

AN EYE FOR AN EYE LEAVES EVERYONE BLIND:
FIELDS V. BROWN AND THE CASE FOR
KEEPING THE BIBLE OUT OF CAPITAL
SENTENCING DELIBERATIONS

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INTRODUCTION

While on parole from prison after serving a sentence for manslaughter, Stevie Lamar Fields embarked on a three-week “one man crime wave”¹ that involved premeditated murder and the kidnapping, rape, and robbery of multiple victims in California.² On the afternoon that the penalty phase of Fields’s trial began, the jury deliberated for a mere two hours and failed to

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¹ *Fields v. Brown*, 503 F.3d 755, 761 (9th Cir. 2007) (en banc) (quoting *In re Fields*, 800 P.2d 862, 872 (Cal. 1991)), *cert. denied*, 128 S. Ct. 1875 (2008).

² *Id.*

reach a verdict.³ The jury's foreperson, Rodney White, returned home that evening and consulted his Bible for guidance.⁴ Drawing from the Bible, White crafted a list of notes "for" and "against" the death penalty.⁵ When deliberations resumed the next morning, he shared the written notes from his evening of research with at least some of the other jurors.⁶ By three o'clock, the jury had reached a verdict authorizing the imposition of the death penalty.⁷ California appellate courts affirmed Fields's conviction and death sentence, but on collateral review, the Central District of California granted Fields's habeas corpus petition, which was based on a claim that the jury had improperly considered extrinsic evidence during its penalty phase deliberations.⁸ Ultimately, the Ninth Circuit, sitting en banc, reversed the district court's judgment and affirmed Fields's conviction and death sentence.⁹

Fields's case is far from the first to involve jurors who seek guidance from the Bible during capital sentencing deliberations. In *People v. Harlan*, jurors imposed the death penalty after consulting a Bible, Bible index, and handwritten notes.¹⁰ Although the Colorado Supreme Court in *Harlan* confronted facts strikingly similar to those in *Fields v. Brown*, it upheld the trial court's decision to vacate the defendant's death sentence "because there was a reasonable possibility that use of the Bible in the jury room . . . would have influenced a typical juror to reject a life sentence"¹¹

In a similar Fourth Circuit case, *Robinson v. Polk*, when the jurors convened to determine Marcus Robinson's fate, one read aloud from the Bible, citing an "eye for an eye" in an effort to persuade the others to impose the death penalty.¹² In contrast to *Harlan*, the Fourth Circuit upheld the district court's decision to deny Robinson habeas relief.¹³ In cases involving slight factual variations—for example, where the foreman led the jurors in group prayer during deliberations¹⁴ and where the jury engaged in a general discussion about the Bible without the text present¹⁵—courts have also upheld juries' decisions to impose the death penalty.

³ *Id.* at 777.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 777–78.

⁷ *Id.*

⁸ *Id.* at 761.

⁹ *Id.*

¹⁰ 109 P.3d 616, 623 (Colo. 2005).

¹¹ *Id.* at 620.

¹² *Robinson v. Polk (Polk I)*, 438 F.3d 350, 359–60 (4th Cir. 2006), *reh'g denied*, 444 F.3d 225 (4th Cir. 2006).

¹³ *Id.* at 368.

¹⁴ *McNair v. Campbell*, 416 F.3d 1291, 1301 (11th Cir. 2005).

¹⁵ *Young v. State*, 12 P.3d 20, 49 (Okla. Crim. App. 2000).

Although the various cases involving Bible-influenced capital sentencing share remarkable similarities, courts addressing this issue have reached different conclusions, and the analyses leading to these conclusions have varied accordingly. At the center of these cases is the tension between the Sixth Amendment right to an impartial jury trial¹⁶ and the American legal system's historical veneration of private jury deliberations.¹⁷ In juries comprised of imperfect human beings, misconduct inevitably occurs. When it does, the interest in remedying the resulting injury to the defendant's right to an impartial jury trial directly conflicts with the systemic interest in final jury verdicts. Federal Rule of Evidence 606(b) attempts to mediate between these interests—generally prohibiting jurors from impeaching their verdicts, but providing narrow exceptions for testimony about the presence of “extraneous prejudicial information” and “outside information improperly brought to bear upon any juror.”¹⁸

The core issue presented when exploring the legality of Bible-influenced capital sentencing is whether the exceptions provided by Rule 606(b) permit jurors to testify about the use of Biblical materials during jury deliberations. The confusion underlying the divergent approaches to this issue in the courts stems from the ambiguous language of Rule 606(b), the Supreme Court's limited and unclear pronouncements regarding this language, and the Court's failure to address specifically whether consultation of the Bible falls within the exceptions provided by Rule 606(b). Against the backdrop of unclear caselaw, *Fields* further complicated the issue of Bible-influenced capital sentencing with its misguided analysis and decision.

This Note argues that *Fields* was wrongly decided and that the Ninth Circuit should have held that use of Biblical materials during capital sentencing deliberations constituted juror misconduct. In addition, the widespread disagreement among various state and federal courts about Bible-influenced capital sentencing suggests that the Supreme Court must speak on the issue and must state clearly that consulting Biblical materials during capital sentencing deliberations constitutes misconduct.

Part I explores the Sixth Amendment right to an impartial jury trial, the American legal system's longstanding reluctance to allow jurors to impeach their verdicts, and the tension between those competing interests. Part II identifies the flaws in *Fields* and presents an alternative analysis of the intrusion of the Bible into jury deliberations. This Part proposes that—contrary to the decision in *Fields*—the Bible should be considered an external influence that can fatally prejudice jury deliberations. Part III explores related policy concerns that further support this argument. Finally, Part IV

¹⁶ U.S. CONST. amend. VI; *see infra* Part I.A.

¹⁷ *See infra* Part I.B.

¹⁸ FED. R. EVID. 606(b). Even within these exceptions, jurors can only testify about the existence of external influences, not the subjective effect of these influences on their decisionmaking.

urges the Supreme Court to address the issue of Bible-influenced capital sentencing.

I. TENSION BETWEEN THE SIXTH AMENDMENT AND RULE 606(B)

The inherent tension between the Sixth Amendment right to an impartial jury trial and the interest in preserving private jury deliberations provides the backdrop for the Bible-influenced capital sentencing debate. This Part explores the contours of the Sixth Amendment right to an impartial jury trial and tracks the evolution of the rule against juror impeachment of a verdict and its related policies, which culminated in the creation of Federal Rule of Evidence 606(b). It also discusses the cases that followed the enactment of Rule 606(b) and the current state of confusion regarding the Rule's provisions.

A. *The Sixth Amendment Right to an Impartial Jury Trial*

Traditionally deemed one of the most fundamental American rights, “the right to an impartial jury stands among those most revered by the founding generation.”¹⁹ The Sixth Amendment “guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.”²⁰ Jurors are chosen from the community at large and may draw upon their individual experiences while performing their duty to apply the law to the facts at hand.²¹ The Sixth Amendment thus endows the legal system—and specifically its criminal verdicts—with credibility by reflecting the values of the community and protecting the accused against oppression by the government.²² Accordingly, by recognizing that death penalty decisions

¹⁹ *Robinson v. Polk (Polk II)*, 444 F.3d 225, 230 (4th Cir. 2006) (King, J., dissenting); see also *Irvin v. Dowd*, 366 U.S. 717, 721 (1961) (“England, from whom the Western World has largely taken its concepts of individual liberty and of dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury.”).

²⁰ *Irvin*, 366 U.S. at 721. The Sixth Amendment reads:

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 defence.

U.S. CONST. amend. VI.

²¹ Dean Sanderford, *The Sixth Amendment, Rule 606(b), and the Intrusion into Jury Deliberations of Religions Principles of Decision*, 74 TENN. L. REV. 167, 173 (2007) (analyzing the tension between the Sixth Amendment and Rule 606(b) in *Fields* and other recent cases addressing Bible-influenced capital sentencing). For another analysis of *Fields*, see Nicholas G. Shively, Note, *Divine Intervention? The Threat of Religious Discussion in the Context of Capital Sentencing Deliberations: Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007) (*en banc*), 76 U. CIN. L. REV. 1401 (2008) (arguing that *Fields* was wrongly decided and suggesting an alternative approach to Bible-influenced capital sentencing).

²² *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968) (“[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found ex-

capture community mores, “the Court has consistently transposed its confidence in the jury system to the capital punishment setting”²³

While jurors’ individual life experiences inevitably accompany them into the jury room, the Sixth Amendment requires that jurors base their decisions solely on the facts and law presented during the trial. Courts have long recognized that evidence developed against a defendant must originate on the witness stand, thus preserving the defendant’s rights of confrontation, cross-examination, and counsel.²⁴ These rights require protection “regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies.”²⁵ Moreover, if even one juror fails to act impartially, the defendant’s right to an impartial jury is undermined.²⁶

B. *The Rule Against Juror Impeachment of a Verdict*

Despite the Sixth Amendment’s aspiration for an impartial judicial system, juror misconduct inevitably occurs because juries are comprised of imperfect human beings.²⁷ While dismantling verdicts attained by misbehavior may reinforce public confidence in the jury system,²⁸ doing so undermines the sacred finality of jury verdicts. Over time, courts have fashioned various approaches to accommodate these competing interests. This section explores the evolution of the rule prohibiting jurors from impeaching their verdicts, the common law diversions from this rule, and the enactment of Federal Rule of Evidence 606(b), which captures these developments.

In the 1785 English case *Vaise v. Delaval*,²⁹ Lord Mansfield ended the historically permissive treatment of juror testimony about misconduct by

pression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.”); see also *Irvin*, 366 U.S. at 722 (“In the ultimate analysis, only the jury can strip a man of his liberty or life. In the language of Lord Coke a juror must be as ‘indifferent as he stands unsworne.’”).

²³ Gregory Ashley, Note, *Theology in the Jury Room: Religious Discussion as “Extraneous Material” in the Course of Capital Punishment Deliberations*, 55 VAND. L. REV. 127, 137 (2002) (citing *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988)).

²⁴ *Parker v. Gladden*, 385 U.S. 363, 364 (1966); see also *Turner v. Louisiana*, 379 U.S. 466, 472 (1965); *Polk I*, 438 F.3d 350, 359 (4th Cir. 2006).

²⁵ *Turner*, 379 U.S. at 472.

²⁶ *Parker*, 385 U.S. at 366 (“[P]etitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors.”).

²⁷ Sanderford, *supra* note 21, at 173 (“A juror’s reliance on personal beliefs and experiences, while recognized as one of the great strengths of the jury system, also enhances the risk that the ultimate decision will be unfaithful to the law and facts of the case.”).

²⁸ Benjamin T. Huebner, Note, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. REV. 1469, 1471 (2006) (“[I]gnoring postjudgment allegations of juror misconduct implicates fairness issues and undermines the public’s faith in the jury system.”).

²⁹ (1785) 99 Eng. Rep. 944 (K.B.).

establishing a categorical prohibition on juror impeachment of verdicts.³⁰ The absolutist “Mansfield Rule” rested on the premise that jurors who engage in misconduct are not credible to testify about their misconduct.³¹ Despite its severity, the Mansfield Rule was “buoyed up by other policy reasons of a sounder nature,” which enabled the Rule to survive its “import[] into the United States.”³²

During the mid-nineteenth century, American courts liberalized the Mansfield Rule, endowing it with new policy justifications.³³ When the issue of juror misconduct reached the Supreme Court in *Hyde v. United States*,³⁴ the Court refused to allow testimony that jurors improperly reached their verdict through a bargain³⁵ and established a rule prohibiting jurors from testifying about “matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors, and can receive no corroboration.”³⁶ Although the *Hyde* Court provided little policy justification for the rule it adopted, it derived its rule from the Iowa Supreme Court, which focused on the “sanctity and conclusiveness” of verdicts in *Wright v. Illinois and Mississippi Telegraph Co.*³⁷ The *Wright* court expressed fear that allowing jurors to testify about their internal, subjective thought processes, which are “incapable of disproof,”³⁸ would render the jury room vulnerable to the “importunities and appliances of parties and their attorneys”³⁹ However, objective testimony about an allegedly improper means of deliberation would “purify the jury room, by rendering such improprieties capable of probable exposure”⁴⁰

Several years after *Hyde*, the Court elaborated upon the existing justification for the rule against juror impeachment of a verdict in *McDonald v. Pless*,⁴¹ articulating many of the modern policies underlying the rule.⁴² The Court expanded its focus beyond the historical emphasis on purely evidentiary concerns, discussing the prevention of juror harassment by defeated

³⁰ Huebner, *supra* note 28, at 1472.

³¹ Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 513 (1988) (“The policy behind the Mansfield Rule was simple. If a juror during deliberations engaged in wrongful conduct, his subsequent testimony was considered untrustworthy.”).

³² *Id.* at 514.

³³ *Id.*

³⁴ 225 U.S. 347 (1912).

³⁵ *Id.* at 381, 383.

³⁶ *Id.* at 384.

³⁷ 20 Iowa 195, 211 (1866).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* One such piece of testimony, for example, would be “the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance, or the like” *Id.*

⁴¹ 238 U.S. 264 (1915).

⁴² *Id.* (holding that jurors may not impeach their verdicts by testifying that they reached their decision by calculating the average of jurors’ individual opinions on the damage award).

parties,⁴³ the preservation of “frankness and freedom of discussion,”⁴⁴ and the protection against jury tampering by the public.⁴⁵ In addition to citing these frequently recognized policy considerations, modern courts have also asserted related justifications such as enabling juries to impose unpopular verdicts without fear of reprisal⁴⁶ and preventing the possibility of a dissatisfied juror fabricating testimony about misconduct to impeach the verdict.⁴⁷

As the Court adapted the Mansfield Rule to fit the contemporary American context, it also recognized several exceptions to the traditional Rule: The Court permitted jurors to testify about (1) “any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind”⁴⁸ and (2) the improper influence of a third party—specifically “any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury.”⁴⁹

The Court formulated its first exception to the traditional rule in *Mattox v. United States*.⁵⁰ In *Mattox*, the Court admitted jurors’ affidavits presented in support of a new trial after the jury consulted a newspaper article about the trial and the bailiff suggested both that the defendant previously committed murder and that the verdict would be reviewed on appeal.⁵¹ By allowing affidavits addressing the jury’s exposure to extraneous information, the Court carved a narrow exception to the general rule against juror impeachment of a verdict.⁵² Justifying this exception, the Court appealed to the “plainest principles of justice,” which required the exception but demanded that it be exercised cautiously.⁵³ Moreover, the Court expressed concern that allowing testimony about the subjective influence of extrane-

⁴³ *Id.* at 267.

⁴⁴ *Id.* at 267–68.

⁴⁵ *Id.* at 268.

⁴⁶ *Tanner v. United States*, 483 U.S. 107, 120–21 (1987). The Court in *Tanner* referenced and restated traditional policy justifications for the rule against juror impeachment of a verdict, noting that a “[f]ull and frank discussion in the jury room, jurors’ willingness to return an unpopular verdict, and the community’s trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.” *Id.*

⁴⁷ Sanderford, *supra* note 21, at 178.

⁴⁸ *Mattox v. United States*, 146 U.S. 140, 149 (1892).

⁴⁹ *Remmer v. United States*, 347 U.S. 227, 229 (1954).

⁵⁰ 146 U.S. 140.

⁵¹ *Id.* at 149. Specifically, the affidavits stated that the bailiff said to the jury, “[a]fter you fellows get through with this case it will be tried again down there,” and on a different occasion, “[t]his is the third fellow [the defendant] has killed.” *Id.* at 142. In addition, the jurors’ affidavits stated that they considered a newspaper article expressing that “the evidence against [the defendant in the case] was very strong.” *Id.* at 143.

⁵² *Id.* at 148.

⁵³ *Id.* (“[P]ublic policy, which forbids the reception of affidavits, depositions, or sworn statements of jurors to impeach their verdicts, may in the interest of justice create an exception to its own rule, while, at the same time, the necessity of great caution in the use of such evidence is enforced.”).

ous information “gives to the secret thought of one the power to disturb the expressed conclusions of twelve.”⁵⁴ The Court also indicated that the fact that the case involved a defendant sentenced to death further supported its decision to allow jurors to impeach their verdicts by testifying about misconduct⁵⁵—a point of particular significance in the context of Bible-influenced capital sentencing.

In several later cases, the Court recognized a second exception to the common law rule by allowing testimony about the improper influence of third parties. In *Remmer v. United States*, the Court permitted a juror to testify that a third party had bribed him.⁵⁶ The Court also allowed testimony about the influence of third parties in *Turner v. Louisiana*⁵⁷ and *Parker v. Gladden*.⁵⁸ In *Turner*, the Court held that the defendant had been denied the right to an impartial jury trial when two deputy sheriffs, who presented key testimony for the State during the trial, supervised and socialized with jurors outside of the courtroom.⁵⁹ In *Parker*, the bailiff responsible for overseeing the sequestered jurors suggested that the “wicked fellow” was guilty and that if the jury erroneously found him guilty, the Supreme Court would correct it.⁶⁰

In both *Turner* and *Parker*, the Court focused explicitly on the Sixth Amendment’s promise of an impartial jury trial, including the rights to confrontation and cross-examination, and the related requirement that all evidence considered by the jury be presented during the trial.⁶¹ The *Turner* Court underscored the importance of this guarantee, stating that “[t]he requirement that a jury’s verdict must be based upon the evidence developed

⁵⁴ *Id.* (quoting *Perry v. Bailey*, 12 Kan. 539, 545 (1874)). In addition, the Court cited concerns that allowing jurors to testify about misconduct would tend “to produce bad faith on the part of a minority; to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict.” *Id.*

⁵⁵ *Id.* at 149 (“It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.”); see also *Crump*, *supra* note 31, at 518 (“[T]he Court believed that the interests of justice would be served particularly well by an exception that allowed jurors to testify to misconduct in which they had engaged while determining the petitioner’s fate in a capital case, because an individual’s life was at stake.”).

⁵⁶ 347 U.S. 227, 229 (1954). In so holding, the Court deemed “any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury . . . presumptively prejudicial.” *Id.*

⁵⁷ 379 U.S. 466 (1965).

⁵⁸ 385 U.S. 363 (1966).

⁵⁹ *Turner*, 379 U.S. at 473. The jurors’ interaction with the sheriffs potentially prejudiced the jurors by bolstering the credibility of the sheriffs’ testimony, thus subverting the defendant’s right to challenge the sheriffs’ credibility meaningfully through cross-examination during the trial. *Id.*

⁶⁰ *Parker*, 385 U.S. at 363–64.

⁶¹ *Id.* at 364–65; *Turner*, 379 U.S. at 472.

at trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.”⁶²

While acknowledging the important policies served by unreviewable jury verdicts in *Mattox*, *Remmer*, *Turner*, and *Parker*, the Court also gave credence to the strong countervailing interest in impartial jury trials, as promised by the Sixth Amendment. Accordingly, these cases provided narrow exceptions to the prevailing common law rule prohibiting jurors from impeaching their verdicts.

C. Codifying the Law’s Development in Rule 606(b)

Adopted in 1975, Federal Rule of Evidence 606(b) codified both the common law rule against juror impeachment of verdicts and the exceptions carved out by subsequent decisions.⁶³ Although Congress vigorously debated the contours of the Rule, promulgating several drafts before reaching a careful compromise,⁶⁴ the final Rule provides:

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.⁶⁵

Reflecting the contentious nature of its drafting process, the final rule is peppered with vague and ambiguous language.⁶⁶ The core pronouncement of the rule, stating that jurors may not testify about matters discussed during deliberations or the influence of those matters on their decisionmaking, closely resembles the rules set out in *Hyde* and *McDonald*.⁶⁷ Posing

⁶² 379 U.S. at 472 (internal quotation marks omitted).

⁶³ See *Martinez v. Food City, Inc.*, 658 F.2d 369, 373 (5th Cir. 1981) (acknowledging that Rule 606(b) represented a codification of the common law as developed by federal courts); *United States v. Holck*, 398 F. Supp. 2d 338, 364 (E.D. Pa. 2005) (same); Sanderford, *supra* note 21, at 180 (citing the recognition in *Tanner v. United States*, 483 U.S. 107, 121 (1987), that “Federal Rule of Evidence 606(b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences”).

⁶⁴ 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6071 (2d ed. 2007); Crump, *supra* note 31, at 520–25, 527.

⁶⁵ FED. R. EVID. 606(b).

⁶⁶ Crump, *supra* note 31, at 520–25 (“The difficulty with Rule 606(b) is that it embodies a delicate political compromise camouflaged by ambiguous language, rather than an expression of consistent policy considerations.”).

⁶⁷ See *supra* Part I.B.

greater challenges for interpretation, the broadly defined exceptions provided by Rule 606(b)(1) (“extraneous prejudicial information”) and 606(b)(2) (“outside influence”) generally track the common law exceptions provided in *Mattox*, *Remmer*, *Turner*, and *Parker*.⁶⁸ Congress’s failure to articulate clearly the parameters of these exceptions reflects the inherent difficulty in accommodating the competing values of accuracy and fairness, on the one hand, and finality, on the other.⁶⁹ Because the ideal balance between these conflicting interests is unclear⁷⁰ and the vague language of the Rule itself offers little guidance, courts charged with interpreting the exceptions to Rule 606(b) must rely almost exclusively on the meaning ascribed by caselaw.

In general, courts have interpreted Rule 606(b)(1)’s exception for “extraneous prejudicial information”⁷¹ as broadly referring to evidence that was not presented at trial and therefore not subject to challenge in open court.⁷² Examples include the newspaper article considered by the jury in *Mattox*⁷³ and the impressions jurors formed of key witnesses’ credibility outside of the parameters of the trial in *Turner*.⁷⁴ When deciding whether information considered by the jury falls within this exception, courts frequently distinguish between general knowledge that inherently accompanies jurors into deliberations and information pertinent to the specific case or defendant.⁷⁵ General information is at least permissible and at most an asset to the jury system; however, specific information constitutes “extraneous prejudicial information.”⁷⁶ Whether courts should consider the Bible “extraneous prejudicial information” depends crucially on where they draw the line between specific and general information.⁷⁷

⁶⁸ See Sanderford, *supra* note 21, at 181.

⁶⁹ 27 WRIGHT & GOLD, *supra* note 64, § 6075, at 518–20.

⁷⁰ *Id.*

⁷¹ FED. R. EVID. 606(b)(1).

⁷² 27 WRIGHT & GOLD, *supra* note 64, § 6075, at 520; Sanderford, *supra* note 21, at 182; Huebner, *supra* note 28, at 1480.

⁷³ *Mattox v. United States*, 146 U.S. 140, 147 (1892).

⁷⁴ *Turner v. Louisiana*, 379 U.S. 466, 473 (1965). Other instances in which courts have invoked the “extraneous prejudicial information” exception have included “the jury’s consideration of extra-record information derived from books . . . and other public media, court documents, other objects not in evidence, experiments or investigations, views of the relevant scene or premises, the bailiff, the judge, the parties or witnesses, other persons not on the jury, or the jurors themselves.” 27 WRIGHT & GOLD, *supra* note 64, § 6075, at 523–26 (footnotes omitted).

⁷⁵ Sanderford, *supra* note 21, at 182.

⁷⁶ *Id.* at 183 (“[W]hile jurors are expected to bring knowledge and wisdom gleaned from personal experience to aid in performing their core function of deciding questions of fact, they must not stray from their task of dutifully applying the law to the facts. When the information relates specifically to the case or the defendant, it no longer serves as an aid in *evaluating* the evidence presented at trial; rather, the information becomes a *substitute* for the evidence presented at trial.”).

⁷⁷ See *infra* Part II.B.2.

While the scope of the “outside influence”⁷⁸ exception also lacks clear definition, this exception generally refers to bribery or coercion by a third party.⁷⁹ Examples falling within this exception include the bribery at issue in *Remmer* and the bailiffs’ comments to the jurors in *Mattox* and *Parker*. Although this exception applies less to the use of the Bible in deliberations than the “extraneous information” exception, it remains relevant because courts sometimes conflate the two exceptions, referring to both exceptions under the umbrella of “external” influences.⁸⁰

D. Confusion Following Rule 606(b): The Current State of the Rule Against Juror Impeachment of a Verdict

A flurry of litigation ensued after the enactment of Rule 606(b).⁸¹ *Tanner v. United States*, the Supreme Court’s most recent pronouncement on the Rule, exemplifies the confusion cultivated by the Rule’s vague language.⁸² In *Tanner*, the Court refused to admit juror testimony about the consumption of alcohol, marijuana, and cocaine by jurors during the trial and deliberations.⁸³ Attempting to distinguish between Rule 606(b)’s general proscription of juror testimony about “internal” influences and the Rule’s narrow exceptions for testimony about “external” influences, the Court stated that “[t]he distinction was not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based on the *nature of the allegation*.”⁸⁴ In other words, courts must evaluate each allegation on a case-by-case basis to determine whether they should admit juror testimony impeaching a verdict.

Although the Court contrasted the “nature of the allegation” standard with a “rigid distinction based only on whether the event took place inside or outside the jury room,”⁸⁵ the Court neither explained the meaning of its test nor offered additional criteria for determining whether a particular influence is internal or external.⁸⁶ At most, the Court discussed several examples of internal influences about which jurors may not testify: generally, physical or mental incompetence,⁸⁷ and specifically, a virus, poorly prepared food, or lack of sleep.⁸⁸ With its ill-defined “nature of the allegation”

⁷⁸ FED. R. EVID. 606(b)(2).

⁷⁹ See Sanderford, *supra* note 21, at 181–82.

⁸⁰ See, e.g., *Tanner v. United States*, 483 U.S. 107 (1987).

⁸¹ See Crump, *supra* note 31, at 522.

⁸² 483 U.S. at 107.

⁸³ *Id.*

⁸⁴ *Id.* at 117 (emphasis added).

⁸⁵ *Id.*

⁸⁶ See Crump, *supra* note 31, at 524 (“The most troublesome aspect of this reasoning, however, is the absence of a test explaining what elements in the ‘nature of the allegations’ make the difference between irregularities that will qualify as ‘external’ and those that will not.”).

⁸⁷ *Tanner*, 483 U.S. at 118–19.

⁸⁸ *Id.* at 122.

test, the *Tanner* Court added another layer to the difficulty lower courts already faced when interpreting the unclear parameters of Rule 606(b).

Without useful guidance provided by either Rule 606(b) or relevant caselaw, courts are left analogizing Bible-influenced capital sentencing to the drug and alcohol use in *Tanner* or the equally inapposite influences in *Mattox*, *Remmer*, *Turner*, or *Parker*. Challenged by the limited, fact-specific jurisprudence surrounding Rule 606(b) and its exceptions, courts repeatedly struggle to determine whether jurors' consultation of Biblical materials during deliberations constitutes misconduct.

II. WHY THE NINTH CIRCUIT WRONGLY DECIDED *FIELDS V. BROWN*

In *Fields v. Brown*, the Ninth Circuit recently considered whether jurors committed misconduct by consulting notes that Rodney White, the jury's foreperson, transposed from his Bible and other reference texts into lists "for" and "against" the imposition of the death penalty.⁸⁹ After White shared his notes with at least some members of the previously undecided jury, the jury voted to sentence Fields to death.⁹⁰ On appeal, the California Supreme Court affirmed Fields's conviction and death sentence.⁹¹ The federal district court denied Fields's petition for a writ of habeas corpus with

⁸⁹ 503 F.3d 755, 777 (9th Cir. 2007) (en banc), cert. denied, 128 S. Ct. 1875 (2008). The "for" side of White's notes included: "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 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." *Id.* at 778 n.15.

The "against" side of White's notes included: "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"; and "'Popular' feelings." *Id.*

In addition to consulting his Bible, White consulted his dictionary for definitions of the words "ex-tenuation," "vindication," and "mitigate." *Id.* at 777. White incorporated these definitions into his notes as well. *Id.*

⁹⁰ *Id.* at 778.

⁹¹ *People v. Fields*, 673 P.2d 680 (Cal. 1983). Fields was convicted of robbery-murder of one victim, with the special circumstance of willful, deliberate, and premeditated murder during the commission of a robbery; robbery of a second victim; kidnapping for robbery and forced oral copulation of a third victim; kidnapping for robbery, robbery, rape, forcible oral copulation, and assault with a deadly weapon of a fourth victim; and kidnapping, robbery, forcible oral copulation, and rape of a fifth victim. *Fields v. Brown*, 503 F.3d at 763.

respect to his conviction and granted a writ on Fields's claim that the jury considered extrinsic evidence during the sentencing phase.⁹² The Ninth Circuit, en banc, found that the jury's consideration of Biblical materials did not violate the Sixth Amendment and accordingly upheld Fields's death sentence.⁹³ His petition for a writ of certiorari was denied by the United States Supreme Court on April 14, 2008.⁹⁴

The latest among numerous state and federal decisions concerning Bible-influenced capital sentencing, *Fields* exemplifies the general confusion courts have faced when applying Rule 606(b) to the intrusion of the Bible into jury deliberations. Courts have differed over whether Biblical materials constitute external influences under 606(b) and whether jurors' consultation of such materials constitutes misconduct. The misguided analysis performed by the Ninth Circuit, which led the court to the wrong conclusion, underscores the need for a coherent, consistent approach to the recurring issue of Bible-influenced capital sentencing.

A. *Avoiding Misconduct: The Fields Court's Greatest Error*

The *Fields* court erred most significantly by neglecting to fully examine the overriding interests at stake in the case: The defendant's Sixth Amendment right to an impartial jury trial and the competing tradition of private jury deliberations. Anomalous among the many courts that have considered Bible-influenced capital sentencing,⁹⁵ the *Fields* court chose not to hinge its analysis on whether the jury had engaged in misconduct.⁹⁶ Accordingly, the court failed to comprehensively explore Sixth Amendment concerns that would have accompanied an analysis focused on the misconduct issue.

Other state and federal courts addressing juror behavior comparable to that in *Fields* have explored more thoroughly whether introducing Biblical precepts into jury deliberations constitutes misconduct.⁹⁷ In contrast to

⁹² *Fields*, 503 F.3d at 761. The district court agreed to hold a hearing to examine the jury's alleged consideration of evidence beyond the scope of the trial, including Biblical materials. *Id.*

⁹³ *Id.* at 783.

⁹⁴ *Fields v. Ayers*, 128 S. Ct. 1875 (2008).

⁹⁵ See *infra* note 97 and accompanying text.

⁹⁶ Instead, the court's analysis turned on whether misconduct, if it occurred, had a "substantial and injurious" effect on the jury's verdict. In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court adopted this standard to determine whether error is harmless on habeas review. See *infra* Part II.B.4.

⁹⁷ See, e.g., *McNair v. Campbell*, 416 F.3d 1291, 1307–08 (11th Cir. 2005) (considering the merits even though McNair's Sixth Amendment claim was procedurally barred and stating, "[I]t is undisputed that jurors in the guilt phase of McNair's trial considered extrinsic evidence during deliberations"); *Jones v. Kemp*, 706 F. Supp. 1534, 1558–60 (N.D. Ga. 1989) (finding constitutional error where the jury considered the Bible during capital sentencing deliberations); *People v. Harlan*, 109 P.3d 616, 624–29 (Colo. 2005) (upholding the trial court's decision to vacate the defendant's death sentence when jurors considered a Bible, Bible index, and handwritten notes during deliberations). See generally *Polk II*,

Fields, these other courts have found, more often than not, that it does.⁹⁸ Although the contours of the analyses vary, courts generally begin by acknowledging the Sixth Amendment's guarantee that all evidence weighed by the jury must originate from the trial, thus preserving the defendant's rights to confrontation and cross-examination.⁹⁹ As a corollary to this principle, any evidence that was not presented in open court constitutes extraneous prejudicial information.¹⁰⁰

Extraneous information may include either facts that were not introduced during the trial or law that was not provided in the legal instructions issued to the jury. In *Jones v. Kemp*, the Northern District of Georgia equated the Bible with dictionaries¹⁰¹ and quasi-legal texts,¹⁰² materials that it had already deemed improper influences.¹⁰³ The court held that, comparable to reliance on dictionaries or quasi-legal texts, the jury's reliance on the Bible constituted misconduct.¹⁰⁴ The court stated that "[a] search for the command of extrajudicial 'law' from any source other than the trial judge, no matter how well intentioned, is not permitted."¹⁰⁵

In *People v. Harlan*, the Colorado Supreme Court engaged in similar reasoning when it applied Colorado Rule of Evidence 606(b)—which is virtually identical to Federal Rule of Evidence 606(b)—to jurors' consideration of the Bible during capital sentencing deliberations.¹⁰⁶ Explaining how the Bible functions as law for many Americans, the court stated:

The [Bible] may also be viewed as a legal instruction, issuing from God, requiring a particular and mandatory punishment for murder. Such a "fact" is not one presented in evidence in this case and such a "legal instruction" is not the law of the state or part of the court's instructions.¹⁰⁷

444 F.3d 225 (9th Cir. 2006) (denying rehearing en banc of a claim that the jury unconstitutionally relied on the Bible in its capital sentencing decision).

⁹⁸ See *Fields*, 503 F.3d at 795 (Berzon, J., dissenting) ("As to the procedural propriety of consulting the Bible during deliberations, federal and state appellate courts generally agree when engaging in de novo review, that a jury engages in unconstitutional consultation of extrinsic material by introducing the Bible into deliberations during a capital trial.").

⁹⁹ See, e.g., *McNair*, 416 F.3d at 1307; *Jones*, 706 F. Supp. at 1560; see also *supra* note 24 and accompanying text.

¹⁰⁰ See *McNair*, 416 F.3d at 1307–08; *Jones*, 706 F. Supp. at 1560; *People v. Williams*, 148 P.3d 47, 79 (Cal. 2006); *Harlan*, 109 P.3d at 633.

¹⁰¹ *Jones*, 706 F. Supp. at 1558 ("The courts have condemned the use of a common dictionary by jurors where there exists a reasonable possibility that it was used to define legal terms, or act as a substitute for instructions in the jury's deliberations.").

¹⁰² *Id.* at 1559 ("Due process was undermined, the court concluded, when the jury sought instruction in the law from a source other than the court.").

¹⁰³ *Id.* at 1558–59.

¹⁰⁴ *Id.* at 1559.

¹⁰⁵ *Id.*

¹⁰⁶ 109 P.3d 616, 624 (Colo. 2005).

¹⁰⁷ *Id.* at 632.

When considering the jury's consultation of Biblical materials, the *Fields* court did not perform an analysis comparable to the decisions discussed above. Although the court offered several reasons to support its position that the jury did not engage in misconduct,¹⁰⁸ ultimately the court avoided deciding whether misconduct in fact occurred.¹⁰⁹ Specifically, the court stated, "[W]e do not need to decide whether there was juror misconduct because even assuming there was, we are persuaded that White's notes had no substantial and injurious effect or influence in determining the jury's verdict."¹¹⁰

Instead of expounding on the issue of misconduct, in a footnote the court deferred to the Fourth Circuit's debate on the subject, as presented in the majority and dissenting opinions in *Robinson v. Polk* and Judge Wilkinson's concurrence in the Fourth Circuit's denial of rehearing en banc.¹¹¹ However, as discussed more thoroughly in Part IV, the Fourth Circuit was bound by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),¹¹² which requires federal courts reviewing a state conviction on collateral review to determine whether the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."¹¹³ As the *Fields* court was not bound by this highly demanding standard,¹¹⁴ its deference to the Fourth Circuit's evaluation of misconduct was inapposite—and possibly misleading.¹¹⁵

B. *Flaws in the Court's Reasoning*

Fields not only failed to decide whether misconduct occurred, giving short shrift to the related Sixth Amendment concerns, but the misconduct analysis that the court did provide involved flawed reasoning. The court presented three reasons to support its conclusion that jurors' consultation of White's Biblical notes did not constitute misconduct: (1) "[the foreman]'s

¹⁰⁸ See *infra* Part II.B (discussing the flaws in the reasons offered by the court).

¹⁰⁹ *Fields v. Brown*, 503 F.3d 755, 761 (9th Cir. 2007) (en banc), *cert. denied*, 128 S. Ct. 1875 (2008).

¹¹⁰ *Id.*; see *supra* note 96 and accompanying text.

¹¹¹ *Fields*, 503 F.3d at 781–82 n.21 (citing *Polk I*, 438 F.3d 350 (4th Cir. 2006), *reh'g denied*, 444 F.3d 225 (4th Cir. 2006) (refusing petitioner's application for habeas relief because of the jury's consultation of the Bible and holding that one juror's reading of the "eye for an eye" passage to persuade other jurors to sentence the defendant to death did not violate petitioner's Sixth Amendment rights)); *Polk II*, 444 F.3d 225 (4th Cir. 2006).

¹¹² Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

¹¹³ 28 U.S.C. § 2254(d)(1) (2006).

¹¹⁴ Because *Fields*'s petition was filed before the enactment of AEDPA, this modern standard did not apply to the merits of *Fields*'s appeal. *Fields*, 503 F.3d at 763. Instead, the *Fields* court was bound only by the harmless error standard. See *supra* note 96.

¹¹⁵ See *infra* Part IV.

notes are not like the[] examples” of misconduct found in Supreme Court and Ninth Circuit precedent;¹¹⁶ (2) the list that the foreman derived from the Bible merely “contained . . . notions of general currency that inform the moral judgment that capital-case jurors are called upon to make;”¹¹⁷ and (3) while it may be “improper and prejudicial for the *prosecution* to invoke God or to paraphrase a Biblical passage[,] . . . what may be improper or prejudicial when said by a prosecutor may not be so when said by a juror.”¹¹⁸ After presenting these arguments, the court ultimately chose not to rule on whether misconduct occurred, holding that any potential error was harmless.¹¹⁹ Each of these arguments is explored in turn below.

I. White’s Notes Are “Not Like These Examples”.—The court began its analysis by summarizing the instances of improper influence identified by the Supreme Court in *Mattox*, *Remmer*, *Turner*, *Parker*,¹²⁰ and similar Ninth Circuit precedent.¹²¹ After a cursory review of these examples, the court concluded that the jury’s actions did not constitute misconduct because they were “not like these examples.”¹²² In the most superficial sense, the court’s statement was accurate: the court correctly distinguished the facts of the relevant precedent from the facts at hand. However, Bible-influenced capital sentencing involves “difficult and problematic circumstances far removed from the context in which the principle [involving external influences] has been applied.”¹²³ Accordingly, the court’s focus on

¹¹⁶ *Fields*, 503 F.3d at 780.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 780–81.

¹¹⁹ *Id.* at 781; *see supra* note 96.

¹²⁰ *See supra* Part I.B.

¹²¹ The examples cited from Ninth Circuit precedent closely resemble Supreme Court precedent. *See Fields*, 503 F.3d at 780. The court found improper external influences when, similar to *Mattox* and *Parker*, jurors received extra-record information about the defendant. Such cases included *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993), where the jury learned that the defendant had committed a prior armed robbery; *Lawson v. Borg*, 60 F.3d 608, 612–13 (9th Cir. 1995), where a juror told others about the defendant’s reputation for violence; and *Sassounian v. Roe*, 230 F.3d 1097, 1108–10 (9th Cir. 2000), where the jury discussed an extra-record telephone call regarding the defendant’s motive. Finally, just as improper influence resulted where key witnesses fraternized with the jurors in *Turner*, the Ninth Circuit found a similar improper influence where jurors had a twenty-minute conversation with a detective who provided crucial testimony. *Caliendo v. Warden of Cal. Men’s Colony*, 365 F.3d 691, 696, 698 (9th Cir. 2004).

Interestingly, while citing this Ninth Circuit precedent regarding improper external influences, the *Fields* court erroneously cited *United States v. Armstrong* as finding improper influence where a juror received threatening phone calls. *Fields*, 503 F.3d at 780. In fact, the court’s result in *Armstrong* was just the opposite. In *Armstrong*, the court held that “even if it was a third party who placed the calls, we are convinced that the District Court did not abuse its discretion in refusing to declare a mistrial as a result. . . . These facts render this case quite unlike those where reversal has been required.” 654 F.2d 1328, 1333 (9th Cir. 1981). The court cited *Remmer* and *Mattox* as distinguishable cases “where reversal has been required.” *Id.*

¹²² *Fields*, 503 F.3d at 780.

¹²³ *Polk II*, 444 F.3d 225, 230 (4th Cir. 2006).

the obvious distinction between the facts of *Fields* and prior cases stopped short of actually resolving whether the jury's actions constituted misconduct. Moreover, extending the court's fact comparison one logical step further leads to a bizarre conclusion: If White's notes do not constitute an external influence, then they must constitute an "internal influence" comparable to jurors' consumption of drugs and alcohol in *Tanner*¹²⁴—an untenable proposition. Because, in fact, Biblical notes resemble *neither* the external *nor* the internal influences explored by precedent, the court's argument that White's "notes are not like these examples"¹²⁵ is a nonstarter.

Next, the court implicitly supported its contention that Biblical "notes are not like these examples"¹²⁶ with its subsequent proposition that the notes "are a mix of ideas 'for' and 'against' capital punishment."¹²⁷ However, the court failed to explain how this statement—a restatement of facts, and not legal analysis of any sort—supported its position. Moreover, the court's insinuation that White provided a balanced list of pros and cons was demonstrably incorrect. As Judge Gould pointed out in his dissent, the pros list was significantly longer and more substantive than the cons list, and "[t]he extreme[ly] lopsided nature of the . . . lists simply underscore[d] the emphasis White placed on Biblical justification of the death penalty."¹²⁸

2. *White's Notes Constitute "Notions of General Currency"*.—The court next supported its position that the jurors did not commit misconduct by stating that "[b]oth the Biblical verses and the other concepts contained in the notes are notions of general currency that inform the moral judgment that capital-case jurors are called upon to make."¹²⁹ Without offering any support or explanation, the court accepted the premise that notes citing specific Biblical verses constitute common knowledge. However, White's actions belied the hollow premise the court took for granted: as Judge Gould stated in dissent, "If these biblical verses are well known as 'notions of general currency,' why did White have to conduct research to produce them?"¹³⁰ Moreover, characterizing Biblical passages as "notions of general currency" offends believers and nonbelievers alike. According to many Christian Americans, verses such as those cited by White do not represent mere moral notions but "hard-and-fast imperatives that must direct daily life."¹³¹ On the other extreme, equating the Bible with "notions of general

¹²⁴ See *supra* Part I.D.

¹²⁵ *Fields*, 503 F.3d at 780.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 784 (Gould, J., dissenting).

¹²⁹ *Id.* at 780 (majority opinion).

¹³⁰ *Id.* at 784 (Gould, J., dissenting).

¹³¹ *Id.* at 796 (Berzon, J., dissenting).

currency” offends the many non-Christian Americans who ground their moral beliefs in other sources.¹³²

The court underscored its argument that White’s notes contained notions of general currency by stating that the notes actually helped “inform the moral judgment” required of jurors in capital sentencing proceedings.¹³³ However, while many Americans seek guidance from religion to inform their moral values, the majority overlooked the very important difference between religion and morality in the context of capital sentencing deliberations. While morality may aid jurors in their duty to apply the law to the facts, jurors’ consultation of religious materials creates the risk that they will base their decisions on Biblical law rather than the law prescribed by the judge.¹³⁴ This is because religion “claims an authority greater than secular law,” and religious principles often assume a concrete form resembling law.¹³⁵ Unlike appeals to amorphous notions of morality, appeals to religion carry a strong potential to undermine the application of secular law by providing an alternative code of law to prescribe a jury’s decisionmaking.

¹³² See *infra* Part III.C (discussing the possible Establishment Clause issues raised by Bible consultation in jury deliberations); see also *Fields*, 503 F.3d at 785 (Gould, J., dissenting) (“[I]f these [notes] can be characterized sensibly as ‘notions of general currency,’ then are they notions that some jurors might view as divinely commanded or inspired? . . . If the majority’s rule applies only to the introduction of quotes from the Judeo-Christian Bible, then this introduces something akin to an Establishment Clause violation in the heart of the jury room.”).

¹³³ *Fields*, 503 F.3d at 780. The court went on to cite Justice Stevens in *Sawyer v. Whitley*: “[W]hile the question of innocence or guilt of the offense is essentially a question of fact, the choice between life imprisonment and capital punishment is both a question of underlying fact and a *matter of reasoned moral judgment*.” *Id.* (emphasis added) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 370 (1992) (Stevens, J., concurring in the judgment)) (internal quotation marks omitted).

¹³⁴ Moreover, Biblical law is inherently inconsistent with the American legal system because it is fixed and susceptible to many interpretations. See Terrence T. Eglund, Comment, *Prejudiced by the Presence of God: Keeping Religious Material out of Death Penalty Deliberations*, 16 CAP. DEF. J. 337, 340 (2004) (“Unlike state and federal law, religious law is temporally fixed from the moment that it is written. When society evolves . . . legislatures and courts are able to pass new legislation or render legal decisions that adapt the civil law to the changing culture.”).

Alternatively, some argue that religious law is, in fact, flexible and may be interpreted differently over time. For example, traditional Shari’a law may be interpreted to accommodate the modern emphasis on human rights and women’s rights. Abdullahi Ahmed An-Na’im, *Human Rights in the Muslim World*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 531 (Henry J. Steiner et al. eds., 3d ed. 2008). Under this view, religious law may not be at odds with the flexible character of American law.

¹³⁵ *Recent Cases: Capital Sentencing—Juror Prejudice—Colorado Supreme Court Holds Presence of Bible in Jury Room Prejudicial*, 119 HARV. L. REV. 646, 650 (2005) [hereinafter *Juror Prejudice*]; see also *Polk II*, 444 F.3d 225, 227 (4th Cir. 2006) (“[The Bible] is a sacred and authoritative expression of the Judeo-Christian tradition Its very place as a canon of scriptural authority is so powerful that it threatens to supplant the individualized sentencing inquiry into the nature and consequences of the crime and the particular aggravating and mitigating circumstances brought forward in the evidence.”); *People v. Harlan*, 109 P.3d 616, 630 (Colo. 2005) (“The Bible and other religious documents are considered codes of law by many [potential jurors]. . . . The book of Leviticus is one of the first five books of the Old Testament, which are considered the *books of law* . . . and is *almost entirely legislative in character*.” (emphasis added) (internal quotation marks omitted)).

Even if the court was correct that White’s notes constituted “notions of general currency” comparable to broad moral norms, it still failed to support its general position that Biblical notes are not “extraneous prejudicial information” under Rule 606(b).¹³⁶ Courts usually distinguish between specific and general extraneous information because specific information improperly supplants evidence presented during trial, while general information—which expectedly accompanies jurors into their service¹³⁷—may help them apply the law to the facts. Accordingly, specific extraneous information is impermissible while general extraneous information is permissible. However, this distinction becomes irrelevant when the extraneous information at issue is *legal*, not factual, as in *Fields*.¹³⁸ Unlike factual information relating specifically to the defendant or his crimes, “[t]he text [of the Bible] may . . . be viewed as a legal instruction, issuing from God, requiring a particular and mandatory punishment for murder.”¹³⁹ Whether general or specific, extraneous *legal* information will *always* interfere with jurors’ duty to apply facts to the law prescribed by the judge.¹⁴⁰ While *factual* information derived from life experience may enrich jurors’ competence, extraneous *legal* information inevitably conflicts with—and potentially undermines—the legal instructions issued to the jury.

3. *The Facts of Fields Are Distinguishable from Those in Sandoval v. Calderon.*—The court next distinguished *Fields* from its earlier holding in *Sandoval v. Calderon*.¹⁴¹ The *Fields* court recognized that in *Sandoval*, it held that the *prosecution* may not appeal to religion in the closing arguments of a capital sentencing proceeding.¹⁴² The *Fields* court acknowledged several considerations underlying its previous decision in *Sandoval* and then concluded that “[n]one . . . applies in a similar fashion to a juror; what may be improper or prejudicial when said by a prosecutor may not be so

¹³⁶ FED. R. EVID. 606(b)(1).

¹³⁷ *Hard v. Burlington N. R.R.*, 870 F.2d 1454, 1461 (9th Cir. 1989) (“[T]he type of after-acquired information that potentially taints a jury verdict should be carefully distinguished from the general knowledge, opinions, feelings and bias that every juror carries into the jury room.”); *see also* 27 WRIGHT & GOLD, *supra* note 64, § 6075, at 533; *Sanderford, supra* note 21, at 186.

¹³⁸ *See Sanderford, supra* note 21, at 186–87.

¹³⁹ *Harlan*, 109 P.3d at 632.

¹⁴⁰ *See Sanderford, supra* note 21, at 186 (“No matter how widely known, the introduction into deliberations of an alternative principle of decision, such as the biblical mandate of an eye for an eye, can serve no permissible function, and thus it can never constitute the kind of general information one expects and encourages a juror to consider during deliberations.”).

¹⁴¹ 241 F.3d 765, 769 (9th Cir. 2001) (awarding defendant habeas relief in his capital case because he “was denied a fair penalty phase trial by the prosecutor’s closing argument that invoked divine authority and paraphrased a well known Biblical passage as support for imposition of the death penalty”).

¹⁴² *Fields v. Brown*, 503 F.3d 755, 780 (9th Cir. 2007) (en banc) (“Fields correctly points out that we have held that it is improper and prejudicial for the *prosecution* to invoke God or to paraphrase a Biblical passage in closing argument in the penalty phase of a capital case.”), *cert. denied*, 128 S. Ct. 1875 (2008).

when said by a juror.”¹⁴³ In fact, all three *Sandoval* considerations mentioned by the court apply equally, if not more persuasively, to the invocation of religious principles by jurors during deliberations.

The *Fields* court first noted that the *Sandoval* prosecutor’s religious arguments in favor of the death penalty “frustrated the purpose” of the closing argument—to summarize the evidence on which juries must base their decisions.¹⁴⁴ In *Sandoval*, the court supported this proposition by citing the widely recognized principle that “[t]he jury’s decision is to be based upon the evidence presented at trial and the legal instructions given by the judge.”¹⁴⁵ Numerous courts have invoked this principle when deeming jurors’ consultation of Biblical materials misconduct.¹⁴⁶ If the prosecutor’s appeal to religious principles undermines the jury’s duty to apply the law to the facts discussed during trial, surely the jury’s own consultation of religious materials is just as improper.

While the court in *Fields* argued that “the prosecutor is constrained in ways that a juror is not,”¹⁴⁷ based on their different roles in the justice system, the jury indeed functions as a state actor in many ways and therefore faces the same constraints.¹⁴⁸ Jurors “act[] pursuant to a delegation of authority from the state”¹⁴⁹ and accordingly accept the privileges conferred upon state actors, including both payment by the state and common law immunity from prosecution.¹⁵⁰ Moreover, the Supreme Court has explicitly identified the jury as “a governmental body.”¹⁵¹ Not only does the jury face the same constraints as the prosecutor, in the context of Bible-influenced capital sentencing, “[a] fellow juror’s introduction of such material into the jury room has an *even greater* potential for a prejudicial effect.”¹⁵² This greater potential for prejudicial effect results from the defendant’s inability to counteract the impact of the religious materials in open court.¹⁵³

The *Fields* court also dismissed without explanation two additional considerations underlying *Sandoval*: (1) that the prosecutor’s religious argument “violated the Eighth Amendment principle of narrowly channeled

¹⁴³ *Id.* at 781.

¹⁴⁴ *Id.*

¹⁴⁵ *Sandoval*, 241 F.3d at 776.

¹⁴⁶ *See supra* note 100 and accompanying text.

¹⁴⁷ *Fields*, 503 F.3d at 781.

¹⁴⁸ *See* Eglan, *supra* note 134, at 359 (“When a citizen acquiesces to serve as a juror, he sheds his role as a citizen and accepts the role of a state actor.”).

¹⁴⁹ Gary L. Simson & Stephen P. Garvey, *Knockin’ on Heaven’s Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV. 1090, 1108 (2001).

¹⁵⁰ *See* Eglan, *supra* note 134, at 359.

¹⁵¹ *See* Simson & Garvey, *supra* note 149, at 1108 (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991), which held that jury selection constitutes state action for purposes of the Fifth Amendment Due Process Clause).

¹⁵² *Fields*, 503 F.3d at 799 (Berzon, J., dissenting).

¹⁵³ *Id.*

sentencing discretion,”¹⁵⁴ and (2) that the prosecutor’s religious argumentation “undercut[] the jury’s own sense of responsibility for imposing the death penalty.”¹⁵⁵ These considerations also apply with equal force to a jury’s reliance on religious materials.

4. *White’s Notes Did Not Have a “Substantial and Injurious Effect” on the Jury’s Verdict.*—After marshalling three defective arguments in support of its position that consultation of Biblical materials did not constitute misconduct, the *Fields* court ultimately chose not to rule on whether misconduct had indeed occurred.¹⁵⁶ The court concluded that whether or not jurors engaged in misconduct, their actions did not have a “substantial and injurious effect or influence” on the verdict.¹⁵⁷ However, like the court’s misconduct analysis, its evaluation of the impact of White’s notes—which formed the basis of its holding—was also flawed.

The court first supported its holding that the “for” part of White’s notes had no substantial and injurious effect or influence on the jury’s verdict by pointing out that White’s notes included both “for” and “against” categories.¹⁵⁸ However, beyond the superficial inclusion of both “for” and “against” columns, all other features of White’s list favored the death penalty:¹⁵⁹ the “for” side included at least thirteen separate entries, while the “con” side included six entries; the “for” side included over thirty-one lines of text, while the “con” side included six lines; the “for” side included several direct Biblical quotations, while the “con” side did not include a single Biblical quotation.¹⁶⁰ Belying the court’s suggestion, White’s list was hardly balanced.

The court next supported its holding by noting that White introduced his notes early in the deliberations, and that the jurors could take as much time as they needed to decide upon the appropriate penalty.¹⁶¹ Although the court relied on this statement of fact for support, this statement can just as easily weigh against the court’s argument. It is likely that the notes indeed affected the jury’s decision due to their early introduction, as the jury barely deliberated at all without their presence.¹⁶² In addition, as noted by Judge Berzon in her dissent, the fact that the jury reached unanimity only after the introduction of White’s notes further demonstrates their influence on the verdict.¹⁶³

¹⁵⁴ *Id.* at 781 (majority opinion); *see infra* Part III.B.

¹⁵⁵ *Fields*, 503 F.3d at 781; *see infra* Part III.A.

¹⁵⁶ *Fields*, 503 F.3d at 781.

¹⁵⁷ *Id.* at 783; *see supra* note 96.

¹⁵⁸ *Fields*, 503 F.3d at 781.

¹⁵⁹ *Id.* at 784 (Gould, J., dissenting); *see also* text accompanying note 128.

¹⁶⁰ *Fields*, 503 F.3d at 784 (Gould, J., dissenting); *see also supra* note 89.

¹⁶¹ *Fields*, 503 F.3d at 781.

¹⁶² *Id.* at 801 (Berzon, J., dissenting); *id.* at 787–88 (Gould, J., dissenting).

¹⁶³ *Id.* at 798 (Berzon, J., dissenting).

Finally, and “[m]ore importantly,” the court supported its holding by stating that “the jury was instructed to base its decision on the facts and the law as stated by the judge, regardless of whether a juror agreed with it,” and “[courts] presume that jurors follow the instructions.”¹⁶⁴ However, by definition, presumptions can be rebutted. This is especially true in cases as clear as *Fields*, where the jury directly contravened its instructions to apply the law provided by the judge by considering—and likely relying on—Biblical mandates.¹⁶⁵ Like the court’s other arguments, this argument is easily dismantled, leaving the court with no support for its conclusion that the error in this case was harmless.

C. *A Note on Biblical Notes*

After discussing the Ninth Circuit’s and various other courts’ approaches to Bible-influenced capital sentencing, it is prudent to acknowledge the difference between the Bible and notes or excerpts derived from the Bible. The cases discussed in this Note have ranged from addressing mere discussion of Biblical principles,¹⁶⁶ to Biblical notes as in *Fields*,¹⁶⁷ to actual Bibles present in the jury room.¹⁶⁸ At least one scholar goes so far as to argue that Rule 606(b) should permit jurors to deliver testimony challenging their verdict where the jury merely discusses Biblical principles without the actual text present.¹⁶⁹ However, at a minimum, Rule 606(b)

¹⁶⁴ *Id.* at 781–82 (majority opinion) (citing *Kansas v. Marsh*, 548 U.S. 163 (2006), and quoting *Richardson v. Marsh*, 481 U.S. 200 (1987), as applying “the almost invariable assumption of the law that jurors follow their instructions”).

¹⁶⁵ *Id.* at 787 (Gould, J., dissenting) (“What basis is there to presume, as the majority does, that after consulting both the dictionary and the Bible for aid in deliberations, that the jury members disregarded the secular and divine insights gleaned from these sources and based the sentencing decision on the facts and the law as stated by the trial judge. . . . This jury proved it did not follow the trial court’s specific and explicit instructions.”).

¹⁶⁶ *Young v. State*, 12 P.3d 20 (Okla. Crim. App. 2000).

¹⁶⁷ 503 F.3d at 755.

¹⁶⁸ *Polk I*, 438 F.3d 350 (4th Cir. 2006), *reh’g denied*, 444 F.3d 225 (4th Cir. 2006); *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005); *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989); *People v. Williams*, 148 P.3d 47 (Cal. 2006); *People v. Harlan*, 109 P.3d 616 (Colo. 2005).

¹⁶⁹ See Sanderford, *supra* note 21, at 188 (“[W]hen a jury decides a criminal defendant’s fate in accordance with biblical rather than legal principle, the defendant suffers the same injury whether the jury read directly from the Bible or merely discussed it.”). Sanderford argues that both consultation of a Bible during jury deliberations and discussion of Biblical principles, in the absence of the text, constitute juror misconduct. *Id.* at 188. Accordingly, Sanderford urges the extension of Rule 606(b) to allow juror testimony on discussion of religious principles. *Id.* at 192–96.

While embracing policy goals similar to those expressed in this Note, Sanderford skips an important step in his analysis by failing to appreciate that whether the *physical presence* of a Bible during jury deliberations constitutes misconduct has not yet been settled. See, e.g., *Fields v. Brown*, 503 F.3d 755, 761 (9th Cir. 2007) (en banc) (quoting *In re Fields*, 800 P.2d 862, 872 (Cal. 1991)), *cert. denied*, 128 S. Ct. 1875 (2008); *Polk I*, 438 F.3d 350. But see, e.g., *McNair*, 416 F.3d 1291; *Jones*, 706 F. Supp. 1534; *Harlan*, 109 P.3d 616.

should allow jurors to testify about the presence of either a Bible or Biblical materials during jury deliberations. Just as allowing testimony about the presence of a Bible remains faithful to the policy considerations captured by Rule 606(b), the same holds true for testimony about the presence of Biblical notes: such testimony provides objectively verifiable evidence about jurors' consideration of extraneous information.

Moreover, as Judge Berzon's dissent properly recognized, "making only certain portions available exacerbates, rather than ameliorates, the problem presented by the introduction of Biblical writings during jury deliberations."¹⁷⁰ As in *Fields*, without the entire Bible present, jurors encounter only the biased quotations selected by one individual.¹⁷¹ In addition, verses memorialized in writing are more authoritative and permanent than verses or concepts cited from memory.¹⁷² When Biblical quotations are captured in writing, jurors may repeatedly consult and study these principles, even outside the presence of the individual who introduced them.¹⁷³ Accordingly, such written notes obtain greater salience—and therefore become more persuasive—than quotations cited from memory.¹⁷⁴ For these reasons, Biblical notes, like the Bible, constitute "extraneous prejudicial information" to which jurors must be permitted to testify to establish misconduct.

III. POLICY CONSIDERATIONS DEMONSTRATING THAT CONSULTING BIBLICAL MATERIALS CONSTITUTES MISCONDUCT

Several policy considerations, either ignored or mistreated by the *Fields* court, further support the argument that consultation of the Bible during capital sentencing deliberations constitutes misconduct. The policy concerns explored in this Part include jurors' acceptance of responsibility for the sentences they authorize; the Eighth Amendment's requirement of narrowly prescribed and objectively verifiable sentences; the Establishment Clause's obligation to maintain a separation of church and state; and finally, the overarching integrity of the legal system.

Moreover, even accepting the premise that the Bible constitutes extraneous prejudicial information about which jurors may testify to establish misconduct, allowing jurors to testify about discussion on religious matters may encroach too far on the systemic interest in private jury deliberations, invoking the fear that one juror may undermine a verdict by presenting testimony that others cannot objectively verify.

¹⁷⁰ *Fields*, 503 F.3d at 795 (Berzon, J., dissenting).

¹⁷¹ See *id.* at 777–78 (majority opinion); see also *supra* text accompanying notes 126–128.

¹⁷² *Harlan*, 109 P.3d at 632 ("The written word persuasively conveys the authentic ring of reliable authority in a way the recollected spoken word does not.").

¹⁷³ *Fields*, 503 F.3d at 797 (Berzon, J., dissenting) ("[T]he lengthy quotations, written down and passed around, conveyed a sense of authority quite different from a paraphrase or one line quotations spoken from memory, not least because they could be consulted repeatedly and outside of White's immediate presence.").

¹⁷⁴ *Id.*

A. *Eighth Amendment Requirement of Juror Responsibility*

Studies have shown that jurors faced with capital sentencing decisions actively seek to evade the serious responsibility that accompanies their obligation.¹⁷⁵ Additionally, jurors who successfully minimize their sense of responsibility more frequently impose the death penalty than jurors who fully appreciate their role in the capital sentencing determination.¹⁷⁶ As these studies demonstrate, jurors' abdication of responsibility carries troubling implications for the frequency with which juries impose the death penalty.

Jurors' evasion of responsibility for authorizing the death penalty is not only troublesome—it violates the Constitution. In *Caldwell v. Mississippi*,¹⁷⁷ the Supreme Court vacated the defendant's death sentence after the prosecutor indicated to the jury that ultimate responsibility for its sentence rested with the state supreme court, which would review the propriety of the sentence.¹⁷⁸ The Court held, "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."¹⁷⁹ Accordingly, juries in capital sentencing proceedings violate the Eighth Amendment's ban on cruel and unusual punishment by failing to appreciate the "awesome responsibility" that accompanies their duty.¹⁸⁰

In the context of Bible-influenced capital sentencing, by relying on Biblical law, jurors impermissibly abdicate their responsibility to apply the law prescribed by the judge to the facts presented in evidence.¹⁸¹ This is es-

¹⁷⁵ Joseph L. Hoffmann, *Where's the Buck—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1137–38 (1995) (“[J]urors are prone to abdicate their personal moral responsibility for the death sentencing decision.” (citing Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305)); see also Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 117–18 (2002) (“[P]sychological literature indicates that individuals faced with grave decisions will . . . look for ways to escape responsibility.”).

¹⁷⁶ Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339, 377 (1996) (“A modest correlation . . . exists between rejection of responsibility and sentencing to death. Jurors who assign sentencing responsibility to judges are more likely to have imposed death.”); see also Semeraro, *supra* note 175, at 114 (“Religious and social practice provide an array of rationalizations to which a sentencer could turn for help in making the difficult sentencing choice.”).

¹⁷⁷ 472 U.S. 320 (1985).

¹⁷⁸ *Id.* at 323.

¹⁷⁹ *Id.* at 328–29.

¹⁸⁰ *Id.* at 329–30; see also 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, 89–90 (2000) (discussing *Caldwell* in the context of prosecutors' Biblical references during closing arguments, which unconstitutionally diminish jurors' sense of responsibility).

¹⁸¹ *People v. Harlan*, 109 P.3d 616, 631 (Colo. 2005) (analogizing to *Caldwell* and noting, “How much more persuasive to a typical juror, then, is the biblical text relieving the juror from his or her individual responsibility to determine whether to commit a person to death because God commands that result?”).

pecially true in *Fields*, where the jury relied on the “eye for an eye” passage,¹⁸² which may be interpreted as commanding the imposition of the death penalty, regardless of the specific circumstances of the case.¹⁸³ The *Fields* majority even recognized the veracity of this concern, noting that in *Sandoval v. Calderon*, the Ninth Circuit found that the prosecutor’s “argument involving religious authority undercut[] the jury’s own sense of responsibility.”¹⁸⁴ The court failed to explain why this concern did not apply equally in *Fields*, as both the Supreme Court in *Caldwell* and pertinent studies suggest otherwise.

B. Eighth Amendment Requirement of Individualized Sentencing

Implicating related concerns, jurors’ reliance on Biblical materials in capital sentencing decisions violates the Eighth Amendment’s requirement that the sentencing jury engage in meaningfully individualized consideration of each defendant eligible for capital punishment.¹⁸⁵ In *Woodson v. North Carolina*, the Supreme Court established that the death penalty cannot be imposed categorically, without regard for the particular defendant or unique circumstances related to the case.¹⁸⁶ The Court explained:

A process that accords no significance to relevant facets of character and record of the individual offender or the circumstances of the particular offense

¹⁸² *Fields v. Brown*, 503 F.3d 755, 777 n.15 (9th Cir. 2007) (en banc), cert. denied, 128 S. Ct. 1875 (2008).

¹⁸³ See Blume & Johnson, *supra* note 180, at 64–67 (discussing the prevalence of prosecutors’ arguments relying on “an eye for an eye,” which “at least upon facial interpretation, appear to require the imposition of the death penalty”).

Of course, while “an eye for an eye” is commonly interpreted as mandating that an offender’s punishment match his crime, in fact, many modern scholars interpret “an eye for an eye” in the Old Testament as a maximum limit to punishment. DANIEL J. HARRINGTON, *THE GOSPEL OF MATTHEW* 88 (Daniel J. Harrington ed., 1991) (“The ‘law of retaliation’ is expressed in Exod 21:24; Lev 24:20; and Deut 19:21. The goal of the law was to keep revenge within certain boundaries, and to avoid the escalation of violence. Its [Old Testament] formulations affirm personal responsibility for one’s actions, the equality of persons before the law, and just proportion between crime and punishment.”). Additionally, in the New Testament, Jesus explicitly rejects the “eye for an eye” principle. See *Matthew* 5:38–40 (King James) (“5:38 Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: 5:39 But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also. 5:40 And if any man will sue thee at the law, and take away thy coat, let him have thy cloak also.”).

¹⁸⁴ *Fields*, 503 F.3d at 781.

¹⁸⁵ *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that North Carolina’s sentencing scheme, which mandated imposition of the death sentence for all defendants convicted of first-degree murder, violated the Eighth and Fourteenth Amendments); see also Blume & Johnson, *supra* note 180, at 90–91 (discussing *Woodson* in the context of prosecutors’ religious arguments, which undermine jurors’ individualized consideration of offenders and their offenses and therefore violate the Eighth Amendment).

¹⁸⁶ *Woodson*, 428 U.S. at 304 (“[T]he Eighth Amendment requires 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.” (citation omitted)).

excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.¹⁸⁷

Enriching this requirement, the Court held in *Godfrey v. Georgia*¹⁸⁸ that a state's capital sentencing scheme "must channel the sentencer's discretion by 'clear and objective standards'"¹⁸⁹ to avoid the "substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."¹⁹⁰ Accordingly, a state's capital sentencing scheme must include clear, rational criteria that separate cases that warrant imposition of the death penalty from those that do not.¹⁹¹

Jurors' reliance on Biblical authority violates the Eighth Amendment's requirement of individualized capital sentencing because use of the Bible as a "code of authority,"¹⁹² espousing principles that apply in all circumstances, prohibits individualized consideration. As such, the Bible "threatens to supplant the individualized sentencing inquiry into the nature and consequences of the crime and the particular aggravating and mitigating circumstances brought forward in the evidence."¹⁹³

The danger that jurors' reliance on the Bible will undercut individualized consideration is even greater when the Biblical principle consulted is "an eye for an eye," as in *Fields*. Principles such as "an eye for an eye," which many interpret as mandating imposition of the death penalty, promote complete disregard for the circumstances particular to the defendant and the crime.¹⁹⁴ While the *Fields* court recognized the Ninth Circuit's

¹⁸⁷ *Id.*

¹⁸⁸ 446 U.S. 420 (1980).

¹⁸⁹ *Id.* at 428 (quoting *Gregg v. Georgia*, 428 U.S. 153, 198 (1976)) (holding that Georgia's broad and vague construction of its death sentence statute violated the Eighth and Fourteenth Amendments).

¹⁹⁰ *Id.* at 427.

¹⁹¹ *Id.*; see also Eglund, *supra* note 134, at 356 (arguing that the Eighth Amendment requires individualized consideration of defendants before imposing the death penalty).

¹⁹² See *supra* note 135 and accompanying text.

¹⁹³ *Polk II*, 444 F.3d 225, 227 (4th Cir. 2006); see also *Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989) ("The use by deliberating jurors of an extrajudicial code . . . cannot be reconciled with the Eighth Amendment's requirement that the decision to impose death must be the result of discretion which is carefully and narrowly channeled and circumscribed by the secular law of the jurisdiction."); Eglund, *supra* note 134, at 341 ("However valuable the teachings and mandates of the Bible or other sacred texts in the personal lives of church members, the one-size-fits-all nature of the retributive justice found in Christian, Jewish, and Islamic law has no place in the application of constitutional, statutory, and common law."); Sanja Zgonjanin, Comment, *Quoting the Bible: The Use of Religious References*, 9 N.Y. CITY L. REV. 31, 54 (2005) ("By quoting biblical passages in support of their decisions, judges . . . perpetuate . . . the legitimacy of laws based on religious morality without any concern for the parties involved and the actual legal standards governing society." (citation omitted)).

¹⁹⁴ In *Sandoval v. Calderon*, the Ninth Circuit held that the prosecutor's appeal to religion violated the Eighth Amendment. 241 F.3d 765, 776 (9th Cir. 2001). Positing that "[t]he Biblical concepts of

holding in *Sandoval* that the “prosecution’s invocation of ‘higher law’ or extrajudicial authority violated the Eighth Amendment principle of narrowly channeled sentencing discretion,”¹⁹⁵ the court failed to extend this holding to Biblical materials consulted by jurors.¹⁹⁶ However, whether presented by the prosecutor or introduced by the jury, Biblical materials carry the strong potential to undermine the Eighth Amendment’s promise of individualized consideration of all defendants eligible for capital sentencing.

C. Establishment Clause Violation “in the Heart of the Jury Room”

While attempting to define the *Fields* majority’s vague “notions of general currency” standard,¹⁹⁷ Judge Gould, in his dissent, expressed concern that “[i]f the majority’s rule applies only to the introduction of quotes from the Judaeo-Christian Bible, then this introduces something akin to an Establishment Clause violation into the heart of the jury room.”¹⁹⁸ Although the majority never acknowledged this issue, several courts and scholars considering Bible-influenced capital sentencing have suggested that jurors’ consultation of the Bible may violate the Establishment Clause.¹⁹⁹ In *Polk II*, the Fourth Circuit explored this possibility, stating:

The jury room is not the place to debate the respective merits of the Bible, the Koran, the Torah, or any other religious scripture that Americans revere, nor is it the proper forum for a clash between belief and nonbelief. These discussions would likely be divisive, and might range far afield from the appropriate legal and factual inquiry. In a pluralistic America, the jury room must remain a place of common ground firmly rooted in law, irrespective of deeply and sincerely held religious differences.²⁰⁰

Consultation of Biblical materials during jury deliberations constitutes government endorsement of religion in violation of the Establishment Clause. This is clearest when the bailiff or another state official provides

vengeance invoked by the prosecution . . . do not recognize [the] refined approach” required by the Eighth Amendment, the court cited two cases noting specifically that “the primitive simplicity” of “an eye for an eye” is inconsistent with the Eighth Amendment individualized sentencing obligations. *Id.* (quoting *Tison v. Arizona*, 481 U.S. 137, 180–81 (1987) (Brennan, J., dissenting), and *Coker v. Georgia*, 433 U.S. 584, 620 (1977) (Burger, C.J., dissenting)). *But see supra* note 183.

¹⁹⁵ *Fields v. Brown*, 503 F.3d 755, 781 (9th Cir. 2007) (en banc) (quoting *Sandoval*, 241 F.3d at 776–77), *cert. denied*, 128 S. Ct. 1875 (2008).

¹⁹⁶ *Id.*

¹⁹⁷ *See supra* Part II.A.2.

¹⁹⁸ *Fields*, 503 F.3d at 785 (Gould, J., dissenting).

¹⁹⁹ *See Simson & Garvey, supra* note 149 (exploring the use of Establishment Clause claims to challenge death sentences imposed by jurors who consult religious materials); *see also Eglund, supra* note 134 (same); *Juror Prejudice, supra* note 135, at 651–53 (summarizing the strategic advantages to Establishment Clause challenges to Bible-influenced capital sentencing).

²⁰⁰ *Polk II*, 444 F.3d 225, 227 (4th Cir. 2006). *But see Jones v. Kemp*, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989) (“[T]here is no issue raised here involving the (anti) Establishment clause, such as is involved in the school prayer cases.”).

the Bible consulted by the jury.²⁰¹ However, jurors also violate the Establishment Clause when they bring Bibles into the jury room independently because private citizens function as state actors when they serve as jurors.²⁰²

Several scholars have suggested that parties challenging Bible-influenced capital sentencing have mistakenly overlooked the Establishment Clause as an effective tool to invalidate sentences imposed by jurors who consult Biblical materials.²⁰³ According to these scholars, presenting Establishment Clause claims may more effectively work to overturn death sentences than challenges based on Rule 606(b), which face “formidable . . . evidentiary hurdles.”²⁰⁴

D. *The Integrity of the Legal System*

Given the “black box” nature of American juries and the purposeful difficulty in revealing what occurs during jury deliberations under Rule 606(b), juries likely consult Biblical materials even more frequently than the many decisions on Bible-influenced capital sentencing indicate.²⁰⁵ In the high-stakes context of capital sentencing, permitting death sentences to rest on the command of religious principles could fatally disturb the public’s faith in the legal system. As stated by the Fourth Circuit in *Polk II*:

A jury’s reliance on the Bible during capital sentencing deliberations . . . has serious implications for the public perception of our criminal justice system. . . . Juries have legitimacy in a democracy because, despite the variety of jurors’ beliefs, they are united in the common endeavor of legal judgment. Any contrary perception threatens the most basic premise of the rule of law.²⁰⁶

Both the number of instances of misconduct that occur undetected and the resulting harm to the integrity of the legal system underscore the need for the Supreme Court to establish clearly that jurors may not consult Biblical materials during deliberations.

²⁰¹ See, e.g., *Polk I*, 438 F.3d 350, 358 (4th Cir. 2006), *reh’g denied*, 444 F.3d 225 (4th Cir. 2006).

²⁰² See *supra* notes 148–151 and accompanying text.

²⁰³ *Juror Prejudice*, *supra* note 135, at 651–63. See generally Simson & Garvey, *supra* note 149; England, *supra* note 134.

²⁰⁴ Simson & Garvey, *supra* note 149, at 1121–22 (“Although challenges based on extraneous or outside sources overcome the evidentiary hurdles erected by rules like 606(b), they usually do not result in a mistrial or reversal. Courts typically find that the party challenging the use of religion during deliberations did not show a sufficient likelihood of prejudice to the proceedings.”).

²⁰⁵ See *id.* at 1127 (“[A]rguments based on religious principles seem hardly uncommon in the jury room. Here, too, some instances of occurrence find their way into published opinions, but the absence of any reliable vehicle for bringing such instances to light suggests that the number of actual instances of occurrence is much greater.” (citation omitted)). It is also possible that known instances of juror consultation of Biblical materials remain unchallenged because all parties—including defense counsel—accept such consultation as a matter of course.

²⁰⁶ *Polk II*, 444 F.3d 225, 227 (4th Cir. 2006).

IV. BIBLE-INFLUENCED CAPITAL SENTENCING UNDER THE MODERN
AEDPA STANDARD: A CALL FOR SUPREME COURT ACTION

Because *Fields* filed his habeas petition before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),²⁰⁷ which currently applies to such cases, this Part provides a brief overview of Bible-influenced capital sentencing under the modern AEDPA standard. AEDPA requires a federal court considering a state conviction on collateral review to determine whether the state court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States.”²⁰⁸ The Fourth Circuit, in *Robinson v. Polk*, ruled on a petition filed after the enactment of AEDPA and thus provides an instructive example of Bible-influenced capital sentencing under the AEDPA regime. Like the Ninth Circuit, the Fourth Circuit denied the defendant’s habeas petition, upholding his death sentence.²⁰⁹ However, the unique constraints imposed on the Fourth Circuit by AEDPA underscore the need for the Supreme Court to rule explicitly on Bible-influenced capital sentencing.

Much like the *Fields* court, the Fourth Circuit struggled—and failed—to fit allegations of juror misconduct within the limited Supreme Court precedent defining “internal” and “external” influences for the purposes of Rule 606(b).²¹⁰ However, unlike the *Fields* court, the Fourth Circuit could only overturn the state court’s decision if it was contrary to, or unreasonably applied, clearly established Supreme Court precedent.²¹¹ Accordingly, the fact that the Supreme Court has not addressed situations even remotely similar to Bible-influenced capital sentencing highly circumscribed the Fourth Circuit’s ability to review the state court’s decision.²¹² While in *Polk I*, the court suggested succinctly that its holding may have been different on de novo review,²¹³ the *Polk II* decision fully—and apologetically—acknowledged the constraints AEDPA imposed on its review.²¹⁴ Noting that the only relevant Supreme Court precedent addressed situations far afield from Bible-influenced capital sentencing,²¹⁵ the court concluded, “To

²⁰⁷ Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.). *Fields* filed the petition at issue in 1995. *Fields v. Brown*, 503 F.3d 755, 763 (9th Cir. 2007) (en banc), *cert. denied*, 128 S. Ct. 1875 (2008).

²⁰⁸ 28 U.S.C. § 2254(d)(1) (2006); *Polk I*, 438 F.3d 350, 354–55 (4th Cir. 2006), *reh’g denied*, 444 F.3d 225 (4th Cir. 2006).

²⁰⁹ *Polk I*, 438 F.3d at 352.

²¹⁰ *Id.* at 360–64; *Polk II*, 444 F.3d at 229–30.

²¹¹ *Polk II*, 444 F.3d at 230.

²¹² As the Fourth Circuit acknowledged, “[w]hether the presence of a Bible is an external influence upon the jury or simply a part of the jury’s internal processes is a question the Supreme Court has not even broached, much less settled.” *Id.*

²¹³ *Polk I*, 438 F.3d at 363.

²¹⁴ *Polk II*, 444 F.3d at 229–30.

²¹⁵ *Id.*; see *supra* Part I.C–D. (discussing Supreme Court precedent interpreting Rule 606(b)).

crystallize a constitutional rule from such uncertain circumstances is the very exercise that AEDPA forbids.²¹⁶

In the end, the Fourth Circuit could not discern an unreasonable application of clearly established federal law essentially *because the federal law in question was not clearly established*.²¹⁷ The Fourth Circuit's conclusion, however, involves much broader implications: Because the federal law in question is not clearly established, federal courts can *never* grant habeas petitioners relief from death sentences authorized by juries who consult Biblical materials. Accordingly, the Fourth Circuit's review of Bible-influenced capital sentencing under the modern AEDPA standard demonstrates the urgent need for the Supreme Court to grant certiorari on the subject and resolve the issue.

The Supreme Court, to be sure, has historically understood the policy underlying AEDPA as constraining the ability of the lower courts to grant habeas unless the law is clear.²¹⁸ However, the special situation of Bible-influenced capital sentencing involves policy concerns beyond those captured by AEDPA's pursuit of "comity, finality, and federalism."²¹⁹ Broadly speaking, lower courts have long struggled to define the contours of Rule 606(b)'s "internal" and "external" influences in light of the Court's last pronouncement on the subject, over 20 years ago, in *Tanner v. United States*.²²⁰ A paradigm of this wider struggle, the Bible-influenced capital sentencing debate presents the perfect opportunity for the Court to revisit, and finally clarify, its ambiguous holding in *Tanner*. This increasingly relevant debate implicates the quintessential conflict between the finality and justice of jury verdicts—in a context involving the highest stakes. Given the need for Supreme Court clarification of *Tanner* and Rule 606(b), and the recent prevalence of cases like *Fields*,²²¹ the Supreme Court should grant certiorari to rule definitively on Bible-influenced capital sentencing. Such a ruling would not only resolve the present debate; it would surely

²¹⁶ *Polk II*, 444 F.3d at 229–30.

²¹⁷ *Id.* at 230. Despite Judge King's attempt to do so in dissent, the majority correctly suggested that by "find[ing] a clearly established Supreme Court rule governing this situation . . . he possesses more clairvoyance than either the state courts, the district court, or a substantial majority of this court." *Id.*

²¹⁸ *Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings.").

²¹⁹ *Id.*

²²⁰ 483 U.S. 107 (1987); see Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Discretion, and Juries in Capital Cases*, 46 B.C. L. REV. 771, 804, 804 n.160 (2005) (collecting sources that track courts' struggles to distinguish between Rule 606(b)'s "internal" and "external" influences under *Tanner*); see *supra* Part I.D.

²²¹ See *supra* Part II.A.

provide much-needed guidance for lower courts examining misconduct in general.

CONCLUSION

By permitting *Fields*'s death sentence to rest on Biblical principles, the Ninth Circuit overlooked the serious misconduct committed by the jury foreperson who introduced these principles into deliberations and the jurors who considered them. In addressing this alleged misconduct, the *Fields* court neglected to fully acknowledge and balance the competing interests of private jury deliberations and the defendant's right to an impartial jury trial. The court also failed to consider both the analyses performed by other courts addressing analogous situations and the larger policy concerns implicated by its decision. This Note explains why *Fields* reached the wrong result by exploring the understandable challenges faced by the court in light of the unclear precedent interpreting Rule 606(b)'s ambiguous language, and by revealing the court's erroneous reasoning. In doing so, this Note introduces a comprehensive approach to the recurring issue of Bible-influenced capital sentencing and, more broadly, urges the Supreme Court to clarify the analysis of juror misconduct under Rule 606(b).

