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Evidence of Religion and the Religion of Evidence

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EVIDENCE OF RELIGION AND THE RELIGION OF EVIDENCE

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I. INTRODUCTION

THE murder was brutal, and seemed even more senseless than most. The defendant and three of his buddies, slighted when the victim refused to talk with them, beat and kicked the victim, and smashed a bottle over his head. They then picked through the victim's possessions, looking for something to steal. After his friends left, Gathers, the defendant, beat the victim with an umbrella, after which he inserted the umbrella into the victim's anus. Gathers then left the unconscious victim. Gathers later returned with one of his companions and stabbed the victim with a knife, killing him.

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Gathers was found guilty of murder. In South Carolina, a jury may sentence a murderer to death. During closing argument to the jury in the death penalty phase, the prosecutor told the jury the following:

> We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. This defendant strewn [sic] them across the bike path, thinking nothing of that.
>
> Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had this [sic] religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.
>
> But look at Reverend Minister Haynes' prayer. It's called the Game Guy's Prayer. "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask you for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life."[1]

The murder victim, Richard Haynes, was a self-proclaimed preacher who called himself "Reverend Minister,"[2] by which the prosecutor continually referred to him during the trial. During the guilt phase of the trial, Haynes' mother testified that her son habitually carried a Bible and other religious items with him, and that he talked to people about the

1. South Carolina v. Gathers, 490 U.S. 805, 808-09 (1989), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597, 2611 (1991).

2. South Carolina v. Gathers, 490 U.S. at 807.

Lord all the time. One of the companions of the defendant testified that Haynes' Bible was clearly visible when they initially approached him; Haynes' possessions that night, including "olive oil, plastic angels, rosary beads, two Bibles, a voter registration card, and the 'Game Guy's Prayer' "[3] were also introduced into evidence, although none of those items was clearly referred to during the guilt phase of the trial. These items of evidence were entered without objection, although defense counsel complained about the prosecutor's continual references to Haynes as "Reverend Minister."[4]

The jury sentenced Demetrius Gathers to death. The South Carolina Supreme Court reversed, in part because the comments by the prosecutor suggested that "because the victim was a religious man," Gathers deserved the death penalty.[5] The Supreme Court, without discussing the propriety of using religion to appeal to the jury, affirmed the South Carolina Supreme Court based on its decision in *Booth v. Maryland,*[6] which forbade the use of victim impact statements in death penalty cases.

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented from the application of the *Booth* test. Unlike the majority, Justice O'Connor questioned whether the prosecutor's actions were an unconstitutional appeal to religious bias. She wrote that the claim of the defendant was that "the prosecutor's closing argument impermissibly invited the jury to impose the death sentence on the basis of the victim's religion and political affiliation in violation of the Due Process Clause."[7] While she speculated that, because the Game Guy's Prayer was already admitted into evidence, any error might constitute harmless error, she concluded that she would remand the case to the South Carolina Supreme Court for an inquiry on this issue. Before discussing the due process issue, however, Justice O'Connor stated, "[t]hat the victim in this case was a deeply religious and harmless individual who exhibited his care for his community by religious proselytization and political participation in its affairs was relevant to the community's loss at his demise."[8] Since being religious and talking with people about religion is deemed a communal good, Justice O'Connor accepted that any revelation to the jury of the religiosity of the victim is an aid to the

3. *Id.* at 815 (O'Connor, J., dissenting).

4. *Id.* at 823.

5. Gathers v. State, 369 S.E.2d 140, 144 (S.C. 1988).

6. 482 U.S. 496 (1987). *Booth* was overruled last term in the case of Payne v. Tennessee, 111 S. Ct. 2597, 2611 (1991).

7. South Carolina v. Gathers, 490 U.S. at 821 (O'Connor, J., dissenting).

8. *Id.*

jury in assessing the punishment to be given to the defendant. At the same time, Justice O'Connor accepted the notion that putting a person to death because of the religious *affiliation* of the victim is a form of religious discrimination which is unconstitutional. In other words, at a broad level of generality, evidence of religion may be given the jury, but at a narrower level of generality, evidence of religion is impermissible.

The prosecutor focused the jury's attention on Haynes' religiosity in several ways: first, by repeatedly calling Richard Haynes "Reverend Minister" during both phases of the trial; second, by eliciting testimony during the guilt phase of the trial from Haynes' mother that Haynes carried a Bible with him and spoke to people about the Lord; third, by directing the jury's attention to the "olive oil, plastic angels, rosary beads, [and] two Bibles," at the penalty phase; and fourth, by quoting from the "Game Guy's Prayer" during the penalty phase of the trial. The prosecutor was likely assuming both that it was important for the jury to know that Richard Haynes was a religious person and, more importantly, that informing the jury of Haynes' faith *as a Christian* would assist in persuading the jury of the defendant's guilt and that he should be punished by death.

When testimony about the religiosity of the victim is elicited, the jury will likely become aware of the religious affiliation of the victim. While the jury may not know whether the victim was Presbyterian, Baptist or Methodist, it will almost always know whether the victim was Christian, Jew or Muslim. Given the inherent difficulty with Justice O'Connor's approach, should the legal system resort to a formal neutrality which attempts to separate religion by categorically barring its admissibility?

Justice O'Connor pitches the virtue of religion at a broad level of generality, in part to avoid concluding that the prosecutor was arguing that Gathers deserved to die because of Haynes' religious affiliation, and in part because knowing that the victim was religious may assist the jury in "knowing" the victim. In her view, evidence of the victim's religiousness may be introduced to the jury for whatever consideration it may give that information. As will be later discussed, Justice O'Connor is attempting to find a middle course between requiring a trial, in particular, a murder trial, to be a "purely intellectual performance,"[9] and permitting jurors to base their decision simply on factors perceived as emotional or irrational. It appears that whether the victim was an "es-

9. Edmund M. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 4 (1942) [hereinafter *Foreword*] ("A trial cannot be a purely intellectual performance.").

tablished" minister, a devoutly religious person, or a member of a religious "cult," the community may learn of the religiosity of the victim in assessing the punishment given the defendant. The prosecutor, at a much more specific level of generality, by referring to Haynes as "Reverend Minister" and by discussing Haynes' Christian beliefs, was trying to persuade the jury that these particular facts were important for them to know.

The difficulty with the move to formal neutrality is that it is so easily evaded at trial. Two recent trials are instructive.

Last year, in San Antonio, Texas, there was a trial concerning the death of a twenty year old aspiring singer named Cassandra Rodriguez. Ms. Rodriguez drove into a flooded city intersection and drowned when her compact car was swept by the floodwater from the intersection into a drainage culvert. Early in the civil trial against the City of San Antonio, the plaintiffs, Ms. Rodriguez's parents, called the Roman Catholic Archbishop of San Antonio, Patricio (Patrick) Flores, to the stand. According to the newspaper account of his testimony, Archbishop Flores testified that Ms. Rodriguez's death was "a great loss to the city, the church and to all."[10] He continued, "[i]t's not often I can't control myself at a funeral, but I could not at this one," and also testified that the funeral was one of the largest he had witnessed since becoming Archbishop in 1979.[11]

The Archbishop's testimony, at least that testimony excerpted in the newspaper report, bears little relevance to the factual issues of the case. Further, in terms of its publication value, the account printed in the paper seems newsworthy not for reasons of explaining the dangerousness of an intersection used by many in the city nor for showing the grief of Cassandra Rodriguez's parents, but because the witness was the Archbishop of San Antonio. One of the attorneys for the Rodriguezes stated that the Archbishop's testimony was relevant to the issue of damages, since he knew Cassandra Rodriguez and testified about her character, as well as the grief suffered by her parents. The plaintiffs' attorney also

10. Dan Kelly, *Flores Testifies in Lawsuit Over Five Points Drowning*, SAN ANTONIO LIGHT, July 27, 1990, at B5. The majority of the residents of Bexar County (which encompasses the City of San Antonio) are Hispanic, and the majority of Hispanics in Bexar County are Roman Catholic. Archbishop Flores was the first Hispanic Archbishop of the San Antonio Archdiocese, and his stewardship has been greatly admired throughout his eleven years in San Antonio. He is a heroic figure who is much beloved.

11. *Id.* The jury decided that the City of San Antonio was 75% at fault, and awarded damages in the amount of $1.4 million, including $500,000 in punitive damages. Dan Kelly, *City Loses Five Points Drowning Lawsuit*, SAN ANTONIO LIGHT, Aug. 18, 1990, at A1.

stated that the jury was heavily Hispanic and heavily Catholic,[12] and that he and his co-counsel were hopeful that hearing testimony from "an emissary of God"[13] would influence the jury to award the plaintiffs a larger sum in damages.

During the trial of then Washington, D.C., Mayor Marion Barry on charges of cocaine possession and perjury, the trial judge barred the Reverend Louis Farrakhan and the Reverend George Stallings from attending the trial, holding that their presence would be disruptive and might intimidate the jury.[14] After the United States Court of Appeals for the District of Columbia Circuit remanded the case to Judge Thomas Penfield Jackson with instructions to hold a hearing on their presence,[15] the Revs. Farrakhan and Stallings were allowed to attend the trial.[16] The post-trial news reports concerning the jury's deliberations do not mention whether the presence of the Revs. Farrakhan and Stallings had any impact on the jury.

Justice O'Connor and the prosecutor in the *Gathers* case, the attorneys for the Rodriguezes, and Judge Jackson in the *Barry* case have all tapped into something about juries and decisionmaking. One of the shining examples showing the greatness of the United States is the people's unswerving dedication to the constitutionally-based legal ideal of the separation of church and state. At the same time, opinion polls routinely indicate the United States is an extremely religious country. A person is not logically inconsistent if she supports the ideal of separation and is religious. The conflict concerns the social (and inevitably, legal) permis-

12. In the Texas jury information form filled out by prospective jurors and reviewed by attorneys, the prospective juror is asked to write down his or her religion. The attorneys for the Rodriguezes were thus well aware of the religious affiliations of the impanelled jury.

In the recent trial of the Cincinnati Contemporary Arts Center's Dennis Barrie for obscenity for displaying photographs taken by Robert Mapplethorpe, the Wall Street Journal noted that "[a]t least four [jurors] have been active church members." Alecia Swasy & Milo Geyelin, *Jurors Chosen in Mapplethorpe Obscenity Case*, WALL ST. J., Sept. 28, 1990, at B5. I inferred that the "religiosity" of several of the jurors made it less likely that Barrie would either get a fair trial, or made it more likely that he would be convicted. Barrie was acquitted. Milo Geyelin, *Cincinnati Sends a Warning to Censors*, WALL ST. J., Oct. 8, 1990, at B1. Ironically, the jurors acquitting Barrie did so in deference to the expert testimony presented by the defense. *See* Isabel Wilkerson, *Obscenity Jurors Were Pulled Two Ways*, N.Y. TIMES, Oct. 10, 1990, at A12.

13. Telephone Interview with Randall Jackson, one of the plaintiffs' attorneys (Sept. 4, 1990).

14. George Hackett & Bob Cohn, *Mayor Barry: Lurid Tales of the Tape*, NEWSWEEK, July 9, 1990, at 25. During closing argument, Barry's attorney called the prosecution's witnesses "little Lucifers." *'Little Lucifers' at Barry Trial*, SAN ANTONIO LIGHT, Aug. 3, 1990, at A4.

15. United States v. Barry, No. 3152, 1990 WL 104925 (D.C. Cir. July 5, 1990).

16. *See* Ronald L. Goldfarb, *Criminal Trials: How Public, Whose Public?*, WASH. LAW., Sept./Oct. 1990, at 48. In discussing the criminal defendant's right to bring "guests" into the courtroom, the author posits a case of bringing as a guest "a clergyman in an adulterous divorce case." *Id.* at 49.

sibility of speaking publicly about one's religious faith or justifying one's actions by resort to one's religious faith. The ideal of separation, to promote religious liberty, is altered to promote secular liberty, for example, by requiring nonreligious justifications for public acts.[17] Religion is cabined within the private lives of Americans. The "conflict" is best explicated by a statement made during the 1988 campaign for President by George Bush:

> Was I scared floating around in a little yellow raft off the coast of an enemy-held island, setting a world record for paddling? Of course I was. What sustains you in times like that? Well, you go back to fundamental values. I thought about Mother and Dad and the strength I got from them — and God and faith and the separation of Church and State.[18]

It is difficult to imagine someone in mortal danger thinking about the separation of church and state. The appending of the "separation" language indicates that presidential candidate Bush was concerned some might believe his religious belief was not tempered by his knowing that religion was a "private" matter. The bow to separation is an acceptance of the view that religious beliefs affect only one's private life.

If citizens of the United States believe themselves to be religious, then calling the murder victim "Reverend Minister," eliciting testimony about the carrying of and visibility of a Bible and quoting from the "Game Guy's Prayer" during closing argument are all ways of introducing evidence of religion to persuade the jury of the prosecutor's case. Similarly, the decision of an attorney in a wrongful death case to call a popular religious figure as a witness to testify to the tragedy of that death may also influence the jury. Finally, barring two black religious figures whose orations regularly excoriate whites as racists from the trial of a prominent and popular black politician is intended to prevent a swaying of the jury by information which is not accepted evidence.

Several problems arise out of these cases. First, if evidence of religion can be useful, then conversely, it can be harmful. Second, in order to prevail at trial, parties may be forced to choose between alienating the jury by following their religious tenets and abjuring their religious beliefs in order to be perceived more favorably by the jury. Third, because of

17. *Cf.* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988) (arguing the permissibility in liberal theory of using religious beliefs in public life). *Cf.* GARRY WILLS, UNDER GOD 341-85 (1990). Wills states that "America has remained deeply religious while taking evermore seriously the ideal of separation." *Id.* at 379.

18. Cullen Murphy, *Reports and Comment, Notes, War is Heck*, ATLANTIC MONTHLY, Apr. 1988, at 14.

the structure of the trial and the rules of evidence, the response to evidence of religion is so idiosyncratic as to be worse than useless.

The sole effort to evaluate evidence of religion found in the rules of evidence is a resort to the formal neutrality of Federal Rule of Evidence 610,[19] which is inapplicable to any of the cases discussed above. While this formal response solves several problems for judges, it creates a chasm in understanding the interplay between law and religion in the courtroom, for judges are not required to understand that interplay, but can simply recite Rule 610, even where the rule is inapplicable. Similarly, when courts are faced with difficult issues of religious liberty in the setting of the courtroom, the unconsidered response is simply to cite to "separation of church and state," rather than to evaluate the individual's interest in religious liberty and the public's (or state's) interest in avoiding religiously-based discrimination or a conjoining of law and religion.

The purpose of this article is to examine several ways in which religion is admitted or excluded from the courthouse in light of the analogous ideals (or slogans) of separation of church and state and the rule of law. Ordinarily, this would mean a broad examination of the clergy-penitent privilege,[20] or a discussion of its existence in federal common law.[21] The use of religion extends further than that, however, as shown by the skillful use of religion by the prosecutor in the *Gathers* case, the

19. Religious Beliefs and Opinions: Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

FED. R. EVID. 610.

20. *See, e.g.*, Michael C. Smith, *The Pastor on the Witness Stand: Toward a Religious Privilege in the Courts*, 29 CATH. LAW. 1 (1984). Alternatively, a discussion could focus on the tradition of calling ministers as character witnesses in behalf of a defendant in a criminal trial, or the use of religion by attorneys in closing arguments. *See The Art of Legal Method: Closing Arguments in State v. Leopold and Loeb, in* FAMOUS AMERICAN JURY SPEECHES 992 (Frederick C. Hicks ed., 1925), *excerpted in* WILLIAM R. BISHIN & CHRISTOPHER D. STONE, LAW, LANGUAGE AND ETHICS 670-720 (1972). There are a number of references to religion by attorneys in jury trials referenced in FAMOUS AMERICAN JURY SPEECHES. *See also*.Carol Weisbrod, *Charles Guiteau and the Christian Nation*, 7 J.L. & RELIGION 187 (1989) (discussing the use of Christianity in the 19th century trial of Charles Guiteau, the assassin of James Garfield); John S. Hilbert, Comment, *God in a Cage: Religion, Intent, and Criminal Law*, 36 BUFF. L. REV. 701 (1987) (assessing whether religious belief can negate intent in criminal law); Commonwealth v. Wilmer, 254 A.2d 24 (Pa. 1969) (holding a court's instruction to "do what is right and proper in the sight of Almighty God" was reversible error).

21. The Supreme Court's draft of the Federal Rules of Evidence contained 13 rules on privileges, including a clergy-penitent privilege. *See* FED. R. EVID. 506 (Proposed, Supreme Court Advisory Committee, 1972). The Federal Rules of Evidence adopted by Congress deleted those privilege rules, substituting a single rule which suggests a common law approach to the adoption of specific privileges. *See* FED. R. EVID. 501. *Cf.* United States v. Gordon, 493 F. Supp. 822 (N.D.N.Y. 1980), *aff'd*, 665 F.2d 478 (2d Cir. 1981) (concluding that Federal Rule of Evidence 501 includes a clergy-penitent privilege and holding that the privilege was inapplicable).

calling of Archbishop Flores as a witness, and the presence of the Revs. Louis Farrakhan and George Stallings at the trial of Marion Barry.

This article begins with an overview of the contemporary jurisprudence of law and religion. After briefly tracing the path of twentieth century legal thought and evidentiary reform, the article explores the general issue of separating religion from the courtroom by reviewing the history, purpose and theory of Federal Rule of Evidence 610.[22] The article then analyzes three paradigm cases of evidence of religion: first, whether an attorney who is also a cleric may wear religious garb at a jury trial;[23] second, the response of the legal system when jurors and juries make decisions relying upon their own religious beliefs;[24] and third, a speculative examination of two cases which may indicate the effect a judge's religious beliefs can have on legal decisionmaking.[25] Throughout this article, two distinct points become apparent. First, the structure of the adversary system and the rules of evidence invite attorneys to use anything, including religion, to persuade a jury. Second, the rules of evidence and our jurisprudential system lack both the vocabulary and the theoretical foundation to evaluate evidence of religion.

This article is not intended to address two related issues. The presence of aspects of the American civil religion[26] in the courtroom, from the oration, "God save the United States and this Honorable Court" in the Supreme Court, to the requirement that witnesses swear an oath or

22. The only recent article discussing Federal Rule of Evidence 610 is Karl R. Moor & Jennifer M. Busby, *Cacotheism and the False Witness: A Modest Proposal for Amending the Federal Rules of Evidence*, 19 CUMB. L. REV. 75 (1988) (suggesting a modification of Rule 610 to permit examination of a witness' religious beliefs to show interest or bias or to show membership in a group which encourages or requires making false statements). *See infra* text accompanying notes 65-87.

23. There will be some comparisons made concerning the legal permissibility of a party, witness or spectator to wear religious garb at a jury trial. *See infra* text accompanying notes 111-49.

24. *See infra* text accompanying notes 143-78.

25. *See* Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989) (discussing in liberal theory whether religious beliefs may be relied upon by the morally sensitive judge when deciding cases). *See infra* text accompanying notes 179-202. *Cf.* United States v. Bakker, 925 F.2d 728 (4th Cir. 1991) (vacating the sentence of televangelist Jim Bakker, and remanding the case for resentencing, because the sentencing judge stated during sentencing that "those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests"). *See also Judge is Reprimanded for Referring to God*, N.Y. TIMES (Midwest Edition), June 29, 1991, at 9 (reporting that a Minnesota judge was reprimanded by the Minnesota Board on Judicial Standards for expressing religious beliefs in court); *Gov. Wilder is Questioning Role of Thomas' Religion*, WALL ST. J., July 3, 1991, at A8 (quoting Wilder as asking "[T]he question is: How much allegiance does [Mr. Thomas] have to the pope?").

26. Robert Bellah, BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD 168-89 (1970). *See also* CIVIL RELIGION AND POLITICAL THEOLOGY (Leroy S. Rouner ed., 1986).

affirm[27] that they will tell the truth, "so help me God," will only be discussed tangentially. Further, this article does not explore the effect on adjudication when the plaintiff or defendant is a religious entity.[28]

II. THE RULE OF LAW AND THE LAW OF THE RELIGION CLAUSES

The words that bind American law to our system of justice are "neutrality" and "impartiality." Chief Justice Marshall opined long ago that the "government of the United States has been emphatically termed a government of laws, and not of men."[29] We continue to comfort ourselves and justify our legal system with references to the "rule of law."[30]

Just as clearly, the adversary system, the governing form of adjudication in the United States, has attained the authority it possesses in part due to the appearance of impartiality of the factfinder and the lawmaker. Parties to a case are entitled to an impartial jury of their peers.[31] They are also entitled to an impartial judge.[32]

The words "neutrality" and "impartiality" also bind the legal rela-

27. Federal Rule of Evidence 603, entitled "Oath or Affirmation," provides: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."

28. *See, e.g.*, Molko v. Holy Spirit Ass'n, 762 P.2d 46 (Cal. 1988), *cert. denied*, 409 U.S. 1084 (1989) (suit alleging fraud by the Unification Church); United States v. Moon, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984) (criminal prosecution for tax evasion, among other charges, of the Reverend Sun Myung Moon, founder of the Unification Church). *See also* CARLTON SHERWOOD, INQUISITION: THE PERSECUTION AND PROSECUTION OF THE REVEREND SUN MYUNG MOON (1991) (arguing Moon's prosecution was tactically based on attacking Moon by attacking the Unification Church).

29. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

30. *See, e.g.*, Kenneth R. Starr, *The Supreme Court, the Constitution and the Rule of Law*, 73 JUDICATURE 159 (1989) (discussing the centrality of the rule of law to American society). *Contra* GRANT GILMORE, THE AGES OF AMERICAN LAW 105 (1977) ("The idea of law was ridiculously oversold, which led to great confusion in the public mind when it became clear that ours is a government not of laws but of men and that justice under law is notably unequal.").

31. The Sixth Amendment states, in pertinent part: "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." This right was applied to the states through the Fourteenth Amendment in Duncan v. Louisiana, 391 U.S. 145 (1969). *See* Reynolds v. United States, 98 U.S. 145, 167-68 (1879). In *Reynolds*, the defendant argued that the trial court erred by charging the jury to consider the consequences of polygamy. The Court held that the trial court did not appeal to the passions or prejudices of the jury, that it did not try "to make them partial, but to keep them impartial." *Id.* at 168. *See also* Albert W. Alschuler, *The Vanishing Civil Jury*, 1990 U. CHI. LEGAL F. 1, 7 (1990) (complaining that "[t]he impartial resolution of disputes, a basic social service, is not a service that our society provides very well").

32. *See* 28 U.S.C. § 144 (1991) (disqualifying judges who have evidenced a bias in favor of or a prejudice against a party). *Cf.* Carter, *supra* note 25 (discussing whether, pursuant to liberal theory, a judge may use her religious convictions in making decisions).

tionship between government and religion. The First Amendment's religion clauses are designed, the Supreme Court has stated, to create a neutrality between the state and religion.[33] This neutrality is ascertained through decisions crafted by impartial decisionmakers. The Supreme Court, caught in an entangling web in its religion clause jurisprudence, declaims a freedom from that entangling web through its oft-stated commitment to neutrality between religion and government by separating religion from government.

During the decade of the 1980s, explication of the religion clauses of the First Amendment consumed a great deal of the Court's time. From *Widmar v. Vincent,*[34] to *Texas Monthly, Inc. v. Bullock,*[35] and in between,[36] the Court has attempted to articulate notions of neutrality and impartiality when deciding the constitutionality of actions involving both government and religion. This effort to shape doctrine disintegrated at the end of the decade,[37] in large part because notions of impartiality and

33. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion clauses, both of which are cast in absolute terms. . . . The course of constitutional neutrality in this area cannot be an absolutely straight line.").

34. 454 U.S. 263 (1981) (holding unconstitutional as violating the Free Speech Clause the decision of the University of Missouri at Kansas City to deny campus religious organizations, but not any others, the use of available classrooms for meetings).

35. 489 U.S. 1 (1989). *See infra* note 37.

36. County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989); Hernandez v. Commissioner, 490 U.S. 680 (1989); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987); Edwards v. Aguillard, 482 U.S. 578 (1987); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); Ohio Civil Rights Comm'n v. Dayton Christian Sch., 477 U.S. 619 (1986); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Bowen v. Roy, 476 U.S. 693 (1986); Aguilar v. Felton, 473 U.S. 402 (1986); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1986); Jensen v. Quaring, 472 U.S. 478 (1985); Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Marsh v. Chambers, 463 U.S. 783 (1983); Mueller v. Allen, 463 U.S. 388 (1983); Larson v. Valente, 456 U.S. 228 (1982); United States v. Lee, 455 U.S. 252 (1982); and Thomas v. Review Bd., 450 U.S. 707 (1981).

37. In Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), Justice Brennan wrote a plurality opinion holding that a Texas statute which exempted from its sales tax only religious publications violated the Establishment Clause. Justices Blackmun and White concurred in the judgment only, joined by Justice O'Connor in the latter opinion, and Justice Scalia dissented, joined by Chief Justice Rehnquist and Justice Kennedy.

In County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989), the other contentious religion clause case of the term, Justice Blackmun wrote the opinion for the badly divided Court. "Justice Blackmun announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV, and V, an opinion with respect to Parts I and II, in which Justice O'Connor and Justice Stevens join, an opinion with respect to Part III-B, in which Justice

neutrality were grounded on ideas of separation which failed both jurisprudentially[38] and socially.[39] The likelihood that the Court will decide a number of religion cases in the near future is great, so long as the Court is focused on implementing their views of impartiality and neutrality based on the failed effort of separation.[40]

With the exception of the elliptical discussion already noted above in *South Carolina v. Gathers*,[41] and an endorsement of Federal Rule of Evidence 610,[42] the Supreme Court has not discussed the propriety or constitutionality of the use of evidence of religion in the courtroom.[43] Indeed, even in the state courts, confrontations with religion are met with puzzlement, and dismissed perfunctorily by references to "separation," without a discussion of the ways in which this issue can (or should) affect the decisions of jurors and juries. What little evidence there is suggests that the Supreme Court, in religion clause cases, and state courts, in cases involving evidence of religion, believe that a separation of religion from public life, like a stated adherence to the Rule of Law, will create an "impartiality" or "neutrality" in legal decisionmak-

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Stevens joins, and an opinion with respect to Part VI." *Id.* at 577. Justice O'Connor wrote an opinion concurring in part and concurring in the judgment, in Part II of which Justices Brennan and Stevens joined; Justice Brennan wrote an opinion concurring in part and dissenting in part, joined by Justices Stevens and Marshall; and Justice Kennedy wrote an opinion concurring in part and dissenting in part, joined by Justices White and Scalia and Chief Justice Rehnquist. Justice Blackmun's opinion held that placing the crèche in the courthouse was unconstitutional but that saluting religious liberty by placing on public property a Christmas tree next to a menorah was not an impermissible establishment of religion. *Id.* at 601-02, 620. Justice Brennan's opinion was that both displays were unconstitutional, and Justice Kennedy's opinion was that both were constitutional. *Id.* at 637, 655. *See also* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) and Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (both attempting to reconstruct (or is it deconstruct?) free exercise doctrine).

38. *See, e.g.*, Michael W. McConnell, *Why 'Separation' Is Not the Key to Church-State Relations*, 106 CHRISTIAN CENTURY 43 (1989).

39. *See generally* A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE (1985); *see also* RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE (2d ed. 1984).

40. The Court continues to hear and attempt to resolve cases of law and religion. *See* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990); Employment Div. v. Smith, 110 S. Ct. 1595 (1990); Davis v. United States, 110 S. Ct. 2014 (1990); and Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990). *See also* Lee v. Weisman, *cert. granted*, 111 S. Ct. 1305 (1991).

41. 490 U.S. 805 (1989). *See* text accompanying notes 6-8.

42. This "endorsement" may have been perfunctory. When Justice Douglas dissented from the Supreme Court's decision to send the Federal Rules of Evidence to the Congress, one reason given by him was that the Court had merely rubber stamped the rules. 56 F.R.D. 185-86 (1972). *See also* FED. R. EVID. 506 (Proposed, Supreme Court Advisory Committee, 1972) (creating a clergy-penitent privilege, which was approved by the Supreme Court but deleted by Congress).

43. One explanation, of course, is that the Supreme Court rarely decides evidentiary issues of a substantive nature. *See* CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., 21 FEDERAL PRACTICE AND PROCEDURE § 5006 (1977).

ing. Religion is cabined in First Amendment jurisprudence because its role in public life must be limited, and evidence of religion can not be permitted in the courtroom because religion can play no role in judging. The irony is that, no matter how much courts restrict religion, it won't go away as long as persons are religious, and religion will be a part of public life in myriad ways.

III. THE FEDERAL RULES OF EVIDENCE AND EVIDENCE OF RELIGION

A. *Introduction*[44]

One of the goals of twentieth century American legal progressives was the creation of a more "rational" system of proof. From Roscoe Pound's efforts to reform the adversary system by giving greater discretion to judges presiding over trials,[45] to John Henry Wigmore's rationalization and reformation of the law of evidence,[46] these attempts at reform were undertaken to permit the trial to become a search for truth rather than a game or sport. This faith in the rationality of law and in rationalizing the administration of justice ill fit with "irrational" faiths like religion.

The rise of American legal realism led to doubts about broad notions of the rationality of law and the legal system, faith in judges and the idea of truth and absolute values.[47] Legal progressivism was revived as legal process after World War II (and the demise of legal realism) by scholars who largely were educated or who taught at Harvard Law School. These scholars tried to repair a faith in the autonomy of law and its rationality. Even after legal realism coaxed some progressives into abandoning truth as the sole goal of adjudication, and abandoning the

44. The material in this subsection is treated more comprehensively in a forthcoming article discussing twentieth century efforts to reform the American law of evidence. *See* Michael Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence* (forthcoming, currently on file with author).

45. Roscoe Pound, *The Causes of Popular Dissatisfaction in the Administration of Justice*, 29 A.B.A. REP. 395 (1906) (reprinting Pound's 1906 speech to the annual convention of the American Bar Association).

46. JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1st ed. 1904-05) [hereinafter WIGMORE ON EVIDENCE]. A second edition was published in 1923, and a third edition in 1940.

47. *See, e.g.*, Edmund M. Morgan, *The Code of Evidence Proposed by the American Law Institute*, 27 A.B.A. J. 539 (1941) [hereinafter *Proposed Code*] ("A lawsuit is not a means of making a scientific investigation for the ascertainment of truth; it is a proceeding for the orderly settlement of a controversy between litigants."). This is repeated in essence in Morgan's *Foreword*, *supra* note 9, at 3.

search for absolute values, there remained a faith in the rational exercise of judicial discretion and the value of process. The Model Code of Evidence, adopted by the American Law Institute in 1942, was one attempt to repair a faith in law by relying on the expertise and discretion of judges. The Model Code was the basis for two subsequent evidence codes, the Uniform Rules of Evidence and the Federal Rules of Evidence, both of which gave the trial court expansive discretion to admit evidence.

The efforts of reformers to structure guidelines for rational decision-making necessitated the drawing of lines, marking off the rational from the irrational. Religion was lumped together with the irrational, thus cabining religion within bounds which many persons do not recognize. This approach by the progressives is not surprising, since intellectual thought since the Enlightenment has been incommensurable with religion.[48] Faith in rationality, including a faith in the rationality of law, was an intellectual substitute for religion. When the realists attacked the rationality of law, they were attacking the faith held by reformers. Efforts to repair that shattered faith are found in the Model Code of Evidence and its successor, the Federal Rules of Evidence.

B. *Historical Background*

> *Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.*[49]

Rule 610 contains the only reference to religion in the Federal Rules of Evidence. The Rule is itself a byproduct of the historical effort to make rules of proof more rational by ridding the law of evidence of religious conceptions.[50] In the twentieth century we have witnessed the

48. *See generally* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989); *see also* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 14 (1990) ("The natural law project has never recovered from what Nietzsche called the death of God (at the hands of Darwin)."). *Cf.* Elizabeth V. Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 1034-37 (1991) ("Christian, including evangelical, reaction to Darwin was by no means uniformly negative."). *See also* WILLS, *supra* note 17, at 97-114 (discussing the intellectual fallout from the *Scopes* trial and William Jennings Bryan's fear, not of evolution, but of *social* Darwinism).

49. FED. R. EVID. 610.

50. *See* MODEL CODE OF EVIDENCE, Ch. 6 at 218 (1942).

> The Anglo-Saxon trial by ordeal, the Anglo-Norman trial by battle, and trial by compurgation both before and after the Norman Conquest were essentially adversary proceedings. Though they were conducted under the supervision of the court, the adversaries furnished the actors through whom they appealed to the Deity for a decision. The insti-

completion of the disconnection between religion and the law of evidence in two notable respects: oathtaking and the dying declaration exception to hearsay.

In 1940, Wigmore stated that the oath was historically understood as "a summoning of divine vengeance upon false swearing. . . . [The oath] is now conceived as a method of reminding the witness strongly of the divine punishment somewhere in store for false swearing, and thus of putting him in a frame of mind calculated to speak only the truth as he saw it."[51] Two years later, the comment to Model Code of Evidence Rule 103 explicitly disavowed this chain of reasoning, holding that a disbelief in God was no bar to taking the oath; in this case, however, the Model Code of Evidence was not anticipating this change, but simply was acknowledging the decisions of the states deciding this issue.[52]

In explaining the dying declaration exception to hearsay, Wigmore discussed whether there was a requirement precedent to admissibility that the declarant believe that a Higher Power would punish a liar. His conclusion was that the several courts deciding the issue treated as essential to a statement's admission a theological belief in a future punishment for lying. Wigmore declared that the better rule was finding that the declarant had "a natural and instinctive awe at the approach of an unknown future — a physical revulsion common to all men, irresistible, and independent of theological belief."[53] The Model Code of Evidence subsumed the dying declaration within Model Code Rule 503, which admitted any hearsay declaration if the declarant was unavailable as a witness and the statements would have been admissible had the witness

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tution of the Norman inquest, from which the jury evolved, was revolutionary. It not only substituted a rational investigation for a more or less superstitious ceremony, but it removed the proceeding for the determination of the facts completely from the control of the litigants.

51. 6 WIGMORE ON EVIDENCE § 1816, *supra* note 46 (3d ed. 1940).

52. The most prolific writer on this subject was Frank Swancara, who wrote a number of law review articles, and one book, Obstruction of Justice by Religion, discussing the baleful impact of religion on the trial process, including the oath. By the time Swancara's book was published in 1936, there was no requirement that the witness swearing an oath believe in God, much less in a future state of rewards or punishments, in order to testify as a witness. *See, e.g.*, McClellan v. Owens, 74 S.W.2d 570 (Mo. 1934). The most recent case Swancara could find supporting the view that a witness was incompetent unless he believed in God was State v. Mockus, 113 A. 39 (Me. 1921), which itself was an oddity not followed by any other state. FRANK SWANCARA, OBSTRUCTION OF JUSTICE BY RELIGION 28 (1936). *Cf.* CHESTER J. ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS 107-11 (1965) (suggesting that witness incompetence due to a lack of belief in God was largely discarded by the mid to late nineteenth century).

53. 5 WIGMORE ON EVIDENCE § 1443, *supra* note 46 (3d ed. 1940).

testified.[54] Unlike the Model Code of Evidence, the Uniform Rules of Evidence specifically adopted a dying declaration exception.[55] It required proof only that the statement was made voluntarily and in good faith. The latter requirement appears to be a secular version of the then discredited requirement that the declarant hold a theological belief, although there is nothing to indicate that the drafters intended that construction. Rule 804(b)(2) of the Federal Rules of Evidence eliminated the "good faith" requirement, and thus, any link to theological belief.[56]

The Model Code of Evidence explicitly discussed evidence of religion in two places. First, the comment to Model Code Rule 106 concerning attacks on credibility stated, "Evidence of race, alienage, or theological belief is ordinarily irrelevant to credibility, but it may well have some bearing on bias, interest or subjection to influence in a specific case."[57] Second, in the section entitled "Personal Privileges," Model Code Rule 224 stated,

> Every person has a privilege to refuse to disclose his theological opinion or religious belief unless his adherence or non-adherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness.[58]

The comment to the rule indicated that the rule might be based on an interpretation of state or federal constitutional rights protecting religious belief, and that Model Code Rule 224 had been adopted in more states than were rules permitting attacks on a witness' credibility based on her religious beliefs.[59] Interestingly, the comment ended with the statement that this Rule "does not affect the admissibility of evidence of [religious beliefs] when relevant to credibility, if offered otherwise than through questions to the witness."[60]

Consequently, the comment seems to imply that a jury's hearing about the religious beliefs of a witness will not cause it to decide a case irrationally; in other words, there is relatively little fear of evidence of

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54. MODEL CODE OF EVIDENCE Rule 503 (1942).

55. UNIF. R. EVID. 63(5), 9A U.L.A. 636 (1953).

56. "While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present." FED. R. EVID. 804(b)(2) (Advisory Committee's Note).

57. MODEL CODE OF EVIDENCE Rule 106 cmt. c(3) (1942).

58. *Id.* at Rule 224.

59. *Id.* Some states, after abolishing laws requiring a belief in God to take an oath, permitted the agnostic's credibility to be attacked on grounds of a lack of religious belief, which apparently was indicative of a propensity to lie on the witness stand. By the late 19th century, however, the trend was to prohibit such credibility attacks. *See* SWANCARA, *supra* note 52, at 65-74.

60. MODEL CODE OF EVIDENCE Rule 224 cmt. (1942).

religion. This appears confirmed by the language of the Rule, which grants a witness a privilege to refuse to disclose her religious beliefs. If the witness chooses, she need not assert the privilege, and thus can speak of her religious beliefs if she is convinced it will credit her testimony.

Thus, Model Code Rule 224 is limited to ensuring that a person's "private" beliefs will be permitted to remain private against any efforts to make them public. This notion that religious beliefs are "private," rather than "public" is part of the "rationalist" movement in Western thought.[61]

In 1953, Model Code Rule 224 was adopted verbatim by the drafters of the Uniform Rules of Evidence.[62] The entirety of the comment to the Uniform Rule is, "This privilege adopts American Law Institute Model Code of Evidence Rule 224 and is generally recognized either expressly or in practice."[63]

C. *Federal Rule of Evidence 610*

Federal Rule of Evidence 610, implemented in 1975, is a marked change from the Model Code Rule. It forbids any evidence regarding a witness' beliefs, whether offered to impair or enhance the credibility of the witness. The rule is no longer framed in terms of protecting the individual conscience of the witness, but is restructured in an attempt to exclude religion from the courtroom. Two reasons for this change are evident. First, in 1942, when the Model Code of Evidence was passed, the Supreme Court's religion clause jurisprudence was almost nonexistent,[64] while by 1971 the Court had exhausted itself in attempting to

61. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."). This intellectualization and compartmentalization of religion began in 18th century America with the Deists, and continued to find favor in the 19th century with a number of mainstream Protestant sects.

62. UNIF. R. EVID. 30 (Commissioner's Note), 9A U.L.A. 618 (1953).

63. *Id.*

64. The most recent case as of 1942, and one which greatly influenced the subsequent development of religion clause jurisprudence of the Supreme Court, was Cantwell v. Connecticut, 310 U.S. 296 (1940), which incorporated the First Amendment's Free Exercise Clause into the Due Process Clause of the Fourteenth Amendment. During the 1930s and the early 1940s, the entirety of the Court's jurisprudence regarding religion resulted from the attempts of Jehovah's Witnesses to proselytize without interference or regulation from local authorities. *See, e.g.*, Lovell v. Griffin, 303 U.S. 444 (1938) (holding an ordinance requiring a permit to distribute religious tracts of the Jehovah's Witnesses violative of the First Amendment). Notably, in protecting the Jehovah's Witnesses from prosecution the Court usually used the Free Press and Free Speech Clauses to strike down the state statutes and local ordinances, rather than the Free Exercise Clause of the First Amendment. Lastly, the first "casebook" on church and state was not published until 1952, and then only in a prelimi-

frame the constitutional contours of the establishment clause.[65] Second, the perceived general consensus concerning religion and public life (for example, the "nondenominational" prayers said in all public schools)[66] had disintegrated into a series of conflicts requiring the continuing attention of the Supreme Court. In 1952, Justice Douglas, in a rhetorical flourish, said, "We are a religious people whose institutions presuppose a Supreme Being."[67] This presumed consensus did not represent all of "the people," as later shown by the interminable disputes regarding interactions between religion and government. The interdenominational organizations and interfaith projects begun in earnest after World War II covered only a part of the religious diversity of America.[68] No longer were challenges to the constitutionally-based relationship of religion and public life initiated only by "fringe" groups like the Jehovah's Witnesses.

There is nothing in the Advisory Committee's Note to Federal Rule of Evidence 610 indicating that these tremendous societal and jurisprudential changes caused the Committee to restructure the Rule. Indeed, there is only the comment that the rule does not apply to inquiries into a witness' religious beliefs "for the purpose of showing interest or bias because of them. . . ."[69] Nevertheless, the tremendous increase in Supreme Court cases structuring religion clause jurisprudence from 1947 makes it plausible that the Advisory Committee considered it important to wash

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nary edition. MARK DE WOLFE HOWE, CASES ON CHURCH AND STATE IN THE UNITED STATES (1952).

65. Lemon v. Kurtzman, 403 U.S. 602 (1971) ("Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law. The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment." *Id.* at 612. "[T]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.* at 614). Just as importantly, the Court found itself in a morass concerning the constitutional limitations on civil litigation over church-owned property. In Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970), the Court did not articulate "neutral principles" of law, that is, nonreligiously-based principles of law, which could guide lower courts in determining who owned church property.

66. These prayers were declared unconstitutional by the Court in Engel v. Vitale, 370 U.S. 421 (1962). *See also* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (holding constitutional the expulsion of Jehovah's Witnesses schoolchildren from public schools for refusing to salute the American flag), *overruled by* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). *Cf.* WILL HERBERG, PROTESTANT, CATHOLIC, JEW 40-58 (1955) (attempting to show American consensus without eliminating religious differences).

67. Zorach v. Clauson, 343 U.S. 306, 312-13 (1952). *See also* Church of the Holy Trinity v. United States, 143 U.S. 457, 465 (1892) ("[N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people.").

68. *See* MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 403-26 (1984).

69. FED. R. EVID. 610 (Advisory Committee's Note).

their hands of evidence of religion. The resulting alteration in approach makes Federal Rule of Evidence 610 a much more formal rule. The only apparent exception to the bar on evidence of religion is showing a witness' bias or interest in the case because of her religious beliefs. The application of such a formal rule requires little consideration of evidence of religion. The goal of Federal Rule of Evidence 610 in avoiding evidence of religion is the protection of the secular government, not the protection of the parties' right to a fair trial or the protection of the conscience of the individual witness-believer. This purpose comports with the notion of "separation" between church and state fashioned by the Supreme Court in the last forty years.

In *The Garden and the Wilderness,* Professor Mark De Wolfe Howe compared the use of the "wall of separation" metaphor used by both Thomas Jefferson and Roger Williams.[70] Jefferson, in an 1802 letter to the Danbury Baptist Association, wrote that the First Amendment was designed to build a wall of separation between church and state.[71] Jefferson's interpretation of the First Amendment "reflect[ed] the bias of eighteenth-century rationalism."[72] It was not surprising, then, Professor Howe noted, that Jefferson "should have been taken to regard the First Amendment as the safeguard of public and private interests against ecclesiastical depredations and excursions."[73] The First Amendment was designed more to protect the secular state from religion, rather than to protect religious liberty. In contrast, when the seventeenth century religious seeker Roger Williams[74] wrote that the church or garden should be walled from the wilderness, it was because Williams feared "the worldly corruptions which might consume the churches if sturdy fences against

70. MARK DE WOLFE HOWE, THE GARDEN AND THE WILDERNESS 1-32 (1965).

71. 16 WRITINGS OF THOMAS JEFFERSON 281-82 (1903) (Letter of January 1, 1802) (*quoted in* HOWE, *supra* note 70, at 1). The Court's interpretation of the religion clauses in the First Amendment in Reynolds v. United States, 98 U.S. 145, 163-64, relies heavily on Jefferson's 1802 letter to the Danbury Baptist Association to discern their meaning. *See also* Everson v. Board of Educ., 330 U.S. 1 (1947) (assuming that the history of the First Amendment's Religion Clause is derived singly from the battle for religious freedom fought in Virginia from 1776 to 1786, and conflating the thought of Jefferson and Madison regarding religious liberty). *Compare* David Little, *The Origins of Perplexity: Civil Religion and Moral Belief in the Thought of Thomas Jefferson, in* AMERICAN CIVIL RELIGION (Russell G. Richey & Donald G. Jones eds., 1974) (contrasting the thought regarding religion of Jefferson and Madison) *with* WILLS, *supra* note 17, at 363-80 (stressing similarities of the ideas of Madison and Jefferson).

72. HOWE, *supra* note 70, at 2 (1965).

73. *Id.*

74. An insightful portrayal of Roger Williams is found in WILLIAM L. MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 151-224 (1986).

the wilderness were not maintained."[75] Williams desired a wall to protect religion from secular depredations.

The Jeffersonian notion of fencing the barbarities or corruption of religion from the secular realm of the state has dominated the thinking of the Supreme Court since *Everson v. Board of Education.*[76] The explicit adoption of Jefferson's freighted metaphor by both the majority[77] and the dissent[78] in *Everson* has framed mainstream legal thought about religion clause jurisprudence. This commonly accepted view separates the constitutional protection granted religion into two distinct clauses, each with its own jurisprudence. The two religion clauses are perceived as devices to separate religion and government in order to save government; further related separations include such dichotomies as assuming that religion exists in the realm of the irrational, while government (or law) is found in the realm of the rational, and that religion is an individual's private affair, concerned solely with the individual, and government is concerned with the public affairs of society. Separating religion and government enables government to remain secular; that is the primary goal to which the religion clauses aspire. In its most protective sense, separation only creates a negative liberty from a feared union of religion and government. It does not create any positive liberty regarding individual conscience.[79]

The retreat to formalism evidenced by the phrasing of Federal Rule of Evidence 610 embodies that notion of separation. Rule 610 banishes evidence of religion from the courtroom not because the result would otherwise be that individual conscience would be infringed, but because separation is the model for protecting government.[80]

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75. HOWE, *supra* note 70, at 6.

76. 330 U.S. 1 (1947). *See supra* note 71.

77. *Id.* at 18 ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.").

78. *Id.* at 29 (Rutledge, J., dissenting) ("Neither so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia's great statute of religious freedom and the First Amendment. . . .").

79. This has been most clearly expressed by the Supreme Court in its two most recent free exercise cases: Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) and Employment Div. v. Smith, 110 S. Ct. 1595 (1990). In *Lyng*, the Court dismissed the free exercise claim of the Native American plaintiffs because the development of the proposed road through land sacred to the Native American religion did not "burden" their free exercise rights since they could still pray there. *Lyng*, 485 U.S. at 447-58. In *Smith*, the Court held that a constitutional claim of exemption from a state law based on free exercise rights failed as long as the statute from which the claim for exemption was made was a generally neutral statute. *Smith*, 110 S. Ct. at 1600-02.

80. *See also* Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 Va. L. Rev. 689, 693 n.12 (1968) (comparing the colonists' understanding of freedom and liberty meant a freedom to serve God with the present view that "[t]oday, of course, 'freedom' means freedom *from*

D. *Commentary on Rule 610*

There is little in the way of commentary explicating Federal Rule of Evidence 610 in *Weinstein's Evidence,*[81] Saltzburg & Martin's *Federal Rules of Evidence Manual*[82] or *McCormick on Evidence.*[83] What little commentary there is suggests only that the rule is too protective of religion. In an especially superficial editorial comment, Professors Saltzburg and Martin write:

> At first blush, Rule 610 appears to be so attuned to First Amendment and privacy concerns that it is beyond criticism. We fear, however, that it is overbroad. For example, if a fundamental tenet of a religion is that government is a false god that should be fought and not obeyed, a member of the religious group might not be a trustworthy witness. At a time when religion and politics are difficult to separate, and when religious cults seem to be proliferating, an absolute ban on evidence of membership may be too broad.[84]

Faced with this comment, it is difficult to know where to begin. Examination of each statement made by Saltzburg and Martin illuminates the shallow and/or irrational nature of their commentary. The explicit assumption that Federal Rule of Evidence 610 is "attuned to the First Amendment" evinces only a narrow understanding of the religion clauses.[85] The further praise for the rule's concern for privacy seems misplaced, since a huge exception permitting attacks based on bias or interest is contemplated implicitly by the rule and explicitly by the Advisory Committee's Note.[86] Next, the fear that some religions may teach that "government is a false god that should be fought and not obeyed" implicitly assumes that the primary harm of this "overbroad" rule will

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religion and its restraints."). *Cf.* HOWE, *supra* note 70, at 15 (1965) ("The Court's refusal to acknowledge that religious conviction as well as religious skepticism underlies our rule of separation has, furthermore, made it needlessly difficult to explain the inclusion in the First Amendment of the guarantee of religious liberty.").

81. 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 610-1 to 610-9 (1988 & Supp. 1991). There is one page dedicated to FED. R. EVID. 610 in the most recent Supplement.

82. STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 681-83 (5th ed. 1990).

83. MCCORMICK ON EVIDENCE § 48 (Edward W. Cleary ed., 3d ed. 1984).

84. SALTZBURG & MARTIN, *supra* note 82, at 681. *Accord* MOOR & BUSBY, *supra* note 22.

85. *See supra* text accompanying notes 71-75 (discussing the First Amendment as a response to 18th century rationalism and as a means of protecting the state from ecclesiastical intrusion).

86. "While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character to truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition." FED. R. EVID. 610 (Advisory Committee's Note).

fall on the government; it fails to consider the harm that government may do to others, or the harm individuals may do to religions outside the mainstream of society. Present society's inability to (rationally?) separate religion and politics is another reason for Saltzburg and Martin's concern about the rule's breadth.[87] This reason also assumes that there is either a need or a way to "separate" religion and politics in the present United States. The final reason given by Saltzburg and Martin is based on the fear that the proliferation of religious cults, unlike *real* religions, may inculcate values antithetical to American society (who's irrational now?).

E. *An Example from Michigan Case Law*

In most states, there are only scattered cases discussing the permissibility of inquiring about a witness' religious beliefs. In Michigan, however, there is a series of cases which exemplify the shift from protecting individual religious conscience to formally attempting to exclude religion from the courtroom to protect the state.[88] Eventually, Michigan's "rule" became a search for the intrusion of "religion" into the courtroom, leading to strained constructions of law.

In *People v. Williams,*[89] two witnesses for the defendant were asked whether they believed in a Supreme Being and whether they would lie under oath to protect the defendant. The Court of Appeals of Michigan properly held this inquiry reversible error.[90] Two years later, the Supreme Court of Michigan, in *People v. Hall,*[91] evaluated a prosecutor's inquiry into the strength of the defendant's religious beliefs, followed by questions asking whether the defendant would lie. This was *per se* reversible error said the court, for otherwise this would lead to "the de-

87. *Cf.* REICHLEY, *supra* note 39; NEUHAUS, *supra* note 39; and CHRISTOPHER F. MOONEY, PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION (1986) (all suggesting that religion is essential to informed public and political debate).

88. Early in Michigan's history the state supreme court held that Art. VI, § 34 of the Michigan Constitution and § 4336 of the Compiled Laws of Michigan forbade all questions of a witness related to her religious beliefs. People v. Jenness, 5 Mich. 305, 319 (1858). *See also* MICH. CONST. art. II, § 17 (1890) ("Competency of witness. No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief.") *in* ANTIEAU ET AL., *supra* note 52, at 201. Subsequent cases (re-)interpreting this sensible position include People v. Williams, 197 N.W.2d 858 (Mich. Ct. App. 1972); People v. Hall, 215 N.W.2d 166 (Mich. 1974); People v. Bouchee, 253 N.W.2d 626 (Mich. 1977); People v. Poteat, 255 N.W.2d 1 (Mich. Ct. App. 1977); People v. Jones, 267 N.W.2d 433 (Mich. Ct. App. 1978); People v. Calloway, 427 N.W.2d 194 (Mich. Ct. App. 1988); and People v. Calloway, 446 N.W.2d 870 (Mich. Ct. App. 1989).

89. People v. Williams, 197 N.W.2d 858, 859-61 (Mich. Ct. App. 1972).

90. *Id.* at 862.

91. People v. Hall, 215 N.W.2d 166 (Mich. 1974).

fendant being tried, convicted and punished on the nature of his religious beliefs."[92]

The rule in *Hall* was restructured by the Court in *People v. Bouchee*.[93] The defendant, a married man, was accused of attempted rape, and his defense was that the complainant consented by offering sex in exchange for money. Bouchee testified that when he balked at the price asked, he got out of the car and the complainant drove away.[94] Bouchee also testified on direct examination that he was a church member and regularly attended church, and strictly believed in the Bible. On cross-examination, the prosecutor attacked Bouchee's defense by asking whether the Bible condoned extramarital sexual intercourse. Bouchee's character witness, the Reverend Amos Williams, was asked on cross-examination whether Bouchee was a religious man, to which the Rev. Williams responded by saying that Bouchee was a "Christian."[95] The court held that the "rule" extended to "the instance in which a witness' religious opinions and beliefs are explored through the questioning of another witness."[96]

The holding in *Bouchee* illuminates the paradox of mechanically excluding evidence of religion. Bouchee's defense was that he was more credible than the complainant, in part because he was a God-fearing dutiful member of a church, and that he believed in strictly following the commands of the Bible. His religious beliefs were offered to the jury as a reason for the jury to acquit him. It was crucial for the prosecution to attack Bouchee's (religious) credibility, especially when Bouchee called his minister as a character witness. Apparently hypnotized by the idea that religion could not be allowed in the courtroom, Michigan's Supreme Court ignored the context of the events at trial, and reversed Bouchee's conviction. The "separation" model thus resulted in the court ignoring the fact that the initial reason for the rule was the protection of the defendant/witness.

The shift was completed in *People v. Poteat*.[97] There, the complaining witness, a fifteen year old boy, testified that Poteat fellated him. On cross-examination, the boy testified that later, he and the defendant argued about the boy's Catholic beliefs, after which he left the defend-

92. *Id.* at 170.
93. 253 N.W.2d 626 (1977).
94. *Id.* at 628.
95. *Id.* at 631.
96. *Id.*
97. 255 N.W.2d 1 (Mich. Ct. App.), *vacated*, 282 N.W.2d 923 (Mich. 1977).

ant's house. In the written opinion of the trial court, finding Poteat guilty, the judge wrote that "I have to take into account also the religious background [of complainant] and the necessity of truth saying which I do take into account."[98] The court of appeals reversed the conviction "despite the fact that the defense counsel elicited this testimony,"[99] because the court "expressly admit[ted] to being influenced to accept complainant's version of the incident at least in part because of the complainant's expressed religiosity."[100] The notion that the constitutional and statutory provisions protected the conscience of the witness has disappeared; the purpose has been changed to protect the court from any formal "religious" influence, which apparently is synonymous with "irrational." The Supreme Court of Michigan agreed, concluding that "the trial judge should not have considered, in his findings, the relationship between witness' 'religious background and the necessity of truth saying.' "[101]

People v. Jones,[102] decided the next year, concerned the effect of the cross-examination of the defendant's character witness, the Reverend Raymond Riggs. Jones' defense to the charge of felonious assault was that he lacked intent because he had been drinking heavily. The Rev. Riggs testified on direct examination about the defendant's church work, as well as the church's requirement that members not drink alcohol. On cross-examination, the prosecutor elicited from the Rev. Riggs that the church required periodic reaffirmation of its tenets, and asked whether Jones' admission that he drank alcohol while reaffirming his adherence to church tenets affected the reverend's opinion of the defendant's truth or veracity.[103] While this inquiry neither discussed the defendant's (nor the witness') religious beliefs nor was directed at credibility (it was an inquiry into the witness' opinion of the defendant's character), the conviction was reversed. The appellate court found that it was "not inconceivable" that the jury might have been affected by the prosecutor's cross-examination of the Rev. Riggs, and Jones was thereby prejudiced.[104] Again, the reason was related more to cleansing the courtroom of religion than protecting the conscience of the witness. Since Jones had

98. 255 N.W.2d at 1.

99. *Id.*

100. *Id.*

101. People v. Poteat, 282 N.W.2d 923, 923 (Mich. 1977).

102. 267 N.W.2d 433 (Mich. Ct. App. 1978).

103. *Id.* at 435. The court erroneously believes this to be an attack on the defendant's credibility. *Id.* at 436.

104. *Id.* at 437.

introduced the issue of religion by calling the Rev. Riggs, the appellate court could have concluded that defense counsel was required to mitigate any damage done to Jones by questioning the Rev. Riggs on redirect. This would better comport with notions of avoiding religious discrimination (and the possibility of an unfair trial) as well as notions of individual conscience.

The issue in the final case, *People v. Calloway*,[105] was whether the defendant's conviction should be reversed when a witness other than the defendant answered affirmatively to the question whether she was a religious person.[106] The witness, Ola Mae Reed, was the separated wife of the victim. Apparently, one defense was that Reed, not the defendant, had killed her husband because he had left her to live with another woman. Reed had argued with her husband shortly before he was murdered, and had been seen in a blue van shortly after the murder. Eyewitnesses heard shots which killed the victim and then saw a blue van leaving the murder scene. Reed's testimony was that the blue van was owned by the church she belonged to, and the prosecutor asked her whether she was a religious person and how long she had been a member of her church.[107] The court of appeals reversed the conviction based on a strict reading of *Hall*.[108] The Supreme Court of Michigan vacated the judgment and remanded the case to the court of appeals.[109] On remand, the court of appeals held that the *Hall* rule did not apply because "[f]irst, the direct examination before and after the two brief questions which were asked had no reference to 'opinions on the subject of religion.' Secondly, a fair reading of the testimony of Ola Reed indicates the questions were part of a relevant inquiry about the witness' activities at the time of the killing."[110] While the question concerning Ola's presence in a blue van was relevant to show she was not the killer, the question concerning

105. 427 N.W.2d 194 (Mich. Ct. App. 1988), *vacated and remanded*, 440 N.W.2d 414 (Mich. 1989), *and aff'd*, 446 N.W.2d 870 (Mich. Ct. App. 1989).

106. The entire colloquy was:

Q. Ola[,] are you a religious person?

A. Yes

Q. Okay. How long have you belonged to the church you go to now?

A. For nine years.

427 N.W.2d at 200.

107. *Id.*

108. *Id.* at 200. The court of appeals concluded that while the two questions asked had "no bearing in determining the question of defendant's guilt," *id.* at 201, it was bound by *Hall* to reverse the conviction since a harmless error analysis was prohibited. The court of appeals urged the Supreme Court of Michigan to reverse *Hall*. *Id.*

109. People v. Calloway, 440 N.W.2d 414 (Mich. Ct. App. 1989).

110. People v. Calloway, 446 N.W.2d 870, 872 (Mich. Ct. App. 1989). The court of appeals

whether Ola Mae Reed was a religious person certainly asks, albeit at a broad level of generality, her opinions about religion. The refusal of the court to so acknowledge is an effort to avoid the strict consequences of their own misguided interpretation; again, the hope is that its interpretation will result in the exclusion of evidence of religion from the courtroom, rather than in the protection of the religious conscience of the witness. The court makes no considered evaluation of the effect this evidence would have on the trial.

The shift in legal thought about the interplay of religion and public life, begun in constitutional law with the Supreme Court's decision in *Everson,* is more narrowly exemplified in this series of Michigan cases. The Supreme Court of Michigan originally focused on protecting the witness' religious beliefs from prosecutorial attack — the government was not to use religious beliefs to persuade a jury to convict a defendant. As permutations of this problem arose, the court shifted its focus to completely cleansing the courtroom of religion. The court did not address or attempt to understand the contextual web which gave rise to this issue, largely because the model of separation is unable to account for the variety of problems relating to evidence of religion in our courtrooms.

Protecting religious beliefs is one of the time-honored goals of the First Amendment and comparable state constitutional provisions. Achieving that goal by excluding religion from the courtroom or any "public square" is a much more recent idea. The source for requiring exclusion is the separationist approach. This approach, if applied as in this series of cases from Michigan, does not result in a better way to protect religious conscience, but simply results in a mindless exclusion of religion from the public square.

Federal Rule of Evidence 610, and its Michigan counterpart, can provide protection for those whose religious beliefs will place them at odds with a jury. In that sense, just as the notion of separation enunciated by Thomas Jefferson has value, Rule 610 has value. The problem is that the surface sensibility of Rule 610 permits judges, lawyers and even scholars to avoid looking beneath that surface, in order to challenge or contemplate prevailing views about the connections among law, religion and government in American society. This attempted return to a formal separation of religion and law provided by Rule 610 blocks a continuing search for both religiosity and law as Law; it just as surely does not end that search. This directs us to our last three investigations regarding evi-

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further held that the *Hall* rule mandating reversal of a conviction applied when any witness, not just the defendant, was asked questions about her religious beliefs.

dence of religion. In each, concerns for formal neutrality regarding religion lead to a blindness about religion.

IV. EVIDENCE OF RELIGION - THREE PARADIGM CASES

A. *Wearing Clerical Garb at a Jury Trial*

Working at a Legal Aid office in New York City, Father Vincent La Rocca defended those accused of crimes. Before he could begin defending Cecilia Daniels in his first jury trial, the assistant district attorney objected to Father La Rocca's wearing his collar symbolizing his status as a Roman Catholic priest. The trial court ordered him to remove his clerical collar before continuing the trial. Thus began a conflict about which six decisions were written,[111] and from which several other opinions were written distinguishing La Rocca's case.

La Rocca appealed the trial court's order, and requested the court issue a writ of prohibition. Judge Mangano, as a reviewing court of one, held that LaRocca's constitutional interest in wearing his clerical collar required the issuance of the writ of prohibition.[112] Judge Mangano's opinion made two points concerning the state's interests in preventing Father La Rocca from wearing a clerical collar during a jury trial. First, the state's presumption of jury bias or prejudice was inconsistent with the assumption that jurors would decide cases based on the evidence. That is, the general assumption that the jury would act rationally in deciding the disputed facts at issue in a trial was undermined by the assumption that a jury would act irrationally if a priest (and attorney) represented a person accused of committing a crime. Additionally, to assume that a questioning of the jury panelists during *voir dire* would not ferret out any bias or prejudice also undermined generalized notions of rational decisionmaking by the jury. Neither of these assumed propositions could override the more fundamental assumption made about jury decisionmaking. Second, if the state's fear was that "religious" attorneys would impermissibly create jury bias or prejudice, a decision barring a priest from wearing a clerical collar would solve only a small part of the prob-

111. La Rocca v. Lane, 353 N.Y.S.2d 867 (N.Y. Sup. Ct. 1974), *rev'd*, 366 N.Y.S.2d 456 (App. Div.), *aff'd*, 338 N.E.2d 606 (N.Y. 1975), *and cert. denied*, 424 U.S. 968 (1976); People v. Rodriguez, 424 N.Y.S.2d 600 (N.Y. Sup. Ct. 1979), *rev'd sub nom.* Gold v. McShane, 426 N.Y.S.2d 504 (App. Div.), *and appeal dismissed*, 431 N.Y.S.2d 1033 (1980); La Rocca v. Gold, 662 F.2d 144 (2d Cir. 1981).

112. La Rocca v. Lane, 353 N.Y.S.2d 867 (N.Y. Sup. Ct. 1974) [hereinafter the subsequent history of the case will be given only when necessary to explain the case; otherwise the citation will be only to the opinion under discussion].

lem. It would do nothing to prevent a religiously devout "lay" attorney from representing clients, even when the jurors had independent knowledge of that attorney's religious devotion. In addition, the decision concerning La Rocca would affect all attorneys, not just Roman Catholic priests, who wear some visible symbol emblematic of their religious faith while trying a case.

The Appellate Division of the Supreme Court of the State of New York reversed. It suggested that three issues were present: 1) the right of the defendant to counsel of her choice; 2) La Rocca's right to wear the collar of the Roman Catholic priest before a jury; and 3) the power of the court to regulate an attorney's dress.[113] In the court's opinion, the first issue was easily resolved because Ms. Daniels was officially represented by the Legal Aid Society, and not Father La Rocca. Her formal right to counsel was satisfied — she had no right to be represented by Father La Rocca. The court addressed the two remaining issues together, as if they were one.

The court began its discussion of Father La Rocca's right to wear his clerical collar by stressing the limitations of the free exercise of religion. One's freedom of religion was "not altogether beyond regulation by the State,"[114] and the court adopted the formal belief/action distinction of *Reynolds v. United States*[115] regarding state regulation. The argument that La Rocca was required by his Bishop to wear his collar was brushed aside by the court with the response that La Rocca's dress was "regulated by the court only when he is performing his duties as an attorney in a trial before a jury. The court did not undertake to prohibit him from wearing the clerical collar as a spectator, as a witness, or as a party."[116] The interest of the state in a fair trial, by contrast, was paramount to the administration of justice, and "a fair trial is linked closely to the conduct of the attorneys appearing in the trial."[117] The rule was not too onerous because "it is directed against him only when he tries cases before a jury and requires him only to doff his clerical collar."[118] Finally, the court's regulation of LaRocca's dress was reasonable because

> [w]hen he appears in court, he is not acting as a priest. This does not mean that he gives up his religious beliefs or his priestly duties when he acts as an

113. La Rocca v. Lane, 366 N.Y.S.2d 456, 458 (App. Div. 1975).

114. *Id.* at 459.

115. 98 U.S. 145, 166 (1878).

116. La Rocca v. Lane, 366 N.Y.S.2d at 460.

117. *Id.* at 461. Of course, the conduct of witnesses and parties is also linked to the fairness of the trial.

118. *Id.*

attorney; it does mean, however, that when he enters on secular pursuits he is subject to reasonable regulations in the secular realm.[119]

The court is unable to perceive religion in any other way than through Jefferson's separationist lens. It assumes, without reliance on any empirical support, that a fair trial is made nearly impossible if the attorney for the criminal defendant is a priest. It also assumes that the simple physical act of removing a collar will have little effect on Father La Rocca, thus failing to contemplate that notions of conscience bar many from undertaking seemingly simple physical acts. Finally, it assumes, consonant with the separation model, that there are distinct public and private spheres, and religion operates only in the private sphere. To assume that when La Rocca appears in court he is not acting as a priest means that the state, through the court, has, contrary to the idea of separation, adopted a theological view not shared by all in society.[120]

The court decided that while a judicious use of *voir dire* might result in an unbiased jury, it would be impossible to conclude so definitively. In any event, a fair trial required the *appearance* of a fair trial, and attempting to eliminate bias or prejudice by use of *voir dire* questioning was legally insufficient.

Again, the assumption is that the jury might not tell the truth when questioned about the effect of Father La Rocca's collar on their decision-making ability, and so the possibility of irrational action by the jury required a solution impairing La Rocca's free exercise of religion. The formal requirement of the appearance of a fair trial (which realistically might be denied if another attorney was required to replace La Rocca) outweighed any substantive concerns. The retreat into formalism is a

119. *Id.* at 462. This is the same line of reasoning developed in Mexico after the revolution of the late 1800s and early 1900s. The idea of separation of church and state in Mexico prohibits Catholic priests and nuns from wearing their religious habits in public. Matt Moffett, *In Catholic Mexico, A Priest's Power Is Limited to Prayer*, WALL ST. J., Dec. 6, 1989, at A1. On November 1, 1991, in his annual State-of-the-Union address, Mexico President Carlos Salinas de Gortari proposed a constitutional amendment legalizing the status of the Roman Catholic Church in Mexico. *See* Marjorie Miller, *Mexico Acts to Legitimize Shunned Catholic Church*, L.A. TIMES, Nov. 2, 1991, at A1.

120. *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 624-25 (9th Cir. 1988) (Noonan, J., dissenting) (noting that a governmental decision sharply dividing what is "secular" from what is "religious" is itself a theological position which the First Amendment forbids), *cert. denied*, 489 U.S. 1077 (1989). *See also* John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 28-31 (1949) (Murray, a well known American Jesuit philosopher, concluding that the Madisonian concept of separation, adopted in the *Everson* case, is grounded in "a sectarian idea of religion."). "[I]f there is one thing that the First Amendment forbids with resounding force it is the intrusion of a sectarian philosophy of religion into the fundamental law of the land." *Id.* at 30.

consequence of the reliance upon notions of separation absent countervailing ideas of liberty of conscience.

The decision of the Appellate Division was affirmed by the New York Court of Appeals.[121] After a lengthy foray into the appropriateness of the nature of La Rocca's request for relief, the court, relying on the decision of the Appellate Division, indicated that some persons would attach greater credit to the statements of a member of the clergy than "others."[122] This was "understandable, but not condonable."[123] Some jurors might discredit La Rocca because of their religious prejudices, which would deny the defendant a fair trial. The court was charged with the responsibility of ensuring a fair trial, and a refusal by the defendant to object was of no consequence. Additionally, the requirement of a fair trial applied to both the defendant and the state, and the risk of an unfair trial "outweighed this incidental limitation."[124]

The Court of Appeals showed the same lack of concern for La Rocca's religious liberty interests as had the Appellate Division. The Court of Appeals went further, however, by linking the fear of an unfair trial to the state's interest in convicting Ms. Daniels. The historical fear necessitating a "fair trial" was the power of the state in prosecuting individuals and depriving them of their liberty. This fear is flipped by the court, so that the due process protections guaranteed the individual are used to "protect" the state from the insidious influence of a criminal defense attorney's clerical collar.

La Rocca's petition to the Supreme Court of the United States for a writ of certiorari was denied.[125] This did not end La Rocca's attempts to wear his clerical collar.

In 1978, La Rocca, still employed as an attorney with the Legal Aid Society of New York, began representing Anna Rodriguez, who was charged with the criminal sale of marijuana. La Rocca made an application to the court to wear his clerical garb while defending Ms. Rodriguez at the jury trial, which was denied. La Rocca made the same application

121. La Rocca v. Lane, 338 N.E.2d 606 (N.Y. 1975).

122. *Id.* at 613.

123. *Id.*

124. *Id.* This reasoning would allow the court to exclude attorneys on the basis of the possible prejudice of prospective jury members to the attorney. Consequently, attorneys who are women or members of a racial or ethnic minority could also be excluded from representing defendants in criminal trials. *Cf.* Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir.) (rejecting company's reliance on customer preference for female flight attendants as basis for excluding males from those positions), *cert. denied*, 404 U.S. 950 (1971).

125. La Rocca v. Lane, 424 U.S. 968 (1976).

before a different judge of the Criminal Term of the Supreme Court of New York. The court, concluding that the recent Supreme Court decision in *McDaniel v. Paty*[126] allowed it to revisit *La Rocca v. Lane,* held that forbidding La Rocca from wearing his clerical collar substantially burdened La Rocca's free exercise of religion.[127] This burden was not required by any compelling state interest, the court concluded, for the assumption that society (and juries) manifested a fixed awe of members of the clergy resulting in a bias preventing a fair trial was not based on any empirical data. The court also found that the assumption that *voir dire* would not assist the court in ensuring a fair trial of the case also was based solely on speculation.[128]

The Criminal Term court also analogized two other New York cases. In *Close-It Enterprises, Inc. v. Weinberger,*[129] the New York Appellate Division reversed a judgment for the plaintiff on the grounds that the defendant was forced to choose between attending the trial and removing his yarmulke, or wearing his yarmulke and absenting himself from the trial. This choice impermissibly burdened the free exercise rights of the defendant. According to the Appellate Division, *Close-It Enterprises* presented a much different case than *La Rocca v. Lane* because the latter case "involved an attorney who was also a priest and who desired to represent a defendant in a criminal case while attired in his clerical garb."[130] This reasoning assumes, without attempting to persuade, that there is a constitutional difference between a party and an attorney. It might be argued that a constitutional difference exists because a party has a right to enter the court system, while the lawyer has only a privilege to do so, but the right/privilege distinction in constitutional law has been discarded for years.[131] It may also be that a constitutional difference exists because Weinberger was a defendant who was

126. 435 U.S. 618 (1978). *See infra* text accompanying notes 143-78.

127. People v. Rodriguez, 424 N.Y.S.2d 600, 606 (N.Y. Sup. Ct. 1979), *rev'd sub nom.* Gold v. McShane, 426 N.Y.S.2d 504 (App. Div.), *appeal dismissed,* 431 N.Y.S.2d 1033 (1980).

128. 424 N.Y.S.2d at 604, 606-07.

129. 407 N.Y.S.2d 587 (App. Div. 1978). Three early Pennsylvania cases decided by its Supreme Court may be relevant. In Stansbury v. Marks, 2 Dall. 213 (1793), the court accepted dismissal of a case fining a Jew named Jonas Phillips for refusing to testify in court on a Saturday. In Commonwealth v. Lesher, 17 Serg. & Rawle 155 (1828), it held that excluding a juror whose religious beliefs led him to disavow capital punishment was not error, and three years later in Simon's Executors v. Gratz, 2 Pen. & W. 412 (1831), held proper a denial of a continuance because one plaintiff refused to testify on his Sabbath.

130. 407 N.Y.S.2d at 588.

131. *See* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

haled into court against his will, while La Rocca voluntarily choose to practice law as a trial lawyer. Neither of these arguments was advanced by the court, however. Clearly, the only acknowledged difference was simply that Weinberger was a party while La Rocca was an attorney,[132] for "any potential prejudice could have been taken care of through the *voir dire* and the court's instructions to the jury."[133]

The second analogous case, according to the Criminal Term of the Supreme Court, was the officially unreported case of *People v. Ramirez*,[134] in which the state successfully opposed the criminal defendant's motion to prevent a prosecution witness, a Roman Catholic priest, from wearing his clerical collar.[135] In granting La Rocca's application, the court concluded that an attorney's religious dress was less likely to affect the jury than the religious dress of parties.

This decision was reversed in four short paragraphs by the Appellate Division. In its memorandum decision, the Appellate Division held that there was no change of circumstances which permitted Judge McShane in *People v. Rodriguez* to rule contrary to the decision in *La Rocca v. Lane*.[136] The appeal to the New York Court of Appeals was

132. If there was a legal difference between a civil and a criminal trial requiring a distinction between the two cases, the *Close-It Enterprises* court did not address the distinction.

133. Close-It Enterprises, Inc. v. Weinberger, 407 N.Y.S.2d at 588.

134. *Cited in* People v. Rodriguez, 424 N.Y.S.2d 600, 607 (*Ramirez* was noted in the September 11, 1979 issue of the New York Law Journal).

135. In People v. Drucker, 418 N.Y.S.2d 744 (Crim. Ct. 1979), a defense motion to bar the alleged victim, an Episcopalian priest, from wearing his clerical collar when testifying was denied. The court obliquely criticized the decision of the New York Court of Appeals in *La Rocca v. Lane*, stating that "Chief Judge Breitel's decision does not demonstratively deal with the alternative of the *voir dire* or the charge to the jury in the case of the attire of a witness." *Id.* at 747. The opinion in *People v. Rodriguez* did not cite to *People v. Drucker*. *Cf. Nun's Habit Raises Controversy in Trial*, BOSTON GLOBE, Mar. 16, 1987, at 7, in which it was reported that a judge in the Philadelphia Court of Common Pleas forbade Sister Ann Colleen Dougherty, a Roman Catholic nun and the sister of the murder victim, from wearing her religious habit at the trial of the four men accused of her brother's murder. *See also In re* Palmer, 386 A.2d 1112 (R.I. 1978) (a spectator wearing a takia (a prayer cap required to be worn by orthodox Sunni Muslims) in the courtroom did not threaten public order, and order to remove takia violated the Free Exercise Clause); McMillan v. State, 265 A.2d 453 (1970) (reversing criminal contempt citation of a member of a religious sect known as Ujamma who refused to take off his filaas in court); O'Reilly v. New York Times Co., 692 F.2d 863, 869 n.8 (2d Cir. 1982) (distinguishing *La Rocca* on grounds that priest who asked to represent himself in civil case was not a lawyer, that banning such clerical garb would prejudice the jury by suggesting that the court doubted that he was in fact a priest, and that objections could be cured by jury instructions). *See also* Frankel v. Roberts, 567 N.Y.S.2d 1018 (App. Div. 1991) (holding that an attorney has a First Amendment right to wear a "Ready to Strike" button on her lapel at trial, and finding *La Rocca* inapplicable).

136. Gold v. McShane, 426 N.Y.S.2d 504, 505 (App. Div.), *appeal dismissed*, 431 N.Y.S.2d 1033 (1980).

dismissed for lack of a substantial constitutional question.[137]

The final chapter in this saga is the Second Circuit's decision in *La Rocca v. Gold.*[138] The United States Court of Appeals for the Second Circuit, faced with La Rocca's claim that his constitutional right to freely exercise religion was violated by the district attorney's actions, held that the issue was precluded by the doctrine of collateral estoppel.[139] In dicta, however, the court distinguished the *Close-It Enterprises* and *Drucker* cases. Lawyers, as officers of the court, were different from witnesses and parties because part of the jury's duty is to evaluate the credibility of witnesses and parties, but "[t]he jury should have no need to judge the lawyer's credibility."[140] *Close-It Enterprises* also was distinguishable because no one objected to Weinberger wearing a yarmulke, and *Drucker* was distinguishable because either a) the credibility of the priest, as the alleged victim, was at issue, or b) the decision in *Drucker* did not represent the law of the state.[141]

We know by now that attacking or supporting the credibility of a witness based on the witness' religious beliefs is impermissible, so the argument distinguishing *Close-It Enterprises* by arguing that the jury should know about the religiosity of the witnesses and parties to assess their credibility is completely repudiated by the law of evidence.[142] Second, the requirement that there be a "fair trial" was the responsibility of the court, not the parties, and therefore, the failure of the opposing party to object to Weinberger wearing a yarmulke is legally irrelevant to a court determination of the likelihood of a fair trial. Finally, the Second Circuit's purported distinctions of the *Drucker* case, that is, that wearing a collar was relevant to the issue of the witness' credibility, has already been shown as fallacious. The court's alternative reason gives no sound explanation why *Drucker* is not good law.

The unwillingness to discuss the merits of Father La Rocca's claim, except in dicta, is a refusal to seriously examine the meaning of religious liberty. This refusal becomes more difficult to understand given the

137. Gold v. McShane, 431 N.Y.S.2d 1033 (1980).

138. 662 F.2d 144 (2d Cir. 1981).

139. *Id.* at 148.

140. *Id.* at 149.

141. *Id.* at 150.

142. *See* People v. Valdivia, 485 N.Y.S.2d 580, 582 (App. Div. 1985) (holding that a fleeting and "relatively neutral" cross-examination concerning the witness' religious beliefs was harmless error); People v. Wood, 488 N.E.2d 86, 88 (N.Y. 1985) ("[A]ny attempt to discredit or otherwise penalize a witness because of his religious beliefs . . . is improper, because those factors are irrelevant to the issue of credibility.").

Supreme Court's intervening decision in *McDaniel v. Paty.*[143] The Court held that Tennessee could not bar the Reverend Paul McDaniel, an ordained minister, from sitting as a delegate to a state constitutional convention in order to foster a more complete separation of church and state. Tennessee proposed that a statute disqualifying clergy from participating in the framing of its constitution protected the state's compelling interest in preventing an establishment of religion.[144] Although the justifications for the decision varied,[145] the Court unanimously held that Tennessee could not bar McDaniel from participating in the constitutional convention. McDaniel's status as a minister did not cut him off from public life or issues, and any attempt by the state to do so failed to consider the impact on McDaniel's religious liberty to engage in the *exercise* of his religion. Justice Brennan, concurring in the judgment, noted that freedom to believe encompassed a freedom to act on those beliefs, "even including doing so to earn a livelihood."[146]

The story of Father Vincent La Rocca is similar to the Reverend McDaniel's story. While La Rocca's religious *beliefs* were not impaired by the rules forbidding him from wearing his clerical collar while defending a woman accused of a crime before a jury of her peers, the question was whether La Rocca's constitutional right to *exercise* his religious beliefs was infringed by the state's action. The decisions prohibiting La Rocca from wearing clerical garb at trial were premised on the formal belief/action distinction first stated in 1879 in *Reynolds v. United States.*[147] This belief/action distinction had been limited in 1940, in *Cantwell v. Connecticut.*[148] The Supreme Court in *McDaniel v. Paty* prohibited Tennessee from barring McDaniel from a constitutional convention solely because McDaniel was an ordained minister. Tennessee's

143. 435 U.S. 618 (1978).

144. *Id.* at 621.

145. A plurality, in an opinion by Chief Justice Burger, held that this law infringed McDaniel's exercise of religion, and that the state's interest was not compelling. McDaniel v. Paty, 435 U.S. at 626. A concurrence by Justice Brennan concluded that the Tennessee law violated McDaniel's freedom of belief. *Id.* at 630. Justice Stewart separately concurred in Justice Brennan's opinion. *Id.* at 642. Justice White concluded that McDaniel's exercise of religion was not infringed, but the statute violated the Equal Protection Clause. *Id.* at 643.

146. *Id.* at 631 (Brennan, J., concurring in the judgment).

147. 98 U.S. 145, 164 (1879) ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."). The Court was relying upon Jefferson's letter to the Danbury Baptist Association, which made the same opinion/action distinction. *Id. See supra* notes 70-73 and accompanying text.

148. 310 U.S. 296, 303-04 (1940) ("Thus the [First] Amendment embraces two concepts, - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

actions discriminated against McDaniel because his religious beliefs led him to assume the status of minister in society. La Rocca's religious beliefs, like McDaniel's, led him to assume the status of priest, as one whose religious beliefs led him to embrace God differently than do many of the rest of us. This difference is eradicated by the New York courts in the name of a pervasive secularism. La Rocca must set aside his priestly status if he also intends to act as an attorney. His acts as a lawyer are deemed to be in the secular world, something apart from the private, religious world.[149]

B. *Religious Belief and Jury Decisionmaking*

The defendant, Leland DeMille, was charged with murder in the second degree. During the closing argument, DeMille's attorney failed to look at one of the jurors. When the jury began deliberating, this juror told the other members of the jury that she had prayed to God for a sign regarding DeMille's guilt, and had received a revelation from God that DeMille was guilty if defense counsel did not look her in the eye during closing argument. DeMille was convicted.[150]

In support of his motion for a new trial, DeMille requested the trial court to consider an affidavit of another juror relating the news of this divine revelation. The trial court refused to consider it, citing Utah Rule of Evidence 606(b).[151] The Supreme Court of Utah affirmed DeMille's conviction.

The court's affirmance was based on several related reasons. First, to hold that reliance upon responses to prayer are "outside influences" within the meaning of Rule 606(b) might improperly create a religious test for serving on a jury, which would infringe the religious liberties of

149. *Cf.* THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS 71-110 (1987) (discussing whether there can be a separation of private and public morality).

150. State v. DeMille, 756 P.2d 81, 83 (Utah 1988). *See also* Daniel S. Day, Note, *Utah Rule of Evidence 606(b): Is God an Improper Outside Influence?*, 1989 Utah L. Rev. 969. *DeMille* was followed by the Court of Appeals of Utah in State v. Tolman, 775 P.2d 422, 427 (Utah Ct. App. 1989).

151. 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 his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

UTAH R. EVID. 606(b) differs from FED. R. EVID. 606(b) only in the substitution of gender neutral terms ("the juror") for "him" and "his."

prospective jurors. In support of this argument, the court noted that "[p]rayer is almost certainly a part of the personal decision-making process of many people, a process that is employed when serving on a jury."[152] Second, the affidavit produced no facts which indicated that the juror who had received the divine revelation was disqualified because she was "unable to fairly consider the evidence and properly apply the law."[153] Lastly, even if the affidavit had showed that the juror was incapable of deciding the case on the evidence adduced at trial, DeMille was precluded under Rule 606(b) from arguing that the juror was "incompetent" after the verdict had been rendered. Instead, ensuring that the juror would base her decision on the evidence was properly raised only during jury *voir dire.*[154]

Justice Stewart, the lone dissenter, argued that while "a juror may seek guidance through prayer in reaching a decision, and courts have so recognized,"[155] verdicts decided on some basis other than the evidence introduced in court and the law applied to the case made "the constitutionally guaranteed right to trial by jury a nullity."[156] The *constitutional* difference was whether the juror received divine guidance in assessing the evidence (permissible) or whether the juror received divine indications of the correct decision (impermissible).[157] Identification of this difference requires an assumption that there is a rational/irrational boundary which was crossed by the juror who relied on a sign from God in ascertaining DeMille's guilt.[158] At the very least, Justice Stewart will permit the defendant's lawyer to grill the juror about whether and to what extent she used her religious beliefs in making her decision about DeMille's guilt. The result, under Justice Stewart's approach, is that the truth or validity of the juror's beliefs would be on trial, an approach which is inconsistent with religious liberty.[159] In Justice Stewart's view, a trial court would be

152. State v. DeMille, 756 P.2d at 84.

153. *Id.* at 85.

154. *Id.*

155. *Id.* (Stewart, J., dissenting) (citing State v. Rocco, 579 P.2d 65 (Ariz. Ct. App. 1978), and State v. Graham, 422 So. 2d 123 (La. 1982), *appeal dismissed*, 461 U.S. 950 (1983)).

156. State v. DeMille, 756 P.2d at 85.

157. *Id.* at 85-86.

158. *But see* THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935); JEROME FRANK, LAW AND THE MODERN MIND, (1930); LEON GREEN, JUDGE AND JURY (1930) (realist writings all concluding that trial by jury is irrational in its very execution). *See also* Ariens, *supra* note 44 (discussing historical challenge to rationality of adjudication made by legal realists); MILNER S. BALL, THE PROMISE OF AMERICAN LAW 42-63 (1981) (discussing the idea of courts as theaters). *Cf.* JEROME FRANK, COURTS ON TRIAL 80-102, 374-77 (1949) (suggesting that the administration of justice would benefit by moving from a "fight" theory of dispute resolution toward a "truth" theory).

159. *See* United States v. Ballard, 322 U.S. 78 (1944).

required to decide, after making a factual inquiry into the decisionmaking processes of the juror, whether that juror used divine guidance to (rationally) assess the evidence in the case or whether the juror impermissibly (irrationally) decided the case based on a revelation from God.[160]

Foraging through the beliefs of a juror to assess the extent to which religion influences her clearly violates liberty of conscience. In essence, her religious conscience will be protected only if religious conscience does not matter to society. Praying to God for guidance in assessing the evidence is apparently constitutional because, in the final analysis, God remains remote. God does not interfere with the juror's "rational" process of deciding according to the evidence — God simply enables the juror to use better her (own?) reasoning facilities. The secular right to a trial by jury is consequently not invaded by religion. On the other hand, a juror who votes to convict because she states that God revealed to her the defendant's guilt is, according to Justice Stewart, acting irrationally because Justice Stewart has concluded that she is relying solely and impermissibly on God rather than on the (secular) evidence. Her decision then *must* deprive the defendant of a right to a (secular) trial by jury. There is the assumption that we know the difference in decisionmaking by one who prays and one who receives a revelation. This knowledge itself assumes a particular religious belief. This invasive God, if we can assume that God actually spoke to her, must be cabined, must be removed from the legal system and the jury. God must be removed by reversing the conviction and removing the juror. The boundary between rational and irrational becomes the boundary between secular and religious.[161]

The majority accepts the dissent's rational/irrational, secular/religious distinction. It affirms only because it concludes that the divine revelation was *in effect* an aid to the juror's rational assessment of the evidence rather than a command to be obeyed, and because a narrowly textual reading of Rule 606(b) forbade the admissibility of the affidavit. The majority wishes to limit issues of evidence of religion to the *voir dire*

160. *Cf.* 1A WIGMORE ON EVIDENCE, *supra* note 46, at § 30 n.5 (Peter Tillers ed., 1983):

> For our own part, we are inclined to believe that the effort to state systematically and comprehensively the premises on which our inferences rest may produce serious distortions in the factfinding process in part (but only in part) because such systematic statement obscures the complex mental processes that we actually employ and should employ to evaluate evidence. It is not true that we can say all we know, and the effort to say more than we are able to say is likely to diminish our knowledge and our ability to use it.

161. *See* Paul J. Zwier, *God, Man, and Jury*, 1989 UTAH L. REV. 33.

of the prospective jurors;[162] it implicitly assumes that relying on revelations from God would be irrational, violating the rights of the defendant. The tone of the majority is a wish that religion would just go away.

The issue of religion and its influence on jury decisionmaking is not the primary focus of either opinion. Instead, the focus of the majority is ensuring the finality of jury verdicts, and the focus of the dissent is the due process right of the defendant to a trial by a secularized jury. Each separates religion from secular concerns, assuming a legal necessity for such action, and a society's (jury's) ability to do so.

Further, neither opinion discusses whether there exists a congruence between rational decisionmaking and truthful decisionmaking. While the Note discussing this case concludes by asserting that "the jury is a rational truthfinder,"[163] and thus that religious influences may not be permitted in jury deliberations, neither opinion in *DeMille* resorts to Wigmore's view that a trial is a search for truth.[164] Both instead appear to be searching for ways to create the appearance of impartiality, so disputes can be "resolved" "peacefully" within the legal system, rather than resolved "violently" outside it. The court shies away from noting that many Americans believe that insights from religion may speak to "truth" as well as (if not better than) anything else. Since truth is not the explicitly stated goal of adjudication, but "rational" decisionmaking is, the court can conclude that religious insights are irrelevant.[165]

The problem, of course, is the extent to which our system of justice requires juries to decide cases rationally. Before the jury venire is winnowed and a jury panel seated, prospective jurors are questioned by either the trial court, the attorneys for the parties or both.[166] Prospective

162. The majority cites State v. Ball, 685 P.2d 1055, 1057 (Utah 1984), in which it held that, at a trial for driving while intoxicated, a prospective juror can be asked whether his personal or religious beliefs led him to abstain from drinking alcohol. While *Ball* supports the majority's decision to limit questions of religious belief to *voir dire*, the majority fails or refuses to consider the implications for protecting the religious liberty of prospective jurors. It is difficult to see any resting place down the slippery slope.

163. Day, *supra* note 150, at 989. *Contra supra* note 158.

164. *See* 1 WIGMORE ON EVIDENCE, *supra* note 46, at § 8e (3d ed. 1940) ("[r]ules of evidence should be so devised as to facilitate the ascertainment of truth"). *See also* Ariens, *supra note* 44 (tracing the notion of truth as the goal of adjudication and the law of evidence.).

165. One may speculate whether the judges' own religious beliefs led them to opposing conclusions, although each opinion was apparently based on the same premises. Their religious beliefs may have influenced their views regarding the truth of divine revelation, and thus the result appropriate in this case. It is clear that the Note takes a skeptical view of the existence or truth of divine revelations. *See* Day, *supra* note 150, at 983, 989 (discussing "So-called 'revelation' " and "some supposedly divine sign").

166. *See, e.g.*, FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a).

members of the jury are screened for their knowledge of the case, their acquaintance with the parties and attorneys, and their relevant biases and prejudices, and may be challenged for cause or stricken through the available peremptory challenges given each party.[167] Before the parties' opening statements, the jury is often cautioned that it is to base its decision fairly and impartially on the evidence which they are about to hear. The jury will be instructed at the close of the trial that their decision must be based on the evidence presented at the trial and the instructions of law given by the judge.[168]

At the same time, the secrecy of jury deliberations is a staple of the American system of justice. The jury decides in a room closed to anyone else.[169] Once a jury decides a case, its decision, no matter how well or poorly reasoned, is impervious to most attacks.[170] The appeals to rational decisionmaking end once the jury begins its deliberations.[171]

This suggests an alternative to this rational/irrational distinction. A jury's decisions, no matter how made, may be viewed as nonrational, rather than as either rational or irrational. Professor Zwier suggests that, broadly speaking, all jury decisions are nonrational and "religious."[172] Professor Tillers, in his imaginative and insightful revision of volumes 1 and 1A of *Wigmore on Evidence*,[173] suggests that modern theories of rele-

167. 28 U.S.C. § 1870 (1989) lists the number of peremptory challenges in federal civil cases; FED. R. CRIM. P. 24(b) lists the number of peremptory challenges in federal criminal cases. *Cf.* Batson v. Kentucky, 476 U.S. 79 (1986) (holding that racially motivated peremptory challenges by the state violate the Equal Protection Clause of the Fourteenth Amendment); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088-89 (1991) (applying *Batson* to all civil cases).

168. *See* EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 71.02, 71.03 (3d ed. 1977) (civil cases) and §§ 11.03, 11.11 (3d ed. 1977) (criminal cases).

169. *Cf.* State v. Rocco, 579 P.2d 65 (Ariz. Ct. App. 1978) (holding that entry for less than one minute of alternate juror into jury deliberation room to "say a prayer with the jurors" before she left did not violate defendant's constitutional rights).

170. *See* WALL ST. J., Sept. 21, 1990, at B7 (reporting reversal by federal district court of conviction of two savings & loan officials because jurors, during deliberations, discussed the indictment of another well-known savings & loan operator, whose name had been mentioned frequently at the trial).

171. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-72 (1978) (discussing whether adjudication can be meaningful if the decision is not reached "rationally," which Fuller interprets to include "inarticulate" or "intuitive" decisions which appear to be rational if they could be rationally expressed). This paper was first written twenty years earlier, and excerpts were printed in HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 420-26 (tent. ed. 1958).

172. Zwier, *supra* note 161, at 440. While I don't agree with Professor Zwier's definition of "religion," I agree with his conclusion that jury decisionmaking is not "rational," because it is nonfoundational reasoning.

173. 1 & 1A WIGMORE ON EVIDENCE, *supra* note 46 (Peter Tillers ed., 1983).

vance must redefine "rational" decisionmaking.[174]

> We believe that rational evaluation can remain rational even though the process employs presuppositions and processes that remain implicit, and there is no need to force a choice between explicit and implicit inferential processes since it is quite sensible to think that rational evaluations may involve both implicit and explicit processes. To demand that everything be made explicit is to foreordain the failure of reason since the demands we make on reason are too great and hence impossible to satisfy.[175]

In either case, the opinions in *State v. DeMille* must be reconciled with a recategorization of secular/religious, and rational/irrational. The "improper" or "inappropriate"[176] use of religion may be for a juror (or court) to discriminate against others who are of different or antagonistic faiths.[177] It would not encompass a juror's "reliance" on divine revelation in voting to convict or acquit. The difference here is the notion of good faith. In the *DeMille* case, there is no question about the juror's good faith.[178] Instead, it is a question of the validity of her relying upon her religious faith. The implicit assumption of both *DeMille* opinions is that religious faith cannot be trusted if it fails to comport with secular notions of rational thinking. In other words, unless religious faith fits into judicial conceptions of proper decisionmaking, it must be excluded from secular society. In a case in which jurors make their decisions based on the religious faith of a party or witness, good faith is absent.

Religious liberty is respected and protected when a juror's religious beliefs are protected from *post-hoc* interrogations — religious pluralism is

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174. *Id.* at § 37.

175. *Id.* at § 37.4.

> If it may be assumed, as we do, that factfinding can be "rational" even though no transcendental basis exists that determines the appropriate classification, characterization or dissection of evidence, it seems probable that rational inquires into the nature and implications of evidence and facts is advanced when the trier persists, insofar as possible, in the effort to determine whether the characterization, interpretation, dissection, and so on, of the evidence that he has adopted is in fact a truly meaningful dissection and characterization (from his point of view) in the light of the assumptions and beliefs he entertains (both of a general character as well as of the general constitution of the whole of the evidence before him).

Id. at § 37.7.

176. *See* Day, *supra* note 150 (arguing, without defining, that a certain kind or form of "religious" influence would be improper or inappropriate).

177. *See, e.g.*, United States v. Moon, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984). *See also* South Carolina v. Gathers, 490 U.S. 805, 821 (O'Connor, J., dissenting).

178. Indeed, this differentiates the *DeMille* case from jury decisions based on throwing dice. *See* William Twining, *Evidence and Legal Theory*, 47 MOD. L. REV. 261, 274 (1984) (citing New York Law Journal's April 17, 1983 edition which reported the case of Judge Alan Friess in New York doing just that to decide a case).

not respected nor protected when decisions are based on antagonism to another's beliefs. A method of deciding cases by placing one's faith in God to make a decision is difficult to accept because it is explicitly nonrational. It does, however, promote an important value in American society, one important enough to be constitutionally protected. A juror who decides a case because a party's religious beliefs are contrary to the juror's is not acting in the interest of religious liberty and pluralism. This decision is more irrational than nonrational, but more importantly, it is also inappropriate because it deforms religious pluralism. This method of decisionmaking is instead a form of religious discrimination, which the Constitution forbids.

C. *Judging and Religious Beliefs*

The final issue to be addressed is the impact of religion on judging. Professor Stephen Carter's recent essay explores the permissibility, within liberal political theory, of using one's religious beliefs to judge.[179] Carter concludes that if morally sensitive judges are necessary to a system of justice, then a religiously devout judge may make decisions based on her religious beliefs. My intention here is to compare two cases, *Colorado v. Connelly*[180] and *State v. Lafferty*,[181] which offer markedly different views about the "rationality" of persons accused of crimes, based seemingly on the different religious influences permeating the judges' thoughts.

Francis Connelly approached a police officer in downtown Denver in August of 1983, and stated that he had murdered a person and wanted to talk about it. After immediately being advised of his *Miranda* rights, and after further questioning by a police officer "bewildered by this confession," Connelly stated that he wanted to talk because his conscience had been bothering him.[182]

After the arrival of a homicide detective, Connelly stated that he had killed a young girl named Mary Ann Junta the previous year. The next day he stated that he had followed the direction of "voices" in confessing. At a hearing to suppress his statements, psychiatrist Jeffrey Metzner testified that Connelly told him that on the day before he approached the police officer, the "voice of God" told him to withdraw money from a bank, fly from Boston to Denver, and either confess to the

179. Carter, *supra* note 25.
180. 479 U.S. 157 (1986).
181. 749 P.2d 1239 (Utah 1988).
182. 479 U.S. at 160.

killing or commit suicide. "Reluctantly following the command of the voices,"[183] Connelly confessed. The psychiatrist testified that Connelly was experiencing command hallucinations which interfered with his ability to make rational and free choices. The Colorado trial and supreme courts suppressed the confessions.

The Supreme Court reversed, in an opinion written by Chief Justice Rehnquist. It held that since the police had not engaged in any coercive activity, there was no predicate which required the court to assess the "voluntariness" of the confession.[184] In conclusion, the Court held that Connelly's "perception of coercion flowing from the 'voice of God,' however important or significant such a perception may be in other disciplines, is a matter to which the United States Constitution does not speak."[185]

Justice Stevens, concurring in part and dissenting in part, concluded that while the precustodial statements were admissible because there was no state coercion, the postcustodial statements were properly suppressed because they were not the product of Connelly's free will.[186] In dissent, Justice Brennan wrote that Connelly's paranoid schizophrenia made him clearly unable to make an intelligent decision regarding the wisdom of making such a confession.[187]

The majority excludes from discussion the notion that Connelly truly heard from God that he should confess, by eliminating the requirement that a criminal defendant waive his rights by an exercise of "free will" where there is no police coercion. The concurrence by Justice Stevens and the dissent by Justice Brennan assume the incompetence (or irrationality?) of Connelly without *any* examination of the plausibility or possibility of a revelation from God. The belief that God would tell someone, especially someone who had been treated previously in mental hospitals, that he should confess was too ludicrous to even contemplate. This "agnosticism" by the majority and "atheism" by the separate opinions are both consistent with separating law and religion. Liberal political theory may be neutral with respect to the good life, but "liberalism is *not* neutral with respect to competing conceptions of reality. It does not

183. *Id.*

184. *Id.* at 166.

185. *Id.* at 170-71.

186. *Id.* at 172 (Stevens, J., dissenting in part and concurring in part). Stevens quotes in a footnote the trial court's conclusion that Connelly's statements were "mandated by auditory hallucination, had no basis in reality, and were the product of a psychotic break with reality." *Id.* at 173 n.4.

187. *Id.* at 174.

admit the possibility that religious claims might be objectively real, at the same time that it does not admit that secular claims might be subjectively imaginary."[188] The Court's opinions, based on liberal thought, create a vacuum filled by a putatively objective "science," psychiatry,[189] which creates or privileges a reality that is unable to conceive of an historical God who would speak to a person. The Court washes its hands of religion in an effort to remain "neutral," but that lacuna is filled by psychiatry, which inevitably displaces religion.

Ronald Lafferty was convicted of killing his sister-in-law and her fifteen month old daughter. On appeal, he argued to the Supreme Court of Utah that the trial court erroneously concluded that he was competent to stand trial, because four psychiatric examiners concluded that he suffered from a "religious delusional system."[190] One expert testified at the competency hearing that he believed Lafferty was competent to stand trial.

Lafferty, who had been excommunicated from the Mormon Church, told others that he had received a divine revelation that four persons, including his sister-in-law Brenda Lafferty and her daughter Erica, were to be "removed." After killing Brenda and Erica, he was arrested and charged with murder and conspiracy to commit murder. At a hearing in October 1984, he was found competent, but was further examined in the state hospital in November by four examiners after he had assaulted several persons in jail. At the end of November, the four examiners concluded Lafferty did not suffer from mental disease or defect, and the court again found him competent to stand trial. Shortly after Christmas he attempted suicide, and the same examiners reevaluated Lafferty. In March 1985, they concluded that Lafferty was incompetent to stand trial because his pervasive religiosity had turned into a "religious delusional system."[191]

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188. Frederick M. Gedicks, *Hostility to Religion in the Public Square: The Anti-Religious Dimension of Liberalism* 25 (1990) (unpublished manuscript on file with author). *See also* United States v. Bakker, 925 F.2d 728, 741 (4th Cir. 1991) (reversing sentence on due process grounds because sentencing judge based his decision on "personal religious principles.").

189. The privileging of psychiatry over religion in modern Western thought has been subjected recently to a strong challenge. *See* ROBERT COLES, THE SPIRITUAL LIFE OF CHILDREN 1-21 (1990) (criticizing Sigmund Freud and more recent psychoanalysts for reducing religiosity to an occasional neurosis). *See also* ERNEST BECKER, THE DENIAL OF DEATH 255-85 (1973) (arguing that the modern effort to use the "therapeutic religion" of psychiatry to replace traditional religions cannot and will not succeed); PHILIP RIEFF, FREUD: THE MIND OF THE MORALIST 257-99 (1959) (arguing that psychoanalysis is the last great nineteenth century secularism offered to dislodge religion in Western life and thought).

190. State v. Lafferty, 749 P.2d 1239, 1242-43 (Utah 1988).

191. *Id.*

In affirming the trial court, the Utah court held that "the examiners diagnoses' were based on the premise that Lafferty's religious beliefs and experiences did not accord with reality, an unsupportable premise on which the trial judge could not rely."[192] In November the four court-appointed examiners had determined Lafferty's religiosity did "not approach the level of a thought disorder."[193] In the supreme court's view, the only change regarding Lafferty between November 1984 and March 1985 was the label attached to his religious beliefs. "The trial court could also reject the examiners' opinions because they were based on unfounded assumptions about Lafferty's religious experiences."[194] The court continued, "[T]he examiners thought that Lafferty's religious experiences did not comport with reality. In the absence of some foundation for their assumptions that Lafferty's religious experiences did not occur, the trial court was justified in rejecting the psychiatrists' conclusions."[195] According to the court, the First Amendment's religion clauses prevented the court from deciding whether these experiences had occurred. In particular, the majority relied on *Ballard v. United States,*[196] in which the Supreme Court concluded that the truth of the defendant's religious beliefs could not constitutionally be made the basis of the government's charge of criminal conduct. In a footnote, the court took judicial notice that Lafferty had been a member of the Mormon Church, which doctrine included a belief in divine revelation and personal spiritual experiences.[197]

Two concurrences rejected the majority's statement that the Constitution prohibited the examiners or the trial court from relying upon Lafferty's belief in divine revelation to determine his competence.[198] The concurrence of Associate Chief Justice Stewart rejected the conclusion of the majority that the examiners reached their conclusions by assuming that Lafferty's religious experiences did not occur.[199]

The majority in *Lafferty* brackets religion a perspective opposite that of the *Connelly* court. In *Connelly,* psychiatry was a substitute for

192. *Id.* at 1244.
193. *Id.*
194. *Id.* at 1245.
195. *Id.* at 1246.
196. 322 U.S. 78 (1944).
197. State v. Lafferty, 749 P.2d at 1246 n.4.
198. *Id.* at 1262 (Howe, J., concurring, Stewart, J., concurring). Chief Justice Hall concurred without opinion, and Justice Durham concurred in Justice Howe's opinion. Justice Stewart dissented from the affirmance of the imposition of the death penalty.
199. *Id.* Justice Stewart also disagreed that the First Amendment required the trial court to reject the examiners' opinions.

religion. In *Lafferty,* the majority notes that Mormon doctrine posits a person's ability to receive divine personal revelations from God. To hold that Lafferty could not have received a divine revelation, even as an excommunicated Mormon (whether the revelation was accurately understood by Lafferty), is to broadly conclude that divine revelation is nonexistent. This conclusion would privilege the "knowledge" of secular (psychiatric) experts regarding conceptions of reality and denigrate the possibility of religious knowing.[200] However, in order for the court to appear to decide the case without reference to their religious beliefs, and in order to prevent a displacement of religious "knowing" with psychiatric "knowing," the court distorts the holding of *Ballard v. United States.*[201] It concludes that the trial court is constitutionally constrained to assume the truth of Lafferty's beliefs and find him competent unless the psychiatrists can prove the invalidity of Lafferty's religious experiences. This burden is, of course, impossible to meet.

The Utah court's stronger argument concerns its response to the secular belief that makes us unwilling to believe, as one doctor testified, that "faith in divine intervention was rational."[202] This secular belief dominates the legal system and our legal assumptions about how and why persons act as they do. The assumption is so pervasive that the Supreme Court in *Connelly* found it unnecessary to discuss in any meaningful fashion. The Utah court finds itself unable to discuss issues of faith in legal terms, instead choosing to hide behind an inartful and inaccurate interpretation of the Supreme Court's decision in *Ballard.* The present Supreme Court, consciously or not, evidences an agnosticism which betrays not an impartiality toward religion, but a blindness to religion. This blindness makes it unable to see when other (secular) faiths attempt to dislodge religion in society. In contrast, the Supreme Court of Utah evinces a concern for religion — a concern, however, which is immediately covered with a resort to law, because the court cannot find the language to speak about religion without contradicting law.

The problem remains that neither court is capable of seriously encountering religious belief, nor examining religious belief in light of secu-

200. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 30-31 (2d ed. 1984) (noting that one of the "characters" of the modern self is the "Therapist"). *See generally* PHILIP RIEFF, THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD (1987).

201. 322 U.S. 78 (1944). In *Ballard,* the Court was concerned with the fairness of submitting to a jury evidence of the defendants' religious beliefs. *Id.* at 86. In *Lafferty,* the Court uses *Ballard* to conclude that the defendant's religious beliefs are to be protected in order for the government to try Lafferty and request the jury sentence him to death. *Lafferty,* 749 P.2d at 1246.

202. State v. Lafferty, 749 P.2d at 1246.

lar ideas about Reality. This is not to suggest that either Francis Connelly or Ronald Lafferty is "sane" or "insane." It is to suggest that pretending that religion is safely cabined away from legal discourse will not make religion go away.

Divine revelation may or may not have come to Francis Connelly and/or Ronald Lafferty. The appeal to religion to justify and excuse the cruelest actions did not begin and will not end with the punishment of these two men. It may simply be that a belief that the American legal system is a rational legal system precludes acknowledging evidence of religion. However, the absence of a theoretical foudation and/or the lack of a vocabulary for religion in law does not mean that religion does not exist.

V. CONCLUSION

Historically, both the United States and its citizens prospered when church and state were successfully separated. Before the First Amendment prohibited the Congressional establishment of religion, it seemed paradoxical to believe that religion was better protected by ending the formal ties between religion and government. The American experiment to disentangle church and state showed that religious liberty (although not necessarily religious sects) would thrive, and the paradox dissolved. Constitutional protection of religious liberty resulted in the proliferation of amazingly diverse religions and religious beliefs. The separation model, cast as an aspirational ideal, protected and promoted religious liberty.

Beginning fifty years ago, however, the aspirational ideal of separation was transformed into a legal instrument. The Supreme Court began applying the model of separation throughout the public (including legal) order. A primary purpose for applying the separation model was to eliminate the influence of religious discourse, and religion generally, from public discourse. Since the many religious beliefs present in American society were incompatible with one another, and since religious expression was equated with the irrational or emotional, privatizing religion was believed necessary to protect the state. The language of the public square was to be limited to secular, rational, "non-religious" discourse. The problem with using the separation model was that the aspirational ideal of separation was premised on the belief that separation better protected religious believers, while applicants of the separation model in different venues in American public life were based on protecting the state from the incursion of religion. Transferring the project of separation

without transferring the premises of the project distorted the value of, and rationales for, separation.

The goal of the tolerant society was to seal religion from the public square. But the separation model has failed to demarcate any space between secular and religious. Specifically, the quest to exclude religion from the formal resolution of disputes is impossible as long as dispute resolution involves persons, and as long as persons continue to embrace religion.

The effort to calibrate the proper degree of separation continues, however, for the legal system is incapable of considering religion in any other way. Federal Rule of Evidence 610 and the cases discussed throughout this article are examples of the inability of lawmakers to recognize religion, except through a categorical rule based on the formal ideal of separation. Not only does Rule 610 fail to achieve its purpose, it masks a wide range of issues about which the legal system seems baffled.

The vocabulary permitting a different approach to questions of religion and the courtroom does not exist. Courts faced with unusual problems of law and religion resort to a formal neutrality and separation in part because they are unable to articulate any alternative approach. The legal system is unable to talk about religion any other way, and it is unlikely that this will change. A beginning would require a reevaluation of liberty of conscience and the permissibility of "exercising" one's faith in both a secular and religiously pluralistic society. This beginning would require, as Professor Edmund Morgan suggested in another context,[203] a radical reformation of American society, something highly unlikely. We lack an understanding which will provide us with the capability of acknowledging religion without immediately returning to religious discrimination. This chasm created by silence grows wider the longer words are unavailable to us.

"What we cannot speak about we must pass over in silence."[204]

203. *See* Morgan, *Proposed Code*, *supra* note 47, at 540; *Foreword*, *supra* note 9, at 6 (Arguing in 1940, "It is time, too, for radical reformation of the law of evidence.").

204. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 151 (D.F. Pears & B.F. McGuiness trans., 1961) (1921).