"*NO* HELP YOU GOD": RELIGION, THE COURTROOM, AND A PROPOSAL TO AMEND THE FEDERAL RULES OF EVIDENCE

Antony Barone Kolenc[*]

[*] Antony Barone Kolenc (J.D., University of Florida College of Law) is an associate professor of law at University of North Texas Dallas College of Law. He served as a Lieutenant Colonel in the Air Force Judge Advocate General's Corps before retiring in 2012.

IN THE BEGINNING . . .

The prosecution of a "sex cult" involving a female television star soon became a titanic news story that spawned a popular series on HBO: *The Vow*.[1] The charges revolved around NXIVM, a self-proclaimed "empowerment" movement begun in 1998, which

[1] *See The Vow* (HBO broadcast Aug. 23-Oct. 18, 2020). *The Vow* was billed as a "documentary series following a number of people deeply involved in the self-improvement group NXIVM over the course of several years." *The Vow*, HBO, https://www.hbo.com/the-vow [https://perma.cc/D76D-ES35] (last visited Nov. 22, 2021).

ensnared such public figures as Allison Mack (former star of the *Smallville* series) and two billionaire heiresses.[2] Based on philosophies derived from Ayn Rand, the renowned author of *Atlas Shrugged*, the "sex cult" employed "technology" that purportedly could "heal individuals and transform the world" through sessions known as "Explorations of Meaning," which could turn a person into a "badass"—someone who was "not only rich but emotionally disciplined, self-controlled, attractive, physically fit and slender."[3]

In 2018, NXIVM began to fall apart in a sensationally public way. Members of the group were accused of racketeering, sex trafficking, mental abuse, manipulation, and branding female "sex slaves" with hot irons.[4] In 2019, its leader—Keith Raniere—was convicted in federal court, along with several other high-ranking members of the group.[5] As part of his defense, Raniere had opposed the introduction of evidence of NXIVM's "beliefs" and "practices," arguing that such inquiries would be improper religion-related testimony under the Rules of Evidence. In response, federal prosecutors argued the group should not be treated as "religious" because it had expressly disavowed any religious connection in its rituals and practices.[6]

The NXIVM case provides but one example of the complex issues that arise when courts consider evidence related to religion and religious liberty, a prized right under the U.S. Constitution.[7] The Federal Rules of Evidence and most state evidence codes address such evidence in three main areas. First and most significant, Rule 610—essentially adopted in every state[8]—declares, "Evidence of a witness's religious beliefs or opinions is not

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[2] *See* Vanessa Grigoriadis, *Inside Nxivm, the 'Sex Cult' That Preached Empowerment*, N.Y. TIMES MAG. (May 30, 2018), https://www.nytimes.com/2018/05/30/magazine/sex-cult-empowerment-nxivm-keith-raniere.html [https://perma.cc/URM7-QVMG] (describing NXIVM as a "sex cult" and philosophical movement).

[3] *Id.*

[4] *See id.*

[5] Vanessa Romo, *NXIVM Leader Keith Raniere Found Guilty of All Charges in Sex Cult Case*, NPR (June 19, 2019, 3:17 PM), https://www.npr.org/2019/06/19/734116183/nxivm-leader-keith-raniere-found-guilty-of-all-charges-in-sex-cult-case [https://perma.cc/6JXN-JKKC].

[6] *See infra* notes 118-122 and accompanying text.

[7] *See infra* notes 18-23 and accompanying text.

[8] *See infra* note 30 and accompanying text.

admissible to attack or support the witness's credibility."[9] While some courts have construed Rule 610's language narrowly, others have used its rationale to broadly keep religion-related evidence out of the courtroom.[10] Second, Rule 403—though it does not mention religion—prohibits the admission of evidence if its probative value is substantially outweighed by the danger of unfair prejudice or other concerns.[11] This Rule has provided judges with a discretionary tool to keep out religion-related evidence deemed unfairly prejudicial.[12] Third—least notable and not mentioned further in this Article—the hearsay rules provide exceptions for statements of fact in records of religious organizations concerning personal or family history, or in certificates of marriage, baptism, and similar ceremonies.[13]

This Article takes a closer look at the evidentiary rules—especially the combination of Rules 610 and 403—and argues that the Federal Rules of Evidence (and corresponding state evidentiary codes) inadequately address religion-related evidence in light of the importance of religion in the history and tradition of the United States. When interpreted as written, Rule 610 provides too little protection from unfairly prejudicial attacks on religion, and it fails to recognize the positive uses of such evidence. On the other hand, Rule 403 provides no guidance on the sensitive topic of religion-related evidence and offers judges too much discretion, leading to inconsistent results.

This Article offers four propositions, followed by a concrete recommendation to amend the Federal Rules of Evidence to better address religion-related evidence. Part I touches on the first proposition: that religious identity and practice is a critical individual freedom that should be protected by government-mandated rules, such as the Federal Rules of Evidence. Part II briefly explores an important second proposition: that Rule 610 (when properly interpreted) and Rule 403 provide limited and inconsistent protection from attacks on a person's religion during court proceedings. Building on that foundation, Part III extensively

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[9] FED. R. EVID. 610.

[10] *See infra* notes 56-71 and accompanying text.

[11] *See* FED. R. EVID. 403.

[12] *See infra* notes 87-96 and accompanying text.

[13] *See* FED. R. EVID. 803(11), (12).

examines the third proposition: that the Federal Rules of Evidence should be strengthened to limit the use of religion-related evidence as a tool of attack, except when used by a defendant in a criminal case. Part IV discusses a fourth proposition: that the Rules of Evidence should allow for a greater use of religion-related evidence if offered in a way that does not cause unfair prejudice to the religious (or non-religious) person. Finally, Part V applies these propositions by suggesting an amendment to the Federal Rules: the deletion of Rule 610 and its replacement with a new Rule (Proposed Rule 416) that will better address religion-related evidence.

I. FIRST PROPOSITION: RELIGION IS WORTHY OF PROTECTION IN THE RULES

Unfortunately, only scant space can be devoted here to expound on an issue that is critical to fundamental individual rights in the United States: that is, religious liberty. Part I of this Article will not elaborate overlong on the hopefully non-controversial proposition that religious liberty is an essential freedom worthy of government protection. Scholars have propounded such arguments elsewhere,[14] and the proposition deserves more justice than can be mustered in an article focused primarily on inadequacies in the Federal Rules of Evidence.

By way of summary, therefore, it is noteworthy that faith and spirituality are special. Globally and throughout human history, religion has played a foundational role in civil society because it addresses a universal aspect of humanity: the relationship of the person to "divine or transcendent authority."[15] Indeed, religion has been instrumental in developing the basic civil freedoms and

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[14] *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); Antony Barone Kolenc, *Religion Lessons from Europe: Intolerant Secularism, Pluralistic Neutrality, and the U.S. Supreme Court*, 30 PACE INT'L L. REV. 43 (2017).

[15] Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 218 (1991). *See generally* MIRCEA ELIADE, THE SACRED AND THE PROFANE (Willard R. Trask trans., Harcourt, Brace & Co. 1959) (discussing the universal aspects of the divine throughout human history).

secular human rights that undergird Western Civilization.[16] This includes the forming of the American political creed that "all men are created equal, [and] that they are endowed by their Creator with certain unalienable Rights."[17]

For these and other reasons, America's founding generation viewed religion and morality as essential to the success of a constitutional democracy.[18] This founding desire to protect religious liberty is apparent in the original text of the U.S. Constitution, which declares that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[19] That requirement was intended to protect individual religious rights in a nation that had great diversity of belief even at the time of its founding, although most of that diversity existed within the Christian religion itself.[20]

More significant, the First Amendment to the U.S. Constitution protects religious liberty, declaring, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[21] There is little doubt that the founders viewed religion as being in a special category. This is illustrated by the debate in the first Congress about whether the First

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[16] *See* Aaron R. Petty, *Religion, Conscience, and Belief in the European Court of Human Rights*, 48 GEO. WASH. INT'L L. REV. 807, 816-17 (2016) (recounting Christianity's role in developing human rights in Europe).

[17] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[18] *See* IX CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS, 228-29 (Boston, Little, Brown & Co. 1854) (predicting the Constitution would succeed if it governed "a moral and religious people"); Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50-53 (reenacting the Northwest Ordinance, which declared that "[r]eligion, morality, and knowledge [are] necessary to good government and the happiness of mankind"). *See also* Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 885-912 (2005) (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting); Lynch v. Donnelly, 465 U.S. 668 (1984); Zorach v. Clauson, 343 U.S. 306, 312-14 (1952) (detailing the historical case for religion's accepted role in official government actions).

[19] U.S. CONST. art. VI, cl. 3.

[20] *See* Torcaso v. Watkins, 367 U.S. 488, 491-96 (1961) (using Art. VI, cl. 3 to strike down Maryland's religious test oath). *See also* McConnell, *supra* note 14, at 1421, 1479 (noting the wide religious diversity at the founding and discussing Madison's observation about the "multiplicity of sects" in America).

[21] U.S. CONST. amend. I. "Religion" likely holds the same meaning in both of these clauses. Greenawalt, *supra* note 14, at 758; Everson v. Bd. of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

Amendment should protect secular beliefs in addition to religious ones, with Congress rejecting a version of the Religion Clauses that would have broadly covered all conscience rights.[22]

These constitutional requirements demonstrate an intent to eradicate religious bigotry in the filling of public offices, to prevent government from oppressing the religious liberty of its citizens by establishing a single religious creed (as nations had done in the "Old World"), and to guarantee the right of religious exercise free from state interference. In short, the founding generation viewed religion as worthy of special protection. Indeed, freedom of religion is considered the "first freedom" in the Bill of Rights, where religion is given "preferential treatment."[23]

It should be non-controversial, then, to suggest that any government-devised set of rules should respect a person's religious identity and liberty and, at a minimum, not encroach upon that right even for a moment.[24] Consider the breadth of the Federal Rules of Evidence, which "apply to proceedings in United States courts,"[25] including most civil and criminal proceedings.[26] Similar state evidentiary rules apply to nearly every state court proceeding.[27] Thus, virtually every personal, constitutional, contractual, proprietary, and pecuniary right available to persons in the United States are secured through court proceedings governed by evidentiary rules. To allow such rules to disrespect religion on an institutional scale would be to demean perhaps the most cherished fundamental right in the Constitution. In short, devising evidentiary rules that respect religion means, "[a]t a

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[22] Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 803 (1997); McConnell, *supra* note 14, at 1481.

[23] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 400 (1993) (Scalia, J., concurring in judgment).

[24] *See* Elrod v. Burns, 427 U. S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[25] FED. R. EVID. 101(a) (discussing the scope of the Federal Rules of Evidence).

[26] *See generally* FED. R. EVID. 1101 (defining the scope of proceedings for the Federal Rules of Evidence).

[27] *See* UNIF. R. EVID. 102.

minimum," that such rules will not "treat[] religious exercises worse than comparable secular activities."[28]

II. SECOND PROPOSITION: THE RULES OFFER FEW PROTECTIONS FOR RELIGION

The Federal Rules of Evidence should ensure that a person's religion is not abused during court proceedings, but the reality is that the rules provide little such protection. Federal Rule of Evidence 610—though hailed as a protection for religion—does not provide significant protection on its own merits when interpreted as intended. Moreover, Rule 403, which provides no express guidance on the matter of religion-related evidence, leads to inconsistent results.

A. Proper Application of Rule 610 Provides Scant Protection

Rule 610 states, "Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility."[29] This federal rule has garnered near-complete acceptance because every state has "rules that either track [Rule] 610 or achieve the same result,"[30] with three states—Arizona,

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[28] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) (per curiam) (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U. S. 520, 546 (1993)).

[29] FED. R. EVID. 610. Before the rules were entirely rewritten in 2011 (without intending any change to their meaning), Rule 610 read as follows: "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." 9 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE: RULES OF EVIDENCE STYLE PROJECT Rule 610, Westlaw (database updated Nov. 2021).

[30] Allan W. Vestal, *Fixing Witness Oaths: Shall We Retire the Rewarder of Truth and Avenger of Falsehood?*, 27 U. FLA. J.L. & PUB. POL'Y 443, 445 n.14 (2016) [hereinafter Vestal, *Fixing Witness Oaths*]. Professor Vestal has catalogued the forty-five states that have adopted Rule 610, as well as the five states (Connecticut, Kansas, Missouri, New York, and Virginia) that have not adopted it, but "reach the same result by alternative means." Allan W. Vestal, *The Lingering Bigotry of State Constitution Religious Tests*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 55, 85 & n.153 (2015) [hereinafter Vestal, *The Lingering Bigotry*] (citing ALA. R. EVID. 610; ALASKA R. EVID. 610; ARIZ. R. EVID. 610; ARK. R. EVID. 610; CAL. EVID. CODE § 789; COLO. R. EVID. 610; DEL. R. EVID. 610; FLA. STAT. ANN. § 90.611 (West 2012); GA. CODE ANN. § 24-6-610 (2013); HAW. R. EVID. 610; IDAHO R. EVID. 610; ILL. R. EVID. 610; IND. R. EVID. 610; IOWA R. EVID. 5.610; KY. R. EVID. 610; LA. CODE EVID. ANN. art. 610 (1989); ME. R. EVID. 610; MD. R. 5-610; MASS. R. EVID. 610; MICH. R. EVID. 610; MINN. R. EVID. 610; MISS. R. EVID. 610; MONT. R. EVID.

Oregon, and Washington—placing that same prohibition in their state constitutions.[31] This Section will explore the scope of Rule 610 and its failure to protect persons from broader attacks based on their religious identity, beliefs, and practices.

1. Witness Competency, Impeachment, and the Adoption of Rule 610

To best understand Rule 610, one should recognize that it stems directly from the rejection of an ancient common-law view about witness competency and impeachment. In past centuries, categories of witnesses were disqualified as incompetent to testify due to their perceived deficiencies. Professor Edward Imwinkelried has explained that "the common law rendered certain categories of persons per se incompetent as witnesses: interested persons, persons who had previously suffered specified felony convictions, and persons with aberrant religious beliefs[,] . . . on the theory that the integrity of these persons was questionable" and that "persons in the prohibited categories were 'liars.'"[32] Thus, the ancient common-law understanding viewed witnesses who did not believe in a particular kind of God (e.g., a deity that prohibited bearing false witness)—mainly "atheists, agnostics, and religious minorities"—as untruthful because they expected no eternal consequence for lying.[33]

610; NEB. REV. STAT. § 27-610 (2014); NEV. REV. STAT. § 50.105 (1971); N.H. R. EVID. 610; N.J. R. EVID. 610; N.M. R. EVID. 11-610; N.C. GEN. STAT. § 8C-1 610; N.D. R. EVID. 610; OHIO R. EVID. 610; OKLA. STAT. ANN. tit. 12, § 2610 (West 2002); OR. REV. STAT. § 40.365 (1981); PA. R. EVID. 610; R.I. R. EVID. 610; S.C. R. EVID. 610; S.D. CODIFIED LAWS § 19-14-17 (2014); TENN. R. EVID. 610; TEX. R. EVID. 610; UTAH R. EVID. 610; VT. R. EVID. 610; WASH. R. EVID. 610; W. VA. R. EVID. 610; WIS. STAT. ANN. § 906.10 (West 2013); WYO. R. EVID. 610). *See also* Scott C. Idleman, *The Underlying Causes of Divergent First Amendment Interpretations*, 27 MISS. COLL. L. REV. 67, 73 n.22 (2007) (cataloguing states that had adopted Rule 610).

[31] Allan W. Vestal, *"In the Name of Heaven, Don't Force Men to Hear Prayers": Religious Liberty and the Constitutions of Iowa*, 66 DRAKE L. REV. 355, 430-31 (2018) (citing ARIZ. CONST. art. II, § 12; OR. CONST. art. I, § 6; WASH. CONST. art. I, § 11).

[32] Edward J. Imwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 U. MIA. L. REV. 1069, 1081-82 (1992) (footnotes omitted).

[33] Vestal, *Fixing Witness Oaths*, *supra* note 30, at 445. *See also* PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE Rule 610, Westlaw (database updated May 2021) (explaining that atheists were "incompetent" because they were "deemed incapable of taking an oath").

In the nineteenth and early twentieth centuries, however, the common law, along with some state legislatures, moved away from the complete disqualification of such witnesses. As the U.S. Supreme Court noted in 1918, over the prior twenty years in both the United States and Great Britain, a principle that had "come to be widely, almost universally, accepted" by both courts and "legislative bodies" was "to remove disabilities from witnesses" because "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding . . . , leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent."[34] In other words, the common law developed to hold that the best way for the factfinder to arrive at the truth was to hear from relevant fact witnesses, subject to the truth-seeking function of the adversarial system—namely, cross-examination and impeachment.

For the most part, this evolution of the common law did not reject the underlying premise of the old competency bars: that certain categories of witnesses are per se less truthful. Instead, the older absolute bans on witness testimony were merely removed and replaced by rules that permitted advocates to impeach the credibility (i.e., truthfulness) of such witnesses due to their status.[35] Such rules still exist today, for instance, in Rule 609, which permits a witness to be impeached for truthfulness based on a past felony conviction.[36] Likewise, modern impeachment practice allows for broad attacks on "interested persons" to prove bias, with the underlying assumption that an "interested" (i.e., biased) witness is less likely to be truthful than an unbiased one.[37]

Unlike with felons and interested witnesses, however, the developing common law of the twentieth century began to disfavor

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[34] Rosen v. United States, 245 U.S. 467, 471 (1918) (discussing the old rule declaring felons as incompetent).

[35] *See* GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY, AND AUTHORITY §§ 601.3-601.5 (6th ed. 2009).

[36] *See generally* FED. R. EVID. 609.

[37] *See, e.g.*, United States v. Abel, 469 U.S. 45, 52 (1984) (explaining bias as a common-law term that describes a relationship between a party and a witness that might lead the witness to slant testimony, and concluding it is almost always relevant and can be proven with extrinsic evidence).

the premise underlying the belief that a witness's religion was connected to his or her character for truthfulness.[38] Still, "testimonial discrimination based on religious belief" continued "[w]ell into the twentieth century," until eventually all jurisdictions abolished the practice.[39] As summed up by Professor Charles T. McCormick's treatise, legal thinkers eventually concluded "there is no basis for believing that the lack of faith in God's avenging wrath is an indication of greater than average untruthfulness."[40] Part IV of this Article will discuss the merits of that modern verdict and question whether it should be partly revisited.

When the Federal Rules of Evidence were adopted in 1975, its drafters codified the common-law practices in existence at that time. Thus, Rule 601—"Every person is competent to be a witness unless these rules provide otherwise"[41]—codified the modern rejection of ancient common-law competency bars. Similarly, Rule 609 retained the continued mistrust of testimony by a witness convicted of a felony.[42] Likewise, Rule 610 adopted the contemporary disfavor of using religious beliefs or opinions to impeach a witness's truthfulness.[43] In short, the Rule maintained the status quo. As one authority summed it up, "The adoption of Rule 610 effected no change in federal practice."[44]

2. Rule 610 Applies Solely to Impeachment for Truthfulness

Recognizing that Rule 610 is the mere codification of the evolved common-law view about impeachment for truthfulness goes a long way toward appreciating the limited scope of the rule. By its own terms, the rule places "no limits on the admissibility of evidence concerning the religious beliefs of people who will not

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[38] *See* Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 BUFF. L. REV. 357, 415-16 (2010) (discussing the purpose behind Rule 610).

[39] Vestal, *Fixing Witness Oaths*, *supra* note 30, at 445. *See also* Vestal, *supra* note 31, at 431 (discussing Iowa's adoption of Rule 610 in 1983).

[40] GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 46 (Kenneth S. Broun ed., 7th ed. 2014).

[41] FED. R. EVID. 601.

[42] *See generally* FED. R. EVID. 609.

[43] *See* FED. R. EVID. 610.

[44] 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 610 app. 101 (Mark S. Brodin ed., 2d ed. 2021).

testify."[45] More importantly, the drafters of Rule 610 made an "unfortunate" word choice by connecting religion-related evidence to witness "credibility"[46] instead of witness "truthfulness"—a decision that has caused continued confusion in understanding the rule.[47]

Rule 610 was always intended to apply *only* to evidence of witness truthfulness. A major point in favor of that focused view is the placement of the Rule directly after Rules 608 and 609, which exclusively address a witness's character for truthfulness. None of those Rules (608, 609, or 610) purport to restrict evidence of a witness's "bias, or defects in memory or perception."[48] This is confirmed by the advisory committee notes, which indicate the Rule was intended to "foreclose[] inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature . . . ."[49] The committee went on to clarify that the rule left open "an inquiry for the purpose of showing interest or bias because of them . . . . Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule."[50] In 2003, when considering rule amendments, the committee reaffirmed this position, making it clear that Rule 608 referred to "character for truthfulness" and noting that Rules 609 and 610 "also use the term 'credibility' when the intent of those Rules is to regulate impeachment of a witness' character for truthfulness."[51]

Admittedly, the advisory committee notes are not binding and may be given "no weight" by courts interpreting the rule.[52] Still, many courts that have examined Rule 610 have agreed with the committee's position. And while the U.S. Supreme Court has not

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[45] ROGER PARK & TOM LININGER, THE NEW WIGMORE. A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 7.6, Westlaw (database updated 2021).

[46] FED. R. EVID. 610.

[47] James Joseph Duane, *The Proposed Amendments to Federal Rules of Evidence 608(b) and 804(b)(3): Two Great Ideas That Don't Go Far Enough*, 209 F.R.D. 235, 236 (2002) (calling the word "credibility" in Rules 608-10 "probably the most unfortunate word choice in all of the Federal Rules").

[48] *Id.*

[49] FED. R. EVID. 610 advisory committee's note to 1972 Proposed Rules.

[50] *Id.*

[51] FED. R. EVID. 608 advisory committee's note to 2003 amendments.

[52] Duane, *supra* note 47, at 241 (quoting Williamson v. United States, 512 U.S. 594, 602 (1994)).

definitively ruled on the matter, the federal circuit courts agree.[53] For instance, the Eleventh Circuit explained in *United States v. Beasley* that Rule 610 does not prohibit admission of a "person's beliefs, superstitions, or affiliation with a religious group . . . where probative of an issue in a criminal prosecution."[54] This same narrow interpretation of Rule 610 has applied in most state courts, which have recognized that the "mere fact that evidence touches upon the subject of religion does not preclude its introduction."[55]

3. Demonstrating the Limited Protection Under Rule 610

As the discussion above illustrates, Rule 610 is applicable only to attempts to bolster or attack a witness's truthfulness. Thus, the rule applies in only a small subset of situations where religion-related evidence might be offered in a court proceeding. A few case examples will demonstrate the narrow range of the rule and how advocates (and sometimes judges) can misunderstand the limited scope of that protection.

First, some advocates mistakenly believe that Rule 610 prevents impeachment beyond that for truthfulness. In *United States v. Weinland*,[56] the defendant filed an overly broad motion in limine to "prevent impeachment" by the prosecution regarding "his religious beliefs and the religious beliefs of several members of his church (i.e., the Church of God—Preparing for the Kingdom of

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[53] *See, e.g.*, United States v. Sampol, 636 F.2d 621, 666 (D.C. Cir. 1980); United States v. Beasley, 72 F.3d 1518, 1527 (11th Cir. 1996); United States v. Sun Myung Moon, 718 F.2d 1210, 1233 (2d Cir. 1983); United States v. Shalom, No. 95-1768, 1997 WL 225514, at *4 (6th Cir. May 1, 1997) (per curiam).

[54] *Beasley*, 72 F.3d at 1527. *See also* State v. Paulson, No. 108,795, 2015 WL 6444314, at *15 (Kan. Ct. App. Oct. 23, 2015) (permitting evidence of the defendant's religious view about marriage and divorce when offered by the prosecution to establish a potential motive for the premeditated murder of his wife as "an option preferable to divorcing her").

[55] Defendant's Opposition to Plaintiff's Omnibus Motion in Limine Pursuant to Omnibus Order Dated January 22, 2010 at 19, Bessent-Dixon v. R.J. Reynolds Tobacco Co., No. 01-2015-CA-002554, 2018 WL 4167369 (Fla. Cir. Ct. July 30, 2018), 2018 WL 4111406 (citing Colbert v. Rolls, 746 So. 2d 1134, 1135 (Fla. Dist. Ct. App. 1999); Gillman *ex rel.* Gillman v. Sch. Bd., No. 08cv34, 2008 WL 1883544, at *5 (N.D. Fla. Apr. 25, 2008); Valle-Ortiz v. R.J. Reynolds Tobacco Co., 385 F. Supp. 2d 126, 132 (D.P.R. 2005); Davis v. State, 329 S.W.3d 798, 805 (Tex. Crim. App. 2010); Kaufman v. People, 202 P.3d 542, 560 (Colo. 2009); United States v. Simmons, 431 F. Supp. 2d 38, 57 (D.D.C. 2006); State v. Waterhouse, 513 A.2d 862, 864-65 (Me. 1986)).

[56] No. 11-70-DCR, 2012 WL 1902153 (E.D. Ky. May 25, 2012).

God)" because their religious beliefs "may be viewed as being unconventional or unusual."[57] The prosecution noted—and the court agreed—that the defendant's request went beyond the scope of Rule 610, which would not be violated if the prosecution offered "evidence of a witness's religious beliefs or opinions for the purpose of showing his or her interest or bias."[58]

Second, some advocates seem to think that Rule 610 should keep out all religion-related evidence. Consider the criminal defendant's mistaken position in a New Jersey state case applying the equivalent of Rule 610, in *State v. L.O.T.*[59] There, "during his custodial interrogation," the defendant had made statements to a notary public about being an atheist who did not "believe in anything."[60] The defendant objected that his custodial interrogation had been admitted before the jury, including that verbatim exchange.[61] The court recognized that the defendant's reliance on Rule 610 was entirely "misplaced," and that the rule did not bar the complained-of evidence, which was not being offered to attack his truthfulness.[62] Making a similar mistake, in *Brown v. K&L Tank Truck Service, Inc.*,[63] the plaintiffs moved to "exclude reference to defendants' and defense witnesses' religion, prayers, or that they attend church."[64] The plaintiffs were particularly concerned about a witness's deposition testimony that referenced "four separate events in which he stated he would pray for plaintiffs, prayed for a new president of K&L when it was struggling, and mentioned that he was on his way home from church when he learned about a particular event."[65] The court viewed the request as overbroad,

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[57] *Id.* at *1.

[58] *Id. See also* United States v. Miller, 562 F. App'x 272, 302-03 (6th Cir. 2014) (rejecting claim by member of a "religious" group known as the "Five Percent Nation," and finding the prosecutor's questions about the group were not improper and the fact that "substantive beliefs may be unpopular or out of the mainstream alone does not suffice to make the government's question improper" under Rule 610).

[59] No. A-0458-15T4, 2017 WL 6398791 (N.J. Super. Ct. App. Div. Dec. 14, 2017).

[60] *Id.* at *4.

[61] *Id.* Notably, "[t]he State never referred to the exchange, introduced evidence of defendant's religious beliefs, or inquired into defendant's religious beliefs during cross-examination." *Id.*

[62] *Id.*

[63] No. 15-9587, 2017 WL 5499408 (D. Kan. Nov. 16, 2017).

[64] *Id.* at *3.

[65] *Id.*

agreeing that the evidence could "not be used to bolster his credibility," but allowing it, "to the extent relevant, . . . if they provide context to his testimony or support defendants' defense."[66]

Perhaps the best case to illustrate the limited scope of Rule 610 is *United States v. Hoffman*,[67] which involved a threat to President Ronald Reagan from a follower of Reverend Sun Yung Moon.[68] Responding to a motion in limine to prevent any reference to the defendant's religious beliefs, the prosecution argued that:

> "In this case, the government intends to show 'that the threat letter was written by the defendant not as a joke or as part' of a political debate, but out of defendant's anger with the President for his failure to pardon Sun Yung Moon[,] the leader of a religious group with which defendant was associated for a time and to whom he retained loyalty. . . ."[69]

Both the trial court and the Seventh Circuit found the evidence relevant to demonstrate the defendant's motive for sending the letter.[70] Rule 610 provided the defendant no protection.

In sum, when properly applied, Rule 610 provides limited protection because it does not preclude litigants from using evidence about a witness's religious beliefs or opinions for any other legitimate inquiry other than to impeach or bolster truthfulness.[71]

B. Rule 403 Provides Inconsistent Protection

Besides Rule 610, the other rule that is often relied upon to exclude unfairly prejudicial religion-related evidence is Federal Rule of Evidence 403, which allows the court to exclude otherwise-

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[66] *Id.* Although the court ruled properly, it too overstated the law by declaring too expansively, "[G]eneral references to a witness's religious beliefs or conduct are inadmissible." *Id.*

[67] 806 F.2d 703 (7th Cir. 1986).

[68] *Id.* at 705.

[69] *Id.*

[70] *See id.* at 705, 708-11 (finding that the admission of the evidence did not violate Rule 403 and noting that the trial court excused two biased jurors who might have held the defendant's religious views against him).

[71] *See* Joni Larson, *Tax Evidence III: A Primer on the Federal Rules of Evidence as Applied by the Tax Court*, 62 TAX LAW. 555, 646-47 (2009) (noting evidence of religious beliefs "may be admissible for other purposes") (citing Kessler v. Comm'r, 87 T.C. 1285, 1286 (1986) (a tax case where the taxpayer's religious beliefs were admitted "to support his constitutional arguments" and not in violation of Rule 610)).

relevant evidence for various reasons.[72] As this Section argues, however, the wide judicial discretion under Rule 403 leads to inconsistent results.

1. The Theory Underlying Rule 403

Rule 403 states in its entirety, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[73] The rule is often invoked when a party believes that the admission of evidence would inject an unreasonable amount of unfairness into court proceedings. Rule 403 is "one of the most important and influential rules in the Federal Rules of Evidence" because it "grants judges a considerable degree of discretionary power" by using "ambiguous, value-laden" terms "such as 'unfair,' 'prejudice,' 'confusion,' and 'misleading.'"[74] As with other evidentiary rulings, a judge's decision-making in this area is reviewed on appeal for an abuse of discretion.[75] This forgiving standard makes it difficult for an appellate court to conclude that a judge has overstepped all reasonable discretion when determining that evidence is or is not too confusing, misleading, or unfair. After all, who is in a better position than the trial judge to determine whether too much confusion or unfairness is present?

More to the point, Rule 403 says nothing about religion.[76] Nor did the advisory committee comment on how the rule should be applied to religion-related evidence.[77] Some scholars recommend that practitioners combine Rules 610 with 403, and they argue that Rule 610 "reflects a *per se* judgment about the value of religious beliefs as an indicator of candor or deception, and this judgment should guide the application of [Rule] 403 in analogous

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[72] *See* FED. R. EVID. 403.

[73] *Id.*

[74] CHRISTOPHER W. BEHAN & ANTONY B. KOLENC, EVIDENCE AND THE ADVOCATE: A CONTEXTUAL APPROACH TO LEARNING EVIDENCE 113 (2d ed. 2018).

[75] 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:12, Westlaw (database updated May 2021).

[76] *See* FED. R. EVID. 403.

[77] *See* FED. R. EVID. 403 advisory committee's note to 2011 amendments.

circumstances."[78] Other scholars suggest that Rule 610's placement within the evidence code under the "witnesses" section makes the rule off-limits to Rule 403 balancing (i.e., evidence *must* be excluded if it violates Rule 610 without considering Rule 403).[79] Neither of those views would appear to prevent Rule 403 from excluding religion-related evidence that does *not* fall within the ambit of Rule 610. When that occurs, the handling of religion-related evidence is mostly within the discretion of the trial judge, as illustrated below.

2. Rule 403, Rule 610, and Religion-Related Evidence

When advocates raise a Rule 610 objection, they often have in mind a broader concern about the evidence than that encompassed by the narrow embrace of Rule 610.[80] Usually, the concern is that religion-related evidence is being offered to inflame the passions and prejudices of the factfinder against a particular religious group—often where a witness practices a minority religion or is an atheist or agnostic.

As one example, a scholar examined a litigation tactic used by U.S. Supreme Court Justice Hugo Black when he was still practicing law, decades before Rule 610 existed.[81] Black was defending a Methodist minister accused of murdering a Catholic priest in 1921, "a time when anti-Catholic fervor was sweeping across the South."[82] Black cross-examined several witnesses and highlighted the fact "that they were Catholic or had familial ties to Catholics."[83] The import of these questions was that witnesses who were affiliated with the Catholic Church would be less truthful or credible on the issue of a priest being murdered.[84] To the extent Black was exploring witness bias, that would be a permissible

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[78] PARK & LININGER, *supra* note 45, § 7.1 n.6.

[79] *See, e.g.*, Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 161 n.53 (2008) (citing 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6152, at 310 (3d ed. 1993)).

[80] *See supra* notes 46-55 and accompanying text.

[81] *See* Scott E. Sundby, *The Conundrum of Zealous Representation*, 8 OHIO ST. J. CRIM. L. 567, 571-74 (2011) (reviewing SHARON DAVIES, RISING ROAD: A TRUE TALE OF LOVE, RACE, AND RELIGION IN AMERICA (2010)).

[82] *Id.* at 567.

[83] *Id.* at 572.

[84] *Id.*

practice under Rule 610 today; however, Black's questions were also "aimed at playing to popular prejudices at a time when vitriolic statements were circulating about Catholics, especially in the South."[85] That scholar noted that a judge applying Rule 403 today might very well prevent such questions.[86] Under these facts, however, reasonable judges would likely disagree about whether the danger of unfair prejudice (i.e., inflaming jurors against Catholics) substantially outweighed Black's asserted relevance (i.e., revealing witness bias).

By their very nature, Rule 403 decisions are highly discretionary. Consider *United States v. Davis*,[87] in which the Eleventh Circuit examined whether the federal rules barred a jury from knowing that a witness worked as a police chaplain.[88] In that case, neither side had argued that the chaplain's status affected his credibility, despite his being the prosecution's key witness and referred to by his title throughout direct examination.[89] On appeal, the court found no reversible error because the use of the witness's title was mere "background information" and the jury was never made aware of the witness's religion.[90] The court noted, however, that Rule 403 would have "allowed" the judge to exclude the chaplain's title "on the ground that the limited probative value of identifying the witness as a chaplain rather than only as an officer was substantially outweighed by the danger of unfair prejudice."[91] Thus, the judge properly could have ruled either way. This illustrates the remarkable discretion—and scant guidance for judges—under Rule 403.

As another example, consider *Hinton v. Outboard Marine Corp.*,[92] a products-liability case. There, the defendants sought to

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[85] *Id.* at 572-73.

[86] *See id.* at 573-74.

[87] 779 F.3d 1305 (11th Cir. 2015).

[88] *See id.* at 1307.

[89] *Id.* at 1307-08.

[90] *Id.* at 1309.

[91] *Id.* at 1311. *See also* Woodward v. Sec'y, Fla. Dep't of Corr., No. 13-cv-155-J-34JRK, 2016 WL 1182818, at *15-16 (M.D. Fla. Mar. 28, 2016) (denying an unexhausted habeas claim in a child molestation case that had alleged that Rule 610 should have excluded testimony by a witness "that she was a church-goer and that the people at her church encouraged her to forgive [the defendant] for his alleged molestation," even though the testimony might have raised Rule 403 issues).

[92] No. 09-cv-00554, 2012 WL 215145 (D. Me. Jan. 24, 2012).

introduce evidence that the injured plaintiff turned down four jobs in the Methodist Church over a disagreement regarding the church's policy on homosexuality, which allegedly impacted his claim for $452,000 in lost earnings and his ability to mitigate those damages.[93] The trial judge (wrongly) suggested the evidence would "raise Rule 610 issues," even though the defendant had not offered the evidence to impeach truthfulness but to mitigate damages.[94] The evidence was excluded, however, because the judge (vaguely) found that the reason the plaintiff had a break with the church did "not pass Rule 403 standards."[95] With such wide discretion available under Rule 403, results are rarely predictable and tend toward inconsistency.

In short, the highly subjective determinations under Rule 403 are often subject to the whims of a judge's personal views.[96] Because the rule does not provide any guidance on religion-related evidence, and because it is at the mercy of the judge's discretion, it provides only inconsistent protection for religion-related evidence.

III. THIRD PROPOSITION: THE RULES SHOULD BETTER PROTECT RELIGION-RELATED EVIDENCE

This Article has contended that religion and religious liberty are fundamental freedoms that are offered scant protection by the Federal Rules of Evidence, particularly under Rules 610 and 403. Building upon that foundation, Part III argues that the Federal Rules should better protect a person's religion during court proceedings. This can be done by placing a higher burden upon the

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[93] *Id.* at *1.

[94] *Id.* at *2.

[95] *Id.*

[96] Who could predict how a judge would rule in Defendant Blackstone Medical Services, LLC's Motion in Limine, Bunting v. Blackstone Med. Servs., LLC, No. 16-cv-2229-T-23JSS, 2018 WL 1072033 (M.D. Fla. Feb. 27, 2018), 2017 WL 10088254 and Plaintiff's Response in Opposition to Defendant's Motion in Limine, Bunting v. Blackstone Med. Servs., LLC, No. 16-cv-2229-T-23JSS, 2018 WL 1072033 (M.D. Fla. Feb. 27, 2018), 2017 WL 10088254? In a religious discrimination case, an employee was fired after complaining about Scientology training materials. The defense sought to exclude all references to Scientology, arguing it was "wholly irrelevant" which religion was involved. The plaintiff argued Scientology was relevant due to the Defendant's proselytizing. The court never ruled because it granted summary judgment on other grounds. *See* Bunting v. Blackstone Med. Servs., LLC, No. 16-cv-2229-T-23JSS, 2018 WL 1072033, at *4 (M.D. Fla. Feb. 27, 2018).

party offering religion-related evidence. Part III also suggests, however, that this higher burden should be relaxed in the case of a defendant in a criminal trial.

A. Constitutional and Policy Considerations

Strong policy reasons and abundant precedent exist for creating heightened protections for religion-related evidence under the Federal Rules of Evidence—more protection than currently exists under Rules 403 and 610. These reasons stem from respect for the values embedded within the First Amendment of the U.S. Constitution, as well as from a desire to enhance desirable societal norms.

1. Constitutional Values Underlying Religion-Related Evidentiary Rules

Scholars and courts that have addressed the issue have concluded the First Amendment does not *require* the Rules of Evidence to provide protection for religion-related evidence.[97] This may be so, though perhaps one could argue that institutional disregard of religion while securing other comparable liberties *would* violate the Free Exercise Clause. In any event, this Article will not address that argument. Instead, it is sufficient to note that creating religion-protective policies (such as this Article's proposed Rule 416) would not *violate* the First Amendment either.[98] To the contrary, creating rules for religion-related evidence would dignify and enhance constitutional principles.

Constitutional values underlie the protection of religion and religious liberty, yet neither Rule 610 nor Rule 403 expressly embrace those constitutional values when addressing religion-related evidence. Some scholars have looked deeper into Rule 610 and found that the rule was created as a way to vindicate the

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[97] Although this Article does not have space to explore that proposition, others have discussed it. *See* Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1243 (2004) (citing S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 361 (2d ed. 1977)).

[98] *See* 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, 81 (1988) ("Although it has been said that Federal Rule 610 is harmonious with the First Amendment, the rule is not, however, demanded by the First Amendment.").

religious liberty protected by the First Amendment.[99] They argue that "the use of legal mechanisms to attack a witness on the basis of her religion is a form of religious persecution that is constitutionally prohibited."[100] Thus, evidence of a person's constitutionally protected religious activities is "admissible only if it is used for something more than general character evidence."[101]

Citing constitutional principles, others have concluded that "[t]he purpose of [Rule 610] is to guard against the prejudice which may result from disclosure of a witness's faith."[102] As one court explained, Rule 610 exists "to strictly avoid any possibility that jurors will be prejudiced against a certain witness because of personal disagreement with the religious views of that witness."[103] This is done "to ensure that fact-finders do not apply a prejudice in favor of a believer of their religion, and perhaps more importantly, that fact-finders do not apply a prejudice against a believer of a different religion."[104] Moreover, some scholars see Rule 610 as based on "a national ideal of religious freedom and toleration that would suffer if witnesses were compellable not only to come and give evidence, but to submit to questions on religious belief or

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[99] Katharine Traylor Schaffzin, *Is Evidence Obsolete?*, 36 REV. LITIG. 529, 563 (2016) (citing multiple treatises).

[100] Bradford S. Stewart, Comment, *Opening the Broom Closet: Recognizing the Religious Rights of Wiccans, Witches, and Other Neo-Pagans*, 32 N. ILL. U. L. REV. 135, 192-99 (2011).

[101] Flanagan v. State, 846 P.2d 1053, 1055-59 (Nev. 1993) (finding error when a prosecutor presented details of the defendants' beliefs in the occult to establish his bad character during sentencing). *See also* United States v. Brown, 41 M.J. 1, 3 (C.M.A. 1994) (explaining that Rule 610 "rests upon grounds of relevancy, policy, and a concern to avoid time-consuming collateral inquiry," and that evidence of an accused's religious affiliation requires the factfinder to "infer that the accused has adopted a particular belief and then infer further that the accused acted in accordance with that belief") (citing 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 328, at 384-85 (1979)).

[102] United States v. Sampol, 636 F.2d 621, 666 (D.C. Cir. 1980). *See also* Contemp. Mission, Inc. v. Bonded Mailings, Inc., 671 F.2d 81, 84 (2d Cir. 1982) (finding extensive questioning on church affiliation to be a "collateral, potentially confusing and prejudicial, issue").

[103] People v. Jones, 267 N.W.2d 433, 435-36 (Mich. Ct. App. 1978) (discussing M.S.A. § 27A.1436, which read: "No person may be deemed incompetent as a witness in any court, matter or proceeding, on account of his opinions on the subject of religion. No witness may be questioned in relation to his opinions on religion . . . ."). *See also* Davis v. Jones, No. 04-cv-294, 2007 WL 2873041, at *10 (W.D. Mich. Sept. 26, 2007).

[104] Stewart, *supra* note 100, at 192.

opinion, or to exposure of these by extrinsic evidence of some sort."[105]

In sum, even under the current rules structure, scholars and courts recognize that rules that enhance protection for a person's religion further important constitutional principles. This Article agrees and seeks to strengthen that protection under the Rules.

2. Other Policy-Related Protections in the Federal Rules of Evidence

Creating strong evidentiary protections for religion-related evidence is consistent with the practice throughout the Federal Rules of Evidence to further worthy social policies and activities. Apart from the common-law rules regarding privilege,[106] the Rules affirm several other external social policies. Rules 404 through 406 limit the use of relevant character evidence to avoid making judgments based on a person's character, rather than on his or her actions.[107] Rule 407 encourages the remediation of hazardous conditions by excluding evidence of "subsequent measures" to prove negligence.[108] Rule 408 encourages parties in a civil case to settle their disputes by excluding evidence of compromise negotiations "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction."[109] Rule 409 encourages the paying of another's medical expenses by excluding evidence of such payments "to prove liability for the

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[105] 3 MUELLER & KIRKPATRICK, *supra* note 75, § 6:58.

[106] *See* FED. R. EVID. 501-02 (setting out rules regarding common-law privileges).

[107] *See* FED. R. EVID. 404-06 (setting out rules regarding character and habit evidence).

[108] FED. R. EVID. 407 ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction.").

[109] FED. R. EVID. 408 ("Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering . . . a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim . . . .").

injury."[110] Rule 410 encourages guilty pleas in criminal cases by providing extensive protection for those negotiations.[111] Rule 411 encourages the purchase of liability insurance by excluding evidence of such purchases to prove liability.[112] Most notably, Rule 412's "rape-shield" protections added in the 1990s give victims of sexual assault unprecedented rights and safeguards, and protect their interests as individuals, even when they are not parties to the litigation.[113]

With built-in protections for so many other worthy causes, it seems equally appropriate for the Rules to provide comparable protections for religion-related evidence, especially in light of the nation's respect for religious liberty.

3. The Problem of Defining Religion

Before detailing the need for stronger protection for religion-related evidence, it seems appropriate to reflect on the problem of defining terms such as "religion" and "religious belief." There has been vigorous and continued debate about the meaning of the term "religion," and the U.S. Supreme Court has sent mixed signals over the years.[114] Some scholars broadly interpret "religion" to include all manner of moral, ethical, and philosophical beliefs—even atheistic ones[115]—while others seek to limit the term to its

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[110] FED. R. EVID. 409 ("Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.").

[111] *See* FED. R. EVID. 410 (setting out strict rules regarding admission of criminal plea negotiations).

[112] *See* FED. R. EVID. 411 ("Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully.").

[113] *See* FED. R. EVID. 412 (providing strong victim protections in both criminal and civil trials).

[114] *See* Davis v. Beason, 133 U.S. 333, 342 (1890) (unanimously defining "religion" to mean "reference to one's views of his relations to his Creator"); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (noting no protection for a "way of life . . . based on purely secular considerations" because "claims must be rooted in religious belief"). *But see* Wallace v. Jaffree, 472 U.S. 38, 53 (1985) (finding that the First Amendment "embraces the right to select any religious faith or none at all").

[115] *See, e.g.*, ROTHSTEIN, *supra* note 33, Rule 610 (noting that religion has been "broadly defined" under Rule 610 to include "well-recognized groups such as Catholics or Jews, but has also been held to include groups that are lesser known, such as Rastafarians and Lucemes"); Stewart, *supra* note 100, at 193 (arguing that neo-

traditional theistic distinction recognized by the founding generation.[116] This issue already arises in cases applying Rule 610, which likely uses the same definition for the term as it arises in other "analogous contexts," such as in "interpreting the clergy-penitent privilege, in evaluating the applicability of tax breaks for religious institutions, in assessing the solemnization of marriages, and in construing the First Amendment."[117]

In *United States v. Raniere*,[118]—the "NXIVM" case highlighted in this Article's introduction—prosecutors sought to introduce evidence of certain "[r]ules and [r]ituals" against the defendant related to the organization's racketeering conspiracy involving forced labor and sex trafficking.[119] NXIVM had at times billed itself as a "philosophical movement," and was often referred to as a "sex-slave cult."[120] When the defendant objected based on evidentiary prohibitions, prosecutors replied that Rule 610 did not apply because the organization's "'Rules and Rituals' state '[u]nder no circumstance should any rule, ritual or method be construed to have any religious or mystical content . . . we fashion all aspects of [NXIVM] in a non-religious, non-mystical and practical manner.'"[121] In the end, jurors were permitted to hear testimony about the branding rituals for "sex slaves."[122]

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paganism is part of "the Supreme Court's definition of religion" that "must be accepted as such at all judicial levels for all judicial purposes").

[116] *See* Antony Barone Kolenc, Not *"For God and Country": Atheist Military Chaplains and the Free Exercise Clause*, 48 U.S.F. L. REV. 395, 406-08 (2014) (discussing the drafting of the Religion Clauses).

[117] PARK & LININGER, *supra* note 45, § 7.2 (footnote omitted).

[118] Government's Reply Memorandum in Further Support of Its Motion to Admit Certain Racketeering Evidence, United States v. Raniere, 384 F. Supp. 3d 282 (E.D.N.Y. 2019) (No. 18-cr-204), 2019 WL 1427875.

[119] *Id.* at 7-10, 7 n.4.

[120] Grigoriadis, *supra* note 2.

[121] Government's Reply Memorandum, *supra* note 118, at 7 n.4 (alterations in original).

[122] *See* Robert Gavin, *Raniere Wanted Branding Ceremony to Resemble Ritual Sacrifice*, TIMES UNION (May 23, 2019, 3:17 PM), https://www.timesunion.com/news/article/Raniere-wanted-branding-ceremony-to-resemble-13872965.php [https://perma.cc/REA5-8MRH]. *See also* Defendant Jacob O. Kingston's Motions *in Limine*, United States v. Kingston, 515 F. Supp. 3d 1196 (D. Utah 2021) (No. 18-cr-00365), 2019 WL 3476935. In that case, involving alleged fraudulent activity, the defendants similarly argued that the government would "run afoul" of Rule 610 by referring to witnesses as members of various "religious" organizations and from referring to their "religious beliefs or affiliations including, but not limited to, the

The problem of defining religion under Rule 610 also comes up in cases involving what some view as fantastical beliefs. For instance, in *United States v. Jorell*,[123] a child sexual assault victim espoused a belief in the "ability to cast spells to physically change another person into a frog."[124] When prosecutors sought to use Rule 610 to prevent the defense from cross-examining the victim on those allegedly neo-Pagan beliefs, the defense took the position that Rule 610 was not implicated because the child's beliefs "were not part of the Wiccan religion."[125] The court used Rule 610 to prevent the questions, finding that "[c]ourts should not be in the business of deciding what is or is not a proper belief under one's professed religion, so long as those beliefs are in fact religious," and that Rule 610 was intended to avoid courts "making value judgments between religions or of one's religious beliefs compared to others in the same faith."[126]

A district court reached a contrary conclusion in *United States v. Ruzicka*,[127] where the prosecution's star witness was a child who believed that he had "conversations with wildlife, angels, or other ethereal beings."[128] Prosecutors attempted to use Rule 610 to prevent the defense from impeaching the witness, arguing that "hallucinations" of speaking to wildlife—including "conversations in English with deer that he shot dead while hunting"—were actually "religious beliefs."[129] The court disagreed, finding that the child's hallucinations were relevant to impeach his perception and that the government had "stretched the definition of 'religious beliefs' further than it may go."[130]

This difficulty in defining "religion" and "religious belief" will continue to plague any rules—current or amended—that rely on those terms. The broader those terms are defined, of course, the

practice of polygamy." *Id.* at 2, 4. The indictment, however, made "several references" to the fact that those very organizations were entwined with the charged money-laundering activity. *Id.* at 3.

123 73 M.J. 878 (A.F. Ct. Crim. App. 2014).

124 *Id.* at 882.

125 *Id.*

126 *Id.* at 884.

127 No. 16-246, 2018 WL 385422 (D. Minn. Jan. 11, 2018).

128 *Id.* at *4.

129 *Id.*

130 *Id.*

more problematic it is to handle religion-related evidence because almost any philosophical or supernatural view may trigger evidentiary protection. In any event, this debate should not prevent the Rules from protecting this fundamental right.

B. Illustrating the Need for a Stronger Rule to Limit Religion-Related Evidence

This Article has contended the current evidentiary rules provide scant protection for religion and that policy reasons support strengthening the rules. This Section illustrates that need with examples where religion-related evidence has been admitted under the present rules, yet where dangers abound in using that evidence to demean a person's religious affiliation or beliefs. Many of these cases arise in criminal prosecutions, with the government using religion as a sword. This is not surprising because crimes often involve immoral actions, and religion is often associated with morality.

1. Belittling a Person's Religion

With so many diverse beliefs in the United States outside the "mainstream" of the nation's majority religions, attorneys sometimes use religion-related evidence to demean religious beliefs, humiliate believers, and inflame juror prejudices.

In *Petersen v. Rogers*,[131] the Court of Appeals of North Carolina reversed a judge's transfer of the custody of a minor from his adoptive parents to his biological parents.[132] There, over 147 pages of the record focused on the religious beliefs of the adoptive parents, who were involved with a religious group known as "the Way," which the judge characterized as a "Pentecostal, biblically-oriented Christian sect which encourages its members to lead an affirmative lifestyle and . . . to reflect religiosity by overtly speaking in tongues."[133] The judge conducted an inquisition into the parents' beliefs, and—though finding the adoptive parents to be fit—still cut

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[131] 433 S.E.2d 770 (N.C. Ct. App. 1993), *rev'd on other grounds*, 445 S.E.2d 901 (N.C. 1994).

[132] *See id.* at 772.

[133] *Id.* at 773 (alteration in original).

off their parental and visitation rights.[134] Focusing on the First Amendment's Free Exercise Clause, the appellate court rightly found that the judge went beyond a permissible limited inquiry into how the parents' religious practices might adversely affect the child.[135]

Not every appellate court finds such questions improper. In *Pawlik v. Pawlik*,[136] the court found it entirely proper for an attorney in a custody dispute to question the child's paternal grandmother about her beliefs as a Jehovah's Witness, even though the child's father was *not* a member of that religion.[137] The court found the testimony was not sought to "discredit [the grandmother's] truthfulness," but rather "to illuminate for the court what sort of a factor [she] would be" in the child's "religious training" if the father were given physical custody because the father lived with her.[138] The court explained that, in a custody dispute, there are "practical, value-neutral reasons for the court to consider the parties' religious beliefs and practices," such as "to order the noncustodial parent to refrain from allowing the child to participate in activities that are inconsistent with the custodial parent's religious beliefs."[139] Here, the court approved the following questions to the grandmother for that purpose: whether she went to church "several times a week"; whether she read "Jehovah Bible stories" to her grandchild; whether she was discouraged by her church from wearing or displaying a cross or crucifix or from "saluting the flag"; whether she celebrated holidays or birthdays because, "[a]ccording to [her] religion, it's too pagan"; whether she was "not too crazy about the Girl Scouts"; whether she voted; and whether she, her son, or her grandchild were one of the chosen "144,000 that will be reigning with Christ in heaven for a thousand years" and "will be kings and priests."[140] But these questions seemed calculated to place the grandmother's beliefs outside the mainstream rather than to deal with any "practical" issues related to custody.

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134 *See id.* at 774, 777.
135 *Id.* at 775-78.
136 823 N.E.2d 328 (Ind. Ct. App. 2005).
137 *Id.* at 329-30, 334.
138 *Id.* at 333-34.
139 *Id.*
140 *Id.* at 330-31.

Beyond the child custody realm, in *United States v. Argueta*,[141] the prosecution seemed to belittle a defense expert while cross-examining him about his participation in "a Buddhist meditation ritual" known as a "dark retreat."[142] Spiritual participants in a "dark retreat" often spend hours or days alone in the dark in meditation.[143] The prosecution claimed the questions about Buddhism sought to highlight the expert's "varied research interests, including the use of urine in different cultures, mental retardation in the elderly, HIV clinical trials, and meditation."[144] The defense objected, arguing this was an attack on the expert's "spiritual beliefs" in violation of Rule 610.[145] The district court allowed the inquiry, however, because the prosecution was not impeaching truthfulness.[146] Affirming, the Fourth Circuit noted the prosecutor "focused on the logistics of the ritual and [its] possible psychological effects" and that the questions demonstrated the expert's "interests in a multitude of seemingly unrelated topics underscored his lack of expertise in any particular subject matter."[147] A less proper purpose might also be perceived: an attempt to make the expert look unserious for participating in spiritual exercises that would be unusual to any "mainstream" juror.

2. Attacks on a Criminal Defendant's Religious Beliefs

Prosecutors sometimes use religion-related evidence to demonize defendants and inflame juror prejudices against them. In *Slagle v. Bagley*,[148] the defendant admitted to brutally murdering his female neighbor and was caught in her home with the bloody murder weapon, though he later claimed he was under the influence of alcohol and drugs.[149] The victim had started praying

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[141] 470 F. App'x 176 (4th Cir. 2012).

[142] *Id.* at 180.

[143] *Dark Retreat*, TIBETAN BUDDHIST ENCYCLOPEDIA, http://tibetanbuddhistencyclopedia.com/en/index.php/Dark_retreat [https://perma.cc/4XTC-9YH6] (last visited Oct. 30, 2021).

[144] *Argueta*, 470 F. App'x at 180.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] 457 F.3d 501 (6th Cir. 2006).

[149] *Id.* at 507, 509.

before the murder, and Slagle had told her to "[s]hut up because I don't like to hear your prayers."[150] When cross-examining Slagle about that, the prosecution further inquired about "whether he liked [prayers]" and whether he "said prayers," to which Slagle testified that "he saw nothing wrong with prayers, and that he says prayers."[151] The Sixth Circuit found the questions "slightly probative" and proper because they were not offered for "truthfulness."[152] A less proper motive behind the questions became apparent in closing, however, when the prosecutor argued that Slagle "had the nerve to tell [the jury] 'I pray. I pray.'"[153] The court found that this argument appeared "to have been to inflame the passions of the jury" regarding the defendant's purported spiritual life, and that it was "improper . . . [b]ecause the prosecution implied without any evidence that Slagle does not pray"[154]—as though his lack of praying would have been relevant to a murder charge. It would not.

Similarly, in *Gipson v. State*,[155] the Court of Appeals of Georgia criticized the prosecutor's "argumentative and improper" questioning by pointing out "that Gipson was wearing a Christian cross and insinuat[ing] through a series of questions that Gipson was a hypocrite" due to his treatment of the victim.[156] Likewise, in *Dobek v. Berghuis*,[157] the prosecutor cross-examined the defendant about his "Catholic beliefs in order to show that the beliefs were inconsistent with his behavior" in sexually assaulting his stepdaughter.[158]

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[150] *Id.* at 517.

[151] *Id.* at 509.

[152] *Id.* at 517-18.

[153] *Id.* at 518 (alteration in original).

[154] *Id.* The court ultimately rejected Slagle's habeas corpus petition. *Id.* at 529.

[155] 772 S.E.2d 402 (Ga. Ct. App. 2015).

[156] *Id.* at 411.

[157] No. 08-CV-13968, 2011 WL 761495 (E.D. Mich. 2011), *aff'd*, 474 F. App'x 447 (6th Cir. 2012).

[158] *Id.* at *10-11. The defense arguably had opened the door to those questions when he testified that his stepdaughter "could have sought guidance from a priest" and that his kids were "brought up with-in the Catholic faith." *Id.* at *10. Citing Rule 610, the district court agreed that the prosecutor's questions "were likely improper, [but] . . . were conceivably made in good faith in response to defense counsel's prior examination . . . ." *Id.* at *10-11. The court ultimately rejected this habeas corpus petition. *Id.* at *13.

A closer case is *In re Lui*,[159]—involving the murder of the defendant's girlfriend—where the prosecutor questioned the defendant's friend about the extent to which the defendant was a "practicing Mormon[]."[160] To demonstrate the defendant was a bad Mormon, the prosecutor asked "whether it was against the Mormon faith to have premarital sex, to live with someone outside of marriage, to drink (presumably alcohol), to smoke (presumably cigarettes), and to consume caffeine."[161] Those questions purportedly would "highlight a critical inconsistency" in the defendant's statements to the police and support the inference that "if his faith were as important to him as he claimed, why did he engage in premarital sex with multiple women . . . ."[162] This, in turn, was intended to undermine his pretrial (hearsay) claims to police that he had no motive to kill his girlfriend because they had reconciled, and that he was sleeping apart from her the night before she disappeared because they "had decided to abstain from sexual intercourse until their wedding in order to live more consistently with the tenets of his Mormon faith."[163] The weakness of this argument by the prosecution—which had control over admitting Lui's pretrial hearsay statements—is that Lui's statement about "living more consistently" with his faith was not contradicted by the fact that he had been a bad Mormon (i.e., had previously lived less consistently with his faith). Discrediting his faith, it seems, was intended more to demean him as a sinner and hypocrite.[164]

Prosecutors who use these types of tactics should recognize they are weaponizing religion to show that a sinner accused of heinous, immoral behavior should be scorned by the jurors for daring to identify with religion—an improper attempt to inflame the jury's passions against the defendant. The Rules should not permit this.

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159 397 P.3d 90 (Wash. 2017).

160 *Id.* at 113.

161 *Id.*

162 *Id.*

163 *Id.*

164 *See also* Davis v. Jones, No. 04-cv-294, 2007 WL 2873041, at *9-10 (W.D. Mich. Sept. 26, 2007) (finding no error when a prosecutor questioned the sincerity of a Muslim defendant's faith by arguing he lied about his belief in "the Koran" because he sent a letter to a friend quoting "the Biblenot [sic] the Koran" and by stating, "How sincere is he about that?").

3. The Troubling Connection of Narco-Trafficking with Religion

A fascinating case study can be made of the troubling line of cases where prosecutors use religious beliefs and practices to associate a defendant with narco-trafficking. In a leading case, *United States v. Holmes*,[165] the Eighth Circuit upheld a trial court's decision to let the prosecution's law-enforcement expert testify about Jesús Malverde, a "'narco-saint' hailed as a 'Mexican Robin Hood.'"[166] Because the defendant possessed a statue of Malverde, the court viewed the testimony about that "saint" as evidence of the defendant's *modus operandi*.[167] Dubiously, the court treated the statue similarly to cases involving "otherwise innocuous household items" (e.g., Ziploc bags) that are "an indicator of drug trafficking."[168]

In *United States v. Medina-Copete*,[169] the Tenth Circuit—with now-Supreme Court Justice Neil Gorsuch on the panel—rejected the *Holmes* reasoning in a case involving testimony by "a purported expert" who testified that "veneration of a figure known as 'Santa Muerte' was so connected with drug trafficking as to constitute evidence that the occupants of the vehicle were aware of the presence of drugs in a secret compartment."[170] This law-enforcement expert improperly rendered "theological opinions about the 'legitima[cy]' of Santa Muerte vis-à-vis other venerated figures."[171]

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[165] 751 F.3d 846 (8th Cir. 2014).

[166] *Id.* at 849. Malverde lived "during the reign of dictator Porfirio Díaz (1877-1911)"—"a bandit who rode the hills near Culiacán" as "a Mexican Robin Hood," hung by the government and left "to rot in a tree." SAM QUINONES, TRUE TALES FROM ANOTHER MEXICO: THE LYNCH MOB, THE POPSICLE KINGS, CHALINO, AND THE BRONX 226-27 (2001).

[167] *Holmes*, 751 F.3d at 849-51.

[168] *Id.* at 850.

[169] 757 F.3d 1092 (10th Cir. 2014).

[170] *Id.* at 1095. Devotion to "Santa Muerte"—known as "Our Lady of Holy Death"—"spiked in the late 20th century"; although, some trace her origins to the Aztecs, "who occupied what is now present-day Mexico" and "worshipped a deathly figure called Mictecacihuatl, or 'Lady of the Dead,' who served as a goddess of death and the underworld." *Santa Muerte: The Saint Known as Our Lady of Holy Death*, HIST. 101 (Mar. 18, 2020), https://www.history101.com/santa-muerte-our-lady-of-holy-death/ [https://perma.cc/ZA53-BGMD].

[171] *Medina-Copete*, 757 F.3d at 1095 (alteration in original).

The *Medina-Copete* court rejected two prosecution theories of admissibility. First, the prosecution could not "legitimately connect Medina's prayer to drug trafficking" because there was "no evidence that Santa Muerte iconography is 'associational,' nor was there any allegation that the 'main purpose' of Santa Muerte veneration 'was to traffic in' narcotics."[172] The law-enforcement expert acknowledged that "there may be 'millions' of followers of Santa Muerte, but he proffered no manner of distinguishing individuals who pray to Santa Muerte for illicit purposes from everyone else."[173] Second, the court rejected the theory that a prayer card held by the defendant during police questioning was "a tool of the drug trade."[174] Defining that term as a "means for the distribution of illegal drugs," the court found the prosecution had "failed to explain how the Santa Muerte iconography in this case was a 'means for the distribution of illegal drugs,'" in contrast to actual tools of the trade, such as "a single-edge razor blade, a pager or beeper, and a loaded pistol . . . [,] $990 cash and $20 in food stamps."[175] The *Medina-Copete* case is exceptional because of the First Amendment religious liberty aspects of the case.[176]

The Fifth Circuit encountered a similar issue in *United States v. Gil-Cruz*,[177] another narcotics case where the prosecution sought to place a defendant's religion-related habits into evidence to prove his knowledge of drug activity.[178] There, the prosecution admitted (over defense counsel's objections) photos of the defendant's Santeria "altar"—upon which he had sacrificed a chicken, and where he had placed a set of car keys to a silver Ford Focus.[179] The prosecution offered the photos as circumstantial evidence of the defendant's knowledge of narcotics trafficking by purportedly

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[172] *Id.* at 1102.

[173] *Id.*

[174] *Id.* at 1102-03, 1103 n.2.

[175] *Id.* at 1102-03 (alterations in original).

[176] *See* United States v. Chapman, No. CR 14-1065, 2015 WL 10401776, at *14 n.12 (D.N.M. Aug. 28, 2015). In *Chapman*—which did not involve narco-saints—the court described *Medina-Copete* as "an inchoate First Amendment opinion," and opined the Tenth Circuit was uncomfortable "with the religious nature of the criminal inferences to which the prayer card gives rise." *Id.*

[177] 808 F.3d 274 (5th Cir. 2015).

[178] *Id.* at 276.

[179] Brief for Appellant at 17-18, *Gil-Cruz*, 808 F.3d 274 (No. 14-41298), 2015 WL 1926183 at *17-18.

demonstrating he was seeking supernatural blessings on his upcoming trip to Mexico to smuggle narcotics back into the United States.[180] The trial court admitted the photos, not as Rule 404(b) knowledge evidence, but as *res gestae* evidence as "part of the whole picture."[181] The court apparently believed the evidence was related to "Santa Muerta" (which the court stated was not a religion) and was relevant based on the defense's direct examination.[182]

The defendant argued on appeal that the prosecution's cross-examination of the defendant had the "single purpose of impeaching his testimony," and that "[a]ll of the government's questions were propounded in a way to convince the jury that Mr. Gil-Cruz was an untruthful person," violating not only Rule 610, "but also the First Amendment."[183] In response, the government argued waiver and stated that "[t]he First Amendment 'does not erect a pro se [sic] barrier to the admission of evidence concerning one's beliefs and associations' at trial,"[184] as long as the evidence is offered "to establish the elements of a crime or to prove motive or intent."[185] In his reply brief, the defendant countered that the government could not use "evidence of religious, cultural, or associational beliefs as evidence of guilt or permissible impeachment evidence," unless it could "show that the crime, in the defendant's mind, was inspired, justified, or necessitated by those beliefs, or that references to religion were made during the commission of the crime."[186] The Fifth Circuit never resolved the debate, however, because it found harmless error.[187]

These cases demonstrate two key points. First, there are manifold theories under the current evidentiary rules that the prosecution in a narco-trafficking case can use to admit evidence of a defendant's spiritual practices. Second, those theories mostly seek

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[180] *Id.*

[181] *Id.* at 18-19.

[182] *Id.* at 19.

[183] *Id.* at 33.

[184] Brief of Plaintiff-Appellee at 18-19, 45, *Gil-Cruz*, 808 F.3d 274 (No. 14-41298), 2015 WL 4241234 at *18-19, *45 (quoting United States v. Simkanin, 420 F.3d 397, 417 (5th Cir. 2005)).

[185] *Id.* at 45 (citing United States v. El-Mezain, 664 F.3d 467, 537 (5th Cir. 2011)).

[186] Reply Brief for Appellant at 15, *Gil-Cruz*, 808 F.3d 274 (No. 14-41298), 2015 WL 4937557.

[187] *Gil-Cruz*, 808 F.3d at 276-78.

to establish a sort-of "guilt by association" by connecting certain spiritual practices to the drug trade itself. This idea was decried by a district court in the Tenth Circuit, which analogized this dangerous line of reasoning to the situation of Islam: "[R]egardless whether foreign terrorism thus far in the twenty-first century is statistically associated with Islam, it would be unseemly for the United States to use trappings of a criminal defendant's Islamic faith to support an inference that the defendant was associated with terrorist groups."[188] The same holds true for the followers of Santa Muerta.

C. Recurring Concerns: Muslims and Neo-Pagans

Historically, adherents of minority religions (or no religion) in the United States have had the most to fear from religion-related evidence.[189] Logically, members of the majority religion (i.e., Christianity) did not need to worry about the stigma of being associated with a "non-traditional" religion, or the possibility of offending jury members who did not understand (or approve of) certain religious beliefs or practices. The need for rules to protect from religious prejudice is still felt today, especially in cases involving Islam and neo-Paganism.

1. Concerns of Prejudice Against Islam

Since the devastating terrorist attacks on September 11, 2001, some have expressed concern about anti-Islamic discrimination due to a perceived connection between international terrorism and Islam itself (e.g., use of the term, "radical Islamic terrorism").[190] Some scholars argue that religion-related protections in the evidentiary rules serve an important purpose in "the current political climate," where "religious beliefs may be used more as a sword than shield against the witness to prey on the prejudices of

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[188] United States v. Chapman, No. CR 14-1065, 2015 WL 10401776, at *14 n.12 (D.N.M. Aug. 28, 2015).

[189] *See* Redman v. Watch Tower Bible & Tract Soc'y of Pa., 630 N.E.2d 676, 678 (Ohio 1994) ("When . . . the witness belongs to a minority sect, which may or may not be viewed with disdain or misunderstanding, the risk of unfair prejudice is high.").

[190] Helen Norton, *Government Speech and the War on Terror*, 86 FORDHAM L. REV. 543, 546-47 (2017).

some jurors against certain religions . . . ."[191] In particular, there is concern in terrorism cases that prosecutors may misinterpret a defendant's "use of the word 'jihad' to mean violent or armed jihad, where the term could also imply legal conduct" if interpreted differently.[192]

This fear of discrimination animated a Rule 610 argument in *Shelton v. Bledsoe*,[193] where a Muslim prisoner who had brought an excessive force case against his prison guards attempted to "exclude evidence and inquiry about his religious background."[194] The prisoner argued that "the anti-Muslim political climate that has emerged since September 11, 2001, and the attacks carried out by terrorist groups such as ISIS," could "lead to unfair prejudice with members of the jury" if his religious affiliation became known.[195] In response, the defendants did not dispute that using the plaintiff's "Islamic faith . . . to impeach him because he simply has that faith" or "inflam[ing] a jury with any witness's religion, causing unfair prejudice," would be improper.[196] The defendants argued instead that evidence of the plaintiff's religion was relevant because he had "made his religion an issue" by claiming "that Defendants placed him in a cell with a gang member" because the officers knew that "gang members attack Muslims."[197] The court ruled protectively in the case under Rule 403, allowing evidence of the plaintiff's religious affiliation to be presented only if the plaintiff "'opens the door' during his presentation of evidence."[198]

In *Tatum v. Clarke*,[199] another prison case, a Muslim prisoner filed claims alleging excessive force and violations of his religious diet under the First Amendment and the Religious Land Use and

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[191] Schaffzin, *supra* note 99, at 563.

[192] Steven R. Morrison, *Strictissimi Juris: The First Amendment's Defense Against Conspiracy Charges*, CHAMPION, Dec. 2015, at 40, 46. In this context, the term "*strictissimi juris*" means that a rule should "be interpreted in the strictest manner." *Strictissimi Juris*, BLACK'S LAW DICTIONARY (8th ed. 2004).

[193] No. 11-0368, 2017 WL 2906560, at *8 (M.D. Pa. July 7, 2017).

[194] *Id.* at *1, *8.

[195] *Id.* at *8.

[196] *Id.*

[197] *Id.*

[198] *Id.* at *9.

[199] No. 11-C-1131, 2015 WL 6392609 (E.D. Wis. Oct. 22, 2015).

Institutionalized Persons Act ("RLUIPA").[200] The prisoner agreed that evidence about his religion was relevant to the case; however, he sought to prevent the government from identifying him as a member of the "[u]northodox . . . Nation of Islam (NOI)," which teaches "'highly inflammatory matters if taken out of correct context' such as that 'white people are the devil(s)' and 'the Black man is God,' which are 'irrelevant to determining religious diet facts.'"[201] The court denied the prisoner's motion in limine as "overbroad" and advised the prisoner that the defense would be allowed to "inquire into the sincerity of his professed religiosity."[202]

A separate line of cases involves Islamic witnesses taking the oath at trial before testifying. In *United States v. Anwari*,[203] the prosecutor inappropriately asked the defendant at the start of cross-examination whether he was a Christian, since he had taken his oath on a Bible, to which he answered, "I'm Islam, but I speak a lot of the Bible too."[204] The prosecutor claimed the question "was designed to ensure that [the defendant] took his oath seriously, not to impeach his credibility per se."[205] On appeal, the court found no plain error because—although the question might have been erroneous—there was no further mention of religion.[206] Despite the absence of reversible error, however, it seems difficult to fathom any other motive by the prosecutor than an attempt to highlight the defendant's religion for an inflammatory purpose. The Superior Court of Pennsylvania, in a 2018 case involving a non-Muslim defendant, reversed a conviction for exactly the same reason.[207]

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[200] *See id.* at *1. Codified at 42 U.S.C. §§ 2000cc to 2000cc-5, RLUIPA requires a compelling state interest furthered by the least restrictive means when substantially interfering with a prisoner's free exercise of religion. § 2000cc-1(a).

[201] *Tatum*, 2015 WL 6392609, at *3. *See also* Jerome Deise & Raymond Paternoster, *More Than A "Quick Glimpse of the Life": The Relationship Between Victim Impact Evidence and Death Sentencing*, 40 HASTINGS CONST. L.Q. 611, 623-24 (2013) (discussing the danger of jury prejudice in admitting evidence of religious beliefs).

[202] *Tatum*, 2015 WL 6392609, at *4. The court did advise the defense to question carefully because the NOI beliefs were not on trial. *Id.*

[203] 393 F. App'x 54 (4th Cir. 2010).

[204] *Id.* at 56.

[205] *Id.*

[206] *Id.*

[207] *See* Commonwealth v. Harrison, No. 2659 EDA 2016, 2018 WL 2424161, at *4 (Pa. Super. Ct. May 30, 2018) (reversing the defendant's conviction when, over objection, the prosecutor, "in an effort to impeach Appellant's credibility, repeatedly asked whether he had or was willing to put his hand on the Bible and swear that he was telling the truth").

A starker oath incident occurred in *Powell v. State*,[208] when the prosecution asked the defendant's wife during cross-examination whether she believed in taking oaths, to which she answered, "Yes, I do."[209] The prosecution inquired further about her "beliefs about taking oaths and telling the truth in our courts of law," and whether she was "free from having to tell the truth in a non-Muslim courtroom."[210] She answered, "My religion does not interfere with any oath within the United States, period. My religion is my religion, I'm a Muslim, that's it."[211] On appeal, the State of Georgia argued that the trial had taken place in 2013, prior to Georgia adopting the equivalent of Rule 610, and that under prior law, using religion to bolster a witness's credibility was permissible.[212] The State further argued that "a person's beliefs with regard to the meaning and consequences of taking an oath to tell the truth are clearly of probative value in a criminal prosecution."[213] The Supreme Court of Georgia did not need to address that argument, however, because the issue had not been preserved for appeal.[214]

Particularly difficult are cases involving female victims, where evidence is offered to broadly paint Islam as a religion that subjugates women. In *State v. Beasley*,[215] the Court of Appeals of Ohio found no error when the prosecutor asked the victim of domestic violence about Islam to explain why she had testified that she had previously lied about the defendant's assault against her.[216] Over objection, the prosecutor asked the victim about the "Muslim religion," including how women were "viewed" in that religion, and the reason that her religion "required" her to wear a "head covering."[217] The clear import of that questioning was to broadly tar Islam as a religion that subjugated women under the control of Muslim men, such as the defendant. The court held that these

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[208] Brief on Behalf of the Appellee, Powell v. State, 773 S.E.2d 762 (Ga. 2015) (No. S15A0600), 2015 WL 535609.

[209] *Id.* at 13-14.

[210] *Id.* at 14.

[211] *Id.*

[212] *Id.* at 15-16.

[213] *Id.* at 16.

[214] *See* Powell v. State, 773 S.E.2d 762, 767 (Ga. 2015).

[215] No. 88989, 2007 WL 2949521 (Ohio Ct. App. Oct. 11, 2007).

[216] *Id.* at *5.

[217] *Id.*

questions were proper because they sought to explore the victim's bias in favor of the defendant: "The state's theory was that appellant (as the victim's boyfriend), as the rule-maker in the relationship, was trying to force the victim to drop the charges and/or refuse to testify against him."[218] Demonstrating that a dominant male defendant forced his girlfriend-witness to lie on his behalf was, no doubt, a valid impeachment goal. The prosecution accomplished that goal, however, by stereotyping an entire religion as a proxy for this male dominance, rather than demonstrating the point through specific incidents, past behavior, or even cultural norms (rather than religious ones).[219] The dubious logic of the court's reasoning is illustrated by imagining, for instance, a prosecutor making the same points against a Christian woman by impeaching her with Bible references to women covering their heads and submitting to their husbands because "the head of the woman is man."[220]

There can be no doubt that some jurors harbor anti-Muslim sentiments, and the cases above demonstrate that parties are willing to use the Rules of Evidence to highlight a person's identification with Islam, potentially for improper purposes. These cases, in particular, support the call for stronger rules to prohibit religion-related evidence, especially when it may trigger unspoken or implicit prejudices among the jurors.

2. Concerns of Prejudice Against Neo-Paganism

For very different reasons than with Islam, adherents of neo-Pagan religions, such as Wicca, also worry that religion-related evidence about their beliefs will be used in prejudicial ways.[221]

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[218] *Id.*

[219] In a similar, older case, the court permitted cross-examination of the defendant accused of raping his daughter, permitting religious questions, such as whether a father is seen as a "dominant" or "powerful figure" in the Muslim religion. State v. Shamsid-Deen, 379 S.E.2d 842, 849 (N.C. 1989). The court saw this as proper evidence to show the father's intimidation of his daughter over a long period of time. *Id.* at 850. This again used religion as a proxy for evidence about the father's dominance in that family.

[220] 1 *Corinthians* 11:3, 5 (New Int'l Version) ("[T]he head of the woman is man . . . . [E]very woman who prays or prophesies with her head uncovered dishonors her head."). *See also Ephesians* 5:22 (New Int'l Version) ("Wives, submit yourselves to your own husbands as you do to the Lord.").

[221] Stewart, *supra* note 100, at 192-99.

Because neo-Pagan views are often associated with "witchcraft"—a word that can conjure up varied images, some negative—jurors may assume neo-Pagans are fantastical, delusional, or even evil or satanic.[222] When offered at trial, evidence of such beliefs is often used to question the veracity and overall credibility of the individual, as already seen in two cases discussed earlier.[223]

In *State v. Plaskett*,[224] the defendant in an aggravated incest case sought to impeach the credibility of his alleged child-victim based on her former Wiccan beliefs in "ghosts and witches," including her desire "to find out EVERYTHING . . . about the Occult," such as how "to tell fortunes" and about "tarot cards, stones and crystals," because she wanted "to become a REAL *witch*" and "learn how to use Powers."[225] The defense's theory was that the girl's former beliefs showed that she "had a vivid imagination and that she did not restrict her thinking to verifiable facts."[226] When the trial court did not permit the impeachment, the Kansas Supreme Court found reversible error.[227] Some have criticized that ruling as a failure to "recognize the victim's Wiccan religious beliefs as . . . outside the scope of permissible character impeachment."[228]

That same year, the Kansas Supreme Court decided another case involving Wiccan beliefs, *State v. Leitner*,[229] this time finding the prosecution inappropriately impeached a Wiccan defendant who murdered her husband (in claimed self-defense) after he abused her physically and emotionally.[230] The prosecution sought to explore the defendant's activities with "Wicca, a pagan religion, sometimes referred to as witchcraft,"[231] specifically that she "was using a black caldron, she cooked flowers in there, seeds, and did chants of some sort, and she slept with some type of tree branch . . . over her bed . . . as protection . . . from the [police]."[232] While the

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[222] *See id.* at 148-53.

[223] *See supra* notes 114-130 and accompanying text (discussing cases regarding the definition of religion).

[224] 27 P.3d 890 (Kan. 2001).

[225] *Id.* at 910.

[226] *Id.*

[227] *Id.* at 914.

[228] Stewart, *supra* note 100, at 194 (discussing *Plaskett*).

[229] 34 P.3d 42 (Kan. 2001).

[230] *Id.* at 47-51, 56.

[231] *Id.* at 51.

[232] *Id.* at 52.

defense won a pretrial motion in limine under Rule 610, preventing the prosecution from "making reference to, eliciting testimony or offering evidence of . . . [t]he alleged practice of 'witchcraft' by the accused,"[233] during trial, the prosecution convinced the court that the defense had opened the door to cross-examination about the defendant's "involvement with prostitution, witchcraft, and extramarital affairs."[234] The prosecution cross-examined the defendant about whether her husband had been upset because the defendant "had attended a pagan ritual involving witchcraft and . . . was dating a man involved in it."[235]

On appeal, the Kansas Supreme Court rejected the cross-examination, finding the record contained "no hint or innuendo that [the defendant's] abstract beliefs had any connection" to the murder.[236] The court recounted the "possible prejudice" of "the idea of witchcraft," which "has generated terror and contempt throughout American history."[237] The court noted that, "[e]ven in our culture today, satanic imagery associated with witchcraft continues," and that "our culture associates witchcraft with Satanic worship and other evil practices," making "[a]ny mention of a defendant's involvement with witchcraft . . . highly prejudicial."[238] The Court of Appeals of North Carolina was similarly skeptical about a prosecutor's "tenuous" introduction of evidence about a wife's Wiccan beliefs in a first-degree murder case where the defendant's boyfriend shot her husband, although the assumed error there was harmless under the circumstances.[239]

Similarly, in *In re Huff*,[240] a North Carolina lower court terminated the parental rights of a Wiccan couple after it "permitted the guardian ad litem to question the father about his

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[233] *Id.* at 51 (alterations in original).

[234] *Id.* at 51-52.

[235] *Id.* at 52.

[236] *Id.* at 55.

[237] *Id.*

[238] *Id.* at 55-56. For a further discussion on *Leitner*, see Stewart, *supra* note 100, at 195-97.

[239] State v. Theer, 639 S.E.2d 655, 658-60, 664 (N.C. Ct. App. 2007). In *Theer*, the trial court admitted testimony about the defendant's "sexual promiscuity and affairs," her "swinging," and "her belief in the Wiccan religion." *Id.* at 663. One scholar complained *Theer* failed to "dignify the religious rights of the defendant" by accepting "that Wicca had some relevance to the case." Stewart, *supra* note 100, at 197.

[240] 536 S.E.2d 838 (N.C. Ct. App. 2000).

religious beliefs" and whether his wife was "a 'witch,'" as well as "remarks by three witnesses, and six pages of inquiry" about their Wiccan beliefs.[241] Among other questions, the guardian ad litem asked the father "whether he was aware that his wife had once stated that the reason one of her children slept well on a particular night while in the hospital was because she had cast a spell."[242] The father also testified that he prayed in an "unorthodox" Wiccan way to find employment.[243] The lower court found this "limited religious inquiry . . . inherently relevant to the present or possible future impact of the parents' religious practices on the child."[244] At least one scholar has criticized the "dubious line of questioning" in this case, where the religion-related evidence emphasized "how the parents used Wicca in ways an orthodox religious practitioner would pray to their deity: for help finding a job and to help their child sleep well while in the hospital."[245] In the end, the appellate court upheld the termination of rights because "any error in allowing the religious inquiry was not prejudicial."[246]

Finally, in a case involving Satanism, *State v. Klinger*,[247] the prosecution put on evidence that the defendant (accused of indecent liberties with a child) had given his victim "a 'Satanic necklace,'" and that the defendant's Facebook page included images of "Satan, evil, and Christianity with a line drawn through it."[248] The victim also testified that the defendant "had tried to influence him by talking to him about Satanism and introducing him to satanic writing, poetry, and jewelry."[249] Denying a defense motion in limine based on Rules 403 and 610, the court found the evidence "relevant to the offenses for which defendant was charged as it showed the 'grooming process' defendant used to 'bond[ ]' with [the victim] and prevent disclosure of the sexual abuse."[250] Apparently, the court believed the probative value was sufficiently high as to not be

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[241] *Id.* at 840, 842-43.
[242] *Id.* at 842.
[243] *Id.*
[244] *Id.* at 844.
[245] Stewart, *supra* note 100, at 198 (criticizing *Huff*).
[246] *Huff*, 536 S.E.2d at 845.
[247] No. COA12-798, 2013 WL 1121335 (N.C. Ct. App. Mar. 19, 2013).
[248] *Id.* at *4.
[249] *Id.*
[250] *Id.* (alterations in original).

substantially outweighed by the undoubtedly strong potential prejudice of jurors against a Satanist.

The above attacks on religion—especially in the context of minority religions, such as Islam and Wicca—demonstrate that the current evidentiary rules do not provide sufficient protection from potential abuses to the dignity of a person's religion. The solution is to formally raise the bar when such evidence may create unfair prejudice.

D. Wider Latitude for Criminal Defendants to Admit Religion-Related Evidence

This Article has argued that the Federal Rules of Evidence should be strengthened to better protect religion-related evidence by raising the bar on the admission of such evidence—a recommendation that is accompanied by a proposed rule in Part V. This suggestion, however, does not propose raising the admission bar for defendants in a criminal case who are attempting to impeach the credibility of an accuser or other hostile witness. The desire for ample due process and fairness for defendants being prosecuted by the government justifies placing a lesser burden on persons fighting for their lives and liberty. In an abundance of caution, the proposal in this Article limits the admission of religion-related evidence by criminal defendants only through the usual evidentiary balancing under Rule 403, with the intent to provide wider latitude to those defendants.

1. Other Exceptions for Criminal Defendants in the Federal Rules

This Article's proposal to permit wider latitude for criminal defendants to admit religion-related evidence is not foreign to the Federal Rules of Evidence. Indeed, the Rules are filled with exceptions in favor of defendants in a criminal trial, either due to a general desire to give additional rights to those fighting the government for their lives or liberty, or simply because the U.S. Constitution requires it.[251]

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[251] *See, e.g.*, FED. R. EVID. 404 advisory committee's note to 2006 amendments (noting that the purpose of the "mercy rule," which allows a criminal defendant to introduce

Rule 104 gives criminal defendants extra procedural rights not offered to other litigants. First, Rule 104(c)(2) requires a judge to "conduct any hearing on a preliminary question so that the jury cannot hear it if . . . a defendant in a criminal case is a witness and so requests."[252] Next, Rule 104(d) ensures that criminal defendants "testifying on a preliminary question" do not become "subject to cross-examination on other issues in the case."[253] In addition, for the sake of the defendant, Rule 201(f) does not permit a judge in a criminal case to instruct the jury that it must accept a judicially noticed fact as "conclusive," unlike in civil cases.[254] Exceptions also exist in the area of character evidence, which is highly regulated under the Rules. For instance, it is often noted that the defendant holds the keys to character evidence in a criminal trial. Rule 404(a)(2) allows only a defendant in a criminal case to "[A] offer evidence of the defendant's pertinent trait," and also to "[B] offer evidence of an alleged victim's pertinent trait."[255] And Rule 404(b)(3) requires a prosecutor before trial to give the criminal defendant "reasonable notice" of the general nature "of any [404(b)] evidence that the prosecutor intends to offer at trial."[256]

Criminal defendants also receive special benefits in other areas of the 400-series of Rules. Rule 410(a) strongly protects pleas and plea discussions by criminal defendants.[257] Moreover, criminal defendants get more opportunities than civil litigants under Rule 412 to admit evidence about a victim's sexual behavior, assuming the evidence is offered "[A] to prove that someone other than the defendant was the source of semen, injury, or other physical evidence," or "[B] with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent," or where the exclusion of such evidence "[C] would violate the defendant's constitutional rights."[258]

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character evidence that would be inadmissible in a civil case, is to provide the "accused, whose liberty is at stake" the opportunity to build their defense).

[252] FED. R. EVID. 104(c)(2).

[253] FED. R. EVID. 104(d).

[254] FED. R. EVID. 201(f).

[255] FED. R. EVID. 404(a)(2)(A)-(B).

[256] FED. R. EVID. 404(b)(3).

[257] *See* FED. R. EVID. 410(a).

[258] FED. R. EVID. 412(b)(1).

Rules that govern the handling of witnesses also favor criminal defendants. When it comes to admitting a witness's criminal convictions to impeach truthfulness under Rule 609, judges are only required to admit such evidence "in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant"[259]—a much higher reverse-403 standard than for other witnesses.[260] Rule 609 also prohibits the admission of evidence of a criminal defendant's juvenile adjudications, unlike other witnesses.[261] Further, under Rule 612, if a writing is used to refresh the memory of a witness, adverse parties (including criminal defendants) have the right "to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony"; however, if a prosecutor fails to produce or deliver that writing to a criminal defendant, "the court must strike the witness's testimony or—if justice so requires—declare a mistrial," which is a much stronger penalty than that available for other wronged adverse parties.[262]

In the realm of hearsay, Rule 803(8) provides that public records that include "a matter observed" by "law-enforcement personnel" "while under a legal duty to report" are not admissible under the exception for public records in criminal cases.[263] Rule 803(10) also gives criminal defendants extra rights when a prosecutor intends to introduce a certification under Rule 902 that "a diligent search failed to disclose a public record or statement," with the criminal defendant getting "written notice of that intent at least 14 days before trial," and the chance to "object in writing within 7 days of receiving the notice."[264] Finally, under Rule 804(b)(3), a "statement against interest" is admissible only if it "is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability."[265]

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[259] FED. R. EVID. 609(a)(1)(B).

[260] *See* FED. R. EVID. 609(a)(1)(A) ("[E]vidence of a criminal conviction . . . must be admitted, subject to Rule 403, . . . [if] the witness is not a defendant.").

[261] *See* FED. R. EVID. 609(d).

[262] FED. R. EVID. 612(b)-(c).

[263] FED. R. EVID. 803(8)(A)(ii).

[264] FED. R. EVID. 803(10)(B).

[265] FED. R. EVID. 804(b)(3).

With so many exceptions for criminal defendants already in the Rules, granting them wider latitude to admit religion-related evidence does not seem out-of-bounds.

2. Use of Rule 610 by Prosecutors to Limit Criminal Defendants

The recommendation to give wider latitude to criminal defendants in admitting religion-related evidence arises from the observation that some prosecutors have used Rule 610 to prevent defendants in criminal trials from fully confronting their accusers. This Article already has discussed two cases where defendants in criminal cases were prevented from impeaching the credibility of their neo-Pagan accusers due to concerns about religion-related evidence.[266] Other examples also exist.

In *State v. Bharadwaj*,[267] a state court found that Rule 610 prevented a criminal defendant from impeaching his accuser's credibility in a case involving a religious cult.[268] After Bharadwaj had fled the cult, allegedly because its leader ("the Swami") had forced him to engage in sexual acts, a teenaged cult member accused Bharadwaj of having a sexual relationship with her while he was part of the cult.[269] Tried and convicted for child molestation, Bharadwaj argued on appeal that his trial defense counsel had been ineffective for failing to call experts to testify that the victim and her family—who were loyal to the Swami—had been brainwashed to the point of hypnosis.[270] Arguably, their testimony might have been inadmissible under Washington law, which held that facts known through hypnosis are inherently unreliable.[271] Bharadwaj argued that such testimony would not have violated Rule 610 because it was proof of the victim's "bias, not belief"—an exception to the rule.[272] While acknowledging the exception, the court found that Rule 610 would have barred Bharadwaj's proposed testimony

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[266] *See supra* notes 123-126 and accompanying text (discussing United States v. Jorell, 73 M.J. 878 (A.F. Ct. Crim. App. 2014)) and notes 224-228 and accompanying text (discussing State v. Plaskett, 27 P.3d 890 (Kan. 2001)).

[267] No. 74013-0-I, 2016 WL 7470084 (Wash. Ct. App. Dec. 27, 2016).

[268] *Id.* at *5-6.

[269] *Id.* at *1.

[270] *Id.* at *4.

[271] *Id.* at *4.

[272] *Id.* at *5.

because, to attack witness credibility, any experts would have discussed the witnesses' "beliefs towards their group and the Swami," including the victim's "belief in the Swami's divinity or her possible religious obligations to him and the group."[273]

In *United States v. Teicher*,[274]—a security frauds case against two Jewish defendants—a federal appellate court found that Rule 610 prevented the criminal defendants from impeaching a government witness to show that he was "biased against Jews."[275] The defendants sought to impeach a key government witness for bias based on the witness's "religious thoughts" about "Jewish traders" who "worshipped money too much and false gods or false messiahs," and who had believed "messianic thought" and "that perhaps there would be repercussions" against those Jews.[276] The court agreed that Rule 610 allowed evidence to show "interest or bias," yet it felt "compelled" by the Rule to exclude the proposed evidence.[277] The witness, who was also of Jewish descent, had "messianic beliefs" and claimed he was reluctant to testify because "Jews aren't supposed to turn other Jews over."[278] Incredibly, the court still found that the witness's beliefs were "not probative of bias" and thus inadmissible under Rule 610.[279]

As a final example of limiting impeachment, in *United States v. Kalaydjian*,[280] two Muslim prosecution witnesses requested to be sworn on the Quran rather than the Bible, but later requested only an "affirmation" under Federal Rule of Evidence 603.[281] Citing Rule 610, the court stopped the defense from cross-examining these witnesses regarding their "reasons for refusing to swear, in order to cast doubt on [their] credibility."[282] The Second Circuit rejected the defense argument that Rule 610 did not apply, stating that the desired cross-examination would "raise the following inference: if a

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[273] *Id.* Bharadwaj's hypnosis theory was weak, and he likely would have lost his case on appeal for other sound reasons. Still, the court applied Rule 610 (wrongly) to prevent his impeachment of several hostile witnesses, including his accuser.

[274] 987 F.2d 112 (2d Cir. 1993).

[275] *Id.* at 114, 118-19.

[276] *Id.* at 118.

[277] *Id.* at 118-19.

[278] *Id.*

[279] *Id.* at 119.

[280] 784 F.2d 53 (2d Cir. 1986).

[281] *Id.* at 55.

[282] *Id.*

man is religious, he will be willing to swear on his religion's bible; but if he refuses to swear, his testimony will be untrustworthy"—impermissible under Rule 610 because it would allow the defense "to inquire into the sincerity and genuineness of [the witness's] Muslim beliefs."[283]

Further, some prosecutors attempt to use Rule 610 to limit criminal defendants from presenting religion-related evidence to support acquittal. In *United States v. Warren*[284]—a prosecution for concealing an illegal immigrant—the defendant raised the Religious Freedom Restoration Act ("RFRA") as a defense because he had assisted the immigrant as part of a church ministry through the Unitarian Universalist Church.[285] The prosecution objected to that evidence under Rule 610, arguing that it would be inadmissible because "[t]hese matters are irrelevant to charges regarding the defendant's actions" and "to the defendant's *prima facie* RFRA case and is certainly inadmissible under Rule 610 as evidence proffered only to bolster defense witnesses' testimony."[286]

This Article's proposal to give wider latitude for defendants in criminal cases is intended to allow the types of impeachments and proof foreclosed in the above examples. Allowing this extra latitude undoubtedly will cause friction with the principles of religious dignity discussed earlier. On balance, however, the defense of an accused person in a criminal prosecution provides a compelling justification to temper those concerns, subject to the prudent balancing already available under Rule 403.[287]

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[283] *Id.* at 56. *See also* Marie A. Failinger, *Islam in the Mind of American State Courts: 1960 to 2001*, 28 S. CAL. REV. L. & SOC. JUST. 21, 52-53 (2019) (discussing examples of anti-Muslim prejudice in courts and citing Commonwealth v. Mimms, 335 A.2d 516, 518 (Pa. Super. Ct. 1975), *rev'd on other grounds*, 370 A.2d 1157 (Pa. 1977), *rev'd sub nom.* Pennsylvania v. Mimms, 434 U.S. 106 (1977), as another example of using a Muslim witness's affirmation as a way to attack credibility for truthfulness).

[284] Government's Motion *in Limine* Regarding Evidence Related to RFRA Defense, United States v. Warren, No. 18-CR-233-TUC, 2019 WL 9098533 (D. Ariz. verdict rendered Nov. 20, 2019), 2019 WL 2365290.

[285] *See id.* at 1-3.

[286] *Id.* at 2-3.

[287] *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury . . . .").

IV. FOURTH PROPOSITION: ALLOWING THE ADMISSION OF SOME RELIGION-RELATED EVIDENCE

Up until now, this Article has argued that the Rules of Evidence need to be strengthened to protect religion-related evidence, raising the bar for evidence that could be unfairly prejudicial, except when offered by criminal defendants. But in Part IV, this Article argues that, where religion-related evidence does not unfairly prejudice a person, it should be admitted, whether to rehabilitate credibility or for other relevant purposes.

A. In Defense of Positive Religion-Related Evidence

Rule 610 focuses exclusively on prohibiting the use of religion or religious belief as a proxy for a witness's truthfulness.[288] The Rule's rejection of the common-law connection between religiosity and truthfulness is based on the modern view that "the probative value of a witness's religious beliefs is almost always nearly non-existent, if it is even relevant at all; thus, such evidence would usually be excluded by Rules 402 and 403."[289] The overbroad premise of that conclusion deserves challenge.

No doubt, rejection of the ancient common-law view about truthfulness and non-belief is appropriate when considering the negative side of that proposition: that non-believing witnesses are necessarily less truthful because they do not believe in a higher power.[290] That was the true injustice of the ancient view, which did not appreciate the moral compass that could guide a non-religious person. As one treatise explains, "If the witness is an atheist or

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[288] *See supra* notes 45-55 and accompanying text.

[289] Schaffzin, *supra* note 99, at 563. *See also* 28 CHARLES ALAN WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6152 (2d ed. 2012) (noting the "low probative value" of religion-related evidence); STEPHEN A. SALTZBURG & KENNETH R. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 560 (4th ed. 1986) (finding Rule 610 to be "probably grounded in a judgment that such evidence is not highly probative, and that it is unseemly for courts to invade unnecessarily this very personal sphere of the witness' life"); Pham v. Beaver, 445 F. Supp. 2d 252, 259 (W.D.N.Y. 2006) (noting the impropriety of a prosecutor's "attempt to bolster a witness's credibility on the basis that he subscribes to a particular religion, or to suggest that a witness is more credible simply because he is religious").

[290] *See* Paul W. Kaufman, Note, *Disbelieving Nonbelievers: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom*, 15 YALE J.L. & HUMANS. 395, 416-18 (2003) (noting this history).

agnostic, his views may be the product of honest and careful thought rather than the product of an antisocial or destructive bent. Hence, they may have no bearing on the question whether he is truthful generally or in his testimony."[291] Such an unjust rule deserved to be discarded; although, even when it was in force, the rights of non-believing witnesses were given consideration by some courts.[292]

But what of the corollary to that view, which has been equally rejected in modern times without serious testing? Is it truly denied that a witness's sincere belief that God requires truthful testimony (possibly on pains of eternal punishment) will make it more likely the witness will testify truthfully? That very concept undergirds the oath requirement, which still persists today (albeit with an opt-out provision).[293] The same treatise quoted above also states, "If the witness is a devout follower of any major sect, his faith may bear on his general truthfulness and the likelihood that he will speak the truth on the stand . . . ."[294] Another treatise explains, "All religions condemn . . . bearing false witness . . . . Logically, then, that the defendant is a good Christian, [Muslim], Jew, etc. is at least as pertinent a trait of character as obedience to law."[295] In Georgia, that positive view of religion and truthfulness persisted through 2013, until it was changed legislatively without

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[291] 3 MUELLER & KIRKPATRICK, *supra* note 75, § 6:58. *But see id.* § 6:59 (recognizing that "a radical ideological commitment of a nonreligious nature may bear on the probability that a witness will tell the truth," and noting that "it is sometimes hard to distinguish religious from nonreligious beliefs").

[292] *See, e.g.*, Commonwealth v. Smith, 68 Mass. (2 Gray) 516, 516 (1854) (noting that "belief in the existence of a God is held by us necessary to the competency of a witness," but holding that the witness is "not to be questioned as to his religious belief, nor required to divulge his opinions upon that subject in answer to questions put to him while under examination," but instead, that "the fact is to be shown by other witnesses").

[293] *See* FED. R. EVID. 603 (permitting a witness to take an "affirmation to testify truthfully"). *See also id.* advisory committee's note to 1972 proposed rules ("Affirmation is simply a solemn undertaking to tell the truth . . . ." Rule 603 "is designed to afford the flexibility required in dealing with religious adults, atheists, [and] conscientious objectors . . . .").

[294] 3 MUELLER & KIRKPATRICK, *supra* note 75, § 6:58.

[295] 3 CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 16:16 (7th ed. 1998). *See also* State v. Gonderman, 531 N.W.2d 11, 15-16 (N.D. 1995) (suggesting a defendant's religious beliefs might be offered to prove a pertinent character trait, but finding the proffered evidence was offered by an improper method).

explanation.[296] Moreover, even a century ago, courts recognized that adherents of all variety of sects were to be treated equally and with respect on this matter.[297]

So what justification is given for discarding this "likelihood" of truthfulness that makes many believers "obedien[t] to law"? Merely, the unconfirmed notion that "common experience suggests religious persons are not necessarily more truthful, nor more likely to speak truthfully, than others."[298] This unprovable and anecdotal modern idea of "common experience" defies centuries of tradition. While it may be true that some religious persons are not more truthful due to their beliefs, that does not discount the possibility that devout believers are influenced by their faith to testify truthfully. As with other matters of credibility, jurors have the ability to assess how sincere they believe the witness is who relies upon faith to bolster truthfulness, where appropriate.

Apparently, scholars have discarded the traditional stance (i.e., that believers testify truthfully due to their beliefs) for a more practical reason: "The difficulties in deciding how or whether religious belief or the lack of it bears on veracity in any given case are too great to be worth the effort."[299] Another treatise captures that sentiment by explaining that such an effort can "waste time" and "confuse the jury, because theology is an abstract and esoteric matter."[300] In the limited circumstances where it is appropriate to

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[296] *See* JOHN D. HADDEN, GREEN'S GEORGIA LAW OF EVIDENCE § 6:38, Westlaw (database updated Oct. 2021) (explaining that, "[u]nder pre-2013 law, religious belief could 'go . . . to the credit of the witness,' and courts had held that a witness's religious belief could be considered in connection with . . . credibility") (alteration in original); Donkle v. Kohn, 44 Ga. 266, 270-71 (1871) (same). *See also* HADDEN, *supra*, § 6:38 ("The current Code . . . appears to eliminate the previously permitted use of religious belief to bolster credibility.").

[297] *See, e.g.*, Allen v. Guarante, 148 N.E. 461, 462 (Mass. 1925) (stating, in a case involving a Christian Science witness, that courts must "utterly banish[]" any "direct or covert incitement of religious prejudice and open or veiled sarcasm or mockery of religious beliefs or affiliations" when determining witness credibility due to religion, and explaining that "[a]dherence to any particular sect is no basis for argument in this respect").

[298] 3 MUELLER & KIRKPATRICK, *supra* note 75, § 6:58. *See also* Redman v. Watch Tower Bible & Tract Soc'y of Pa., 630 N.E.2d 676, 678 (Ohio 1994) ("[C]ommon experience suggests that affiliation with any particular religious belief is not necessarily indicative of a predisposition to testify honestly.").

[299] 3 MUELLER & KIRKPATRICK, *supra* note 75, § 6:58.

[300] PARK & LININGER, *supra* note 45, § 7.1.

bolster an attacked witness's truthfulness,[301] however, this fear seems overblown.

A more serious justification for the modern prohibition has already been addressed in this Article: that "the admission of evidence regarding religious beliefs could result in prejudice, in that jurors may favor or disfavor a witness based on the similarity between the jurors' and the witness's religious views."[302] Where evidence of a person's religious beliefs can result in unfair prejudice to the person, this Article's proposed new rule offers a heightened bar to exclude such evidence. Thus, the worst possible concerns are already addressed, and there is little risk in admitting positive evidence to bolster truthfulness. Any risk that might still exist, however, can be handled with a limiting instruction, the way all other sensitive but relevant evidence is handled.[303] For instance, as the next Section illustrates, there is a laundry list of occasions where religion-related evidence is marshaled against a criminal defendant under the current Rules.[304] If the risks of such evidence can be tolerated on those occasions, then it seems equally acceptable to tolerate the risk when evidence can be used to assist a witness.

For all these reasons, this Article's proposed Rule, which sets a high bar against religion-related evidence, does not apply to efforts to bolster credibility where it is appropriate to explore a witness's truthfulness, as noted in the next Section.

B. Relevant Positive Uses for Religion-Related Evidence

Religion-related evidence sometimes can have relevant uses without working unfair prejudice against a person. Where

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[301] *See* FED. R. EVID. 608(a).

[302] *Id. See also* 3 MUELLER & KIRKPATRICK, *supra* note 75, § 6:58 ("If a witness belongs to a small sect that may be disliked or misunderstood (or both), relevancy problems may be compounded by the risk that inquiry into beliefs would become abusive or inject prejudice, particularly (but not only) where the witness is a party.").

[303] *See* FED. R. EVID. 105.

[304] *See, e.g.*, PARK & LININGER, *supra* note 45, § 7.6 (listing permissible uses of religion-related evidence to include: "to show the defendant's motive"; "that the defendant exploited a position of religious authority to assault vulnerable victims"; "that the complainant was devoutly religious . . . to establish . . . her mental anguish"; that the defendant wore "religious attire while committing the offense"; "that the accused sought to distract" investigators "by prominently displaying religious items"; "if relevant to an affirmative defense"; and "if necessary to explain . . . delay in reporting" the crime).

appropriate, the rules should permit such evidence to rehabilitate credibility and for other relevant reasons, as discussed below.

1. Evidence Offered to Rehabilitate Credibility

In light of the policy discussion above, the Rules of Evidence should not flatly prohibit the use of religion-related evidence to support a witness's truthfulness. It may be necessary to explore a witness's motivations for testifying truthfully, especially after the witness has been impeached. This scenario often presents itself in criminal cases, where prosecutors are forced to use tainted witnesses, as shown in the following cases.

A religious conversion experience may be the reason a witness of questionable credibility comes forward to testify truthfully. In *United States v. Johnson*,[305] a robbery case, the prosecution witness (Moss) referenced his Islamic faith when he testified on direct examination that his "spiritual beliefs" were part of the reason he did not lie to the government as part of a plea agreement.[306] The defense unsuccessfully argued on appeal that this was an improper attempt "to bolster [Moss's] credibility in the eyes of the jury. Subsequently, while being cross examined, Moss seized every opportunity to interject his conversion and religious beliefs to try to convince the jury that because of those beliefs he simply would not lie."[307] Similarly, in *United States v. McGill*,[308] the prosecution discussed with a key witness how he had recently converted "to Islam while in prison," with later testimony that the witness was motivated "to cooperate with the government . . . in part by his conversion and the concomitant need for him to make amends for his past wrongdoing."[309] On appeal, the court found that any potential error was harmless.[310]

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[305] 645 F. App'x 954 (11th Cir. 2016).

[306] Initial Brief of the Appellant Daryl Davis at 35-36, *Johnson*, 645 F. App'x 954 (No. 13-14676), 2015 WL 1395354, at *35-36.

[307] *Id.* at 38.

[308] 815 F.3d 846 (D.C. Cir. 2016).

[309] *Id.* at 941.

[310] *Id.* at 941-42. The court found that the prosecution "made no mention of this testimony in its opening or closing arguments, nor did it argue or even suggest to the jury that [the witness's] religious beliefs bolstered his credibility." *Id. See also* United States v. Moore, 651 F.3d 30, 75-76 (D.C. Cir. 2011) (finding no harmful error when two prosecution witnesses revealed they were motivated to testify for the government

If a religious conversion is part of a witness's motivation for being truthful or cooperative, that witness should be entitled to testify about it, especially where the witness's credibility has been attacked. But that evidence might also be relevant for other purposes. In *Bergna v. Benedetti*,[311] for instance, the trial court recognized a proper use for evidence of a jailhouse conversion that was not offered "to enhance credibility."[312] The court found that the witness's "religious conversion is what inspired him to attend Bible Studies, and it was after one such meeting . . . that he and [the defendant] had their [incriminating] conversation," and that a later mention to the witness's pastor came up when he "was asked about who he had talked to about coming forward and testifying."[313] As the court in *People v. Ruiz*[314] put it, the government witness's religious conversion "was relevant to show why he refused to cooperate with police until the eve of trial," especially in light of repeated attacks on the witness's conflicting accounts prior to that time.[315]

Likewise, religious belief may be the reason a previously untruthful witness has now decided to tell the truth. In *United States v. Dohan*,[316] the prosecution attempted on redirect examination to rehabilitate the credibility of a witness who had admitted to lying in other proceedings, asking the witness, "What actually happened to you to cause you to . . . start telling the truth?"[317] The witness stated that he considered himself to be "a moral, Christian man," and that his time in jail had led him to "a tremendous amount of self-examination" and a recognition that he had "hurt a lot of people."[318] The witness then explained, "I was

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because they had converted to Islam, and on cross, the defense attempted to demonstrate that the conversions of those two witnesses were a sham), *aff'd sub nom.* Smith v. United States, 568 U.S. 106 (2013).

[311] No. 10-CV-00389, 2016 WL 4473422 (D. Nev. Aug. 23, 2016), *aff'd*, 721 F. App'x 729 (9th Cir. 2018).

[312] *Id.* at *23.

[313] *Id.*

[314] No. 14-2496, 2016 WL 4761860 (Ill. App. Ct. Sept. 12, 2016).

[315] *Id.* at *11.

[316] Nos. 00cr48, 09cv192, 2013 WL 1276549 (N.D. Fla. Feb. 6, 2013), *report and recommendation adopted*, Nos. 00cr48, 09cv192, 2013 WL 1248220 (N.D. Fla. Mar. 27, 2013).

[317] *Id.* at *33 (alteration in original).

[318] *Id.*

locked in solitary confinement . . . . And during that time with, basically, myself and God, I determined that I had to do everything I could to try to make things right."[319] The court found that the defense had not timely objected to the questioning and that any potential error was harmless because the prosecution "agreed not to mention the unsolicited religious reference in its closing argument."[320] In any event, if a witness's motivation for telling the truth is sincerely related to faith, it should still be admissible.

2. Evidence Related to Witness Background or Religious Identity

A person's religious affiliation, education, or career may be an important part of their background. There is little reason for a court to fear the religious aspects of a person's life and to divorce them from the person's identity while in court, especially where that identity is relevant for other reasons. Any concerns about jurors placing undue emphasis on religion can be resolved with a limiting instruction under Rule 105—the appropriate remedy whenever a court has concerns about the jury misusing evidence.[321]

For example, witnesses often testify to their interests, hobbies, and family situations to provide a better appreciation for their whole person so that the factfinder can better assess their testimony. In *Myers v. State*,[322] the grandmother of the defendant testified for the prosecution and was asked, as the trial court put it, "some introductory questions just so the jury knows who the witness is."[323] In addition to providing "background about her children and family" and "that she had lived in her home for forty-five years, that she was homemaker, that her husband was deceased, and that her hobbies included reading, writing, and gardening," the witness also testified "that she had completed some studies at a Bible college," had "authored a children's Bible school curriculum," had "attended Maple Grove Christian Church for nine

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[319] *Id.*

[320] *Id.*

[321] *See* FED. R. EVID. 105 (requiring that the court, on request, "restrict the evidence to its proper scope and instruct the jury accordingly" if evidence is admitted "for a purpose," but not "for another purpose").

[322] 33 N.E.3d 1077 (Ind. Ct. App. 2015).

[323] *Id.* at 1100-01.

years," and had written "poetry and ladies' devotionals."[324] Requiring witnesses such as this one to divorce the religious parts of their lives from the secular parts is unnecessary and demeans the role of religion in a person's background. Indeed, some mention of religious activities may be "unavoidable" with witnesses whose faith is important to them.[325]

Additionally, a witness's background may have ties to other relevant issues in the case. In *Duval v. Law Office of Andreu, Palma & Andreu, PL*,[326] the defendants tried to use Rule 610 to exclude the "religious beliefs, education, and . . . employment" of a plaintiff with a "masters [sic] degree in divinity and a doctorate degree in theology."[327] The court ruled narrowly, concluding that either party could "inquire into Plaintiff's calling or occupation" to "establish background information," but not to attack or support the plaintiff's credibility.[328] Likewise, in *Vargas v. Michaels Stores, Inc.*,[329] the defendant tried to use Rule 610 to stop the plaintiff from making "[a]ny reference" to his "religion, religious preference, or participation in non-secular activities" because such evidence "would serve only to garner sympathy from those members of the jury with similar religious backgrounds."[330] The court denied the motion, agreeing with the plaintiff that his "master's degree in theology is relevant to his background and employability," and his counseling with a priest "should not be categorically excluded" because documentation "of emotional troubles related to his termination" was relevant to damages.[331]

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[324] *Id.* at 1102.

[325] *See, e.g.*, Commonwealth v. Dahl, 724 N.E.2d 300, 307-08 (Mass. 2000) (noting that religious affiliation references during the testimony of an eyewitness studying to be a nun were "unavoidable" as "part of a factual recitation of the witness's daily activities," where the witness went "to the police with incriminating evidence only after consulting with her priest; and the witness testified that she had attended morning mass and evening family devotions on the day" of the crime, but also concluding that the "witness should not have been allowed to testify with rosary beads").

[326] No. 09-22636-CIV, 2010 WL 11506699 (S.D. Fla. June 30, 2010).

[327] *Id.* at *1.

[328] *Id.*

[329] No. 16-cv-1949-T-33JSS, 2017 WL 3723655 (M.D. Fla. Aug. 29, 2017).

[330] *Id.* at *3-4.

[331] *Id.* at *4. *See also* Wilson v. Munson Med. Ctr., No. 297780, 2013 WL 1830864, at *4-5 (Mich. Ct. App. Apr. 30, 2013) (finding no error when a medical doctor, who was also a nun, briefly referenced her professional connection with a religious community, noting that "[a]ll of the other doctors in this case were asked to detail their educational

In contrast to the above cases, in *Beem v. Providence Health & Services*,[332] the court prohibited a hospital from presenting evidence of its Catholic affiliation.[333] Citing Rule 610, the court would "not allow what is effectively vouching in the form of Providence putting on evidence of its religious affiliation, history, and values in order to argue or infer that all decisions were made in accordance with its five core values and thus Providence could not have discriminated against Ms. Beem."[334] The court did acknowledge, however, that "some evidence of Providence's affiliation will undoubtedly come into evidence through the documentary evidence."[335] But if the hospital's Catholic identity and values influenced its passage and enforcement of certain employment policies, it seems unfair to keep those relevant facts out of evidence merely because they were intertwined with the hospital's religious affiliation.

Finally, some witnesses wear symbols of their faith on their person as part of their own spiritual practices—a reality that has been accepted and respected by courts in the past.[336] In *State v. Tate*,[337] however, a prosecutor convinced the judge to require a testifying criminal defendant to "put a cross that he was wearing around his neck inside his shirt so that it was not visible to the jury, arguing that Tate's cross would be 'sending a religious connotation to the jury.'"[338] Tate objected, citing his right to the free exercise of religion under the First Amendment to the U.S. Constitution and under the "Freedom of Conscience Clause" in Minnesota's constitution, which applies strict scrutiny to government actions

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experience and medical backgrounds and Dr. Supanich was no different from the others").

[332] No. 10-CV-0037, 2012 WL 13018728 (E.D. Wash. Apr. 19, 2012).

[333] *Id.* at *1.

[334] *Id.*

[335] *Id.*

[336] *See, e.g.*, Joseph v. State, 642 So. 2d 613, 614-15 (Fla. Dist. Ct. App. 1994) (finding that the Free Exercise Clause permitted a defendant to wear clothes with "ostensible religious pictures and names" related to his beliefs, which were "not mainstream"); *In re* Palmer, 386 A.2d 1112, 1113-14 (R.I. 1978) (finding a violation of the Free Exercise Clause when the court did not allow a Sunni Muslim defendant to wear his prayer cap in court).

[337] 682 N.W.2d 169 (Minn. Ct. App. 2004).

[338] *Id.* at 174.

that burden religion.[339] Apparently, the district court believed that the state had a "compelling state interest" to hide the defendant's cross because jurors were "captives of the system and would not have that same right to express their religious beliefs or the right to refuse to have other's religious beliefs expressed to them."[340] This theory did not support a compelling interest because it was based on the faulty premise that the appearance of a religious symbol offends the rights of those viewing the symbol.[341] While the appellate court found error, it did not reverse Tate's conviction because he had conceded that "there is no articulable prejudice here."[342]

3. Evidence Relevant to the Issue of Damages

Religion-related evidence may be relevant to the issue of damages, especially in tort cases. Such evidence can help demonstrate the existence or amount of harm to a plaintiff, or perhaps to show mitigation of an injury or loss. In either case, there is little reason to exclude evidence at trial that is not unfairly prejudicial merely because it touches upon the topic of religion.

In *Dennis v. Progressive Northern Insurance Co.*,[343] the defendant unsuccessfully sought to use Rule 610 to bar the plaintiff and her witness, Terry Dennis, from "discussing their religious beliefs" or stating that they "are 'in the ministry' or 'called to the ministry,' identifying Terry Dennis as a 'chaplain' or 'ordained minister,' or providing any testimony or evidence concerning their faith."[344] The plaintiff had argued that her status in the religious ministry was relevant to the issue of damages, including her "loss of reputation, embarrassment, and mental pain and suffering."[345]

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[339] *Id.* ("Courts must ask if (a) the objector's belief is sincerely held; (b) the state regulation burdens the free exercise of religious beliefs; (c) the state interest in the regulation is compelling; and (d) the state regulation uses the least restrictive means.").

[340] *Id.* at 174-75.

[341] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2090 (2019) (finding no constitutional violation by display of a giant cross as part of a public war memorial); Van Orden v. Perry, 545 U.S. 677, 691-92 (2005) (allowing display of the Ten Commandments on the grounds of the state capitol despite offense to the observer).

[342] *Tate*, 682 N.W.2d at 175.

[343] No. CIV-17-182, 2018 WL 4871039 (W.D. Okla. Apr. 9, 2018).

[344] *Id.* at *5.

[345] *Id.*

Similarly, in *Brooks v. Caterpillar Global Mining America, LLC*,[346] the defendant argued under Rule 610 that the court should "preclude any reference or evidence of Plaintiffs' religious beliefs or habits."[347] The court, however, ruled that the plaintiffs "may properly testify regarding [the injured husband's] church activities to illustrate hardships imposed on [him] by his physical condition in his efforts to attend church or participate in other religious activities."[348] Both of these cases illustrate instances where religious affiliation is relevant in determining how much impact an injury has had upon a plaintiff's personal or professional life.

Religion-related evidence can also show mitigation of a plaintiff's harm. In *Estate of Karic v. PeaceHealth*,[349] the plaintiffs sought to exclude all references to the Islamic religion during a trial involving a child who lost his father due to the alleged medical malpractice of the defendant.[350] In response, the defendant non-profit organization noted that the plaintiff "may try to offer evidence from [a] school counselor . . . about the struggles he has faced since losing his father."[351] The defendant argued that such evidence would trigger its right "to explain to the jury that many of the son's problems discussed in the counseling records were caused by anxiety from being bullied at school by his classmates for being Muslim," which could have been the "true cause" for all of his school absences.[352] This evidence could have mitigated the claimed damages without causing unfair religious prejudice to the child, who was shown to be a victim of bigotry.

Likewise, in *South v. Austin*,[353] the two plaintiff children of a deceased mother in a wrongful death case sought to prevent the defendants from presenting evidence regarding statements they made in their depositions that "they believe in heaven and that

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[346] No. 14CV-00022, 2017 WL 3401476 (W.D. Ky. Aug. 8, 2017).

[347] *Id.* at *6.

[348] *Id.* at *7.

[349] Defendant's Response to Plaintiffs' Motions *in Limine*, Est. of Karic v. PeaceHealth, No. 16-2-02297-2, 2018 WL 2398455 (Wash. Super. Ct. Mar. 20, 2018), 2018 WL 2386497.

[350] *See id.* at 4.

[351] *Id.*

[352] *Id.*

[353] No. 15CV342, 2016 WL 7209554 (S.D. Miss. Dec. 12, 2016).

their mother is in it."[354] The defendants argued that this evidence would show that the children's emotional distress was mitigated by the comfort they took from their beliefs about heaven.[355] The court rightly permitted the inquiry, which had the potential to shed light on the depth of the children's pain and anguish.[356] When evidence such as that presented in these cases will not cause unfair prejudice to the religious (or non-religious) person, then it makes no sense to exclude it at trial.

4. Pertinent Character Evidence

Perhaps the most controversial positive use of religion-related evidence is to show a person's religious character. This type of evidence requires sensitive handling because the Rules of Evidence generally disfavor character evidence and attempt to minimize its admission.[357] Still, there is precedent for using character as a defense based on secular character traits in certain circumstances. For instance, in the prosecution of a military member, the defendant has traditionally been permitted to present a "good soldier defense" (i.e., evidence of the member's good military character).[358] This is based on a longstanding military tradition that, "[i]n order to show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing and evidence of his general character as a moral well-conducted person and law-abiding citizen."[359] The Court of Military Appeals has explained that a "person of good military character is less likely to commit offenses which strike at the heart of military discipline and

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[354] *Id.* at *2.

[355] *Id.*

[356] *See id.*

[357] *See* FED. R. EVID. 404(a).

[358] *See* Rory T. Thibault, *"The Good Soldier Defense Is Dead. Long Live the Good Soldier Defense": The Challenge of Eliminating Military Character Evidence in Courts-Martial*, ARMY LAW., Dec. 2015, at 19, 19-20.

[359] United States v. Vandelinder, 20 M.J. 41, 44 (C.M.A. 1985) (citing MANUAL FOR COURTS-MARTIAL UNITED STATES 243 (1951)).

readiness."[360] The good soldier defense has been justified by several policy considerations.[361]

A similar analysis could be used with religious beliefs to demonstrate a witness's character where a particular character trait is pertinent. For example, in *United States v. Brown*,[362] a criminal defendant offered character evidence that he would not have used illegal drugs "because of his personal, deeply held religious beliefs" against drug use.[363] While recognizing that Rule 610 rested upon "a national ideal of religious freedom and toleration, and of personal privacy,"[364] the court allowed the character evidence because "there would have been no invasion of appellant's privacy because he was the proponent of the evidence," and because the defendant had offered "character evidence, based on the witness' observation of appellant's behavior."[365] In appropriate situations, such as here, a factfinder could infer from these beliefs that a person would be more likely to act in accordance with them. Indeed, to allow a defense based on secular traits (i.e., good military character) but not religious ones is hardly equal treatment for religion.

Further, religion-related character evidence is sometimes used during sentencing to show the impact of a crime or the character of the defendant. In *Pantoja v. State*,[366] the defendant was permitted to put on a witness to testify about the defendant's good character—to include his religious upbringing—as part of the assessment of the defendant's "suitability for community supervision."[367] The court explained that, "in determining an appropriate punishment" for the

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[360] *Id.* at 45 (quoting United States v. Vandelinder, 17 M.J. 710, 712 (N-M.C.M.R. 1983) (Gladis, J., dissenting)).

[361] One military lawyer and scholar has detailed four key policy considerations: "(1) military life entails a 'separate society,' (2) the unique nature of military offenses, (3) Soldiers are 'under surveillance' and subject to constant scrutiny, and (4) the long standing 'tradition' of allowing military character evidence at trial." Thibault, *supra* note 358, at 27.

[362] 41 M.J. 1 (C.M.A. 1994).

[363] *Id.* at 2-3.

[364] *Id.* at 3 (quoting 3 LOUISELL & MUELLER, *supra* note 101, § 328, at 385).

[365] *Id.* at 3-4. *See also* Jackson v. Allstate Ins. Co., 785 F.3d 1193, 1199, 1202-03 (8th Cir. 2015) (refusing to allow testimony from several witnesses "about Jackson's religious proclivities and her good moral character").

[366] 496 S.W.3d 186 (Tex. App. 2016).

[367] *Id.* at 191-92.

defendant, "a sentencer might rationally want to take into account testimony of his good character and . . . that he possessed indicia of a religious upbringing."[368] In addition, one case study of capital sentencing proceedings revealed victim impact evidence that focused on the character of the victim as being "a religious man" who "loved God."[369] Some scholars worry that such evidence might sway jurors "to find the declarant . . . more credible simply because of a juror's and victim's shared religious beliefs"—a result that allegedly "would violate the rules."[370] They suggest that a "deceased victim's belief in God is irrelevant, since his credibility as a witness is not an issue," and the purpose could be dangerous by showing that the victim's "belief in God makes him a better person than the defendant."[371] But this type of evidence is not as problematic as they suggest. Juries often take into account abstract considerations when assessing the impact of a crime or injury, and any concerns about misusing such evidence can be handled through a limiting instruction.[372] Excluding a person's background or victim impact information merely because of its religious character would flatly discriminate against religion and underestimates the ability of the factfinder to handle such evidence.

5. Other Relevant Uses of Religion-Related Evidence

In addition to bolstering truthfulness, presenting a person's background, exploring damages, and presenting pertinent character traits, countless other relevant reasons exist to present religion-related evidence in a way that does not cause unfair prejudice to the person.[373] Often, the evidence seeks to explain a person's actions.

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[368] *Id.* at 192.

[369] Deise & Paternoster, *supra* note 201, at 623.

[370] *Id.*

[371] *Id.* at 624.

[372] *See* FED. R. EVID. 105.

[373] *See, e.g.*, State v. Schreiber, No. 2 CA-CR 2016-0287, 2017 WL 3747132, at *2-3 (Ariz. Ct. App. Aug. 30, 2017) (finding a witness's Mormon affiliation was relevant to show the witness had learned sign language while serving as a missionary).

In *Foster v. Bergh*[374]—a habeas corpus petition by a man convicted of sexual assault—the prosecution offered relevant evidence of the victim's religion-related activity in a way that would not unfairly prejudice her.[375] Specifically, the prosecutor offered "evidence relating to the victim's praying" to explain "how the victim coped with the sexual assaults and why she would return to the home after she had left for college."[376] Thus, the purpose of this evidence was to explain the victim's actions, which might be confusing to a jury. The court rightly found this to be relevant and not suggesting the victim was "more credible."[377] Similarly, in *Commonwealth v. Field*,[378] a judge allowed evidence of a photograph from the defendant's jail cell with religious symbols because it "corroborated the victim's testimony that the defendant spoke about his religion to her."[379]

A less-compelling relevant connection was attempted in *Post-Confirmation Committee for Small Loans, Inc. v. Martin*.[380] There, a defendant argued that her "religious beliefs and involvement with her church" were relevant to her defense because "her status as a religious person" helped explain that "she simply did not have time to allegedly aid and abet and conspire to secure a breach" of her fiduciary duties, and also that she opposed a lottery program relevant to the case "on religious grounds."[381] The court wrongly ruled against the defendant, however, because it found that relying on her religious belief "as a defense to negate alleged involvement with 'nefarious and fraudulent behavior'" would "edge[] over the line Rule 610 deliberately set out" and "could improperly bolster [her] credibility."[382] Admittedly, the connection between the defendant's time and religious activity was weak; however, if she had made the same argument claiming that she was too busy taking

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[374] No. 08-CV-14269, 2010 WL 4940006 (E.D. Mich. July 19, 2010), *report and recommendation adopted*, No. 08-CV-14269, 2010 WL 4940038 (E.D. Mich. Nov. 30, 2010).

[375] *Id.* at *1, *11.

[376] *Id.* at *11.

[377] *Id.*

[378] No. 12-P-312, 2013 WL 5941065 (Mass. App. Ct. Nov. 7, 2013).

[379] *Id.* at *1-2.

[380] No. 13-CV-195, 2016 WL 9243594 (M.D. Ga. Oct. 4, 2016).

[381] *Id.* at *5.

[382] *Id.* The court reserved judgment on whether the defendant could "cite her religious beliefs as a reason for her opposition to the lottery program." *Id.* at *6.

college courses, would not such evidence have been admitted as relevant? Why then should it be excluded here simply because it happened at church?

While there are challenges in admitting character evidence, or any kind of religion-related evidence, in the appropriate circumstances, such evidence can and should be permitted for relevant purposes. The next Section will propose a Rule to do so.

V. A PROPOSAL TO AMEND THE RULES OF EVIDENCE

The Rules of Evidence should be amended to better protect religion by raising the admission bar on religion-related evidence, while also providing exceptions for criminal defendants and for relevant evidence that does not unfairly prejudice a person's religious belief or practice. Part V of this Article proposes draft language for such a Rule, explaining the sources of that language and how such a Rule could be properly applied.

A. The Draft Language of Proposed Rule 416

As discussed throughout this Article, Rule 610 is problematic because it focuses solely on impeaching truthfulness and does not recognize proper uses of religion-related evidence.[383] While Rule 403 provides a mechanism to do what this Article suggests—and sometimes has been used that way—that Rule is not designed to address the special character of religion-related evidence and provides too much discretion and no guidance.[384] Therefore, this Article recommends deleting Rule 610 and supplementing Rule 403 with a new Rule: *Proposed Rule 416*. The Proposed Rule reads as follows:

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[383] *See* FED. R. EVID. 610.

[384] *See supra* notes 72-96 and accompanying text.

> Rule 416. Religious Affiliation, Beliefs, or Opinions.
>
> (1) In General. The court may not admit evidence of a person's religious affiliation, beliefs, or opinions unless its probative value substantially outweighs the danger of unfair prejudice to that person, which includes demeaning that person's religious affiliation, beliefs, or opinions.
> (2) Exception for the Defendant in a Criminal Case. The court may admit relevant evidence of a person's religious affiliation, beliefs, or opinions if offered by the defendant in a criminal case, unless the court excludes it under Rule 403.

B. Explaining the Proposed Language

Proposed Rule 416 attempts to accomplish the balancing of interests discussed throughout this Article. The wording of the Proposed Rule is drawn from language already existing in the Federal Rules of Evidence, such as in Rules 403, 412, 609, 610, and 703. Several aspects of the Proposed Rule deserve further comment.

First, the Proposed Rule applies to "*religious* affiliation, beliefs, or opinions"—language partly drawn from Rule 610.[385] Recall that the term "religious" here includes the choice of a non-religious person to *reject* religion entirely or to adopt a life-view that is on par with religious faith, such as a belief in humanity itself (e.g., secular humanism).[386] Thus, the Proposed Rule does not merely apply to evidence about those who practice traditional religions, but it also protects those who possess all manner of beliefs (or no religious belief at all) when evidence is offered about their religious proclivities.

Second—as with Rule 412, which seeks to protect victims of sexual misconduct[387]—the Proposed Rule protects persons who are not necessarily parties or witnesses in the case. Thus, the Proposed Rule does not focus on whether the *parties* would be prejudiced by the admission of religion-related evidence, but rather whether the religious (or non-religious) persons themselves would be harmed. This is consistent with one of the intents behind Rule 610, which is

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[385] *See* FED. R. EVID. 610.

[386] *See supra* notes 114-130 and accompanying text (discussing the definition of religion).

[387] *See* FED. R. EVID. 412.

to protect the individual believer by "preserving the witness's overriding constitutional right to religious freedom."[388] This is also consistent with the policy interest to create rules that respect the free exercise of religion, which is enshrined as a fundamental constitutional right belonging to the individual believer.[389] It also broadens the level of protection from the current Rules, which "place no limits on the admissibility of evidence concerning the religious beliefs of people who will not testify."[390] The parties are not irrelevant, however, because—where Proposed Rule 416 is applied to a person who is not a party to the case—the interests of the parties may be separately considered by the court under the traditional Rule 403 balancing test.[391]

Third, the Proposed Rule provides clear guidance to judges by expressly prohibiting the court from admitting religion-related evidence unless it passes a hefty balancing test. In other words, the default position is to exclude religion-related evidence. The balancing of the "probative value" against "the danger of unfair prejudice" is a commonly used formula throughout the Rules of Evidence. That balancing appears, of course, in the traditional Rule 403 test (which is a rule of admissibility because it only allows for the exclusion of relevant evidence if unfair prejudice substantially outweighs the evidence's probative value),[392] as well as in the reverse-403 balancing tests found in Rules 412, 609, and 703 (which are rules of exclusion because they require probative value to substantially outweigh unfair prejudice).[393] Proposed Rule 416 is a similar rule of exclusion, creating a high bar before any religion-related evidence is offered (by someone other than a criminal defendant) in a way that would cause unfair prejudice to the religious person. This high bar, however, can be overcome where the probative value of the evidence is strong.[394]

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[388] Redman v. Watch Tower Bible & Tract Soc'y of Pa., 630 N.E.2d 676, 677 (Ohio 1994).

[389] *See supra* notes 14-28 and accompanying text.

[390] PARK & LININGER, *supra* note 45, § 7.6.

[391] *See* FED. R. EVID. 403.

[392] *See id.*

[393] *See* FED. R. EVID. 412(b)(2), 609(b)(1), 703.

[394] The probative value of religion-related evidence is often high in criminal cases where religion is relevant to motive or used as a criminal instrumentality. For instance, in *State v. Williamson*, No. 1 CA-CR 09-0476, 2010 WL 5076481 (Ariz. Ct. App. Dec. 9,

Fourth, the "unfair prejudice" with which the Proposed Rule is concerned is the type of prejudice that is harmful to the religious person. This includes evidence offered to demean a person's religious affiliation, beliefs, or opinions, as well as evidence that causes other types of unfair prejudice, such as inflaming the passions of the trier of fact against the person based on religious bigotry or other bias. But this type of unfair prejudice does not include instances where relevant religion-related evidence—though offered in a positive, dignified way—undermines a party's litigation goals, such as by mitigating damages.[395]

Finally, the Proposed Rule contains the beforementioned exception for criminal defendants, who are not subjected to the heightened bar of exclusion. Instead, those defendants are governed by the traditional Rule 403 analysis, which is still available to prevent criminal defendants from introducing evidence with probative value that is substantially outweighed by the danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[396]

CONCLUSION

Religious belief and practice are prized individual rights under the First Amendment of the U.S. Constitution. The founding generation recognized that religion is in a special category of protection because of its role in the development of Western Civilization and the central place it has filled in the lives of countless individuals across history. For this reason, the Federal

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2010), the defendant's minor daughter was permitted to testify that the defendant had told her that they could have sex because their Wiccan religion "had said that it was okay" for him to "marry" her. *Id.* at *1-3. Because that evidence showed how the defendant had manipulated his biological daughter into having sexual relations with him, it had high probative value despite any potential unfair prejudice to the defendant himself by mentioning Wicca at trial. *Id.* at *2-3. It likely would be permitted under the Proposed Rule as well.

[395] *See, e.g.*, South v. Austin, No. 15CV342, 2016 WL 7209554, at *2 (S.D. Miss. Dec. 12, 2016) (where evidence of two children's belief in heaven was offered in a non-demeaning way to show that their belief mitigated their emotional distress at the loss of their mother). While such evidence might ultimately lower their damages, the evidence of the children's faith was not unfairly prejudicial to them, and thus Proposed Rule 416 would not prohibit it.

[396] FED. R. EVID. 403.

Rules of Evidence and state evidentiary codes should contain strong, well-defined protections to exclude evidence that unfairly prejudices religious (and non-religious) individuals during court proceedings.

Currently, however, the Rules of Evidence provide little protection and almost no guidance about religion-related evidence. Rule 610's prohibition on "[e]vidence of a witness's religious beliefs or opinions" applies only where evidence is used "to attack or support" the truthfulness of a witness, which occurs in only a narrow range of situations.[397] Rule 403—which does not even mention religion—gives judges wide discretion to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice.[398] That general rule, however, cannot be counted on to produce consistent results in this area because of the great deference given to 403 rulings.

The Rules of Evidence should be strengthened across-the-board to limit the use of religion-related evidence as a tool of attack, except when used by a defendant in a criminal case. Case examples over the past decade demonstrate that religion-related evidence is being used to demean a person's religious affiliation, beliefs, and opinions, and to inflame the passions of the jury against a person based on religious bias. This has been especially true in drug trafficking cases and in cases involving Muslims and Neo-Pagans. Raising the evidentiary requirement to admit such evidence would work to protect the policies underlying the Religion Clauses of the First Amendment. This proposal to raise the admission bar for religion-related evidence does not apply, however, to defendants in a criminal case because of the competing interests in due process and general fairness for those being prosecuted by the government.

Moreover, the evidentiary rules should allow the admission of relevant religion-related evidence that does not unfairly prejudice a person. There are ample instances where such evidence is necessary, such as when rehabilitating the credibility of a witness, illustrating the impact or mitigation of damages, or showing a person's pertinent character trait. For that reason, the bar should not be raised on religion-related evidence in such instances. This

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[397] FED. R. EVID. 610.

[398] *See* FED. R. EVID. 403.

Article's Proposed Rule 416—which includes individualized protections for religious (and non-religious) persons, a reverse-403 balancing test, and an exception for criminal defendants—attempts to accomplish these policy goals.