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Spiritual Occlusion and Systemic Integrity: Legal Evaluations of Due Process Protections and Freedom of Religious Expression and Practices Safeguards

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Abstract: As is the case with other constitutionally protected rights, the freedom of religion is not unlimited nor without restriction or constraint. Rather, the courts have long held that the state may have legitimate reasons for placing reasonable restrictions on the otherwise free exercise of religious practice. The courts have also held that the state cannot restrict religious practice in a capricious or gratuitous manner. However, the courts have also held that individuals have a constitutional right to due process legal protections. In many instances, these two freedoms exist independently of each other. In instances when they intersect, conflict may result from one right seeking hegemony over the other. In instances such as these, the courts may have to resolve conflicts by establishing legal principles and precedents regarding which of these constitutional protections will be granted contextual prominence over the other. Thus far, the legal evaluation of this important question has been confused at best and contradictory at worst. This has resulted in a number of substantive outcomes that pose significant challenges to the practice and application of both rights and an underlying avoidance of broader constitutional questions.

Keywords: religious law; freedom of religious expression; freedom of religious practice; due process protections; intrinsic religious orientation; extrinsic religious orientation; first amendment; second amendment

1. Introduction

The American legal system did not develop in a vacuum. Instead, other significant societal institutions, such as religion, developed alongside it. Over time, religion and the law developed a symbiotic, if somewhat contentious relationship. In fact, some (Miller et al. 2008) have argued that religion has become an inseparable part of the American legal system. Religion has influenced American legal processes and outcomes in a variety of ways, while the law has acted to constrain religious practice in at least certain manners. The relationship between religion and the law is not a concept of singular concern in the United States. Rather, it has been the subject of evaluation in many other countries, including the United Kingdom (Sandberg 2011), Germany (Robbers 2010), Spain (Martinez-Torron 2014), India (Baird 2005), and Hungary (Schanda 2011). However, given the unique role that religion has played in the founding, growth, and development of the country, it plays a rather unique role in contemporary American society.

Prior research in the United States has underscored the extent to which religion has exerted an influence on the legal system through judges, prosecutors, defense attorneys, and defendants (Bornstein and Miller 2009; Kislowicz 2018; Shahshahani and Liu 2017; Miller and Bronstein 2006; Henson 2001; Reza 1999). While religion's influence on all of these legal system stakeholders is important, its influence on juries and jurors is perhaps most significant symbolically, substantively, and

pragmatically. Ultimately, juries are responsible through their deliberations for making the majority of decisions regarding guilt or innocence during the criminal trials which serve as the most visceral representation of the broader American legal system and the representative ideals that the public espouses concerning this system. Perhaps most importantly, very little research has been done to date on religion's influence on juries. Research (Eisenberg et al. 2001; Bornstein and Miller 2009; Miller et al. 2011) has tended to focus on jury selection, jury composition, and juror attitudes. This lack of research has caused scholars (Miller et al. 2008) to call for additional evaluations of the nature of the religion-jury relationship. The relative absence of research in this area is surprising given the exponential growth (Failinger 2014) that has occurred in the broader religion and crime field during the course of the last several decades.

The lack of research noted above becomes even more apparent when the relationship between religious practice and legal due process protections are considered. Given the significant role that jury deliberations play in broader legal processes' outcomes, the importance that many place on the exercise of their individual religious beliefs, and the lack of current research in this area, the current evaluation will focus on the legal nature of the relationship that exists between religion and juries. More specifically, this exploratory evaluation will focus on the nature of the relationship that exists between freedom of religious practice and constitutional due process protections. The evaluation will be conducted through the collection and synthesis of relevant state and federal court decisions. The objective of the study is to determine the legal nature of the relationship that exists between legal due process protections and freedom of religious practice guarantees, as well as the constitutional issues (specifically those related to First and Sixth Amendment issues) that are raised by the oftentimes opposing nature of this relationship. Since this is an exploratory evaluation, it will rely primarily on relevant case analysis and synthesis in an attempt to provide a broad general overview of the contemporary state of this relationship and as a means of identifying critical public policy issues that have yet to be addressed.

2. Background

The United States Constitution provides specific protections for the exercise of religious freedoms and due process rights regarding fair and impartial legal proceedings. Theoretically, each of these distinct freedoms are envisioned autonomously, in that they are thought to operate and be protected independently of one another. While there are certainly instances when autonomy is present, there are also occasions when simultaneous application or contextual circumstances create conflict, juxtaposing the two freedoms. In these instances, the resulting conflict between individual religious freedoms and broader due process protections may necessitate social, political, and legal assessments of the relative merits of each of these freedoms and an individual and collective evaluation of their relative place and purpose in contemporary American society. While balance and equilibrium are preferable when evaluations of this nature are undertaken, conflicting opinions and differing priorities often emerge during times of conflict, increasing the likelihood that symmetry will prove elusive. This can result in subjugation of one of these important freedoms in an effort to underscore the significance and legitimacy of the other. This creates a unique challenge to American idealism from both a pragmatic and theoretical standpoint.

From a theoretical standpoint, a dualistic fallacy regarding the depth and breadth of the true freedoms Americans enjoy is created and exposed by the conflict that is created between religious freedoms and due process protections. After all, if guarantees pertaining to these two liberties which are commonly taken for granted cannot enjoy a symbiotic relationship, what chance is there of the unencumbered exercise of the other freedoms that Americans have long assumed that they enjoy? From a more pragmatic standpoint, contextualized evaluations such as these may necessitate the prioritization of conflicting rights or protections in instances when full symmetry or integration is not a realistic possibility. As a result, individuals may encounter a forced systemic choice necessitating an individual decision regarding which of these rights is the most significant or important in light of

current circumstances and prior lived experiences. In extreme cases, this may ultimately mean that one of the protections in question simply ceases to exist in the shadow of the other.

Collectively, assessments of this nature can contribute to broader societal perceptions regarding the value or priority that is assigned to individual rights, resulting in the alienation of those who disagree with the broader existing consensus. The law represents a means of exercising societal power and its application, inevitably creating losers and winners (Maravall and Przeworski 2003). This contributes to the emergence of perceptions among those groups unable to advance their agendas that societal institutions are unable to appreciate or represent their views. As certain groups become increasingly alienated and marginalized, the engagement of these groups is undermined and the fabric of society can break down (Trudeau and McMorran 2011). Civil discourse becomes increasingly more fraught as deepening divides are created in response to the increasing tensions which undermine the processes that facilitate an organized and united society. While no one issue can claim full responsibility for societal issues of this nature, individually, they can chip away at the foundations of established communal norms and values. Given the individual and collective significance of issues such as these, gaining a better understanding of the legal conflicts that exist between the individual ability to exercise religious freedoms and legal standards related to the provision of due process protections is important. However, in order to better understand the potential conflicts in this area, a broader overview of relevant background factors and current contextual issues must be provided.

3. Freedom of Religion

Religious freedoms in the United States are defined, operationalized, and protected by several key constitutional standards and legislative provisions. More specifically, the First and Fourteenth Amendments to the Constitution provide language which outlines and underscores the comprehensive protections that exist in American society regarding religious thought, practice, and application. The First Amendment includes two key provisions which are commonly referred to as the establishment clause and the free exercise clause. The first of these provisions, the establishment clause, is a fluid concept that, while malleable, has historically been interpreted as prohibiting any legislative actions that attempt to establish a formal state religious denomination or governmental actions that seek to mandate the individual practice of religion (Brownstein 2008; Ravitch 2007).

In practice, this means that while individual citizens have a right to freely exercise and practice their religious beliefs, the state cannot force them to do so in either a church of their own individual choice or in one that is mandated or supported by the state. The second of these provisions, oftentimes referred to as the free exercise clause, has historically been interpreted as preventing the government from actions, behaviors, or the creation of legislation that that undermines or unnecessarily impinges upon an individual's ability to freely exercise their religious beliefs or to practice the legitimate tenets of their individual religious faith. Collectively, these two provisions have historically served to ensure that the government is prohibited from either mandating adherence to a particular faith or unduly restricting the religious practices of those individuals who desire to adhere to and practice one of their own volition.

Initially, many federally provided protections were only applicable to federal employees and federal agencies. In many instances, they did not apply to the states, creating a disjuncture between federal and state civil liberties and constitutional protections. The Fourteenth Amendment prohibited state governments from violating or preventing the exercise of many of the individual rights, privileges, and protections that are ensured at the federal level. This Amendment was brought into law in an attempt to prevent states from depriving newly freed slaves of their constitutional rights during the historical period referred to as reconstruction that occurred after the conclusion of the Civil War (Epps 2006). The rights in question pertained to a variety of different federal protections, but included those pertaining to the freedom of religion. In practice, this meant that the religious protections that were guaranteed at the federal level became more far reaching and universal, as they also had to be honored and enforced by both state and federal governments.

There are also a number of other substantively important religious practice protections that supplement those that are expressly provided by the federal Constitution. For instance, the Civil Rights of Institutionalized Persons Act (CRIPA) protects the religious practice rights of incarcerated populations (Jolicoeur and Grant 2018), and the Religious Freedom Restoration Act (RFRA) was passed by congress as a means of prohibiting government restrictions on religious practice (Tebbe 2017). Additionally, while specific provisions vary, virtually all states protect religious freedoms to varying degrees in their individual constitutions (Hammons 2013; Tarr 1988). Religious freedoms are only one set of protections that are guaranteed to residents of the states through the 14th Amendment. The amendment also provides protections pertaining to equitable treatment before the law and the provision of both substantive and procedural due process protections during criminal court proceedings. Given their importance to the current evaluation, these legal due process protections will be examined in greater detail in the following section.

4. Legal Due Process

The United States prides itself upon a legal system that provides an equitable system of justice that is based upon established rules and procedures which govern how legal proceedings are to be undertaken. As part of these protections, individuals facing legal processing are provided with certain rights, privileges, and protections to ensure that they are treated in a manner conducive with the protections established by the Due Process Clause of the Fifth and Fourteenth Amendments. The Due Process Clause prohibits state and federal governments from depriving any person of “life, liberty, or property without due process of law.” The amendments do not specifically define the term “due process of law,” and since each state was originally thought to have the authority to define its own ideas regarding how the due process of the law would be operationalized, broader clarity was compromised. As a result, the courts, in reviewing claims of constitutional violations, had to look outside constitutional amendments for guidance in determining whether particular circumstances met constitutional requirements regarding the provision of due process.

In doing so, the courts established two distinct yet related veins of legal due process: procedural due process and substantive due process. Procedural due process requires the government to adhere to fair legal processes before depriving any person of life, liberty, or property. In considering procedural due process claims, courts have applied a two-part legal analysis. First, the court has to determine whether the plaintiff has a liberty or property interest that entitles them to procedural protections. Once it is determined that the interest exists and that due process applies, the question regarding what due process is required still remains (Blum et al. 2018). In *Morrissey v. Brewer* (1972)¹, the United States Supreme Court made it clear that the procedural requirements of due process are flexible and that due process “calls for such procedural protections as the particular situation demands.” Nevertheless, when the government attempts to deprive an individual of life, liberty, or property, procedural due process typically will require that the individual be afforded, at a minimum: notice of intent, an opportunity to be heard, including presenting evidence and the opportunity to cross-examine adverse witnesses, and the right to a decision made by a neutral judge or an impartial jury (Blum et al. 2018).

The Due Process Clause, however, guarantees more than a fair process, and the “liberty” it aims to protect extends far beyond the mere absence of actual physical restraint. The concept of substantive due process provides heightened protection against government interference with certain fundamental rights and liberty interests. The interests protected by substantive due process are much more difficult to accurately define, and courts have continually struggled over the years with its application. In one attempt to do so, the United States Supreme Court, in *United States v. Salerno* (1987)², stated that

¹ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

² *United States v. Salerno*, 481 U.S. 739, 746 (1987).

substantive due process prohibits governmental conduct that either: (1) interferes with rights that are deemed fundamental, or (2) “shocks the conscience.”

The “shocks the conscience” standard was established by the Supreme Court in *Rochin v. California* (1952)³, and was historically applied when the substantive due process violation in question resulted not from a piece of legislation depriving an individual of a fundamental right, but from an abuse of power by a state actor in the executive branch. Under those circumstances, the Court held that only an abuse of power that “shocks the conscience” will be actionable. In determining whether an act was “shocking to the conscience,” courts typically considered whether the action was deliberate or was done with a purpose to harm that was unrelated to the legitimate governmental need (see *Wilkinson v. Torres*)⁴. However, the “shocks the conscience” standard has not been widely used since the 1960s, as the test received significant criticism for permitting judges to assert their individual subjective views of whether the asserted conduct was “shocking.” Consequently, the main focus of substantive due process claims has resorted to determining whether the stated liberty interest is a fundamental right.

In determining whether a stated liberty interest amounts to a fundamental right, or a protected liberty interest, courts have used a variety of language in their attempts to explain their inquiries. However, the court will often refer to whether the right in question is “implicit in the concept of ordered liberty” or “deeply rooted in this Nation’s history and traditions” (Rubin 2003). If it is, “strict scrutiny” is applied when analyzing the law. Under these circumstances, the state will be required to show some overriding governmental necessity, and even then, the state must further demonstrate that the law is narrowly tailored to serve that compelling state interest (Amendola et al. 2018).

Few laws are able to survive this heightened level of judicial scrutiny associated with strict scrutiny. On the other hand, if the court finds that the right being asserted in a given case is not a “fundamental right,” the court will apply a “rational basis” standard for the resulting legal analysis. The rational basis test asks only if the law is rationally related in some way to a legitimate government purpose. As long as this question is answered in the affirmative, the court will let the law stand (Amendola et al. 2018). In comparison to strict scrutiny, this test is vastly more lenient which provides a more reasonable legal threshold. Put more simply, so long as the court can find some rational reason for the government to act in the way that it did, the law will usually be allowed to stand.

Courts have consistently held that state actions establishing religion or interfering with its free exercise infringe upon liberty without the due process of law. Because the analysis has been set up to evaluate claims on a case-by-case basis, however, the decision as to what constitutes a fundamental right is arguably more subjective. The Supreme Court has considered several issues with religious implications but has not always viewed issues related to the free exercise of religion as fundamental rights. For example, in *Washington v. Glucksberg* (1997)⁵, the Court recognized that it has found fundamental rights to include a variety of intimate individual decisions related to marriage, procreation, contraception, abortion, family relations, child-rearing practices, and education. While these rights may be fundamental rights in and of themselves, most of them have substantial overlap with religion and the related religious beliefs, customs, and practices followed by adherents.

In spite of repeated evaluation, the specific legal principals and applications that are relevant to the intersection of due process protections and freedom of religious practice rights remain somewhat fluid and unsettled. The strict liability standard as it applies to freedom of religious expression and practice was first announced in *Sherbert v. Verner* (1963)⁶. The *Sherbert Test* as it has been labelled held that when examining restrictions on religious practice, the courts must attempt to balance the compelling nature of the state’s interest in restricting religion against the threat to individual liberties that is posed by the government restriction in question. The balancing test established in *Sherbert v.*

³ *Rochin v. California*, 342 U.S. 165 (1952).

⁴ *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010).

⁵ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁶ *Sherbert v. Verner*, 374 U.S. 398 (1963).

Verner (1963) was revisited in *Employment Division v. Smith* (1990)⁷. In this case, the Supreme Court held that unless legislative acts inordinately target specific religions for constraint or restriction, it does not amount to a bright line violation of the *Sherbert* Test. In essence, this decision served to relax the stringent nature of the legal test that had previously been used to judge the constitutionality of any governmental restrictions on the free exercise of religion and replaced them with a much lower legal threshold (Scharffs 2012).

In relaxing the standards originally established in *Sherbert v. Verner* (1963), the Supreme Court created public and political animosity. Public concern was particularly intense given growing fears regarding the possibility of further government constraints on the freedom of religious practice in the future. As a result of concerns of this nature, legislation was passed in the form of the Religious Freedom Restoration Act (RFRA) in 1993. The RFRA was intended to reinforce existing legal religious freedom protections by mandating the compelling state interest test that was associated with the strict liability standard in both federal and state courts. The Supreme Court later reviewed RFRA in *City of Boerne v. Flores* (1997)⁸, overturning several key provisions of the legislation. More specifically, the Court held that the act's provisions, which mandated federal legal standards on the states, amounted to an unconstitutional exercise of congressional power. With the elimination of state mandates, the RFRA strict liability mandate remained applicable in federal courts only. After this decision, many states created their own individual versions of RFRA, thereby mitigating the divide that had been created in this regard between federal and state systems.

One remaining vestige of the *Employment Division v. Smith* (1990) decision, was that it served to further the focus of government impartiality towards religious groups in an attempt to avoid the appearance of favoritism. One key way in which this transition has been most visible is in the tendency for government agencies to seek a position of neutrality towards various religions and religious groups and denominations. This can at least partially be seen in a reluctance to establish specific restrictions on only certain religions, but also in a movement away from any sort of state-provided funding of religion. While important, restrictions on state funding of religion are beyond the scope of the current investigation. However, it should be noted that these restrictions are also almost certainly the result of a desire among government officials to maintain an appearance of impartiality towards any particular religion. With a basic understanding of the factors that have historically been associated with the protection of both due process and religious practice, we can proceed forward to evaluate specific issues and applications that have arisen from ongoing attempts to reconcile these conflicting protections. As will be seen, some of the issues that have arisen might have been expected, while the means by which the courts have attempted to "resolve" them may not have been.

5. Due Process-Religious Freedom Dissonance as Reflected in Jury Deliberations

Some of the most profound examples of religion's influence on court outcomes and the conflict that can develop between due process rights and freedom of religious practice and expression can be observed in the jury decisions associated with capital punishment cases. While there are certainly many other instances in which religion influences the law and legal processes (Bornstein and Miller 2009), there is an absence of research regarding the nature of this relationship in regard to jury deliberations (Miller et al. 2008). Additionally, for most Americans, the trial process and its outcomes generate a sense of fascination and become the most visceral representation of the broader legal system (Friedman 2015). The fact that most criminal cases are disposed of through alternative means, such as plea bargains, does little to dissuade the public from its focus on criminal court trials (Neubauer and Fradella 2017). Additionally, jury deliberations offer an exceptional backdrop against which some of the more substantive aspects of the interplay between due process and freedom of

⁷ *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁸ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

religious practice can be evaluated both socially and legally. The following analyzation of relevant cases will provide an opportunity to synthesize existing legal thought, but will also help clarify important legal questions that remain unanswered and at least one potential means by which this can be accomplished.

Religious beliefs and practices can influence the procedural and due process aspects of jury deliberations in a variety of ways during the course of legal proceedings. To complicate matters, religious influences on jury deliberations can originate with the actions of the prosecutor, the defense attorney, or the judge. Additionally, the religiously inspired actions or behaviors of jurors themselves during deliberations can raise due process concerns as jurors share spiritual beliefs, confer with religious counsel for guidance, and make use of religious texts and artifacts while making decisions. All of these different factors become more complicated when it is noted the decisions that different courts have reached when analyzing religion's influence on jury deliberations from a due process perspective have varied in much the same manner that individual religious beliefs and commitment vary between individuals based upon adherence and denominational commitment.

Numerous appellate jurisdictions have issued decisions related to the influence that religion, religious beliefs, religious practices, and religious artifacts have on jury deliberations. In some instances, the courts have found religious influence amounted to a prejudicial error. For instance, the Colorado Supreme Court held that a jury's use of the Bible during deliberations constituted extraneous information in violation of the Sixth Amendment, and there was a reasonable possibility of prejudice to the defendant, requiring the death sentence to be set aside (see *People v. Harlan*)⁹. Similarly, the Tennessee Supreme Court held that a jury foreman's reading of Biblical passages to the jury during deliberations in the penalty phase of a capital case was reversible error (see *Tennessee v. Harrington*)¹⁰. Additionally, a federal district court in Georgia reviewed a claim and found prejudicial error where the trial court had permitted the Christian Bible to be taken into jury deliberations at the request of the jurors for consultation in connection with their deliberations (see *Jones v. Kemp*)¹¹. On a slightly different issue regarding religious influence during deliberations, the California Supreme Court analyzed a case where a juror actually consulted with his minister during the course of deliberations, speaking at length about mercy and the death penalty (see *People v. Hensley*)¹². The minister did not directly tell the juror how to vote but clearly indicated that concepts like mercy and sympathy were inconsistent with "the law of the land," and that persons who kill must themselves be killed. The *Hensley* Court found the conduct prejudicial because the juror actively solicited the minister's comments while he was serving on a jury deliberating the death sentence and the advice he was given was inconsistent with the jury instructions advising the jury they could consider mercy in determining the proper sentence.

In comparison, in other jurisdictions, the courts are considering similar circumstances and finding no error at all, much less prejudicial error. The Fourth Circuit Court of Appeals, for example, seems to consistently find that the potential for religion to influence a verdict does not rise to a constitutional violation. In *Robinson v. Polk* (2006)¹³, the Fourth Circuit considered a case where a juror requested and received a Bible from the court bailiff, during the sentencing-phase deliberations. The juror apparently read aloud a passage concerning the Biblical mandate of "an eye for an eye" during deliberations in order to persuade others to recommend a death sentence. Finding that the Bible was merely present as an article of devotion for individual jurors and was not the focus of the deliberations, the *Robinson* Court found no constitutional violation. The Fourth Circuit has applied the holding in *Robinson* to

⁹ *People v. Harlan* 109 P.3d 350 (4th Cir. 2006).

¹⁰ *Tennessee v. Harrington*, 627 S.W. 2d 345 (Tenn. 1981), cert. denied, 457 U.S. 1110 (1982).

¹¹ *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989).

¹² *People v. Hensley*, 59 Cal 4th 788 (2014).

¹³ *Robinson v. Polk*, 444 F.3d 225 (4th Cir. 2006).

similar cases (see *Lenz v. Washington*¹⁴; *Lynch v. Polk*¹⁵). The Supreme Court of California applied a similar rationale to a claim involving jurors sharing their religious beliefs and praying together during deliberations (see *People v. Lewis*¹⁶).

In *State v. DeMille*¹⁷, the Utah Supreme Court took this rationale even a step further and held that a juror's affidavit stating that another juror had informed the jury during deliberations that she had prayed and received a revelation as to the defendant's guilt could not be used to attack the guilty verdict because it did not demonstrate that the jury considered extraneous, prejudicial material during deliberations. There, the Court reasoned that a finding that it is inappropriate for a juror to rely upon prayer, or a supposed response to prayer, during deliberations would violate the religious liberties of the juror. Specifically, the Court noted:

"Prayer is almost certainly a part of the personal decision-making process of many people, a process that is employed when serving on a jury. There is no necessary inconsistency between proper performance as a juror and reliance on prayer or supposed responses to prayer. So long as a juror is capable of fairly weighing the evidence and applying the law to the facts, one may not challenge that juror's decision on grounds that he or she may have reached it by aid of prayer or supposed responses to prayer." (*State v. DeMille*, 1988)

However, the dissent in *DeMille* makes an interesting point, as well. The dissent acknowledges that a juror may seek divine guidance through prayer in reaching a decision. However, the dissent seems to argue that, in this particular case, the juror at issue was relying more on a supposed divine indication of guilt, rather than divine guidance through prayer. In fact, in support of the motion for a new trial, the defendant submitted a juror's affidavit stating that the juror in question stated during deliberations that during the defense attorney's closing statement she prayed "... that if said attorney made eye contact with her she would know he was telling the truth, but if he did not she would know he was not telling the truth about the defendant; that he did not make eye contact with her, so she knew said attorney was not telling the truth." According to the affidavit, this juror went on to be one of the leaders during deliberations for a quick determination of guilt. Nevertheless, the Court found there was no constitutional error.

The Supreme Court of Louisiana applied a similar reasoning in a string of cases involving group prayer by the jurors during the trial and deliberation (see *State v. Graham*¹⁸, *State v. Copeland*¹⁹, *State v. Langley*²⁰). In *Graham*, the court held that "[r]eligious services among jurors [did] not amount to a substantial deprivation of constitutional rights necessary to overcome the prohibition against juror testimony."

Some courts have avoided making a finding on the potential influence that religion may have on jurors and the deliberations process, and instead jumped straight to the finding of no prejudice. For instance, in *Fields v. Brown*²¹, the Ninth Circuit Court of Appeals reviewed a claim that the foreman of the jury consulted a Bible in the evening, on his own, and made notes about arguments "for" and "against" the death penalty, which he brought with him into deliberations the next day. Without reaching at a conclusion as to whether this constituted misconduct, the Court assumes it was misconduct and relies on a finding that any error associated with the misconduct was harmless error; not prejudicial. The Court took this same tact in *Crittenden v. Ayers*²², where a juror again consulted the Bible and shared passages with other jurors during deliberations.

¹⁴ *Lenz v. Washington*, 444 F.3d 225 (4th Cir. 2006).

¹⁵ *Lynch v. Polk*, 204 F. Appx. 167 (4th Cir. 2006).

¹⁶ *People v. Lewis*, 26 Cal. 4th 334, 390, 28 P.3d 34, 73 (2001).

¹⁷ *State v. DeMille*, 756 P.2d 81 (Utah 1988).

¹⁸ *State v. Graham*, 442 So. 2d 123 (La. 1982).

¹⁹ *State v. Copeland*, 530 So. 2d 526 (La. 1988).

²⁰ *State v. Langley*, 711 So. 2d 651 (La. 1988).

²¹ *Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007).

²² *Crittenden v. Ayers*, 624 F.3d 943 (9th Cir. 2010).

Finally, other jurisdictions have found that the influence that religion exerts on deliberations does create a due process violation, but that this violation amounts to nothing more than harmless error which does not necessitate overturning an existing sentence. In *Oliver v. Quarterman*²³, the Fifth Circuit Court of Appeals held that the jury's consultation of specific Bible passages that described someone committing acts similar to those of the defendant and being put to death was a clear violation of the Sixth Amendment. However, the court did not find it to be prejudicial error. The Eleventh Circuit applied similar reasoning and found the foreperson's reading aloud from the Bible and leading the jurors in group prayer during deliberations amounted to harmless error. Other jurisdictions have applied a similar rationale (see *Perkins v. State*²⁴; *State v. Robinson*²⁵). The Supreme Court of California even found harmless error in cases where jurors went so far as to consult with a pastor or a retired priest about the death penalty during deliberations (see *People v. Danks*²⁶; *People v. Tafoya*²⁷).

While a review of these relevant cases clearly illustrates the divide in how courts are applying the Sixth Amendment analysis, the conflict and inconsistent opinions can often be seen within a single opinion. One particularly stark example of this conflict related to religious influence on deliberations can be seen in the court's opinion in *People v. Harlan* (2005). In this case, the defendant was convicted for the crimes of kidnapping, rape, and murder. The jury deliberated late into the evening after being assigned the case, but were unable to reach a verdict. Later that evening after finishing deliberations, several jurors read passages from the Bible in the hotel rooms they had been sequestered to. When sentencing deliberations resumed, at least one Bible made its way into the jury room, as did handwritten notes on the location of relevant biblical passages for one juror to share with others during the ongoing course of deliberations. The Bible verses in question commanded the death penalty for murderers, advocated an "eye for an eye" approach to punishment, and promoted obedience to civil authorities. After holding an evidentiary hearing, the district court judge vacated the death sentence and ordered that Harlan be resentenced to life without the possibility of parole. The judge in this case argued that there was a reasonable possibility that the manner in which the Bible was used in the jury room advocated for a sentencing of death and in doing so could have prejudicially influenced a typical juror to vote for a capital sentence.

On appeal, an unusually narrow majority of the Colorado Supreme Court affirmed the vacated death sentence. It should be noted, however, that the majority opinion in that case represented the views of only three of the seven justices. Justice Rice authored a strong dissenting opinion, in which Justice Kourlis joined, while two other justices decided not to participate. Nevertheless, the majority ruled that the Bible and notes on Bible passages constituted extraneous evidence since they had not been admitted into evidence in the case. As a result, their introduction into the jury deliberations was improper and constituted juror misconduct. The majority reasoned that a typical Colorado juror could be influenced to vote for the death penalty by the presentation of the biblical text. In doing so, the Court stated:

"We do not hold that an individual juror may not rely on and discuss with the other jurors during deliberation his or her religious upbringing, education, and beliefs in making the extremely difficult 'reasoned judgment' and 'moral decision' he or she is called upon to make... We hold only that it was improper for a juror to bring the Bible into the jury room to share with other jurors the written Leviticus and Romans texts during deliberations..."
(*People v. Harlan*)

²³ *Oliver v. Quarterman*, 541 F.3d 329 (5th Cir. 2008).

²⁴ *Perkins v. State*, 144 So. 3d 457 (Ala. Crim. App. 2012).

²⁵ *State v. Robinson*, 303 Kan. 11 (2015), disapproved of by *State v. Cheever*, 306 Kan. 760 (2017).

²⁶ *People v. Danks*, 32 Cal. 4th 269 (2004).

²⁷ *People v. Tafoya*, 42 Cal. 4th 147 (2007).

In *Harlan*, the defense raised the relevant issues as Sixth Amendment violations. This is a common practice in cases involving religion and due process and one that is to be expected in this case given that the Bible and Bible notes, are considered extraneous information when not formally admitted into evidence for the jury's consideration. Under the Sixth Amendment, a defendant has a right to a fair trial and the courts have interpreted this to mean in part a trial that is free from extraneous influences. As appellate courts have noted, when a jury considers information in a criminal case that has not been properly introduced as evidence, the defendant is deprived of his or her right to confront that evidence in open court, be present and represented by counsel when it is presented to the jury, to cross-examine the witness who presents the evidence, and to offer rebuttal evidence or an attempt to put the evidence in context (*State v. Abdi*, 2012)²⁸. Using this approach, the vast majority of courts have consistently found that jury misconduct occurs when jurors consult a Bible, or when jurors relied on some other religious artifact which had not been admitted as evidence, when attempting to reach a verdict. However, many of these same courts also found that the resulting error proves to be harmless when analyzing the amount of prejudice that is demonstrated by the error and the related harm that is done to the defendant's case. In practice, this means that no justification for reversal is found to exist. This has created an interesting situation in which defendants are winning their case by proving juror misconduct, but finding no real relief because that error is viewed as being harmless in relation to the final court outcome.

While the majority decision in the *Harlan* case found that the Sixth Amendment was applicable to the issues being considered, the dissenting opinion in the case also acknowledged that there were some important First Amendment implications associated with the case. More specifically, this dissenting opinion appears to provide an avenue for legal counsel to raise some more substantive issues related to the deprivation of religious freedom as represented in the establishment and free exercise clauses that are contained in the First Amendment. The dissent notes that the jurors in the *Harlan* case were instructed to make an "individual moral assessment" regarding whether death was an appropriate sentence in the case. The jurors were instructed to take into consideration their own moral and religious precepts, and their own general knowledge, in reaching a well-reasoned determination regarding the defendant's sentence. The dissent points out that many people know Bible passages by heart and are capable of quoting large portions of scripture verbatim, especially when the passages refer to well-known concepts like the *lex talionis* or "eye for an eye" biblical standard. In considering this possibility, the dissent notes that:

"It is without doubt that a juror may relate passages of scripture from memory during deliberations, and that such recitation would not even be considered extraneous, much less prejudicial. It makes little sense, therefore, that the exact same passage in written form is somehow enshrined with an authority that the spoken or remembered passage lacks."
(*People v. Harlan*)

As the dissent is able to effectively articulate, this places current and former jurors in a very precarious position. They are given judicial instructions to make principled individual assessments and decisions when examining cases. As part of this process, they are to take their backgrounds, upbringing, moral, and religious beliefs into consideration, but only so long as those assessments are made from their own memory and not from recorded or written passages. Those who do not possess the ability to memorize biblical passages, who wish to rely on pastoral counseling, or want to use other religious artifacts that cannot be committed to memory are placed at a substantive disadvantage in terms of their ability to exercise their religious faith as a result of this legal standard. In practice, this standard delineates the manner in which those wishing to exercise religious freedom during jury deliberations are legally able to, creating a divide between those who are allowed to do so and those

²⁸ *State v. Abdi*, 191 Vt. 162, Syl ¶ 1 (2012).

who are not. At a more substantive level, conflict of this nature really underscores deeper issues and more pragmatic aspects of restrictions on religious freedom of practice by forcing jurors to choose between abiding by legal due process directives and their own individual right to freely practice their religious beliefs as guaranteed by the First Amendment. This is a key finding of the current case analysis and synthesis evaluation, which will be examined in greater detail in the following section.

6. Discussion

A thorough and detailed examination of the intersection of personal religious freedom and legal due process protections as they apply to jury deliberations yields several critical insights for our collective consideration. These insights serve to both frame the current state of the law in this area and to underscore substantive future challenges that are likely to arise from these oftentimes competing civil liberties moving forward. One of the first significant insights to be drawn from a detailed examination of this nature pertains to the degree to which the law remains unsettled. In many other controversial areas, the law tends to be characterized by more settled principles and established practices which largely dictate the form, structure, and practice of the law. This is beneficial in creating a shared sense of understanding that helps to minimize confusion about the law and limits ongoing systemic conflict. However, that is not the case in regard to the law as it applies to due process-religious freedom conflicts in the area of jury deliberations. Variations exist in the applicable legal standards or thresholds that exist in federal and state level courts.

Differences in federal and state courts are aptly illustrated by the reversal of some of the provisions of the RFRA. In practice, this reversal resulted in the creation of a patchwork of legal standards regarding challenges to restrictions on religious practice related to jury deliberations that vary depending on where a case originates across the broader legal landscape. Federal courts still follow many of the standards that were originally established in *Sherbert v. Verner* (1963). After the Supreme Court overruled state provisions of RFRA, some states created their own versions of this legislation resulting in the implementation of standards very similar to those that exist in federal courts, while other states decided not to do so, creating additional disparities between the states.

These differences are further exacerbated by the divergent rules of evidence pertaining to jury deliberations that have developed in federal and state level courts. For example, in instances when courts wish to determine if juror misconduct has occurred in regard to a reliance on legally irrelevant or prejudicial information, like biblical texts, evaluative standards might best be viewed as disjointed and abstruse. Federal Rule of Evidence 606(b) underscores what juries may and may not consider during the course of deliberations and when the consideration of other materials might result in the legal need to set aside a final jury verdict. Given the somewhat ambiguous nature of this rule, differing opinions regarding the legal legitimacy of what amounts to extraneous information or information that is considered improperly by jurors can emerge (Baron 2009). As if the inherent vagueness of this federal rule did not individually contribute to the broader obscurity surrounding relevant legal issues and standards, it must also be remembered that each state has its own unique legislation of this nature. This legislation is oftentimes equally ambiguous to the previously examined federal standards, albeit in subtly different manners given that it has been drafted at the state level.

Some of the jurisdictional differences noted above are muted given that the vast preponderance of relevant court actions of this nature will take place within the federal court system. However, those differences that do remain are further complicated by the disparate findings that have been reached by courts relying on the different standards that are noted above. While a number of courts have examined Sixth Amendment claims related to the influence of religious practice on due process aspects of jury deliberations, their findings in regard to this common issue have varied. Some have found that religious practice in this context does amount to a due process violation, while others have not. In instances when due process violations have been found to exist, the courts have also differed in regard to their perceptions of the severity of these violations. Some courts have found that the severity of the violation is not sufficient grounds for overturning a conviction because it does not rise to the

level of reversible error. However, in other cases the courts have found differently in ruling that reversible error is present given the substantive amount of harm done to a defendant as a result of the exercise of religious practice. As a result of differences of this nature, the law remains unsettled, and it becomes increasingly difficult for both those within and those external to the legal system to determine the current state and substance of the law in this regard. An evaluation of the current state of these issues serves to underscore the need for the Supreme Court to directly address these issues in an effort to provide greater clarity regarding the legal nature of the relationship that exists between freedom of religious expression and individual due process protections during the course of jury deliberations (Baron 2009).

Interestingly, the unsettled nature of the law in this area can negatively influence the ability of those on both sides of this issue to use the legal system as a means of seeking redress for perceived violations. Those individuals who wish to exercise their religious freedoms may ultimately decide that it is not worth the effort necessary to do so given the difficulty associated with determining how the courts will respond to challenges of this nature. As a result of an uncertain legal landscape, attorneys may also be unwilling to pursue challenges of this nature as a part of any broader legal strategy. The collective hesitancy of both individuals and attorneys to seek legal redress regarding perceived due process violations of religious expression freedoms and practices during jury deliberations can pose a broader challenge. More specifically, this can minimize the likelihood of legal challenges being advanced even in instances when they are critically important for clarifying the underlying legal standing of the substantive rights involved. Further, limiting the ability of those with a sincere or intrinsic belief in the religious principles and practices of their individual faith during the course of jury deliberations may undermine other more substantive constitutional rights and personal liberties. As we have seen, for those with an intrinsic religious orientation, it is difficult to determine where they as an individual end and their religious beliefs begin. A failure to evaluate broader First Amendment concerns can facilitate substantive deprivations among intrinsically oriented religious populations that may very well outweigh the need to ensure due process protections. If so, this might dramatically change the legal landscape regarding these issues.

Those fearing that religious practice might undermine their due process protections may also be deterred from pursuing legal recourse as a result of the inconsistencies that exist within the law. More specifically, the legal representatives of those facing criminal court processing may suggest alternative courses of action if they believe that directly raising due process concerns linked to religious practice in the jury deliberation context offers a poor return for their efforts. This trend to avoid raising legal issues in this context may arise from the plurality of courts finding that no substantive harm or reversible error occurs even in instances when constitutional issues related to religious exercise in jury deliberations have been legally established. In essence, attorneys attempting to press issues of this nature may very well win their legal argument, yet find that doing so offers little tangible legal benefit for their broader case because doing so offers their client no legal relief. If reversible error is not found, findings that religious exercise during jury deliberations violates a defendant's due process protections amounts to little more than a moral victory for defense attorneys. A similar example might be found in a defense attorney that is able to prove that law enforcement officers violated their client's rights, only to find that the court refuses to mandate exclusionary sanctions regarding any illegally obtained evidence. If no appreciable benefit is associated with pursuing claims of religious freedom overreach during jury deliberations, the motivation for attorneys to legally challenge such actions is undermined resulting in fewer legal actions being filed and potential violations being overlooked. In essence, this could result in due process violations that go unchecked because of perceptions that the pursuit of such issues yields an uneven and unsure legal benefit.

Another critical conclusion that can be reached from the current synthesis of existing relevant cases can be derived from the degree to which existing legal challenges have focused on Sixth Amendment avenues for appellate review. While this approach has a great deal of intuitive appeal, given the systemic desire to preserve the integrity of established legal due process provisions, it does tend

to overlook other broader and perhaps more significant legal issues pertaining to the freedom of religious practice as expressed during the course of jury deliberations. More specifically, the focus on examining claims of this nature primarily from a Sixth Amendment perspective has resulted in the more substantive evaluations that must necessarily be examined from First Amendment perspectives going largely overlooked. As a result, the claims related to religious due process violations during jury deliberations have tended to provide systemic protections at the expense of individual religious freedom protections. Given the immense importance of religious practice to many believers, this tendency not only contributes to an incomplete evaluation of the due process-religious practice relationship, it can undermine evaluations of more meaningful constitutional protections.

Prior research has indicated that religion can have differing influences on an individual's perceptions and actions. While this differential influence has been operationalized using a variety of different measures and terminology, one approach that has a great deal of applicability to the current evaluation was developed by Allport (1966) and focuses on the meaning that religion has for the individual. Allport (1966) argued that religion could be expressed in individual adherents either intrinsically or extrinsically. For extrinsically-oriented individuals, religion has little real meaning or purpose and exerts little substantive influence on the worldview or behavior of believers. To the contrary, religion is often used by these individuals as a means of accomplishing other purposes, such as providing a means of solace regarding unethical or deviant behavior or advancing career aspirations by impressing a devout supervisor. For intrinsically-oriented individuals, religion exhibits a substantive influence on an adherent's core attitudes and beliefs. In essence, religion becomes a key part of the fiber of a believer's individual lived existence. As a result of this lived orientation, religion directly influences how intrinsically-oriented individuals live their lives and the decisions they make over time. For these individuals, religious customs, spiritual practices, sacred texts, religious artifacts, and guidance from religious officials become key provision that fundamentally guide and direct behavior. Decisions, especially those that are more challenging, tend to increasingly require the use of spiritual principles and a reliance on religious materials as an important means of helping facilitate judgments and decisions.

Limiting the free exercise of religion during jury deliberations, even to a minimal extent, can amount to a substantive deprivation for intrinsically religious individuals given the degree to which they rely upon religion when making important decisions. It would certainly seem that such a deprivation would amount to a First Amendment violation according to any of the various legal standards that the courts have established in relation to the previously examined Sixth Amendment claims. An overview of existing case law supports the broader assertion that the freedom of religious practice can be threatened when adherents are serving as jurors in criminal court cases. Prior decisions have challenged a broad spectrum of religiously-based activities during deliberations, including the ability of jurors to: consider Bible verses (*McNair v. Campbell*)²⁹, seek spiritual counsel regarding deliberations (*People v. Hensley*), rely on divine inspiration in reaching a verdict (*State v. DeMille*), consider biblically-inspired closing argument while deliberating (*Commonwealth v. Chambers*)³⁰, have a Bible present in the juror room while considering a verdict (*United States v. Lara-Ramirez*)³¹, and engage in congregate prayer during the course of deliberations (*State v. Williams*)³².

Those with an intrinsic religious orientation have an understandable impetus for arguing that the traditional legal recognition that jurors bring their backgrounds and histories with them to the deliberation process are violated with restrictions of this nature on religious practice. This is because those with an intrinsic orientation face difficulties when differentiating between their religious beliefs and principles and who they are as an individual. Asking them to discard spiritual beliefs and religious

²⁹ *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005).

³⁰ *Commonwealth v. Chambers*, 599 A.2d 630 (1991).

³¹ *United States v. Lara-Ramirez*, 519 F.3d 76, 82 (2008).

³² *State v. Williams*, 162 Ohio App. 3d 55 (2005).

practices and materials would be the equivalent in many ways of asking other prospective jurors to forget their lived experiences and the sense of self they bring with them to the jury room while deliberating. This realization provides support for the broader assertion that a need exists for a deeper form of legal analysis that gets beyond the structural nature of Sixth Amendment challenges by focusing on the legitimacy of more substantive First Amendment challenges.

A final related issue that can be culled from the current synthesis of relevant cases pertaining to religious freedom and due process protections in jury deliberations pertains to the rights that criminal court defendants have to use religion as a part of their legal strategies. Thus far, the courts have avoided this type of evaluation, choosing instead to focus on a more limited systemic evaluation of existing safeguards. However, a broader evaluation is necessary given the importance that religious beliefs hold for their spiritual adherents. Individuals with an intrinsic orientation towards religion tend to define themselves, their actions, and their larger place in the world largely in accordance with their religious beliefs and the established practices associated with their chosen denomination. Their behavioral motivations and the justifications for their actions oftentimes directly stem from or are substantively influenced by the core spiritual beliefs. For instance, research has found that an intrinsic orientation towards religion is associated with more ethical consumer decisions (Schneider et al. 2011), more prosocial interactions with peers (Stavrova and Siegers 2014), a reduced likelihood of aggression towards others (Johnson et al. 2000; Watkins 2003; Johnson 2011), more frequent volunteerism in the community (Ozorak 2003), and an increased propensity to be generous to others (Galen 2012; Johnson et al. 2013).

Given the degree to which religion influences many fundamental aspects of the behavior of these individuals, especially those with an intrinsic orientation, it is doubtful that a jury deliberation environment devoid of any meaningful understanding of religious practice and expression will be able to accommodate their ability to gain any real meaning from the introduction of legally permissible evidence. Doing so will likely create a substantive void and necessitate efforts to first place evidence in an appropriate religious context that at least recognizes or accounts for the religious beliefs, perceptions, and orientations of the individual jurors and defendants involved in a given case. Whether an environment similarly lacking for relevant representations of the artifacts and practices of those spiritual beliefs during jury deliberations is able to provide individuals with the full measure of religious freedom the Constitution guarantees is debatable. Ironically, in an attempt to ensure systemic integrity, the legal system may ultimately undermine the ability of at least some individuals serving as jurors to get a full and complete measure of one of the constitutional protections that form the foundation for that system.

7. Conclusions

Systemic efforts to adequately address the concerns of all relevant stakeholders regarding any important or controversial social, cultural, economic, legal, political or religious issue ultimately proves to be a difficult and challenging undertaking. This process is further complicated when these efforts involve making ongoing determinations regarding the best means by which the integrity of relevant system concerns and the individual expectations regarding the exercise of important freedoms must be balanced. Stakes increase when fundamental protections like those contained within the First and Sixth Amendment are involved. This is because protections of this nature go to the heart of broader societal and personal ideals regarding American exceptionalism and are representative of the systemic protections and freedoms that contribute to the creation of contemporary American cultural identity.

Theoretically, both of these provisions would coexist without necessitating broader societal or systemic judgments regarding their respective importance. However, in practice, contradictions and conflict have emerged. The efforts of the legal system to address conflicts of this nature have thus far provided vague, superficial, confusing, and oftentimes contradictory results, especially in the context of jury deliberations. Future efforts will need to examine the relationship that exists between due process protections and freedoms of religious expression and practice during the course of jury deliberations in a more definitive manner. Only through such an evaluation will a more meaningful holistic

understanding of the broader place and purpose of both of these critical protections in contemporary American society and culture be obtained.

One key aspect of this broader evaluative process must originate within the legal system itself. Clearer guidelines regarding the relevant legal standards that will be used when evaluating due process challenges to the application of religious freedoms in a jury deliberation context must be established. This will help pave the way for more universal standards and greater clarity in expectations among both legal professionals and members of the public. As part of this process, the Supreme Court needs to more fully address some of the conflicting decisions that have been reached by state and lower level federal courts. The contradictory findings have contributed to a confusing legal context that undermines the broader use of legitimate challenges to both due process and religious practice violations in the context of jury deliberations. Finally, while greater clarification is important, efforts must be undertaken to get beyond the procedural due process evaluations of religion's influence on jury deliberations that have predominated in the past. While Sixth Amendment claims are certainly an important aspect of this issue, more substantive efforts to directly examine First Amendment claims need to be undertaken. A failure to do so would appear to favor systemic protections related to due process over individual freedoms of free practice and ultimately amounts to little more than kicking an important legal can down the road.

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