

CATHOLIC JURORS AND THE DEATH PENALTY

By Gerald F. Uelmen*

Introduction.

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

Let us assume that we represent one of the “underdogs” . . . because of an indictment brought by what the prosecutors name themselves, “the state.” Then what sort of men will we seek? An Irishman is called into the box for examination. There is no reason for asking about his religion: he is Irish: that is enough. We may not agree with his religion, but it matters not, his feelings go deeper than any religion. You should be aware that he is emotional, kindly and sympathetic. If he is chosen as a juror, his imagination will place him

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¹ Clarence Darrow, *How to Pick a Jury*, Esquire Magazine, May, 1936.

in the dock; really, he is trying himself. You would be guilty of malpractice if you got rid of him, except for the strongest reasons.²

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

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

If the German was Lutheran, though, Darrow said “Beware”:

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

² Darrow’s enthusiasm for Catholic jurors was not universally shared. One of the “trial manuals” recommended to me when I was a student at Georgetown Law School offered this advice for picking juries to try an insanity defense:

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

George W. Shadoan, Ed., *Law and Tactics in Federal Criminal Cases* [Coiner Publications, 1964], pp. 265-66.

Darrow, who himself was agnostic, had a stereotype for every religion he encountered. He thought that Presbyterians were a “bad lot” and that Baptists were even more hopeless. If you were sitting between a Methodist and a Baptist, he wrote, you would “move toward the Methodist to keep warm.” He advised keeping Unitarians, Universalists, Congregationalists and Jews without asking them too many questions. As for women, Darrow concluded, “Luckily, . . . my services were almost over when women invaded the jury box.”

Are Catholic jurors more likely to have qualms about the death penalty? The demographics would suggest they are. It is not a coincidence that the states which don't have the death penalty include the states with the highest proportion of Catholics in their population.³ What few polls are available seem to confirm growing Catholic opposition to the death penalty. The Gallup poll regularly asks, “which do you think is the better penalty for murder – the death penalty or life imprisonment with absolutely no possibility of parole?” In 1999, the national answer was 56% death, and 38% life imprisonment.⁴ The Catholic answer, in a poll conducted that same

³ The population of the State of Rhode Island is 63% Catholic, of Massachusetts is 49%, and of Wisconsin is 32%. Nationally, the population of the United States is 26% Catholic. <http://www.adherents.com>.

⁴ Sourcebook of Criminal Justice Statistics Online, <http://www.albany.edu/sourcebook/pdf/t244.pdf>. The Gallup poll does not track responses by religion, but the 2003 poll reflects that Republicans (67%) are much more likely to prefer death than Democrats (38%), and men (58%) are more likely than women (48%). A strong preference for life is expressed by Blacks (73%) and those with post-graduate education (62%).

year for the Missouri Catholic Conference, was 40% death, 60% life imprisonment.⁵ A recent Zogby national poll of 1500 Catholics found 49% agreed with the statement capital punishment is wrong under virtually all circumstances, while 48% disagreed.⁶ An Online “Catholic Poll” misstates the position of the Catholic Church by asking, “Do you agree with the policy of the Catholic Church against the death penalty under any circumstances?” It currently registers 34% agreement, and 47% disagreement.⁷ In national polls, when asked whether they support the death penalty for a person convicted of murder, Americans now register 71% in favor, down from the high of 80% in 1994.⁸

This article will address four questions raised by the position of the Catholic Church opposing the use of the death penalty. First, can jurors even be asked their religion? Is it a relevant question in jury selection? Second, can Catholics can even serve as jurors in death penalty cases? Are they “death qualified” jurors within the meaning of *Witherspoon v. Illinois*,⁹ and *Wainwright v. Witt*,¹⁰ or can they be challenged and removed for cause? Third, will our system of peremptory challenges permit the systematic

⁵ Center for Social Sciences and Public Policy Research, Southwest Missouri State University, November, 1999.

⁶ Zogby Poll.

⁷ The Catholic Poll.

⁸ <http://www.pollingreport.com/crime.htm>

⁹ 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

¹⁰ 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

exclusion of Catholics from juries in death penalty cases, without running afoul of the constitutional limits on the use of peremptory challenges to engage in unlawful discrimination? And finally, the question William F. Buckley, Jr., writing in the *National Review*, posed for Justice Antonin Scalia: Should Catholics allow their faith to affect their reasoning on whether a defendant should be executed?¹¹

1. *Voir Dire* Questioning.

I'll start with the easiest question. The test for what questions can be asked of prospective jurors is simply one of relevance: is the question relevant to whether the juror has a bias or predisposition? Wouldn't you want to know if your jurors were Catholic if you were on trial for an illegal abortion?¹² Wouldn't you want to know if your jurors were Mormons if you were on trial for drunk driving?¹³ In a death penalty trial, jurors will ordinarily be asked if they hold any religious views that might affect their decision whether to impose a sentence of death.¹⁴ Frequently, this question is asked in a written questionnaire before the juror is seated. The lawyers, and often the judge, will then follow up with additional voir dire questions,

¹¹ William F. Buckley, Jr., *Can Catholics Decree Death?*, *National Review*, Feb.8, 2002.

¹² *See Oregon v. Barnett*, 251 Ore. 234, 445 P.2d 124 (1968).

¹³ *See Utah v. Ball*, 685 P.2d 1055 (1984). The Utah Supreme Court ruled it was error to disallow an inquiry to prospective jurors whether their choice not to drink was "a personal conviction or a religious one?"

¹⁴ *State v. Davis*, 504 N.W.2d 767 (Minn. Supreme Court, 1993). *But see Bader v. State*, 40 S.W.3d 738, 741 (Arkansas Supreme Court, 2001).

and the religious affiliation of the juror will emerge. So let us assume, in response to a question about religious views, a juror reveals that he or she is a practicing Roman Catholic. Our Catholic juror could then be asked whether he or she agrees with the position espoused in the latest version of the Catholic Catechism, which says:

The traditional teaching of the Church does not exclude, presupposing full identity and responsibility of the offender, recourse to the death penalty, when this is the only practicable way to defend the lives of human beings effectively against the aggressor. If, instead, bloodless means are sufficient to defend against the aggressor and to protect the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person. Today, in fact, given the means at the State's disposal to effectively repress crime by rendering inoffensive the one who has committed it, without depriving him definitively of the possibility of redeeming himself, cases of absolute necessity for suppression of the offender today are very rare, if practically non-existent.¹⁵

¹⁵ Catechism of the Catholic Church, Paragraph 2267.

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

2. Challenge for Cause.

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

In *Witherspoon v. Illinois*,¹⁶ the United States Supreme Court addressed the constitutionality of a death penalty imposed by a jury selected pursuant to an Illinois statute which provided: “In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.”¹⁷ At the defendant’s trial, nearly half of the prospective jurors were eliminated under the authority of this statute. The Court struck down the death sentence imposed by the surviving jurors, and held that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding potential jurors for cause simply because they voiced general objections to the death penalty, or expressed

¹⁶ *Supra*, n. 9.

¹⁷ Ill. Rev. Stat., c.38, § 743 (1959).

conscientious or religious scruples against its infliction.¹⁸ In a footnote, the Court added that prospective jurors *could* be excluded if they made it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them.¹⁹ Many courts subsequently adopted the standard expressed in the footnote, to rule that a potential juror could not be excused *unless* he stated with unmistakable clarity that he would never vote to impose the death penalty under any circumstances. Then, in *Wainwright v. Witt*,²⁰ the Court clarified the *Witherspoon* standard, dispensing with the reference to “automatic” decision-making, as well as unmistakable clarity in the juror’s position. In *Witt*, the Court upheld the exclusion of a juror who was simply asked whether her personal objections to the death penalty would interfere with judging the guilt or innocence of the defendant. She responded, “I think it would.”²¹ The Court ruled that a juror may be excluded for cause in a death penalty case if the juror’s views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”²²

¹⁸ *Id.* at p. 522.

¹⁹ *Id.* at p. 522, n. 21.

²⁰ *Supra*, n. 9.

²¹ 391 U.S. at 416.

²² *Id.* at 425.

Thus, unless a Catholic juror believes the death penalty is never appropriate under any circumstances, which is neither the position of the Catholic Catechism nor the position of the U.S. Catholic Bishops,²³ he or she should not be excluded from sitting on a jury in a death penalty case. Under the *Witherspoon* standard, Pope John Paul II and every Catholic Bishop in America could be “death qualified” jurors. Even under the limitations of the *Witt* standard, a Catholic juror who embraces the Catholic Catechism can truthfully state that his or her view would not prevent or substantially impair the performance of his or her duties as a juror. As the death penalty is currently administered under the “guided discretion” laws enacted in the wake of *Furman v. Georgia*,²⁴ and *Gregg v. Georgia*,²⁵ the jury is called upon to weigh the mitigating and aggravating circumstances of the case and determine whether death is the appropriate penalty under the law. Personal objections to the death penalty law, or even a predisposition to rarely utilize it, does not disqualify a juror *either* if he is willing to set aside his own beliefs in deference to the rule of law, *or* his beliefs would not actually

²³ U.S. Catholic Bishops’ Statement on Capital Punishment, Approved by U.S. Bishops in November, 1980. Although the Statement calls for the abolition of death penalty laws, it does not suggest that the death penalty is never appropriate under any circumstances.

²⁴ 408 U.S. 238 (1972).

²⁵ 428 U.S. 153 (1976).

preclude him from engaging in the weighing process and returning a verdict of death.²⁶

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

If a Catholic juror truly believes that there are no circumstances that could *ever* justify a sentence of death, he or she would, and probably should, be disqualified as a juror.²⁷ But he or she is not obligated to hold that view

²⁶ *People v. Stewart*, --- Cal.4th ---, 15 Cal.Rptr.2d 656, 93 P.3d 271 (2004). The California Supreme Court voided a death judgment because five jurors were excluded simply upon the basis of their affirmative response to the question: “Do you have a conscientious opinion or belief about the death penalty which would prevent or make it very difficult for you to find the defendant guilty of first degree murder regardless of what the evidence might prove, to find a special circumstance to be true, regardless of what the evidence might prove, or to ever impose the death penalty?” The Court concluded that even a juror who would find it very difficult to impose a death penalty would not be “substantially impaired” in performing his or her duties as a juror. 15 Cal.Rptr.2d at 676.

²⁷ Note, however, the concurring view of Justice William O. Douglas in *Wiltherspoon*, *supra* at 528: “In such instance, why should not an accused have the benefit of that controlling principle of mercy in the community? Why should his fate be entrusted exclusively to a jury that was either enthusiastic about capital punishment or so undecided that it could exercise a discretion to impose it or not, depending on how it felt about the particular case? I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. Exclusion of them means the selection of jurors who are either protagonists of the death penalty or neutral concerning it. That results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment.”

as a Catholic. A Catholic is not even obligated to hold the view espoused in the Catholic Catechism, since it does not represent *ex cathedra* teaching.

3. Peremptory Challenges.

The fact that a Catholic juror survives a challenge for cause does not put him or her in the jury box, however. Counsel for both sides are given the opportunity to exercise peremptory challenges, and the number of peremptory challenges allowed is usually increased in a capital case.²⁸ That leads me to our third question: does our system of peremptory challenges permit the systematic exclusion of Catholics from juries in death cases?

In *Batson v. Kentucky*,²⁹ the United States Supreme Court limited the exercise of peremptory challenges by ruling that the exclusion of potential jurors solely on account of their race violates the Equal Protection Clause. Where a prima facie showing is made that a lawyer has exercised peremptory challenges on the basis of race, he or she is required to articulate a race-neutral explanation for striking the jurors in question.³⁰

In a string of recent cases, courts have been asked to extend *Batson* to discrimination on the basis of religion. Significantly, many of these cases

²⁸ In a death penalty case, federal law allows each side 20 peremptory challenges, compared to 6 for the government and 10 for the defendant in ordinary felony cases. FED.R.CRIM.P. 24. In California, each side is allowed 20 peremptory challenges in death penalty cases, compared to the 10 allowed each side in ordinary felony cases. CAL.CIV.PROC.CODE §231(a)(2004).

²⁹ 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), the *Batson* rule was extended to discrimination on the basis of gender.

³⁰ *Hernandez v. New York*, 500 U.S. 352, 358-59, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). The ultimate burden of proving racial discrimination, however, remains on the defendant.

arise where Black jurors have been excused, and the prosecutor responds to the *Batson* challenge by citing the juror's religious views. A good example is the decision of the Virginia Supreme Court in *James v. Commonwealth*.³¹ After the prosecutor in a prosecution for cocaine distribution used peremptory challenges to remove two Black jurors, he explained that the reason one of these jurors was excused was not because he was Black, but because he was wearing a crucifix that was approximately two inches long, and wearing this visible religious symbol was indicative of a sympathetic disposition. The Virginia Supreme Court upheld the conviction, refusing to consider an argument that discrimination on the basis of visible religious affinity also violates the Equal Protection Clause and the First Amendment, because those objections were not raised in the trial court.³² Those objections have been preserved and considered in a number of subsequent decisions of both state and federal courts, however.³³ The consensus that emerges from these decisions draws a sharp distinction between discrimination on the basis of religious affiliation, which is generally not permitted, and discrimination on the basis of religious beliefs, which is.

³¹ 247 Va. 459, 442 S.E.2d 396 (1994).

³² *Id.* at 463, fn.

³³ *United States v. Brown*, 352 F.3d 654 (2nd Cir. 2003); *United States v. DeJesus*, 347 F.3d 500 (3rd Cir. 2003); *United States v. Stafford*, 136 F.3d 1109 (7th Cir. 1998); *State v. Fuller*, 356 N.J.Super. 266, 812 A.2d 389 (N.J.App.Div. 2002); *State v. Purcell*, 199 Ariz. 319, 18 P.3d 113 (Ct.App.Ariz. 2001); *Thorson v. State*, 721 So.2d 590 (Miss. 1998).

Two of the decisions, however, seem to countenance discrimination of the basis of religious affiliation. In *State v. Davis*,³⁴ the Supreme Court of Minnesota upheld a conviction for aggravated robbery despite the defendant's objection that the prosecutor's only explanation for excusing a Black juror was that the juror was a Jehovah's Witness. The prosecutor explained:

I have a great deal of familiarity with the sect of Jehovah's Witnesses. I would never, if I had a peremptory challenge left, . . . fail to strike a Jehovah's Witness from my jury. In my experience, that faith is very integral to their daily life in many ways, many Christians are not. That was reinforced at least three times a week he goes to church for separate meetings. The Jehovah's Witness faith is of a mind the higher powers will take care of all things necessary. In my experience, Jehovah's Witnesses are reluctant to exercise authority over their fellow human beings in this Court House.³⁵

Over the dissent of Chief Justice Wahl and Justice Page, the majority ruled that *Batson* should not be extended to religious bigotry, because it is not as prevalent, flagrant, or historically ingrained in the jury selection process as is

³⁴ 504 N.W.2d 767 (1993).

³⁵ *Id.* at 768.

race.³⁶ Apparently, they never read Clarence Darrow's advice for picking juries. The United States Supreme Court denied *certiorari* in the *Davis* case, over the dissents of Justices Thomas and Scalia.³⁷

The other decision came from the Texas Court of Criminal Appeals, in *Casarez v. State*.³⁸ There, the prosecutor responded to an objection to the removal of two Black jurors by saying he opted to remove them not because they were Black, but because they were members of the Pentecostal Church. He explained:

It's been my experience that people from that religion often have a problem in passing judgment on other persons, and that they often believe that that is a matter for God and not for man. And that they have trouble not so much, Your Honor, although some do, with the guilt phase of the trial, but especially the punishment phase of the trial, and they are want to – want probation rather than to be responsible, in their eyes, for sending someone to the penitentiary, thereby judging them.³⁹

Again over a vigorous and cogent dissent by Justice Baird, who, not incidentally, lost his bid for reelection to that Court in the next election, the

³⁶ *Id.* at 771.

³⁷ *Davis v. Minnesota*, 511 U.S. 1115, 114 S.Ct. 2120, 128 L.Ed.2d 679 (1994).

³⁸ 913 S.W.2d 468 (1995).

³⁹ *Id.* at 496-97.

majority ruled that *Batson* should not apply to discrimination on the basis of religious affiliation. The majority opinion declared:

Because all members of the group share the same faith by definition, it is not unjust to attribute beliefs characteristic of the faith to all of them.⁴⁰

These judges *were* familiar with Clarence Darrow's advice for picking juries, since they quoted from it in their opinion!⁴¹ I find both of these decisions deeply disturbing. They implicitly suggest that if a particular religious sect is known to take their dogma seriously, then individual members can be excluded as jurors simply by virtue of their membership, without inquiry as to their individual views. Some courts have given explicit approval to such a distinction, even while saying they reject discrimination on the basis of mere affiliation. In *State v. Fuller*,⁴² for example, a New Jersey court upheld the exclusion of a Black Muslim from a jury. The court concluded the exclusion was not just because he was a member of the Muslim faith, but because he *dressed* like one! The prosecutor inferred from the juror's name and attire that he was a Muslim "and that he was devout in his faith." He explained that "people who tend to be demonstrative about

⁴⁰ *Id.* at 496.

⁴¹ *Id.* at 492.

⁴² 356 N.J. Super. 266, 812 A.2d 389 (2002).

their religion tend to favor defendants to a greater extent than do persons who are, shall we say, not as religious.”⁴³

Catholics, of course, are not known to be demonstrative about their religion, nor are they a sect that is known for taking its dogma too seriously, at least in America. Judge Baird took note of this in his dissent in the *Casarez* case, and argued that a court should not assume every member of a religion subscribes to all of its teachings. He wrote:

The Catholic Church officially condemns the use of artificial contraceptives, but 84% of the members of the Catholic Church believe Catholics should be allowed to use artificial contraceptives. . . . Consequently, if a party peremptorily challenged a Catholic [juror] because the party attributed to the [juror] the Catholic Church’s condemnation of the use of artificial contraceptives, the party would be wrong 84% of the time.⁴⁴

Distinguishing between fundamentalists who take their dogma seriously and other religious groups smacks of the distinction the United States Supreme Court used to draw in First Amendment challenges to aid to religious schools between those that were “pervasively sectarian” and those

⁴³ *Id.* at 276-77.

⁴⁴ 913 S.W.2d at 501.

that weren't.⁴⁵ We should not permit jurors to be dismissed on the basis of church or sect membership, with no inquiry as to their individual views, simply because we attribute particularly fervent or pervasive religious views to that church or sect.⁴⁶

On the other hand, if a particular viewpoint or opinion would interfere with the performance of a person's duties as a juror, it should receive no greater protection simply because it is labeled a "religious" viewpoint, or a "moral" opinion. Which brings us back to the issue of death penalty cases. The only decision to address the use of a peremptory challenge to exclude a Catholic juror from a death penalty trial comes to us from Arizona, in the case of *State v. Purcell*.⁴⁷ The juror in question was not just a member of the Catholic Church, she was a secretarial employee of the Catholic Diocese of Phoenix. During voir dire questioning, she stated she did not believe in capital punishment, but she told the judge her opinion would not affect her ability to be fair and impartial. Thus, she was not subject to a challenge for

⁴⁵ See the plurality opinion of Justice Clarence Thomas in *Mitchell v. Helms*, 530 U.S. 793, 826-29 (2000): "The dissent is correct that there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school. But that period is one that the Court should regret, and it is thankfully long past. . . . [T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. . . . [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."

⁴⁶ Compare *Thorson v. State*, 721 So.2d 590 (1998), where the Mississippi Supreme Court reversed a death judgment because the only explanation offered by the prosecutor for striking a juror was because she was a member of the Holiness faith. The court declared: "Unlike race and gender, religious beliefs are not ordained at birth. A person may belong to a particular religious group without adopting all the tenets and dogma of that religion. The critical determination is an individual's beliefs, not the doctrines or dogma espoused by her religion." *Id.* at 595.

⁴⁷ 199 Ariz. 319, 18 P.3d 113 (2001).

cause, but the prosecutor did exercise a peremptory challenge to remove her. When a *Batson* objection was raised, the prosecutor offered the following explanation for his peremptory challenge:

She works for the Diocese of Phoenix. The Bishop come out specifically on Good Friday and said you Catholics should start to be against the death penalty. The Pope has spoken about that. I feel that the pressure of whatever she may have said, her work pressure and those kinds of pressures would be really too much for her when it really came down to it to completely be objective with regard to premeditated murder if she felt that would make an option for this defendant to be sentenced [to death]. [T]here are two . . . specific Statements [in her questionnaire]: “I can say that I am against the death penalty.” And then again, “I am against the death penalty.” I feel that the pressure for her being employed by the diocese would be too much for her. And that’s my articulated reason.

The Court then inquired, “So you’re saying, you said being employed by the diocese, being Catholic and being employed, not just being Catholic, is that correct?”, to which the prosecutor responded, “Correct.”⁴⁸

⁴⁸ *Id.* at 118-19.

The Arizona Court of Appeals upheld the exercise of the peremptory challenge, because it was based upon her employment relationship and her personal views, not her religious affiliation.⁴⁹ Thus, we can conclude that Catholics may not be systematically excluded from death penalty juries by peremptory challenges, but they can certainly be selectively excluded, depending upon their individual views toward the death penalty.

This means that a good many Catholics have sat on death penalty juries, and we can anticipate they will continue to do so. First, their individual views on the death penalty may not reflect the current position of the Catholic Catechism. Second, even if they accept the current position of the Catholic Catechism, they might get past the peremptory challenge stage because the prosecutor feels they can be trusted to put their personal beliefs aside and follow the instructions to the jury, or because the prosecutor simply ran out of peremptory challenges. Juror Number 2 in the California murder trial of Scott Peterson, which resulted in a verdict of death, was a devout Catholic who needed to consult his priest after receiving his jury summons because he was troubled by the thought of sentencing someone to die.⁵⁰ That leads us to the final question, the one which William Buckley

⁴⁹ *Id.* at 122.

⁵⁰ *Who Are the Peterson Jurors?*, http://abclocal.ga.com/Kgo/news/peterson/052804_nw_peterson_trial.html (May 28, 2004).

posed for Justice Scalia: Should the faith of Catholic jurors affect their reasoning on whether a defendant should be executed?

4. Death Deliberations.

Another way to ask this question is to inquire whether jurors should “compartmentalize” their religious or moral views and attempt to ignore them in reaching their decision? Although I think President Bill Clinton deserves the heavyweight title for being the “Great Compartmentalizer,”⁵¹ Justice Antonin Scalia certainly comes in a close second. Here’s how he describes his role as a Justice of the Supreme Court:

I try mightily to prevent my religious views or my political views or my philosophical views from affecting my interpretation of the laws, which is what my job is about. I read texts. I’m always reading a text and trying to give it the fairest interpretation possible. That’s all I do. How can my religious views have anything to do with that? They can make me leave the bench if I find that I’m enmeshed in an immoral operation, but the only one of my religious views that has anything to do with my job as a judge is the seventh commandment – thou shalt not lie. I try to observe that faithfully, but other than that I don’t think

⁵¹ Uelmen, *The Great Compartmentalizer*, San Jose Mercury News, Jan. 24, 1999, p. C-1; Uelmen, *Compartmentalizing the Presidency*, Los Angeles Times, Jan. 13, 1999.

any of my religious views have anything to do with how I do my job as a judge.⁵²

Clearly, the role assigned to a juror in our system is very different than the role assigned to a Justice of the Supreme Court. A Supreme Court Justice interprets the meaning of the constitution and statutes, but does not engage in the kind of normative determination we expect jurors to make in a death penalty case. Here is how the jurors' task is described in the instructions we give to the jury in every death penalty case tried in California:

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

⁵² Pew Forum, "A Call for Reckoning: Religion & The Death Penalty," Session Three, p. 24 (Date).

mitigating circumstances that it warrants death instead of life without parole.⁵³

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

[I]f I were in that position as either a juror or a governor I wouldn't feel free to act upon my own religious beliefs. I'm there representing the community. If I were a governor, as to whether I should commute a sentence, I would want standards. I would say it seems to me the sentence ought to be commuted if these factors exist, but not because I'm a bleeding heart Christian. That ought to have nothing to do with it.⁵⁴

While Justice Scalia's point may have limited relevance to a governor considering a pardon application,⁵⁵ it is an inaccurate characterization of the juror's role, at least in a death penalty case. While jurors are drawn from a cross section of the community, they are not put in the jury box to "represent" anyone. They have no constituency, and are not answerable to

⁵³ California Jury Instructions – Criminal (CALJIC), Section 8.88.

⁵⁴ *Id.* at p.39.

⁵⁵The power to pardon is most often characterized as the power to dispense mercy, very different than the power of a reviewing court, but Governors are elected officials who are answerable to the public. See Kathleen Dean Moore, *Pardons: Justice, Mercy and the Public Experience* (1989). Moore concludes that a pardon is a "duty of justice that follows from the principle that punishment should not exceed what is deserved." *Id.* at 12.

the “community” for how they vote. As Judge Learned Hand famously observed:

[T]he individual can forfeit his liberty – to say nothing of his life – only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. . . . Since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove.⁵⁶

The relevance of jurors’ religious views to death deliberations was recently presented to the California Supreme Court in the case of *People v. Lewis*.⁵⁷ The defendant challenged his sentence of death on the grounds of juror misconduct, establishing that all 12 jurors held hands and prayed at the beginning of their deliberations, and that the Jury Foreperson told one reluctant juror that “he did not know if it would help her, but what had helped him make his decision was that [defendant] had been exposed to Jesus Christ and if that was in fact true [defendant] would have ‘everlasting life’ regardless of what happened to him.”⁵⁸ The Court rejected the contention that the jurors relied upon outside sources or “extraneous law” in

⁵⁶ *U.S. ex rel. McCann v. Adams*, 126 F.2d 774, 775-76 (2nd Cir. 1942).

⁵⁷ 26 Cal.4th 334, 28 P.3d 34, 110 Cal.Rptr.2d 272 (2001).

⁵⁸ *Id.* at 387.

reaching their verdict. In an opinion authored by Justice Ming Chin, who happens to be Roman Catholic, the Court concluded:

That jurors may consider their religious beliefs during penalty deliberations is to be expected. . . . Given the collective nature of jury deliberations, we do not find it unusual, much less improper, that jurors here may have shared their beliefs with other jurors either through conversations or prayers. We find nothing in the record, moreover, that suggests the jurors disregarded the law or the court's instructions, and instead imposed a higher or different law. The fact that some jurors expressed their religious beliefs or held hands and prayed during deliberations may have reflected their need to reconcile the difficult decision – possibly sentencing a person to death – with their religious beliefs and personal views. . . . But it does not show that jurors supplanted the law or instructions with their own religious views and beliefs.⁵⁹

This year, the California Supreme Court relied upon the *Lewis* decision in upholding a death verdict although two of the jurors shared Bible quotations with fellow jurors and consulted their pastors for advice during the jury deliberations. Although the Court found this was misconduct which

⁵⁹ *Id.* at 389-90.

violated the instructions to jurors, it concluded the misconduct was not prejudicial. In her majority opinion, Justice Janice Rogers Brown emphasized that:

Nothing in our opinion is intended to convey that a juror’s consideration of personal religious, philosophical, or secular normative values is improper during penalty deliberations. As we have repeatedly stated, the task of jurors at the penalty phase is qualitatively different from that at the guilt phase. At the penalty phase, jurors are asked to make a normative determination – one which necessarily includes moral and ethical considerations – designed to reflect community values.⁶⁰

Although there is some variance in how various State death penalty laws define the role of the jury in deciding between death and life imprisonment, the insistence that it is a normative judgment which will be strongly influenced by religious, moral or ethical views of the jurors resonates in the decisions of many Courts. In the State of Georgia, prosecutors took great delight in quoting for jurors in death penalty cases the words of a Georgia Supreme Court opinion written in 1873. In *Eberhart v. State*,⁶¹ a Reconstruction-era Justice authored a diatribe against “that sickly

⁶⁰ *People v. Danks*, 32 Cal.4th 269, 311, 82 P.3d 1249, 8 Cal.Rptr.3d 767 (2004).

⁶¹ 47 Ga. 598 (1873).

sentimentality that springs into action whenever a criminal is about to suffer for crime.” He wrote, “we have had too much of this mercy, which is not true mercy because it only looks to the criminal.”⁶² In eight separate opinions, the United States Court of Appeals has repeatedly condemned the reading of the *Eberhart* opinion to jurors. In the most recent of these rulings, the Court declared:

The *Eberhart* argument is wrong on the law, because mercy is acceptable in post-*Furman* capital sentencing regimes, and if anything, is particularly favored under Georgia’s statute, which permits the jury in its unbridled discretion to impose a life sentence regardless of the number or strength of aggravating circumstances. . . . Telling a Georgia capital sentencing jury that the state supreme court, or a justice of it, or some judge or legal scholar has decided that they should not even consider mercy misleads the jury about one of its central tasks, which is to decide whether the individual, convicted murderer standing before it should receive mercy.⁶³

⁶² For a full discussion of the *Eberhart* opinion and its subsequent use see *Drake v. Kemp*, 762 F.2d 1449, 1467-69 (11th Cir. 1985)(en banc)(Hill, J., concurring) and *Nelson v. Nagle*, 995 F.2d 1549, 1555-58 (11th Cir. 1993).

⁶³ *Romine v. Head*, 253 F.3d 1349, 1367-68 (11th Cir. 2001).

Many courts have expressed strong disapproval of prosecutors who quote the bible in an effort to persuade jurors to impose the death penalty,⁶⁴ and have even held that jurors who consult the bible in the jury room commit misconduct.⁶⁵ But the strict prohibition of reference to extraneous sources has never been extended to a juror's reliance upon their own religious convictions. As noted by one court in an oft-quoted passage:

The court in no way means to suggest that jurors cannot rely on their personal faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen.⁶⁶

⁶⁴ *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (Pa. Supreme Court, 1991) (Quotation of Bible in support of death penalty is per se reversible error); *Commonwealth v. Brown*, 551 Pa. 465, 711 A.2d 444 (Pa. Supreme Court, 1998) (Applying *Chambers* to reverse death judgment); *Carruthers v. State*, 272 Ga. 306, 528 S.E.2d 217 (2000). See Brooks, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Argument*, 33 Ga. L. Rev. 1113 (1999). Few cases have discussed use of Biblical quotations by defense lawyers, but in *State v. Haselden*, 357 N.C. 1, 577 S.E.2d 594 (N.C. Supreme Ct. 2003), the Court overruled a claim of error based on Bible quotations by the prosecutor, noting "prosecutors are forced to anticipate and address the potential Biblical arguments that defendants often make in death cases." *Id.* at 24, 608-09. See Uelmen, *The Nincompoops Aren't in the Jury Box*, Los Angeles Times, Nov. 19, 1991, criticizing the *Chambers* decision of the Pennsylvania Supreme Court:

"The best cure for bible-thumping prosecutors is Bible-thumping defense lawyers. If Karl Chambers were being defended by Clarence Darrow, there wouldn't even have been an objection to the prosecutor's argument. Darrow would simply have pulled a bible out of his beat-up briefcase and turned to Exodus. He would have reminded the jurors that the same Bible that commands the death of murderers also commands the execution of adulterers, witches, those who have sex with animals, and anyone who reviles or curses his mother or father. He would have noted that the Bible contains some curious exceptions, such as the one for a man who beats his slave to death. . . . Finally, Darrow would have turned to the New Testament, and read to the jurors the words of Jesus Christ when he was invited to participate in an execution: 'Let anyone among you who is without sin be the first to cast a stone at her.' The point is not whether the Bible supports or condemns capital punishment. The point is that jurors are intelligent enough to give the Bible the weight it deserves, and lawyers should be free to address jurors as though they are intelligent human beings."

⁶⁵ *Jones v. Kemp*, 706 F.Supp. 1534 (N.D.Ga. 1989).

⁶⁶ *Ibid.*

I find a striking parallel between the way our courts deal with the injection of religion into death deliberations and the way they deal with the issue of jury nullification. Both are treated like crocodiles in the bathtub, of whose presence we are constantly aware but make a studied effort to ignore. While a jury has the undeniable power to ignore the law and acquit a defendant simply because they believe the law under which he is being prosecuted is unjust, Courts consistently refuse to instruct juries that they have this power, and will not permit lawyers to urge juries to exercise it.⁶⁷ Some courts have even permitted the removal of individual jurors who seem intent upon exercising their power of nullification, to the dismay of their fellow jurors.⁶⁸ But jurors who consider their personal religious values in a death penalty case are *not* engaged in jury nullification. They are following the law. Why not tell them that, by instructing them:

You may consider your personal religious, moral and ethical values and beliefs in weighing the aggravating and mitigating factors and deciding whether death or life imprisonment is justified as the punishment in this case.

Perhaps one reason defense lawyers would not request such an instruction, and oppose it if requested by the prosecution, is that they fear that more

⁶⁷ *United States v. Daugherty*, 473 F.2d 1113 (D.C.Cir. 1972).

⁶⁸ *People v. Cleveland*, 25 Cal.4th 466, 21 P.3d 1225, 106 Cal.Rptr.2d 313 (2001). *But see United States v. Thomas*, 116 F.3d 606 (2nd Cir. 1997).

jurors will rely upon religious views that favor the death penalty, than would hold religious views disfavoring it. The process by which we select jurors for death penalty trials fully justifies that fear. Jurors whose religious views disfavor death are less likely to make it through the selection process than jurors whose religious views would encourage its use.

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

Conclusion.

Preparing this article led me to ask myself, how much does my being a Catholic have to do with my opposition to the death penalty? I started out in my legal career after eighteen years of Catholic education, eight of them with the Jesuits, as a prosecutor who had no qualms about the death penalty, although I never had to ask a jury for a death sentence. Fifteen years later, I concluded the death penalty is unethical, immoral and unacceptable under any circumstances. I would not be a “death qualified” juror, and if I were a judge, I would have to recuse myself in a death penalty case. I reached that conclusion not because of anything the Pope said, or any Bishop had to say about it, but giving respectful consideration to those views has certainly reinforced my own conclusion. I must confess that I was most impressed by what Mother Theresa had to say after she came to California and visited our death row at San Quentin. After surveying the rows of cells in which we now confine more than 640 men to await a final walk to the death chamber, she poked her bony finger into the chest of the burly guard who escorted her and said, “Remember, what you do to these men, you do to God.”⁶⁹

I reached my judgment about the death penalty because, both as a prosecutor and a defense lawyer, I had seen first hand the imperfections of

⁶⁹ Uelmen, *Capital Punishment: Looking the Condemned in the Eyes Brings New View*, Santa Clara Magazine, Summer, 1990, p. 47.

our system of justice. I still believe it's the best system of justice in the world. But nonetheless, it simply cannot be trusted to reliably and fairly and consistently sort out who should live and who should die. I think a lottery would be a better system. If we sentenced every murderer to life imprisonment and a lottery ticket, then once a year we conducted the "big spin" to pick 60 or 70 to be executed, we would save billions of dollars and achieve approximately the same result that our current system of appeals and habeas corpus petitions and writs of certiorari accomplish. Now, is that a position based upon an ethical or moral judgment? I suppose it is. And I really can't compartmentalize it and separate it from my religious faith. I'm really saying it is morally wrong for the state to take the life of a criminal, unless the state has a flawless system of justice to reliably, fairly and consistently determine who should and who should not be executed. And I believe it is simply impossible for human beings to devise a flawless system of justice. If you reject my "big spin" as immoral, you should reject the death penalty on the same grounds of immorality.

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

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