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### Recommended Citation

Marci A. Hamilton, *The Rules Against Scandal and What They Mean for the First Amendment's Religion Clauses*, 69 Md. L. Rev. 115 (2009)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol69/iss1/11>

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## THE RULES AGAINST SCANDAL AND WHAT THEY MEAN FOR THE FIRST AMENDMENT'S RELIGION CLAUSES

MARCI A. HAMILTON\*

Theorizing about religious liberty and the Constitution, at least in the law schools, tends too often to operate in a sphere divorced from fact, or at least, informed by a small set of decided cases. Cases are couched in the following terms: A sincere religious believer is pitted against an impersonal, domineering, and/or insensitive government. That is not to say the believer always wins, but rather to point out that most of the disputes that occupy constitutional scholars fit into this pattern of an inherent imbalance of power and seem to involve no one beyond the deserving believer and the intolerant state. From within this constricted world view, it becomes nearly irrational—and often tyrannical—to take the government's position, and irresistibly tempting to assume that the religious believer is part of a “minority religion” that cannot operate the levers of power effectively. This model dominates most interactions between government and religion to drive discourse and theory away from a sound foundation.

The model also alters the meaning of the term “minority.” Since no majority of Americans belongs to any one religion, the already loaded term “minority religion” can be stretched to cover virtually every religious believer in the United States.<sup>1</sup> The high ground be-

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1. The unfortunate phrase “Christian country” is misleading at best. The United States is 26.3% Evangelical (which includes the Pentecostal, Holiness, Adventist, and Pietist denominations as well as the evangelical traditions of the Baptist, Methodist, Nondenominational, Lutheran, Presbyterian, Anglican/Episcopal, Restorationist, Congregationalist, Reformed, and Anabaptist denominations); 23.9% Catholic; 18.1% Mainstream Protestant (which includes the mainline Baptist, Methodist, Nondenominational, Lutheran, Presbyterian, Anglican/Episcopal, Restorationist, Congregationalist, Reformed, Anabaptist, and Friends denominations); 6.9% Historically Black Churches (which includes the Historically Black tradition of the Baptist, Methodist, Nondenominational, Pentecostal, and Holiness denominations); 1.7% Mormon (of which the Church of Jesus Christ of Latter-Day Saints constitutes 1.6% and the Community of Christ and unspecified Mormon denominations make up the remainder); 1.7% Jewish (which includes 0.7% Reform, 0.5% Conservative, 0.3% Orthodox, and < 0.6% Other Jewish groups); 0.6% Muslim; 3.9% other (including

comes the permanent seat of the believer, while the government's interest is lower, and any interests served by the government devalued. This default reasoning leads to decisions like *Wisconsin v. Yoder*,<sup>2</sup> in which the Supreme Court did not consider the interest of children in being educated through high school as the Court granted the right of their parents to pull them out of school early to work on family farms.<sup>3</sup>

I have written extensively on the fact that this is not an enlightened framework from within which to judge theories of religious liberty or to decide cases. In fact, it is dangerous for the vulnerable, who, due to the large percentage of Americans who profess religious belief,<sup>4</sup> frequently find themselves dealing with religious leaders, believers, and organizations.<sup>5</sup> Moreover, it is not empirically sound to jump to the conclusion that any particular religious entity is an oppressed

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Buddhist, Hindu, Jehovah's Witness, Other Christian, Orthodox, Wiccan, Native American, Pagan, and other world religions); and 16.1% unaffiliated (which includes atheism, agnosticism, and no religion). PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY—RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 12 (2008), <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>. Despite the number of Christians, they do not share a particular world view, set of policy preferences, or social priorities. *Id.* at 13. Moreover, the percentage of Christians as compared to non-Christians is declining with Protestant denominations losing significant adherents and the religiously unaffiliated emerging as the fastest growing population group. *Id.* at 5 (“The Landscape Survey confirms that the United States is on the verge of becoming a minority Protestant country; the number of Americans who report that they are members of Protestant denominations now stands at barely 51%.”). Moreover, the percentage of Christians as compared to non-Christian religions is declining, with the expectation that Christians will constitute less than 50% of the United States by 2042. See Ontario Consultants on Religious Tolerance, Religious Identification in the U.S.: How American Adults View Themselves (July 19, 2007), [http://www.religioustolerance.org/chr\\_prac2.htm](http://www.religioustolerance.org/chr_prac2.htm).

2. 406 U.S. 205 (1972).

3. See *id.* at 234–36; see also Marci Hamilton, *In Colorado Christian University v. Weaver, the U.S. Court of Appeals for the Tenth Circuit Adopts the Incorrect Theory that Religious Individuals Are Entitled to Exemptions from Generally Applicable Laws*, FINDLAW'S WRIT, Aug. 7, 2008, <http://writ.news.findlaw.com/hamilton/20080807.html> (discussing a recent decision further eroding the separation of church and state, in which a federal court overturned a state statute excluding students attending a “pervasively sectarian” college from a scholarship program).

4. A recent comprehensive survey by the Pew Forum found that 92% of Americans believe in God or a universal spirit, and that 83.1% of Americans are adherents of some religious faith. PEW FORUM ON RELIGION & PUBLIC LIFE, *supra* note 1, at 5, 162.

5. See, e.g., MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 12–13 (2007) (noting the phenomenon of child sexual abuse by members of the United States clergy); Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225, 225–26 (2007) (same); Marci A. Hamilton, *The Maturing of a Movement: Statute of Limitations Reform for Sex Abuse Victims*, FINDLAW'S WRIT, June 11, 2009, <http://writ.news.findlaw.com/hamilton/20090611.html> (discussing “window legislation” passed by several states, which temporarily permits victims of child sexual abuse to file otherwise expired claims).

institution in the political context, even if it is small. In reality, the Court's opinion in *Employment Division, Department of Human Resources v. Smith*,<sup>6</sup> was correct to point out that in the United States there is a general preference for religious liberty, which is proven in the legislatures across the country:

Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.<sup>7</sup>

"Minority" and even hated religions have done quite well in the legislative process, from widespread peyote exemptions for Native American Church members following the *Smith* decision<sup>8</sup> to child medical neglect exemptions for Christian Scientists and other faith-healing religions<sup>9</sup> to clergy exemptions for reporting child abuse<sup>10</sup> to

6. 494 U.S. 872 (1990).

7. *Id.* at 890.

8. See, e.g., 42 U.S.C. § 1996a(b)(1) (2006) (amending the American Indian Religious Freedom Act of 1978 to permit the use of peyote "in connection with the practice of a traditional Indian religion"); ARIZ. REV. STAT. ANN. § 13-3402(B) (2001) (providing religious exemption in criminal peyote statute); COLO. REV. STAT. ANN. § 12-22-317(3) (West 2003) (same); IOWA CODE ANN. § 124.204(8) (West 2007) (same); KAN. STAT. ANN. § 65-4116(c)(9) (2002 & Supp. 2008) (same); MINN. STAT. ANN. § 152.02 Subd. 2(4) (West Supp. 2009) (same); NEV. REV. STAT. ANN. § 453.541 (LexisNexis 2005) (same); N.M. STAT. § 30-31-6(D) (2005 & Supp. 2008) (same); OR. REV. STAT. § 475.840(4) (2007) (same); S.D. CODIFIED LAWS § 34-20B-14(17) (2004) (same); TEX. HEALTH & SAFETY CODE ANN. § 481.111(a) (Vernon 2003) (same); WIS. STAT. § 961.115 (West 2007) (same); WYO. STAT. ANN. § 35-7-1044 (2009) (same); 21 C.F.R. § 1307.31 (2009) (exempting the use of peyote in the Native American Church from federal regulations). Many states also tie their exemptions to federal law which, in the case of peyote, presently gives an exemption to Native American Churches. See, e.g., ALASKA STAT. § 11.71.195 (2008); MISS. CODE ANN. § 41-29-111(d) (2005); MONT. CODE ANN. § 50-32-203 (2007); N.J. STAT. ANN. § 24:21-3(c) (West 1991 & Supp. 2009); N.C. GEN. STAT. § 90-88(d) (2007); N.D. CENT. CODE § 19-03.1-02(4) (2004); R.I. GEN. LAWS § 21-28-2.01(c) (2002); TENN. CODE ANN. § 39-17-403(d) (2006); UTAH CODE ANN. § 58-37-4(2)(a)(iii)(V) (2007); WASH. REV. CODE ANN. § 69.50.201(d) (West 2007); W. VA. CODE ANN. 60A-2-201(d) (LexisNexis 2005).

9. For example, thirty-nine states and the District of Columbia have religious exemptions in their civil statutes on child abuse and neglect. See Religious Exemptions from Health Care for Children, <http://www.childrenshealthcare.org/legal.htm#Exemptions> (last visited Aug. 23, 2009). Eighteen states—including Arkansas, New Jersey, and Wisconsin—permit religious defenses to felony crimes against children. *Id.* Moreover, twelve states have religious defenses for misdemeanors. *Id.*

10. States that grant to "pastoral communications" an exemption from child abuse reporting laws include Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minne-

the use of communion wine during Prohibition when Roman Catholics were treated to widespread discrimination.<sup>11</sup> Yet these facts rarely enter the academic discourse. Scouring the work of “leading” religion scholars yields little or no attention to the fact of widespread exemptions or the political facility of even small religious groups in the political process. Indeed, leading academics have declared the opposite. For example, Edward McGlynn Gaffney, Douglas Laycock, and Michael W. McConnell argued, in their 1991 *Open Letter to the Religious Community*, that *Smith* represented a “sweeping disaster for religious liberty,” without mentioning the impressive statutory exemptions gained by religious groups.<sup>12</sup>

Add to this mix a powerful social taboo against criticizing religious entities, clergy, or beliefs in public, and you end up with discussions and doctrine that are intellectually anemic and based on false empirical assumptions. This often thin gruel of discourse about religious liberty is not solely attributable to religious scholars or societal taboos, however. There is another factor in the social mix that further suppresses the truth and makes it more difficult to accurately gauge the empirical relation between religious liberty and the public good: Religious institutions often hold and foster beliefs that forbid believers from telling outsiders about internal bad behavior. In other words, religious institutions act to suppress negative information in ways that then further falsify reality to outsiders. If outsiders do not know about the bad actions of religious groups, they can easily underestimate the need to apply the law to them.

There has been an enormous amount of information regarding the internal operation of religious organizations coming to the public’s attention in the last five to ten years as a result of the child sex abuse issues within the Roman Catholic Church (“RCC”);<sup>13</sup> the Church of Jesus Christ of Latter-Day Saints (“LDS”);<sup>14</sup> the Fundamen-

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sota, Missouri, Montana, Nevada, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. Clergy as Mandatory Reporters of Child Abuse and Neglect, [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/clergymandated.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/clergymandated.cfm) (last visited Aug. 23, 2009).

11. National Prohibition Act, ch. 85, 41 Stat. 305 (1919) (repealed 1935).

12. Edward McGlynn Gaffney, Douglas Laycock & Michael W. McConnell, *An Open Letter to the Religious Community*, FIRST THINGS, Mar. 1991, available at <http://www.firstthings.com/article/2007/10/004-an-open-letter-to-the-religious-community-37>.

13. See Bishop Accountability, <http://www.bishopaccountability.org> (last visited Aug. 23, 2009) (collecting news and documents relating to child abuse in the Roman Catholic Church).

14. See MARTHA BECK, LEAVING THE SAINTS: HOW I LOST THE MORMONS AND FOUND MY FAITH 228–30 (2005) (describing child abuse in the Mormon community); John Metcalfe, *One Man’s Brutal Encounter with Sexual Abuse in the Mormon Church*, SEATTLE WKLY., May 29,

talist Latter-Day Saints (“FLDS”);<sup>15</sup> the Jehovah’s Witnesses (“JW”);<sup>16</sup> and more recently the Orthodox and ultra-Orthodox Jewish communities.<sup>17</sup> While there had been coverage of childhood sexual abuse by clergy in the RCC since the 1980s,<sup>18</sup> the institutional role in furthering the abuse through hierarchical cover-up did not come to public light until 2002 when reporters at the *Boston Globe* broke the story of the cover-up of abuse and the persistent transfer of pedophile priests by bishops.<sup>19</sup>

In each of these religious communities (among others), there has been an acknowledged rule (or theological principle) that forbade the airing of dirty laundry to outsiders. In the RCC, for example, there has been a rule against “scandal,” which included stiff penalties, such as excommunication, if believers told those outside the faith about problems within it.<sup>20</sup> In the Orthodox community, it is referred to as “chilul hashem,” which literally means “desecration of God’s

2007, <http://www.seattleweekly.com/2007-05-30/news/one-man-s-brutal-encounter-with-sexual-abuse-in-the-mormon-church> (same); *Sexual Abuse Lawsuit Filed by Edmund J. Scanlan Against Mormon Priest & Church of Latter-Day Saints*, REUTERS, Feb. 24, 2009, <http://www.reuters.com/article/pressRelease/idUS230161+24-Feb-2009+PRN20090224> (same).

15. See, e.g., FLORA JESSOP & PAUL T. BROWN, *CHURCH OF LIES* 1–3 (2009) (describing suffering at the hands of the FLDS).

16. See, e.g., Paul Vallyely, *The Big Question: Who Are the Jehovah’s Witnesses, and Why Do They Refuse Blood Transfusions?*, INDEPENDENT, Nov. 6, 2007 (“A Panorama investigation reported [Jehovah’s Witnesses] have an internal list of 23,720 reported abusers which they keep private.”); Lisa Myers & Richard Greenberg, *New Evidence in Jehovah’s Witness Allegations*, MSNBC, Nov. 21, 2007, <http://www.msnbc.msn.com/id/21917798> (alleging that the Jehovah’s Witnesses have settled nine child sexual abuse lawsuits to protect prominent church members); Silent Lambs, <http://www.silentlambs.org> (last visited Aug. 23, 2009) (providing information about child abuse experienced in the organization of Jehovah’s Witnesses).

17. See, e.g., RACHEL LEV, *SHINE THE LIGHT: SEXUAL ABUSE AND HEALING IN THE JEWISH COMMUNITY* xxvii–xxviii (2003) (describing child abuse within the Jewish community); Avrohom Mondrowitz, *N.Y. to Battle Sexual Abuse Among Ultra-Orthodox Jews*, HAARETZ, Apr. 1, 2009 (same); Hella Winston & Larry Cohler-Esses, *No Sex Charge for Kolko; Boys’ Parents Foiled by DA*, JEWISH WK., Apr. 16, 2008 (same); Scott Michels, *Orthodox Jewish Community Struggles with Abuse Allegations*, ABC NEWS, May 5, 2009, <http://abcnews.go.com/TheLaw/Story?id=7376057&page=1> (same).

18. See, e.g., Michael Hirsley, *Accusations Distract Bishops from Agenda*, CHI. TRIB., Nov. 7, 1989 (detailing early allegations of a RCC cover-up of child abuse by priests).

19. See THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, *BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH* 3 (2002) (describing its coverage of the scandal as “the story of a large number of Catholic priests who abused both the trust given them and the children in their care”).

20. See THE SUPREME AND HOLY CONGREGATION OF THE HOLY OFFICE, *INSTRUCTION ON THE MANNER OF PROCEEDING IN CASES OF SOLICITATION* (1962), <http://image.guardian.co.uk/sys-files/Observer/documents/2003/08/16/Criminales.pdf> (describing a secret procedure for handling sexual offenses and outlining a policy of the strictest secrecy under penalty of excommunication).

name,"<sup>21</sup> and is deployed to prohibit giving the community a bad name through revelations about inappropriate bad behavior within the organization.<sup>22</sup>

Theories about institutions indicate that they often operate to perpetuate themselves, and this is obviously one way that religious institutions can secure themselves from public criticism. This is a rule, though, that makes it difficult for citizens and scholars to assess how necessary it is to apply generally applicable laws to religious organizations and believers. If the troubling behavior is shielded from public view, we are led to believe that the institution and its believers are not in need of external checks on behavior and are even inherently virtuous. Since status and wealth of religious organizations are dependent on their public face, there are strong forces that tempt religious leaders to hide bad, and especially heinous, behavior from as many people as possible.<sup>23</sup>

More troubling, such rules ensure that the vulnerable, such as children and disabled adults, within or served by the organizations may not receive the protection they need. These rules guarantee not only that the organization's reputation is not defiled but also that a cycle of abuse or mistreatment is fueled.<sup>24</sup> Only sunlight is capable of

21. MICHAEL PRIOR, ZIONISM AND THE STATE OF ISRAEL: A MORAL INQUIRY 42 (1999).

22. RABBI YOSEF BLAU, CONFRONTING ABUSE IN THE ORTHODOX COMMUNITY 2-5 (2003), <http://www.jofa.org/pdf/uploaded/863-BWMF1871.pdf>.

23. These motives do not distinguish religious bodies from others, e.g., businesses. What is distinctive is that the religious entities are entering the political fray with such motives and with virtually no required public disclosure of their finances or operations. See I.R.C. § 501(c)(3) (2006) (allowing churches and religious organizations to qualify for federal income tax exemption); see also INTERNAL REVENUE SERVICE, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS: BENEFITS AND RESPONSIBILITIES UNDER THE FEDERAL TAX LAW 3 (2008), <http://www.irs.gov/pub/irs-pdf/p1828.pdf>. Unlike nonreligious nonprofits,

[a] church or religious organization is not required to provide a disclosure statement for *quid pro quo* contributions when: (a) the goods or services meet the standards for *insubstantial value*; or (b) the only benefit received by the donor is an *intangible religious benefit*, [which include] admission to a religious ceremony [and] de minimus tangible benefits, such as wine used in religious ceremony.

*Id.* at 25. Additionally, unlike nonreligious nonprofits,

Congress has imposed special limitations, found in IRC section 7611, on how and when the IRS may conduct civil tax inquiries and examinations of churches. The IRS may only initiate a *church tax inquiry* if the Director, Exempt Organization, Examinations reasonably believes, based on a written statement of the facts and circumstances, that the organization: (a) may not qualify for the exemption; or (b) may not be paying tax on an unrelated business or other taxable activity.

*Id.* at 26.

24. BishopAccountability.org maintains an archive of news articles detailing such abuses. See, e.g., Susan Evans, *Evidence Reveals Diocese Cover-up*, TRIB.-DEMOCRAT Feb. 24, 2003, [http://www.bishopaccountability.org/news2003\\_01\\_06/2003\\_02\\_24\\_Evans\\_Evi](http://www.bishopaccountability.org/news2003_01_06/2003_02_24_Evans_Evi)

protecting such individuals and it is sunlight that the rules against scandal block. The purpose of this Essay is to introduce the dynamic of this vicious cycle.

Why is this relevant to constitutional discourse? There are two reasons. First, there has been a recent uptick in interest regarding theories of so-called “religious autonomy” for religious institutions.<sup>25</sup> Purely as a matter of operation, legal autonomy would reach the same results as the scandal rule, though the courts would be in the business of keeping the institutions’ secrets. It is additional insurance for religious entities seeking control of criminal and tortious actions from within. Second, the appearance of legislative free exercise statutes enacting the constitutional standard of strict scrutiny, such as the Religious Freedom Restoration Act (“RFRA”)<sup>26</sup> and the state RFRA,<sup>27</sup> provide more arguments for religious entities to avoid legal liability and even discovery involving their internal bad actions. If the former were to come into effect or the latter were applied enthusiastically, there is the very real potential that constitutional doctrine might work hand in glove with hiding and perpetuating abuse of the vulnerable. Moreover, constitutional scholarship would continue to operate out of ignorance rather than fact.

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denceReveals.htm (discussing how evidence for a 1994 trial against a priest for sexual abuse was withheld because the documents were “believed to be protected under centuries-old religious doctrine”).

25. See Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 837–39 (2009) (noting the Court’s recent “hands-off” approach to matters that relate to religious doctrine); Hamilton, *The Waterloo for the So-Called Church Autonomy Theory*, *supra* note 5, at 232–38 (discussing religious autonomy in the context of child sexual abuse cases).

26. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4 (2006)), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997); *see also* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 (2006) (forbidding state and local governments from imposing land use regulations as to impose a “substantial burden” on religious exercise).

27. See, e.g., ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. §§ 41-1493.01 to .02 (2004); CONN. GEN. STAT. § 52-571b (West 2005); FLA. STAT. ANN. §§ 761.01–.05 (West 2005); IDAHO CODE ANN. §§ 73-401 to -404 (2006); 775 ILL. COMP. STAT. ANN. 35/1–35/99 (West 2001); MO. ANN. STAT. §§ 1.302–.307 (West 2000 & Supp. 2009); N.M. STAT. ANN. §§ 28-22-1 to -5 (LexisNexis 2004); OKLA. STAT. ANN. tit. 51, §§ 251–258 (West 2008); 71 PA. CONS. STAT. ANN. 1 §§ 2401–2407 (West 1990 & Supp. 2009); R.I. GEN. LAWS §§ 42-80.1-1 to -4 (2005); S.C. CODE ANN. §§ 1-32-10 to -60 (2005); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001–.012 (Vernon 2005). The RFRA only applies to the federal government, because it is unconstitutional as applied to the states. City of Boerne v. Flores, 521 U.S. 507, 536 (1997). The state religious liberty statutes have a wide range of exceptions for particular areas of the law, depending on the state.



## I. THE SCANDAL RULE

For ease of discussion, I will refer to the principle of internal secrecy that runs across religious entities as the “scandal rule.” This is the term employed by the RCC,<sup>28</sup> but for purposes of this Essay its colloquial meaning adequately captures the sense of the other religions’ rules imposing secrecy. The rule operates primarily to block the flow of information from moving from inside to outside of the religious entity. First, and most obviously, it impedes the movement of information from within the organization to the following: (1) law enforcement; (2) state agencies and lawmakers; (3) the media (including news coverage and commentary and widely viewed and influential talk shows like Oprah and Larry King); (4) other nonprofit organizations, social leaders, and philanthropists who might otherwise take action for the victims; and (5) the public, which might well demand prosecutorial action and legal reform if they knew the facts. With the information stopping at the edge of the religious organization, the people have very little chance of learning the existence of the bad behavior. This means that the ability of outsiders to stop the inappropriate behavior—even when those outsiders are charged with punishing, deterring, or monitoring that particular form of behavior—is stymied before their social and public roles are fulfilled.

Second, the rule against scandal can block information flow between believers within the organization. The way the rule typically operates, the information is shared with as few people as possible even within the organization. Thus, in the RCC, until the *Boston Globe* stories, there was no open sharing of information between priests about the abusive practices of their fellow priests, and even less sharing of information with parishioners. This means that even insiders, who are the most invested in the organization’s reputation and future, lack the information necessary to reform the organization. In addition, if there are isolated leaks of information, as there were with respect to priests abusing children in the 1980s,<sup>29</sup> the scandal rule keeps the flow of information to a trickle, so that outsiders and insiders cannot assess the depth and breadth of an internal problem.

The scandal rule is not just a regulation of information, however. It is also an important means by which clergy maintain power over their flocks and in the larger community. When bad behavior (especially when it has a criminal element) can only be addressed in-house, the leadership’s role of spiritual advisor expands to encompass civil

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28. See *supra* text accompanying note 20.

29. See *supra* text accompanying note 18.

judge, jury, and/or case worker. That does not mean they take on all of the functions of these social actors, but rather that they displace them. That not only enhances their standing in their own communities, but also puts them in a quasi-omniscient position.<sup>30</sup>

The scandal rule makes the vulnerable even more vulnerable than one might think because even when the story starts to spread more widely within the group, co-religionists often place their role as believer above their public role. For example, a prosecutor might refuse to investigate or prosecute co-religionists even though his role otherwise would demand such actions.<sup>31</sup> A recent confirmation of this reality involved Justice David T. Prosser Jr. on the Wisconsin Supreme Court. When he was a prosecutor, parents learned of their child's abuse by a priest and intended to press charges.<sup>32</sup> Prosser, accompanied by a deacon and another member of the parish, went to the family's home to urge the parents not to publicly embarrass the RCC.<sup>33</sup> They succeeded.<sup>34</sup>

Clergy may also impress outsiders into observing the rule. It is common knowledge that prosecutors across the country, whether co-religionists or not, received reports regarding sexual abuse by RCC priests, and when approached by the local bishop, agreed to let the diocese handle its own "dirty laundry."<sup>35</sup> Prosecutors apparently assumed that they were hearing about isolated events, not a church-wide, mandated process for handling abuse secretly. Their lack of information was attributable to the relative success of the scandal rule; prosecutors simply did not have the quantum of information needed for them to suspect the larger, insidious pattern.<sup>36</sup> Alternatively, prosecutors saw a pattern but believed in the social myth that religious entities are equipped to handle the suffering of anyone hurt, includ-

30. See ADAM D. MOORE, INFORMATION ETHICS: PRIVACY, PROPERTY, AND POWER 406–07 (2005) (recounting massive child abuse discovered within Atlanta's House of Prayers congregation); Karen E. Pettigrew & Margaret Ann Wilkinson, *Control of Community Information: An Analysis of Roles*, 66 LIBR. Q. 373, 375 (1996) (researching the control of information within community networks).

31. Another possibility is that the police might tip off the diocese of priests under investigation. See, e.g., Letter from "Fred" to "John" (Feb. 25, 1986), available at [http://www.bishopaccountability.org/docs/boston/oleary/OLEARY\\_ARTHUR\\_P\\_1\\_048\\_050.pdf](http://www.bishopaccountability.org/docs/boston/oleary/OLEARY_ARTHUR_P_1_048_050.pdf) (letter reporting that a state police captain admitted to "going against his own regulations" to tip off the Boston Archdiocese about Reverend Arthur P. O'Leary's upcoming arrest).

32. Marie Rohde, *Justice Prosser's Link to Priest Case Assailed: As DA in '79, He Decided Not to Prosecute, Records Indicate*, MILWAUKEE J. SENTINEL, Feb. 5, 2008, at A1.

33. *Id.*

34. *Id.*

35. HAMILTON, GOD VS. THE GAVEL, *supra* note 5, at 15.

36. *Id.*

ing those sexually abused.<sup>37</sup> That myth is perpetuated by the rules against scandal.

Similarly, numerous news sources abetted the scandal rule when the bishops pressured them to keep the abuse and the bishops' knowledge of the abuse confidential. The *Philadelphia Inquirer* falsely accused reporter Ralph Cipriano of lying when Cipriano authored a story exposing the Philadelphia Archdiocese's handling of clergy abuse,<sup>38</sup> and the *Milwaukee Journal Sentinel* moved Marie Rohde off the church beat when she started to dig too deeply.<sup>39</sup> And while the *Boston Globe* broke the cover-up story first, allegations had swirled around for years before the *Globe* published the first article on the cover-up of clergy abuse.<sup>40</sup>

Religious organizations also invest heavily in keeping the information protected by the scandal rule out of the public eye. One of their key initiatives is intended to ensure that older cases never make it to court. In 2009, the Catholic Conference invested in lobbyists to defeat a bill in the New York legislature that would have eliminated the statute of limitations for all child sex abuse victims for a year, even if the statute of limitations had already expired.<sup>41</sup> In Colorado, the Archdiocese of Denver has dedicated a "very large sum" to a mediation firm to accomplish the same end.<sup>42</sup> Why? Because such legislation forces their mandatorily secret information public, as happened in California when similar legislation was in place during 2003.<sup>43</sup> The FLDS has hired one of the most effective public relations firms in Utah to go into hyperdrive whenever news leaks about its polygamous practices. When Texas authorities discovered widespread statutory rape and child bigamy at the Yearning for Zion Ranch in Eldorado,

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37. See, e.g., Mike Stanton & Tom Mooney, *The Abuse Files: Lawsuits Unearth Secret Church Papers, Shedding New Light on Allegations of Priest Sex Abuse Going Back Decades*, PROVIDENCE J., Dec. 2, 2007, at A1 (explaining that the Massachusetts state police agreed to allow a diocese to handle "internally" those crimes related to the church).

38. RALPH CIPRIANO, COURTROOM COWBOY: THE LIFE OF LEGAL TRAILBLAZER JIM BEASLEY 306-09 (2008) (discussing the libel suit that Cipriano then filed against the *Philadelphia Inquirer*).

39. Bruce Murphy, *The Catholic Cover-up*, MILWAUKEE MAG., Feb. 13, 2007.

40. See THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, *supra* note 19, at viii.

41. See Amy Kotlarz, *Revised Markey Bill to Be Voted on by N.Y. Assembly Within Days*, CATHOLIC COURIER, June 6, 2009, <http://www.catholiccourier.com/tmp1.cfm?nid=78&articleid=107524>; Hugh Kramer, *Catholic Church Helps Quash Child Sex-Abuse Legislation*, EXAMINER, Aug. 15, 2009, <http://www.examiner.com/x-8947-LA-Atheism-Examiner~y2009m8d15-Catholic-Church-helps-quash-child-sexabuse-legislation>.

42. Jean Torkelson, *Archbishop Offers Mediation Process: Chaput Hires Firm to Seek Settlements in Alleged Abuse Cases*, ROCKY MTN. NEWS, May 25, 2006.

43. See Jean Guccione & William Lobdell, *Law Spurred Flood of Sex Abuse Suits*, L.A. TIMES, Jan. 1, 2004, at A1.

Texas, in 2008, the organization's patriarchs reacted with a multistage public relations campaign, including paying to set up a sophisticated website and frequenting high-profile talk shows, to distract from the facts they wished to keep secret.<sup>44</sup> The same phenomenon exists in the Jewish world.<sup>45</sup>

The facts reported to the public were troubling. For years, FLDS prophet Warren Jeffs routinely took underage girls across state and international lines to be married to much older men in plain violation of the Mann Act.<sup>46</sup> After intense pressure on the FBI, mostly coming from groups like Tapestry Against Polygamy and Child Protection Project (groups of formerly polygamous wives and/or children),<sup>47</sup> Jeffs was finally apprehended and convicted of two counts of being an accomplice to rape.<sup>48</sup> In 2008, the Texas Department of Family and Protective Services responded to a report of abuse at the FLDS's Yearning for Zion Ranch compound in Eldorado, Texas, and took all of the children into custody. Based on the agency's final report, over twenty-five percent of pubescent girls at the compound had been the victims of statutory rape, with over half of those rapes resulting in pregnancies: Twelve girls were "spiritually" married at ages ranging from twelve to fifteen, and seven of the girls had one or more children.<sup>49</sup> FLDS spokesman Willie Jessop responded to the state's official report by attempting to deflect attention away from the bad acts

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44. Ben Winslow & Nancy Perkins, *FLDS Take Their Battle Online*, DESERET NEWS, Apr. 22, 2008, at A5.

45. See generally TEMPEST IN THE TEMPLE: JEWISH COMMUNITIES AND CHILD SEX SCANDALS (Amy Neustein ed., 2009); see also Robert Kolker, *Accused Pedophile Rabbi Still Go-Carting*, N.Y. MAG., Aug. 7, 2006 (describing a Brooklyn rabbi accused in two sexual-abuse lawsuits); Hella Winston & Larry Cohler-Esses, *Yeshiva Fired, Then Paid, Rabbi Charged with Abuse*, JEWISH WK., Apr. 2, 2008 (noting an allegation that a school's chief administrator "'knew of allegations that [a rabbi] was sexually abusing boys at [a Jewish school] years before' but failed to act").

46. 18 U.S.C. § 2421 (2006). The statute provides the following:

Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

*Id.*

47. See Tapestry Against Polygamy, <http://www.polygamy.org> (last visited Aug. 24, 2009) (offering resources and support for refugees affected by polygamy and advocating for changes to make the transition easier for those leaving the lifestyle); Child Protection Project, <http://www.childpro.org> (last visited Aug. 24, 2009) (providing awareness about child abuse and polygamy within religious institutions).

48. *Polygamist 'Prophet' to Serve at Least 10 Years in Prison*, CNN, Nov. 20, 2007, <http://www.cnn.com/2007/US/law/11/20/jeffs.sentence>.

49. Ben Winslow, *FLDS Report Says 12 Girls Married Underage*, DESERET NEWS, Dec. 24, 2008, at A1.

with the claim that it was just a “sensational” bid to make the sect look bad.<sup>50</sup> The underlying message was that it was offensive for the state to reveal the FLDS’s secrets. The numbers, in fact, are in all likelihood an undercount because girls were instructed to lie about their ages and the sect does not file birth certificates, making it impossible to verify exact age.<sup>51</sup>

The ultra-Orthodox Jewish community has enforced the scandal rule vigilantly and successfully until very recently.<sup>52</sup> Now, there is an ongoing debate among rabbis regarding the appropriateness of telling the authorities about child sex abuse, with some adhering to the scandal rule while others propose sending the information through inside channels and only then to the authorities.<sup>53</sup> This was the approach that the RCC crafted at its Dallas meeting following the *Boston Globe*’s revelations.<sup>54</sup> Suffice it to say that the scandal rule has not been removed from the culture of the RCC, with Cardinal George of Chicago and Archbishop Timothy Dolan of Milwaukee (now New York) recently covering up information about active abusers.<sup>55</sup>

Two contemporary developments in the field of religious liberty threaten to intensify the negative externalities generated by the scandal rule. I will now turn to each of these to examine how they further the scandal rule while undermining the ability of the vulnerable to protect themselves.

## II. THE THEORY OF RELIGIOUS AUTONOMY (FOR INSTITUTIONS)

Two current legal tactics have been attractive to religious entities and extremely troubling to children’s advocates and those who work to protect the vulnerable from religious entities. First is the notion of

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50. Robert T. Garrett, *12 Girls at Ranch Sexually Abused, CPS Says ‘Spiritual’ Marriages Cited; Sect Spokesman Slams Agency’s Report*, DALLAS MORNING NEWS, Dec. 24, 2008, at A1.

51. *Id.* (noting that state Child Protective Services workers found a “pattern of deception” revealing that “[s]ect members shredded documents, and women and youngsters withheld information about their identities and family ties”).

52. Hella Winston, *Brooklyn DA Announces New Plan to Urge Reporting of Abuse*, JEWISH WK., Apr. 1, 2009 (“Acknowledging the community’s insularity and the cultural taboo against reporting abuse to the secular authorities, [Brooklyn District Attorney] Hynes stressed the importance of partnering with Orthodox institutions and leadership in this effort.”).

53. *Id.*; see also BLAU, *supra* note 22, at 3–4 (recognizing that the Jewish community must learn to “recognize abuse” and “[p]roper[ly] utiliz[e] . . . secular authorities”).

54. See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *ESSENTIAL NORMS FOR DIOCESAN/EPARCHIAL POLICIES DEALING WITH ALLEGATIONS OF SEXUAL ABUSE OF MINORS BY PRIESTS OR DEACONS* (2002), <http://www.usccb.org/ocyp/2005EssentialNorms.pdf>.

55. See Manya A. Brachear, Margaret Ramirez & Azam Ahmed, *Cardinal Lifts the Veil on Abuses*, CHI. TRIB., Aug. 13, 2008, at C1; Annysa Johnson, *SNAP Group Says Archbishop Dolan Lax on Abusive Priests*, MILWAUKEE J. SENTINEL, Feb. 6, 2009.

religious “autonomy,” which is a benign label that papers over the peril of church autonomy for children and disabled adults.<sup>56</sup> Second is the movement to enact laws that protect religious exercise by imposing strict scrutiny across the board, like RFRA and the state RFRA.<sup>57</sup> The notion of “autonomy” from the law is couched in libertarian terms, but creates the opportunity for licentiousness, which the founding generation rightly feared. Although there are various iterations of it, Professor Douglas Laycock describes the principle as it would apply to individuals as follows: “[F]rom the view that religious liberty consists of minimizing government influence and maximizing individual choice, government best protects religious liberty in the usual case by exempting religious practices from regulation.”<sup>58</sup> More recently, Professor Richard Garnett of the University of Notre Dame Law School has worked to craft a theory of institutional autonomy:

There is, *finally*, the most ancient rationale of all, namely, that secular authorities lack the *power* to answer some questions—*religious* questions—whose resolution is, under an appropriately pluralistic political theory, left to other institutions. It is not that religious questions are hard, weird, or irrelevant; it is that they are questions that the political authority lacks power, or *jurisdiction*, to answer. This rationale, it seems to me, is not only the strongest; it also pulls the hands-off rule from the margins of First Amendment esoterica to the very heart of religious freedom and church-state separation, properly understood. I have suggested elsewhere that “the preservation of the churches’ moral and legal right to govern themselves in accord with their own norms and in response to their own calling is our day’s most pressing religious freedom challenge.”<sup>59</sup>

With the scandal rule in place, there is no need for an autonomy rule—if the information regarding bad behavior never goes beyond the elite clergy or well-controlled clusters of members, legal violations remain hidden from public view. Literally, the law cannot be enforced and, for the institution, need not be avoided. What happens when the rule against scandal starts to fail? So far, it appears that religious entities resort to outside forces to further the project of se-

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56. See *supra* text accompanying note 25.

57. See *supra* notes 26–27 and accompanying text.

58. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 200 (2004); see also Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981).

59. Garnett, *supra* note 25, at 861–62 (citation omitted).

crecy. If the rule against scandal becomes increasingly difficult to enforce, a theory of legal autonomy becomes very attractive as it would enlist the First Amendment to achieve the same ends. If the secrets cannot be kept internally and, therefore, the law will be brought to bear, legal autonomy is needed to avoid accountability, legal punishment, and penalties.

To be sure, those advocating religious or institutional autonomy do not express any intent to keep secret the illegal behavior occurring in religious institutions. Nor do the briefs filed by religious organizations demanding “autonomy” come out and say that their project is to perpetuate the rule against scandal. Regardless of the couching of autonomy theory, though, it is simple fact that an autonomy doctrine would work synergistically with scandal rules.

The primary problem with “autonomy” in general is that it entails unaccountability and therefore operates to perpetuate illegal or immoral behavior. When religious entities operate with the scandal rule in place, lawmakers are disabled from protecting the vulnerable due to lack of knowledge. One of the recent relevant issues has been whether to deter child abuse within religious organizations by creating a legal obligation to report known abuse. When reporting requirements started to appear, either legislators did not know that they would need to impose such a requirement on clergy and religious institutions (as a result of the success of the scandal rules) or religious entities requested exemptions and legislators knew too little to challenge them (again because of the success of the scandal rules).<sup>60</sup> It should not be surprising that once the RCC cover-up “scandal” broke in 2002, states with clergy exemptions started to change their statutes to include reporting for clergy.<sup>61</sup> The education of the legislators led to more protective measures for children. Such a move can only

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60. Another possibility is that they were overly cautious about interfering with the clergy-communicant privilege. See *Mockaitis v. Harclerod*, 104 F.3d 1522, 1534 (9th Cir. 1997) (holding that a priest and archbishop had a reasonable expectation of privacy under Fourth Amendment and that a district attorney’s plan to wiretap a murder confession by a suspect to his priest was a violation of RFRA); see also Julie M. Arnold, Note, “Divine” Justice and the Lack of Secular Intervention: Abrogating the Clergy-Communicant Privilege in Mandatory Reporting Statutes to Combat Child Sexual Abuse, 42 VAL. U. L. REV. 849, 851 (2008) (arguing that states should abrogate the privilege in relation to existing mandatory reporting statutes).

61. See Fred Bayles, *States Add Clergy to Sex-Abuse Laws*, USA TODAY, July 5, 2002, at A1 (explaining that Massachusetts, Illinois, Missouri, and Colorado have added clergy to their mandatory reporting statutes since the beginning of 2002); see also Michael Powell, *Catholic Clout Is Eroded by Scandal*, WASH. POST, July 6, 2002, at A1 (noting that New York also passed legislation in June 2002 that required clergy to report incidents or allegations of non-family child abuse to authorities).

work, though, if it is constitutional to make religious entities accountable for the harm they cause, which is to say if they are not “autonomous” from the law that governs others.

The Supreme Court has never adopted the “autonomy” theory in the sense that some today advance it.<sup>62</sup> At most, it has forbidden courts from interpreting religious doctrine or making ecclesiastical choices.<sup>63</sup> It would be hard to believe that the relatively recent rise in interest in an autonomy theory on the part of denominations with serious abuse issues is disconnected from the fact that secrets about abuse within institutions are now being released.

### III. RFRA AND STATE RFRAS

Like “autonomy,” the RFRA strict scrutiny formula looks most appropriate when not tethered to unpleasant facts. When passed, members of Congress had good intentions but too little information, in part because of the success of the scandal rule across religious denominations. From 1990 to 1993, when RFRA was being formulated and debated, there were inklings of a pattern of abuse within the RCC, but there was no widespread or public knowledge of the complicity of bishops and the Vatican. The last question members of Congress would have asked is whether RFRA would impact negatively on children. That is not just a result of the general taboo against talking negatively about religion (a most potent taboo for politicians seeking

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62. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1112 (2004).

63. See, e.g., *Jones v. Wolf*, 443 U.S. 595, 609 (1979) (stating that if a state law provides that the identity of a local church is to be determined by the “laws and regulations” of the general hierarchical church, then the First Amendment requires that state courts defer to a determination of that local church’s identity by the authoritative ecclesiastical body); *Gen. Council on Fin. & Admin., United Methodist Church v. Cal. Super. Ct.*, 439 U.S. 1369, 1372 (1978) (explaining that while there exist “constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance,” the Supreme Court “never has suggested that those constraints similarly apply outside the context of such intraorganization disputes”) (citation omitted); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (noting that the First Amendment “severely circumscribes the role that civil courts may play in resolving church property disputes”); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871) (explaining that “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories . . . the legal tribunals must accept such decisions as final, and binding on them, in their application to the case before them”); see also HAMILTON, *GOD VS. THE GAVEL*, *supra* note 5, at 190 (explaining that Supreme Court cases have only said that “courts are not permitted to decide any solely ecclesiastical question between members from within the organization”).



voting blocs), but also the success of the scandal rule, which secured the facts in “secret archives,” to which only bishops were admitted.

I do not want to over-exaggerate the success of the scandal rule. When the issue is abuse, keeping a tight lid on information, at least as of the latter part of the twentieth century, has been increasingly difficult as the legal status of children and abuse victims in general has improved. State agencies charged with children’s welfare were aware of children being hurt in religious environments before 2002, to be sure, and they strongly opposed RFRA once they understood that it would impact their efforts to save children.<sup>64</sup> One of the most serious problems with RFRA was its enormous scope and the near impossibility of comprehending its impact while it was being enacted. The rules against scandal compounded the difficulties posed by RFRA by suppressing information about the religious entities’ harmful behavior.

The verbiage surrounding its passage was all about “religious liberty.” Indeed, there was an agreement among the lobby of religious groups, which forbade discussion of the particular legal exemptions each sought under RFRA, because it would lead to too much infighting.<sup>65</sup> For example, the Christian Legal Society was most interested in RFRA because it wanted to create opportunities for evangelical Christians and others to refuse to rent apartments to homosexuals or unmarried couples, a principle that the progressive mainstream Protestants could not have supported.<sup>66</sup> It was easier to lobby for “liberty” if the mainstream closed its eyes and ears to the likely practical impact of the law. The fair housing issues eventually persuaded the American Civil Liberties Union that its support for RFRA was problematic.<sup>67</sup> Thus, everybody spoke solely about the virtue of religious liberty and overruling the Supreme Court’s decision in *Employment Division, Department of Human Resources v. Smith*<sup>68</sup> without any really serious discussion about the illegal practices of religious believers and institutions that would be permitted with RFRA in place. Abstraction and political rhetoric, not facts, were the order of the day.

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64. See American Academy of Pediatrics, *Religious Exemptions from Child Abuse Statutes*, 81 PEDIATRICS 169, 170–71 (1988). The American Academy of Pediatrics is also on the record opposing state exemptions for parents who have denied medical care to their children for religious reasons. See News Release, American Academy of Pediatrics, Pediatricians File Brief in Prayer vs. Medical Care Case (Dec. 29, 1998), available at <http://web.archive.org/web/20050213224926/http://aap.org/advocacy/washing/prayer.htm>.

65. HAMILTON, GOD VS. THE GAVEL, *supra* note 5, at 180–81.

66. *Id.*

67. *Id.* at 183–84.

68. 494 U.S. 872 (1990).

In operation, however, RFRA did affect children's issues, leading children's advocates to oppose re-enactment of RFRA after it was held partially unconstitutional in *City of Boerne v. Flores*.<sup>69</sup> They were one of the main reasons (along with the cities and municipalities) that the Religious Liberty Protection Act ("RLPA") was never passed.<sup>70</sup> This illustrates that once the facts are brought to the attention of legislators, they are capable of denying demands by religious entities. But in the absence of facts, the balance often tips in favor of the religious lobbyists who control information that might well reverse public policy decisions.

#### IV. CONCLUSION

The scandal rule creates an environment within religious organizations that is propitious for those who would abuse children and disabled adults, or who would cover up such abuse to protect power, image, and wealth. It also has external effects that make it much more difficult for those in civil society to protect the vulnerable. When discussing the merits of autonomy or high protection of religious liberty, the scandal rule needs to be one of the foci for debate. Without acknowledging its powerful presence and operation, it is far too easy to presume that the protection of religious practice is a necessary good.

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69. 521 U.S. 507 (1997).

70. See Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 334 (2003).