their beliefs more than the typical juror. They must look within themselves (and, essentially, outside the evidence, which is the source of the factors they must consider) when they weigh aggravating and mitigating circumstances and make their independent moral assessment. For many, this will involve Christian beliefs.

The independent moral assessment requirement is part of a morass of prerequisites imposed by the Constitution before the state can execute defendants. Courts tightly channel the jury's discretion during the guilt phase of a trial, to prevent arbitrary imposition of the death penalty. Yet, jurors must give each defendant an "individualized sentence." Individualized sentences are by nature arbitrary.

58 COLO. REV. STAT. § 18-1.3-1201(2)(c) (2006); Harlan II, 109 P.3d 616, 630 (Colo. 2005) (citing People v. Dunlap 975 P.2d 723, 736 (Colo. 1999)). Colorado's four-step sentencing process is outlined in COLO. REV. STAT. § 18-1.3-1201(2)(a)-(b) (2006). In some jurisdictions, separate jurors are used for the liability phase and the penalty phase of the trial.


60 See, e.g., COLORADO JURY INSTRUCTIONS: CRIMINAL 3:01 (1983) (expressing the "independent moral assessment" idea); CALIFORNIA JURY INSTRUCTIONS: CRIMINAL § 8.88 (2005) ("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."); 4 OHIO JURY INSTRUCTIONS: CRIMINAL § 503.011(12) (2005) ("You shall then decide whether the State of Ohio proved beyond a reasonable doubt that the aggravating circumstance(s) outweigh(s) the mitigating factors present in this case. It is the quality of the evidence regarding aggravating circumstance(s) and mitigating factors that must be given primary consideration by you.").


62 Kosmin & Lachman, supra note 22.


Attempting to draw a line between religion and secular moral philosophy, the Supreme Court has previously stated, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Yet, the independent moral assessment charge requires the decision to be made on the basis of emotion. Each defendant's fate turns on the unpredictable moral assessments of the jury. The only way to prevent a sentence that will be "arbitrary," in this sense, is to provide an objective foundation.

Abolishing the independent moral assessment would thus require states to come up with a "point system" for balancing aggravating and mitigating circumstances. A point system, though, is the opposite of a "moral" response, as states often explain to their juries. The Supreme Court of the United States initially voiced some skepticism about whether states could satisfactorily legislate aggravators, mitigators, and how the two interact. It soon thereafter retreated from its skepticism, holding that states can adequately channel jury discretion by spelling out statutory aggravating circumstances and requiring them to be found beyond a reasonable doubt.

But, creating a balancing system may violate the "individualized sentencing" requirement of Woodson v. North Carolina. Woodson required the scale to be recalibrated with each defendant. The

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67 See, e.g., CALIFORNIA JURY INSTRUCTIONS: CRIMINAL § 8.88 (2005) ("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."). However, the instructions on "ties" between aggravators and mitigators belie the idea that the judgment is totally qualitative. See, e.g., OHIO JURY INSTRUCTIONS: CRIMINAL § 503.011(14) (2005) ("EQUAL WEIGHT. If the weight of the aggravating circumstance(s) and mitigating factors are equal then you must proceed to consider the life sentence alternatives."). States are allowed to require the defendant to prove that the mitigating evidence outweighs the aggravating evidence; thus, state statutes that tell the jury to impose death when the aggravators and mitigators are in equipoise are constitutional. Kansas v. Marsh, 126 S. Ct. 2516, 2523 (2006). In Marsh, the Court held that a jury finding that aggravators and mitigators are in equipoise does not reflect confusion or indecision, but simply is "indicative of the type of measured, normative process in which a jury is constitutionally tasked to engage when deciding the appropriate sentence for a capital defendant." Id. at 2528.
68 McCautha v. California, 402 U.S. 183 (1971). In McCautha, the court concluded that unfettered jury discretion did not offend the Constitution. Viewing the same boundless power a year later in Furman v. Georgia, the court famously reached the opposite conclusion—that the U.S. capital punishment system as a whole had to fall. 408 U.S. 231 (1972).
70 However, jurors can still treat as mitigating or non-mitigating any proffered evidence.
question, then, is whether this is wise. And the answer depends upon our concept of the jury system. If the jury is the answer to government oppression (as originally conceived), then we must allow its members to speak with their conscience and the conscience of the community when making perhaps the weightiest civic decision assigned to private citizens. Under this view, the wide discretion granted jurors allows death penalty penology to match up with the morality of the community in a way that insulated judges cannot as effectively guarantee.\(^1\) If one instead conceives the jury as an instrument of majoritarian whim and the passions of the mob, then one will want to tie its hands further.

Because the first view seems to be the dominant one, especially in light of Woodson and related cases vesting the jury with the ability to give mercy for reasons too intangible to be put into statute, any calls for abolishing the moral response requirement likely will go unanswered. So, the jurors each search their feelings and morals, and if all agree that the defendant should be executed, the order is given.

The jury's sentence is nowhere near final once handed down. In many states, the death sentence is automatically reviewed by an appellate court. Automatic independent review is a hallmark of constitutionally valid death penalty systems.\(^2\) Reviewing courts typically employ a de novo standard of review.\(^3\) However, they follow a strong presumption that jurors are able to listen to evidence, sort through it, and reach a decision.\(^4\) In Colorado, the courts review a death sentence to ensure that it is: (1) appropriate under the circumstances; and (2) not imposed arbitrarily or under the influence of passion, prejudice, or some arbitrary factor.\(^5\)

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\(^1\) Cf. Trop v. Dulles, 356 U.S. 86, 104–05 (1958) (Black, J., concurring) (stating that a sanction of denaturalization as punishment for desertion should be the domain of a civilian court (i.e. jury) and not the military tribunals).

\(^2\) See Gregg, 428 U.S. at 206 ("The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty.").

\(^3\) E.g., People v. Dunlap 975 P.2d 723, 736–37, 765 (Colo. 1999). This differs substantially from typical appellate review of a judge’s criminal sentence. Appellate courts can vacate a sentence if the judge’s sentence is unreasonable. United States v. Booker, 543 U.S. 220, 261 (2005) (holding that, though appellate review provision of the Sentencing Guidelines is unconstitutional, the statute, in other provisions, sets forth an implicit reasonableness standard).

\(^4\) See, e.g., Tuilaepa v. California, 512 U.S. 967, 975–77 (1994) (upholding a statutory aggravator because the factor had a “common-sense core” that courts could presume jurors understand); Strickland v. Washington, 466 U.S. 668, 695 (1984) (“The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.”); United States v. Lomeli, 76 F.3d 146, 149 (7th Cir. 1996) (“We must presume that juries are capable of both sorting through the evidence and following a court’s instructions.”).

\(^5\) Harlan II, 109 P.3d 616, 630 (Colo. 2005) (citing Dunlap, 975 P.2d at 736).
Voir dire, liberal evidentiary standards (where they benefit defendants), and automatic judicial review are just some of the major checks on the jury, designed to prevent arbitrary decisions. Different jurisdictions weigh their importance in varying and sometimes contradictory ways. Favorably reviewed voir dire and instructions will defuse allegations of other misconduct. But courts will only scrutinize jury decision-making to a limited degree. They truncate the parties' ability to ask jurors about deliberations to a few limited circumstances. Even when courts grant access to the jury, they limit the admissibility of the testimony jurors give.

3. Rule of Evidence 606(b) and Extraneous Information

Though the court further regulates jury decision-making after the jury reaches a verdict and sentence, Rule 606(b) limits the evidence the court can use to reduce the sentence on the basis of juror misconduct:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

This rule prohibits jurors from testifying about the substance of their deliberations, and prevents the court from admitting even their

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76 See FED. R. EVID. 606(b).
77 Id. For an excellent discussion of the legislative tumult that culminated in the passage of Rule 606(b), see MUELLER & KIRKPATRICK, supra note 7, § 245. Rule 606(b) as it appears here was amended in 2006, but this amendment does not affect the analysis in this Note. For brief acknowledgment and comment on this, see Comments of Federal Magistrate Judges Association Rules Committee on Proposed Changes to the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence, 2005 FED.CTS. L. REV. 2.
voluntary testimony on such matters. Rule 606(b) applies to jury sentencing, including capital proceedings.

The rule applies even where one side alleges juror misconduct. It limits testimony about the effect of extraneous information to specifics about the information. The purpose of Rule 606(b) is to promote finality of the jury’s decision and protect the jurors from harassment. The courts have weighed these principles against potential harm to defendants wrought by a poisoned jury. In balancing the two, the Supreme Court of the United States sides with the Rule and not the defendant, save for cases of the plainest injustice.

Though juror testimony as to actual effect has all the veracity of any other testimony, truth-seeking is not always the sole purpose of evidentiary rules. There are tradeoffs involved. Here, the Rules trade accuracy for finality, harassment prevention, and the legal fiction that the jury is perfect, though any commentator will concede that shenanigans probably transpire in every deliberation.

Rule 606(b)’s principle was generated by Lord Mansfield, and was based on the moral principle nemo turpitudinem suam allegans audietur (“no one shall be heard to allege his own turpitude”). Mansfield applied this maxim in a 1785 case where the jurors illicitly reached their verdict by casting lots. The principle eventually trickled across the Atlantic, and into the American reporters. Though the maxim had no basis in American legal precedent, and has been repudiated in other areas of evidence law, it became virtually sacrosanct, and Rule 606(b) retains it to this day.

Some exceptions gradually emerged, however, and they remain as common-law baggage to the current version of the Rule. Attorneys

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78 Courts have even drawn a distinction between a juror testifying that they are not guilty of misconduct, and attempting to impeach their own verdict by that misconduct. 75B AM. JUR. 2D Trial § 1901 (1992 & Supp. 2006) (collecting cases). Even the most liberal courts that have adopted Rule 606(b) permit testimony as to the deliberative process only to prove “objective facts.” Id. at 632 n.3.


80 Harlan II, 109 P.3d 616, 626 (Colo. 2005) (describing the factors that can be considered).

81 Stewart v. Rice, 47 P.3d 316, 322 (Colo. 2002).

82 McDonald v. Pless, 238 U.S. 264, 267–69 (1915).

83 See MUELLER & KIRKPATRICK, supra note 7, at § 247 (citing Sims’ Crane Serv., Inc. v. Ideal Steel Prods. Inc., 800 F.2d 1553, 1556 (11th Cir. 1986)).


85 People v. Hutchinson, 455 P.2d 132, 135 (Cal. 1969) (adopting a liberal view of the rule, but still permitting only evidence of objective facts to impeach a verdict).

86 For an excellent discussion of the remaining historical journey from Mansfield to the modern-day Rule 606(B), see Alison Markovitz, Note, Jury Secrecy During Deliberations, 110 YALE L. J. 1493, 1501–04 (2001) (citing 8 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN THE COMMON LAW § 2352 (3d ed. 1940)).
may examine, for instance, whether the jury saw extraneous evidence during the deliberations, or whether jurors coerced each other such that their verdicts were "not their own." They do so in an evidentiary hearing after one side makes a minimal demonstration that the jury might have had access to extraneous information. However, in both cases, the hearing authorized is a limited one, and must stop short of any probing into the substance of the jurors' deliberations. Courts stop probing potential juror misconduct at the first hint that a juror was not acting improperly. Further, the sentence cannot be disturbed, even when one side shows that a juror misunderstood the instructions. If that juror's verdict "was his own," it will stand. If the hearing proves that the information posed a reasonable likelihood of prejudice to the defendant in the mind of a typical juror, the court will order a new trial.

Rule 606 is silent on several key matters. It presumes that "extrinsic" evidence is improper. And, it leaves open the question of the consequence of extrinsic evidence being before the jury. It does not prescribe a method for courts to determine prejudice to the defendant. Nor does it dictate a particular result if the court finds prejudice. Common law rules fill these doctrinal gaps.

Evidence not admitted into the record is deemed "extraneous." In the early days of the jury system, the jury was expected to be a "self-informing" body, and was "supposed to have sufficient knowledge to try a case in which no evidence on either side was produced in court." But increasing commercial and industrial development dispersed the small, stable communities where everyone knew everyone else. Jurors often found that they lacked first-hand

87 People v. Rudnick, 878 P.2d 16, 21-22 (Colo. Ct. App.1993). But see Ravin v. Gambrell, 788 P.2d 817, 821 (Colo. 1990) ("However important these concepts are, in cases where the result of jury deliberations has been substantially undermined because of fundamental flaws in the deliberative process itself, courts must weigh the force of these policies against the overriding concern that parties to the judicial process be assured of a fair result.").
88 Rudnick, 878 P.2d at 21-22.
91 Karen Abbott, Verdicts in on Juries That Run Their Own Way, ROCKY MOUNTAIN NEWS, Apr. 15, 2005, at 26A (collecting prominent examples of new trials ordered for the presence of extraneous material).
92 In fact, the Federal Rules of Evidence never expressly proscribe a jurors' use of extrinsic information.
94 Edward L. Rubin, Trial By Battle. Trial By Argument., 56 ARK. L. REV. 261, 275
knowledge of the case and the ability to efficiently get it. Courts needed to prevent the jury from investigating on their own. But it would have been impractical to force the parties to educate the jurors about elementary suppositions not specific to the case at hand (water runs downhill, the sun rises in the east, etc.). As such, courts seek mostly to limit "case-specific" facts or opinions not admitted into evidence from being before the jury, rather than background facts or principles courts presume jurors know.

As for the prejudice determination, because Rule 606(b) prohibits juror testimony about actual effects, courts use a typical juror test to determine prejudice. Exposure to extraneous material does not always require a new trial, though extraneous material is usually viewed as presumptively prejudicial. Once this presumption arises, the State bears the burden of rebutting the presumption by showing that the consideration of the evidence was harmless to the defendant. In capital cases, courts that find prejudice to a defendant during the sentencing deliberations will usually reduce the sentence to life imprisonment. But, both the typical juror and "sentence reduction" decisions are common-law concepts that must be made (and can therefore be changed) by common-law courts.

Several recent cases have applied these principles to Biblical extraneous material. In difficult moral decisions like sentencing, one might expect the sentencer to refer to personal moral frameworks. The most likely sort of extraneous information and the sort most likely to muddy the legal waters are religious materials. Though the next section will primarily restrict its discussion to religious examples, the principles discussed apply to any extraneous information in capital cases. As noted above, this Note does not argue that religious or moral sources are in any way not "extrinsic," not "extraneous," or presumptively proper.


Robert Eliot Harlan faced the death penalty for the murder, kidnapping, and rape of casino worker Roberta Maloney and a crippling assault on Maloney’s would-be rescuer Jacque Creazzo. The jury sentenced Harlan to die. The Colorado Supreme Court upheld the sentence. First, the high court made sure that Harlan was the sort of criminal for whom the death penalty was appropriate. The death penalty had to be appropriate “having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed.” Second, the court had to verify that the jury did not impose the death penalty “under the influence of passion, prejudice, or any other arbitrary factor.”

In Harlan I, the Colorado Supreme Court noted that the death penalty was appropriate because Harlan’s crime was “exceptionally brutal” and because the state proved three statutory aggravating factors, which were not sufficiently mitigated by the factors (his remorse and lack of prior criminal record, e.g.) offered in his defense. The court further decided, despite some reservations, that the trial was a fundamentally fair proceeding. Moving to the second portion of the inquiry, the Harlan I court was primarily concerned with racial bias, which it deemed did not undermine the fundamental fairness of the trial because it was adequately handled in voir dire and with rigorous jury instructions.

97 Justice Alex J. Martinez wrote the opinion for a unanimous court. Justice Nathan Bender did not participate. 98 The Harlan II court found the jury’s death sentence appropriate. 109 P.3d 616, 619 (Colo. 2005). 99 COLO. REV. STAT. § 18-1.3-1201(6)(a) (2004). 100 Formerly COLO. REV. STAT. § 16-11-103(5)(d), (g), (j), relocated to COLO. REV. STAT. § 18-1.3-1201(5)(d), (g), (j) (2006). The trial court also noted in mitigation, somewhat incredibly, that Harlan posed no significant threat of violence to others if sentenced to life imprisonment. See Harlan I, 8 P.3d at 495. 101 Harlan I, 8 P.3d at 498–99. 102 The Supreme Court of the United States, in Turner v. Murray, 476 U.S. 28 (1986), has held that, in interracial capital cases, the defendant is entitled to have the jurors apprised of the race of the victim and to be able to question the jurors to root out potential racial bias. Notably, the Colorado Supreme Court in 2000 closed its validation of Harlan’s death sentence by noting that Harlan’s facts were equal if not more gruesome than cases where it had deemed death appropriate. Harlan I, 8 P.3d at 501. (“[T]he defendant raped, kidnapped, assaulted, and killed his victim in an especially brutal way. These facts . . . substantially parallel prior cases in which we have found a death sentence to be appropriate.”) Thus, Harlan I allowed the first part of its inquiry, the appropriateness test, to influence the second part of its inquiry, the arbitrariness test. Because the facts of the case were commensurate with other death penalty cases, the Colorado Supreme Court found a decreased likelihood of actual prejudice and so it upheld the sentence.
After the jury rendered its verdict and sentence, a defense investigator discovered that one of the jurors brought a Bible into the sentencing deliberations. The juror had taken notes on several passages, and read those passages aloud. The passages chosen and read in the jury room seemed, in the trial court’s view, to command the death penalty for murderers. Those passages were: (1) *Leviticus* 24:20-21—“Fracture for fracture, eye for eye, tooth for tooth, as he has caused disfigurement of a man, so shall it be done to him. And whoever kills an animal shall restore it, but whoever kills a man shall be put to death.” (2) *Romans* 13:1—“Let every soul be subject to the governing authorities for there is no authority except from God and the authorities that exist are appointed by God.”

The jury had been sequestered, and ordered not to watch television or read the paper. The jurors were admonished not to venture outside to collect extra factual materials, and the court emphasized that the jury’s freedoms would be restricted so that it could focus on the case at hand.

But no one thought to remove the ubiquitous Gideon’s Bible from their hotel rooms.

The trial court held an evidentiary hearing after finding that the defense sufficiently established that the jury might have used extraneous information. It reduced Harlan’s sentence to life imprisonment, after trying to isolate the passages the jury read, and deciding that there was a “reasonable possibility” that the Biblical passages the trial court thought the jury read “would have influenced a typical juror to reject a life sentence for Harlan.”

The Colorado Supreme Court again reviewed the trial court’s determination. This time, it affirmed the trial court’s decision to

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103 The majority thought that the Romans passage meant jurors were required to impose the death penalty. Justice Rice, in her dissent, notes that this passage simply means that individuals are to follow the governing law of their state, i.e., the four-step process laid out in *Dunlap*. The only way the majority’s reading makes sense is if they supposed the jury thought the passage in *Leviticus* (which does seem to require the death penalty) was a substitute for the death penalty law in Colorado.


105 The judge had placed all of the jurors under a strict gag order, in part because the O.J. Simpson trial was in progress in California.

106 Evidence about the jury’s deliberations was admissible under COLO. R. EVID. 606(b) to show “(1) the presence of improperly introduced extraneous materials; (2) the content of the extraneous information; (3) whether the materials were used by jurors; and (4) whether they were used before the jury reached its verdict.” *Harlan II*, 109 P.3d at 627. Evidence was also admissible regarding “[(5)] the nature of the extraneous information; and [(6)] during which phase of deliberations it was presented.” *Id.* at 629.

107 *Harlan II*, 109 P.3d at 620.
reduce the sentence to life. It again had no problem with the appropriateness of the original death sentence. But, it thought that the presence of the Bible meant the jury handed down the sentence under the influence of an arbitrary factor, and thus reduced the sentence to life imprisonment.

In Wiser, a juror used a dictionary to look up the definition of “burglary,” and the court found misconduct. The judge had given no specific command to the jury against using the dictionary, other than the instruction on the law of burglary to be applied to the defendant’s case. In Wadle, a juror looked up the depression drug Paxil on the Internet, despite the judge’s specific instruction not to use outside reference materials. From these cases, the Harlan II majority derived the rule that “extraneous information is improper for juror consideration whether or not the court specifically warned against its


109 Formerly Colo. Rev. Stat. § 16-11-103(6)(b), relocated to Colo. Rev. Stat. § 18-1.3-1201(6) (2004); Harlan II, 109 P.3d at 620 (“[W]e can no longer say that Harlan’s death sentence was not influenced by passion, prejudice, or some other arbitrary factor.”). This step, rather than remanding to the trial court for a new sentence, is part of the Colorado Supreme Court’s duty under 8A Colo. Rev. Stat. § 16-11-103(7)(b) (Cum. Supp. 1994). The Harlan II Court was not clear whether they viewed the Wiser/Wadle inquiry as a component of their two-step independent review of the death sentence. The court calls it an “additional basis” for their conclusion, though they suggest that the two inquiries are intermingled earlier in the opinion.

The trial court found its guidance from Wiser v. People, 732 P.2d 1139 (Colo. 1987) and People v. Wadle 97 P.3d 932 (Colo. 2004). Interestingly, there is nothing at all to indicate that this test is appropriate or required for capital sentencing; neither Wiser nor Wadle was a death penalty case. The Harlan II majority believed that though Wiser and Wadle dealt specifically with the guilt phase, it was still applicable because the jury in capital cases is required to reach a second “verdict” (the death sentence) and because the stakes are much higher. Harlan II, 109 P.3d at 630. Wiser and Wadle set out a two-part test for confronting extraneous evidence. First, the court decides if the jury used extraneous evidence, and, second, whether this extraneous information created a “reasonable possibility” of prejudice to the defendant in the minds of an “objective juror.” The court gleaned the following factors from Wiser and Wadle as guideposts in this:

(1) How the extraneous information relates to critical issues in the case; (2) How authoritative is the source consulted; (3) whether a juror initiated the search for the extraneous information; (4) whether the information obtained by one juror was brought to the attention of another juror; (5) whether the information was presented before the jury reached a unanimous verdict; and (6) whether the information would be likely to influence a typical juror to the detriment of the defendant. Harlan II, 109 P.3d at 626 (citing Wadle, 97 P.3d at 937; Wiser, 732 P.2d at 1143).

As with the propriety of the two-step test at all, there is no clear mandate to use these six factors. Justice Rice’s dissent points out that the main focus is, overall, whether a reasonable possibility of prejudice to the defendant existed. Harlan II, 109 P.3d at 636 n.8 (Rice & Kourlis, JJ., dissenting); accord McNair v. Campbell, 416 F.3d 1291 1308 (11th Cir. 2005).

110 Wiser, 732 P.2d at 1141.
use . . . where the extraneous information contains legal content . . . and where it contains factual information.”

The court overturned the verdict based on the scraps of testimony Rule 606(b) left for it. The record compiled at the prejudice hearing contained ample testimony of how the information actually affected the jury’s deliberations while sentencing Robert Harlan. But, the court could not consider it under Colorado Evidence Rule 606(b). The court instead concluded that, to a typical juror, the Bible verses posed a reasonable possibility of prejudicing Harlan. Accordingly, the second requirement of the Colorado Supreme Court’s independent review was not satisfied. The majority’s principal fear seemed to be that the jury used the Biblical passages as an extra-judicial code, substituting the Biblical principles it allegedly read for the instructions and evidence presented. Further, the court feared the jury sought refuge in the Biblical passages to unconstitutionally shirk their civic responsibility. But, at the same time, the majority opinion disclaimed any implication that the jurors in this case could not distinguish the jury instructions from the Biblical texts. Harlan’s jurors, by the court’s logic, must have been superior to the typical juror, who could not be expected to make this distinction between the Bible and the jury instructions. Harlan’s jurors testified that they could and that the Biblical passages had no effect. Yet, the court could not take them at their word because of Rule 606(b).

_Harlan II_ highlights two particular problems with the typical juror standard. First, the court will often have to ignore actual testimony controverting their decision on the objective likelihood of prejudice. Five of Harlan’s jurors testified they had not seen the Bible at all. The

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111 _Harlan II_, 109 P.3d at 625.
112 _Id._ at 620 (“The record of the Bible Motion hearing contains much testimony by jurors about the content of their deliberations and whether or not the Bible passages actually affected the verdict. Rule 606(b) prevents us from considering this testimony.”).
113 _Id._ at 620 (upholding trial court’s determination that “there was a reasonable possibility that use of the Bible in the jury room to demonstrate a requirement of the death penalty for the crime of murder would have influenced a typical juror to reject a life sentence for Harlan.”).
114 The second step of the Supreme Court’s mandated independent review under COLO. REV. STAT. § 18-11-103.6(b) corresponds with the fourth step of the jury’s sentencing sequence under _People v. Dunlap_, 975 P.2d 723, 736 (Colo. 1999).
115 _Harlan II_, 109 P.3d at 630.
116 _Id._ at 631. The Constitution requires state courts to overturn death sentences when the jury believes that the responsibility for decision does not rest with them. Caldwell _v._ Mississippi, 472 U.S. 320, 328–29 (1985); see also _McNair v. Campbell_, 416 F.3d 1291, 1308 (11th Cir. 2005) (rejecting challenge based on extraneous information where information encouraged jurors to take their responsibilities seriously).
117 _Harlan II_, 109 P.3d at 631 (“[W]e do not suggest that the jurors who served in this case were unable to distinguish between religious and state law.”).
Harlan II court discredited their testimony because they refused to speak with the defense investigator initially. In addition, one of the jurors was specifically asked about the “eye for an eye” passage in Leviticus, and noted that, though religious, he did not follow that stern Old Testament edict, but instead, attempted to be fair in all that he did. The juror who brought the Bible into the jury room, Ms. Eaton-Ochoa, testified that she showed the passage in Romans to another juror, Cordova, simply to point out that the Bible says “obey the law of the land.”

Second, the court may have trouble isolating the passages the jury read. The trial court was unable to completely delimit during the evidentiary hearing the passages the jury read. It expressed concern over a passage suggesting jurors should deputize themselves to the government as agents of “wrath to bring punishment to the wrongdoer.” This passage is found in Romans 13:4. The trial record contained no reference to this passage.

The majority’s disclaimer notwithstanding, the dissent accused it of sacrificing substance for form. It accused the majority of splitting legal hairs, resting their opinion on a distinction between written and unwritten Biblical material. The dissent pointed out that Harlan II’s rule is that jurors must use their moral scruples in sentencing, so long as they do not need the assistance of the texts from which those scruples derive.
But, evidence rules, like all rules, must split hairs and draw lines, and those lines all contain some element of arbitrariness. The law’s drawing of lines should only draw judicial ire when it does not do so optimally. In the case of extraneous evidence, drawing the “written/non-written” distinction is both a rule of convenience and a relic of times when the fact that few could read or write meant written extrinsic evidence was especially dangerous—those jurors who could read could impose their own interpretation on the remainder of the jury and command essentially total respect from those who could not read.

To avoid such hair splitting, and assuming governing law allowed it, the Colorado Supreme Court could have chosen two other options: allowing both written and intangible “moral” material in the jury room (which would raise serious issues because it would be difficult to divide the world into “moral” and “non-moral” sources), or banning both. Other courts have held that religious discussion during capital jury proceedings is proper and even “not . . . surprising.”

Even the most ambitious attackers of religious material in capital sentencing do not seek to ban all religious discussions from jury deliberations. Thus, the line between written and non-written, while perhaps arbitrary, is likewise proper.

Deeming a source extraneous does not end the inquiry. Courts must assess whether the extraneous evidence prejudiced the defendant. On their second look, the Colorado Supreme Court did not consider the weight of the state’s case against Robert Harlan as it did the first time. In 2000, the court placated its fears of arbitrary jury action (and allegations of racial prejudice) with the overwhelming propriety of the sentence. After evidence of extraneous information came out, the appropriateness of the sentence was not enough. Other courts have agreed that prejudice from extraneous information depends in part on the weight of the state’s case and the “totality of the circumstances.” The amount of time the jury deliberates is one


\[\text{126} \text{ Ashley, supra note 15 at 158 n.188 (noting that the author “stop[s] short of advocating that jury instructions must always and necessarily entail proscriptions against religion”). The Harlan II dissent spoke to this point directly, 109 P.3d at 636 (Rice & Kourlis, JJ., dissenting).}\]

\[\text{127} \text{ McNair v. Campbell, 416 F.3d 1291, 1307–08 (11th Cir. 2005); Miller v. United States, 135 F.3d 1254, 1256 (8th Cir. 1998); U.S. v. Williams-Davis, 90 F.3d 490, 501 (D.C. Cir. 1996).}\]
measure of this. Harlan’s jury convened for only parts of two days, suggesting that the state’s case was very persuasive.

As noted above, this Note does not fault Harlan II’s analysis of “extraneous-ness.” Instead, this Note does take issue with the way the court assessed prejudice. An actual effect test would strike a better balance between the interests involved—a defendant’s fair trial rights and the state’s interest in upholding the integrity of the jury system. Courts could avoid the pitfalls described above in Harlan’s case, and reap the benefits described below. The next section begins with a comparative example, discusses more of the merits of the typical and actual juror tests, and then proposes a few solution options.

II. SOLUTIONS & ANALYSIS

A. Using an Actual Effect Test

The following section describes benefits courts could obtain from using an actual effect test. It will contrast the typical juror standard with the actual effect test.

An actual effect analysis would proceed as follows. The initial stages mirror the typical juror test. If defendants believe the jury used extraneous information, they file a motion to vacate the death sentence with the trial court. If the trial court thinks the motion has merit, it should hold a hearing and allow questioning of the jurors on what extraneous information, if any, they used. As before, the

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129 See People v. Rudnick, 878 P.2d 16, 22 (Colo. App.1993) (pointing to short deliberation time as evidence that juror pressure was minimal).

130 See, e.g., McNair, 416 F.3d at 1307-08 (noting that the strength of the case is relevant to introduction of extrinsic evidence). By contrast, “lengthy deliberations suggest a difficult case.” United States v. Velarde-Gomez, 269 F. 3d 1025, 1036 (9th Cir. 2001) (four-day deliberations).

131 Consider also Harlan’s situation, but in reverse. This occurred in the Utah case of State v. Demille, 756 P.2d 81, 84 (Utah 1988). Utah’s Supreme Court upheld a murder conviction despite a juror’s testimony that she convicted solely because her prayer for a sign was answered. Id. at 83 (“She claimed to have received a revelation that if defense counsel did not make eye contact with her when he presented his argument, DeMille was guilty—defense counsel did not make the requisite eye contact.”). The defendant contended that the juror sharing her epiphany to her fellow jurors constituted prejudicial “outside influence.” The court disagreed, and held that sharing religious beliefs and “signs” was “certainly not an illegitimate inter-juror dynamic,” and that Rule 606(b), to be construed narrowly, prevented inquiry any further. Id. at 84-85. Thus, the court did not test “actual influence,” despite clear evidence of illicit “substitution” of the divine for the secular.

132 When deciding whether to hold an evidentiary hearing, the court should “consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source.” United States v. Brande, 329 F.3d 1173, 1176-77 (9th Cir. 2003) (quoting United States v. Angulo, 4 F.3d 843, 847 (9th Cir. 1993)). The party attempting to show juror misconduct must merely make a “colorable claim,” United States v. Herndon, 156 F.3d 629, 635
defendant would have to first make a threshold showing of misconduct, usually contained in a motion for a new trial. Then, states could make their choice as to who bears the burden of showing prejudice.\(133\) Also, the state would need to consider the standard of persuasion. It would likely be "beyond a reasonable doubt" if the prosecution bore the burden,\(134\) and "by a preponderance of the evidence" if the defense bore the burden.\(135\)

Meeting this burden would require showing that at least one juror voted for death because of ("but-for") the extraneous information. If the burden were on the defendant to show prejudice, one juror would suffice because a unanimous jury recommendation is required to impose the death penalty.\(136\) Similarly, if the prosecution bore the burden, they would have to show that no juror was actually affected by the illicit evidence.

The parties may desire to treat the jurors like traditional witnesses and impeach them for credibility. Each state could handle this contingency as it now does under the "reasonable likelihood of prejudice" evidentiary hearings. The states should consider several factors. Would the use of extrinsic evidence (i.e., other witnesses)

\(133\) The state's decision would be subject to federal constitutional guarantees. However, the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that any fact that could potentially increase the penalty or sentence of a defendant must be proved by the prosecution beyond a reasonable doubt, would not be implicated. There is no point of increase beyond death.

\(134\) See, e.g., United States v. Prime, 431 F.3d 1147, 1157 (9th Cir. 2005) (citing Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir. 1988)); United States v. Williams, 809 F.2d 75, 80–81 n.2 (1st Cir. 1986).

\(135\) Few cases discuss who bears the burden in prejudice hearings. In Harlan II, the Supreme Court of Colorado made no mention of which party bears the burden. At the federal level, the prosecution generally bears the burden. See, e.g., Prime, 431 F.3d at 1157; United States v. Ortiz, 393 F.3d 540, 549 (5th Cir. 2004); Williams, 809 F.2d at 80–81 n.2. However, some state courts, including Colorado, have held that the defendant bears the burden. Harper v. People, 817 P.2d 77, 81 (Colo. 1991) (defendant bears the burden of showing a reasonable likelihood of prejudice from the juror misconduct).

\(136\) Mills v. Maryland, 486 U.S. 367 (1988). Florida is the lone exception to this rule. The Florida Supreme Court refuses to entertain challenges to Florida's death penalty statutes, which do not require a unanimous recommendation of death for death to be imposed. See, e.g., Delgado v. State, 948 So. 2d 681, 686 (Fla. 2006) ("In addition, we have repeatedly rejected Ring [sic] claims similar to Delgado's [premised on the theory that non-unanimous death recommendations violate the Sixth Amendment as understood in Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi, 530 U.S. 466] and deny [the] claim without further discussion."); see also Fla. Stat. § 921.141 (2006) (setting out Florida's death penalty procedure, where the judge makes a recommendation to the judge and the judge decides whether to impose death). Thus, in Florida, for a defendant to have been actually prejudiced, it would have to be shown not only that the judge's decision depended on the recommendation of the jury, but also that if the affected jurors had not been exposed to extraneous information, they would have recommended life.
waste time? Prohibitions on extrinsic evidence usually stem from a desire to save time. Nevertheless, capital courts are willing to take their time. Delay does not excuse incomplete truth-seeking. What would impeachment of a testifying juror look like? It would be especially difficult to impeach a juror’s conclusions about extraneous Biblical information. To do so, one side might call an expert to testify as to the meaning of a specific Biblical passage. But a central theme of this Note has been that different jurors can draw different inferences from such information, and that each juror’s testimony about their personal deliberations should be given great weight. However, it might be important to the judge (who must weigh each juror’s credibility) to know what the generally accepted theories of interpretation for a particular source are, or at least the competing and most common theories. The Federal Rules (and their analogs in the states) provide the authority for the judge to call expert witnesses for assistance in this regard, and it might be relevant on the credibility of each juror’s testimony about the effect of extraneous information. These would be policy judgments each state would have to make.

Judges can still proscribe specific sources (like medical texts or dictionaries or Bibles). Even without specific proscribing instructions, courts do not allow juries to consult extra-record evidence during deliberations. But, the judge must still decide what to do when the jury disobeys. The judge can decide whether the error was harmless or prejudicial, or can presume prejudice. This Note will deal with both choices. It will conclude that the first inquiry is the appropriate one, and that an actual effect test is the proper means to effectuate it.

1. The Perils of Objectivity

Though widely used in capital review and elsewhere for their analytical convenience, objective tests like the typical juror test are

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137 See Fed. R. Evid. 608(b) (prohibiting proof by extrinsic evidence of specific acts of untruthful conduct to impeach a witness).

138 This is another instance where this Note’s force peaks in Biblical information cases.

139 See Fed. R. Evid. 614(a) (“The court may ... call witnesses.”); Fed. R. Evid. 706(a) (“The court may ... appoint expert witnesses of its own selection.”).

140 Capital reviewing courts apply objective tests to various portions of capital sentencing. For instance, in the Strickland test for ineffective assistance of counsel, once defendants show their attorney fell below the standard of a reasonable attorney and that this created an objectively “reasonable possibility” of prejudice, they may obtain post-conviction relief. Strickland v. Washington, 466 U.S. 668, 687, 692 (1984). Courts review capital jury instructions on aggravating and mitigating circumstances for whether they could have been applied by a reasonable juror in an unconstitutional way. Mills 486 U.S. 367. Interestingly, the Mills court left open the question of what it would do if the trial or subsequent hearings adduced extrinsic evidence demonstrating that the jury did not actually apply the instructions in an
not panaceas. Objectivity trades convenience and ease of proof for accuracy. The typical juror test (an objective test) assumes that the trial court will be able to identify, isolate, and characterize extraneous information that the jury read, and then determine how it affected the typical juror.\(^\text{141}\) For extraneous material arguably brought in to assist the independent moral assessment, the problem of identification becomes acute. It is easier to determine whether a juror could draw prejudicial inferences from the definition of burglary than from the Bible. For instance, Biblical passages, when removed from their surrounding context, are malleable both to condemn or to acquit.\(^\text{142}\) This reality explodes the idea that a court can say whether or not a particular passage prejudiced a typical juror since it is unclear what particular moral inference a typical juror would draw.\(^\text{143}\)

unconstitutional way: "There is, of course, no extrinsic evidence of what the jury in this case actually thought... Our reading of those parts of the record leads us to conclude that there is at least a substantial risk that the jury was misinformed." \(\text{Id. at 381 (emphasis added).}^\text{1d}\) Objective legal proofs assist courts in efficiently resolving legal disputes, though they rest on the legal fiction of the "reasonable actor." Courts use objective tests in the following circumstances, among others: (1) When individual perspective is unimportant. In criminal law, because subjective mental state dictates culpability, a subjective test is employed. Enmund v. Florida, 458 U.S. 782 (1982). (2) Where the danger of untraceable idiosyncrasies is especially pressing (probably a big reason for the employment of an objective test as in \(\text{Wiser and Wadle).}^\text{14}\) [A]n objective test was preferable to a subjective test in part because it does not place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question." Yarborough v. Alvarado, 541 U.S. 652, 662 (2004) (citations omitted) (internal quotation marks omitted) (discussing the test for whether a suspect has been taken into "custody" during a traffic stop by police). Although arguably capital sentencing is such a situation, voir dire and strict instructions are likely sufficient to root out insidious bias. (3) When requiring a person to testify in open court seems particularly (if vaguely) distasteful. Morgan v. United States, 298 U.S. 468, 480–81 (1936) (highlighting the administrative law concept of granting substantial deference to the agency head on whether the head actually "heard" the evidence before making the final decision in an administrative adjudication because an evidentiary hearing would be required and the agency head would have to be deposed to testify as to his state of mind). This deference is so great that reviewing courts, in effect, require only objective proof that the agency head considered the record below in good faith. (4) When mutual understanding is required; (5) When courts fear a "flood of litigation," and problems of proof. Lonchar v. Thomas, 517 U.S. 314, 331–32 (1996) (noting that inquiry into the subjective motives of a habeas petitioner creates unneeded complexity and is often unanswerable); Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972) (discussing the problems of a subjective test for causation in informed consent to medical treatment decisions). Most of these dangers recede for jurors, strengthening the case for applying "actual effect" analysis.

\(^{141}\) Courts are typically comfortable with determining the behavior of fictional personifications (e.g., musing on the reasonable man in tort law). But, in the case of a legal personification (the typical juror) charged with making an idiosyncratic, personal decision about the life or death of another, they should instead paint the typical juror with the brush of an actual juror's testimony.

\(^{142}\) History demonstrates this—individuals making misguided defenses of the Crusades and slavery in America come to mind.

\(^{143}\) Ashley, \textit{supra} note 15, at 152 (quoting a juror’s statement that she and her fellow jurors felt compelled to pray for the defendant). In \textit{Lenz v. True}, 370 F. Supp. 2d 446 (W.D. Va. 2005), a district court dismissed the defendant’s habeas petition appealing his death sentence because
courts do not even care whether the inference is reasonable. Its courts ask instead whether a typical juror (rather than a reasonable juror) would draw a prejudicial inference.

When the court examines extraneous material seeking a typical juror’s inference, and that material is religious, the court casts itself in the role of religious interpreter. The court’s typical juror net scoops up some cases and vacates the jury’s sentence when extraneous information had no actual effect. But in other cases, the court concludes that the passages it thinks the jury actually read would not bias a typical juror in favor of death. It then upholds a death sentence, even if scrutiny would reveal jury misconduct. To be clear, the court might not think a particular passage would bias typical jurors, when it actually biased the real jurors in the case. This could result in the either of two types of appellate error—mistaken condemnation (death sentence or conviction at the trial stage) or mistaken reprieve (life sentence or acquittal at the trial stage. While mistaken condemnation is obviously the more troubling of the two, important societal interests also attend known mistaken reprieves.

2. The Merits of Actual Effect Analysis

But, why make the change? Any change in longstanding legal doctrine requires justification. New exceptions require proof that they will not swallow the rule to which they apply. This Note’s thesis is that because of the unique nature of capital cases and the heightened scrutiny they demand, the benefits of using an actual effect test outweigh the burdens.

he could not prove which verses of the Bible the jury read. It upheld the Virginia Supreme Court’s determination that the Biblical passages did not raise an inference of prejudice under Remmer v. United States, 347 U.S. 227 (1954). Id.

144 People v. Wadle, 97 P.3d 932, 937 (Colo. 2004) ("[T]he objective test is concerned with typicality, not objective reasonableness.").

145 See, e.g., COYNE & ENTZEROTH, supra note 48, at 706 n.4 (quoting John Adams’s discussion of the danger of mistaken conviction in closing arguments during the trial of the British soldiers who killed Crispus Attucks and others at the Boston Massacre, where he represented the soldiers: "[I]t is of more importance to [the] community that innocence should be protected than it is that guilty should be punished. . . . when innocence itself is brought to the bar and condemned, especially to die, the subject will exclaim, 'It is immaterial to me whether I behave well or ill, for virtue itself is no security.' And if such a sentiment as this should take place in the mind of the subject there would be an end to all security whatsoever.").

146 For a discussion of these societal interests, see Thomas M. DiBiagio, Judicial Equity: An Argument for Post-Aquittal Retrial when the Judicial Process is Fundamentally Defective, 46 CATH. U. L. REV. 77, 102 (1996).
i. Actual effect review provides closer scrutiny when it is needed most—in capital cases

Capital juries enjoy more discretion than typical criminal juries and sentencing judges. As discussed above, decisions in capital cases at all stages are subject to heightened scrutiny relative to regular criminal cases. This, along with the gravity of the capital juror’s decision, makes recent empirical studies showing that the selection process biases capital jurors in favor of both conviction and death quite troubling. In addition, it was the fear of unchecked discretion and bias that motivated the court in Furman v. Georgia to fell the U.S. death penalty system. A hearing to test the actual effect of extraneous information would help uncover that bias through the window of “spillover” from the actual effect test. Although the hearing would only be triggered by extraneous information and thus wouldn’t be available to all capital defendants, it would ensure that, when a juror errs, reviewing courts expose a juror’s errors to maximum scrutiny. The jury’s collective power and each juror’s lack of obligation to explain their collective sentence mean that the jurors themselves should testify when the court finds irregularities in their sentence. Capital cases demand no less.

Critics of this approach will contend that it is merely a way to railroad defendants because it arguably requires a higher standard for defendants to prove bias. But, it may also benefit defendants. Rather than railroading them, it may save their lives. Suppose a defendant is convicted and the jury references extraneous Biblical passages. A reviewing court could determine that the extraneous passages were not “reasonably prejudicial,” to a typical juror, when an actual juror voted for death because it thought the passage commanded it. Under the Wiser/Wadle typical juror standard, a reviewing court would uphold the biased sentence.

149 See Luginbuhl & Middendorf, supra note 42 (showing that death-qualified jurors are more likely to convict); Allen, Mabry, & McKelton, supra note 45. However, as the authors point out, their studies do not, and likely cannot account for the group interaction that occurs in jury deliberations. Id. at 724. Opponents of the death penalty claim that the command in Wainwright v. Witt, 469 U.S. 412 (1985) that capital jurors be “death-qualified” (i.e. state that they would potentially vote for the death penalty) prejudices the process against defendants.
Actual effect review accounts for the court's inability to accurately
determine what a typical juror would infer from a passage, especially
when the juror uses the passage for moral guidance

Different courts have reached different conclusions about the
prejudice of the same Biblical passage. One of the passages at issue in
Harlan II was Romans 13:1. The court thought that the passage would
coerce jurors to vote for death. By its terms, the passage simply
commands obedience to civil authority. Harlan's trial court could not
escape considering the passage in its context during the evidentiary
hearing. The court's analysis included passages that the jury did not
read.\footnote{151}

Yet in Fields v. Brown, the Ninth Circuit reviewed a case where
the jurors read precisely the same passage from Romans and an
equivalent passage from Leviticus.\footnote{152} Indeed, in Fields the miscreant
juror was the foreman, someone charismatic enough to persuade the
other jurors to appoint him to that post. Yet, the court found no
prejudice.\footnote{153} The court held that the passages were "common
knowledge," and reasoned that the words were part of the body of
knowledge that a typical juror would possess.

Courts may struggle to interpret extraneous information and tease
out the typical juror's inference on any piece of extraneous
information. This difficulty increases with the "moral-ness" of the
information. Indeed, both the Old Testament and the New Testament
in particular are replete with passages demonstrating both God's
mercy (and his command for his followers to do the same), and of
examples of His wrath.\footnote{154} Fields and Harlan II illustrate this
difficulty.\footnote{155} Under the typical juror test, then, reviewing courts might

\footnote{151}Harlan II, 109 P.3d 616, 635 (Colo. 2005) (Rice & Kourlis, JJ., dissenting). Also, as
noted above, while jurors can testify about what passages they read under the current version of
Rule 606(b) and under the typical juror, if courts admit more of their testimony, they are less
likely to exclude relevant testimony on what was read or discussed and less likely to commit
this type of error.

\footnote{152}431 F.3d 1186, 1207 (9th Cir. 2005). The jury foreman made a "pro/con" list about
whether the jury should impose death that included this item on the "pro"[-death] side. \emph{Id}.

\footnote{153}The Fields jury committed a more severe series of crimes than the Harlan jury, though
the court does not mention this fact in their analysis of the prejudice wrought by the Bible
verses.

\footnote{154}Beggs, supra note 16, at 160–61 (detailing three such examples—Numbers 35:6, 16–28
(the City of Refuge for criminals); Genesis 19:15–16 (Lot and the destruction of Sodom and
Gomorrah); and Exodus 32:1–14 (the Golden Calf)). For a good discussion of Christian views
(1996).

\footnote{155}One implicit assumption of this argument is that "typical jurors" in Colorado and
improperly uphold a sentence. As discussed above, the court might find a passage not prejudicial when jurors actually drew prejudicial inferences.\textsuperscript{156}

\textit{iii. Actual effect review accounts for the fact that the parties are most likely to put Biblical passages “at issue” during capital sentencing}

When the court tells jurors to make an independent moral assessment, jurors likely respond with confusion. They are supposed to make a judgment about a defendant who may have just quoted at length about Biblical commands for mercy in his allocution statement. They likely just heard repeated character evidence about whatever ties to Christianity or some other religion the defense can show. The court both restricts them to the information in the record and instructs them to view that record in light of their background. The temptation to indulge in extraneous moral inquiry and commentary can prove too tempting for judges,\textsuperscript{157} and no less so for jurors. The same Bible verses appear with regularity. During Harlan’s voir dire, a defense attorney presciently questioned one of the jurors about the very Leviticus passage the jury ultimately read and discussed.\textsuperscript{158} Of course, this, like the remainder of evidence the defense adduced during prejudice hearings, escaped the \textit{Harlan II} court’s review thanks to Rule 606(b).

In \textit{Harlan II}, the prosecution argued that Harlan’s attorneys put religion at issue by comparing Abraham and Isaac to the relationship of Robert Harlan with his father and making extensive religious references.\textsuperscript{159} The \textit{Harlan II} court thought the defense counsel’s

\textsuperscript{156}To be sure, under the actual effect test, two trial judges might reach opposite conclusion about prejudice, as the courts in \textit{Fields} and \textit{Harlan II} did. But still, in capital cases, since this error is an unavoidable consequence of an imperfect legal system, it should come based on the interpretation of the jury’s testimony, and not from the differing dispositions of two judges musing about hypothetical effects. However, the capital regime evinces a bias for the jury as a decision-maker, which should be followed here.

\textsuperscript{157}See, e.g., Arnett v. Jackson, 393 F.3d 681 (6th Cir. 2005), \textit{reh’g en banc denied}, No. 03-4375, 2005 U.S. App. LEXIS 6618 (6th Cir. Apr. 6, 2005) (upholding a 51-year sentence for a child molester though the judge cited a passage from the Book of Matthew at sentencing).

\textsuperscript{158}\textit{Harlan II}, 109 P.3d 616, 634, 637 (Colo. 2005) (Rice & Kourlis, JJ., dissenting). The juror, who ultimately was impaneled, noted he \textit{didn’t subscribe} to the “eye for an eye” approach supported by the Leviticus passage, as noted above.

\textsuperscript{159}\textit{Genesis} 22. God wanted to test Abraham’s faith. God ordered Abraham to take his son Isaac up a mountain and offer him as a sacrifice to God. When he saw Abraham’s faith, God provided a ram for Abraham to slaughter and sacrifice as a burnt offering instead. Sacrificing Isaac would have been incredibly difficult for Abraham—Isaac’s birth was totally unexpected (Abraham and his wife were very old, so old that Abraham’s wife is said to have burst into
closing statement was a "legitimate plea for mercy," and not an invitation to the jury to bring in the Bible during sentencing.\textsuperscript{60}

Other courts have also dismissed this "invited error" argument. In \textit{State v. Haselden}, the North Carolina Supreme Court held that a prosecutor's Biblical references in anticipation of defense closing argument were proper because either side could use the Bible to argue in favor of mercy or retribution.\textsuperscript{61} Granted, the danger of "substitution" of these Biblical precepts for secular law is lower for closing arguments than for extraneous materials during jury deliberations because the intrusion of Biblical material during deliberations is simply closer (chronologically) to the point of decision.\textsuperscript{62}

The two dissenting justices in \textit{Haselden} chastised the majority for not enforcing North Carolina's rule "discourag[ing]" the use of religious arguments because their use is "distracting," and leading to an endless arms race of "ecclesiastical artillery."\textsuperscript{63} They also noted widespread criticism of religious argument at the federal level, but even then would not totally preclude religious argument, and argued for an actual effect standard like the one proposed here:

\begin{quote}
[T]here is a place for religious and moral arguments in our jurisprudence. However, in order to give guidance to litigants and judges, this Court should hold that any argument that essentially asks a jury to base its decision on moral or religious grounds instead of on the law and the evidence is improper and grounds for reversal.\textsuperscript{64}
\end{quote}

The \textit{Haselden} dissent pointed out that the prosecutor asked the jury to substitute Biblical precepts for the law of the case by saying in closing argument that both the Biblical passage and North Carolina

\footnotesize
\begin{itemize}
\item laughte when she heard the news), and Abraham treasured him. \textit{Genesis 21}. The defense thus compared Harlan's father, a retired police detective, to Abraham, because he turned in incriminating evidence to the police. \textit{Harlan II}, 109 P.3d at 633.
\item \textit{Harlan II}, 109 P.3d at 632. Or, the problem could be solved by also allowing the prosecution to comment on the Biblical references.
\item \textit{State v. Haselden}, 577 S.E.2d 594, 615 (N.C. 2003) (Brady & Lake, JJ., concurring) ("Therefore, arbitrarily eliminating only one category of argument would unfairly limit the ability of prosecutors to communicate to the jury that the ultimate punishment of death is sometimes appropriate. Likewise, such a standard would unfairly limit the ability of defense counsel to persuade the jury to spare the defendant's life.").
\item Also, if the references occur during closing, the opposition can give a meaningful (if only oratorical) adversarial response. In the jury room, this of course cannot happen.
\item \textit{Id.} at 616--17 (Edmunds & Orr, JJ., dissenting).
\item \textit{Id.} at 617 (Edmunds & Orr, JJ., dissenting).
\end{itemize}
law were "statutes of judgment."\textsuperscript{165} Both sides' interpretations affirm a key premise of this Note—that the presence of the Bible or the presence of religious arguments alone do not \textit{ipso facto} prejudice a defendant. Courts should still hold a prejudice hearing where prejudice gets determined by listening to the testimony of the jurors as to the actual effect of the extraneous materials on their deliberation. Further, the Supreme Court of the United States has frequently and consistently held that all juries are supposed to reflect the moral sensibilities of the community, and that capital jurors must individually make a moral assessment of the defendant.\textsuperscript{166} Because both sides usually offer evidence about religion, the court should be willing to look closer to see if the jury was in fact biased by this evidence.

\textit{iv. Actual effect review reduces arbitrariness}

Supreme Court jurisprudence on the death penalty is a mess.\textsuperscript{167} (This should be apparent from the foregoing discussion, which sketches only the tip of the iceberg.) But one clear aim emerges from it: rooting out arbitrariness.\textsuperscript{168} Whenever the Supreme Court must pick between two procedural alternatives, it prefers the one that reduces (even if it does not eradicate) arbitrariness.

What is an "arbitrary" result? In the law, it is usually understood to mean treating two material equals differently for an immaterial

\textsuperscript{165} Id. at 617–18 (Edmunds & Orr, JJ., dissenting) (pointing out that the prosecutor told the jury: "North Carolina Statute 15A-2000 is a statute of judgment . . . And what does it say in the Bible about a statute of judgment? A statute of judgment unto you throughout your generations and all your dwellings. Whosoever killeth any person, the murderer shall be put to the death by the mouth of witnesses.").

\textsuperscript{166} Spaziano v. Florida, 468 U.S. 447, 461–62 (1984) (rejecting petitioner's argument that the death penalty must be issued by the jury, but noting that juries are supposed to express the moral voice of the community); cf. Taylor v. Louisiana, 419 U.S. 522, 529–30 (1975) (quoting H.R. REP. NO. 1076, at 8 (1968)) ("It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it.").


\textsuperscript{168} See Gregg v. Georgia, 428 U.S. 153, 221–26 (1976) (plurality opinion) (White & Rehnquist, JJ., Burger, C.J., concurring) (holding that procedures that substantially reduce the risk of arbitrariness meet the Eighth Amendment's terms); Janet C. Hoeffel, \textit{Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases}, 46 B.C. L. REV. 771, 772 (2005) (arguing that the decision in \textit{Gregg} was incorrect, but noting that \textit{Gregg} cements a preference for those procedures that most substantially reduce arbitrariness).
reason, an incorrect reason, or no reason at all.\textsuperscript{169} A result can also be arbitrary if two polar opposites are treated as their respective polar opposite (e.g., giving innocents the death penalty and allowing serial killers to live).

For an example of this second sort, consider two adjacent capital courtrooms, with defendants in identical circumstances. Both defendants receive a death sentence. The defendant in Courtroom 1 awaits execution. However, the jury in Courtroom 2 consults the Bible during deliberations, and the judge determines it posed a reasonable likelihood of prejudice to a typical juror. The jury might actually have been prejudiced by the presence of the Biblical text. In this case, the result would not have been arbitrary. The defendant in Courtroom 2 was denied a fair sentence. However, the jury might not have been prejudiced, and this result would be arbitrary—the defendant in Courtroom 1 would be treated differently from Courtroom 2 for an immaterial reason. If a judge could use actual juror testimony about the effect of the extraneous information on their deliberations, it would decrease the likelihood of this result. Thus, it would yield less arbitrariness than the typical juror standard, and is constitutionally preferred.\textsuperscript{170}

\textbf{v. When a capital sentence is vacated on questionable grounds, political uproar threatens judicial legitimacy}

The typical juror standard reflects a desire for jury secrecy.\textsuperscript{171} The argument is that the public does not want to know what actually transpires in deliberations, because it will undermine the public confidence that legitimizes government.\textsuperscript{172} But, when courts hypothesize about typical citizens without using actual testimony when it is available in the high-stakes realm of death penalty cases, societal uproar may ensue that may itself threaten judicial legitimacy.\textsuperscript{173} This is especially true in capital cases, where the crimes

\textsuperscript{169} See Hoeffel, supra note 168, at 789–90. Substantive law sets what counts as “material.” For instance, state statutes define what makes one capital defendant materially different from others—statutorily defined aggravating factors.

\textsuperscript{170} See id at 803 (collecting cases showing that “lower courts have rejected testimony that, if allowed, would have shown that a juror arbitrarily imposed death”).

\textsuperscript{171} This goal is implemented by, for example, Rule 606(b). See infra. Part III(B)

\textsuperscript{172} See Hoeffel, supra note 168, at 813 (noting that this argument depends on the assumption (in the author’s view, an erroneous one) that the public would rather have wrongs swept under the rug than brought to light).

\textsuperscript{173} See generally GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); see also Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) (“The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the judiciary as fit to determine what
are often quite grisly. After all, governmental institutions derive their legitimacy from public support. One role for the jury is to connect the public to the administration of justice. Whenever courts upset this, they risk political reprisal. This can come in many forms, the most obvious being legislative action.\(174\) In Robert Harlan's case, the decision catalyzed Colorado Senate Concurrent Resolution 8, a proposal sponsored by Republican state senator Doug Lamborn.\(175\) The Resolution proposed a constitutional amendment to make judges removable by the same procedures (petitions and special elections) as Colorado state legislators.\(176\) The bill died in committee, but local commentators suggested that the issue will appear again.\(177\) The danger grows when courts ignore actual evidence from the jurors. Capital cases add still more tension because the public cares more about the sentence.\(178\) At the very least, judges might deflect some of this criticism by noting that they decided whether extraneous information (particularly in the case of the Bible, near to the hearts of many citizens) prejudiced the defendant subjectively, based on the testimony of those called to pass judgment upon him.

Finally, all states have an interest in seeing the work and civic responsibility they assign its jurors granted respect. Capital jurors bear a weightier burden than non-capital jurors. They make an unquestionably "awesome" decision—whether to take another human's life.\(179\) But, when the jury's requirements remain shrouded in mystery and uncertainty even to some Supreme Court Justices, it is fair to say that society can expect little better of jurors instructed to rigidly obey aggravating circumstances and then postulate any number of mitigating factors and balance them in a moral way.\(180\)

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\(176\) Id.


\(178\) This was certainly true in Robert Harlan's case. The Supreme Court decision sparked a flurry of letters to the editor, and columns in local newspapers. See, e.g., Felix Doligosa, Jr., Life term for Harlan; Notorious Killer was Spared Death by State High Court, ROCKY MOUNTAIN NEWS, December 20, 2005, at A29; Michael Ortiz, Letter to the Editor, ROCKY MOUNTAIN NEWS, July 13, 2005, at A48; David Harsanyi, When the Good Book's A Bad Thing, DENVER POST, March 31, 2005, at B1; Diane Carman, Schiavo Case, Bible Ruling, Rape Bill Cook Up Feast of Irony, THE DENVER POST, March 31, 2005, at B5.

\(179\) Caldwell v. Mississippi, 472 U.S. 320, 324 (1985) (quoting the defense's argument against the imposition of the death penalty on the defendant).

Arguably, the jury will be more sensitive to the facts of the case and their emotional impact—this connection with community emotions and morals is why it (and not a judge) is used in most trials. Courts should be willing to listen to jurors’ testimony about the substance of their deliberations to see if an error they made was fatal to their decision. If the decision is vested with the jury because it is better than a judge at making moral assessments, then the judges of a reviewing court should be reluctant to overturn its sentence absent evidence from the actual jurors that something legally impermissible substantively interfered with their individual moral judgments.

Indeed, the Constitution now all but precludes judges from exercising the jury’s role in capital cases. If the decision is vested with the jury because it is better than a judge at making moral assessments, then the judges of a reviewing court should be reluctant to overturn its sentence absent evidence from the actual jurors that something legally impermissible substantively interfered with their individual moral judgments.

On this score, reviewing courts should obtain jury testimony as to actual effect for precisely the same reasons they require reasoned decision-making from administrative agencies—wide latitude in decision-making and a relative absence of checks and balances. To be sure, capital proceedings feature many “checks and balances.” See supra Part II(B). Yet, on the particular balancing between aggravating and mitigating circumstances, there are relatively few limits on the jury’s discretion. But cf. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), abrogated by Califano v. Sanders, 430 U.S. 99 (1977) (remanding a dispute over agency action to the district court because the agency head had not clearly stated the basis for his decision, and leaving open the possibility that the agency head could be called to testify). Similarly, because governments that choose to allow juries to sentence defendants to death grant them so much responsibility, courts should be loath to overturn that sentence absent evidence of an actual negative effect of extraneous evidence on the death sentence. The words of some prominent commentators on administrative law apply, if only by analogy: “The existence of this substantial discretion within agencies explains in part another set of concerns that motivates courts . . . Where discretion exists, there is always the potential for its abuse. This danger is particularly acute where the substantive standards . . . are vague . . . [D]iscretion could be exercised for corrupt reasons . . . or it could simply be exercised in a sloppy manner.” Richard J. Pierce, Jr., Sydney A. Shapiro, & Paul R. Verkuil, Administrative Law and Process 125 (4th ed. 2004). The Constitution favors (arguably requires) jurors to be the sentencer, treating them like the moral experts, to continue the administrative law metaphor. Thereby, they should at least be entitled to testify as to their deliberations in answering charges of irregularity rather than substituting their own conclusions about the potential effect of extraneous material.
Because the choice is such a personal one, reviewing courts should ask for and consider the jury's testimony on the role of extraneous evidence. In this way, reviewing courts can help to avoid the political reprisal and charges of a counter-majoritarian judiciary that might ensue under a typical juror test. The reviewing court that strikes down or upholds a death sentence will have concrete, real-life testimony from the actual individuals affected by the extraneous evidence to mollify the public.

The capital system, like the jury system as a whole, is balanced atop a pyramid of legal fictions—that juries represent the moral sense of the community, that they decide cases objectively, that they sentence defendants to die who deserve it in some cosmic sense and withhold it from the undeserving, that they must have rigidly channeled discretion in determining the defendant's sentence, but unfettered discretion in choosing life. Jurors must simultaneously express both their own independent moral assessment and be the conduit between the community and the administration of justice. When jurors make their unenviable decision, their work should not be

Cf. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 814 (1978) (holding that the FCC's determination of the public interest in broadcasting was a specialized matter on which the agency was entitled to discretion). From Pierce et al., again if only by analogy: "[R]eviewing courts tend to defer to agencies because agencies often have superior knowledge of the wide range of factors that should be considered . . . . [Arguing that the courts should not exercise this role] could only be supported by studies demonstrating that generalist judges, who may be called upon to review a particular dispute in a specialized area once or twice a year, have a knowledge of that area superior to agency decision makers who are required to resolve hundreds of similar and related disputes each year." PIERCE, ET AL. supra note 183, at 123-24. Pierce, at al., later point out that, though relatively unaccountable agencies must be held to answer when they deviate from prescribed procedures, the court should not substitute its judgment for that of the agency. Id. at 365. This is not to say that judges lose their moral sense when they ascend to the bench. But, in sharply limiting the judge's role in capital sentences, the Supreme Court (interpreting the Constitution, especially the Sixth Amendment) prefers juries to judges. Furthermore, the juridical calling requires judges to doggedly pursue impartiality and remove themselves from the very emotional and moral impulses that jurors use in their independent moral assessment.

The actual effect method thus recognizes the discretion the jury receives in capital sentencing in two ways the typical juror method does not, again analogous to agencies. It both makes them more accountable by requiring them to give reasons for their decision when they made the error of consulting extraneous information (by requiring them to answer questions at the prejudice hearing), and shows deference by only overturning their sentence if the extraneous evidence happened to actually affect the sentence, and by at least deigning to hear their testimony.

184 See, e.g., Furman v. Georgia, 408 U.S. 238 (1972) (holding that arbitrary imposition of the death penalty is unconstitutional).

185 This is the central paradox of modern death penalty law. Compare Furman, 408 U.S. 238 (holding that arbitrary imposition of the death penalty is unconstitutional), with Woodson v. North Carolina, 428 U.S. 280 (1976) (striking down North Carolina's mandatory death penalty system—which was one way of permanently eliminating arbitrariness—on the grounds that capital sentencers also needed to have discretion).
upset unless, among other things, mistaken consultation of extraneous evidence actually affected their sentence. The actual juror test helps to ensure that the death penalty is meted out fairly and appropriately, while protecting defendants from those jurors who cannot reach a sentence on permissible grounds if they or someone else commit an error like using extraneous material to sentence. This Note argues that, when the jury has left a "footprint" of how the extraneous evidence affected it in a capital case, reviewing courts should honor it.

3. Problems with Actual Effect Analysis

The actual effect test has its share of problems, too.

First, it relies more on juror testimony and memory than the typical juror test. Whenever memory is involved, the potential for fallibility enters. But, juror testimony poses no greater danger than that of witnesses or parties. And jurors lack some of the incentives parties and material witnesses have to lie. Jurors have as potential incentives only their own sense of guilt for sentencing a defendant to die, or perhaps bribery from outside parties.

Even capital courts, however, have confidence in the ability of voir dire to remove the extremely careless or illicitly motivated jurors, and of good jury instructions to rehabilitate those that voir dire leaves behind. Both capital and non-capital courts follow a strong presumption of juror competence and rectitude. But when the jury has even more power, as it does in capital cases, courts should be willing to probe more deeply into the jury’s mind, rather than settling for their own conclusions—even though the court must still weigh credibility and make the ultimate decision. In this sense, the actual

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186 Harlan I, 8 P.3d 448, 485 (Colo. 2000). Colorado’s death penalty statute was passed in 1991 in response to a proclamation from then-Governor Romer in response to several judicial decisions rendering it inoperable. See People v. Young, 814 P.2d 834, 846-47 (Colo. 1991) (holding the then operative death penalty statute unconstitutional). The subjective test also recognizes the balancing that must be done between the Free Exercise and Establishment Clauses vis-à-vis jurors and the Due Process Clause and Establishment Clause vis-à-vis defendants.

187 See, e.g., Harlan I, 8 P.3d at 500.

188 This was noted above, in section (II)(B)(3). See United States v. Lomeli, 76 F.3d 146, 149 (7th Cir. 1996) (citing Opper v. United States, 348 U.S. 84, 95 (1954)); Strickland v. Washington, 466 U.S. 668, 695 (1984) ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."); Tuilaepa v. California, 512 U.S. 967 (1994) (upholding a statutory aggravator because the factor had a “common-sense core” that courts could presume jurors understand).
effect test both honors the jury's discretion and safeguards defendants from that discretion more than the typical juror test.

"Impracticality" is the strongest critique. "Subjective" tests like the actual effect test are often rejected because they may require separate evidentiary hearings. Thus, a serious argument against the actual effect test can be made on judicial economy grounds. Death penalty cases are already extraordinarily expensive. Also, proving subjective state of mind may be quite difficult. There may be little circumstantial evidence to substantiate or discount any juror testimony.

But, in a modern judicial system quite comfortable (and rightly so) with the thicket of procedure separating convicted capital felons from the death penalty, one more bramble appears trivial. Courts would not need to change the logistics of the current prejudice hearing, just the admissibility rules.

Perhaps the attorneys would require more time since there might be simply more questions to ask. But, under actual effect analysis in capital cases, more lengthy questioning may not even be required. Justice Hobbs, writing for the Harlan II majority, noted that the

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189 See, e.g., Murray v. Carrier, 477 U.S. 478, 487 (1986). The "actual effect"-"typical juror" dichotomy overlaps the "subjective"-"objective" distinction found throughout law. Harlan II, 109 P.3d 616, 625 ( Colo. 2005) ("Accordingly, we adopted an 'objective test' for ascertaining 'prejudice.'"). "Actual effect" testing probes the impact of extraneous information on the jury's deliberations. "Typical juror" testing tells the court to imagine a reasonable juror, and then to divine the effect that a particular passage would have on the juror. Both involve probing the mind of an actor, one actual, and one fictional. But since courts attempt to fill the latter's head with objectively reasonable content about the effect of extraneous information, the determination is more objective than subjective. Thus, the "actual effect" test bears all of the burdens of other subjective tests.


190 COYNE & ENTZEROTH, supra note 48, at 37-42.

191 This argument is less convincing, then, in non-capital cases, where less procedure is often afforded.

hearing adduced "much testimony by jurors about the content of their deliberations and whether or not the Bible passages actually affected the verdict." In Wadle, relied upon by the Harlan II majority, the misconduct hearings likewise produced much testimony as to whether the Internet definition of Paxil had any effect on the jurors. Capital defense investigators and attorneys question the jury as a matter of course, if their jurisdiction permits it. However, courts cannot consider much of the evidence the grilling produces because of Rule 606(b). Often, questioning by attorneys during a prejudice hearing may produce unintended testimony of actual effect.

Because Rule 606(b) stands in the way of hearing this testimony, the next section considers the merits of an exception to the Rule, and its polar opposite: associating the common-law corollary of an irrebuttable presumption of prejudice from extraneous evidence in capital cases with the Rule.

B. Potential Solutions

1. Rule 606(b) Exception

"If one reads through the cases rejecting juror testimony under Rule 606(b), uncorrected miscarriages of justice leap off of the page." One procedural elephant remains in the room. Rule 606(b) all but requires a typical juror analysis, since the actual jurors cannot testify as to the actual effects on their sentence. However, the line between what is testimony as to the effect of extraneous information not admitted into evidence (and is therefore impermissible), and what merely characterizes that piece of information (and is therefore permissible under the exception to Rule 606(b)) can be difficult to draw. Courts occasionally blur the line between the two tests.

As the Eleventh Circuit noted in McNair v. Campbell, holding Biblical readings in the jury room can be harmless: "[T]he prayers and scripture readings in the jury room were intended to encourage, and had the effect of encouraging, the jurors to take their obligation

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195 Some jurisdictions require a court order before juror contact is allowed.
196 As noted above, the rule presumes the impropriety of extraneous evidence if prejudice can be shown, but prescribes a method for determining neither.
197 Hoeffel, supra note 168, at 801.
seriously." Biblical evidence was held non-prejudicial at the trial level and by the Eleventh Circuit on appeal, despite the fact that Alabama has a similar 606(b) rule. In relying upon People v. Wadle, the Harlan II court ratified the approach taken by the Wadle Court of Appeals, which used something akin to an actual juror test. They noted that the Internet definition of Paxil was “of significance to some, if not all, of the jurors.” The Colorado Supreme Court did not contest this finding. Even the Supreme Court of the United States occasionally ignores or discounts the effect of the rule. Even though courts may blur the line between inadmissible subjective effect evidence and admissible objective detail evidence, Rule 606(b)’s plain language prohibits juror testimony as to subjective effect. Applying Rule 606(b)’s prohibition of testimony about extraneous information arguably used for the independent moral assessment yields an ironic result. Centuries ago, the jury was thought to be a body speaking divine will. The idea behind Lord Mansfield’s exclusionary rule was to allow the jury to deliberate in secret and mystery, ostensibly communing with God. The rule was originally predicated on religiously grounded fears of tampering with that exercise of divine will through the jury system. Yet, today the rule may require a court to vacate the jury’s sentence when that communion becomes prejudicially intimate.

Lord Mansfield’s idea that “a juror may not impeach his own verdict,” should yield to a rule that more accurately reflects reality in American capital punishment cases. Courts could preserve the

198 McNair v. Campbell, 416 F.3d 1291, 1308 (11th Cir. 2005) (“From the testimony at the hearing, we conclude that the prayers and scripture readings in the jury room were intended to encourage, and had the effect of encouraging, the jurors to take their obligation seriously and to decide the question of guilt or innocence based only on the evidence presented from the witness stand in open court.”) (emphasis added) (quoting McNair v. State, 706 So. 2d 828, 838 (1997)). The McNair court could have been simply “projecting” their conception of the reasonable juror onto the jury in the case.

199 Ala. R. Evid. 606(b).


201 People v. Wadle, 97 P.3d. 932 (Colo. 2004).

202 See Hoeffel, supra note 168, at 805 (citing cases).

203 Markovitz, supra note 86, at 1505 (citing WILLIAM HOLDSWORTH, A HISTORY OF EVIDENCE LAW 317 (A.C. Goodhart & H.G. Harbury eds., 7th ed. 1956)). Holdsworth explains that the jury system replaced the “ordeals” of fire and water and that the Court was not to inquire into the substance of the jury’s deliberations because this would be “impious.” Id. However, this did not stop the King or Queen of England from punishing jurors for returning a verdict displeasing to the Crown. JAMES FITZJAMES STEVEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 305 (London, MacMillan 1883).

204 Markovitz, supra note 86, at 1505; see also GEORGE FISHER, EVIDENCE 5–7 (2002) (“Lacking any claim to divine legitimacy, the jury eventually found a remarkable source of systemic legitimacy in the secrecy of its deliberation room.”).
purposes of Rule 606(b) while providing a limited exception to the rule that would prevent the problems highlighted by Harlan II.\textsuperscript{205} Rule 606(b)'s endurance is remarkable, and courts will no doubt be very wary of broadening exceptions to it. The Pandora's Box danger looms any time courts crack open the lid of a strong prohibition like Rule 606(b). But the exception this Note proposes could be confined, and the rule's purposes will still be served.

The exception would be confined in several ways. First, this exception only applies in capital cases, which are rare. Among capital cases, only a small subset will involve extraneous evidence. The exception to Rule 606(b) would concern only these cases. The legal fiction that usually hides the moles and scars of the jury system will otherwise remain intact.\textsuperscript{206}

The purposes of the rule would still be preserved. In capital punishment, where sentences must often stand the test of twenty years' time before becoming "final," potentially prejudicial evidence rules whose purpose is preserving "finality" should bend to allow closer scrutiny. Indeed, while finality has an "inevitable appeal" in non-capital cases, capital cases place non-arbitrariness above finality.\textsuperscript{207} Careful examination does not grease the machinery of death, but rather serves to benefit the defendant, the state, and the public alike. And it is strange indeed that a rule whose purpose is "finality" should authorize the result in Harlan II.\textsuperscript{208} "Finality" is not a common virtue of the capital process, with its seemingly endless litany of appeals available to death-row defendants, many of whom meet their end by old age rather than execution.\textsuperscript{209} Most of all, actual testimony from the jury helps prevent the sort of "guesswork" this Note has discussed, and could lead to quicker appellate resolution.\textsuperscript{210}

Second, Rule 606(b)'s purpose of preventing jury harassment would still be served—an evidentiary hearing would still be allowed only if there were some indication extraneous material was before the jury.\textsuperscript{211} Moreover, in Harlan II, the jurors had already been

\textsuperscript{205} 109 P.3d 616 (Colo. 2005); see supra pp. 980–83.
\textsuperscript{207} Hoeffel, supra note 168, at 803.
\textsuperscript{208} See People v. Wiser, 732 P.2d 1139, 1143 (Colo. 1987) (Erickson, J., specially concurring).
\textsuperscript{210} See Hoeffel, supra note 168, at 808.
\textsuperscript{211} Many federal district courts limit post-verdict questioning of jurors to very specific circumstances when no misconduct is alleged beforehand. Local court rules also regulate
"harassed" in the sense of that term used in explicating Rule 606(b)'s purpose—Investigator Knapp's questionnaire. In cases of extraneous information, that jurors will be "harassed" is all but certain, because each juror must testify about that information. This Note proposes limiting actual effect analysis to extraneous information cases. There, the court will already ask jurors about their deliberation, and the "anti-harassment" justification for Rule 606(b) weakens.

Additionally, courts can loosen Rule 606(b)'s prohibition because the rule serves in large part to preserve a legal fiction. Judges meticulously instruct juries about how to follow the law. And reviewing courts presume juries follow the law. But, judges refuse to admit evidence of the effect of extraneous material on the jury. They refuse to hear whether the jury has actually followed these instructions to ignore extraneous information.

When the stakes are especially high—and in capital cases they are highest—Rule 606(b)'s exceptions should be broadened, and the "impenetrable legal walls" chipped somewhat.212

Despite the constant litany of protest against it, recited again above, Rule 606(b) stands inviolate, as it has for centuries.213 Indeed, as Justice O'Connor noted in Tanner v. United States:

There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it.214

Uproar would accompany any attempt to limit Rule 606(b)'s reach. Thus, as a solution, it would face a difficult political fight.215

harassment; many jurisdictions require defense attorneys to show cause before they can question the jury. If defense attorneys cannot provide the threshold proof required for post-verdict questioning, then they lose the chance to prove the all-important evidence of extraneous information. Benjamin M. Lawsky, Note, Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and its Verdict at the Expense of the Defendant, 94 COLUM. L. REV. 1950, 1951 (1994).

212 Ashley, supra note 15, at 157.
215 See, e.g., S. REP. NO. 93-1277, at 7060 (1974) as reprinted in 1974 U.S.C.C.A.N.2051, 2060 (noting disagreement between the House and Senate proposed versions of Rule 606(b)) However, in death penalty procedural and substantive law, persistence clearly is a virtue. Consider Hitchcock v. Dugger, a Florida capital case. 481 U.S. 393 (1987). The defense attorney there lodged a facial challenge to the Florida mitigating circumstance statute. Florida's statute did not feature the typical "any other relevant mitigating evidence" provision, allowing sentencing jury consideration of all potential mitigating evidence. The defense asserted that strict adherence to the statutory mitigators thus violated the Lockett v. Ohio, 438 U.S. 586
Proponents justify the exclusionary rule articulated by Rule 606(b) by framing the jury system as a good, but not perfectible system. But the Constitution holds the capital jury to the highest standards of any court. One can make a case, then, that because capital-reviewing courts should require a nearly perfect performance from the jury, a limited exception to Rule 606(b) is justified. Furthermore, this prohibition would allow courts to perform actual effect analysis, gaining the above-described benefits.

2. Establishing an Irrebutable Presumption of Prejudice

As this Note discussed, a court may struggle to qualify and interpret the passages of extraneous material read or referenced at trial, especially when it is moral material. An irrebutable presumption of prejudice from extraneous evidence during the sentencing phase of capital trials would prevent the problem altogether. The court could instruct each juror to report the presence of any extraneous information to the foreperson. After confirming that extrinsic evidence was before the jury, the court could either declare a mistrial, require a re-sentencing and impanel a new jury, or vacate the death sentence, if the jury imposed one, as it did in Robert Harlan’s case. The court would not care about possibilities of prejudice and actual effects. Because capital cases may tempt jurors to consult Bibles, judges should include the Bible in their “no extraneous information” instruction.

Even so, that will not prevent jurors from consulting outside information to confirm moral sentiments, and this Note’s thesis—that the independent moral assessment requirement causes confusion—predicts that they will continue to do so. If the judge does not specifically prohibit a source, that source is not made any less extraneous. Similarly, if the judge prohibits a particular source, that does not make a disobedient juror inherently biased. The problem is not whether the jurors consult the Bible, the problem is whether they unjustifiably rely on it in lieu of the governing law. A rule that

(1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), guarantee of a jury consideration of any potential mitigating evidence, despite threats of sanctions from Florida courts, who had deemed the argument frivolous. Nevertheless, the Supreme Court of the United States unanimously agreed with the defense, and struck down the Florida statute, casting doubt over the morality of executing the sixteen prisoners punished under the statute since it was passed in the wake of Furman v. Georgia, 408 U.S. 238 (1972).

216 Mueller & Kirkpatrick, supra note 7, at § 247.
217 For instance, a juror might consult religious commentary, or some other item meant to refresh their moral memory.
218 Hudson, supra note 27.
courts should throw up their hands may be easy to apply, but may not make much sense, especially because it holds, like all black-and-white rules, the potential for injustice.

But this system is ripe for perversion. Dishonest jurors, after a bribe from the defendant, or on their own volition could poison the deliberations by planting extrinsic evidence. Ideally, voir dire would help remove these individuals from the jury. But, a system where sentences must be vacated on such slender grounds gives jurors with "buyer's remorse" an easy out.\(^2\) The judge could instruct the jury about how to report extraneous information, and its consequences. But, to help solve this problem, judges could treat the instruction like jury nullification. They could instruct only how to report misconduct and what to report, leaving out the consequences.

However, whether a juror deliberately introduced the extraneous information is already a component of a reviewing court's prejudice analysis. Thus, the trial court could hold a limited evidentiary hearing seeking only to establish whether the extraneous information was brought in with the mere intent of scuttling the trial. But this would raise many of the same concerns of probing jurors' minds for the actual effect as the subjective analysis advocated above.

If "poisoning" occurred, the judge could require a new trial, impanel a new jury for sentencing, or vacate the death sentence if the jurors voted for it. This defect would be sufficient to kill the proposal. In capital cases, there is less worry about delay. The worry about an additional trial, or simply demanding from the jury something closer to perfection is less burdensome in capital trials and could make the proposal workable. Capital cases are already rarer.

One fear might be that the presence of extraneous information, particularly of a moral nature, will encourage jurors to cling to the written text and produce an intractable disagreement about the appropriate sentence.\(^{220}\) As such, the theory might go, the presence of extraneous information should raise an irrebuttable presumption. The fear of a philosophical impasse (which is arguably allowed by the independent moral assessment requirement, and the abolition of unanimity requirements for mitigating circumstances) must be untangled from the fear of actual effect (which, I agree, is improper in all circumstances). Every juror must decide individually how to weigh aggravating and mitigating circumstances in a capital

\(^{219}\) This might also occur under the actual effect test, but the jury would be bound clearly by the penalties attending perjury.

\(^{220}\) *Harlan II* followed this line of thinking.
sentencing. Contrary to what some observers have argued, jurors are allowed to advocate different philosophical viewpoints as their basis of weighing aggravating circumstances against potential mitigating circumstances. In their desire to reach a sentence that lets them sleep at night, they may turn to extraneous materials for guidance. Such materials are likely to be moral. Their use should be barred. Yet, if the jury would have easily reached the conclusions to which those materials guide them on their own, the chance of prejudice diminishes. Furthermore, religious materials are just as likely to guide a juror to mercy as to vengeance. In the heightened scrutiny world of capital cases, courts should look to the jury for details on this intimate choice, and not rely on their own hypotheses.

CONCLUSION

"The very concern that we will see what we fear—arbitrariness in imposing death—counsels that we open our eyes."

No one should be sentenced to death because of the unenacted prescriptions of any religion, favored, disfavored, historically important, or not. But when we choose to grant juries the power underlying the naked choice that is the independent moral assessment, we must do so with careful scrutiny. An actual effect test, where courts consider testimony from juries potentially tainted by extraneous evidence respects both the rights of capital defendants,
and the interests of citizens in a jury system that hands down a sentence with the appropriate factors in mind and commensurate with the facts of the case.

This Note has attempted to do several things. First, it sought to survey the existing landscape of capital sentencing law, showing its departure from the usual criminal model. Then, this Note sought to show that a religiously-charged mood often dominates capital trials. From there, this Note sought to outline how an actual effect test might work, and to make the best justification for it. Though certainly not built on unassailable premises, the actual effect test has the advantage of being limitable to only those circumstances where it would work best—by cabining the exceptions that permit it to a small subset of capital cases. This helps to justify any perturbation in the legal status quo, like an exception to Rule 606(b).

As explained above, actual effect testing is not prohibitively inefficient. It adds another check against arbitrary imposition of the death penalty. It would remove from courts the uncomfortable function of religious exegesis, and place the duty of explanation on jurors. It reflects the difficult and ambiguous task that jurors must perform in capital deliberations. It lets the jurors aver for themselves if they discharged their task properly. Finally, it defuses claims of illegitimacy the public will make when reviewing courts overturn jury sentences for reasons contravened or undermined by record evidence.

The typical juror test under Rule 606(b) is overinclusive—in some cases, courts will think a Biblical passage prejudiced the minds of a typical juror, when it did not prejudice the minds of the actual jurors. But the test is also dangerously underinclusive—in some cases, courts will not think a Biblical passage prejudiced the mind of a typical juror, when it did prejudice the minds of the actual jurors to the detriment of the defendant.

And if they can elude a reviewing court in this way, the Gideons might find their mark next time.

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