ELEVATING FORM OVER SUBSTANCE: WHY CIRCUIT COURTS MUST MODIFY THEIR PROCEDURAL APPROACH TO JURIES' USE OF THE BIBLE IN THE SENTENCING PHASE OF A CAPITAL CASE

I. INTRODUCTION

> Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God. Therefore whoever resists authority resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Do you wish to have no fear of the authority? Than do what is good. But if you do what is wrong, you should be afraid, for the authority does not bear the sword in vain! It is the servant of God to execute wrath on the wrongdoer. Therefore one must be subject, not only because of wrath but also because of conscience.
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> *Romans* 13:1-5

In the New Testament, St. Paul speaks of the moral authority God gives local governments; authority which includes the power to "execute wrath" upon evil-doers for the greater good.[1] In America, where more than eight-in-ten citizens self-identifies as a Christian,[2] more than a few people agree with Paul. Many others likely do not, believing instead that the totality of the New Testament encourages an abolitionist position on capital punishment.

While individuals' stance on the death penalty has always been a hot-button subject for presidential and academic debates, the recent phenomenon of *jurors* consulting the Bible when deciding whether to impose capital punishment on a criminal defendant has reenergized discourse and forced advocates on both sides to articulate their position on this new trend. On the one hand, it is understandable that jurors might consult the Bible when forced to decide the fate of another human being. After all, one can hardly conceive of a more sobering experience—one where divine guidance is more strongly desired—than having another's life in your hands. On the other hand, it is not our jurisprudential

1. *Romans* 13:1-5.

2. ABC News, *Poll: Most Americans Say They're Christian Varies Greatly From the World at Large* (July 18, 2009), *available at* http://abcnews.go.com-/sections/us/DailyNews/beliefnet_poll_010718.html (last visited October 25, 2009).

tradition to allow accommodation of jurors' religiosity to compromise a capital defendant's right to a fair trial and sentencing.

Luckily, proponents on both sides of the debate have been forced to strike common ground in recognition of the applicability of Federal Rule of Evidence 606(b), which promotes the policies of the Sixth Amendment and protects defendants from convictions based upon extra-evidentiary material, by disallowing all "extraneous prejudicial" influences in the jury room.[3] Once it is discovered that a potentially prejudicial influence—an "external influence"—was consulted by one or more jurors, the court may elicit testimony from the jury to ascertain whether the influence has actually prejudiced the verdict.[4] If the verdict was in fact tainted, a new trial or other appropriate remedy is pursued. This basic procedural framework has never been seriously questioned.[5] Its application to the novel problem of "the Bible in the jury room" is, however, the subject of much controversy. Whether the Bible is actually an improper influence in the jury room is a question beyond the scope of this Note.[6] In lieu of tackling this controversial subject, this Note focuses

3. FED. R. EVID. 606(b). In its entirety, Federal Rule of Evidence 606(b) states:

> *(b) Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. 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.

Id. (emphasis added).

4. *Id.*

5. *See, e.g.*, Smith v. Phillips, 455 U.S. 209, 215 (1982) (citing Remmer v. United States, 347 U.S. 227, 230 (1954)).

6. For interesting discussions of this topic, see for example, Dean Sanderford, *The Sixth Amendment, Rule 606(B), and the Intrusion into Jury Deliberations of Religious Principles of Decision*, 74 TENN. L. REV. 167, 170 (2007) (arguing that the Bible is substantively equivalent to books, dictionaries, and other "alternative principles of decision" routinely prohibited by courts); *Capital Sentencing – Juror Prejudice – Colorado Supreme Court Holds Presence of Bible in Jury Room Prejudicial* – People v. Harlan, 109 P.3d 616 (Colo.), *cert. denied*, 126 S. Ct. 399 (2005), 119 HARV. L. REV. 646 (2005) (exploring the role of the Establishment Clause in prohibiting the Bible in the jury room); Gary J. Simson & Stephen P. Garvey, *Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV. 1090, 1128 (2001) (arguing for an expanded role of the "religion clauses" in determining the acceptability of religion in capital cases); Nicholas G. Shively, *Divine Intervention? The Threat of Religious Discussion in the Context of Capital Sentencing Deliberations*: Fields v. Brown, 503 F.3d

on the fringes of the issue, identifying a fundamental problem in courts' procedural approach to the Bible in the jury room and arguing for more workable standards by which courts can fairly evaluate a claim of improper, external influence under Rule 606(b). Because the Supreme Court has never ruled on whether the Bible is indeed proper in the jury room,[7] intermediate appellate courts must possess effective procedures and standards to determine whether the presence of the Bible corrupted the deliberation process.

A critical reason why courts' current application of Rule 606(b) is deficient is widespread, apparent misunderstanding of the meaning of the term "external," leading to misapplication of the crucial "external influence" test embodied in Rule 606(b). While the term "external influence" was intended to attach only to those influences that carried the potential to prejudice the jury,[8] it now seemingly represents nothing more than courts' determination that the particular influence was physical, and was not introduced into evidence at trial.[9] Because the traditional meaning of "external influence" has been perverted to such an extent, its intended role as a procedural gatekeeper, preventing unnecessary hearings into the deliberations of the jury, has been destroyed. Without this threshold, jury room doors have been opened to baseless inquiries, threatening the stability and finality of jury verdicts.

Circuit courts have differed on their interpretation of the prejudicial nature of the Bible both because of regional, ideological differences and, more practically speaking, the fact that different circuits have been faced with particularized uses of it.[10] What is uniform, however, is the loose standard applied to the term "external influence." While not every circuit needs to have the same standard for determining when something is an external influence, every circuit *should* use Rule 606(b)'s externality test as a threshold standard to ensure that they do not open the jury room door unnecessarily. As it stands, courts' standard-less application of the external influence test leads to intrusive hearings consistently resulting in the factual determination that no prejudice resulted from the particular

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755 (9th Cir. 2007) (en banc), 76 U. CIN. L. REV. 1401, 1422-25 (2008) (examining the Ninth Circuit's decision in *Fields v. Brown* and advocating a modified procedure under Rule 606(b) recognizing the irreparable prejudice resulting from consultation of the Bible during deliberations).

7. The Supreme Court has recently denied certiorari on two cases involving the proper application of Rule 606(b) to the Bible in the jury room. *See* Lucero v. Texas, 246 S.W.3d (Tex. 2008), *cert. denied*, 129 S. Ct. 80 (2008); *see also* Oliver v. Texas, 537 U.S. 1161 (2003).

8. See discussion *infra* pp. 1551-54.

9. See discussion *infra* pp. 1556-60.

10. See background discussion *infra* pp. 1554-60.

use of the Bible.[11] This being so, 606(b) hearings have become fruitless disturbances of the would-be secret deliberations inside the jury room, doing more damage than good to the verdict rendered while ultimately concluding that no prejudice has occurred. If courts more astutely approached their initial classification of influences on the jury, in light of their precedents delineating what is and what is not prejudicial, this problem could be easily solved on the front end of the Rule 606(b) test.

In order to posit alternatives for a workable Rule 606(b) threshold test, Section II of this Note will begin by establishing the Bible's capacity to influence jurors. Section II also explains the rules governing the classification of the Bible as either an internal or external influence, including Rule 606(b). Finally, Section II describes various circuit courts' implementation of this rule. Section III of this Note analyzes the similarities and differences between circuit courts' approaches to the problem, and assesses courts' procedural analysis in light of the public policies underpinning Rule 606(b). After careful consideration of these issues, this Note argues that individual circuit courts must modify their procedural approaches to the Bible in the jury room to protect the policies underpinning both Supreme Court case law and the Federal Rules of Evidence. Without more appropriate standards, the integrity of the jury process will continue to erode, and judicial resources will be wasted on unnecessarily complicated analyses under Rule 606(b).

II. BACKGROUND

A. The Bible is an Influence on the Jury

"I think the religious community has played an enormous role in having people question their consciences about where they stand on the death penalty."[12]

A threshold question for this issue is whether the Bible actually has any tangible influence on jurors. If not, the Bible's presence in a jury room is harmless and courts' application of Rule 606(b) is moot. To establish that the Bible influences jurors, it must be proved (1) that the Bible is recognized and used as a tool in the practice of religion; and (2) that religiosity affects one's perception of the death penalty.[13]

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11. See discussion *infra* pp. 1554-60.

12. E.J. Dionne, Jr., Senior Fellow, The Brookings Institution.

13. Obviously a more direct approach to this analysis would be to present data regarding the influence of the Bible, specifically, upon individuals' perceptions of the

In answering the first question, it is useful to look to the "official policies" of some of our nation's largest religious organizations.[14] Doing so, one quickly confirms that the Bible is both regarded and experienced as the centerpiece of American Christian faith. The Presbyterian Church of the United States of America, for example, officially declares that its "knowledge of God and God's purpose for humanity comes from the Bible, particularly what is revealed in the New Testament through the life of Jesus Christ."[15] American Baptist Churches USA, in their official vision statement, call themselves "Christ-centered [and] biblically grounded."[16] Similarly, the Old Roman Catholic Church in North America regards itself as "proclaim[ing] the Gospel of Jesus Christ through [His] Word."[17]

Having established that the Bible is in some way important to the Christian faith, we must establish that the Christian faith (and therefore the Bible) is important to one's opinion of the death penalty. If it is not, then the Bible being important to Christianity is of no relevance; introduction of the Bible into a jury room under these circumstances would be tantamount to, by way of example, introduction of an English dictionary into a society that speaks only French. Like a foreign dictionary, the Bible is a tool of no utility for a jury to which Christianity is generally unimportant.

A 2004 Gallup Poll by the American Death Penalty Information Association revealed that while a majority of Americans favor the death penalty,[18] this favor is increased among Americans who self-identify as

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death penalty. Inconveniently, but unsurprisingly, this data is not readily available. The preferred alternative, then, is to reach this conclusion deductively.

14. It is also of much utility to reflect on our own anecdotal experiences, as participants in a society that is, although technically secular, in reality fairly religious. It seems from this author's perspective, at least, that the vast majority of Christians regard the Bible as very important to their faith. At the very least, even those who do not consult the Bible on a regular basis are aware that the things they hear in church *about* their religion are *derived from* the Bible, and would not exist without it.

15. Presbyterian 101: A General Guide to Facts about the Presbyterian Church USA, *available at* http://www.pcusa.org/101/101-theology.htm (last visited Nov. 11, 2009).

16. American Baptist Churches USA, American Baptist Churches USA Vision Statement, *available at* http://www.abc-usa.org/WhoWeAre/Vision/tabid/56/Default.aspx (last visited Nov. 11, 2009).

17. The Old Roman Catholic Church in North America, Mission Statement of The Old Roman Catholic Church in North America, *available at* http://www.orccna.org/ourfaith/mission.htm (last visited Nov. 11, 2009).

18. Death Penalty Information Center, Religion and the Death Penalty, *available at* http://www.deathpenaltyinfo.org/religion-and-death-penalty (under Opinion Polls: Death Penalty Support and Religion) (last visited Nov. 11, 2009) (explaining that a majority of Americans, 57%, support the death penalty).

Protestants or Catholics;[19] ambivalence regarding the death penalty, in contrast, appears to transcend religious divisions.[20] Paradoxically, while religious people are more likely to favor the death penalty than irreligious people, those who attend church are slightly less likely to favor the penalty than those who do not.[21]

Perhaps unexpectedly given these individual statistics, the great majority of American religious institutions have official policies calling for the abolition of the death penalty.[22] The United Church of Christ, the United Methodist Church of America, the General Board of American Baptist Churches, and the Presbyterian Church of the United States of America have all passed resolutions, for example, articulating their belief that a "proper reading" and observance of the Bible (particularly the New Testament) prevents any Christian from supporting the punishment.[23]

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19. Protestants were the most likely to favor the death penalty (71%), while Catholics were less likely than Protestants but still more likely than those identifying themselves as having no religious affiliation (66%). *Id.* The Gallup Poll also revealed that among the three groups Protestants were the least likely to oppose the death penalty (24% compared with 30% and 38% in the Catholic and no-affiliation groups, respectively). *Id.*

20. 5%, 4%, and 5% of the Protestant, Catholic, and irreligious groups, respectively, reported "no opinion" when asked about the policy. *Id.*

21. Specifically, the 2004 Gallup Poll found that 66% of people who attended religious services weekly or nearly weekly were in favor of the death penalty and 39% were opposed to it. *Id.* Among people who reportedly attended church services monthly, a slightly increased percentage (69%) supported the death penalty while only 27% opposed it. *Id.* Finally, the poll revealed that 71% of people who seldom or never attend church favor the death penalty while 26% oppose it. *Id.* The poll showed that those who attend church more frequently are more likely to remain undecided about the death penalty, with total percentages of 5%, 4%, and 3% reported "no opinion" for the weekly/nearly weekly, monthly, and seldom/never groups, respectively. *Id.*

22. *See, e.g.*, Religious Tolerance.Org, Death Penalty Policies of Religious Groups, *available at* http://www.religioustolerance.org/execut7.htm (last visited Nov. 11, 2009).

23. United Church of Christ, Statement on the Death Penalty, *available at* http://www.deathpenaltyreligious.org/education/statements/ucc.html (last visited Nov. 11, 2009); United Methodist Church, The United Methodist Church Opposes Capital Punishment, *available at* http://www.deathpenaltyreligious.org/education/statements-/umc.html (last visited Nov. 11, 2009); American Baptist Churches in the USA, Resolution on Capital Punishment, *available at* http://www.deathpenaltyreligious-.org/education/statements/baptist.html (last visited Nov. 11, 2009); Presbyterian Church USA, Continuing Opposition to Capital Punishment, *available at* http://www.deathpenaltyreligious.org/education-/statements/presby-terian.html (last visited Nov. 11, 2009). The website religioustolerance.org also provides the following useful information:

	Membership in millions	Position on the death penalty
Roman Catholic Church	60	Near abolitionist

While these statistics might well form the basis for controversy regarding the character of biblical influence on an individual's perception of the death penalty, it must fairly be said, in light of this data, that the Bible would influence the Christian juror.

Baptist Churches	36	Southern Baptists are retentionist; American Baptists are abolitionist
Non-religious	23	Mixed
Methodist Churches	13	United Methodist Church is abolitionist
Pentecostal Churches	10	Mixed. The Assemblies of God have no official stance
Lutheran Churches	8	Evangelical Lutheran Church in America is abolitionist; the Lutheran Church, Missouri Synod is retentionist
Eastern Orthodox Churches	5	Abolitionist
Islam	5	The Qur'an supports the death penalty, but there is a strong tradition of mercy within the faith
Latter-Day Saints/Mormons	5	No official stance
Judaism	4	Mixed; split along liberal and conservative lines
Presbyterian Churches	4	Abolitionist
Episcopal Church	2	Abolitionist
Reformed Church in America	2	Abolitionist
Jehovah's Witnesss	1.2	No official stance
United Church of Christ	1	Abolitionist
Atheists	1	Mixed
Neopagans	Perhaps 1	Mixed

Religious Tolerance.org, Policies of Different Religious Groups, *available at* http://www.religioustolerance.org/execut7.htm (last visited Nov. 11, 2009).

B. Federal Rule of Evidence 606(b) Addresses Influences on the Jury

While not all influences are intrinsically disfavored, not all are admissible in the jury room. Federal Rule of Evidence 606 speaks to this distinction, forbidding jurors from impeaching their own verdict under all but the most concerning circumstances.[24] To this end, subsection (b) of this Rule authorizes jurors to impeach their own verdict only by testifying to the presence of "extraneous, prejudicial information" in the deliberative process.[25] What 606(b) giveth, however, 606(b) taketh away; by the Rule's own terms, the court must render a deductive conclusion as to the prejudicial nature of the external influence. In its analysis, the court may neither seek nor consider juror testimony regarding the *impact* of an external influence on the deliberative process.[26]

Though the Advisory Committee on the Federal Rules of Evidence overtly structured the Rule to prevent unnecessary inquiry into jury verdicts, the Rule is actually a carefully calculated endeavor to appease competing public policies. On the one hand, precluding *all* inquiry into jury verdicts would compromise defendants' rights to fair and regular treatment.[27] Conversely, unrestricted inquiry into jury verdicts would

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

25. *Id.*

26. According to this paradigm, a court eliciting testimony regarding the Bible in the jury room is constrained to consider only the fact of the Bible's presence and the emphasis made to particular verses therein; it may not, for example, ascribe any probative weight to a juror's unsolicited testimony that a particular verse *caused* him to impose the death penalty.

27. The principle rights afforded to defendants that Rule 606(b) seeks to protect are derived from the Fourth, Sixth, and Eighth Amendments to the United States Constitution. They guarantee, respectively:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The fact that Rule 606(b) balances the interests of defendants against the interests of the successful continuation of our jury

embarrass or harass jurors, undermine the traditionally secret function of juries as exclusive fact-finders and weaken the finality of the adjudicative process.[28]

In *McDonald v. Pless*,[29] the Supreme Court agreed with the importance of restricting inquiry into jury verdicts. "Common fairness," said the Court, underpins the notion that jurors should be free to deliberate in complete privacy.[30] Frequent inquiry into jury verdicts would transform "private deliberation . . . [into] the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference."[31] A rule allowing any inquiry into the "internal" deliberations of juries would, according to the Court, encourage over-aggression of losing parties and exploitation of jurors.[32]

Seventy-two years after *McDonald*, the Supreme Court again discussed the impeachment of jury verdicts—this time armed with the evidentiary weapon of Rule 606(b).[33] In *Tanner v. United States*,[34] the Court summarized the legislative history of Rule 606(b) and existing Supreme Court jurisprudence with a simple principle: a court's acceptance of jurors' self-impeaching testimony must be based on a predicate finding of an influence's externality. Writing for the majority, Justice O'Connor concluded that "requiring an evidentiary hearing [only] where extrinsic influences or relationships have tainted the deliberations

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system should not be taken to minimize the protection a defendant is given under our Constitution or the Federal Rules of Evidence. For our nation to continue to be predicated on strict principles of justice and the presumption of innocence, the rights of all other parties (the jury, especially) must consistently yield to those of a capital defendant to ensure, above all else, that a serious conviction secured is a serious conviction earned. Rule 606(b) does not seek to weigh the interests of a capital defendant against the interests of the jury when the former are actually put in jeopardy; by imposing presumptive prejudice as a condition precedent to an evidentiary hearing, Rule 606(b) prohibits investigation into jury verdicts only in those cases where there is no suggestion that the defendant's rights have been compromised.

28. Federal Rule of Evidence Advisory Committee, Notes on Federal Rule of Evidence 606(b), *available at* http://www.law.cornell.edu/rules/fre/ACRule606.htm (last visited Nov. 11, 2009). The Advisory Committee's Notes on the public policy considerations underpinning Federal Rule of Evidence 606 provide the following:

> The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

29. 238 U.S. 264, 267-68 (1915).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. 483 U.S. 107, 120 (1987).

do[es] not detract from, but rather harmonize[s] with . . . the weighty government interest in insulating the jury's deliberative process."[35]

Though the Supreme Court has yet to articulate a bright-line test for whether an influence is external or internal to a jury's deliberations, it has suggested that the characterization hinges on the "nature" of the influence and not its superficial qualities.[36] Because the Supreme Court has been vocal about not effecting unwarranted inquiry into jury verdicts, and because the characterization of an influence as external is the threshold for obtaining post-trial review of a verdict, the externality of an influence must necessarily be a reflection of its potential to prejudice the jury. Internal influences, on the other hand, do not warrant further analysis because they are per se non-prejudicial to the jury's deliberations.

The proper questions for courts to consider when facing the Bible as an influence in the jury room are: (1) whether it is internal or external to the deliberations, and (2) if it is external, whether its particular use prejudiced the jury's verdict. Courts have heretofore addressed these issues on a case-by-case basis, their varying methodologies and divergent conclusions creating a highly controversial circuit split.[37]

C. Circuit Analysis of the Bible in the Jury Room Under Rule 606(b)

An examination of recent case law from several circuit courts reveals an interesting variance in how Rule 606(b) is applied to evaluate the Bible's influence on the jury. In a striking stance of individuality, the Fourth Circuit held in *Robinson v. Polk*[38] that the Bible was not an external influence when passages including the well-known "eye for an eye" were read by several jurors, noting that biblical concepts are "cultural precepts" even for those who do not follow the Judeo-Christian faith.[39] The Fourth Circuit impliedly rested its decision, at least in part, on what it considered the illogical basis for the distinction between

35. *Id.* In *Tanner*, Justice O'Connor discussed the origins of the common-law rule against impeachment of jury verdicts. Technically originating in a 1785 opinion by Lord Mansfield, the rule was at that time so concretely an element of our country's jurisprudence that it was "almost unquestioned."

36. *Id.* at 117.

37. As is often the case, not every one of the courts in the following analysis applied an identical standard of review to the issue of whether the Bible constituted an internal or external influence on the jury. Insomuch as the term "circuit split" is used to denote disagreement among jurisdictions as to the proper way to adjudicate or conceptualize certain legal issues, however, a circuit split may properly be said to exist.

38. 438 F.3d 350 (4th Cir. 2006).

39. *Id.* at 366.

inquiry-precluded *recitation* of Bible verses by memory and inquiry-encouraged *reading* of those same passages in the jury room.[40] Finally, the Fourth Circuit distinguished reading the Bible from external influences confronted by other courts, noting that "[u]nlike these occurrences, which impose pressure upon a juror *apart from the juror himself*, the reading of Bible passages invites the listener to examine his or her own conscience from within. In this way, the Bible is not an 'external' influence."[41]

Conversely, in *McNair v. Campbell*,[42] the Eleventh Circuit found, without further discussion, that the Bible constituted an external influence upon the jury.[43] The court went on to agree with the trial court, however, that the reading of two Bible versus including Psalm 121 and Luke 6:37[44] was "not of such a character or nature as to indicate bias or

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40. *Id.* at 363.

41. *Id.* at 363-64 (emphasis added). In particular, the court addressed the influences confronted by the Supreme Court in *Remmer v. United States*. In *Remmer*, a concerned juror approached a district court judge regarding a visit made to his home, during deliberations, by a friend of the petitioner. Remmer v. United States, 350 U.S. 377, 426 (1956). Upon arrival, the friend requested that the juror "make a deal" with petitioner. The district court judge told the juror that he should not worry about the friend's comments but "take them as a joke." The United States Supreme Court thought differently, finding that:

> [The juror] had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made.
>
> The unduly restrictive interpretation of the question by the District Court had the effect of diluting the force of all the other facts and circumstances in the case that may have influenced and disturbed [the juror] in the untrammeled exercise of his judgment as a juror. We hold that on a consideration of all the evidence uninfluenced by the District Court's narrow construction of the incident complained of, petitioner is entitled to a new trial.

Id. at 380-82. *Remmer* is regarded as the seminal case on what constitutes an "external, prejudicial" influence on the jury. Of course, that bribery of a juror constitutes an improper influence is not nearly as questionable as the present question, which is whether the Bible constitutes the same. While *Robinson*'s holding that the Bible was an influence internal to the jury was controversial, it is at least easy to see how it was distinguished, from the influence involved in *Remmer*.

42. 416 F.3d 1291 (11th Cir. 2005).

43. *Id.* at 1308.

44. Luke 6:37 reads: "[j]udge not, and ye shall not be judged; condemn not and ye shall not be condemned; forgive, and ye shall be forgiven." *Luke* 6:37. Psalm 121 reads:

> 1 I lift up my eyes to the hills—
> where does my help come from?
> 2 My help comes from the LORD,
> the Maker of heaven and earth.

corruption or misconduct that might have affected the verdict."[45] The court thought it clear that the reading of these passages by the jury foreman merely had the effect of encouraging the jurors to take their duty seriously.[46]

In *United States v. Lara-Ramirez*,[47] the First Circuit addressed the issue of the Bible in the jury room in an entirely different context. Here, the presence of the Bible in the jury room was brought to the attention of the sentencing judge *during* deliberations, not after the verdict had been returned.[48] The court implied that the Bible was an external influence, noting that:

> [T]he [lower] court [erred in] treat[ing] the Bible in the jury room as qualitatively different from other types of extraneous materials . . . appear[ing] to invoke a *per se* rule that the presence of the Bible in the jury room, combined with the mention of it by a juror during deliberations, produces a taint so egregious that it cannot be cured.[49]

The court held that evidence showing only that the Bible was present in the jury room and referred to at least once was insufficient to establish any prejudicial effect.[50] Therefore, although the Bible might have been external, it was not damaging and was therefore permissible.[51]

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3 He will not let your foot slip—
he who watches over you will not slumber;
4 indeed, he who watches over Israel
will neither slumber nor sleep.
5 The LORD watches over you—
the LORD is your shade at your right hand;
6 the sun will not harm you by day,
nor the moon by night.
7 The LORD will keep you from all harm—
he will watch over your life;
8 the LORD will watch over your coming and going
both now and forevermore.

Psalms 121.

45. *McNair*, 416 F.3d at 1308.

46. *Id.* (finding no impropriety despite the fact that the reader of the Bible, the jury foreman, was by occupation a Christian minister).

47. United States v. Lara-Ramirez, 519 F.3d 76 (1st Cir. 2008).

48. *Id.* at 86. In all other cases discussed herein, the presence of the Bible in the jury room was brought to the attention of the judge *after* a sentence had been imposed; the courts' decisions in these cases, therefore, was not whether to terminate deliberations but whether to vacate the sentence imposed by the jury.

49. *Id.* at 88.

50. *Id.* at 86.

51. *Id.*

The Fifth Circuit dealt comprehensively with this issue in the recent case of *Oliver v. Quarterman*.[52] There, several jurors consulted a particular verse in the Bible prescribing the death penalty to any man who strikes another with an object and kills him.[53] Because the biblical passage was not of the generic nature of those cited in *Robinson* but rather instructed a particular punishment for the specific crime of which the defendant was accused, the Fifth Circuit determined that the Bible acted as an "external influence" on the deliberations of the jury.[54] Nonetheless, the court ultimately affirmed the trial court's factual finding that the jury had not been prejudiced, and the defendant's rights had not been compromised.[55]

Adopting yet another approach in *Fields v. Brown*,[56] the Ninth Circuit chose not to classify the Bible as either an external or internal influence.[57] The court held that even if the jurors' introduction into deliberations of a biblically-inspired list of pro's and con's regarding the death penalty was an external influence on the jury, it did not have a substantial and injurious effect on the verdict.[58]

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52. Oliver v. Quarterman, 541 F.3d 329 (5th Cir. 2008).

53. *Id.* at 339-40. The precise verse, from the book of Exodus, read: "He who strikes a man so that he dies shall surely be put to death." *Exodus* 21:12.

54. *Id.* Without passing on the objective correctness of other circuits' determinations in this regard, the Fifth Circuit distinguished the use of the Bible with which it was faced from the uses held by other courts to satisfy the "external influence test:"

> This analysis persuades us that when a juror brings a Bible into the deliberations and points out to her fellow jurors specific passages that describe the very facts at issue in the case, the juror has crossed an important line. The Supreme Court counsels us that a jury may not consult material that is outside the law and evidence in the case. The Bible passages in question here were not part of the law and evidence that the jury was to consider in its deliberations. Moreover, the jurors did not simply discuss their own understanding of religious law and morality or quote Bible passages from memory to aid the discussion. Instead, the jurors referenced a specific passage that stated that someone who engages in a particular act-striking a person with an object and killing him, as Oliver did to Collins-is a murderer and must be put to death. *Most circuits have ruled that when a Bible itself enters the jury room, the jury has been exposed to an external influence. Here, we face facts that are even more egregious than in those previous cases, as the jurors consulted a specific passage that provided guidance on the appropriate punishment for this particular method of murder. As such, we hold that the jury's consultation of the Bible passages in question during the sentencing phase of the trial amounted to an external influence on the jury's deliberations.*

Id. at 339-40 (emphasis added).

55. *Id.* at 343.

56. 503 F.3d at 755.

57. *Id.* at 781.

58. *Id.* The "for" notes read:

Left to their own devices, circuit courts have adopted distinct and often conflicting procedures for assessing the propriety of biblical influences on the deliberative process. The harms of these varying procedures can and should be promptly rectified to prevent the unwarranted intrusion into the jury room that they currently permit.

- "placate gods"
- "eye for eye"
- "deterrence"
- "Fitting punishment to crime"
- "Rights of victim"
- "Duty of the state to protect citizens"
- "Biblical"
- "Genesis 9:6 'Whoso sheddeth man's blood by man shall his blood be shed, for in the image of God made He man'"
- "Exodus 21:12 'He that smiteth a man, so that he dies, shall surely be put to death'"
- "Possibility of Repeated offenses"
- "Murder = a rejection of the values of society"
- "*New Test*"
- "Romans 13:1-5 'Let everyone be subject to the higher authorities, for there exists no authority except from God, and those who exist have been appointed by God. Therefore, he who resists the authority, resists the ordinance of God; and they that resist bring on themselves condemnation'"
- "For rulers are a terror not to the good work but to the evil. Dost thou wish, then, not to fear the authority?"
- "Do what is good and thou will have praise from it. For it is God['s] minister to thee for good. But if thou dost what is evil, fear, for not without reason does it carry the sword. For it is God's minister, an avenger to execute wrath *on* him who does evil. Wherefore you must needs be subject, not only because of the wrath, but also for conscience's sake."
- "Luther, Calvin, Aquinas felt this to be supportive of capital punishment" and
- "Per Paul's letter to Romans: State has power for two reasons-1. Satisfy demand's [sic] of God's service [and] 2. Protect society by deterring future crime."

The "against" side read:

- "No real deterrent value-mostly because murderers not normal"
- "Question of 'Just'-There is no simple, 'just,' penalty"
- "Discriminatory selection"
- "Human fallibility-Perhaps wrong chap convicted."
- "Rehabilitation"
- "'Popular' feelings"

Id. at 778.

III. ANALYSIS

A. Form Over Substance: Misapplication of Rule 606(b)'s External Influence Test

Rule 606(b) was intended, by the Committee that created it and the Supreme Court that accepted it, to carefully balance the interests of our jury system and individual capital defendants.[59] While the Rule recognizes the importance of protecting a defendant's constitutional right to a fair trial, it also appreciates the privacy to which juries are entitled, and the detrimental effects that unrestricted inquiry into the deliberation process can create.[60] To further these competing considerations, the Rule mandates that investigation only be conducted regarding influences that are not only physically external to the jury, but potentially prejudicial as well.[61] Though it is clear from *Remmer* and its progeny that the external influence test embodied in Rule 606(b) is meant to separate innocuous influences from potentially prejudicial ones, allowing inquiry only into the latter, recent circuit court decisions have neither recognized nor respected this intent.

The First and Eleventh Circuits have mechanistically categorized the Bible as an external influence, without explaining their reasons for doing so.[62] By failing to apply the proper standard to this threshold consideration, these courts have conducted full investigations into claims they ultimately regarded as unfounded.[63] Had the First and Eleventh Circuits questioned whether the alleged use of the Bible was potentially prejudicial (as would have been the proper treatment of the external influence test) prior to having a 606(b) hearing, it is likely that one if not both courts would have concluded that further inquiry was unnecessary. This determination would have spared the jury the unnecessary harassment it endured.

More egregious than the First and Eleventh Circuit procedure is the one employed by the Ninth Circuit in *Fields v. Brown*, which effected a backwards procedural inquiry under Rule 606(b). As discussed previously, the court in *Fields* did not decide whether the Bible constituted an internal or external influence because it held that, in any

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59. See discussion *supra* pp. 1545-47.

60. Federal Rule of Evidence Advisory Committee, Notes on Federal Rule of Evidence 606(b), *supra* note 28.

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

62. *Lara-Ramirez*, 519 F.3d at 88; *Campbell*, 416 F.3d at 1308.

63. *Lara-Ramirez*, 519 F.3d at 86; *Campbell*, 416 F.3d at 1308.

event, the jury was not prejudiced by its use.[64] If this procedure sounds unfamiliar, it is because it neither follows the structure of the Rule itself, nor Supreme Court precedent indicating that the nonmoving party ought not to have the burden to rebut prejudice until a presumption of prejudice arises from satisfaction of the external influence test.[65] Even the Fifth Circuit recognized this procedurally inconsistent approach when it stated in *Oliver* that "the Ninth Circuit's approach [is] backwards under *Remmer:* the court found that any use of the Bible was not prejudicial before determining if the Bible was an external influence that would trigger the presumption of prejudice."[66]

With the notable (and commendable) exceptions of the Fourth and Fifth Circuits, all of the circuit courts to face this controversial issue have perverted the intended standard of the external influence test. This test is not meaningless, nor should its satisfaction be easy or mechanical, for it is the only thing standing between the traditional secrecy of juror deliberations and the open inquiry into them. Though the consistent misapplication of this test might stem from the particularly emotionally-charged and controversial issue of the separation of church and state and/or improper "endorsement" of religion, this is not an excuse for procedural unfairness. *It is precisely in situations where the court feels morally compelled to take certain action that procedural safeguards are most important.* Instead, these safeguards have been ignored, with the result that virtually all claims relating to the Bible lead to full-blown hearings, even when the court is clearly and openly predisposed to a finding of no prejudice. Entertaining all accusations in the name of fairness, when the court ultimately fails to find prejudice even in the most shocking circumstances, is an unfair application of Rule 606(b) that disregards the careful balance it was intended to strike between protection of defendants and protection of our jury system.

B. Courts Should Not Abandon, but Better Understand and Apply, the External Influence Test

1. Potential Standards for a New External Influence Test Identified

Though the external influence test is deficient as currently applied, it ought not be abandoned. Rather, courts must pointedly apply the test in the way it was intended, as a procedural gatekeeper guarding against unnecessary disturbance of jury verdicts. The external influence test

64. *Fields*, 503 F.3d at 781.
65. *Remmer*, 347 U.S. at 229.
66. *Oliver*, 541 F.3d at 342 n.16.

should be satisfied only when the moving party demonstrates that the alleged use of the Bible has potentially prejudiced the jury. In ascertaining what uses of the Bible (if any) are potentially prejudicial, summation of existing precedent from the various circuit courts might be of some utility.

At bottom, courts have demonstrated surprising accord in the breadth of biblical references they deem non-prejudicial. To the average person, verses like "surely he shall be put to death" and "condemn yet and ye shall not be condemned" espouse directions as clear as they are contradictory regarding the imposition of the death penalty. Courts have, however, held both verses non-prejudicial,[67] suggesting a judicial position that a biblical passage condemning or encouraging the death penalty, standing alone, is not the "extraneous, prejudicial" material prohibited by Rule 606(b). Given that direct biblical commands to kill are apparently non-prejudicial, it would seem that *no* verse would be. Case law has indeed followed this logic, finding biblically-inspired lists of death penalty "pros and cons" non-prejudicial as well as, naturally, the mere presence and occasional reference to the Bible within the jury room.[68]

In short, circuit courts have unanimously failed to identify a prejudicial use of the Bible in the jury room. It would be a natural option, therefore, for a court to adopt a rule—like the *Robinson* Court in the Fourth Circuit—that the Bible is a per se internal influence on the jury's deliberations. Alternatively, a court might wish to "pick and choose" among precedent it finds persuasive, perhaps drawing the line of externality at the situation encountered by the *Oliver* Court in the Fifth Circuit, where the biblical passages introduced during deliberations prescribed capital punishment to remedy a crime factually analogous to the defendant's. Individual circuits might also choose to build from their own decisions, realizing that the particularized scenarios to which they have been exposed provide the minimum, but perhaps not the maximum, permissible use of the Bible during deliberations. More important than the specific approach adopted by each court, however, is the consistency with which it is thereafter applied. The controversial nature of this question and the divergent methodologies with which courts have heretofore interpreted Rule 606(b) have only complicated the issue, confusing jurors and capital defendants alike.

67. *Id.* at 331; *McNair*, 416 F.3d at 1308.

68. *Fields*, 503 F.3d at 781; *Lara-Ramirez*, 519 F.3d at 88.

2. The Role of Jurisdictional Autonomy in 606(b) Reform

Though the combined holdings of recent decisions creates a sketch of what might constitute an external influence, no individual court should be bound to adopt the sum of all other courts' jurisprudence as its own. As a matter of jurisdictional autonomy, individual circuits should determine what alleged uses of the Bible are potentially prejudicial and warrant further investigation. It is important that the Supreme Court has not imposed a uniform standard in this regard; indeed, one would be challenging to articulate given the regional variances associated with the practice, and theory, of religion. Where, as here, beliefs are underpinned by cultural, political, moral, and ideological notions distinct to particular geographic areas, it is perhaps appropriately the prerogative of individual states and circuits, not one court, to articulate the law. Though each circuit should remain free to determine what verses, uses, or references to the Bible give rise to a possibility of prejudice and a Rule 606(b) hearing, jurors should never be forced to impeach their verdict absent an indication that the capital defendant's rights have been violated by a use that is not just controversial, but prejudicial as well.

IV. CONCLUSION

Because of courts' misapplication of the term "external influence," the jury room doors have been opened to harassing and unnecessary interrogations. Without Supreme Court guidance, circuit courts have been remarkably uniform in the substantive determination that many—if not all—uses of the Bible in the jury room do not prejudice the jury's verdict. Such widespread adherence to this conclusion quite clearly indicates that courts need not and should not allow evidentiary hearings under Federal Rule of Evidence 606(b) predicated only upon evidence that the Bible was present during deliberations. To entertain these hearings, when the court's own precedent dictates the determination that the jury was not prejudiced, is to elevate form over substance and destroy the sanctity of the jury room in the process. Unless and until the Supreme Court issues a decision binding lower courts to its conclusions regarding the issue, lower courts should reevaluate the suggestion of prejudice on which a hearing into a verdict is based; when the influence is the Bible, mechanical characterization of the influence as physically "external" is simply insufficient. Courts must expedite review of their current procedures for dealing with this issue so that the policies underpinning

Federal Rule of Evidence 606(b) are appropriately furthered and the interests involved in all aspects of a capital case are served.

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