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"Divine" Justice and the Lack of Secular Intervention: Abrogating the Clergy-Communicant Privilege in Mandatory Reporting Statutes To Combat Child Sexual Abuse

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Notes

"DIVINE" JUSTICE AND THE LACK OF SECULAR INTERVENTION: ABROGATING THE CLERGY-COMMUNICANT PRIVILEGE IN MANDATORY REPORTING STATUTES TO COMBAT CHILD SEXUAL ABUSE

I. INTRODUCTION

"Crime is not the less odious because sanctioned by what any particular sect may designate as religion."[1]

Imagine two loving parents at the airport, anxiously awaiting the return of their sixteen-year-old daughter from a yearlong mission trip to the Philippine Islands. Picture their excitement as they look for their young, vivacious daughter to step off the plane from the terminal window. Now imagine their shock when they see the once bright-eyed girl walking toward them with dull, lifeless eyes and a sickly physique. Envision this weak looking child carrying a newborn infant in her arms. The array of emotions these parents undoubtedly experience as a result of this unexpected situation is great, but try picturing the amount of outrage and devastation they feel when they discover that their church leaders lied to them and sent their daughter on this mission trip to conceal her pregnancy. Imagine their feelings of betrayal to learn that more than seven revered spiritual leaders had been regularly coaxing their daughter into sexual intercourse under the guise of being religiously permissive and ethically wise. Visualize these parents' anger when they learn that the church leaders failed to uphold their promise to provide adequate financial support for their daughter while away, resulting in her suffering malnutrition and being near death during childbirth. Try conceiving their astonishment and feelings of abandonment when the seven errant clergymen and their informed superiors are left unpunished and free to prey on other unsuspecting children and families.[2]

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1 PHILIP B. KURLAND, RELIGION AND THE LAW 24 (1962).

2 This hypothetical situation is based on the case of Rita M. v. Roman Catholic Archbishop, 232 Cal. Rptr. 685 (Cal. Ct. App. 1986).

Situations like the preceding hypothetical are not unique. The United States is facing a pandemic of child sexual abuse.[3] Surprisingly, however, only about ten percent of reported cases of sexual abuse on minors are alleged to have been perpetrated by a stranger.[4] Instead, abuse is typically perpetrated by a family member, friend, or other known and trusted individual, such as a clergyman.[5] Consequently, the tragedy and horror of sexual abuse is found not only in the home, but also in the church.[6]

The government has a strong interest in preventing child abuse in all forms, regardless of the perpetrator's relationship with the victim.[7] Yet,

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[3] National Center for Injury Prevention and Control, *Sexual Violence: Fact Sheet*, http://www.cdc.gov/ncipc/factsheets/svfacts.htm (last visited Aug. 15, 2007) [hereinafter National Center]; Darkness to Light, *Statistics Surrounding Child Sexual Abuse*, http://www.darkness2light.org/KnowAbout/statistics_2.asp (last visited Aug. 15, 2007) [hereinafter Darkness]. Nearly one in four girls and one in six boys are sexually abused before the age of eighteen, with the median age being nine. Darkness, *supra*. Fifty-four percent of all rapes on women transpire before they reach age eighteen, with twenty-two percent of these rapes occurring before age twelve, while seventy-five percent of rapes on men take place prior to their eighteenth birthday, with forty-eight percent of these occurring before age twelve. National Center, *supra*. Child protective service agencies confirmed that approximately two out of every one thousand children in the United States experienced sexual assaults in 2003. *Id*. One in five children are sexually solicited over the internet. Darkness, *supra*. Nearly seventy percent of all reported sexual assaults, including those on adults, occur on children seventeen and younger, and more than twenty percent of those children are sexually assaulted before age eight. *Id*. "An estimated . . . [thirty-nine] million survivors of childhood sexual abuse exist in America today." *Id*.

[4] *Id*. Roughly thirty to forty percent of victims were abused by a family member and another fifty percent by a trusted non-relative, thus leaving only ten percent of abuse conducted by strangers. *Id*. "In 1997, parents and other caretakers committed one fifth of all violent crimes against children seventeen and under." Heather Rushing Potter, Comment, *Confidentiality in Mediation and the Duty to Report Child Abuse*, 29 J. LEGAL PROF. 269 (2004-2005). However, "[a] vast majority of child abuse cases are never reported, and, many times, deaths resulting from child abuse are never reported as such." *Id*.

[5] *See supra* note 4 (reporting how nearly ninety percent of all child sexual abuse crimes are perpetrated by an individual known or trusted by the victim).

[6] Secrecy, a lack of reporting, and inadequate record keeping have made ascertaining the extent and nature of the sexual abuse impossible. Ruth Jones, *The Extrajudicial Resolution of Sexual Abuse Cases: Can the Church be a Resource for Survivors?*, 38 SUFFOLK U. L. REV. 351, 352 (2005). Roman Catholic Church officials alone received 1,092 allegations of sexual abuse on minors in 2004 and 783 in 2005. Tara Dooley, *Fewer Church Abuse Claims Found*, HOUS. CHRON., Mar. 31, 2006, at B3. Additionally, a recent survey commissioned by the United States Conference of Bishops, known as the John Jay Survey, estimated that abuse within the Catholic Church affected more than ninety-five percent of dioceses and approximately sixty percent of religious communities. Jones, *supra*, at 353.

[7] *See* Darkness, *supra* note 4 (stating how, given that most perpetrators are recidivistic if they are not reported and stopped, the government's interest in eliminating child sexual abuse and punishing those who perpetrate it is undoubtedly compelling). Of child sex offenders, nearly seventy percent have between one and nine victims, and at least twenty

despite this concern, the state often hesitates before acting on accusations of abuse within religious communities or by religious leaders, partially due to the constitutional dictates demanding separation of church and state.[8] Thus far, the state has been content to abstain from intervening by allowing the individual organization to confront the abuse in accordance with its own rules and practices.[9] Such passivity is socially unacceptable and ineffective at resolving child sexual abuse.

The criminal justice system has begun making changes to accommodate sexually abused minors; however, as this Note suggests, more aggressive changes are necessary.[10] Because cases cannot be tried until they are reported and investigated, this Note recommends that states universally abrogate the clergy-communicant privilege in relation to already existing mandatory reporting statutes in order to ensure that all complaints or allegations of indecent sexual acts on children are brought to the attention of the appropriate government agency. Hence, Part II of this Note will present the manner by which several religious institutions internally handle sexual abuse allegations and will illustrate some of the deficiencies within the current criminal justice system.[11] Part II also provides a discussion of the constitutional restraints on government action via the First Amendment, current mandatory reporting statutes, and the clergy-communicant privilege.[12] Part III will

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percent have between ten and forty victims. *Id*. The average serial child sexual abuser may have upwards of four hundred victims in his (or her) lifetime. *Id*.

8 *See infra* Part II.B (discussing Religion Clause jurisprudence).

9 Constance Frisby Fain & Herbert Fain, *Sexual Abuse and the Church*, 31 T. MARSHALL L. REV. 209, 211 (2006). "[S]exual abuse by clergypersons has been historically ignored and hidden to a great extent . . . ." *Id.*

10 Judges have already begun "alter[ing] time-honored practices to accommodate children in court." John E. B. Myers, Susan E. Diedrich, Devon Lee, Kelly Fincher & Rachel M. Stern, *Prosecution of Child Sexual Abuse in the United States*, *in* CRITICAL ISSUES IN CHILD SEXUAL ABUSE: HISTORICAL, LEGAL, AND PSYCHOLOGICAL PERSPECTIVES 57 (Jon R. Conte ed., 2002). Examples of such accommodations are: the witness chair being turned slightly away from the accused, not mandating that a child look directly at the accused when answering prosecutor's questions, giving more discretion to the judge as to whether or not to close the proceedings or prohibit courtroom spectators when the child is testifying, granting regular breaks for the child when testifying, permitting judges to control the line of questioning so as to make questions more comprehensible to the child, allowing the child to be accompanied by a "supportive adult[,]" and, in some circumstances, permitting a child to "testify via closed-circuit television, outside the physical presence of the accused" (which was determined not to be in violation of the defendant's right to face-to-face confrontation with the witnesses against him in *Maryland v. Craig*, 497 U.S. 836 (1990)). *Id*. at 57-58.

11 *See infra* Part II.A (demonstrating how some religious institutions internally approach the issue of child sexual abuse and the criminal justice system's response thereto).

12 *See infra* Parts II.B-II.D (discussing the history of Religion Clause jurisprudence, the mandatory reporting statute, and the clergy-communicant privilege).

then analyze mandatory reporting statutes in relation to Religion Clause jurisprudence and the feasibility of abrogating the clergy-communicant privilege as a potential government recourse for the sexual abuse dilemma in the church.[13] Part IV will offer a model mandatory reporting statute abrogating the clergy-communicant privilege.[14]

II. BACKGROUND

The crime of child sexual abuse has infiltrated all places that, in an ideal world, would shelter and protect minors—from the homestead to the school to the church.[15] Innovative measures, such as abrogating the clergy-communicant privilege, are necessary so that law enforcement agencies can effectively combat the child abuse problem and secure the safety of minors.[16] Thus, Part II.A first explores some of the internal polices practiced by the Roman Catholic Church, the Church of Latter-Day Saints, the Jehovah's Witnesses, and the Amish in confronting allegations of child abuse.[17] Then, Part II.B addresses the history of the Religion Clause jurisprudence, looking first at the Free Exercise Clause and then the Establishment Clause.[18] Next, Part II.C of this Note briefly examines the history, purpose, and types of mandatory reporting statutes.[19] Lastly, Part II.D discusses the clergy-communicant privilege and the different approaches states take in the context of criminal prosecutions.[20]

A. Internal Religious Policies in Regard to Child Abuse Exercised Under the Principle of Freedom of Religion and Illustrations of the Government's Responses

Religious institutions often receive exemptions from generally applicable laws.[21] Such exemptions are seen as a means to protect

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[13] *See infra* Part III (stating that the abrogation of the clergy-communicant privilege is socially acceptable and constitutionally viable under the First Amendment).

[14] *See infra* Part IV (presenting a model mandatory reporting statute abrogating the clergy-communicant privilege).

[15] *See supra* notes 3-4 (presenting statistics illustrating the widespread nature of the child sexual abuse epidemic).

[16] *See infra* Part III.B (discussing the necessity for abrogating the clergy communicant privilege as a method of combating child sexual abuse).

[17] *See infra* Part II.A.

[18] *See infra* Part II.B.

[19] *See infra* Part II.C.

[20] *See infra* Part II.D.

[21] Diana B. Henriques, *Religion Trumps Regulation As Legal Exemptions Grow: From Day Care Centers to Zoning Laws, Rules Don't Apply to Faith Groups*, N.Y. TIMES, Oct. 8, 2006, at A1 (stating "such organizations—from mainline Presbyterian and Methodist churches to

religious freedom under the First Amendment.[22] However, according to some scholars and lawmakers, "separation of church and state is no longer the law of the land."[23] While the exemptions that these scholars are referring to generally fall under areas of civil concern, religious institutions are typically allowed to conduct themselves in accordance with the same practices and principles they have used for centuries when dealing with such criminal issues as child abuse.[24] Ambiguity concerning what government actions are constitutionally permissible under the Religion Clauses often shields religious institutions from the government enacting legislation that would encroach upon an institutional practice.[25] These internal policies often include methods for

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mosques to synagogues to Hindu temples—enjoy an abundance of exemptions from regulations and taxes. And the number is multiplying rapidly.").

> [S]ince 1989 . . . more than 200 special arrangements, protections or exemptions for religious groups or their adherents were tucked in Congressional legislation, covering topics ranging from pensions to immigration to land use. . . . The special breaks amount to ''a sort of religious affirmative action program . . . .

Id. at 22.

[22] *See* Henriques, *supra* note 21, at 22. "Some legal scholars and judges see the special breaks for religious groups as a way to prevent government from infringing on those religious freedoms." *Id*. *See generally* Employment Div. Dep't. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990) (holding that generally applicable, neutral laws can be upheld against religious practices without a Free Exercise violation). *See also infra* Part II.B (discussing the scope of religious freedom under the Religion Clauses).

[23] Henriques, *supra* note 21, at 22. "The Court has asserted that the objective of the Establishment Clause is total separation [of church and state] while acknowledging that, in our complex society, total separation is not possible." Patricia Diann Long, *Does the Wall Still Stand?: Separation of Church and State in the United States*, 37 BAYLOR L. REV. 755, 755 (1985). The "wall" is "a flexible rather than a fixed wall." *Id*.; *see also* Laurie Messerly, *Reviving Religious Liberty in America*, 8 NEXUS 151, 159 (2003) (referring to the "*mythological* 'wall of separation' between church and state") (emphasis added).

[24] B.A. Robinson, *Jehovah's Witnesses (WTS) Policies & Examples of Child Sexual Abuse*, Ontario Consultants on Religious Tolerance, Jan. 23, 2007, http://www.religioustolerance.org/witness7.htm (last visited Feb. 23, 2007) [hereinafter *WTS Policies*] ("Every religious institution develops their own policies and regulations concerning accusations of child sexual and physical abuse."). *See also* 91 AM. JUR. TRIALS 151 § 3 (2006). "We, as a culture, have historically trusted the churches to handle . . . [sexual abuse] themselves and they have coveted their right to do so." *Id*. at § 7.

[25] *See infra* Part II.B (discussing the Religion Clause jurisprudence). As the problem of child sexual abuse in the religious community becomes more prevalent, it becomes evident that the epidemic of child sexual abuse within the church needs to be addressed more by the state. *See* Christine A. Clark, *Religious Accommodation and Criminal Liability*, 17 FLA. ST. U. L. REV. 559, 580 (1990) (stating that "the danger of violating the establishment clause 'cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.'") (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)); KURLAND, *supra* note 1, at 22 ("To permit individuals to be excused from compliance with the law solely on the basis of religious beliefs is to subject others to punishment for failure to subscribe to those same beliefs."). Although the government has

handling "sins" within their communities, such as child sexual abuse.[26] Part II.A thus explores some internal handling procedures used by only a tiny fraction of the different denominations in the United States and how the government responds to them.[27]

1. The Roman Catholic Church

As one of the oldest religions in the world, the Catholic Church is "not only a religious entity but a secular political force as well."[28] Because the Church enjoys such a deep and varied history, it has, throughout time, developed its own legal system known as The Code of Canon Law ("the Code").[29] The Code is the basic source of law in the Church.[30] The Code specifically forbids child sexual abuse and outlines

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a compelling interest in protecting children, this interest must sometimes yield to a higher parental right in rearing children. *See*, *e.g.*, *Yoder*, 406 U.S. at 232 (noting the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 165-66 (1944) (acknowledging a state's interest in protecting a child's welfare but stating that the custody and nurture of the child resides first with the parent); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923) (finding that while a state has great latitude in what it can do to improve quality of life for its citizens, parents have a natural duty and fundamental right to care for and educate their children that must be respected). *See also* Clark, *supra*, at 580 (discussing a state's compelling interest in preventing child abuse.)

[26] These institutionally practiced methods often conflict with the social policy of protecting children by cloaking community members from government investigations. Jones, *supra* note 6, at 351 (discussing the decades-long culture of secrecy as pertaining to sexually abusive church officials).

> We as a people, as a nation, *and particularly as a collection of religious institutions*, have maintained, like the proverbial three monkeys, a self-protective posture of 'see no evil, hear no evil and speak no evil.' Child sexual abuse is routinely explained away, trivialized, or simply denied whenever there is a risk of confrontation.

91 AM. JUR. TRIALS, *supra* note 24, at § 4 (emphasis added).

[27] *See infra* Parts II.A.1-II.A.4 (discussing the Catholic Church, The Church of the Latter Day Saints, Jehovah's Witnesses, and the Amish).

[28] Thomas P. Doyle, *Canon Law and the Clergy Sex Abuse Crisis: The Failure From Above*, *in* SIN AGAINST THE INNOCENTS: SEXUAL ABUSE BY PRIESTS AND THE ROLE OF THE CATHOLIC CHURCH 25 (2004). Doyle recounts that the Church throughout its history has served a combination of functions from spiritual leader, to military power, to potent political power, to an economic force. *Id*. at 26.

[29] *Id*. at 25. "Canon," derived from Greek, means "rule" or "straight line." *Id*. This system of self-governance is the oldest continuously functioning legal system in the world today. *Id*.

[30] *Id*.

clear, detailed procedures for investigating such allegations.[31] While the Catholic Church has a historically rooted legal system in place to address the problem of sexually errant clerics, the canonical system has been ineffective at rectifying clergy sexual abuse.[32] This failure, however, is not associated with the Code itself, but rather with those in charge of its implementation.[33] The Vatican rarely removes errant priests from active ministry, thus perpetuating recidivism.[34] Rather than laicize clerics, bishops have sent offending clergy to treatment centers and hospitals

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[31] *See id*. at 26. The Code states, "[i]f a cleric has otherwise committed an offense against the sixth commandment of the Decalogue [a sexual offense] with force or threats or publicly or with a minor below the age of sixteen, the cleric is to be punished with just penalties, including dismissal from the clerical state if the case warrants it." *Id.* (quoting Canon Law Society of America, THE CODE OF CANON LAW c.1395 (1983)). Under canon law, the most severe penalty for sexual misconduct is the removal of the individual from the priesthood. Jones, *supra* note 6, at 359. Additionally, the Code contains provisions for establishing a tribunal system which serves as both an internal civil and criminal court for the purpose of determining the validity and egregiousness of sex abuse allegations and the proper penalty for them. Doyle, *supra* note 28, at 26. Dismissal of clergy members can be imposed through one of these canonical trials; however, due to the complexities, this is rarely done. *Id*. at 27. Instead, the Pope can, upon request of the cleric, laicize the cleric. *Id.* The Code does grant the Pope the power to dismiss a cleric against his will (usually upon the request of his supervising bishop), but this, too, is an anomaly. *Id*. To laicize an errant clergyman means that the Church effectively removes all clerical duties and returns the individual to layperson status. Random House Inc., *laicize*, http://dictionary.reference.com (last visited Aug. 22, 2007).

[32] Doyle, *supra* note 28, at 28 (stating that the "canonical system has been an abysmal failure at dealing with clergy sexual abuse"). Church leaders made decisions and took actions that "placed the interests of the Catholic Church above those of [sexual abuse] survivors and children." Jones, *supra* note 6, at 358.

[33] Doyle, *supra* note 28, at 28. The Code "becomes trivialized when bishops ignore it or apply it dishonestly for self-serving purposes." *Id*. Bishops and other Church leaders were aware of the allegations and instances of sexual abuse, but still "failed to take effective action to stop the abusers and to deal compassionately with victims." Jones, *supra* note 6, at 352. Instead, Church officials doubted the veracity of abuse allegations and told victims that they had either "misunderstood or misinterpreted a priest's affection as abuse and were wrong for making the report." *Id*. at 358.

[34] Jones, *supra* note 6, at 352. The Church failed to "remove abusive priests from the ministry and away from children." *Id*. at 359.

before returning them to their parishes.[35] Additionally, bishops, acting under instruction, have relocated clergy to distant dioceses.[36]

The result of these common practices is the perpetuation of crimes against minors, as discovered in recent years with the highly publicized sexual abuse scandals and the criminal justice system's response to them.[37] Most criminal cases that have come before the courts have been dismissed due to statute of limitation problems, and rarely do such cases involve high-level church officials.[38] Late in 2004, for example, Bishop Thomas L. Dupre became the first Catholic bishop to be indicted for sexually abusing a minor; however, hours after the indictment was filed, the District Attorney withdrew it, allegedly due to the statute of limitations.[39] Instead, most abuse victims have sought "justice" against

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35 Leslie M. Lothstein, *The Relationship Between The Treatment Facilities and the Church Hierarchy: Forensic Issues and Future Considerations*, *in* SIN AGAINST THE INNOCENTS: SEXUAL ABUSE BY PRIESTS AND THE ROLE OF THE CATHOLIC CHURCH 123 (2004). The Church hoped that by sending errant clergy to a variety of different clinics, residential centers, non-therapeutic monastic enclosures, and hospitals, the sexually deviant behaviors could be evaluated and treated without having to dismiss the clergy member. *Id*. After the treatment was concluded, the errant clergyman would be returned to his ministerial duties and allowed further access to children. Jones, *supra* note 6, at 359.

36 Lothstein, *supra* note 35, at 123 (suggesting that the relocation of errant clergy occurs when scandals within a dioceses are looming, thus allowing the clergy to avoid detection among parishioners or identification by their victims). A 1962 Church document, titled "On the Manner of Proceeding in Cases of Solicitation[,]" specifically instructed church officials to transfer sexually abusive priests. 91 AM. JUR. TRIALS, *supra* note 24, at § 3. The document also mandated the destruction of all church documents pertaining to sexual abuse allegations lacking foundation and to secret away all evidence pertaining to specific abuse allegations. *Id*. In 2002, the *Boston Globe* uncovered thousands of pages of the "Church's own records to reveal institutional forgiveness of abusive priests, consistent indifference to victims, and compelling evidence of a decades-long cover-up by a succession of cardinals and their bishops." Michael Rezendes, *Scandal: The Boston Globe and Sexual Abuse in the Catholic Church*, *in* SIN AGAINST THE INNOCENTS: SEXUAL ABUSE BY PRIESTS AND THE ROLE OF THE CATHOLIC CHURCH, *supra* note 28, at 1.

37 *See* Fain, *supra* note 9, at 225 (stating, "many courts have been reluctant to impose liability on the defendants in these types of cases").

38 Marci Hamilton, *D.A.'s Clever Tactic in Child Sex Abuse Wars; Bringing, then Dismissing Indictment against Bishop*, Oct. 9, 2004, http://www.cnn.com/2004/LAW/10/07/hamilton.sex.abuse/index.html (last visited Sept. 3, 2007). *See also*, Laura Russell, Note, *Pursuing Criminal Liability for the Church and its Decision Makers for their Role in Priest Sexual Abuse*, 81 WASH. U. L. Q. 885, 893 (2003) ("To date, no bishop, cardinal, or archdiocese has faced criminal charges in connection with the child sex abuse scandal.").

39 Hamilton, *supra* note 38. According to Hamilton, the prosecutor likely indicted Dupre, knowing that the indictment would be withdrawn due to a statute of limitations issue, for the purpose of expressing that Dupre committed the heinous crime. *Id*. The facts of the indictment alleged that Dupre showed two young boys pornography, proceeded to intoxicate them, and then sexually penetrated them over a five-year period with a two-year overlap. *Id*. Aware that indictment would be withdrawn, Hamilton suspects that the

their perpetrators by means of the civil system, but here, too, many have found "justice" elusive.[40]

2. The Church of Latter-Day Saints

The Catholic Church is not alone in establishing and upholding internal policies that preserve its own traditions, interests, and reputation.[41] The Church of Latter-Day Saints, a division of the Mormon faith, is divided into several different sects, the two primary ones being The Church of Jesus Christ of Latter-Day Saints ("LDS") and The Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS").[42] There is a problem of child sexual abuse within each church, but the problem is more prevalent in the FLDS due to its continued practice of polygamy.[43] The FLDS currently practices the "law of placing[,]" which

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prosecutor persisted in filing it as a warning to other abusers that "the fact that they belong to a religious institution will not insulate them from the criminal law." *Id*.

40 *See, e.g.*, J.M.V.v. Minnesota Dist. Council of Assemblies of God, 658 N.W.2d 589 (Minn. Ct. App. 2003) (affirming dismissal of sexual misconduct lawsuit based on doctrine of *respondeat superior* by deeming plaintiff waived review of the issue on appeal); Doe v. South Central Spanish Dist. of the Church of God, 2002 WL 31296620 (Tex. App. Oct. 14, 2002) (upholding summary judgment for both church and pastor against claims of sexual assault by husband and wife); Robertson v. Church of God, Int'l, 978 S.W.2d 120 (Tex. App. 1997) (granting summary judgment for the church because the alleged sexual conduct was not performed in any official capacity); Rita M. v. Roman Catholic Archbishop, 232 Cal. Rptr. 685 (Cal. Ct. App. 1986) (granting demurrer to all seven charges brought against the church due to either statute of limitations conflicts or failure to state a cause of action).

41 *See infra* Parts II.A.2-II.A.4 (presenting examples of internal policies from three other religious denominations).

42 *See, e.g.*, RAY B. WEST, JR., KINGDOM OF THE SAINTS 342 (1957); B.A. Robinson, *Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS)*, Ontario Consultants on Religious Tolerance, July 25, 2004, http://www.religioustolerance.org/flds.htm (last visited Sept. 3, 2007) [hereinafter *FLDS*].

43 *FLDS*, *supra* note 42; *USA: Polygamy related abuses in Utah*, Women Living Under Muslim Laws, Feb. 15, 2002, http://wluml.org/english/actionsfulltxt.shtml?cmd[156]=i-156-3124 (last visited Sept. 3, 2007) [hereinafter *USA: Polygamy*]. In 1890, the LDS, in a manifesto known as the "Great Accommodation," suspended indefinitely the practice of multiple marriages. *FLDS*, *supra* note 42. In 1935, the FLDS was founded by a number of excommunicated LDS members who resumed the traditional Mormon practice of polygamy. *Id*. "Indeed, many fundamentalist Mormons preferred excommunication to renouncing polygamy, which they considered central to the church's teachings." CLAUDIA LAUPER BUSHMAN & RICHARD LYMAN BUSHMAN, MORMONS IN AMERICA 102 (1999). The FLDS continued to foster the belief that polygamy was necessary for salvation. *Id*. at 92. The Church teaches that women are required to be subordinate to their husbands and husbands should have at least three wives in order to obtain the highest eternal salvation. Laura Blue, *The Merry Wives: A Longtime Haven of Polygamy is Feeling the Heat from Police and from Within*, TIME, Oct. 10, 2005, at 22; John Dougherty, *Derail Polygamy's Money Train*, PHOENIX NEW TIMES, April 7, 2005, *available at* http://www.phoenixnewtimes.com/2005-04-07/news/derail-polygamy-s-money-train/1.

mandates that the prophet of the congregation assign all marriages within the community.[44] The combination of polygamy and the law of placing often results in a shortage of available women within the church community.[45] The Church counters this by urging older men to take child brides and by excommunicating young boys and men to reduce the competition for wives.[46] The FLDS sanctions incest and child abuse and defends the practice as part of its constitutional right under the Religion Clauses.[47] Additionally, the LDS, while no longer condoning polygamy, adheres to a strict practice of "repentance" and "forgiveness" resulting in Church leaders returning known sex offenders to the ministry once they have formally repented their transgressions.[48]

Consequently, the government is increasingly scrutinizing the FLDS, but stern criminal penalties for the abuse that results from FLDS policies are lacking, as illustrated by the Supreme Court of Utah's decision in *State v. Holm*.[49] In *Holm*, the court upheld the criminal conviction of

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[44] Dougherty, *supra* note 43; *Fundamentalist Church of Jesus Christ of Latter Day Saints*, Wikipedia, http://www.en.wikipedia.org/wiki/Fundamentalist_Church_of_Jesus_of_Latter_Day_Saints (last visited Sept. 3, 2007) [hereinafter *Fundamentalist Church*]. Under the law of placing, "[t]he prophet elects to take and give wives to and from men according to their worthiness." *Fundamentalist Church*, *supra*. Both the LDS and the FLDS consider themselves Christians, "believing in continued revelation[s] from God[;]" consequently, they believe that the president of the church, also known as the prophet, seer, and revelator, presently "communicates with the deity." Bushman, *supra* note 43, at 119.

[45] *FLDS*, *supra* note 42. The prophet, however, not only assigns available women to men, but is also permitted to reassign any man's current wife and children to another man. Dougherty, *supra* note 43. In such situations, the new husband often marries both the mother and her daughter(s) (if any). *Id*.

[46] *FLDS*, *supra* note 42. There are "[r]eported cases . . . in which girls from the ages of 13 to 16 have been married to older men" indicating a pattern of child marriage, sexual abuse, and trafficking (as many girls are being transported to and from Canada for the purpose of marriage). *USA: Polygamy*, *supra* note 43.

> Adult women have also described battering, intimidation and sexual abuse within polygamous families. Young women inside these communities are vulnerable to coercion by family members and religious leaders to enter polygamous marriages. Trained to obey religious teachings and denied any other education, they may see no real alternative.

Id. In addition, the FDLS has excommunicated over 400 teenage boys, as young as 13, for the purpose of reducing the competition with older men for young brides. *Fundamentalist Church*, *supra* note 44; *see also* Blue, *supra* note 43, at 22.

[47] *USA: Polygamy*, *supra* note 43. FDLS leaders contend that government action against polygamy-related abuses is equivalent to religious prosecution in violation of the Establishment and Free Exercise Clauses. *Id*.

[48] 91 AM. JUR. TRIALS, *supra* note 24, at § 3.

[49] State v. Holm, 137 P.3d 726 (Utah 2006). "Until recently, law enforcement largely ignored polygamous groups like the FLDS." Andrew Murr, *Polygamist on the Lam: A Sect Leader Lands on the FBI's Most Wanted List*, NEWSWEEK, May 22, 2006, at 37. Although

Rodney Holm, a devout member of the FLDS, for bigamy and sexual conduct with a minor.[50] The trial court sentenced Holm to up to five years in state prison for each conviction and imposed a $3,000 fine; however, the court suspended both in lieu of three years of probation, one year in a county jail with work release, and two hundred hours of community service.[51]

Additionally, FLDS leader Warren Jeffs was recently convicted in Utah on two counts of first-degree felony rape, and criminal charges in Arizona are pending against him for performing marriages with child brides.[52] Jeffs' arrest marks one of the first times in history that a church leader has been criminally charged for a sex crime. Nevertheless, it is unlikely that his arrest will suppress the prevalence of sexual abuse and polygamy within the FLDS church.[53]

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illegal, between 20,000 and 50,000 people live in polygamous families, consecrated as "celestial marriages." Andrew Murr, *Strange Days in Utah*, NEWSWEEK, Nov. 13, 2000, at 74. "[A]uthorities have long followed an informal policy . . . [of] 'don't ask, don't tell'" in regard to these unlawful marriages. *Id*.

[50] *Holm*, 137 P.3d at 730. Holm was charged with three counts of unlawful sexual conduct with a sixteen- or seventeen-year-old and one count of bigamy. *Id*. at 731. The jury returned a guilty verdict on all four charges. *Id*.

[51] *Id*. at 732. The original sentence was suspended, despite Holm taking 16 year-old Ruth Stubbs, sister to his first wife, as his third wife at the age of 32. *Id*. at 730. Ruth testified at trial that Holm regularly engaged in sexual intercourse with her, and by the time she reached the age of majority, she had conceived two children with Holm. *Id*.

[52] Associated Press, *Jeffs May Retain His Grip Even From Jail*, KUTV.com, Aug. 29, 2006, *available at* http://kutv.com/local/local_story_241230306.html [hereinafter *Jeffs*]. Prior to his arrest, Jeffs had been a fugitive for more than two years due to his placement on the FBI's Most Wanted List. *Id*. The felony sex crimes were based in part on Jeffs' orchestrating the marriages between underage girls and older men. *Id*. Jeffs was arrested after a routine traffic stop because an officer could not identify his temporary tags. Brooke Adams & Lisa Rosetta, *FDLS Leader Jeffs Captured; Future of Leadership Cloudy*, THE SALT LAKE TRIBUNE, Aug. 30, 2006. In September 2007, Jeffs' was convicted of two counts of first-degree felony rape as an accomplice for his role in forcing an unwilling 14-year-old girl to marry her 19-year-old cousin. Nancy Perkins, *Resignation: Jeffs has dropped FLDS position*, DESERT MORNING NEWS, Dec. 6, 2007. Jeffs has also been indicted by a federal grand jury in Salt Lake City, Utah on a charge of unlawful flight to avoid prosecution as a result of his time on the FBI's most wanted list. *Id*.

[53] *See Jeffs*, *supra* note 52; Adams & Rosetta, *supra* note 52. On November 20, 2007, after being sentenced to two terms of five-years-to-life, Jeffs formally resigned as president of the FLDS church. Perkins, *supra* note 52. While some members of the FLDS church have begun to waiver in their convictions, many more members of the FLDS church are offering their complete support to Jeffs and vocalizing their disapproval of local law enforcement officers for imprisoning such a holy man. Ben Winslow, *FLDS sect may splinter now that Jeffs is in prison*, DESERT MORNING NEWS, Dec. 2, 2007. As a prophet of the FLDS church, Jeffs' followers are not likely to abandon him or the faith because of the arrest unless they feel he has violated his own FDLS faith. Adams & Rosetta, *supra* note 52.

3. Jehovah's Witnesses

The Jehovah's Witnesses church, also known as the Watchtower Society ("WTS"), is no stranger to sexual abuse of children either.[54] In recent years, abuse scandals and alleged cover-ups have been uncovered within the WTS.[55] Similar to the Catholic Church, the WTS takes a stance that condemns such acts while simultaneously adhering to a "child protection policy" that seemingly protects pedophiles.[56] When investigating an allegation of abuse on the part of a WTS member, the Church follows a biblical standard requiring either "confession on the part of the alleged perpetrator, or [t]he testimony of at least two witnesses to a single case of abuse, or [t]he testimony of one witness to abuse, followed by testimony of a second witness to another instance of abuse."[57] As a result of this practice, the Church rarely prosecutes reported cases of sexual abuse.[58]

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[54] *See, e.g.*, B.A. Robinson, *Jehovah's Witnesses (WTS) Handling of Child Sexual Abuse Cases*, Ontario Consultants on Religious Toleration, Sept. 3, 2002, *available at* http://www.religioustolerance.org/witness7.htm [hereinafter *WTS Handling*]; *Jehovah's Witnesses and Child Protection*, Jehovah's Witnesses Office of Public Information, http://www.jw-media.org/region/global/english/backgrounders/e_molestation.htm (last visited Aug. 22, 2007) [hereinafter Office of Public Information]. The WTS was founded in 1931 by Charles Taze Russell, who denied the deity of Jesus Christ. HERBERT KERN, HOW TO RESPOND TO THE JEHOVAH'S WITNESSES 7 (1977). Instead, Jehovah's Witnesses hold that Jesus was first an angel, then for thirty-three years he roamed earth as a man and, upon death, once more resumed his position as an angel. *Id*. at 22. The WTS relies on the Bible and its own study thereof as set fort in its Watchtower Publications as its only sources of inspiration. *Id*. at 8. WTS leaders believe that they are "God's channel of communication" and that salvation resides only within the Society. *Id*.

[55] *WTS Policies, supra* note 24.

[56] Office of Public Information, *supra* note 54; *Jehovah's Witnesses: Child Abuse Policy*, Panorama Forum, July 12, 2002, http://news.bbc.co.uk/1/hi/programmes/panorama/live_forums/2124808.stm (last visited Aug. 22, 2007). The WTS has stated on its official website, "[c]hild abuse is abhorrent to us. . . . Even one abused child is one too many." Office of Public Information, *supra* note 54. *See also infra* note 57 and accompanying text (illustrating how pedophiles are protected).

[57] *WTS Handling*, *supra* note 54. According to WTS officials, the two witness requirement to substantiate an accusation of child abuse is based on Scripture. Office of Public Information, *supra* note 54. Specifically, the requirement follows the teachings in the Bible that say, "[n]o single witness should rise up against a man respecting any error or any sin . . . At the mouth of the two witnesses or at the mouth of three witnesses the matter should stand good." *Deuteronomy* 19:15.

[58] *WTS Handling*, *supra* note 54. Because few sexual assaults are witnessed, little proof beyond the witness's own accusations can be obtained. *Id*. In this common scenario, WTS elders explain to the victim that the Church must view the accused as an innocent person and leave the question of his guilt in God's hands. *Id*. Regardless, in states that require mandatory reporting of child abuse crimes and include religious clergy within the scope of the statute, elders are expected to report even uncorroborated allegations. *Id*. However, if

In the rare instance that an allegation is corroborated by multiple witnesses or the accused admits guilt, then the member is disfellowshipped.[59] However, if the perpetrator can convince WTS elders that he is truly repentant, then he may be permitted to stay within the church, but will be relieved of all former responsibilities and will be ineligible to resume holding a responsible job within the congregation for at least twenty years.[60] Even so, WTS officials admit that there are exceptions to the general "punishment" for known but repentant sex offenders, based on the individual's record of service to the Church.[61] For example, in October of 2000, Ronald Broadard, a Bible study teacher and son of a Jehovah's Witness church elder, was arrested for sexually abusing a then ten-year-old girl over the course of two years during Bible study.[62] One year later, the charges were dismissed because Broadard was found incompetent to stand trial; however, church elders, including Broadard's father, decided merely to "reprove" him, thus allowing him to keep his title and responsibilities within the church.[63] Comparable exceptions and policies of forgiveness also exist within smaller, socially isolated religious communities, such as the Amish.[64]

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a state does not have a mandatory reporting statute, the WTS church's policy is to keep the matter secret and instead try to handle the problem within the organization. *Id.*

[59] *See* ANDREW HOLDEN, JEHOVAH'S WITNESSES: PORTRAIT OF A CONTEMPORARY RELIGIOUS MOVEMENT 32 (2002). Disfellowship is the equivalent of being excommunicated in the Catholic Church. *WTS Policies*, *supra* note 24. The Governing Body of the Society deals with minor offenses through a series of meetings known as "[c]ounselling." HOLDEN, *supra*, at 77. Disfellowship, therefore, is the ultimate sanction against a Witness. *Id.* at 79. Because "absolution from sin is not in any way regarded as a sacrament or even a form of spiritual healing[] [but] [r]ather . . . something that must be earned as part of the formal procedure for reinstatement," the process of shunning and disfellowship are necessary for protecting both the sanctity of the community as well as the salvation of the sinner. *Id.* at 80.

[60] *See, e.g.*, *WTS Handling*, *supra* note 54; Office of Public Information, *supra* note 54.

[61] Office of Public Information, *supra* note 54. "Anyone in a responsible position who is guilty of child abuse would be removed from his responsibilities without hesitation." *Id.* However, "[i]n a few instances, individuals guilty of an act of child abuse have been appointed to positions within the congregation if their conduct has been otherwise exemplary for decades." *Id.*

[62] Kathleen Burge, *Suit Charges Church Coverup: Jehovah's Witness Group is Blamed in Abuse of Girl*, BOSTON GLOBE, Jan. 1, 2003, at B1.

[63] *Id.* In January 2003, a civil lawsuit was filed against the Jehovah's Witnesses by the then-14-year-old victim and her parents alleging that the church covered up her sexual abuse by a Bible study teacher and discouraged them from notifying police officials. *Id.* The girl's mother stated that the church elders appeared to "coddle" the abuser, while they "socially ostracized" her for notifying law enforcement and pressing criminal charges. *Id.*

[64] *See infra* Part II.A.4 (discussing some of the internal policies within the Amish community).

4. The Amish

Child sexual abuse affects all denominations, from mainline religions to minority religious sects such as the Old Order Amish.[65] The Amish descended from sixteenth century Anabaptists and adhere to a fairly strict policy of rejecting the modern society around them.[66] The Amish abide by the *Ordnung*, both for their district and their church.[67] The *Ordnung* governs all aspects of a community member's life—from dress codes, to prohibitions on modern conveniences such as television, cars, and radios, to when and how a member can be admitted into the church.[68] The *Ordnung* also addresses what to do when major transgressions, such as fornication and child abuse, are discovered.[69]

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[65] DONALD B. KRAYBILL & CARL F. BOWMAN, ON THE BACKROAD TO HEAVEN 12 (2001). The Amish "have high religious ideals, but they are not perfect. Greed, gossip, envy, deceit, and revenge sometimes lift their ugly faces. And there are occasional cases of alcohol abuse, sexual abuse, and domestic violence as well. Despite their outward cloak of righteousness, these people are people." *Id*. Like other people, the Amish, too, "forget, rebel, experiment, and for a variety of reasons, stray into deviance." DONALD B. KRAYBILL, THE RIDDLE OF AMISH CULTURE 111 (1989).

[66] KRAYBILL & BOWMAN, *supra* note 65, at 1, 4-7. The Amish are the most conservative of the Anabaptist churches, rejecting electricity, telephones, and industrialized farming equipment. *Id*. at 6-7. Other Anabaptist churches include the Mennonite, the Hutterites, and the Brethren. *Id*. at 1. Although the Amish appear "to be pressed from the same cultural mold," there are many differences in Amish practices among the many settlements across the country. *Id*. at 107. These differences are camouflaged by at least ten badges of identity shared by most Old Order Amish. *Id*. at 105-06. These badges are:

> (1) horse-and-buggy transportation, (2) the use of horses and mules for fieldwork, (3) plain dress in many variations, (4) a beard and shaven upper lip for men, (5) a prayer cap for women, (6) the Pennsylvania German dialect, (7) worship in homes, (8) eighth-grade private schooling, (9) the rejection of electricity from public utility lines, and (10) taboos on the ownership of televisions and computers.

Id.; *see also* JOHN A. HOSTETLER, AMISH SOCIETY 83-84 (4th ed. 1993).

[67] HOSTETLER, *supra* note 66, at 82-83; KRAYBILL & BOWMAN, *supra* note 65, at 15. The word *Ordnung* is German for "rules and discipline." *Id*. These rules, while typically oral in nature, are the "blueprint for an orderly way of life" and necessary for the welfare of the church-community. HOSTETLER, *supra* note 66, at 82.

[68] KRAYBILL & BOWMAN, *supra* note 65, at 106. "The *Ordnung* clarifies what is considered worldly and sinful, for to be worldly is to be lost." HOSTETLER, *supra* note 66, at 83. While some of the provisions in the *Ordnung* are derived directly from the Bible, many are supported by the sole reasoning that to do otherwise would be worldly and thus unholy. *Id*. All members of an Amish community are aware of the *Ordnung* for their congregation, irrespective of it primarily being oral and unwritten in form. *Id*. at 82.

[69] *See* KRAYBILL & BOWMAN, *supra* note 65, at 109. Amish tradition has established the ritual of confession as a means of punishing such deviant behavior as well as reuniting the errant member with the community. KRAYBILL, *supra* note 65, at 111. There are four levels to the ritual of confession based on the seriousness of the offense. *Id*. Level one, identified as the "private" level, entails a church leader personally visiting with the offender. *Id*.

Because the Amish church community favors living in isolation from the outside world, members prefer to deal with such "sins" themselves through a process of public confession, shunning, and, in worst case scenarios, excommunication.[70] If violators of the *Ordnung* publicly confess their errant ways and demonstrate true repentance during their shunning, the church will restore them in the community with full forgiveness, while excommunicating those who do not.[71] While this practice of confession, shunning, and forgiveness may work as a sound internal remedy for a dress code violation or a member caught watching television, when it comes to adequately managing problems of sexual abuse, the system allows ample opportunity for recidivism.[72] By allowing even the most serious perpetrators of sexual abuse to confess to the Church and publicly apologize, the Amish community essentially permits those individuals to continue to interact freely with the community members, including its youth.[73]

The criminal justice system has been reluctant to impose itself on the Amish community, despite the circulation of child abuse reports for more than twenty years, because "the Amish do not want protection

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Levels two and three both involve public confession, the former through "sitting" and the later through "kneeling." *Id*. at 111-12. Finally, level four entails a six-week ban, during which time the individual is severed from all social contact, thus providing ample time for reflection on the seriousness of the transgression before returning to the community and publicly confessing via kneeling. *Id*. at 112-13.

70 KRAYBILL & BOWMAN, *supra* note 65, at 109. Violations of the *Ordnung* are confessed publicly in a "members meeting." *Id.* The purpose of the public confessions is to diminish self-will, remind members of the "supreme value of submission[,]" and restore "the wayward into the community of faith." *Id*. Those transgressors who refuse to publicly confess their sins, or those who confess extremely terrible sins such as child abuse, can receive a six-week-long probation in which they are shunned by the rest of the community. *Id*. The practice of shunning is often called *Meidung*. HOSTETLER, *supra* note 66, at 85; KRAYBILL, *supra* note 65, at 115. Expelled or excommunicated people are ostracized and shunned for life or until they repent, publicly confess their sins, and are reinstated into the church. KRAYBILL, *supra* note 65, at 116. However, the Amish, like most denominations, are "reluctant to dismiss deviant members[;]" thus, excommunication will only be imposed after the offender is fully warned and encouraged to confess and the community unanimously votes to do so. *Id*. at 114; Hostetler, *supra* note 66, at 85 (stating that the Amish follow Matthew 18:15-17 when excommunicating a member).

71 KRAYBILL & BOWMAN, *supra* note 65, at 109-10. Even years after an offense, excommunicated members can be fully restored into the church and forgiven if they return to publicly confess their sins. *Id*. at 110; KRAYBILL, *supra* note 65, at 115.

72 *See generally* Nadya Labi, *The Gentle People*, LEGAL AFFAIRS (Jan. 6, 2005), *available at* http://www.legalaffairs.org/issues/January-February-2005/feature_labi_janfeb05.msp.

73 *Id*.; *see also* KRAYBILL, *supra* note 65, at 113 ("Those who confess their sin and promise to 'work with the church' are reinstated into it.").

from the state - for religious reasons."[74] When the government does intervene, secular justice is minimal.[75] For example, in 2002, a Philadelphia county judge wanted to incarcerate a convicted sex offender for life for assaulting two Amish boys, but instead accepted a plea agreement giving the recidivistic former Amish man eighteen to thirty-six months in a state prison followed by five years of probation.[76] In another instance, where an Amish girl contacted Children and Youth Services ("CYS") to report that she was being molested and raped by her two older brothers and severely beaten and abused by her parents, the family evaded justice.[77] CYS interviewed the girl, but upon meeting resistance from her parents and community members, the girl was essentially left in the hands of her family.[78] Prosecutors never charged her parents or oldest brother with abuse, while a judge allowed the

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[74] Kathleen Brady Shea, *Judge Accepts Plea to Protect Amish Boys*, PHILADELPHIA INQUIRER, Dec. 5, 2002, at B03. The Amish tend to make a prosecutor's job more difficult by refusing to report offenses and go to court, even when doing so is in their best interest. *Id.*; *see also* Associated Press, *Ex-Amish Women Tell of Repeated Sex Assaults: "I Wasn't Going to be Tortured Anymore," One Says*, WISCONSIN STATE JOURNAL, July 19, 2004, at B1 [hereinafter *Women Tell*].

[75] *Compare* Associated Press, *Judge Sentences Amish Man to Five Years in Sex Case*, CHARLESTON DAILY MAIL, Oct. 31, 2001, at 9A (discussing a five-year prison sentence given to a 69-year-old Amish man for eleven counts of rape and gross sexual imposition when he sexually assaulted two female minors), *with* Duane Schuman, *Man to Get Sentence in Sex-Act Plea, Amish Children Targeted, Prosecutors Say*, FORT WAYNE NEWS SENTINEL, May 1, 2001, at 1A (discussing a possible sixty-eight-year prison sentence for a non-Amish man who abducted and sexually assaulted both male and female Amish children in his van as they traveled home from school).

[76] Shea, *supra* note 74. The lighter sentence is attributed in part to the victims' preference not to testify at trial due the Amish avoidance of the legal system and the sensitivity of the charges. *Id*. The former Amish man had two prior convictions for indecent assault and corruption of minors—one in 1991 and another in 1993. *Id*. The victims in all instances were Amish boys ranging between ten and thirteen years of age. *Id*. His attorney and friend described him as a sixty-nine-year-old man who has "made a couple of mistakes" in his life and needs help, not punishment. *Id*.

[77] Labi, *supra* note 72. The abuse began at the age of eleven when her nineteen-year-old brother sexually molested her. *Id*. When he left the household, her seventeen-year-old brother started raping her. *Id*. After she turned thirteen, and fearing pregnancy, she began to fight against the repeated attacks, causing her brother to place significant pressure on her chest, constricting her ability to breathe during the assaults. *Id*. Her father not only ignored this sibling abuse, but continually would beat her with a piece of wood out at the family woodpile when she violated even the most minor of Amish offenses, such as coloring pictures with markers. *Id*.

[78] Labi, *supra* note 72. Because the girl had done the unspeakable by seeking help from outsiders for a family problem, her mother took her to an Amish dentist and, after the girl had received a Novocain shot in each gum, proceeded to have all of her teeth removed as punishment for talking. *Id*. The girl bled for three days and was shunned by her family throughout the ordeal. *Id*. CYS discovered the abuse in its continued investigation, but neither the dentist nor the mother was criminally charged. *Id*.

younger brother to remain under Amish supervision, provided he stay away from the girl.[79]

As a pluralistic society, the task falls to the government to juggle the competing interests of hundreds of varying religious denominations with those of the nation as a whole in accordance with the goals of the First Amendment.[80] The religious institutions presented here are but a sampling of the array of religious ethos found within the borders of the United States.[81] In keeping with the tradition of pluralism, the Supreme Court has struggled with answering the difficult questions presented under the Religion Clauses; however, in addressing the pandemic of child sexual abuse within the religious community, courts should find fewer First Amendment violations while permitting more government

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[79] *See id*. At age nineteen, having received no relief from either her church or the state, she left both her family and the church. *Women Tell*, *supra* note 74.

[80] *See* United States v. Ballard, 322 U.S. 78, 86 (1944) ("The First Amendment has a dual aspect. It not only 'forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship' but also 'safeguards the free exercise of the chosen form of religion.'"). In a concurring opinion, Justice Stewart commented upon the duty of the Court in the face of internal First Amendment tensions. Sherbert v. Verner, 374 U.S. 398, 417 (1963) (Stewart, J., concurring). Justice Stewart said, "[w]ith all respect, I think it is the Court's duty to face up to the dilemma posed by the conflict between the Free Exercise Clause of the Constitution and the Establishment Clause as interpreted by the Court." *Id*. at 416.

[81] *See, e.g.*, McCreary County v. Am. Civil Liberties Union of Kentucky, 545 U.S. 844 (2005); County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989). Justice Souter, in his majority opinion in *McCreary*, noted:

> It is true that the Framers lived at a time when our national religious diversity was neither as robust nor as well recognized as it is now. They may not have foreseen the variety of religions for which this Nation would eventually provide a home. They surely could not have predicted new religions, some of them born in this country. But they did know that line-drawing between religions is an enterprise that, once begun, has no logical stopping point. They worried that "the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects." The Religion Clauses, as a result, protect adherents of all religions, as well as those who believe in no religion at all.

McCreary County, 545 U.S. at 844 (internal citations omitted). In addition, Justice Blackmun commented that:

> This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent. Sectarian differences among various Christian denominations were central to the origins of our Republic. Since then, adherents of religions too numerous to name have made the United States their home, as have those whose beliefs expressly exclude religion.

Allegheny, 492 U.S. at 589.

interventions into religious practices for the purpose of uncovering, investigating, and prosecuting abuse perpetrators.[82] The fact that the criminal justice system has seemingly turned a blind eye on the problem that is plaguing the church community, through its slow or tempered responses to known instances of sexual abuse, suggests that more stringent government acts, such as the abrogation of the clergy-communicant privilege, need to be implemented.[83] Inaction not only perpetuates a growing dilemma, but it serves as a form of reverse discrimination under the Religion Clauses by conferring added benefits to those within a religious community.[84] Such preferential treatment on the basis of religion conflicts with the dictates of the Religion Clauses by seemingly endorsing religion over non-religion.[85]

B. History of Religion Clause Jurisprudence

Historically, because of their entwinement, the First Amendment's Free Exercise Clause and Establishment Clause[86] commonly clash.[87]

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[82] *See Prince*, 321 U.S. at 166-67 (stating, "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.").

[83] Fain, *supra* note 9, at 224-25. "More sexual misconduct cases involving various denominations have been decided by the courts during the 1990s and 2000s, and it is clear . . . that the judiciary is often reluctant to impose liability on the church regardless of how bizarre the events engendering the claims." *Id.* Often, "the church will approach the law enforcement agency investigating the allegations and assure them that this sex crime is an 'isolated incident' and that the public interest will be best served by removing the offender from the parish and sending them to treatment." 91 AM. JUR. TRIALS, *supra* note 24, at § 8. In addition, given the time that passes between the actual abuse and the victim's report and the age or frailty of the victim, churches and law enforcement officials give in to the temptation of disbelieving the veracity of such malicious crimes. Jones, *supra* note 6, at 358. As a result, the victims of child sexual abuse have obtained limited assistance from the criminal justice system. Fain, *supra* note 9, at 215. "Many feel that the judiciary is not acting forcefully or expeditiously enough in resolving the issue of clergy misconduct." *Id*. There is, however, hope that "persistent media focus addressing the issue and exposing the clergy perpetrators of sexual abuse should exert pressure on the courts, as well as the churches, to do whatever is necessary to alter ministerial behavior." *Id.* at 225.

[84] *See* KURLAND, *supra* note 25.

[85] *See id.*, *supra* note 1, at 18 ("[T]he proper construction of the religion clauses of the first amendment is that the freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden.").

[86] U.S. CONST. amend. I (stating "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

[87] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1454 (2d ed. 2005) (citing Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970)). Chemerinsky poses this hypothetical as an illustration of the inherent tension that exists between the Religion Clauses: if the government provides ministers for those in military service through the use of taxpayer

Turning to the Framers' intent often yields little relief for the dilemma of "proper" Religion Clause application.[88] Even so, with religious diversity continually increasing, the United States Supreme Court has not shied away from interpreting and applying the Religion Clauses, albeit inconsistently doing so.[89] Consequently, it is helpful to review each clause separately, beginning with the Free Exercise Clause.[90]

1. The Free Exercise Clause

The Supreme Court first analyzed the Free Exercise Clause in *Reynolds v. United States*, when it examined whether to criminalize religiously sanctioned polygamy.[91] While acknowledging that the

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dollars, the government is arguably establishing religion; however, if the government refuses to provide any religious ministers to the armed forces, then it is arguably denying the troops free exercise of religion. *Id*. Resolving this tension proves difficult because clear meaning and applicability of the Religion Clauses have continually eluded the courts since their inception in 1791. *Id*. at 1455. Determining a neutral method of applying the Religion Clauses is frustrated by the fact that both the Free Exercise Clause and the Establishment Clause are "cast in absolute terms[,]" and if either is "expanded to a logical extreme[,]" they would clash with each other. *Id*. at 1454 (citing Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970)).

88 *Id*. at 1454-55. The Court's struggle in determining how best to apply the Religion Clauses of the First Amendment is perpetuated by the Framer's differing views. There are

> at least three distinct schools of thought which influenced the drafters of the Bill of Rights: first, the evangelical view (associated primarily with Roger Williams) that "worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained"; second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests (public and private) "against ecclesiastical depredations and incursions"; and, third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure competition among sects rather than dominance by any one.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1158-59 (2d ed. 1988). The problem with turning to the Framers for interpretation of the Religion Clauses "is compounded by the enormous changes" the country has undergone since the adoption of the First Amendment. CHEMERINSKY, *supra* note 87, at 1455.

89 *See*, *e.g.*, Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 825-26 (1999). "It is plain that there is wide variety in American religious taste." *Ballard*, 322 U.S. at 94 (Jackson, J., dissenting); *see also Allegheny*, 492 U.S. at 589.

90 *See infra* Part II.B.1 (discussing the jurisprudence of the Free Exercise Clause).

91 98 U.S. 145, 161 (1878). Reynolds, the plaintiff, was a member of the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church. *Id.* He testified that:

> it was the duty of male members of said Church . . . to practice polygamy . . . that this duty was enjoined by different books which the members of said Church believed to be of divine origin, and among others the Holy Bible, and also that the members of the Church believed that the practice of polygamy was directly enjoined upon the

government cannot prohibit the free exercise of religion, the Court held that the government could make particular actions illegal.[92] The Court emphasized that to allow all religious practices to go unchecked would be to allow individual autonomy to overthrow the laws of the land.[93] The *Reynolds* holding essentially protects religious beliefs while simultaneously placing compelling social concerns above particular religious practices.[94]

Almost a century later, the Supreme Court, in *Sherbert v. Verner*,[95] addressed the Free Exercise Clause again, applying the traditional strict scrutiny test to all laws burdening religious freedom.[96] The South Carolina statute at issue did not withstand strict scrutiny because it unconstitutionally denied unemployment benefits in violation of the Religion Clauses.[97] The Court held that the government could not

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> male members thereof by the Almighty God . . . that the failing or refusing to practice polygamy by such male members of said Church, when circumstances would admit, would be punished . . . [by] damnation in the life to come.

Id. Reynolds went on to say that he had received permission from his church's authorities to enter into the polygamous relationship. *Id*.

92 *Id*. at 166. While laws "cannot interfere with mere religious belief and opinions, they may with practices." *Id*. The Court stated that "there never has been a time in any State of the Union when polygamy has not been an offense against society . . . ." *Id.* at 165. The First Amendment's guarantee of free religion could not possibly be intended to "prohibit legislation in respect to this most important feature of social life." *Id.*

93 *Id*. at 166-67 (reasoning that unchecked religious practices would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself").

94 *See* Marc James Ayers, *Law and Religion* Employment Division, Department of Human Resources of Oregon v. Smith *Survives: Supreme Court Finds Religious Freedom Restoration Act Unconstitutional*, 21 AM. J. TRIAL ADVOC. 193 (1997). "Reasoning that the Constitution protects religious beliefs but not necessarily religious practices, the Court placed great importance on the concerns of society as a whole over and against the religious activities of the few." *Id*.

95 374 U.S. 398 (1963).

96 *See generally id*. at 398. Strict scrutiny, one of three general standards used by the courts to evaluate the constitutionality of particular government acts, requires proof of a compelling government interest. *See*, *e.g.*, *id*. at 406-07; *Smith*, 494 U.S. at 883. Additionally, the standard requires that the government prove that the means used to achieve its professed interest are narrowly tailored—specifically, that they are the least restrictive alternative. *Sherbert*, 374 U.S. at 406-07; *Smith*, 494 U.S. at 883.

97 *Sherbert*, 374 U.S. at 410. *But see id*. at 414-15 (Stewart, J., concurring) (suggesting that if the case had been determined under the Establishment Clause, the denial of unemployment benefits would have been constitutional). Appellant was a member of the Seventh-Day Adventist Church which observes the Sabbath Day on Saturdays. *Id*. at 399. When her employer changed the work week for all shifts to include Saturdays, appellant refused to work the sixth day due to "conscientious scruples." *Id.* As a result, she was dismissed. *Id*. After several unsuccessful attempts at finding employment that did not

substantially burden an individual's religious practices without first having a compelling interest specifically tailored not to penalize particular religious beliefs.[98]

Neither *Reynolds* nor *Sherbert* have been formally overruled, yet the Court steered away from both precedents when it established the current standard for free exercise claims in *Employment Division, Department of Human Resources of Oregon v. Smith*.[99] The *Smith* Court reviewed Oregon's drug use laws under the Free Exercise Clause and determined

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require Saturday labor, appellant applied for unemployment compensation, and was denied. *Id*. at 401.

[98] *Id*. at 402 (stating that the government cannot "compel affirmation of a repugnant belief nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities") (internal citations omitted). The Court reaffirmed *Reynolds* by acknowledging that "one's religious convictions [are] not totally free from legislative restrictions." *Id*. at 403. However, it limited government restrictions on religious practices to those acts that "pose[] some substantial threat to public safety, peace or order." *Id*. This holding marked a shift in First Amendment jurisprudence from *Reynolds* by providing more protection to the individual. Ayers, *supra* note 94, at 193. "After *Sherbert*, the crucial determination would now be whether the action taken by the government substantially burdened the exercise of one's religious practices and whether the governmental interest asserted was compelling enough to justify the burden." *Id*.

[99] 494 U.S. 872 (1990). Congress attempted twice to negate the *Smith* test. CHEMERINSKY, *supra* note 87, at 1477-78. Congress' first attempt to override the *Smith* standard was by enacting the Religious Freedom Restoration Act ("RFRA") in 1993. *Id.* The RFRA specifically sought to restore *Sherbert's* strict scrutiny test. Eugene Gressman, *The Necessary and Proper Downfall of the RFRA*, 2 Nexus J. Op. 73, 76 (1997). This Act, however, was deemed unconstitutional by the Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The RFRA failed because "a logical consequence . . . would be that the states would have to provide exemptions for every possible religious conflict" and "the litigation costs associated with such a burden, combined with the diminished power of the state to govern effectively and with uniformity" were too vast. Ayers, *supra* note 94, at 196. By invalidating the RFRA, the Court reinforced the principle that only the judiciary retains the power to interpret the Constitution. Gressman, *supra*, at 73-74 (noting that the "RFRA represent[ed] an unprecedented effort by Congress to execute one of the core functions of the Court, the delicate function of interpreting the Constitution and applying that interpretation to specific cases and controversies"). Congress's second attempt came under the Religious Land Use and Institutionalized Persons Act of 2002 ("RLUIPA"). CHEMERINSKY, *supra* note 87, at 1478. There was much debate over the constitutionality of RLUIPA, and at least three courts have held the Act as unconstitutional in violation of the Establishment Clause. *See* Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003); Kilaab Al Ghashiyah (Khan) v. Dep't of Corrections of State of Wisconsin, 250 F. Supp. 2d 1016 (E.D. Wis. 2003); Madison v. Riter, 240 F. Supp. 2d 566 (W.D. Va. 2003). *But see* Coronel v. Paul, 316 F. Supp. 2d 868 (D. Ariz. 2004) (upholding the validity of RLUIPA). However, in 2005, the Supreme Court, revisiting one such Sixth Circuit test case involving inmates at the Ohio Department of Rehabilitation and Correction facility, finally determined that RLUIPA did not constitute an Establishment Clause violation because "it alleviates exceptional government-created burdens on private religious exercise." Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

that the *Sherbert* test has never been used to invalidate a law.[100] Instead of applying *Sherbert*'s strict scrutiny test, the Court recognized a new standard for Free Exercise Clause cases known as the "neutral, generally applicable law" test.[101] The Court noted that an individual's beliefs have never been an excuse for noncompliance with a valid law the State possessed authority to create.[102] Rather, only in situations that implicate the First Amendment in conjunction with other constitutional protections may the Court invalidate a neutral, generally applicable law under the Free Exercise Clause.[103]

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[100] *Smith*, 494 U.S. at 884-85 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."). The Court went on to suggest that the *Sherbert* test be deemed inapplicable to such free exercise challenges. *Id.* The Court implied that society would be "courting anarchy" by requiring a compelling government interest before validating a law that encroaches upon some individual's professed beliefs. *Id*. at 888. "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,'—contradicts both constitutional tradition and common sense." *Id*. at 884-85 (quoting, in part, *Reynolds*, 98 U.S. at 167) (internal citations omitted). In this case, plaintiffs were Native Americans and members of the Native American Church, which required the ingestion of peyote, a hallucinogenic drug derived from a plant called Lophophora williamsii Lemaire, during certain religious ceremonies. *Id.* at 874. Oregon law prohibited the possession of a controlled substance except when the drug was prescribed for medicinal use. *Id*. Under the law, peyote was a Schedule I narcotic and its possession was considered a Class B felony. *Id.* Plaintiffs were employees of a private drug rehabilitation facility but were terminated when their peyote use was discovered. *Id*. The lawsuit ensued when plaintiffs were denied unemployment benefits due to their use of peyote for ceremonial purposes. *Id*.

[101] *Id*. at 881. The Court further stated that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting, in part, United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

[102] *Id*. The Court, reasoning that allowing exemptions to generally applicable laws for every conceivable religious claim would make governing inefficacious, held that, despite potentially rendering the practice of someone's religion impossible, a neutral, generally applicable law will not be subjected to strict scrutiny standards. *See* Ayers, *supra* note 94, at 194. "The *Smith* majority distinguished *Sherbert* by finding that the strict scrutiny balancing test is appropriate when a state already has a system of individual exemptions in place, but that general, facially neutral prohibitions will not require a compelling governmental interest." *Id*.

[103] *Smith*, 494 U.S. at 881. The Court, in dicta, proposed an "exception to its neutral law of general applicability rule: the 'hybrid rights' exception. . . . Essentially, the exception suggests that courts should apply heightened judicial scrutiny when a case involves a free exercise component along with another fundamental right." Christopher R. Pudelski, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post*-Smith *World*, 98 NW. U. L. REV. 703, 720-21 (2004). *See also* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) (invalidating a law mandating

The inconsistency among courts that attempt to identify a First Amendment violation as pertaining to the Free Exercise Clause, demonstrates the challenges courts face when assessing the constitutionality of government actions.[104] The process, moreover, is further complicated by the Establishment Clause.[105]

2. The Establishment Clause

Establishment Clause issues are often determined based on one of three mainline approaches the Court utilizes in analyzing the relation between the government and religion.[106] As a result, there is vast inconsistency in the manner in which the Court has interpreted different government acts under the Establishment Clause.[107] For example, in

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attendance in public schools as violating both the Free Exercise Clause and parents' right to rear their children); Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating compulsory education laws as pertaining to the Amish due to the combination of the free exercise of religion and the parental right to raise a child).

[104] *See* McCreary County v. Am. Civil Liberties Union of Kentucky, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring) ("Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society.").

[105] *See supra* note 87 and accompanying text (discussing the entwinement between the Free Exercise Clause and the Establishment Clause and tension it causes).

[106] CHEMERINSKY, *supra* note 87, at 1486; *see* Tribe, *supra* note 88. The three main competing Establishment Clause theories are the strict separation theory, the neutrality theory, and the accommodation theory. CHEMERINSKY, *supra* note 87, at 1486-89. Strict separationists firmly believe that government and religion should, as their name suggests, be separated as much and to the greatest extent possible in order to protect the religious liberty under the Free Exercise Clause. *Id*. at 1486. Neutrality supporters take the stance that government "cannot favor religion over secularism or one religion over others." *Id*. at 1487. Finally, accomodationists suggest that the Establishment Clause should be interpreted as recognizing religion's importance and the need of accommodating its presence in government. *Id*. at 1489. The Court is frequently composed of adherents of all three theories, thus making it near impossible to predict the outcome of a particular case. *Id*. at 1486.

[107] Hamilton, *supra* note 89, at 824-25 ("The Supreme Court's doctrine in the Establishment Clause arena has been treated to more internal and external criticism for its lack of consistency, perhaps, than any other constitutional doctrine."). *See also* John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 847 (1984) (calling for a "more encompassing and clearer view of both of the religion clauses of the first amendment and also of the relation between the religion clauses and other provisions of the Constitution"); Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 861 (1995) (stating "[O]ur Establishment Clause jurisprudence is in hopeless disarray . . . ."); Lynch v. Donnelly, 465 U.S. 668, 672 (1984) (suggesting that in all Establishment Clause cases, the Court must "reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the realty that . . . total separation of the two is not possible").

Lemon v. Kurtzman, the Court established a test to evaluate laws and actions under the Religion Clauses that has been haphazardly followed.[108]

The Court in *Lemon* admitted that identifying a violation of the Establishment Clause is difficult because, in most cases, a particular law does not propose to establish a state religion directly, but rather has the potential to serve as the impetus for doing so in the future.[109] To placate these fears, the Court instituted a three-pronged test for determining the constitutional validity of laws under the Establishment Clause.[110] While acknowledging that some relationship between government and religion is unavoidable, the Court stated that political division along religious lines had to be avoided, and the test was meant to help attain that goal.[111]

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[108] 403 U.S. 602 (1971). *See also* CHEMERINSKY, *supra* note 87, at 1499. The future of the *Lemon* test is unknown. *Id*. There is much criticism surrounding the *Lemon* test, claiming it "has proven unwieldy and has led to inconsistent results." Long, *supra* note 23, at 774. As such, inferences may be drawn from recent Court decisions that the Court is slowly moving towards an abandonment of the *Lemon* test. *Id*.; *see also McCreary County*, 545 U.S. at 900 (Scalia, J. dissenting) (stating, "[a]s bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve.").

[109] *Lemon*, 403 U.S. at 612. "A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." *Id*. Two statutory provisions were at issue in *Lemon*. *Id*. at 106. One was a Pennsylvania statute providing financial support to private elementary and secondary schools via reimbursement for the costs of teacher salaries, textbooks, and other materials used in secular subjects. *Id*. at 606-07. The other was a Rhode Island statute that directly paid fifteen percent of private elementary school teachers' salaries. *Id*. at 607. The opinion held that both types of subsidies to parochial schools were unconstitutional under the Establishment Clause and the Free Exercise Clause. *Id*. at 625. The Court reasoned that the "Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." *Id*.

[110] *Id*. at 612-13. The three prongs of the *Lemon* Test are: (1) that the statute "have a secular legislative purpose[;]" (2) that its primary effect is neither to advance nor inhibit religion; and (3) that it does "not foster an 'excessive government entanglement with religion.'" *Id*. (quoting, in part, *Walz*, 397 U.S. at 674). Excessive entanglement is determined by examining the character and purposes of the benefiting institutions, the nature of the state aid, and the relationship between the state and the religious institution as a result. *Id*. at 615.

[111] *Id*. at 622. "[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id*. The Court identified three additional evils the Establishment Clause alone was enacted to prevent and constructed the *Lemon* test as a method of countering the realization of those evils. *Id*. at 612 (identifying the three evils to be "sponsorship, financial support, and active involvement of the sovereign in religious activity") (quoting *Walz*, 397 U.S. at 668).

After the creation of the *Lemon* test, the Court heard numerous cases challenging the constitutionality of a wide range of issues under the Establishment Clause.[112] The outcomes of those cases, however, were less uniform than expected due to the inconsistent application of the *Lemon* test by the Court.[113] For instance, *Lynch v. Donnelly*[114] and *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*[115] involved similar religious issues but resulted in different outcomes.[116]

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[112] For examples of conflicting application of the *Lemon* test, see generally Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989); Bowen v. Kendrick, 487 U.S. 589 (1988); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987); Edwards v. Aguillard, 482 U.S. 578 (1987); Witters v. Wash. Dep't of Serv. for the Blind, 474 U.S. 481 (1986); Bd. of Tr. of Scarsdale v. McCreary, 471 U.S. 83 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Aguilar v. Felton, 473 U.S. 402 (1984); Widmar v. Vincent, 454 U.S. 263 (1981); Stone v. Graham, 449 U.S. 39 (1980); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); Sloan v. Lemon, 413 U.S. 825 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); Sch. Dist. of Abington Twp., Pennsylvania v. Schempp, 374 U.S. 203 (1963). For similar cases where the *Lemon* test was not applied at all, see generally Marsh v. Chambers, 463 U.S. 783 (1983); Larson v. Valente, 456 U.S. 228 (1982); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

[113] *See* Van Orden v. Perry, 545 U.S. 677, 686 (2005). The *Van Orden* court explained that:

> just two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as 'no more than helpful signposts.' Many of our recent cases simply have not applied the *Lemon* test. Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.

Id. (quoting, in part, *Hunt*, 413 U.S. at 741) (internal citations omitted). *See*, *e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001) (holding that a public school could not deny a Christian club use of the facility for a meeting place after school hours because a modified heckler's veto, "in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive," is not employed in Establishment Clause jurisprudence); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 861 (1995) (holding that because the Establishment Clause "does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants," a student-run religious organization could not be denied university funding to print a newspaper); Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (holding that allowing a religious institution to use public school property to show a film series dealing with child-rearing and family issues would not violate the Establishment Clause under the *Lemon* test); *see also supra* note 108 (addressing the unwieldy nature of the *Lemon* test and the Court's potential abandonment of it).

[114] 465 U.S. 668 (1984).

[115] 492 U.S. 573 (1989).

[116] *Lynch*, 465 U.S. at 668. The question posed in the *Lynch* case was whether a municipality's use of a crèche as an element in its public Christmas display was in violation of the Establishment Clause. *Id*. Similarly, the issue arising in *Allegheny* concerned two different holiday displays—the first utilizing a crèche and the second a menorah. *See generally Allegheny*, 492 U.S. at 573.

In *Lynch*, the Court addressed the *Lemon* test but stated that "no fixed, *per se* rule can be framed."[117] Instead, taking an accommodationist approach, it reasoned that the Constitution mandated not merely tolerance of but also non-hostile accommodation of all religions.[118] Consequently, the Court held that the Establishment Clause did not prohibit a municipality from including a crèche in its Christmas display.[119] Several years later, however, in contrast to the *Lynch* decision, the *Allegheny* Court followed the endorsement analysis outlined in Justice O'Connor's concurring opinion to *Lynch* and concluded that the city's use of the crèche was a violation of the Establishment Clause, though it upheld the legality of the menorah.[120] Thus, the *Allegheny*

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[117] *Lynch*, 465 U.S. at 678.

> The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test . . . .
>
> In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.

Id. at 678-79 (internal citations omitted).

[118] *Id*. at 673 ("Indeed, we have observed, such hostility would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'") (quoting People of State of Illinois *ex rel*. McCollum v. Bd. of Ed. of Sch., 333 U.S. 203, 211-12 (1948)); *see also supra* note 106 (discussing the three primary competing theories of Establishment Clause analysis).

[119] *Lynch*, 465 U.S. at 670-71. The city displayed the crèche, or Nativity scene, for more than 40 years, and was situated in a park owned by a nonprofit organization. *Id.* As per Christian tradition, the display consisted of figurines depicting the infant Jesus Christ, Mary, Joseph, several angels, shepherds, three kings, and some animals. *Id*. The city displayed the crèche in conjunction with other traditional holiday symbols such as: a Santa Claus house, reindeer and a Santa sleigh, candy-striped poles, a Christmas tree, carolers, colored lights, cutout figures of clowns and elephants, and a large banner that read "Seasons Greetings." *Id*. The city had purchased all of the decorations at a taxpayer cost of $1365. *Id.* Based on these facts, the Court concluded that inclusion of the crèche was not expressly advocating a particular religious message and only served a secular purpose. *Id*. at 680-81. *But see id*. at 690-91 (O'Connor, J. concurring) ("The purpose prong of the *Lemon* test . . . . is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes . . . . The proper inquiry . . . is whether the government intends to convey a message of endorsement or disapproval of religion.").

[120] *Allegheny*, 492 U.S. at 579. The Nativity scene was organized by the Holy Name Society, a Roman Catholic group. *Id.* It represented the manger in Bethlehem shortly after the birth of Jesus as described in the Bible, and included all of the traditional characters. *Id*. at 580. In addition, the wooden manger had as its crest, an angel carrying a banner that proclaimed "Gloria in Excelsis Deo" meaning "Glory to God in the highest." *Id*. at 580-81. Unlike in *Lynch*, no Santa Claus, reindeer, or other figurines appeared near the Nativity. *Id*. The Chanukah menorah was owned by Chabad, a Jewish group, but was maintained and stored by the city. *Id*. at 587. In contrast to the Nativity, the menorah was displayed along

holding effectively clarified that "government's use of religious symbolism" would be "unconstitutional if it has the effect of endorsing religious beliefs."[121]

As illustrated by the *Lynch* and *Allegheny* decisions, a consistent legal analysis of Establishment Clause challenges is impossible, because such challenges are wrought with important and sensitive complications.[122] Nevertheless, the Court has interpreted history and politics enough to give the Establishment Clause some shape, even if it "is precious little . . . on which we can hang our hats."[123] The shape of the

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side several large, fully decorated Christmas trees and a sign titled "Salute to Liberty[,]" which bore the mayor's name. *Id*. at 581-82. The liberty sign read, "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *Id*. at 582. The Nativity scene was placed on the Grand Staircase located inside the county's courthouse while the Chanukah menorah was displayed just outside the City-County building. *Id*. at 578. Unable to find sufficient guidance under the *Lynch* opinion, the Court applied Justice O'Conner's endorsement test. *Id.* at 595; *see supra* note 119 (discussing the endorsement test). The Court interpreted the Nativity scene to be an effective endorsement of "a patently Christian message: Glory to God for the birth of Jesus Christ," while dismissing the menorah as a non-sanctified object and symbol of a cultural holiday ranking relatively low in religious significance in the Jewish community. *Allegheny*, 492 U.S. at 584, 586-87, 601. Chanukah was viewed as having a "socially heightened status" which reflected its "cultural or secular dimension" as opposed to Christmas, which could be seen as the holiest of Christian holidays. *Id*. at 587.

121 *Id.* at 597.

122 *See* Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring) (suggesting that Establishment Clause jurisprudence is inconsistently applied to cases needing adjudication); *see also supra* note 106 (addressing the difficulty in obtaining consistent court holdings pertaining to the Religion Clauses). Some scholars, however, have suggested that this lack of consistency in Establishment Clause cases is highly beneficial, because "church and state ever will reach for an increase in power (either alone or together) . . . [and] [r]ote application of bright-line rules to similar factual skeletons would hand church and state a too easily manipulable regime." Hamilton, *supra* note 89, at 825-26. Both church and state can change the balance of power in an infinitely creative number of ways; therefore, having predictable standards for Religion Clause analysis should never be the Court's goal. *Id.* at 825. Demanding consistency and predictability in Religion Clause jurisprudence distracts from the more pressing question of proper allocation of power between state and religion. *Id*. at 826.

123 *Id*. at 822; *see also* Mansfield, *supra* note 107, at 904 (referring to the Court's Religion Clause decisions as a "nearly impenetrable cloud of words and 'tests'"). The Court has clarified the Establishment Clause to mean this much:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large

Establishment Clause is concrete enough to support the government's extension of existing investigatory tools, such as mandatory reporting statutes, into the realm of religion in order to combat child sexual abuse.[124]

C. Mandatory Reporting Statutes

Reporting statutes are one type of investigative tool implemented by the states to aid in the difficult task of prosecuting sexual abuse.[125] Because government intervention and prosecution of child sexual abuse crimes is made possible only by first discovering the need to act,[126] states

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> or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Allegheny, 492 U.S. at 591 (quoting Everson v. Bd. of Edu. of Ewing, 330 U.S. 1, 15-16 (1947)). In addition, it has been noted that the Religion Clauses embody the formerly radical idea that "[f]ree people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct." McCreary County v. Am. Civil Liberties Union of Kentucky, 545 U.S. 844, 881-82 (2005) (O'Connor, J., concurring).

[124] *See infra* Part II.C (discussing mandatory reporting statutes use as an investigatory tool); Part III.A (demonstrating the constitutional feasibility of including clergy members within the scope of mandatory reporting statutes).

[125] *See* Myers, Diedrich, Lee, Fincher & Stern, *supra* note 10, at 58 (discussing the difficulty in proving child sexual abuse in court). Apart from the challenge of identifying instances of sexual offenses, the nature of the crime itself is wrought with evidentiary obstacles. Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."). In addition to lack of witnesses, in some instances the child victim is incompetent to testify on his or her behalf. Myers, Diedrich, Lee, Fincher & Stern, *supra* note 10, at 58. The child is often too young or too frightened to effectively testify. *Id*. Moreover, "[t]he problems of ineffective child testimony and lack of eyewitnesses are compounded by the paucity of medical evidence in most child sexual abuse cases." *Id*. Merely acknowledging these evidentiary obstacles is insufficient; thus, judges have begun adjusting time-honored courtroom practices to better accommodate children. *Id.* at 57; *see also supra* note 10 (providing examples of such accommodations made thus far by courts).

[126] "[I]ntervention is not possible unless there is first detection." Ashley Jackson, *The Collision of Mandatory Reporting Statutes and the Priest-Penitent Privilege*, 74 UMKC L. REV. 1057, 1065 (2006). Mandatory reporting statutes increase the likelihood of obtaining helpful information that will lead to criminal prosecution. Pudelski, *supra* note 103, at 736. A Massachusetts Attorney General report in 2003 blamed the state's inability to prosecute more child abuse perpetrators on weak reporting statutes. *Id*. at 714; Office of the Attorney General, Commonwealth of Massachusetts, *The Sexual Abuse of Children in the Roman Catholic Archdiocese of Boston* 73 (2003), http://www.ago.state.ma.us/archdiocese.pdf. (last visited Aug. 10, 2007). Child abuse is not easily detectable by law enforcement on its own due to the inexperience, fears, and vulnerability of the victims and their failure to report the abuse. Jackson, *supra*, at 1065 (citing "the age and vulnerability of the young victims who would refrain from reporting abuse" as a major source of detection difficulties).

fashioned mandatory reporting statutes "for the purpose of detecting and eradicating child abuse."[127]

The call for reporting statutes began in the early 1960s and included disclosure primarily by physicians and other medical practitioners.[128] By 1967, all fifty states had adopted some form of a statute mandating reports of known or suspected instances of abuse to law enforcement officials.[129] Over the years, the statutes expanded so as to include more professionals likely to encounter child abuse.[130]

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[127] Andrew A. Beerworth, *Treating Spiritual and Legal Counselors Differently: Mandatory Reporting Laws and the Limitations of Current Free Exercise Doctrine*, 10 ROGER WILLIAMS U. L. REV. 73, 103 (2004). The primary purpose behind the implementation of mandatory reporting statutes initially was the protection of children. *See* Pudelski, *supra* note 103, at 706-07 (stating reporting requirements were a response to the public concern of child abuse); Raymond C. O'Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating that Clergy Report Child Abuse*, 25 Loy. L.A. L. Rev. 1, 21-22 (1991). Based on the language of the statutes, it is apparent that:

> reporting requirements are intended to initiate preventative measures by proper authorities to guard against future abuse. In addition to providing safeguards for children, these reporting statutes are aimed at protecting the integrity of the family unit. It follows, then, that reporting provisions are designed to ensure that children can develop normally through growth in a proper mental, physical and emotional atmosphere.

O'Brien & Flannery, *supra*, at 22.

[128] The Department of Health, Education, and Welfare published the first model reporting statute in 1963, requiring physicians to report any suspected cases of child abuse under penalty of misdemeanor for failing to do so. *See*, *e.g.*, Jackson, *supra* note 126, at 1065; Potter, *supra* note 4, at 270.

[129] *See*, *e.g.*, Jackson, *supra* note 126, at 1065-66; Pudelski, *supra* note 103, at 706; Lawrence R. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69, 75 (1982-83) (all providing accounts of the historical development of child abuse reporting statutes in the United States). Today, all fifty states, together with the District of Columbia and the Virgin Islands, have implemented some form of a statute requiring instances of child abuse to be reported to various authorities. Danny R. Veilleux, *Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R.4th 782 (1989); Beerworth, *supra* note 127, at 98. For most state reporting statutes, see the following: Ala. Code § 26-14-3 (2006); ALASKA STAT. § 47.17.020 (2006); ARIZ. REV. STAT. ANN. § 13-3620 (West 2006); ARK. CODE ANN. § 12-12-507 (West 2006); CAL. PENAL CODE §§ 11165-11166 (West 2006); COLO. REV. STAT. ANN. § 19-3-304 (West 2006); CONN. GEN. STAT. § 17a-101(b) (2006); Del. Code. Ann. tit. 16, § 903 (West 2006); FLA. STAT. § 415.504 (2006); Ga. Code. Ann. § 74-111 (West 2006); HAW. REV. STAT. § 350-1.1 (2006); IDAHO CODE ANN. § 16-1619 (2006); 725 ILL. COMP. STAT. ANN. 5/115-11 (West 2006); IOWA CODE § 232.69 (2006); KY. REV. STAT. ANN. § 620.030 (West 2006); LA. REV. STAT. ANN. § 14:403(B) (West 2006); ME. REV. STAT. ANN. tit. 122, § 4011 (West 2006); MD. CODE ANN., FAM. LAW § 5-704 (West 2006); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2006); MINN. STAT. § 626.556 (2006); MISS. CODE ANN. § 43-21-353 (West 2006); MO. REV. STAT. § 210.115 (2006); MONT. CODE ANN. § 41-3-201 (West 2006); NEB. REV. STAT. § 28-711 (2006); NEV. REV. STAT. § 432B.220 (2006); N.H. REV.

Common mandatory reporting statutes contain two types of provisions, "provisions that apply to certain individuals and permissive reporting provisions that apply to everyone."[131] The statutes typically provide immunity from suit for reporting as well as threaten both civil and criminal liability for failing to do so.[132] However, as a result of the growing number of abuse scandals, a few states have added amendments to strengthen their reporting statutes.[133]

In an attempt to improve the effectiveness of the reporting statutes, some states have added clergy to the list of those professionals required to disclose information covered under the statute.[134] The inclusion of

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STAT. ANN. § 169-C:29 (2006); N.J. STAT. ANN. § 9:6-8.10 (West 2006); N.Y. SOC. SERV. LAW § 413 (McKinney 2006); N.D. CENT. CODE § 50-25.1-03 (2006); OHIO REV. CODE ANN. § 2151.42.1 (LexisNexis 2006); 18 PA. STAT. ANN. § 6311 (West 2006); R.I. GEN. LAWS § 40-11-3 (2006); S.C. CODE ANN. § 20-7-510 (West 2006); S.D. CODIFIED LAWS § 26-8A-3 (2006); TENN. CODE. ANN. § 37-1-403 (West 2006); VT. STAT. ANN. tit. 33, § 4913 (2006); VA. CODE ANN. § 63.1-248.3 (West 2006); WASH. REV. CODE § 26.44.030 (2006); W. VA. CODE § 49-6A-2 (2006); WIS. STAT. § 48.981(2) (2006); WYO. STAT. ANN. § 14-3-205 (West 2006).

130 *See* Jackson, *supra* note 126, at 1066. Professionals typically included within the scope of the reporting statute are: teachers, law enforcement officials, social workers, physicians, therapists, and guidance counselors. *Id*. Reporting statutes have also been expanded to provide further protections against neglect, sexual abuse, and physical, mental, and emotional abuse. Pudelski, *supra* note 103, at 707.

131 Potter, *supra* note 4, at 270.

132 Potter, *supra* note 4, at 270. *See also* Landeros v. Flood, 551 P.2d 389 (Cal. 1976). *Flood* was a hallmark decision that provided the necessary force to give life to the reporting statutes. Jackson, *supra* note 126, at 1066. The *Flood* court held that physicians could be liable for negligence in civil cases for failing to report suspected instances of child abuse to the proper law enforcement agencies. *Flood*, 551 P.2d at 392.

133 Pudelski, *supra* note 103, at 713-14, nn.78-81. These amendments include: (1) extending or eliminating the statute of limitations for torts and sexual crimes; (2) increasing the penalties, both civil and criminal, for child abuse; and (3) creating new crimes such as the crime of "recklessly endangering children." *Id.* at 713-14. Nevertheless, for the vast majority of states, the substance of their mandatory reporting statutes has remained unaltered. *Id*.; *see also infra* note 134 and accompanying text (discussing the expansion of mandatory reporting statutes to include clergy members).

134 Pudelski, *supra* note 103, at 713, n.79. Inclusion of clergy members under the scope of mandatory reporting statutes has been met with much resistance. *See generally* Chad Horner, *Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society*, 45 DRAKE L. REV. 697, 730 (1997); Beerworth, *supra* note 127, at 106-07; Jackson, *supra* note 126, at 1062; Michael Keel, *Law and Religion Collide Again: The Priest-Penitent Privilege in Child Abuse Reporting Cases*, 28 CUMB. L. REV. 681, 682-83 (1998). The main contentions opponents have against mandating clergy to report abuse and abrogating the clergy-communicant privilege are that to do so would constitute a Free Exercise Clause violation, would deter parishioners from seeking spiritual guidance or confession, would ultimately result in an increase in sexual abuse, would inhibit congregants from cleansing their souls, would hinder their ability to obtain eternal salvation, would impede upon individual privacy rights, and would result in a slippery slope of government intrusion. Horner, *supra*; Beerworth, *supra* note 127, at 106-07; Jackson, *supra* note 126, at 1062; Keel,

clergy members in the scope of reporting statutes calls into question the applicability of the clergy-communicant privilege.[135] As such, child abuse reporting statutes fall within one of three general categories: (1) those that specifically abrogate the clergy-communicant privilege in cases pertaining to suspected child abuse; (2) those that include clergy in a catch-all provision requiring "any person" to report; and (3) those that preserve the clergy-communicant privilege by affirmatively exempting members of the clergy from reporting.[136]

Given that one of the most challenging obstacles to prosecuting child abuse is discovering its existence, and given that clergy members are in a unique position to obtain such information, mandatory reporting statutes that call for a suspension of the clergy-communicant privilege increase the likelihood of controlling the pandemic of child abuse.[137]

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supra; *see also infra* Part III.B (addressing and dispelling each of these arguments against abrogating the clergy-communicant privilege in the context of mandatory reporting statutes).

[135] *See* O'Brien & Flannery, *supra* note 127, at 26-30. Forty-nine states and the District of Columbia identify the clergy-communicant privilege within their evidence laws. *Id*. at 29. The privilege protecting communications between a clergy member and a congregant has been described as absolute. 81 AM. JUR. 2D WITNESSES § 493 (2006). "Notwithstanding the distinction between a privilege from testifying about confidential communications and a privilege from reporting them, twenty-five states have reporting statutes that include the clergy." O'Brien & Flannery, *supra* note 127, at 29. The form varies as to how clergy are included in the statute, such as: specifically mandating clergy report; implying that they do so; abrogating all privileges thus by default applying it to clergy; or simply abrogating the clergy-communicant privilege. *Id*. at 29-30 n.148; *see also infra* Part II.D (discussing the history of the clergy-communicant privilege).

[136] *See*, *e.g.*, Jackson, *supra* note 126, at 1066; Beerworth, *supra* note 127, at 99. States maintaining the clergy-communicant privilege in full include: Alaska, Arkansas; Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Minnesota, Montana, New Mexico, New York, Ohio, Oregon, South Dakota, Utah, Virginia, and Vermont. Beerworth, *supra* note 127, at 99 n.171-72. States that simply include clergy members among the other listed professionals with a duty to report are: Arizona, California, Colorado, Connecticut, Illinois, Massachusetts, Michigan, Mississippi, Montana, North Dakota, Pennsylvania, South Carolina, and Texas. *Id*. at 99 n.173. Finally, states that utilize a catchall phrase, such as "any person[,]" to include clergy members are: Delaware, Indiana, Kentucky, Nebraska, Nevada, New Jersey, Oklahoma, Tennessee, Wisconsin, and Wyoming. *Id*. at 99 n.174.

[137] Pudelski, *supra* note 103, at 736 ("[O]ne large obstacle to preventing abuse is the limited ability of the state to discover abuse in the first place. Consequently, because clergy members are in unique positions to receive such information, they appear to be one of the state's most important resources to combat abuse."). State interests in prosecuting sexual offenders are advanced through the use of mandatory reporting statutes. *Id*. Mandatory reporting statutes:

> compel citizens, under the threat of punishment, to notify the state of any alleged abuse. They create a link between child welfare services and families of victims so that the social programs in place can work

D. The Clergy-Communicant Privilege

The clergy-communicant privilege did not exist at common law; rather, it was an evidentiary invention of both state and federal governments.[138] The privilege was recognized initially, through *dicta*, by the Supreme Court in 1875, but was not officially recommended to Congress for codification until 1972.[139] Congress rejected the Court's suggestion to implement a specific evidentiary provision pertaining to the clergy-communicant privilege, but instead adopted a rule which created a more general and flexible provision that could be applied to all testimonial privileges.[140] Nevertheless, every state and federal jurisdiction recognizes the privilege.[141]

> with families and authorities to prevent additional abuse. In this way, "[m]andatory reporting laws play a central role in the child protection system, serving as the point of intersection among outlets of children's services, including medical care, mental health, education, and social services."

Id. at 707 (quoting, in part, SETH KALICHMAN, MANDATORY REPORTING OF SUSPECTED CHILD ABUSE 139 (American Psychological Association 2d ed. 1999)).

[138] *See* Pudelski, *supra* note 103, at 708 (noting that the clergy-communicant privilege did not exist at common law). The clergy-communicant privilege is a rule of evidence, codified federally as Rule 501. Keel, *supra* note 134, at 683-84; *see infra* notes 139-40 and accompanying text. Other commonly used terms in referencing the clergy-communicant privilege are: "clergyman-penitent" privilege, "clergy-confider" privilege, "cleric-congregant" privilege, "priest-penitent" privilege, and "ministerial" privilege. DAVID M. GREENWALD, EDWARD F. MALONE & ROBERT R. STAUFFER, *The Clergy Communications Privilege*, 1 Testimonial Privileges § 6:1, § 6:1 n.1 (2006).

[139] *See* Pudelski, *supra* note 103, at 709-10. In 1875, the Court, via *dicta*, acknowledged the existence of certain evidentiary privileges in *Totten v. United States*, 92 U.S. 105, 107 (1875) ("[S]uits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communication by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose."). In 1972, the Supreme Court proposed and approved a version of the Federal Rules of Evidence containing a specific provision for the clergy-communicant privilege. Pudelski, *supra*, at 710. This provision was known as proposed Rule 506. *Id*. Congress never enacted proposed Rule 506 but rather adopted Rule 501, "which makes the common law the starting point in determining whether the court should recognize the priest-penitent privilege." Jackson, *supra* note 126, at 1061.

[140] Pudelski, *supra* note 103, at 710. Federal Evidentiary Rule 501 states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or

While official acknowledgment of the clergy-communicant privilege is relatively new, the privilege can trace its origins to biblical times and the creation of the Catholic Seal of Confession.[142] The Seal, as incorporated in the Code of Canon Law, makes it a crime for a priest to reveal any information obtained during confession.[143] The penalty under the Code for betraying a penitent's secret is typically excommunication.[144] There are no exceptions to the Seal; thus, all

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> political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501. In contrast, the Supreme Court's proposed Rule 506 first laid out definitions for both "clergyman" and "confidential:"

> (a) As used in this rule: (1) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him. (2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

FED. R. EVID. 506 (not enacted). The Court then proceeded to suggest that "[a] person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser." *Id*.

[141] Federal jurisdictions, using federal common law, recognize the privilege either explicitly or implicitly. Pudelski, *supra* note 103, at 710. All fifty states, however, have secured some form of the privilege by means of statutory law. Beerworth, *supra* note 127, at 105; Jackson, *supra* note 126, at 1062; Keel, *supra* note 134, at 683. "These privilege statutes are driven primarily by a respect for free exercise and church autonomy principles." Beerworth, *supra* note 127, at 105. Today, the clergy-communicant privilege's most powerful and important justification is that society views the clergyman-parishioner relationship as significant and worth fostering. Horner, *supra* note 134, at 730.

[142] *See* Jackson, *supra* note 126, at 1058-59. The Seal of Confession is a deeply rooted Catholic tradition that can be traced back over fifteen hundred years to the times of the New Testament. Pudelski, *supra* note 103, at 708.

[143] *See* Pudelski, *supra* note 103, at 708-09. Some churches view a "[v]iolation of the seal . . . [as] a 'crime' against the Church and a sin against God . . . ." Beerworth, *supra* note 127, at 106. As such, denominations such as that of Catholics, treat the confessional relationship as sacrosanct. *Id*. at 105.

[144] Code of Canon Law 983 specifically provides that "the sacramental seal is inviolable; therefore, it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any matter for any reason." The Code of Canon Law c.983, § 1 (1983), http://www.vatican.va/archive/ENG1104/_ _P3G.HTM (last visited Dec. 3, 2007). The Code goes on to state that anyone who breaks the seal can be excommunicated. *See* Pudelski, *supra* note 103, at 708-09 (noting that excommunication is a common punishment for breaching this sacred tenet); Jackson, *supra* note 126, at 1059 (discussing the penalty of exile for violating the seal of secrecy); Beerworth, *supra* note 127, at 106 (stating, "the penalty prescribed in most cases is automatic excommunication – a permanent alienation from the Church and from God Himself"). The significance of the secrecy held in confession is emphasized in the 1983 revised Code of Canon Law by using the phrase "it is a crime for a confessor to betray a penitent" as opposed to the 1917 Code, which stated less stringently that the confessor was "carefully to guard against" betraying the penitent. O'Brien, *supra* note 127, at 31.

confessional matters, as offered to a Catholic clergyman, are held sacrosanct.[145]

These deeply rooted Catholic origins of the clergy-communicant privilege suggest that the privilege applies most directly to those of the Catholic faith.[146] However, there is no clergy-communicant privilege statute that applies exclusively to Catholic priests.[147] Rather, the language is typically open-ended so as to include the religious functions and practices of all established denominations.[148] This said, some statutes may provide more protection for some religions than others due to wording variations in different state statutes.[149]

There are three main approaches that states take in formulating their clergy-communicant privilege statutes, ranging from very conservative to very liberal.[150] Generally, clergy-communicant statutes were enacted

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[145] *Id.* "[T]he Code of Canon Law establishes that the Seal is all encompassing and contains no exceptions. All matters that fall within the Seal of Confession are sacrosanct . . . ." *Id.*

[146] Pudelski, *supra* note 103, at 708 (suggesting that, "because in most other religions it does not violate religious law to disclose confidential information," the privilege most directly applies to the Catholic Church).

[147] GREENWALD, MALONE & STAUFFER, *supra* note 138, at § 6:6. The clergy-communicant privilege, as it exists today, has been extended to protect conversations between clergymen of non-Catholic religious denominations and their followers. Horner, *supra* note 134, at 729. "Therefore, while the earlier policy of protecting the Catholic priest's canonical duties was applicable only to Catholicism, the privilege as the courts apply it today is equally applicable to both non-Western and Western religions, as well as established and nascent Western religions." *Id.*

[148] GREENWALD, MALONE & STAUFFER, *supra* note 138, at § 6:6. Other religious institutions that recognize formal sacraments of confession apart from Catholicism are: Latter-Day Saints, Eastern Orthodox churches, Episcopal churches, American Lutherans, Presbyterians, United Presbyterians, the American Baptist Convention, and various Jewish groups. Beerworth, *supra* note 127, at 105; GREENWALD, MALONE & STAUFFER, *supra* note 138, at § 6:1 nn.11-12.

[149] Pudelski, *supra* note 103, at 708. Jurisdictions mainly vary in their definition of who constitutes the clergy, what the scope of protection afforded to the communication should be, and to whom the privilege belongs. Jackson, *supra* note 126, at 1063. There are three types of clergy privileges: (1) those that specify the religious denominations they protect; (2) those that fail to specify particular denominations, but still show a preference toward particular religions through special words like "priest[;]" and (3) those that are neutral toward all religions. *See, e.g.*, Jackson, *supra* note 126, at 1063; Pudelski, *supra* note 103, at 711.

[150] The three main approaches that states use in implementing clergy-communicant statutes are the conservative approach, the modern approach, and the broad approach. Jackson, *supra* note 126, at 1064. The conservative approach is the narrowest method of applying the privilege and essentially allows only for the confidentiality of those communications made under the sacrament of confession. *Id.* The modern approach is more liberal in that it protects any communication made to a member of the clergy in the

in response to the need to be able to confide in those entrusted with the task of providing spiritual solace and advice without fear of reprisal.[151] Thus, if a communication is not intended to be confidential, then it is not in the purview of the privilege.[152] However, due to the varying approaches states have taken, the extent of the scope of what is allowed to be confidential and with whom differs.[153] For instance, many statutes include communications made for both confessional purposes and those for spiritual counseling to anyone acting in the official capacity of a spiritual advisor.[154] Furthermore, while the majority of states say that

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course of "seeking spiritual counsel or advice." *Id*. This approach relieves the court from having to determine "whether a person was making the communication for the purpose of receiving forgiveness for their sins" as well as "which religious denominations require auricular confession." *Id*. (quoting Michael Cassidy, *Sharing Sacred Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1646-47 (2003)). Lastly, the broad approach protects all communications made to a clergy member functioning in his or her professional capacity, without any regard to spiritual purpose. Jackson, *supra* note 126, at 1064. The variety of communications protected under the broad approach include: "child rearing advice, employment counseling, and personal problems such as alcoholism or sexual dysfunction." *Id*.

[151] GREENWALD, MALONE & STAUFFER, *supra* note 138, at § 6:1. The pervading result of such confidentiality is that "harmony with one's self and others can be realized." *Id*.

> To carry out their mission of providing spiritual and moral guidance and succor during times of personal crisis, military chaplains must develop and keep the trust of those they serve . . . .
> . . . If those who are battling loneliness and resentment feel that their chaplains will have to testify against them about some or all of what they have revealed in confidence, they are likely to avoid going to them for solace.

United States v. Isham, 48 M.J. 603, 607 (N.M. Ct. App. 1998).

[152] Jackson, *supra* note 126, at 1062. "Every state requires that the communication in question must have been made in private, to a clergyman in their professional capacity as a member of the clergy, and with the expectation of privacy." *Id*. at 1064.

[153] Some states have expanded the privilege beyond the confessional, to include both penitents and those persons seeking general spiritual counseling. Pudelski, *supra* note 103, at 711; Keel, *supra* note 134, at 685.

[154] *See* Beerworth, *supra* note 127, at 105; Pudelski, *supra* note 103, at 711. In some clergy-communicant statutes, the position of spiritual advisor may be fulfilled not just by those members of the clergy officially recognized by the church, but also by those individuals who assist clergy in rendering advice. GREENWALD, MALONE & STAUFFER, *supra* note 138, at § 6:6. Nevertheless, some courts have held it necessary that a cleric's assistant be regularly engaged in minister-like activities to be covered under the privilege. *Id*. A few other statutes contain language specifically applying the privilege to lay individuals reasonably believed to be a minister by the penitent communicating to him. *Id*.; *see, e.g.*, FED. R. EVID. 506(a)(1) (not enacted), *supra* note 140. In addition, "depending on the doctrines of the church involved and on the breadth of the relevant statute, the privilege may be extended to elders or other lay officials of a church." GREENWALD, MALONE & STAUFFER, *supra* note 138, at § 6:6.

the privilege belongs to the penitent, there is still some confusion as to who has the right to invoke the privilege.[155]

The main function of the clergy-communicant privilege, while well-grounded in religious and judicial tradition, creates obstacles to the prosecution of child abuse perpetrators by permitting clerics to withhold from law enforcement officials valuable information transmitted to them in confidence.[156] Before such obstacles can be removed, analysis of government intervention with, or abrogation of, the clergy-communicant privilege in relation to the Religion Clauses must ensue.[157]

III. ANALYSIS

Sexual abuse of a minor is an evil that the State is permitted, if not compelled, to regulate for the maintenance of its health, safety, and welfare.[158] Unfortunately, the problem of child sexual abuse has escalated to epidemic proportions.[159] Despite law enforcement efforts to combat the abuse, states must do more by means of investigating, prosecuting, and punishing sexual abuse within the religious

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[155] Jackson, *supra* note 126, at 1064-65. Confusion results from some states reasoning that clergymen have their own Free Exercise right to claim the privilege for themselves too. *Id*. at 1065; Keel, *supra* note 134, at 684. Regardless, the "decision to assert the privilege is "purely a voluntary decision, and the clergy member or communicant is free to depart from the religious tenets and to testify." Pudelski, *supra* note 103, at 708.

[156] *See id*. at 707-08 (discussing the essential function of the clergy-communicant privilege). *See also* James T. O'Reilly & JoAnn M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 59 (1994-95) (illustrating one obstacle created by the conflict between mandatory reporting statutes and the clergy-communicant privilege). For example, a bishop who is furnished with information pertaining to instances of child sexual abuse and fails to "comply with state mandatory reporting statutes may also be sued for negligence per se, whether or not he is criminally charged for the violation. A court could run into evidentiary conflicts if the priest-penitent privilege were invoked by the bishop regarding the admissions made by the priest." *Id*.

[157] *See* Beerworth, *supra* note 127, at 99 ("The jurisdictions that have decided to impose a general reporting duty on clergy have had to further decide whether to extend the duty to confidential communications with parishioners, or to retain the clergy-communicant privilege and thereby avoid a direct conflict between God and Caesar."); *see also infra* Part III.A (analyzing the viability of government intervention into religious practices under First Amendment jurisprudence).

[158] *See* Jackson, *supra* note 126, at 1073 (stating, "The protection of children is a very legitimate and important state interest that must be carefully weighed against society's interest in protecting and preserving the relationship between a clergy member and a parishioner."); *see also supra* note 98 (discussing the *Sherbert* court's limitations on government restrictions to those that are undertaken for the purpose of protecting public safety, peace, and order).

[159] *See supra* notes 3-4 and accompanying text (detailing the statistical nature of child sexual abuse).

community, in order to achieve both greater protection of children and more even-handed justice.[160] Part III.A analyzes the Religion Clause jurisprudence and how increased government intervention into religious institutions' internal handling procedures would not violate the current law.[161] Next, Part III.B recommends abrogating the clergy-communicant privilege in the narrowed context of mandatory child abuse reporting statutes and addresses some of the main arguments in opposition to such government action.[162]

A. Religion Clause Applicability to Government Acts Combating Child Abuse in the Church

The Religion Clause jurisprudence, while unpredictable and contradictory at times, has been resolute on the notion that the First Amendment "embraces two concepts, – freedom to believe and freedom to act," with the first being absolute and the second being governable.[163] Thus, neither Congress nor the states may legislate an individual's beliefs, but they are free to prohibit certain religious practices viewed as detrimental to the best interests of society overall.[164] In conformance

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[160] "State legislatures should act to remove the enforcement hurdles faced by prosecutors, so that in the future, all of those responsible for the sexual abuse of children can be held criminally liable." Russell, *supra* note 38, at 914.

[161] *See infra* Part III.A (applying current Religion Clause jurisprudence to the question of feasibility regarding government interventions within religions communities).

[162] *See infra* Part III.B (addressing and refuting the main arguments proponents have for partially abrogating the clergy-communicant privilege); *see also supra* note 134 (listing the contentions opponents have against abrogating the clergy-communicant privilege).

[163] United States v. Ballard, 322 U.S. 78, 86 (1944); *see also* Cutter v. Wilkinson, 544 U.S. 709, 719 (2005); Reynolds v. United States, 98 U.S. 145, 164 (1878). Treatment of the tension inherent between the two clauses and application of the overall goal of the First Amendment is described as follows:

> [T]he Establishment Clause[] commands a separation of church and state . . . . [T]he Free Exercise Clause[] requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people . . . .
>
> Our decisions recognize that "there is room for play in the joints" between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.

Cutter, 544 U.S. at 719 (internal citations omitted).

[164] *See Reynolds*, 98 U.S. at 164 (stating, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive good order."). *But see* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (invalidating city ordinances prohibiting the ritual slaughter of animals that contained numerous exemptions for butchers, farmers, and other professions, making it clear that the law was passed out of stark animosity for the Church of Lukumi Babalu Aye). The Court stated:

with this spirit, it is reasonable to presume that violations of federal and state child sexual abuse laws by religious institutions are not only punishable by law enforcement and judiciary officials, but the failure to do so is a First Amendment violation in itself.[165]

The Court in *Smith* accurately noted that an individual's religious beliefs have never "excuse[d] him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[166] Given that every state in the union, in addition to the federal government, enacted laws criminalizing sexual abuse of a minor, it logically follows that the State, having exercised its freedom to regulate, is now free to break through the veil of religion in enforcing its criminal ordinances equally among the religious and non-religious communities.[167] "[N]either rights of religion nor rights of parenthood are beyond limitation" by the government; therefore, no religious institution can

> The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.

Id. at 547.

165 *See* KURLAND, *supra* note 25; *supra* note 84 and accompanying text (discussing reverse discrimination under the Religion Clauses); *see also* Henriques, *supra* note 21, at 22 ("Precious as protecting religious freedom is, however, there are cases where these special breaks collide with other values important in this country – like extending the protections of government to all citizens and sharing the responsibilities of society fairly.").

166 Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 878-79 (1990). In denying the respondents' unemployment compensation due to their dismissal for use of peyote during a religious ceremony, the Court affirmed that it could not "afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." *Id*. at 888. In further explaining its reasoning, the Court enumerated a variety of generally applicable laws that advance the overall goals of society and should not be saddled with religious exemptions but under the most stringent circumstances. *Id*. at 888-89. These laws include those governing: compulsory military service, payment of taxes, health and safety regulations such as punishment for manslaughter, child neglect laws, compulsory vaccination laws, drug laws, traffic laws, social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and anti-discrimination laws. *Id*. *See generally supra* notes 99-103 and accompanying text (discussing the *Smith* decision).

167 Every state has statutes prohibiting sexual contact with a minor child, as evidenced by the passage of mandatory reporting statutes. *See supra* note 129 (listing the mandatory reporting statutes for most states).

successfully challenge the application of the general criminal laws against them.[168]

Although possessing the right, if not the duty, to hold religious affiliates to the same legal standards as non-affiliates, both law enforcement officials and judges have been hesitant in doling out even-handed justice to the victims of child sexual abuse.[169] Preference still appears to be on allowing the religious institutions to govern for themselves, by their own bylaws and creeds, as the best means of remedying an otherwise egregious *sin* against society.[170] The result of acting like a bystander has not only increased crime due to recidivist behavior, but also places greater strains on society's ability to function effectively, such as an increased strain on family harmony, trauma to the minor victim impairing later contributions as an adult, and strain on social welfare programs.[171]

The tension between the Free Exercise Clause and the Establishment Clause, as applied to the question of whether the criminal justice system should intervene or blatantly override a particular religious institution's

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168 Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166 (1944).

169 *See* Fain, *supra* note 9, at 225.

> [T]he judiciary is often reluctant to impose liability on the church regardless of how bizarre the events engendering the claims. Continued and persistent media focus addressing the issue and exposing the clergy perpetrators of sexual abuse should exert pressure on the courts, as well as the churches, to do whatever is necessary to alter ministerial behavior.

Id.

170 *See supra* Part II.A (discussing internal church handling procedures and illustrations of the government's hesitation to interfere with those procedures in recent incidents of child sexual abuse). *See also* O'Brien & Flannery, *supra* note 127, at 5 (suggesting that abuse of children sexually is "one of the most egregious situations within society" today).

171 *See Prince*, 321 U.S. at 165 ("It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."). Preventing child sexual abuse is an important societal interest due to the inherent damage it always has on the victim. National Center, *supra* note 3. Some of the potential consequences of child sexual abuse include: lowered self-esteem, suicidal impulses, shock, feelings of shame and guilt, aggression, eating disorders, increased vulnerability to future attacks, running away, social withdrawal, anxiety, fear, sleeping disorders, substance abuse, distrust of authority and authority figures, flashbacks, tendency to be involved in abusive relationships, offender behavior, feeling hopeless or helpless, difficulty in forming trusting, intimate relationships, lower likelihood of marriage, depression, and post-traumatic stress disorder. *See*, *e.g.*, *id*.; WAYNE KRITSBERG, THE INVISIBLE WOUND: A NEW APPROACH TO HEALING CHILDHOOD SEXUAL ABUSE 56-57 (Bantam 1993); SUSAN MUFSON & RACHEL KRANZ, STRAIGHT TALK ABOUT CHILD ABUSE 74-75 (Facts on File 1991); DALE ROBERT REINERT, SEXUAL ABUSE AND INCEST 36-37 (Enslow Publishers 1997).

preferences when confronting child sexual abuse allegations, is clearly visible.[172] On the one hand, by not applying the generally applicable criminal law equally to religious and non-religious adherents, the government is essentially giving preference to religion in violation of the Establishment Clause.[173] On the other hand, too much intervention into the administrative aspects and general practices of a religious body can result in a violation of the Free Exercise Clause.[174] The question becomes: how does one reconcile the two clauses?

Both the Establishment Clause and the Free Exercise Clause allow for such intervention, due to the State's interest in maintaining a higher social norm.[175] For example, in applying the *Lemon* test to a challenged government action interfering with a church's normal administrative policy, the Court would find that interfering to prevent and punish child sexual abuse serves a secular purpose, its primary effect is not to advance or inhibit religion, and it does not "foster 'an excessive government entanglement with religion.'"[176] Similarly, under *Sherbert*'s strict scrutiny test, the Court would view any State interference as advancing a compelling government interest in the most narrowly tailored manner to effectively achieve the interest of punishing sexual abuse and preventing recidivism.[177]

While neither the *Lemon* test nor the *Sherbert* test are consistently applied to Religion Clause cases, the jurisprudence pertaining to such is unambiguous as to the existence of room in the joints between the two

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172 *See supra* text accompanying note 87 (discussing the inherent tensions between the Religion Clauses due to their entwinement). "[E]fforts to protect the free exercise of religion can clash with efforts to assure that religion is not favored by the government." Henriques, *supra* note 21, at 22.

173 *See supra* text accompanying note 84 (suggesting that excluding religious adherents from generally applicable laws is the equivalent of penalizing non-adherents for their lack of faith).

174 *See supra* note 87 (illustrating the inherent tension that exists between the Free Exercise Clause and the Establishment Clause).

175 *See Prince*, 321 U.S. at 166-67 ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."); *see also* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (implying that protection under the Religion Clauses applies only to claims rooted in religious belief, not in religious practice); *supra* notes 92-94 and accompanying text (discussing religious convictions as inalienable and religious practices as governable).

176 Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (quoting, in part, Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)); *see also supra* note 110 (presenting the three prongs of the *Lemon* test).

177 Sherbert v. Verner, 374 U.S. 398, 409-10 (1963); *see also supra* note 96 (explaining the requirements to meet the strict scrutiny standard).

Clauses in which the government can act.[178] Permitting "individuals to be excused from compliance with the law solely on the basis of religious beliefs is to subject others to punishment for failure to subscribe to those same beliefs." This is an Establishment Clause violation, and reasonable intervention by the criminal justice system into the internal handling procedures of a particular religious institution would be permissible.[179] Thus, the question shifts to ask: what types of intervention are needed?

B. The Pros and Cons of Abrogating the Clergy-Communicant Privilege

Both the state and federal governments have a tradition of integrating themselves into the daily lives of their citizens and justify doing so as being in the best interest and overall benefit of said individuals.[180] Within the criminal realm, the government has taken proactive measures to not only punish and deter crime, but also to uncover less visible crimes such as drug trafficking, sale of illegal guns, and child pornography, in order to prevent future crimes.[181] Even sexual abuse has proven to be within reach of the government's arm.[182] By extrapolation, then, because it is common knowledge that sexual abuse does not stop at the churchyard gate, it is not unreasonable to suggest

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178 *See Cutter*, 544 U.S. at 719, *supra* note 163 (discussing the "play in the joints" standard for determining constitutional validity of government acts); *see also supra* notes 108, 122 (noting the inconsistent court decisions that arise due to the irregular applications between the *Lemon* and *Sherbert* tests).

179 KURLAND, *supra* note 1, at 22.

180 Examples of government integration for the overall benefit of its citizens include: social welfare, Social Security, and Medicare.

181 *See generally* New York v. Ferber, 458 U.S. 747 (1982) (stating that it is constitutionally permissible for ownership of child pornography to be criminally punished and that there is no freedom of speech conflict when it comes to protecting children from sexual exploitation).

182 Every state has statutes prohibiting sexual contact with a minor child. *See, e.g.*, ALA. CODE § 13A-6-69.1 (2006); ALASKA STAT. § 11.41.434 (2006); ARIZ. REV. STAT. ANN. § 13-1405 (West 2006); COLO. REV. STAT. ANN. § 18-3-405 (West 2006); DEL. CODE ANN. tit. 11, § 778 (West 2006); GA. CODE ANN. § 9-3-33.1 (West 2006); IDAHO CODE ANN. § 18-1506 (West 2006); KY. REV. STAT. ANN. § 413.249 (West 2006); ME. REV. STAT. ANN. tit. 17-A, § 254 (West 2006); MD. CODE ANN., CRIM. LAW § 3-602 (West 2006); N.M. STAT. ANN. § 30-9-13 (West 2006); N.C. GEN. STAT. ANN. § 14-27.7A (West 2006); 18 PA. STAT. ANN. § 6318 (West 2006); TENN. CODE ANN. § 39-13-522 (West 2006); TEX. PENAL CODE ANN. § 43.25 (Vernon 2006); UTAH CODE ANN. § 76-5-401.1 (West 2006). For examples of federal statutes pertaining to sexual abuse of a minor, see: 18 U.S.C. § 2241 (2006); 18 U.S.C. § 2243 (2006); 18 U.S.C. § 2244 (2006); *see also supra* note 129 (stating that all fifty states have implemented mandatory reporting statutes to help prosecute child sexual abuse).

that the government stretch out its arm further by implementing greater measures to combat such abuses within the church.[183]

One such measure that should be taken in an effort to combat child abuse within the church is to universally abrogate the clergy-communicant privilege in pre-existing mandatory reporting statutes.[184] While several states have already abrogated the clergy-communicant privilege in one fashion or another, the vast majority of states have yet to do so for several possible reasons.[185]

First, opponents to the abrogation of the privilege, even in the limited context proposed in this Note, may contend that to do so would constitute a violation of the Free Exercise Clause.[186] However, as previously discussed, *Smith* allows for the general application of religiously neutral laws toward religious institutions.[187] Abrogation of the privilege would not mean that individuals cannot believe in child sexual abuse, pedophilia, or any other heinous crime, just as the Native American Church was never told it could not believe in peyote as a religious item or the Mormons in polygamy as a means of achieving favor with God.[188] Religious beliefs, provided they are sincerely held, are protected regardless of how extreme or bizarre.[189] But alas, believing

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183 *See supra* Part II.A (illustrating the child sexual abuse problem within the church and how several religious institutions confront it).

184 *See supra* Part II.C (addressing mandatory reporting statutes); *see also supra* Part II.D (discussing the clergy-communicant privilege).

185 *See* O'Brien & Flannery, *supra* note 135, at 29 (discussing the number of states that include clergy into their reporting statutes and the varying manners by which clergy are incorporated); *see also supra* note 134 (presenting abrogation opponents' rationales).

186 *See* Keel, *supra* note 134, at 682-83 (suggesting one reason not to abrogate the clergy-communicant privilege is the Free Exercise Clause of the First Amendment).

187 *See supra* note 102 (discussing the *Smith* test application on personal religious practices). A violation would occur under former free exercise precedents because a "child abuse reporting statute that abrogates all privileges, including the priest-penitent privilege . . . pressures the clergyman to either adhere to his religious beliefs and accept criminal sanctions or abandon his beliefs to avoid such sanctions." *See* Keel, *supra* note 134, at 713. However, under the current *Smith* rationale, "any free exercise argument would fail because a child abuse reporting statute that requires all persons to report occurrences of child abuse and that grants exemptions to no person or class of persons would be viewed as a neutral law, generally applicable to all." *Id*.

188 *See supra* text accompanying note 100 (examining the *Smith* holding regarding whether religious use of peyote could legally be prosecuted); *see also supra* note 91 and accompanying text (addressing the *Reynolds* court's approach to whether religiously sanctioned polygamous practices were constitutionally protected).

189 *See generally* United States v. Ballard, 322 U.S. 78, 86 (1944) (holding that the government is prohibited from determining whether individual convictions are true or false and from interfering in people's right to believe in what they want; however, it is

in something and practicing it are not always harmonious with the social policies and rights of others.[190] In a society that cherishes freedom and equality, it is reasonable to assert that everyone is free to believe in the tenets they choose; however, it is unreasonable and unjust to suggest that Person A, who is agnostic, should be held to a higher standard of the criminal law than Person B, who is a well-respected minister.[191] The inequities of permitting freedom of religious practice to reign supreme are inherently conflicting with the ideals laid out by the Framers.[192]

Additionally, by not abrogating the clergy-communicant privilege, the government is committing an Establishment Clause violation by preferring religion over other testimonial privileges such as the psychotherapist-patient privilege.[193] In cases like these, the flexibility between the Religion Clauses is critical.[194] Moreover, given that the social policy behind uncovering, investigating, and prosecuting child sexual abuse offenders is unquestionably compelling, the scale weighs in favor of avoiding an Establishment Clause violation by abrogating the

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permitted to interfere with or place burdens on certain acts performed in conformance with those convictions).

190 *See supra* text accompanying note 93 (addressing the danger in permitting individual religious practices to proceed unrestricted).

191 *See* Ayers, *supra* note 94 (suggesting that the concerns and wellbeing of society as a whole should come first, before the religious interests of individuals).

192 The Constitution opens with a preamble expressly encapsulating the intent of the Framers:

> We the People of the United States, in Order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl. Later constitutional amendments were made to unquestionably breathe more life into the concept of "securing the Blessings of Liberty to ourselves," as seen in the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.").

193 The difficulty that arises when abrogating certain privileges is that:

> courts do not enforce the prohibitions equally among the various classes of professionals that are otherwise entitled to assert such a privilege. Specifically, several states abrogate the psychotherapist-patient privilege, but states retain the priest-penitent privilege in child abuse cases . . . .
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> . . . [As a result,] states that have abrogated the psychotherapist-patient privilege in child abuse reporting statutes and have not similarly abrogated the priest-penitent privilege may very well have, by virtue of that fact alone, run afoul of the Establishment Clause.

Keel, *supra* note 134, at 687-88, 692-93.

194 *See supra* note 163 (discussing the flexibility built into the Religion Clauses).

privilege, even at the risk of potentially violating the Free Exercise Clause by those members of the clergy torn between their religious tenets and the law.[195]

Admittedly, at the time the First Amendment was ratified, religious diversity was minimal and the idea was to create a nearly unbreakable law to protect the free exercise of religion, but as a practical matter today, such freedoms of religious practice must be restricted by those laws that the government has a compelling, religiously neutral, interest in passing.[196] To allow otherwise would open a Pandora's Box by allowing individuals to create their own new religions solely to circumvent criminal laws.[197] Not only would this further the rampant problem of child sexual abuse, but it would create a slippery slope toward chaos in society as a whole.[198] Rather than open the flood gates to potential social disorder, it is a wiser course of action to start implementing new laws and judicial measures that may encroach upon certain religious practices.[199]

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[195] *See* Keel, *supra* note 134, at 713 ("[S]uch privileges are not guaranteed by the Constitution, and states have broad discretion to weigh other interests against the need to provide for confidentiality.").

[196] *See supra* note 81 (discussing the minimal religious diversity at the time of the Founding Fathers); *see also supra* note 93 (explaining the danger of allowing individuals to become laws unto themselves).

[197] According to the Greek myth, Pandora was molded by the gods under order from Jupiter, in an attempt to punish mankind for receiving the gift of fire from Prometheus. LUCIA IMPELLUSO, GODS AND HEROES IN ART 196 (2003). Pandora was given special qualities from each of the gods, making her irresistible. *Id*. Jupiter then sent Pandora as a gift to Prometheus' brother Epimetheus, who, failing to heed his brother's warning not to accept gifts from the gods, accepted her as his wife. *Id*. Inside the house of Epimetheus, Pandora found an ornate chest, which she was instructed by her husband not to open. *Id*. Succumbing to curiosity, however, Pandora peeked inside the chest. *Id*. The chest contained all of the plagues of humanity, which were released upon the Earth once Pandora opened the chest. *Id*. Pandora then, by Jupiter's instruction, proceeded to close the chest, leaving only hope inside. *Id*. Additionally, society commonly refers to self-created or unorthodox "new-age" religions as cults. WEBSTER'S UNIVERSAL COLLEGE DICTIONARY 198 (Gramercy Books 1997) (defining "cult" as "a religion or sect considered to be false, unorthodox, or extremist").

[198] Essentially, not applying neutral, generally applicable laws equally would allow individuals to become supreme laws unto themselves under the guise of being sanctioned by their religious beliefs, as feared by the *Reynolds* court. *See generally* Reynolds v. United States, 98 U.S. 145 (1878); Employment Div. Dep't. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

[199] *See supra* note 137 (discussing how mandatory reporting statutes advance the state's interest in prosecuting child sexual abusers and suggesting that clergy members are the state's most important resource in achieving that goal).

Naturally, sweeping changes must come in baby steps. While there is much to be done by means of furthering criminal prosecutions of sex offenders in the church, the first course of action should be to abrogate the clergy-communicant privilege so that all clergy may be included under the mandatory reporting statutes.[200] Abolishing the privilege will protect against clergy members confessing to each other to avoid prosecution.[201] With the privilege abolished for purposes of the reporting statutes, clergy members will be posed with a choice: whether it is better to allow a morally corrupt sex offender to go free or uninvestigated, providing ample opportunities for recidivism, or risk punishment themselves for failing to report on a congregant or fellow clergyman.[202]

A second argument that might be posed by anti-abrogationists is that the threat of clergy disclosing communications will seriously deter individuals from either seeking confession or spiritual guidance.[203] The argument continues that the abrogation will actually result in an increase in child sexual abuse, because those perpetrators who might have sought spiritual healing will be deterred from doing so, thus never obtaining the help they require to cease their vicious crimes.[204] Furthermore,

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[200] *See supra* note 135 (discussing the states that have already abrogated the clergy-communicant privilege within their mandatory reporting statutes).

[201] *See supra* Part II.D (addressing the history, purpose, and scope of the clergy-communicant privilege).

[202] *See supra* note 133 (noting that the new criminal sanctions give more force to their mandatory reporting statutes); *see also supra* note 125 (discussing the difficulty of discovering and prosecuting child sexual abuse).

[203] Jackson, *supra* note 126, at 1062; Keel, *supra* note 134, at 683. *See generally* O'Brien & Flannery, *supra* note 127, at 26-29. Members of the clergy hold positions of great power and trust, thus parishioners commonly turn to them for emotional and spiritual guidance. Fain, *supra* note 9, at 211.

> Statistics have shown that in times of emotional strain or anxiety, more people resort to their clergyperson than to other professionals, such as physicians, psychiatrists, psychologists, and social workers. According to a report prepared by the Joint Commission on Mental Illness and Health, "in times of emotional or domestic trouble, approximately forty-two percent of individuals consult clergymen, twenty-nine percent seek help from physicians, eighteen percent consult psychiatrists or psychologists, and ten percent turned to clinics or other social agencies."

Id. at 212 (quoting, in part, Kimberly Anne Klee, Note, *Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?*, 17 U. TOL. L. REV. 209, 219 (1985)).

[204] Jackson, *supra* note 126, at 1069; Beerworth, *supra* note 127, at 112 (discussing the possibility that more instances of child abuse will go undetected due to the deterrence from confessing and seeking spiritual guidance). Society benefits from the pastoral counseling; consequently, blockading the clergy results in diminished social harmony. *Id.*; Keel, *supra* note 134, at 683. *But see* Jackson, *supra* note 126, at 1071 ("Western judicial systems can

opponents may express concern that abolishing the privilege for reporting purposes will hinder an individual's ability to cleanse his (or her) soul.[205]

These arguments are flawed, however, given that several states have already begun to recognize the need for requiring religious officials to report their knowledge regarding instances of child abuse without experiencing a total breakdown of order or religion.[206] Consequently, there is little reason for all states and the federal government not to follow suit.[207] Although it may be true that some individuals might be deterred from revealing information to clergy members, they are by no means prevented from doing so.[208] For example, some laypersons may be deterred from confessing, but if knowledge of their abuse is discovered through means outside confession, then reporting statutes would mandate the disclosure of such information.[209] Therefore, at least for those individuals truly of faith, it would remain more beneficial to confess and obtain spiritual absolution of sin and guilt than not to confess but still potentially be reported.[210] Those who sincerely believe in the purpose and power of seeking spiritual guidance will not greatly be deterred or hindered from doing so by knowing that clergy are not

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operate without the priest-penitent privilege. No empirical evidence exists to demonstrate that parishioners or penitents would forgo spiritual counseling or confession if their communications with the clergy member were not protected by a privilege.").

[205] *See* Jackson, *supra* note 126, at 1069. "Christian eschatology holds that failure to obtain absolution or do penance for one's sins before death is met with the prospect of eternal damnation." Beerworth, *supra* note 127, at 107. In the Catholic tradition, for example, confession is only one of seven sacramental pillars; congregants are also expected to make a full confession at least once annually. *Id*. at 105-06; 107.

[206] *See supra* note 136 (listing the states that have already abrogated the clergy-communicant privilege in some form or another).

[207] *See supra* note 136.

[208] *See supra* note 151 (suggesting the importance of maintaining confidentiality is to protect and encourage clergy-parishioner relationships).

[209] Any ambiguity that currently exists as to whether something is or is not considered a confidential communication under a state's clergy-communicant privilege statute, for purposes of abiding by the mandatory reporting statutes, would be eliminated by simply abrogating the privilege altogether.

[210] *See supra* text accompanying note 144 (addressing the sanctity of confidentiality in confession under the Code of Canon Law); *see also supra* note 127 (stating that the main purpose of mandatory reporting statutes is to protect children from the atrocity that is child sexual abuse).

only free to, but required to, report learned or suspected knowledge of child sexual abuse.[211]

A third concern about abrogating the clergy-communicant privilege is the privacy interest congregants have in maintaining a confidential clergy-communicant relationship.[212] Opponents might argue that the privilege was established initially to protect the individual's privacy rights; thereby, the abolition of the privilege will lead to the downfall of individual privacy in the context of religion.[213] Indeed, privacy rights are a crucial element to individual autonomy and should be protected.[214] However, this Note does not call for the complete abrogation of the clergy-communicant privilege in all contexts, but rather just so far as is necessary to make mandatory reporting statutes more effective in uncovering child sexual abuse.[215] While it is arguably a violation of privacy for certain communications made in confidence to later be disclosed, the amount of actual interference in personal privacy by requiring clergy members to abide by reporting laws is minimal.[216] If governments abrogate the privilege only so far as to require disclosure of sexual abuse information, then nearly all communications between the

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[211] *See supra* text accompanying note 14; *see also supra* note 133 (discussing the possible criminal and civil sanctions for those who fail to abide by the mandatory reporting statutes).

[212] Keel, *supra* note 134, at 683; *see also* Jackson, *supra* note 126, at 1070 (quoting, in part, Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 769 (1987)) ("The privacy rationale is based upon 'each person's interest in the dignity of privacy for his most intimate relationships.'").

[213] The statutes encompassing the privilege were enacted in their varying forms in response to the need for people to be able to confide in those entrusted with the task of providing spiritual solace and advice without fear of reprisal so that "harmony with one's self and others can be realized." GREENWALD, MALONE & STAUFFER, *supra* note 138, at § 6:1 (quoting Keenan v. Giagnte, 390 N.E.2d 1151, 1154 (N.Y. 1979)). However, testimonial "privileges contravene the principle that 'the public . . . has a right to every man's evidence.'" Jackson, *supra* note 126, at 1061 (quoting, in part, Trammel v. United States, 445 U.S. 40, 50 (1980)); *see also* Horner, *supra* note 134, at 731.

[214] *See supra* note 98 (stating that individuals may not be punished merely for holding beliefs contrary with or abhorrent to government officials).

[215] *See supra* note 126 (suggesting that mandatory reporting statutes increase the likelihood that information will lead to prosecution of child sexual abusers); *see also infra* Part IV (presenting a model mandatory reporting statute that abrogates the clergy-communicant privilege for reporting purposes only).

[216] Only those communications that specifically pertain to child abuse or cause the suspicion of child abuse would need to be disclosed; thus, only those individuals who perpetrate such egregious crimes relinquish the right to complete privacy.

clergy and the communicant would still remain protected, as would their individual rights to privacy.[217]

As a last attempt at maintaining the clergy-communicant privilege in its entirety, anti-abrogationists might resort to using a slippery slope argument.[218] If governments can be trusted, however, then the slippery slope argument is reduced to logical paranoia.[219] It may in fact be true that once the State is comfortable enough with abrogating the privilege in one context, there is a risk that it might soon extend further into other contexts until the privilege is non-existent.[220] Nevertheless, this argument is defective to the extent that exceptions have been carved out of other evidentiary privileges with little (if any) backlash.[221] Also, while it might be beneficial for law enforcement officials to be able to compel clergy to report knowledge of theft, homicide, or other criminal acts, religious communities are not undergoing a current epidemic of such crimes.[222] The heinousness of the child sexual abuse problem, if left to the current system, will perpetually grow until confidence in the church is fictional, thereby rendering the need for any form of the privilege superfluous because people who place no trust in their religious leaders will not seek confession or guidance from them.[223]

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217 *Id.*

218 Jackson, *supra* note 126, at 1070; *see also supra* note 134 (suggesting that anti-abrogationists might make a slippery slope argument in opposition to abrogating the clergy-communicant privilege).

219 *See also supra* note 134 (presenting some of the potential arguments opponents to abrogation may make).

220 *Id.*

221 While not officially enacted by Congress, federal common law privileges, recognized by the Supreme Court, carve out exceptions for reporting, such as in the husband-wife privilege. *See* FED. R. EVID. 505 (not enacted). According to proposed Rule 505, there is no husband-wife privilege "(1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage . . . ." *Id.* at (c)(1)-(2). Similarly, proposed rule 504 carves out exceptions to the psychotherapist-patient privilege for communications relevant to proceedings for hospitalizing a patient for mental illnesses, communications made in the course of a judge-ordered mental examination, or communications made during the course of a mental examination conducted as a condition to a claim of self-defense. FED. R. EVID. 504 (not enacted).

222 See *supra* note 3 (providing statistics documenting the current child sexual abuse pandemic).

223 *See supra* Part II.A (presenting illustrations of certain institutions' internal handling policies and how they foster recidivism); *see also supra* note 141 (suggesting the main justification for maintaining the clergy-communicant privilege is because people recognize the clergy-parishioner relationship as one worth fostering).

It is preferable social policy to prevent people from using confession or spiritual guidance as a cloak to hide their acts from the justice system.[224] As officials uncover more sexual abuse scandals, it is more certain that the clergy-communicant privilege cannot be trusted not to be used as a shield by recidivistic child sexual offenders. While perpetrators seek solace in the spiritual guidance and forgiveness of the church by asking that their *guilt* or *sins* be healed for the eternal salvation of their souls, their innocent victims are left without justice or confidence in their own spiritual counselors.[225] Consequently, the minds (and possibly souls) of those betrayed child victims are left with little comfort from either their religious institution or their law enforcement agencies, while their perpetrators are essentially protected and allowed to repeat a vicious cycle of abuse.[226] Moreover, given how varied the state laws are in terms of application of the clergy-communicant privilege, it would be more judicially efficient as well as administratively productive, to abrogate the privilege entirely when it comes to child abuse reporting.[227]

Naturally, certain mechanisms should be in place to protect clergy members and religion, such as limiting the abrogation to child abuse communications only, maintaining reporter anonymity, and providing exemptions from testifying.[228] Provided the statutes contain provisions specifically limiting clergy reporting responsibilities, then the interference with the traditional practices of clergy confidentiality or

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[224] Employment Div. Dep't. of Human Res. of Oregon v. Smith, 494 U.S. 872, 881 (1990) (addressing the need to enforce generally applicable laws equally). Generally applicable laws are just that—generally applicable. Individuals cannot be allowed to hide under the cloak of religion to avoid the appropriate punishments for a crime; otherwise, they would essentially be allowed to render their own laws and system of justice, thereby contravening the Supreme Court's decision in *Smith*. *Id*.

[225] "Child abuse is a heinous crime that can scar the mental health of a child for the remainder of his life." William W. Blue, State v. Williquette: *Protecting Children from Abuse through the Imposition of a Legal Duty*, 12 AM. J. TRIAL ADVOC. 171, 171 (1988); *see also supra* note 171 (discussing the traumatizing consequences of child sexual abuse).

[226] *See supra* Part II.A (illustrating the problem of child abuse and the lack of justice many victims find). In fact, it can be contended that clergy members owe an even greater duty to children to report abuse than a stranger or professional in a less intimate relationship. Blue, *supra* note 225, at 183.

[227] *See supra* note 150 (discussing the different approaches states take in formulating their clergy-communicant privilege statutes).

[228] *See infra* Part IV (demonstrating how certain protections may effectively be incorporated into a reporting statute while simultaneously abrogating the clergy-communicant privilege).

silence is minimal and in accordance with the dictates of the First Amendment.[229]

IV. CONTRIBUTION

The clergy-communicant privilege is one deeply rooted in religious tradition and universally recognized throughout the United States.[230] As a result, many states are reluctant to abrogate the privilege in even narrowly defined contexts, at the cost of weakening law enforcement's ability to uncover, investigate, and prosecute sexual crimes against minors.[231] With careful drafting of the mandatory reporting statutes, many of the fears that plague those favoring the absolute power of the clergy-communicant privilege can be surmounted.[232] The model statute below, with commentary, demonstrates how certain measures can be incorporated into current reporting laws so that clergy members can aid law enforcement officials while simultaneously reserving some protections for their positions as religious leaders.[233]

> (1) For the purpose of this statute, persons mandated to report shall include but not be limited to a: physician, surgeon, resident physician or intern, osteopathic physician, nurse, medical examiner, dentist, dental hygienist, teacher, coach of intramural or interscholastic activities, school principal, school personnel, social worker, guidance counselor, coroner, child-caring personnel, chiropractor, optometrist, emergency medical technician, paramedic, health professional, mental health professional, psychologist, pharmacist, peace officer, probation officer, parole officer, *member of the clergy*, *Christian Science practitioner, or priest,* or any organization or agency for any of the above, who knows or has reasonable cause to believe that a child is dependent, neglected or abused, regardless of whether

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229 *See infra* Part IV (demonstrating how certain protections may effectively be incorporated into a reporting statute while simultaneously abrogating the clergy-communicant privilege).

230 *See supra* Part II.D (exploring the history of the clergy-communicant privilege).

231 *See supra* Part III.B (addressing the main concerns with abrogating the clergy-communicant privilege).

232 *Id.*; *see supra* note 134 (outlining some of the arguments that may be made by anti-abrogationists).

233 The model statute is a combination of provisions and language used by several states in their existing reporting statutes. The proposed amendments are italicized and are the contribution of the author.

> the person believed to have caused the dependency, neglect or abuse is a parent, guardian, person exercising custodial control or supervision or another person, who has attended such child as a part of his professional duties.[234]

Commentary:

Section one specifically incorporates clergy members with the other professionals included in the non-exhaustive list typically found in reporting statutes. The language uses both *priest* and *clergy member*, denoting that the statute is inclusive of all religious officials, regardless of denomination.[235]

> (2) Any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused, *or may become subjected to dependency, neglect, or abuse* shall immediately cause an oral or written report to be made to a local law enforcement agency or the ____ State Police; the cabinet or its designated representative; the Commonwealth's attorney or the county attorney; by telephone or otherwise. Any supervisor who receives from an employee a report of suspected dependency, neglect or abuse shall promptly make a report to the proper authorities for investigation.[236] *All such reports must remain confidential unless the person consents otherwise*. A member of the clergy, Christian Science practitioner or priest who has received a confidential communication or a confession in that person's *professional capacity* in the course of the discipline enjoined by the church to which the member of the clergy, Christian Science practitioner or priest belongs may *not* withhold reporting of the communication or confession. This *includes not only* communications or confessions *but also* personal observations the member of the clergy, Christian Science practitioner or priest may otherwise make of the minor.[237] *Nothing in this section is*

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234 The list of professionals is adapted from: KY. REV. STAT. ANN. § 620.030(2) (West 2006); CONN. GEN. STAT. ANN. § 17a-101(b) (2006).

235 *See supra* text accompanying note 135 (discussing the types of reporting statutes and the primary methods for including clergy within their scope).

236 Excerpted from KY. REV. STAT. ANN. § 620.030(1) (West 2006).

237 Adapted from ARIZ. REV. STAT. ANN. § 13-3620(A) (West 2006).

> *meant to preclude any person from their obligations to report abuse or neglect*.

Commentary:

The inclusion of the phrase "may become subjected to" in section two allows the statute to serve as both an investigative tool for prosecutors and law enforcement officials and as a preventative measure. In this capacity, individuals who know of or suspect a person of committing a prior offense and know of or foresee incidents in the near future that they reasonably believe may lead to child abuse should report the person. The statute also contains a provision designed to protect the confidentiality of the sensitive material disclosed as well as the anonymity of those disclosing it. Preserving anonymity avoids tarnishing the clergy's reputation, thereby preserving the trust necessary to continue counseling parishioners. If parishioners continue to confide in their clergy, then more opportunities to discover instances of child sexual abuse arise.

Section two also contains a specific provision officially abrogating the clergy-communicant privilege in the limited context of reporting abuse. The emphasis that clergy are *required* to report, despite any privileges encapsulated in their roles as clerics, protects against any confusion clergy members, congregants, and law enforcement officials may have as to the extent of the statute's reach. The statute also underscores the principle that all knowledge of child abuse, not just that which is obtained in confessions, must be disclosed.

> (3) A person who *complies with section (2) of this provision and* furnishes a report, information or records *to the appropriate enforcement agency shall be* immune from any civil or criminal liability by reason of that action unless the person acted with malice or unless the person has been charged with or is suspected of abusing or neglecting the child or children in question.[238]

Commentary:

Section three rewards immunity for reporters, thus providing an essential incentive for clergy members to comply. If torn between reporting on a communicant and risking retribution in the form of civil suits from said individual, a clergy member might otherwise choose

[238] Adapted from ARIZ. REV. STAT. ANN. § 13-3620(J) (West 2006).

silence, consequently defeating the purpose of the statute by allowing potential offenders to go unreported and uninvestigated.[239] Providing immunity also prevents people from reaping financial benefits through civil suits merely because others complied with the reporting laws.

> (4) In any civil or criminal litigation in which a child's neglect, dependency, physical injury, abuse, or abandonment is an issue, a member of the clergy, a Christian Science practitioner or a priest *shall not be examined as a witness* concerning any confession *or communication* made to him in his role as a member of the clergy, a Christian Science practitioner or a priest in the course of the discipline enjoined by the church to which he belongs. Nothing in this subsection discharges a member of the clergy, a Christian Science practitioner or a priest from the duty to report pursuant to *section (2) of this provision*.[240]

Commentary:

The noteworthy provision in section four is the testifying exemption offered to clergy members. The exemption is significant not only because clergy members will likely be more willing to report abuse if they do not fear courts compelling them to testify publicly, but because it maintains their anonymity as guaranteed above in section two.

> (5) A person who violates section *(2) of this provision shall be* guilty of *at least a* class 1 misdemeanor *unless it is judicially determined that the offense necessitates elevating the crime to a* class 6 felony.[241] *Additionally, a person who violates section (2) of this provision may be civilly liable for negligence per se to the child or children in question*.

Commentary:

Section five instills life into the statute by providing criminal and civil penalties for failing to abide by the dictates of section two. Use of the word *may* in regards to the imposition of civil liability protects those individuals who are charged under this section for failing to report

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[239] *See supra* note 128 and accompanying text (discussing the purpose for implementing mandatory reporting statutes).

[240] Adapted from ARIZ. REV. STAT. ANN. § 13-3620(L) (West 2006).

[241] Adapted from ARIZ. REV. STAT. ANN. § 13-3620(O) (West 2006).

suspected cases of future abuse. In those instances, the trier of fact should first determine whether the accused had sufficient knowledge of suspected future abuse before deeming him civilly liable. Although the possibility of civil liability in such situations might require more judicial resources to resolve, it would also encourage clergy to report reasonably predicted child abuse cases, thereby increasing the probability that a case is investigated. The potential to save a child from the life-long trauma of sexual abuse outweighs preserving judicial resources.[242]

V. CONCLUSION

Sexual abuse of a minor is a monstrous crime, repugnant to the social fibers of the United States, and yet, it is a crisis that has infiltrated both the home and the chapel. States have already taken measures to combat such crimes against our youth. Regrettably, however, these measures too often fail to breach the churchyard gate, thus allowing a considerable number of child abuse incidents to go uninvestigated and unpunished. Government officials appear to be content in entrusting individual religious institutions with the task of seeking out and eliminating such sexual deviations within their borders. This tactic, unfortunately, has been counter-productive in the fight against child sexual abuse.

The religious protections ensured by the First Amendment have played a role in governments' reluctance to intrude upon the autonomy of religious institutions. This hesitation to intervene is unnecessary, however, because current Religion Clause jurisprudence allows for generally applicable, facially neutral criminal laws to be applied equally to the secular and non-secular realms of society. Moreover, the states have an undeniably compelling interest in eradicating child abuse and prosecuting abusers. Consequently, amending current mandatory reporting statutes to abrogate the clergy-communicant privilege for the narrow purpose of reporting suspected abuse would be a constitutionally acceptable step toward penetrating the veil of religion used to conceal sexual abuse problems within the church. State legislatures and law enforcement officials "must not rely on the church to change itself; tragically, victims and their families have already made that mistake."[243]

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242 *See supra* note 171 (discussing the lasting trauma endured by child abuse victims).

243 Russell, *supra* note 38, at 915-16.

Think back to the hypothetical scenario from Part I when the parents greeted their sixteen-year-old daughter at the airport only to discover that she was the unwilling mother of a clergyman's child.[244] By enacting a mandatory reporting statute that abrogates the clergy-communicant privilege, these parents may now have a viable legal remedy to the grave transgression committed against their daughter. Although nothing can fully compensate victims of child abuse, the hope that justice will be served and the cycle of abuse broken may bring some relief and healing to these children and their families.

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[244] *See supra* Part I (presenting a hypothetical illustration of the tragedy and prevalence of child sexual abuse within the church).

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