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COMMENT: THE CONSTITUTIONAL FATE OF MANDATORY REPORTING STATUTES AND THE CLERGY-COMMUNICANT PRIVILEGE IN A POST-SMITH WORLD

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SUMMARY:

... A conflict between the state's desire to protect children and the individual's constitutional right to free exercise of religion is currently brewing in our nation's legislatures and courthouses. ... If the Court applies this analysis to a mandatory reporting statute that compels a clergy member or communicant to disclose information in a manner that impinges on his religious beliefs, the Court would likely rule in favor of the state if the statute is a generally applicable criminal law. ... In most cases, a clergy member or communicant invokes the privilege when the state attempts to enforce a mandatory disclosure statute by forcing the clergy member or communicant to disclose confidential information in the hope that such information will assist in the prosecution of a criminal offense. ... In addition, the Supreme Court's recent treatment of the state's interest in preventing the exploitation of children in pornography cases provides insight into the Court's likely treatment of the state's interest in detecting and preventing incidents of sexual child abuse. ...

HIGHLIGHT: The right to freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all

- Justice Frank Murphy, *W. Va. Bd. of Educ. v. Bamente* n1

The widespread abuse of children was due to an institutional acceptance of abuse and a massive and pervasive failure of leadership... . They chose to protect the image and reputation of their institution rather than the safety and well-being of the children entrusted to their care. They acted with a misguided devotion to secrecy. And they failed to break their code of silence even when the magnitude of what had occurred would have alerted any reasonable, responsible manager that help was needed.

- Office of the Attorney General, Commonwealth of Massachusetts n2

TEXT:

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I. Introduction

Few constitutional issues spark as much controversy as the clash between First Amendment³ liberties and the state laws that restrict them. A conflict between the state's desire to protect children and the individual's constitutional right to free exercise of religion is currently brewing in our nation's legislatures and courthouses. During the last forty years, all states adopted mandatory reporting statutes requiring anyone exposed to information that a child has been or will be abused to report this to law enforcement authorities. These statutes and their amendments conflict with other state [*704] laws that create a testimonial privilege exempting a clergy member or penitent⁴ from disclosing incidents of child abuse to authorities if the original transmission of that information is made in a confidential manner while seeking spiritual assistance. The recent sex abuse scandal surrounding the Catholic Church highlighted this conflict of laws, and the resulting public backlash against the Church catalyzed state legislatures into action.⁵ State legislatures initiated or passed several bills requiring clergy members to report incidents of child abuse, even if the clergy member acquires such information during a confidential communication.⁶ These recent measures put the clergy-communicant privilege and mandatory child abuse reporting statutes on a collision course. This conflict pits two of society's most cherished beliefs and strongly held values, the right to free exercise of religion and the prevention of child abuse, against each other. The approach courts adopt when presented with this conflict will substantially impact a state's ability to prosecute incidents of child abuse and will also determine the fate of one of our nation's most fundamental constitutional rights. To resolve the legal conflict, it is necessary to determine whether a state can constitutionally enforce a mandatory disclosure statute that compels an individual to disclose confidential, religious information.

Although the Supreme Court has yet to rule on whether the clergy-communicant privilege is protected under any clause of the First Amendment,⁷ in *Employment Division v. Smith*⁸ the Court adopted a "neutrality" analysis in its First Amendment jurisprudence, upholding generally applicable and neutral criminal laws that incidentally burden religious rights.⁹ Consequently, the Court will not apply heightened judicial scrutiny to such [*705] laws.¹⁰ In dicta, however, the Court indicated that it will apply heightened scrutiny to "hybrid claims," or claims that involve two fundamental rights, such as a claim that combines the right to free exercise of religion and the right to free speech.¹¹ If the Court applies this analysis to a mandatory reporting statute that compels a clergy member or communicant to disclose information in a manner that impinges on his religious beliefs, the Court would likely rule in favor of the state if the statute is a generally applicable criminal law. But what would be the constitutional fate of a mandatory reporting statute when a court applies heightened scrutiny in a case involving a hybrid claim?

A number of scholars have addressed the constitutionality of the clergy-communicant privilege under the Free Exercise Clause and the Establishment Clause, but none have seriously analyzed the constitutionality of a hybrid rights claim that seeks protection under the Free Exercise Clause and Free Speech Clause of the First Amendment. This Comment will address the issue of whether a clergy member or communicant can be constitutionally compelled to disclose confidential information under a hybrid rights claim that seeks protection under the Free Exercise Clause and the Free Speech Clause of the First Amendment. Because other scholars have discussed the constitutionality of this privilege under the religion clauses, this Comment pays particular attention to the constitutionality of the privilege under the Free Speech Clause.

Part II examines the extent of child abuse in the United States and in the Catholic Church, the development of mandatory disclosure statutes in the fifty states, and the evolution of the clergy-communicant privilege in state and federal courts. Part III discusses the constitutionality of a mandatory reporting statute and the clergy-communicant privilege under the various clauses of the First Amendment. This discussion examines the hybrid rights exception articulated in *Smith* and describes how a litigant arguing against the enforcement of a mandatory reporting statute can craft his or her argument so that the Court will apply heightened judicial scrutiny, thus making it more difficult for the state to succeed. Part IV examines the arguments that the state and the clergy member or communicant can proffer under the compelling-state-interest test. Part V concludes that advancing a hybrid claim under the Free Speech Clause and the Religion Clauses would present a more successful challenge to a mandatory reporting statute. This Part also concludes that state legislatures seeking to toughen mandatory [*706] reporting statutes should do so before public support and media attention surrounding the Catholic Church's pedophilia scandal dissipates.

II. History and Background of Mandatory Disclosure Laws and Evidentiary Privileges

A. Mandatory Reporting Statutes

Recent estimates indicate that over three million incidents of child abuse and neglect are reported each year in the United States.¹² This number is particularly staggering in light of the fact that only forty percent of suspected cases of

child abuse are believed to be reported. n13 Unfortunately, a substantial number of these incidents of abuse are sexual in nature. n14 The number of cases of child abuse has increased over the past decade, n15 causing the U.S. Advisory Board on Child Abuse and Neglect to declare child maltreatment "a national emergency." n16

Reporting requirements emerged in the early 1960s in response to heightened public concern about the physical abuse of children n17 and changing perceptions of sexual abuse. n18 By 1967, all states had adopted child abuse statutes. n19 Congressional passage of the Child Abuse Prevention and [*707] Treatment Act ("CAPTA"), n20 which clarified these issues and "set the standard for state mandatory reporting laws," n21 alleviated early problems and differences surrounding the definition of child abuse and child neglect. Over the next few decades, states expanded these statutes to include protections against physical, mental, emotional, and sexual abuse, and neglect. n22 Although no broad-sweeping federal child abuse legislation has been enacted in recent years, Congress has nevertheless continued to discuss the issue. n23

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 with families and authorities to prevent additional abuse. n24 In this way, "mandatory reporting laws play a central role in the child protection system, serving as the point of intersection among outlets of children's service, including medical care, mental health, education, and social services." n25

B. The Clergy-Communicant Privilege

1. History of the Clergy-Communicant Privilege. - There are different types of testimonial privileges that exempt certain groups or individuals from testifying in court about confidential communications made between one or more parties. n26 One example of a testimonial privilege is the clergy- [*708] communicant privilege, which permits clergy and, in some states, penitents, to withhold information that is transmitted to them in confidence from law enforcement authorities. For example, a clergy member who is subpoenaed to testify at trial against a child abuser may assert the privilege in the defendant's defense if such information was disclosed to the clergy member in confidence. n27 Of course, 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.

The privilege did not exist at common law, n28 but was later recognized by state courts and legislatures. n29 Although some states did not explicitly incorporate the clergy-communicant privilege into their mandatory disclosure statutes, most states implicitly recognized some sort of clergy communicant exemption. n30 The wording of each privilege statute differs by state, n31 and some privilege statutes provide more protection for some religions than others. n32

The privilege most directly applies to the Catholic Church, because in most other religions it does not violate religious law to disclose confidential information. n33 Under Roman Catholic law, the protection of information given to a priest by a penitent during the Sacrament of Confession n34 is deeply rooted in the traditions of the Catholic Church, traceable over fifteen hundred years to the Seal of Confession. n35 Under the Catholic Church's [*709] Code of Canon Law, n36 it is a crime for a priest to disclose any information learned in confession, and the priest can be punished with excommunication for breaching this tenet.

Because the privilege did not exist at common law, the first state courts to recognize the privilege did so for constitutional free exercise reasons, not because of statutory enactment. In *People v. Smith*, n37 decided in 1813, the court found that no privilege existed for a Protestant minister who was called to testify about a confession of murder made to him. n38 In *People v. Phillips*, n39 a state court was presented with the issue of whether a Catholic priest could be compelled to disclose information revealed to him during a confession. n40 The court held that the priest could not be forced to testify because it would prohibit the free exercise of his religion. This decision consequently created the first privilege at state common law. n41 In 1828, New York became the first state to codify the privilege into law. n42 Following New York's lead, other states created their own statutes recognizing the privilege. n43

The privilege found its way into federal common law as early as 1875, n44 when the Supreme Court recognized its existence in dicta. n45 However, there was an overwhelming absence of legal discussion about the privilege for over seventy-five years. In 1972, Judge Fahy of the D.C. Circuit [*710] recognized the privilege in a concurring opinion. n46 Judge Fahy, and other early federal court decisions, relied heavily on Dean Wigmore's famous treatise on evidence, n47 which argued that four conditions n48 should be established before an evidentiary privilege is recognized. n49

In 1972, the Supreme Court proposed and approved a version of the Federal Rules of Evidence that contained the privilege. n50 Although proposed Rule 506 attempted to codify the privilege into federal law, Congress did not enact its specific provisions. n51 Rather, Congress adopted Rule 501, which created a general and flexible rule that applied to all testimonial privileges, not just the clergy-communicant privilege. n52 Although the Congress never codified the privilege into law, federal courts incorporated the privilege into federal common law based on the language and reasoning of proposed Rule 506. n53 Today, every federal jurisdiction presented with the issue explicitly or implicitly recognizes the privilege based on federal common law. n54

[*711] 2. Invocation of the Clergy-Communicant Privilege. - There are three basic types of priest-penitent privileges: (1) those that specify the denomination of the religions they protect, n55 (2) those that do not specify a particular denomination, but appear to create a preference toward one or more religions through the adoption of certain words like "priest," n56 and (3) those that are neutral toward religion. n57 Some states expand the privilege to include penitents n58 and also to protect communications made while a person seeks general spiritual counseling or general spiritual advice. n59 Although each statute differs based on the type of communication that is privileged, courts generally interpret the privilege broadly to include all religions and anyone who serves a clerical function. n60 As one scholar stated, "the law has determined that, in the long run, society gains more by fostering such relationships than it gains from disclosure of communications within those relationships." n61

In most cases, a clergy member or communicant invokes the privilege when the state attempts to enforce a mandatory disclosure statute by forcing the clergy member or communicant to disclose confidential information in the hope that such information will assist in the prosecution of a criminal offense. n62 At first, it appears that only a clergy member or communicant could bring a constitutional challenge to the privilege. However, anyone forced to testify under a mandatory disclosure statute could potentially bring a challenge. For example, a psychotherapist who is forced to testify or report an incident of child abuse may challenge the statute on Establishment Clause grounds, arguing that the privilege statute favors the establishment of religion because it abrogates all communication privileges except for the religious privilege. n63 It is also possible to envision a challenge [*712] to the statute after the state punishes an individual for failing to testify, whether the punishment is a fine or incarceration. Regardless, the most common constitutional challenge to a mandatory reporting statute is one in which the state attempts to compel a clergy member to reveal information that he had learned in confidence in a criminal proceeding or investigation. n64

C. Impact of the Catholic Church's Pedophilia Scandal on Mandatory Reporting Statutes and the Clergy-Communicant Privilege

1. The Numbers. - The Catholic Church's sex abuse scandal caused incalculable damage to the Church's reputation and eroded its moral authority. n65 The exact number of child abuse and sexual exploitation incidents within the Catholic Church nationwide is unknown; however, as the number of investigations and settlements increase, such information is increasingly available. From what is known, the numbers are staggering. Allegations of abuse and exploitation infest dozens of diocese nationwide. To date, the most credible and well documented evidentiary support is found within the Massachusetts Attorney General's report on child abuse in the Boston Archdiocese. n66 Based on its examination of Church records and documents, the Massachusetts Attorney General documented over 789 victims of sexual abuse involving 250 priests and church workers in the Boston Archdiocese during the last six decades. n67 These numbers are underreported for several reasons: (1) the Boston Archdiocese did not have written policies or documentation on handling sexual abuse complaints against clergy until 1993, n68 (2) it is uncertain how many priests failed to communicate incidents to top Church officials, n69 (3) recently victimized children may not assert their victimization for years to come, n70 (4) those aware of past abuse may be barred [*713] by statutes of limitations, n71 (5) a small number of those abused will report it, n72 and finally, (6) of those that are reported, only a small percentage is reported to law enforcement authorities. n73 The report concluded that, when considering information from outside sources, the number of victims likely exceeds 1000. n74 And this is only in Boston. The numbers of abuse incidents elsewhere are just beginning to emerge. n75 In early 2004, the United States Conference of Catholic Bishops plans to release a compilation of the number of incidents of sexual abuse by Catholic clergy in the United States from 1950-2002. n76 While the names of victims and alleged perpetrators will remain anonymous, n77 the study will provide the most insight into the aggregate amount of sexual abuse to date.

2. Legislative Responses. - Momentum to toughen laws against child abusers, including clergy, resulted in several states changing their reporting statutes. These amendments included: (1) extending or eliminating statutes of limitations for sexual crimes and tort recoveries for sexual abuse, n78 (2) adding clergy to the list of those required to report incidents of child abuse, n79 (3) increasing the civil and criminal penalties associated with child abuse, n80 and (4)

creating entirely new crimes, including the crime of "recklessly [*714] endangering children." n81 The vast majority of states, however, did not alter the substance of their mandatory reporting statutes. n82

The July 2003 Massachusetts report renewed public attention to the scandal. Specifically, the report blamed its inability to prosecute more perpetrators of abuse on "weak" state reporting statutes. n83 Consequently, state legislatures other than Massachusetts increasingly face public pressure to toughen their laws. n84 Indeed, at the time of this writing, several states are considering bills to toughen their reporting statutes. n85

3. The Aftermath. - In many ways, Boston is the epicenter of the scandal; news reports and litigation are most highly concentrated in Massachusetts. Yet, settlements, n86 litigation, n87 and investigations involving the Church have taken or are taking place all over the United States. Seemingly new reports or allegations come out somewhere new everyday.

Unsatisfied with the Church's response, victims of abuse now seek to attain justice in the courtroom. The circumstances surrounding these cases do not exclusively involve mandatory reporting statutes; in fact, most do not involve the statutes at all. Common litigation focuses on evidentiary issues related to the production of Church documents in connection with tort causes of action. Plaintiffs are suing individual priests and diocese in tort, alleging everything from intentional infliction of emotional distress to negligent hiring and negligent supervision. Some individuals have even [*715] achieved class action status. n88 Some states have considered federal prosecution of Church leaders under conspiracy and racketeering laws. n89

The Church has not significantly altered its internal policy with regard to the discipline of priests who sexually exploit children. It appears that the Church will continue its policy of keeping discipline and adjudication "in-house" in Church tribunals. n90 Recently, in an attempt to decrease the number of false allegations of abuse, the Archdiocese of Boston removed "accusers" from the list of individuals who are automatically entitled to review Church files and documents regarding its priests. n91 The aftermath of the scandal is still being written. What is certain is that all affected by the scandal are changing their behavior: the victims of abuse, the Catholic Church, and state legislatures.

4. Privileges. - How these statutes interact with evidentiary privileges largely depends on the type of statute and privilege in each state. Generally speaking, these statutes can be divided into those that clearly state their intended effect, if any, on evidentiary privileges, and those that are unclear or neutral about their effect on evidentiary privileges. n92 At the time of this writing, nineteen states have adopted mandatory child abuse reporting statutes that expressly include clergy members. n93 Fifteen states do not expressly include clergy. n94 Six states do not list clergy, but apply to "any person" or "any other person." n95 Finally, ten states do not list clergy and do not contain an "any person" or "any other person" provision. n96

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III. Does the First Amendment Protect the Clergy-Communicant Privilege Against Mandatory Disclosure Statutes?

Forcing a clergy member to testify or reveal information that violates his or her religious beliefs raises constitutional issues under both the Free Speech and Religion Clauses. This Part will first analyze the Religion Clauses and then move on to the Speech Clause. It principally discusses whether an individual possesses a constitutional right to silence, and, if so, whether a state can enforce a mandatory reporting statute requiring the individual to break that silence.

A. The Religion Clauses

Religious freedom is among the highest and most cherished values in our society. n97 When a state attempts to enforce a mandatory reporting statute despite religious objections, it may offend the Free Exercise Clause. When a state creates a statute aimed at protecting religion, or it creates a privilege that includes only particular religious denominations, it may offend the Establishment Clause.

1. The Establishment Clause. - The Establishment Clause of the First Amendment, made applicable to the states by incorporation under the Fourteenth Amendment, n98 guarantees that the government "shall make no law respecting an establishment of religion." n99 Fearing the same loss of religious liberty that the colonies experienced under British rule, the Framers intended the clause to erect a "wall of separation" n100 between church and state. The Court's interpretation of the clause, however, has undergone numerous transformations over the past two hundred years. Most recently, the Court has applied four different tests to determine whether a law violates the clause, n101 and Establishment Clause jurisprudence appears to be in a state of flux. n102

[*717] Depending on its wording and legislative history, a clergy-communicant privilege statute may violate one or all of the Court's tests. For example, a privilege statute that applies to some religions, but not others, may violate Justice O'Connor's "Endorsement Test" n103 or the purpose prong of the Lemon test. n104 Several scholars argue that state statutes creating a clergy-communicant privilege violate the Establishment Clause because they are written with the intention of promoting religion, or because they implicitly favor religion over non-religion. n105 Another argument is that those privilege statutes that specify particular religions violate the Establishment Clause because, in these instances, the state is not merely promoting religion over non-religion, but protecting one particular religion without protecting all religions. n106 However, the most common type of clergy-communicant privilege, one that is neutral toward all religions, is the type of privilege that is most likely to be held constitutional. This is so because it does not single out and promote a particular religion, but rather is accommodating toward all religions. n107 Other scholars, however, argue that general privilege statutes violate the Free Exercise Clause, not the Establishment Clause, because the absence of the statutes would present situations in which religious believers would be forced to disobey their own religion. n108

Because the state of Establishment Clause jurisprudence is in flux, it is difficult to determine how the Court would resolve a constitutional challenge [*718] to a privilege under the Establishment Clause. n109 Moreover, the majority of these statutes do not present a clear Establishment Clause violation, such as one that explicitly endorses one religion over another. Because of these concerns, a litigant advancing a hybrid claim would be better served by combining a free speech component n110 and a free exercise component rather than a free exercise component and an Establishment Clause component. n111

2. The Free Exercise Clause After Smith. - "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." n112 Free Exercise Clause jurisprudence is generally more doctrinally consistent and predictable than Establishment Clause jurisprudence, but it is not without its vagaries. In 1963, the Supreme Court in *Sherbert v. Verner* adopted a three-prong test to determine whether a state regulation unconstitutionally burdened an individual's First Amendment right to the free exercise of religion. n113 The test required a court to consider whether the regulation prohibited the free exercise of religion; if so, the state had to demonstrate that a compelling state interest supported the regulation. n114 If the state can prove a compelling state interest, it then must show that there was no less restrictive way to accomplish its interest. n115 In 1972, the Court expanded the *Sherbert* test by adding an inquiry into the sincerity of a person's religious belief. n116 The application of the compelling state interest test in free exercise cases continued for over thirty years n117 until the Court, in *Employment Division v. Smith*, n118 abandoned the compelling state interest test in a remarkable shift in constitutional jurisprudence.

The Court held that a law does not violate the Free Exercise Clause if it is a generally applicable and neutral law that has the incidental effect of [*719] burdening a religion. n119 The situation in *Smith* involved a conflict between the religious use of peyote and an Oregon statute that criminalized the use of the drug. n120 The Court upheld the Oregon law because it was neutral and generally applicable to all religions. n121 It also only incidentally burdened the petitioner's religious rights because the object of the state law was not to directly target religion, but to criminalize the use of peyote. n122

The *Smith* decision sparked tremendous debate among scholars and courts, and it is not clear that some or all of *Smith* remains good law today. Nevertheless, the composition of the current Court makes it likely that *Smith* will remain good law. n123

Given that the composition of the current Court would likely uphold *Smith*, a mandatory reporting statute that requires a clergy member or penitent to reveal information disclosed in confidence is not likely to be struck down under the Free Exercise Clause. This is so because the holding in *Smith* permits a state to infringe on religious rights so long as the statute is generally applicable and neutral towards all individuals. n124 Whether a mandatory reporting statute is neutral or not will depend on whether it applies to [*720] all individuals or just certain individuals. Although the Court has stated that "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," n125 the constitutional fate of the clergy-communicant privilege under the Free Exercise Clause is uncertain in a post-*Smith* world.

While compelling someone to disclose information in a way that directly conflicts with his religious beliefs may undermine the ability to freely exercise one's religion, n126 the general holding of *Smith* implies that such a mandatory disclosure statute would be upheld, even if it substantially burdened religion. n127 Most important, however, is the *Smith* Court's abandonment of the compelling state interest test because now a state need not proffer any reason to

justify its adoption of a mandatory disclosure statute so long as the statute is generally applicable to all individuals and incidentally burdens religion. As a result, Smith's holding automatically subordinates the Free Exercise Clause to the state's interest so long as the statute is a generally applicable criminal statute. n128

B. Smith and the Hybrid Rights Exception

In dicta, the Smith Court suggested an exception to its neutral law of general applicability rule: the "hybrid rights" exception. n129 The Court stated:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents to direct the education of their children. n130

[*721] Essentially, the exception suggests that courts should apply heightened judicial scrutiny when a case involves a free exercise component along with another fundamental right. n131 Conversely, if two or more constitutional rights are not burdened by a neutral law, then a court will apply no scrutiny, and the law is constitutional. n132

Although there is much debate among the courts of appeals about the scope and legitimacy of the exception, the Smith Court specifically referenced previous decisions that involved more than a free exercise claim, such as those that implicated free speech, n133 the due process of law, n134 or parental rights. n135 In these situations, the level of scrutiny would resemble that applied in Wisconsin v. Yoder n136 and Sherbert v. Verner: n137 heightened scrutiny. Essentially, the application of heightened scrutiny requires the government to establish something more than a reasonable relationship between its law and purpose. n138 Although the Court did not explicitly suggest what level of scrutiny should be applied, courts that followed the hybrid rights model applied strict scrutiny. n139 Moreover, the fact that the Smith Court [*722] took care to distinguish its holding from the holding in Yoder, when strict scrutiny was applied, reveals that the Court did not intend to abandon the compelling state interest test.

There is much disagreement among both academics n140 and the Justices regarding the interpretation and application of the hybrid rights exception. n141 There is also disagreement within the courts of appeals. At one end of the spectrum, the Sixth Circuit simply refuses to apply heightened scrutiny in hybrid cases absent Supreme Court clarification. n142 On the other end, the Ninth and Tenth Circuits created their own view, interpreting the Court's suggestion to apply heightened scrutiny in those situations in which the plaintiff can present two "colorable" claims. n143 Courts that do not follow the above interpretations lie somewhere in between. For example, the First and Second Circuits adopt a case-by-case approach and apply heightened scrutiny depending on the factual comparison of the case before the court to those specific cases referenced by the Court in Smith. n144 Thus, the jurisdiction [*723] where suit is filed will likely determine the outcome. n145 Disagreement among the various circuits will continue until the Supreme Court revisits an issue that requires an interpretation or application of its hybrid rights dicta in Smith.

When assessing the constitutionality of the clergy-communicant privilege, a discussion of the hybrid rights exception is important because it is possible that a clergy or communicant could challenge a mandatory reporting statute on both free speech and free exercise grounds. Specifically, the individual could argue the statute both compels him to speak in violation of his religious beliefs and prohibits him from freely exercising his religion. If the individual added a free speech component to the challenge, he or she would create a hybrid situation, whereby a court may resurrect and apply the compelling state interest test abandoned in Smith. This situation directly refutes those scholars who argue that a non-hybrid, pure free exercise challenge to the clergy-communicant privilege would fail under the rule established in Smith. n146 Consequently, the state would be forced to demonstrate a compelling interest, making it more difficult to infringe upon religious rights. The question left unanswered, therefore, is whether a litigant can present a viable free speech claim to create a hybrid rights exception under Smith.

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C. The Privilege and the Free Speech Clause

The First Amendment Free Speech Clause includes both the positive right to speak freely and the negative right not to speak. n147 The freedom not to speak is a negative right that the Court has vigorously guarded. n148 While the Court has addressed this right, the scope of the right is uncertain. The Court's interpretation of the right is highly abstract, providing no formal test for its application. One discernable principle, however, is that the First Amendment prohibits

the government from invading the "sphere of intellect and spirit" of the individual. n149 Generally, the sphere protects two types of behavior: autonomy over one's mind n150 and autonomy over one's public image. n151 It is therefore necessary to determine whether mandating that [*725] clergy report incidents of child abuse invades either the autonomy over a clergy member's mind or public image.

1. Invading the Sphere of Intellect and Spirit of the Autonomous Mind. - Compelling testimony from clergy members about incidents of child abuse may violate autonomy over the clergy member's mind. This can also be thought of as an invasion of the "autonomous mind." *West Virginia v. Barnette* n152 addressed this aspect of autonomy. In *Barnette*, the Court upheld the First Amendment right of public school students to refuse to salute the American flag by striking down a statute that mandated a salute. The appellees were Jehovah's Witnesses who objected to saluting the flag; they believed that the obligations imposed by the law of God were superior to that of the laws of government. n153 Particularly, the Book of Exodus required that believers not worship earthly "images," and the appellees refused to salute the flag as one such image. n154 The Court ruled that a compulsory flag salute violated the "sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." n155 The Court defined this sphere to include control over one's mind; to uphold the compulsory flag salute statute, the Court would be "required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not his mind." n156

2. Invading the Sphere of Intellect and Spirit of the Autonomous Image. - The clergy member may argue that compelled testimony about incidents of child abuse violates the autonomy over his or her public image. Compelled testimony can also be thought of as an invasion of the "autonomous image." This conception can be thought of as distinct from the autonomous mind because the former is concerned with damage to the individual as presented to the outside world, while the latter is concerned with damage to the individual as presented to himself. Haig Bosmajian argues that the compelled speech doctrine is grounded in concerns for basic human dignity, including the avoidance of degradation and humiliation. n157 Examples of invading the autonomous image include affronts to [*726] "human dignity, self-worth, personal autonomy, and integrity." n158 Protection of these attributes can be seen as constitutionally grounded in the First, Fourth, and Fifth Amendments. n159

Two Supreme Court cases discuss the importance of the autonomous image in the context of government compulsion. First, in *Wooley v. Maynard*, n160 the Court struck down a New Hampshire statute that required all motorists to display license plates carrying the phrase "Live Free or Die." n161 The *Wooley* appellee objected to the regulation because it offended his moral, political, and religious beliefs. n162 The Court considered whether the state's countervailing interest was sufficiently compelling to justify its license plate requirement and held that the individual's right not to display the plate's message outweighed the state's interest. n163 The Court explicitly recognized the autonomous mind conception, n164 but it implicitly decided the case on the autonomous image conception. Because New Hampshire required the appellee to carry the state motto on his license plate, it required him to display it publicly when he drove his car. n165 The Court viewed the appellee as an "instrument" used by the state to foster public adherence. n166

The second case is *Wisconsin v. Yoder*. n167 There, the Court faced a situation in which several Amish families refused to comply with a Wisconsin law requiring all children to attend school beyond the eighth grade. The Amish viewed exposure to "worldly" values found in high schools as a violation of their religious and moral beliefs. n168 The *Yoder* petitioners brought a hybrid claim, alleging violations of the fundamental right of parents to direct the religious upbringing of their children and the right to free exercise of their religion. n169 The Court exempted Amish families from compliance with the statute. It reasoned the law would substantially alter Amish daily life because the regulated activity, education, was such an integral part of their way of life and their religion. n170 The Wisconsin statute violated the Amish's [*727] autonomous image because it critically impeded their "mode of life." The social fabric maintained for over three hundred years was premised on the choice not to associate the Amish lifestyle with the lifestyles of the non-Amish. Their mode of life was inseparable from their religious beliefs. n171

3. Practical Implications of the Right Not To Speak on the Privilege. - *Barnette*, *Wooley*, and *Yoder* illustrate the importance of the interaction of religious beliefs with compelled speech. In all three cases, the appellees claimed the state's action violated their religious beliefs. n172 And, in each case, the Court attached constitutional importance to the right to be free from state compulsion. Consequently, these decisions shed light on the constitutionality of state compulsion in the mandatory reporting of child abuse context. Does compelling testimony from a clergy member about incidents of abuse violate the clergy member's autonomous mind and autonomous image?

It is difficult to see how compelling such testimony would violate the clergy member's autonomous mind. Drawing on the Court's reasoning in *Barnette*, the Court invalidates statutes that compel individuals "to utter what is not his mind." n173 Most certainly, the clergy member does not want to reveal such information because it violates his religious beliefs. However, it does not follow that the disclosed information itself violates the autonomous mind. Compelled speech in the clergy context would only violate the autonomous mind if it forces the clergy member to express a viewpoint that is not his own. In *Barnette*, the mandatory school salute was challenged because it forced the appellee to act contrary to his own mind. More specifically, the appellee did not believe in paying homage to a secular image. A mandatory reporting statute may compel speech that is offensive to the individual, but it does not compel the disclosure of information that in and of itself violates the autonomous mind.

[*728] Compelled speech in the clergy context may, however, violate the autonomous image. While violations of the autonomous mind affect the individual's inward expression and thought process, violations of the autonomous image violate the individual's external image and self. Compelling speech in the clergy context violates the autonomous image because the process of compulsion is invasive. The process of recounting to a tribunal or other authorities detailed accounts of confidential information is humiliating. It forces a clergy member to essentially publicly disavow his or her religious beliefs. n174

This process may affect the clergy member's mode of life. In *Yoder*, the law required the Amish "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." n175 In the context of religious communications, confidential information lies at the heart of religious law and practice for several of the larger denominations. n176 For example, jeopardizing the confidentiality of such communications may devastate public trust in a Catholic priest by directly threatening the Sacrament of Confession. n177 *Yoder's* conclusion, that the statute at issue affected a social fabric maintained for over 300 years, supports the argument that the Court would treat certain religious communications as fundamental to organized religion and as an interrelated part of many religious observers' lives. n178

The process may also transform the clergy member into an instrument used by the state to prosecute incidents of abuse. The compelled testimony would likely be revealed in the public context, such as in a courtroom, deposition, or grand jury proceeding. This public compulsion may strike at the very heart of the autonomous image. A clergy member is likely to be a visible public figure with civic responsibilities. His or her image is inextricably linked to its public nature. The very act of publicly revealing confidential information that violates one's religious beliefs results in the [*729] degradation and humiliation that *Bosmajian* concludes the compelled speech doctrine is designed to prevent.

The state can respond to the clergy member's contentions under the compelled speech doctrine by making a distinction between speech and action. Namely, the state may argue that the Constitution does not prevent the state from compelling an individual to act in a way that violates religious beliefs, but rather that the compelled speech doctrine only applies to speech that violates religious beliefs. This argument, however, is too narrow a reading of the compelled speech doctrine. n179 It may receive support from some members of the current Court; n180 however, the *Wooley* Court specifically rejected this argument. In discussing the Free Exercise Clause, the Court stated, "our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause." n181 While it recognized the state's broad police power to regulate conduct, n182 it concluded that "belief and action cannot be neatly confined in logic-tight compartments." n183 The Court has held that compelling statements of fact still burdens protected speech. n184

When a state forces someone to speak under the threat of punishment and requires an individual to do something that violates his religious beliefs, it triggers a hybrid rights situation because the litigant can claim a violation of two fundamental rights. n185 Compelled speech that violates a religious belief is exactly the type of additional right, in addition to free exercise, that the *Smith* Court had in mind. n186 The right not to speak is particularly [*730] applicable to the context of the clergy-communicant privilege because a state mandatory reporting statute directs a clergy member or communicant to act in accordance with a facially neutral law and forces him to literally speak out in violation of his religious beliefs. n187

IV. Applying Heightened Scrutiny to a Mandatory Reporting Statute

The foregoing analysis demonstrates how a clergy member or communicant could create a hybrid rights claim by combining free speech and free exercise claims. Once an individual advances a hybrid claim, the *dicta* in *Smith* suggests that a court should apply heightened judicial scrutiny. This Part considers the arguments that the state and the individual may proffer in support of their legal claims.

There are different types of heightened scrutiny. If the Court applied heightened scrutiny to a dispute in which a litigant contested the constitutionality of a state attempt to enforce a mandatory disclosure statute, it would likely adopt the three-part test articulated in *Sherbert*.ⁿ¹⁸⁸ That test requires a court to examine: (1) whether the government's attempt to enforce the statute imposed an undue burden on the contesting litigant's sincere religious belief, (2) whether the state could demonstrate a compelling state interest in support of the statute, and (3) whether the enforcement of the statute was the least restrictive means of achieving its articulated goals.ⁿ¹⁸⁹ The state's burden is particularly high in disputes where the allegedly burdened right is the free exercise of religion. As the Supreme Court stated, "the essence of all that has been said and written on the subject is that only those interests of the highest order ... can overbalance legitimate claims to the free exercise of religion."ⁿ¹⁹⁰ Even then, it is more difficult to meet. "Requiring a state to demonstrate a compelling state interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."ⁿ¹⁹¹ It is important to thoroughly flush out the arguments on both sides to determine whether the state or the litigant would prevail.

[*731]

A. Has the Government Imposed an Undue Burden on a Sincere Religious Belief?

Because the number of official religions in the United States is constantly growing,ⁿ¹⁹² whether a particular statute will substantially burden a religion must be determined on a case-by-case basis. Essentially, this part of the test requires a court to determine the severity or degree of the impact that enforcement of a mandatory disclosure statute has on a particular religion. The Court categorizes the severity of the burden depending on the particular facts of the case,ⁿ¹⁹³ but generally requires that the burden be "substantial."ⁿ¹⁹⁴ The individual will attempt to demonstrate the sincerityⁿ¹⁹⁵ and religious importance of the sought-after information by rooting his or her arguments in religious law and tradition. Both the nature and strength of the claim depend upon the religion that is allegedly burdened. It is indisputable that a mandatory disclosure statute that compels an individual to disclose information that contravenes his religious beliefs burdens the individual's free exercise of religion,ⁿ¹⁹⁶ but it is less clear whether that burden is substantial.

One clear distinction that can be drawn is whether the burdened religion has official religious law that prohibits the disclosure of confidential information. Another is whether it is tradition or common practice not to disclose information transmitted either in confidence or in a spiritual context. For example, it expressly violates the laws of the Catholic Church for a clergy member to disclose confidential information under any circumstance.ⁿ¹⁹⁷ In other religions, such as Judaism or Protestantism, it is frowned upon to disclose confidential information, but it is not expressly against the religious laws of those faiths.ⁿ¹⁹⁸ This distinction between religious law and [*732] religious practice does not imply that, merely because one religion codifies a practice into its doctrine while another does not, the latter should not receive protection. Courts draw the distinction to assist in discerning the likely impact or burden that the enforcement of a mandatory disclosure statute will have on a particular faith. If this distinction cannot be drawn, then the outcome will depend on the facts and circumstances of each case.

B. Has the Government Demonstrated a Compelling State Interest in Support of the Statute?

Once the individual demonstrates that the state has infringed upon his or her religion, the burden shifts to the state to demonstrate a compelling state interest in support of its policy.ⁿ¹⁹⁹ Generally speaking, the state will attempt to prove that the policy reasons underlying the adoption and enforcement of the statute outweigh the interest that the individual has in protecting confidential communication. In contrast, the individual will strive to demonstrate why the state's interest is not compelling and that enforcement of a mandatory reporting statute in the clergy-communicant context may actually undermine the state's interest in protecting children. Although the compelling state interest test does not provide a hard and fast rule for courts to apply and does require a court to consider multiple factors, how the parties present these arguments and in what context the communication of information occurred will likely sway the court in one direction.ⁿ²⁰⁰ Overall, the state's burden is high and its policy must be "essential to accomplish an overriding governmental interest."ⁿ²⁰¹

The state's interest in adopting and enforcing a mandatory disclosure statute is the safety and protection of its children. This interest is firmly rooted in the British doctrine of *parens patriae*,ⁿ²⁰² or "parent of his or her country," which was adopted in the United States in the late nineteenth century.ⁿ²⁰³ The state manifests the inherent power it inherits under this doctrine through the passage of legislation and through judicial dispute resolution in its courts.ⁿ²⁰⁴ Early interpretations of parental rights focused on the relationship [*733] between the state and the parent,ⁿ²⁰⁵ while more recent interpretations focus on the relationship between the state and the child.ⁿ²⁰⁶ Traditionally, children's rights were limited;ⁿ²⁰⁷ however, the state grew more receptive to the concerns of children as it realized that children

were not able to protect themselves from societal ills or parental abuse. n208 The state's involvement is highly limited because of deference to the role of parents in the formulation and development of their child's life. A parent's right, however, "is not absolute." n209

Historically, statutes are upheld when the state shows that children are in life-threatening situations or situations that pose a serious threat to their health. n210 Specifically, three lines of precedent generally favor the state in its pursuit of advancing its interests over the invocation of an evidentiary privilege. n211 In addition, the Supreme Court's recent treatment of the state's interest in preventing the exploitation of children in pornography cases provides insight into the Court's likely treatment of the state's interest in detecting and preventing incidents of sexual child abuse. In these cases, the Court has limited First Amendment free speech rights because the state demonstrated a compelling interest in the protection of its children. n212 But, just as the parent's right is not absolute, the state's inherent authority in this arena is not without its limits. n213 Nevertheless, the state's interest in protecting its children remains generally respected by the Court. n214

[*734] The clergy member or communicant can advance several arguments to demonstrate that the state's interest is not compelling. First, as one scholar argues, spiritual confessions may actually prevent child abuse. n215 This argument contends that the clergy member can prevent future incidents of child abuse by providing meaningful counseling and advice that improves the likelihood that an individual will not commit such acts again. Because of their proximity to confessors, clergy members are in a "unique" position to be the first or only individuals exposed to knowledge of incidents of abuse. n216 Although it is impossible to demonstrate with statistical certainty that spiritual counseling will decrease incidents of child abuse, the argument goes that child abusers likely will not report such incidents to anyone else because they fear retaliation by authorities, and consequently, spiritual healing and counseling is the only possible interaction in which prevention can occur. Moreover, Professor Mitchell asserts that, if the state can force a clergy member to disclose confidential information, individuals may be deterred from actually seeking confession or spiritual reconciliation in the first place. n217 As one Cardinal of the Catholic Church confirmed:

Were the Sacrament rendered difficult or odious to the faithful they would be deterred from approaching it, thereby undermining the Sacrament itself to the great spiritual harm of the faithful, as well as to the entire Church. For this reason, the Church has always scrupulously protected confessional communications, treating them as the confidential relations of individuals with God, mediated through the priest in the Sacrament of Penance. n218

Thus, the clergy member can argue that he or she actually advances the state's interest in protecting children rather than undermining it. In this way, the overall benefit of counseling, which has the potential to reach repeat child abusers, can outweigh the state's interest in prosecuting one individual in one trial in one state or federal court. n219

It is important to note that the above "deterrence" argument requires that a child abuser not report the crime to anyone else. This argument, however, is problematic because it fails to recognize the practical effect that one state court decision in a child abuse case would have on other child abusers. For the argument to succeed, proponents must demonstrate that a judicial ruling requiring confidential information to be disclosed would affect [*735] the decision of other child abusers to seek spiritual guidance. Although a Supreme Court or other high-profile state court ruling against a clergy member might attract statewide or national attention, a local ruling against a penitent child abuser is not likely to attract the same attention. This argument is substantiated by state court decisions that have admitted evidence of information disclosed to a clergy member in confidence in the prosecution of a child abuser.

A second argument that a clergy member or communicant could offer is that the enforcement of a mandatory disclosure statute would create a public backlash if the state attempted to enforce the statute by punishing a member of the clergy. n220 Although the impact that such an event has on the general public is impossible to predict, the consequence may actually decrease the compliance or enforcement of the statute among members of the general public that have a duty to report an incident of child abuse. Compliance with these statutes is voluntary because it is up to the individual to report the incident of abuse. If the public thinks that the statute lacks credibility or is unduly harsh on respected members of society, its willingness to report incidents of abuse may decline to protect clergy. n221 Enforcement against members of the clergy may therefore result in an unintended and arguably adverse consequence.

The arguments on both sides are strong. The strength of the state's interest should not be treated lightly, as the state's power to act on behalf of its children has a rich history of receiving deference by the courts. In instances when the state attempts to prosecute a pedophile priest, the outcome of this prong will likely hinge on the state's ability to successfully analogize incidents of sexual abuse to incidents that severely threaten a child's life. Given the public's

growing intolerance of this type of behavior and increased access to statistical data documenting child abuse, n222 prosecuting an incident of abuse may not be as difficult to prove as it first appears to be.

C. Is the Enforcement of the Statute the Least Restrictive Means for the Government to Achieve Its Intended Result?

At this point, the burden remains on the state to demonstrate that the methods used to satisfy its interest are employed in the least restrictive manner. n223 Essentially, the state must argue that "no alternative form of regulation would combat such abuses without infringing First Amendment rights." n224 In the case of mandatory disclosure statutes, the state would generally [*736] try to prove that such statutes are an essential means of preventing child abuse; the state need not argue that its approach was non-intrusive or non-burdensome to the fundamental right at issue. The individual would attempt to prove that the state could employ alternative means to achieve its ends that do not have the effect of burdening religion.

The state must link its interest in protecting children to the particular method used in the instance before the court. Although the state can proffer numerous interests in support of the adoption of a mandatory disclosure statute, it is fair to say that the state's main interests are to detect, prevent, and prosecute incidents of child abuse. In the prosecution phase, the state will need to prove that it possesses the necessary infrastructure to respond to reported instances of child abuse and that such methods as deposing a witness or criminally prosecuting someone who fails to obey the statute are the most necessary and least restrictive to freedom of speech and religion. As one scholar notes, the state can present a persuasive case detailing its substantial interest in preventing all incidents of child abuse in every circumstance. n225 Moreover, one 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. n226 The issue then becomes whether there are any other methods that the state could employ to prosecute child abuse offenders or any other individuals who disobey a mandatory reporting statute.

The individual can argue that the state's means are "no means" at all to eradicate abuse. n227 In addition to trying to prove the fallacy of the state's policy, the individual must argue that the state has other means to achieve its goal of preventing child abuse. At the very least, the state can force all others except clergy members to report incidents of abuse.

At first glance, it appears that the state could adopt numerous other methods to prevent child abuse. For example, the state could institute training and awareness programs, increase prison sentences for those prosecuted, or increase funding of rehabilitation programs. In the criminal prosecution arena, however, the state's options are more limited. If the state's goal is to ascertain the truth about an individual suspected of child abuse, a mandatory reporting statute certainly advances that interest by making it more likely that it will obtain helpful information. Admittedly, it is nearly impossible to determine the effectiveness of the statute, but those aware of the law certainly will have an incentive to report at the risk of punishment. It is difficult to imagine less burdensome means than a mandatory reporting statute that the state could adopt to discover the truth about a suspected [*737] abuser in order to detect the individual and prevent him from abusing again. Professor Whittaker has gone so far as to say that the enforcement of a mandatory reporting statute is the only constitutional method that the state has at its disposal to discover the truth. n228 If the goal of the mandatory reporting statute is to prosecute child abusers, there is little else that the state can do.

V. Conclusion

The controversy surrounding the interaction between mandatory reporting statutes and the clergy-communicant privilege will be debated in our nation's legislatures and in academic circles, but must ultimately be settled in our nation's courthouses. In the wake of *Smith*, the clergy-communicant privilege holder can make it more difficult for the state to enforce a mandatory reporting statute by advancing a hybrid rights claim, requiring a court to apply heightened judicial scrutiny to the statute. The privilege holder can now advance a claim that involves a challenge under the Free Speech Clause in conjunction with a challenge under one of the Religion Clauses. In the wake of the Catholic Church scandals, greater public attention and outrage about the sexual abuse of children make it more likely that the state can successfully demonstrate a compelling state interest in protecting children.

The call to state legislatures to reform child abuse laws should not go unheeded. n229 Current momentum will likely dissipate over the coming months, and unless state legislatures begin to think seriously about the policy and constitutional implications of this debate, opportunity for reform will dissolve as the current scandal fades. Regardless

of the manner in which legislatures respond, if at all, they must take extreme care not to base their decisions solely on the current political climate. They must also carefully separate the anger and disgust that may cloud their judgment in the formulation of the law and produce results that infringe upon First Amendment rights. n230

Although courts and commentators remain divided over the application of Smith's hybrid exception, it now appears that an individual who desires to defend the clergy-communicant privilege may receive heightened scrutiny [*738] if he or she alleges that a mandatory disclosure statute compels him or her to engage in speech that violates deeply held beliefs and also interferes with the free exercise of religion. As the scope of mandatory reporting statutes increases, so does the likelihood that the Supreme Court will ultimately have to determine the constitutional scope of their application. Until the Court resolves this issue, scholars, the courts of appeals, and individual Supreme Court Justices will remain divided over the proper application of scrutiny when mandatory reporting statutes and the clergy-communicant privilege collide.

FOOTNOTES:

n1. *319 U.S. 624, 645 (1943)* (Murphy, J., concurring).

n2. Office of the Attorney General, Commonwealth of Massachusetts, *The Sexual Abuse of Children in the Roman Catholic Archdiocese of Boston 73* (2003) [hereinafter AG Report], available at <http://www.ago.state.ma.us/archdiocese.pdf>.

n3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I.

n4. Scholarly literature to date has often described these statutes as the "priest-penitent" or "clergy-communicant" privilege. The former description is overly restrictive because it excludes non-priest clergy members such as rabbis, ministers, etc. While one definition of "communicant" is defined as one "who receives or is entitled to receive Communion," another common definition is "a person ... who communicates something." *American Heritage Dictionary of the English Language* 373 (4th ed. 2000). In this Comment, "communicant" will mean the latter definition, which includes both those who communicate to a clergy member in remorse and those who communicate to clergy members as informants.

n5. See *infra* notes 78-85.

n6. See Fred Bayles, *States Add Clergy to Sex-Abuse Laws*, U.S.A. Today, July 5, 2002, at A1 (reporting that Connecticut and Massachusetts are toughening their mandatory reporting laws in response to the Catholic Church pedophilia scandal). For a more detailed discussion of current developments, see *infra* Part II.C.

n7. The Court, however, has recognized the existence of the privilege *in dicta*. See *Trammel v. United States*, *445 U.S. 40, 51 (1980)*. The Court stated:

The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.

Id.

n8. 494 U.S. 872 (1990).

n9. *Id.*

n10. *Id.* at 886-88.

n11. The Court noted:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press

Id. at 881.

n12. See Seth Kalichman, *Mandatory Reporting of Suspected Child Abuse* 11 (2d ed. 1999).

n13. *Id.* at 12.

n14. Approximately 11.3 percent of all child abuse victims suffer sexual abuse. See Children's Bureau, U.S. Dep't of Health & Human Services, *Child Maltreatment 1999*, at vii (2001), available at <http://www.acf.hhs.gov/programs/cb/publications/cm99/cm99.pdf>. The number of reported incidents of sexual abuse rose eighteen-fold between 1976 and 1985. See Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* 129 (1998). This does not demonstrate that the number of incidents of sexual abuse increased during this time, but only that the total number of reported incidents increased. In fact, some reports indicate that substantiated incidents of child abuse are on the decline. See Lisa Jones & David Finkelhor, U.S. Dep't of Justice, *Juvenile Justice Bulletin, The Decline in Child Sexual Abuse Cases* (2001), available at <http://www.unh.edu/ccrc/pdf/declineinsexabuse.pdf>.

n15. Kalichman, *supra* note 12, at 11-12.

n16. *Id.* at 12.

n17. Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 *Minn. L. Rev.* 723, 726 (1987) (reporting on the historical development of child abuse statutes); Kalichman, *supra* note 12, at 13-15 (indicating that enactment of mandatory reporting statutes resulted from a series of published clinical reports in the 1940s that for the first time described and catalogued the abuse of children).

n18. The commonly held meaning of the term "sexual abuse" has undergone serious revision in recent decades. See Jenkins, *supra* note 14, at xi (arguing that current connotations of "betrayal of trust, hidden trauma, and denial" emerged in the 1970s). The changing conception of the term is significant because it influences how legislation is drafted and how broadly a court will interpret words like "abuse," depending on the social mores of the time. *Id.* at 3.

n19. 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) (describing the historical development of child abuse statutes).

n20. Child Abuse and Prevention Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (current version at 42 *U.S.C.A.* 5101 (1994)). CAPTA provides federal funding to states in support of prevention, assessment, investigation, prosecution, and treatment activities and also provides grants to public agencies and nonprofit organizations for demonstration programs and projects.

n21. See Kalichman, *supra* note 12, at 15-16.

n22. Mitchell, *supra* note 17, at 726. Additionally, for an excellent overview and reference to all issues that surround mandatory reporting statutes, see Susan K. Smith, *Mandatory Reporting of Child Abuse and Neglect*, at <http://www.smith-lawfirm.com/mandatory-reporting.htm> (last modified Mar. 30, 2002) (hereinafter Smith Report).

n23. For example, the Americans for Constitutional Protection of Children Act of 1999 was proposed to toughen federal sentencing laws and to create a zero-tolerance policy toward incidents of child abuse. See Smith Report, *supra* note 22. Unfortunately, this bill did not pass. *Id.* The proposed Act would have withheld federal funds to states that maintained an "incest exception" (considering incidents of sexual abuse "incest") and carried a maximum penalty of probation rather than considering such incidents as "sexual abuse" with a much stiffer penalty, often involving prison time. *Id.* In addition to new proposals, the old CAPTA legislation has been amended several times, most recently on October 3, 1996, by the Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, 110 Stat. 3063 (1996). The 1996 amendments require states that accept federal money to adopt statutes that provide for the conviction of certain felonies for certain types of child maltreatment.

n24. See Kalichman, *supra* note 12, at 139.

n25. *Id.* at 12.

n26. See *Hunt v. Blackburn*, 128 *U.S.* 464, 470 (1888) (recognizing the attorney-client privilege); see also *Jaffee v. Redmond*, 518 *U.S.* 1 (1996) (recognizing psychotherapist-patient privilege); *Branzburg v. Hayes*, 408 *U.S.* 665 (1972) (declining to extend the testimonial privilege to newsmen's agreement to conceal criminal conduct of his or her news sources); 8 John H. Wigmore, *Evidence* 2285 (McNaughton rev. 1961) (describing the circumstances necessary to invoke the privilege). See generally Thomas G. Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 *Geo. L.J.* 613 (1976) (providing a historical review of all testimonial privileges).

n27. The privilege applies in other legal situations as well. See Mitchell, *supra* note 17, at 792. Privileges are also recognized before administrative tribunals and in grand jury proceedings. *Id.*

n28. See John C. Bush & William H. Tiemann, *The Right to Silence* 111-12 (3d ed. 1989) (describing the historical development of the privilege and noting that the priest-penitent privilege did not exist at common law because of a strong Anglican tradition that opposed the privilege).

n29. *Id.*

n30. *Id.*; see Lennard K. Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 13 *Regent U. L. Rev.* 145, 149 (2000-2001).

n31. *Id.* at 149-52.

n32. See generally Chad Horner, Note, *Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society*, 45 *Drake L. Rev.* 697, 732 (1997) (arguing that current priest-penitent statutes are written so as not to include non-Western religions).

n33. Take Judaism, for example. Even though the Bible, which Jews adhere to, commands: "thou shalt not go up and down as a talebearer among thy people," Leviticus 19:16, some commentators have argued that Jewish law mandates the disclosure of information of child abuse that might prevent future incidents of abuse. See Seymour Moskowitz & Michael J. DeBoer, *When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect*, 49 *DePaul L. Rev.* 1, 9-21 (1999) (discussing the application of the privilege to various religions, and describing how these religions treat confidential communication between a penitent or congregation member and a clergy member or spiritual leader).

n34. In the Roman Catholic Church, the Sacrament of Confession is one of the seven holy Sacraments. The confession is given to a priest under a confidential "seal." See *infra* note 35.

n35. See Jeffrey H. Miller, *Silence Is Golden: Clergy Confidence and the Interaction Between Statutes and Case Law*, 22 *Am. J. Trial Advoc.* 31, 65-66 (1998); see also *The Code of Canon Law - Latin-English Translation* 361 (1983) (discussing the significance of the Seal of Confession).

n36. See 26 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure: Evidence* 5612, n.51 (West 1992) ("The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion." (quoting *The Code of Canon Law in English Translation* 177 (1983))).

n37. Though not officially reported, an excerpt of *People v. Smith* is available in *Privileged Communications to Clergymen*, 1 *Cath. Law.* 199, 209 (1955).

n38. See *id.*; see also Bush & Tieman, *supra* note 28, at 114 (noting that the Protestant priest in *Smith* waived his right to invoke the privilege, and therefore the judge was not directly confronted with the attempted use of the privilege).

n39. An excerpt of *People v. Phillips*, decided on June 14, 1813 by the Court of General Sessions, County of New York, is available in *Privileged Communications to Clergymen*, *supra* note 37.

n40. The court observed:

If he tells the truth he violates his ecclesiastical oath - If he prevaricates he violates his judicial oath. Whether he lies, or whether he testifies [sic] the truth he is wicked, and it is impossible for him to act without acting against the laws of rectitude and the light of conscience. The only course is, for the court to declare that he shall not testify or act at all.

Id. at 203.

n41. Id.

n42. Bush & Tieman, *supra* note 28, at 121.

n43. Id.

n44. See *Totten v. United States*, 92 U.S. 105, 107 (1875) ("Suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose.").

n45. See *Trammel v. United States*, 445 U.S. 40, 51 (1980).

n46. See *Mullen v. United States*, 263 F.2d 275, 278 (D.C. Cir. 1959) (Fahy, J., concurring) (recognizing the priest-penitent privilege at federal common law).

n47. *Mullen*, 263 F.2d at 278.

n48. These four conditions were :

The communication must originate in a confidence that they will not be disclosed.

This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

The relation must be one which in the opinion of the community ought to be sedulously fostered.

The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Wigmore, *supra* note 26, 2285.

n49. It is not clear that Wigmore's fourth justification, that the injury done as a result of compelled testimony outweigh the benefit of the disclosure to society, remains true today in the face of mandatory

reporting statutes. At the time of the incorporation of clergy-communicant privilege into the federal common law, Wigmore's only justification for why the fourth prong was satisfied concerned the insufficient weight that should be given to testimony that "ought in no system of law to be relied upon as a chief material object of proof." *Id.* 2396. This justification, however, does not consider the gravity of the state's concern in seeking to compel testimony. Wigmore's own test requires that "the injury to the potential relation by compulsory disclosure be greater than the benefit to justice." *Id.* As it will be argued below, the current times appear to demand that the state's interest should be afforded more weight. At the very least, it is no longer clear that the injury to the "relation" outweighs the benefit to the state.

n50. See Rev. Martin R. Bartel, *Pennsylvania's Clergy-Communicant Privilege: For Everything There Is ... a Time to Keep Silent*, 69 *Temp. L. Rev.* 817, 836-37 (1996) (discussing the development of Rule 501 and Proposed Rule 506).

n51. See 26 *Wright & Graham*, *supra* note 36, 5612 (discussing the proposal and rejection of Rule 506).

n52. *Id.*

n53. See *Whittaker*, *supra* note 30, at 148-50.

n54. See *United States v. McCormick*, 1992 *U.S. App. LEXIS 18591*, at 4 (4th Cir. Aug. 10, 1992); *In re Grand Jury Investigation*, 918 *F.2d* 374, 379-80 (3d Cir. 1990); *United States v. Dube*, 820 *F.2d* 886, 889-90 (7th Cir. 1987); *United States v. Luther*, 481 *F.2d* 429, 432 (9th Cir. 1973); *United States v. Wells*, 446 *F.2d* 2 (2d Cir. 1971); *Eckmann v. Bd. of Educ.*, 106 *F.R.D.* 70 (*E.D. Mo.* 1985); *Cimijotti v. Paulsen*, 219 *F. Supp.* 621 (*N.D. Iowa* 1963).

n55. See *Ga. Code Ann.* 24-9-22 (Harrison 1998) (limiting the privilege to Jewish and Christian ministers).

n56. See *Whittaker*, *supra* note 30, at 149-51.

n57. *Id.*

n58. *Id.*

n59. J. Michael Keel, Comment, *Law and Religion Collide Again: The Priest-Penitent Privilege in Child Abuse Reporting Cases*, 28 *Cumb. L. Rev.* 681, 689 (1997-98).

n60. Robert G. Morvillo & Robert J. Anello, *The Clergy Communicant Privilege*, *New York L.J.*, Oct. 2, 2001, at 3 (arguing that courts have interpreted the privilege broadly).

n61. See *Mitchell*, *supra* note 17, at 762.

n62. Usually, law enforcement authorities will discover through the normal course of their investigation that certain individuals possess information disclosed in confidence to them by a suspect or defendant. For example, in *People v. Hodges*, 13 Cal. Rptr. 2d 412 (Cal. App. Dep't Super. Ct. 1992), the authorities discovered that a Pentecostal Church headmaster failed to report an incident of abuse after the child abuse victim directly contacted the authorities. Additionally, in *Cox v. Miller*, 296 F.3d 89 (2d Cir. 2002), the government discovered that a defendant confessed in confidence to fellow members of Alcoholics Anonymous that he killed two individuals, after the government interviewed those Alcoholics Anonymous members.

n63. See Keel, *supra* note 59, at 705. But see Whittaker, *supra* note 30, at 159 (arguing that the non-existence of the privilege may permit the claim that the privilege is necessary to protect the free exercise of religion).

n64. See *State v. Gooding*, 989 P.2d 304 (Mo. 1999) (affirming lower court decision to admit a deposition that was later challenged by the invocation of the privilege); *State v. Martin*, 975 P.2d 1020 (Wash. 1999) (upholding the invocation of the clergy privilege against a government attempt to depose a clergy member in a second-degree murder investigation).

n65. There are approximately 63 million Catholics in the United States. Michael Powell, Catholic Clout Is Eroded by Scandal, Wash. Post, July 6, 2002, at A1. In the wake of more data, an August 2003 poll of 414 Catholics from Cincinnati, Ohio revealed "28 percent say their faith has been negatively affected, 26 percent say they are attending Mass less often, and 25 percent are giving less money to the Church." Robert Anglen, Shaken, Catholics Shunning Church, Cincinnati Enquirer, Aug. 30, 2003, at 1A. An early 2003 national Gallup poll also found public confidence in organized religion and clergy has dropped to a sixty-year all time low. *Id.* Another survey indicates that 96 percent of Catholics wanted bishops who transferred abusive priests from one parish to another to be disciplined. See Jane Lampman, Bishops Walk Fine Line on Abuse Policy, Christian Sci. Monitor, Nov. 11, 2002, at 3.

n66. AG Report, *supra* note 2, *passim*.

n67. *Id.* Prefatory Letter 1-2.

n68. *Id.* at 5.

n69. *Id.* at 5 n.3.

n70. *Id.* at 15 n.10.

n71. *Id.*

n72. *Id.*

n73. *Id.*

n74. *Id.* at 12.

n75. The Archdiocese of Milwaukee revealed that, since 1994, 250 to 300 people contacted it with problems related to clergy sexual abuse of children. Tom Heinen, *Hundreds Reported Abuse by Clergy*, Milwaukee J. Sentinel, Sept. 18, 2003, at 1A. The Seattle Roman Catholic Archdiocese revealed that forty-seven priests have been accused of abuse in Seattle since the mid-1950s. Janet I. Tu, *Settlement Reached in Suit over Sex Abuse by Priest*, Seattle Times, Sept. 12, 2003, at A1.

n76. See U.S. Conference of Catholic Bishops, Office of Child and Youth Prot., *Study of the Nature and Scope of Sexual Abuse by Catholic Clergy in the United States* (2004), available at <http://www.usccb.org/ocyp/webstudy.htm> (last visited Dec. 22, 2003).

n77. *Id.*

n78. Illinois recently extended its statute of limitations for filing of criminal and civil suits by victims of child sex abuse. Chi. Sun-Times, July 25, 2003, at 38. In 1994, California was the first state to extend its statute of limitations regarding child abuse. Following California's lead, forty other states passed similar laws, and now some states are reconsidering the current state of the law, arguing that the original laws did not go far enough. See Teresa Watanabe, *Pioneering Law Allowed Filing of Priest Abuse Cases*, L.A. Times, Sept. 30, 2002, at B1. California recently re-extended the timing requirement under the statute of limitations, and advocates rights groups hailed the legislation as the "most progressive legislation of its kind in the U.S." William Lobdell, *The State Statute of Limitations Eased in Abuse Cases*, L.A. Times, July 12, 2002, at B8.

n79. See Bayles, *supra* note 6, at A1 (explaining that Massachusetts, Illinois, Mississippi, and Colorado have added clergy to their mandatory reporting statutes since the beginning of 2002). New York also passed legislation in June 2002 that required clergy to report incidents or allegations of non-family child abuse to authorities. Powell, *supra* note 65, at A1.

n80. Connecticut is one state that has increased its civil penalties. Hartford Courant, May 3, 2002, at A1. Connecticut has also barred civil courts from keeping settlement details involved an allegation of sexual child abuse silent. *Id.*

n81. Massachusetts created this crime in December 2002. AG Report, *supra* note 2, at 24.

n82. One cannot help but note the irony that states are narrowing the scope of the privilege in response to public outrage, when some states adopted the privilege amid public outrage in response to placing clergy members on the stand. See John J. Montone, III, *In Search of Forgiveness: State v. Szemple and the Priest-Penitent Privilege in New Jersey*, 48 *Rutgers L. Rev.* 263, 277 (1995) (describing how the Delaware legislature adopted its privilege statute amidst such controversy).

n83. Prior to its 2002 amendment, the Massachusetts mandatory reporting statute did not include priests. AG Report, *supra* note 2, at 23.

n84. See Leslie Reed, *New Law Sought on Molesters*, Omaha World Herald, Sept. 20, 2003, at 1 (reporting that victims of sexual abuse are urging Nebraska lawmakers to lengthen the statute of limitations for prosecuting or suing child abusers).

n85. Wisconsin, for example, is considering legislation to "extend criminal and civil statutes of limitations for future clergy sex abuse victims and would require clergy and their superiors to report suspected cases of abuse." See Editorial, *The Right Way to Fight Abuse*, Capital Times, Sept. 22, 2003, at 10A. The Massachusetts legislature is also considering several bills to toughen its child abuse laws and increase penalties on those who do not comply with the mandatory reporting statute. See Ralph Ranalli, *Bills Aim for Stricter Abuse Laws*, Boston Globe, July 25, 2003, at B1; see also AG Report, supra note 2, at 23 n.18.

n86. The Roman Catholic Archdiocese of Chicago settled with fifteen victims of sexual abuse for over \$ 8 million. Mickey Ciokajlo, *15 Cases of Priest Abuse Settled*, Chi. Trib., Oct. 3, 2003, at 1. The Roman Catholic Archdiocese of Seattle settled with fifteen victims of sexual abuse for \$ 7.87 million. Tu, supra note 75, at A1.

n87. See generally Symposium: *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 *B.C. L. Rev.* 947 (2003) (providing a broad overview of litigation strategies and their constitutional implications of abuse victims and the Catholic Church).

n88. *Class Action Status in Clergy Abuse Suit*, Chi. Trib., Oct. 2, 2003, at 15 (reporting Kentucky state court allowing class action suit against the Roman Catholic diocese to go forward).

n89. The chief federal prosecutor in Boston considered this option. *Church Officials in Boston Could Face Federal Charges*, Providence J.-Bull., Aug. 27, 2003, at A-2.

n90. The Church has also changed its formal relationships with congregants. See Patrick J. Schiltz, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 *B.C. L. Rev.* 949, 967 (2003) (discussing how pastors have elected to alter the places where they meet and the types of interactions they have with congregants, including children).

n91. Tom Mashberg & Eric Convey, *Church Abuse Policy Change Riles Advocates*, Boston Herald, Sept. 17, 2003, at 14.

n92. For a general summary of the various mandatory reporting statutes and related federal reports about child abuse, see the congressionally-mandated U.S. Dep't of Health & Human Services National Clearinghouse on Child Abuse and Neglect Information, at <http://nccanch.acf.hhs.gov> (last visited Oct. 28, 2003).

n93. See Norman Abrams, *Addressing the Tension between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 *B.C. L. Rev.* 1127, 1138-39 (2003).

n94. Id.

n95. Id.

n96. Id.

n97. See *Murdock v. Pennsylvania*, 319 U.S. 105, 115-17 (1943). But see *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (arguing that the freedom to act according to one's religious beliefs is not absolute, because individual conduct remains subject to social regulation).

n98. U.S. Const. amend. XIV. See also *Cantwell*, 310 U.S. at 303 (applying the First Amendment to the states).

n99. U.S. Const. amend. I.

n100. See *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

n101. Compare *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (ruling that a statute must have a "secular legislative purpose," that "its principal or primary effect must be one that neither advances nor inhibits religion," and that "the statute must not foster "an excessive government entanglement with religion"), with *Lynch v. Donnelly*, 465 U.S. 668, 684-85 (1984) (creating the "endorsement test" that evaluates whether a statute or regulation sends out a message to nonadherents that they are not members of the political community), and *Lee v. Weisman*, 505 U.S. 577, 581 (1992) (creating a "coercion test" that evaluates whether a statute or regulation compels or coerces participation in a religious activity), and *Zelman v. Simmons-Harris*, 536 U.S. 639, 651 (2002) (upholding Ohio school voucher program because it "neutrally provided benefits to a broad class of citizens defined without reference to religion").

n102. The application of a particular Establishment Clause test is dependent on the context of the state action. For example, *Zelman* and *Lemon* involved school funding, *Weisman* involved graduation prayer, and *Lynch* involved a nativity scene. The most recent evidence of the Court's inconsistent application of the various tests is *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). There, the Court analyzed the constitutionality of student-led prayer at a high school football game. In reaching its decision, the Court applied and incorporated elements of the *Weisman* coercion test, the *Lemon* test, and principles of *Lynch*. Regardless, the Court has not provided a clear and consistent set of decisions. See Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* 158-59 (2d ed. 1994) (arguing that the Justices frequently disagree on the application of the proper test and noting a large number of 5-4 decisions).

n103. See *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (inquiring whether a statute's "actual purpose is to endorse or disapprove of religion" or "conveys a message of endorsement or disapproval"); *County of Allegheny v. ACLU*, 492 U.S. 573, 630-31 (1989) (O'Connor, J., concurring).

n104. See *Lemon*, 403 U.S. at 612-23 (requiring courts to assess the constitutionality of a statute by asking the following: (1) whether there was a secular purpose, (2) whether the statute had the primary effect of advancing religion, and (3) whether the statute required the government to be entangled with religion).

n105. See Whittaker, *supra* note 30, at 155 (arguing that if the privilege is viewed independently of other privileges, it may be an endorsement of religion, but that if the privilege is viewed together with other privileges, it will likely be seen as an accommodation of religion).

n106. See Horner, *supra* note 32, at 715-16, 727 (questioning the constitutionality, for example, of privilege statutes that only extend the privilege to several religions or only to Western religions).

n107. See Ronald J. Colombo, Note, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 *N.Y.U. L. Rev.* 225, 237 (1998) (recommending that states draft a neutral version of the privilege so as to accommodate all religions).

n108. See Whittaker, *supra* note 30, at 159.

n109. Compare *Zelman v. Simmons-Harris*, 536 *U.S.* 639, 668 (2002) (O'Connor, J., concurring) (adopting a neutrality analysis that is supported by the Lemon test), with *Newdow v. United States Cong.*, 292 *F.3d* 597 (9th *Cir.* 2002) (applying the Court's different Establishment Clause tests while striking down the Pledge of Allegiance on First Amendment grounds). See also *supra* note 101 (discussing the three competing tests that the Court has adopted over the years).

n110. See *infra* Part IV.C.

n111. See *infra* Part III.C.

n112. *Employment Div. v. Smith*, 494 *U.S.* 872, 877 (1990).

n113. 374 *U.S.* 398 (1963).

n114. Under the Sherbert test, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Id.* at 406 (quoting *Thomas v. Collins*, 323 *U.S.* 516, 530 (1945)).

n115. *Id.* at 407.

n116. *Wisconsin v. Yoder*, 406 *U.S.* 205, 215-16 (1972).

n117. See *id.* at 215. Congress successfully legislated the compelling state interest test into law with passage of the Religious Freedom Restoration Act of 1993, 42 *U.S.C.* 2000bb (2001) [hereinafter RFRA], which guaranteed "its application in all cases where free exercise of religion is substantially burdened." The Court, however, ruled that the RFRA was unconstitutional in *City of Boerne v. Flores*, 521 *U.S.* 507 (1997).

n118. *Employment Div. v. Smith*, 494 *U.S.* 872, 886 (1990).

n119. *Id.* at 878.

n120. *Id. at 875.*

n121. *Id. at 882.* See generally Keel, *supra* note 59, at 693 (arguing that a child abuse reporting statute that eliminates all testimonial privileges would be seen as a neutral, generally applicable law that would likely pass constitutional muster under Smith).

n122. *Smith, 494 U.S. at 882.*

n123. The current Court differs from the Smith Court in that only five of the nine Justices remain. Interestingly, of the five Justices who abandoned the compelling state interest test, four remain: Chief Justice Rehnquist and Justices Stevens, Scalia, and Kennedy. *Id. at 873.* Justice O'Connor agreed with the majority's ultimate conclusion to uphold the Oregon law, but disagreed with the Court's abandonment of the compelling state interest test. See *id. at 894* (O'Connor, J., concurring) (arguing that "we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest"); see also *City of Boerne v. Flores, 521 U.S. 507, 544-45 (1997)* (O'Connor, J., dissenting) (indicating that she "remains of the view that Smith was wrongly decided"). Rather, she argued that the compelling state interest test should continue to apply in these cases. *Smith, 494 U.S. at 894* (O'Connor, J., concurring). That leaves Justices Souter, Thomas, Ginsburg, and Breyer. Based on past voting behavior, Justice Thomas would likely join Justices Scalia, Stevens, Kennedy, and Chief Justice Rehnquist on this particular issue. See Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2000 Term, 29 Hastings Const. L.Q. 247, 251, 325 (2002)* (arguing that Justice Thomas has an overwhelming tendency to vote with his conservative colleagues Chief Justice Rehnquist and Justice Scalia). The Court would have the five person majority necessary to continue the application of the Smith test. But see So Chun, Comment, *A Decade After Smith: An Examination of the New York Court of Appeals' Stance on the Free Exercise of Religion in Relation to Minnesota, Washington, and California, 63 Alb. L. Rev. 1305, 1305 (2000)* (noting that several state courts have declined to adopt the Smith rule and instead rely on rules derived from interpretations of their own state constitutions). It is important to note this distinction between federal and state courts because, even if a litigant who brings a constitutional challenge fails at the federal level, he may succeed at the state level, as state constitutions oftentimes afford different rights to their citizens than does the federal Constitution.

n124. *Smith, 494 U.S. at 878-79.*

n125. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993)*; see also *Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871)* ("Questions of discipline, or of faith, or ecclesiastical rule, custom, or law [that] have been decided by the highest of ... church judicatories ... must [be] accepted ... as final." (emphasis added)).

n126. *Smith, 494 U.S. at 872.*

n127. *Id. at 882.*

n128. See generally Brian A. Freeman, *Expiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability, 66 Mo. L. Rev. 9, 81 (2001)* (arguing that the Court's First Amendment jurisprudence is in disarray, and consequently, the Court is eroding the constitutional importance of the Religious Clauses). The Smith decision also seems to contradict the foundational aspects of the First Amendment. As the Court stated in *Marsh v. Alabama, 326 U.S. 501, 509*

(1945), "the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men' and we must in all cases "weigh the circumstances and appraise the ... reasons ... in support of the regulation ... of [those] rights." (citing *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939)).

n129. *Smith*, 494 U.S. at 881.

n130. *Id.* (citations omitted).

n131. *Id.*

n132. *Id.*

n133. See *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (striking down a flat tax applied to the dissemination of religious ideas).

n134. Although it is beyond the scope of this paper, one could argue that the mandatory reporting statute is overly vague and unenforceable so as to violate the due process of law. This argument finds judicial support in *Connally v. General Construction Co.*, where the Court stated that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." 269 U.S. 385, 391 (1926) (citations omitted). However, one scholar argues that these statutes must remain intentionally vague to prevent incidents of future abuse. See Kalichman, *supra* note 12, at 182. Another potential Due Process challenge is to state registries that maintain names of individuals reported for alleged abuse. See National Clearinghouse on Child Abuse and Neglect Information, *Due Process and Central Registries: An Overview of Issues and Perspectives* (1999), at <http://www.calib.com/nccanch/pubs/issue/process.pdf> (Sept. 2002) (discussing the constitutionality of state registries under the Due Process Clause).

n135. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (striking down compulsory school attendance laws that applied to Amish children and that were objected to on religious grounds).

n136. *Id.* at 233 (holding that, when hybrid rights are involved, the government must establish "more than merely a "reasonable relation to some purpose within the competency of the State' ... to sustain the validity of the State's requirement under the First Amendment." (citation omitted)). For a general discussion of *Yoder*, see *infra* Part III.C.

n137. See *Sherbert*, 374 U.S. at 402-03 (government actions that substantially burden a religious practice must be justified by a compelling government interest). While both courts apply heightened scrutiny, the test in *Yoder* is slightly different than the test applied in *Sherbert*. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

n138. See *Axson-Flynn v. Johnson*, 151 F. Supp. 2d 1326, 1340 (D. Utah 2001) (applying a "more than reasonable relationship test" to a hybrid-rights claim disputing a university requirement that forced a student to engage in speech that violated her religious beliefs).

n139. See *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 711-12 (9th Cir. 1999) (applying strict scrutiny, compelling state interest test where plaintiff demonstrated hybrid rights claim); see also *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 933 (6th Cir. 1991) ("The Smith decision implies without stating that those hybrid claims which raise a free exercise challenge coupled with other constitutional concerns remain subject to strict scrutiny."); *Hicks v. Halifax County Bd. of Educ.*, 93 F. Supp. 2d 649, 663 (E.D.N.C. 1999) (applying strict scrutiny to plaintiff's hybrid rights claims).

n140. See William P. Marshall, In Defense of Smith and Free Exercise Revisionism, 58 *U. Chi. L. Rev.* 308, 309 (1991) ("[Smith's] use of precedent borders on fiction."); see also Richard F. Duncan, Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom, 69 *Notre Dame L. Rev.* 393, 430-31 (1994) (arguing that the "the cumulative effect of two or more partial constitutional rights equals one sufficient constitutional claim" under the hybrid exception); William L. Esser IV, Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?, 74 *Notre Dame L. Rev.* 211, 219 (1998) ("Clearly, what the Court must have meant is that a less than sufficient free exercise claim, plus a less than sufficient claim arising under a different part of the Constitution, together trigger the compelling interest test." (quoting Richard F. Duncan, Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom, 69 *Notre Dame L. Rev.* 393, 430-31 (1994))); Douglas Laycock, Free Exercise and the Religious Freedom Restoration Act, 62 *Fordham L. Rev.* 883, 902 (1994) ("Justice Scalia had only five votes. He apparently believed he couldn't overrule anything, and so he didn't. He distinguished everything away instead."); Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 *U. Chi. L. Rev.* 1109, 1122 (1990) (arguing that "a legal realist would tell us ... that the Smith Court's notion of hybrid claims was not intended to be taken seriously.").

n141. As stated by Justice Souter:

The distinction Smith draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the Smith rule, and, indeed, the hybrid exception would cover the situation exemplified by Smith, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what Smith calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring).

n142. See *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 240 F.3d 553, 562 (6th Cir. 2001) (criticizing the Court for not adequately explaining how a hybrid claim would alter the level of scrutiny); *Kissinger v. Bd. of Trs. of The Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (refusing to apply the Smith test and calling it "illogical").

n143. See *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 706 (9th Cir. 1999) (defining a "colorable" claim as one which shows a "fair probability" of a "likelihood" of success on the merits).

n144. See *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (explaining that the Second Circuit has not yet adopted a definitive interpretation of the Smith hybrid rights test); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (recognizing the hybrid rights exception, but declining to apply it to the facts of the particular case).

n145. The approach adopted by the Ninth and Tenth Circuits appears to be more consistent with what the Court had in mind than the Sixth Circuit approach, because the latter approach simply fails to acknowledge the existence of the Court's suggestion. Admittedly, the Smith Court did not provide a very thorough explanation of the exception; however, it clearly referenced *Yoder*, a case that involved a free exercise claim and a parental rights claim, as an example of a claim that would constitute an exception. *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990). By refusing to apply the exception at all, even to a claim similar to that in *Yoder* or the other referenced cases, the Sixth Circuit's approach expressly contradicts the Court's suggestion. Further evidence of the Court's intent for lower courts to follow the dicta in *Smith* can be found in subsequent opinions. See *Agostini v. Felton*, 521 U.S. 203, 207 (1997) ("The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions."); see also Joanne C. Brant, Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers, 56 *Mont. L. Rev.* 5, 30 (1995) (supporting the proposition that lower courts should not disobey the Court's hybrid suggestion by stating that "the fact that the Court draws its boundaries illogically does not mean that its power to establish those boundaries is suspect").

That is not to say that the Ninth and Tenth Circuit interpretations are flawless. For example, their "colorable" claim standard does not require the plaintiff to have a meritorious claim, just one that appears to be valid or right. Critics of the hybrid exception argue that this unfairly rewards plaintiffs with heightened scrutiny for simply advancing two fundamental rights when the claims by themselves would likely fail. See *McConnell*, supra note 140, at 1122. However, a recent Ninth Circuit case pointed out that the "colorable-claim" standard is the only standard that "accounts both for *Smith* (which an implication standard cannot) and for the original hybrid cases (which an independently-viable-rights standard cannot)." *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 707 (9th Cir. 1999). The *Thomas* court also pointed out that the *Smith* Court's specific reference to *Cantwell*, *Murdock*, *Follett*, and *Yoder* meant that the Court did not overrule these cases and, therefore, they are still binding on lower courts. *Id.* at 704.

n146. See *Keel*, supra note 59, at 705.

n147. "The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

n148. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1942) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); see also *id.* at 645 (Murphy, J., concurring) ("The right to freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all."). "Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the "severest contests in which I have ever been engaged.'" *Id.* at 646 (Murphy, J., concurring) (quoting from Thomas Jefferson's autobiography).

n149. *Id.* at 642.

n150. See *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (explaining that the government may not control a person's private thoughts); *Barnette*, 319 U.S. 624, 631 (defining the "right of self-determination" to include "matters that touch individual opinion and personal attitude"); David B. Gaebler, First Amendment Protection Against Government Compelled Expression and Association, 23 *B.C. L. Rev.* 995, 1005 (1982) (explaining that the government may not require the individual to "acquiesce in" views that are "involuntarily expressed"

because "it requires a denial of self"). Others argue that government compelled speech is a form of cognitive dissonance. See Martin H. Redish & Christopher R. McFadden, HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association, 85 *Minn. L. Rev.* 1669, 1694 (2001).

If one were to search for such a rationale, it would be appropriate to focus on the manner in which forced expression demoralizes the individual when the views expressed are contrary to or inconsistent with the speaker's own beliefs. Through this process, the government is able to break down the individual's intellectual and moral integrity and render her less of an independently functioning and free-thinking human being. Forced speech, then, may represent a governmentally manipulated type of cognitive dissonance, a psychological process in which an individual forced to associate with particular viewpoints for a sufficient period of time subconsciously adopts those positions as his own.

Id. (citations omitted).

n151. See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (invalidating statute requiring individuals to publicly display "Live Free or Die" motto on their license plates); Haig Bosmajian, *The Freedom Not to Speak* 193 (1999) (arguing that the right not to speak can be constitutionally grounded in concerns for basic human dignity, including humiliation and degradation).

For a general discussion of these two interpretations, see Kari M. Dahlin, Note, *Actions Speak Louder than Thoughts: The Constitutionally Questionable Reach of the Minnesota CLE Elimination of Bias Requirement*, 84 *Minn. L. Rev.* 1725, 1736-42 (2000).

n152. 319 U.S. 624 (1942).

n153. See also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (compelling an employee to finance a union's ideological activities unrelated to collective bargaining violates First Amendment).

n154. *Barnette*, 319 U.S. at 629.

n155. *Id.* at 642. Admittedly, the Court did not limit its holding to religious objections, as it considered political, ideological, and personal objections to a compulsory flag salute. Consequently, of the three cases discussed in this Comment, one can argue that the *Barnette* decision provides the least support for the proposition that the Court protects religious speech from compulsion. Nonetheless, it is useful because the Court's reasoning is applicable to both religious and non-religious objections to compelled speech.

n156. *Id.* at 634.

n157. Bosmajian, *supra* note 151, at 10.

n158. *Id.* at 185-86.

n159. *Id.* at 204.

n160. 430 U.S. 705 (1977).

n161. *Id. at 715.*

n162. *Id. at 707.*

n163. *Id. at 716.*

n164. *Id. at 714* ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1942))).

n165. Indeed, the Court likened the appellee's car to a "mobile billboard." *Id. at 715.*

n166. *Id.*

n167. *406 U.S. 205 (1972).*

n168. *Id. at 210.*

n169. *Id.* Of course, the fact that it was a hybrid claim had no legal significance at that time.

n170. *Id. at 235.*

The Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a Statute generally valid as to others.

Id.

n171. *Id. at 219* ("Nor does the State undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion - indeed, as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others.").

n172. Admittedly, it is not a fair reading of *Barnette* to suggest that its holding was exclusively because the speech in question was religious. But *Barnette* did acknowledge that the specific objection by the Jehovah's Witnesses was grounded in religion. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634-35 (1943). The Court in *Barnette* clearly had in mind religious objections when it discussed speech and acts that could not be compelled. The statute in *Barnette* "required the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights." *Id. at 633*. Immediately after these sentences, the Court then provided an example in footnote 13 explaining that the framers had religious expression in mind. *Id.* Specifically, the Court discussed the situation of early Christians who "were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority." *Id.*

n173. *Id.* at 634.

n174. The process can be likened to the Communist witch hunts during the McCarthy era of the 1950s, when individuals were forced to publicly reveal their deepest and most personal political beliefs. For a general discussion of this history, see Bosmajian, *supra* note 151, at 188-89.

n175. *Yoder*, 406 U.S. at 218.

n176. See *supra* Part II.B.1.

n177. See Cardinal Anthony Bevilacqua, Confidentiality Obligation of Clergy From the Perspective of Roman Catholic Priests, 29 *Loy. L.A. L. Rev.* 1733, 1739 (1996) ("The inevitable uncertainties raised by these questions could only result in creating uncertainties in the minds of penitents, thereby undermining the sacrament itself and its unrestricted availability to penitents."); see also Lori Lee Brocker, Note, Sacred Secrets: A Call for the Expansive Application and Interpretation of the Clergy-Communicant Privilege, 36 *N.Y.L. Sch. L. Rev.* 455, 455 (1991) (indicating that over 40 percent of Americans who seek guidance or counseling initially consult a clergy member).

n178. See *Yoder*, 406 U.S. at 218.

Compulsory school attendance to age 16 for Amish children carries with it a very real threat to undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant religion.

Id.

n179. See Anna M. Taruschio, The First Amendment, the Right Not To Speak and the Problem of Government Access Statutes, 27 *Fordham Urb. L.J.* 1001, 1039, 1042-45 (2000) (arguing that all compelled speech violates the individual's autonomy interest because it forces a "pressure to respond").

n180. Chief Justice Rehnquist may consider an objection to a mandatory disclosure law rooted in religious objections inapplicable under "right not to speak" free speech jurisprudence. In *Wooley*, he stated: "For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually 'asserting as true' the message." See *Wooley v. Maynard*, 430 U.S. 705, 720 (1977) (Rehnquist, J., dissenting).

n181. *Yoder*, 406 U.S. at 219-20.

n182. *Id.* at 220.

n183. *Id.*

n184. See *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797-98 (1988) (explaining that the facts of previous landmark cases such as *Barnette*, *Tornillo*, and *Wooley* "cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech").

n185. See Michael J. Mazza, *Should Clergy Hold the Priest-Penitent Privilege?*, 82 *Marq. L. Rev.* 171, 195 (1998) (arguing that the privilege could potentially constitute a hybrid claim under *Smith*). But see David S. Bogen, *The Religion Clauses and Freedom of Speech in Australia and the United States: Incidental Restrictions and Generally Applicable Laws*, 46 *Drake L. Rev.* 53, 88-90 (1997) (suggesting that the Court may soon apply its generally applicable neutral law analysis to the free speech context, eliminating the compelling state interest test and any hybrid exception).

n186. See *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990) ("The present case does not present such a hybrid situation, but a free exercise right unconnected with any communicative activity or parental right." (emphasis added)). More importantly, the *Smith* Court also specifically mentioned "speech" as the type of fundamental right it had in mind when describing hybrid claims. *Id.* at 881.

n187. Because the clergy-communicant privilege may be waived by the person who invokes it, any person receiving its protection can choose to testify, even if the disclosure violates one's religious beliefs. However, any person who does not choose to waive the privilege would be forced to testify under a mandatory reporting statute. Those mandatory disclosure statutes that do not explicitly provide an exception for clergy members or communicants compel a person to speak irrespective of any religious objections. See *Morvillo & Anello*, supra note 60, at 3 (arguing that most states permit the privilege to be waived).

n188. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (creating the generally accepted heightened scrutiny test).

n189. *Id.*

n190. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

n191. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

n192. See, e.g., Stephen J. Stein, *Religion/Religions In the United States: Changing Perspectives and Prospects*, 75 *Ind. L.J.* 37, 52-54 (2000).

n193. For example, in *Gillette v. United States*, 401 U.S. 437, 462 (1971), the Court ruled that government enforcement of the draft against the objections of conscientious objectors was an "incidental burden." However, in *Yoder*, 406 U.S. at 218, the Court categorized the burden of a state education requirement imposed against the Amish as "a very real threat of undermining the Amish community." It is important to note that the *Smith* decision bypasses this analysis altogether if the statute is a generally applicable neutral law.

n194. *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981).

n195. The Court has explicitly stated that it is not within its purview to question the seriousness of a person's religious beliefs, and, therefore, there is a general presumption that a professed religious belief will be considered substantial and legitimate. *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990). Despite claims by the Court that it will shy away from prying into the seriousness of a plaintiff's religious beliefs, the Yoder Court did examine the seriousness of the threat to the Amish plaintiff's religious beliefs. See supra Part III.C. The Court's approach appears to be its principle more than its practice.

n196. See Mitchell, supra note 17, at 805-06.

n197. 1983 Code c. 983.

n198. See Moskowitz & DeBoer, supra note 33, at 9-21 (1999) (discussing clergy-communicant communications within the various Protestant and Jewish denominations). The Executive Vice-President of the Chicago Board of Rabbis recently reported, "I don't think I could see a situation where if a rabbi found out that someone was molesting a child that he or she would not act to make sure that the child did not face further harm." Aamer Madhani & Julia Lieblich, Church Rite Can Hinder Reporting of Priests, Chi. Trib., May 13, 2002, at A1.

n199. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

n200. See Mitchell, supra note 17, at 808-09 (discussing the competing ways that state and personal interests can be framed).

n201. *United States v. Lee*, 455 U.S. 252, 257-58 (1982).

n202. Black's Law Dictionary 1137 (7th ed. 1999) (defining "parens patriae" as a situation which involves "the state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves").

n203. The "best interest of the child" standard was formulated by Justice Brewer in *Chapsky v. Wood*, 26 Kan. 650 (1881), and Justice Cardozo in *Finlay v. Finlay*, 240 N.Y. 429, 433 (1925).

n204. 3 Donald T. Kramer, Legal Rights of Children 28.01, at 4 (2d ed. 1994).

n205. See Jillian Grossman, Note, 27 *Fordham Urb. L.J.* 1303, 1305-06 (2000) (discussing the historical treatment of competing state and parental interests).

n206. See Tara Kole, Recent Developments, 38 *Harv. J. on Legis.* 231, 232-33 (2001) (explaining that the state's protective framework now encompasses the juvenile justice system).

n207. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing the parental right to direct the upbringing of a child as a fundamental right); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (interpreting Fourteenth Amendment so as to include the basic civil right to raise one's own children).

n208. See 3 Kramer, *supra* note 204, 28.01, at 4.

n209. *Id.* 28.01, at 7.

n210. See Mitchell, *supra* note 17, at 809 n.453 (explaining how courts have allowed state attempts to provide medical treatment to a child to trump religious objections).

n211. See *id.* at 818-20 (summarizing court tendency to rule in favor of the state in the following areas: psychotherapist's privilege subordinated to duty to warn of harm to third persons; federal nondisclosure statute for alcohol and drug treatment programs subordinated to state's interest in preventing abuse; and the marital communications and physician-patient privilege sometimes subordinated to state's *parens patriae* interest in child custody cases).

n212. See *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." (citations omitted)).

n213. For example, it is extremely difficult to terminate a parent's legal rights, even in the child abuse context. See 3 Kramer, *supra* note 204, 28.01, at 28 ("Termination is permitted when the abuse or neglect is so terrible or prolonged that it is unlikely that the parent will reform, or when the risk of harm to the child is too great to offer the parent further chances.").

n214. See *Wyman v. James*, 400 U.S. 309, 318 (1971) (explaining that "there is no more worthy object of the public's concern"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control.").

n215. See David T. Fenton, Note, Texas' Clergyman-Penitent Privilege and the Duty to Report Suspected Child Abuse, 38 *Baylor L. Rev.* 231, 237 (1986).

n216. See Bevilacqua, *supra* note 177, at 1744 ("Confidential communications connected with religious or spiritual counseling often provide perhaps the only setting in which some individuals will make certain revelations that they would make to no other person but a priest, minister, or rabbi.").

n217. See Mitchell, *supra* note 17, at 813. Mitchell also argues that a court is not likely to require the clergy to present empirical data to substantiate this argument. *Id.*

n218. See Bevilacqua, *supra* note 177, at 1736-37. Cardinal Bevilacqua also argued that an attempt to compel the clergy to violate their religious beliefs has "devastating effects" on religious freedom. *Id.*

n219. *Id.*

n220. *Id.*; see also 26 Wright & Graham, *supra* note 36, 51-2 ("The public outcry that has followed attempts to force clerics to disclose would provide ample reason for judges, prosecutors, and the police not to seek to make the cleric an informer against a penitent.") (citations omitted).

n221. See Wigmore, *supra* note 26, at 2396.

n222. See *supra* Part II.C.

n223. *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

n224. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

n225. See Mitchell, *supra* note 17, at 815.

n226. *Id.* at 815-16.

n227. See *id.* at 811-15 (describing the arguments that can be advanced to prove that forcing clergy to compel is not an effective means to prevent child abuse).

n228. See Whittaker, *supra* note 30, at 161.

n229. A potential exception could be created that requires a clergy member to report second-hand allegations of abuse. For example, if a penitent disclosed to the clergy member that another individual committed an act of abuse, the traditional religious duty to maintain the confidentiality of a disclosure of one's own sins may be weakened, or altogether inapplicable. Whether such statements would be admissible non-hearsay evidence at trial is beyond the scope of this analysis. However, even if such statements could not be used at trial, they may assist the state in their detection and subsequent prosecution of abuse without infringing upon fundamental liberties. See also R. 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 (2003) (advocating a partial abrogation of the privilege for persons who present a risk of committing future dangerous crimes).

n230. See Jenkins, *supra* note 14, at 6-8 (describing how panics over sex crimes usually accompany outbreaks of irrational public fear).