EXHIBIT

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THE WATERLOO FOR THE SO-CALLED CHURCH AUTONOMY THEORY: WIDESPREAD CLERGY ABUSE AND INSTITUTIONAL COVER-UP

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INTRODUCTION

The catastrophe of childhood sexual abuse by clergy in the United States was caused by multiple social forces that came together to put children at risk. The phenomenon is nondenominational, with cases involving the Roman Catholic Church,[1] the Church of Jesus Christ of Latter Day Saints,[2] the Jehovah's Witnesses, [3] and many others.[4] This

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[1] There are too many cases to catalogue in this brief essay, but some of the most important recent cases include: Melanie H. v. Doe, Civ. No. 04 CV 1596 WQH-(WMc) (S.D. Cal. Dec. 21, 2005) (holding that one year window reviving otherwise time-barred claims relating to sexual abuse does not violate Religion Clauses); *In re* Roman Catholic Archbishop of Portland in Or., 335 B.R. 842 (Bankr. D. Or. 2005) (holding that First Amendment does not bar inquiry into which church property is part of the bankruptcy estate, in bankruptcy prompted by numerous clergy abuse claims); Roman Catholic Archbishop of L.A. v. Superior Court, 32 Cal. Rptr. 3d 209 (Cal. Ct. App. 2005) (holding that First Amendment and clergy-penitent privilege do not bar disclosure of church documents related to allegations of sexual abuse by priests); Malicki v. Doe, 814 So. 2d 347 (Fla. 2002) (holding that First Amendment does not bar a third-party tort action against a religious institution based on the alleged sexual abuse of its clergy); Doe 67C v. Archdiocese of Milwaukee, 700 N.W.2d 180 (Wis. 2005) (holding that plaintiff did not adequately plead that church had knowledge of priest's abusive tendencies at the time of abuse, so court declined to reach the First Amendment issue); *see also id.* at 195-200, ¶¶ 59-90 (Bradley, J., concurring) (stating she would hold that the First Amendment and Wisconsin statute of limitations do not bar a negligent supervision claim against a religious organization and noting that Wisconsin is in a "distinct and diminishing minority" on the issue).

[2] R.K. v. The Church of Jesus Christ of Latter-Day Saints, No. C04-2338RSM, 2006 WL 3486798 (W.D. Wash. Dec. 1, 2006) (denying motion for rehearing in final disposition of proceeding where jury awarded victim $87,500); Doe v. The Church of Jesus Christ of Latter-Day Saints, 98 P.3d 429 (Utah Ct. App. 2004) (affirming dismissal of plaintiff's claim despite finding that abuse occurred and that the church failed to respond to complaints of abuse and concealed the abuse from both members and secular authorities, because church owed no common law duty to the plaintiff); Doe v. The Church of Jesus Christ of Latter-Day Saints, 90 P.3d 1147 (Wash. Ct. App. 2004) (proceeding involving church cover up of abuse of two girls by

reality is just one of the ways religious entities can cause harm to others, as I document in *God vs. the Gavel: Religion and the Rule of Law*.[5] It is also one part of this culture's profound problem with child abuse; on average, 25% of girls are sexually abused at some point, and 20% of boys.[6] Of those abused, 60% of boys and 80% of girls are abused by

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their stepfather, later resulting in a $4.2 million jury award); Paul McKay, *Church Shunned Sex Abuse Study*, HOUS. CHRON., May 10, 1999, at A1 (detailing Mormon response of study on women survivors of childhood sexual abuse); Peggy Fletcher Stack, *Pressure to Forgive Challenges Mormon Families, Divides Wards*, SALT LAKE TRIB., Oct. 17, 1999, at A1 (outlining steps taken to prevent child sexual abuse within the Mormon church and identifying outstanding issues); Martha N. Beck, et al., *Adult Survivors of Childhood Sexual Abuse: The Case of Mormon Women*, AFFILIA, Spring 1996, at 39 (reporting on a study of 71 Mormon women survivors of childhood sexual abuse in their dealings with church leaders); Paul McKay, *Mormons Caught Up in Wave of Pedophile Accusations*, HOUS. CHRON., May 9, 1999, at A1 (outlining numerous civil suits over child sexual abuse and the Mormon Church response); Metcalf v. The Church of Jesus Christ of the Latter Day Saints, No. CV 90-30185 (Ariz. Super. Ct., 1990) (involving confidential settlement after church officials sent children to live with known pedophile); Lashbaugh v. The Church of Jesus Christ of the Latter Day Saints, No. 87-03-01934 (Or. 1987) (involving confidential settlement after known pedophile Mormon sexually abused more children); Jones v. The Church of Jesus Christ of the Latter Day Saints, No. 97-01-00267 (Tex. 1999) (awarding a $14 million jury verdict after church leaders tipped off clergy abuser that police were after him, allowing him to destroy evidence and weaken case against him).

[3] Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 738 A.2d 839 (Me. 1999) (affirming the dismissal of a claim against the church on First Amendment grounds despite allegations of molestation); Beal v. Broadard, 19 Mass. L. Rep. 114, 2005 WL 1009632 (Super. Ct. 2005) (involving a daughter allegedly molested by church leader during Bible Study in home; some claims dismissed on First Amendment grounds, negligence and breach of fiduciary duty claims were allowed to go forward); Berry v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 879 A.2d 1124 (N.H. 2005) (involving father-daughter incest, Jehovah's Witness elders' knowledge of abuse, and failure to report to authorities); *see also* Silentlambs, http://www.silentlambs.org (provides a forum for hundreds of victims of abuse within the organization of Jehovah's Witnesses) (last visited Jun. 10, 2007).

[4] *See, e.g.*, Doe v. Newbury Bible Church, 455 F.3d 594 (2d Cir. 2006) (certifying question to state supreme court regarding whether restatement of agency applies to pastor); C.B. *ex rel.* L.B. v. Evangelical Lutheran Church in Am., 726 N.W.2d 127 (Minn. Ct. App. 2007) (affirming dismissal of mother and daughter's sexual abuse claims against retired minister because minister was not church employee at time of alleged abuse); *see also* The Int'l Jewish Coalition Against Sexual Abuse/Assault, http://www.thenawarenesscenter.org (support for victims of clergy abuse in Jewish communities in the United States and Israel, and including a list of rabbis convicted of sexually abusing members of congregation) (last visited Jun. 10, 2007).

[5] *See generally* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW, chs. 1-7 (2005).

[6] MARY GAIL FRAWLEY-O'DEA, PERVERSION OF POWER: SEXUAL ABUSE IN THE CATHOLIC CHURCH 6-7 (2007) ("[A]lmost one third of all girls and up to one fourth of all boys [are abused] before they reach eighteen years old."); *see also* Jennifer J. Freyd et al., *The Science of Child Sexual Abuse*, SCIENCE, Apr. 22, 2005, at 308 ("Child sexual abuse involving sexual contact between an adult . . . and a child has been reported by 20% of women and 5 to 10% of men worldwide. Surveys likely underestimate prevalence because of underreporting and memory failure." (citing WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH (Etienne G. Krug et al., eds., 2002))); Gavin Andrews et al., *Child Sexual Abuse: Comparative Quantification of Health Risks*, 2 WORLD HEALTH ORG., COMPARATIVE QUANTIFICATION OF HEALTH RISKS 1852 (Majid Ezzati et al., eds. 2004), *available at* http://www.who.int/publications/cra/chapters/volume2/1851-1940.pdf ("Review articles on the prevalence of child sexual abuse have commonly reported a range of prevalence anywhere from 2% to 62%"); World Health Org., *Child Sexual Abuse and Violence*,

someone known to the child or the child's family, with the perpetrators in this category including relatives, family friends, clergy, teachers, and health care professionals.[7] The problem is deeply embedded in the culture, and to a large extent unreported: victims of childhood sexual abuse tend not to come forward to authorities or others approximately 90% of the time.[8] As the churches will say in their defense, these numbers make it clear that child abuse is not peculiar to religious institutions. They are correct, but what does distinguish the religious institutions is a pattern of covering up child abuse, which includes (1) not going to authorities when abuse is reported to the institution;[9] (2) imposing secrecy requirements on clergy and victims;[10] (3) shifting perpetrators throughout the religious organization, both geographically and by specific house of worship;[11] (4) asking law enforcement and

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www.searo.who.int/LinkFiles/Disability,_Injury_Prevention_&_Rehabilitation_child.pdf (last visited Sept. 11, 2007) ("Studies conducted by various NGOs and institutions in 1995 and 1997 respectively in Delhi revealed that more than half the girls surveyed had experienced sexual abuse by family members; 76% women across five cities in India admitted sexual abuse as children"); Div. of Family and Reprod. Heath, World Health Org., *Sexual Violence: A Hidden Epidemic*, http://www.afro.who.int/drh/sexual_violence.html (last visited Sept. 11, 2007) ("7% to 36% of girls and 3% to 29% of boys have suffered from child sexual abuse.").

[7] Roxanne Lieb, Vernon Quinsey, & Lucy Berliner, *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 50 (1998). According to the 1992 Crime Data Brief for the United States Department of Justice, in three states only 4% of child rape offenders for female victims under twelve years old were strangers to the victims. 46% of the offenders were family members of the victim, and 50% of the offenders were acquaintances or friends (or other non-family relationship) of the victim. For victims ages 12-17, only 12% of the offenders were strangers, while 20% were family members and 65% were friends or acquaintances of the victim. Patrick A. Langan & Caroline Wolf Harlow, *Child Rape Victims, 1992*, CRIME DATA BRIEF, June 1994, NCJ-147001, at 2.

[8] Jennifer J. Freyd et al., *supra* note 6, at 308 ("[C]lose to 90% of sexual abuse cases are never reported to the authorities.").

[9] LYNNE ABRAHAM, DIST. ATT'Y, CITY OF PHILA., REPORT OF THE GRAND JURY (2005), *available at* http://www.philadelphiadistrictattorney.com/images/Grand_Jury_Report.pdf (describing the lengths taken by Philadelphia Archdiocese officials to cover up known abuse by clergy); MARTHA BECK, LEAVING THE SAINTS: HOW I LOST THE MORMONS AND FOUND MY FAITH (2005); Mark Donald, *Judging Amy? Jehovah's Witnesses Sued for Allegedly Protecting Members Who Abuse*, May 5, 2004, *available at* http://www.silentlambs.org/Texaslawarticle.htm (describing imposition of silence placed on members reporting abuse, under threat of excommunication); *Connie Chung Tonight: Witnesses Abused? Church Accused of Failing Children* (CNN television broadcast, Aug. 24, 2002), *transcript available at* http://www.watchtowerinformationservice.org/chung.htm (same) (last visited June 10, 2007).

[10] THE SUPREME AND HOLY CONGREGATION OF THE HOLY OFFICE, INSTRUCTION: ON THE MATTER OF PROCEEDING IN CASES OF SOLICITATION (Vatican Press 1962), http://image.guardian.co.uk/sys-files/Observer/documents/2003/08/16/Criminales.pdf (describing procedure for handling sexual offenses and outlining a policy of the strictest secrecy under penalty of excommunication); *see also* THOMAS P. DOYLE, A.W.R. SIPE & PATRICK J. WALL, SEX, PRIESTS, AND SECRET CODES: THE CATHOLIC CHURCH'S 2000-YEAR PAPER TRAIL OF SEXUAL ABUSE (2006).

[11] *See, e.g.*, REPORT OF THE GRAND JURY, *supra* note 9, at 5 ("One abusive priest was transferred so many times that, according to the Archdiocese's own records, they were running out of places to send him where he would not already be known"); PETER W. HEED, ATT'Y GEN., STATE OF N.H., REPORT ON THE INVESTIGATION OF THE DIOCESE OF MANCHESTER (2003),

newspapers to look the other way when they learn of individual cases;[12] and, most important for this essay, (5) insisting on autonomy from the tort and criminal law for the organization's role in the furtherance of the abuse.

Until very recently, children abused by clergy in the United States were in an extraordinarily weak position to protect themselves because so many elements of society worked against their interests. Obviously, the priest or pastor or rabbi harmed them at the start, but then the measures that might have brought either justice or protection for children did not activate. Because of the American reverence for clergy and religion in general, when children reported abuse by their trusted clergy, their parents often did not believe them.[13] If word seeped out

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available at http://doj.nh.gov/publications/pdf/3303diocesefull.pdf (delineating the diocese practice of transferring priests to other locations after incidents of sexual abuse); JASON BERRY, LEAD US NOT INTO TEMPTATION: CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN (Univ. of Ill. Press 2000); JASON BERRY & GERALD RENNER, VOWS OF SILENCE: THE ABUSE OF POWER IN THE PAPACY OF JOHN PAUL II (2004); Christa Brown, Op-Ed, *No More Church Secrets about Sex Abuse*, DALLAS MORN. NEWS, Apr. 28, 2006, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-brown_28edi.ART.State.Edition1.153aa9d6.html (describing how the author's own abuser was shifted to another Southern Baptist Church and she was instructed not to speak of the abuse); Brendan M. Case, Reese Dunklin, & Brooks Egerton, *Too Much Tolerance? Even as U.S. Catholic Leaders Tout Their Tougher Child Abuse Policy, Some Have Allowed Fallen Priests to Start Over Abroad, and Some Haven't Asked the Vatican to Expel Them*, DALLAS MORN. NEWS, Mar. 16, 2005 at A14 (citing multiple instances of priests moving to new churches in other countries); Thomas Farragher & Sacha Pfeiffer, *Records Detail Quiet Shifting of Rogue Priests*, BOSTON GLOBE, Dec. 4, 2002, at A1; Tom Heinen, *Archdiocese Gave $10,000 to Priest; Defrocked Cleric Tied to Multimillion-dollar Sex Abuse Settlement*, MILWAUKEE J. SENTINEL, Sept. 8, 2006, at B7 (detailing how Friar Franklyn Becker was repeatedly reassigned to positions in the youth ministry, despite his admitted attraction to young boys); Marie Rohde, *Covering for an Abusive Priest: Archdiocese Knew of Pedophile, Records Just Released Confirm*, MILWAUKEE J. SENTINEL, Feb. 11, 2007, at B1 (describing how known child abuser Friar Siegfried Widera was moved from Wisconsin to California after discovery of abuse); Marie Rohde, *Records of Pedophile Priest to Become Public; California Court Case Involves Former Milwaukee Cleric*, MILWAUKEE J. SENTINEL, Feb. 8, 2007, at B1 (in releasing 3,000 pages of church documents, California judge said that "[p]riests with known sexual proclivities have been handed off from one location to another without regard to the potential harm to the children of the church as well as the family members of those children"); Marci A. Hamilton, *Bringing the Fight for Clergy Child Abuse Victims to an International Arena: Cases Show that California/Mexico Priest Shuffling also Occurred*, Oct. 19, 2006, http://writ.news.findlaw.com/hamilton/20061019.html.

[12] *See, e.g.*, Bruce Murphy, *The Catholic Cover-up*, MILWAUKEE MAG., Feb. 13, 2007 (detailing how Milwaukee Journal editors pulled writer Marie Rohde from covering Milwaukee clergy abuse scandal in 1995 under pressure from the Milwaukee Archdiocese, and suggesting former Milwaukee District Attorney E. Michael McCann was compromised by close relationship with Archbishop Rembert Weakland).

[13] *See, e.g.*, REPORT OF THE GRAND JURY, *supra* note 9, at 3 ("A boy who told his father about the abuse his younger brother was suffering was beaten to the point of unconsciousness. 'Priests don't do that,' said the father as he punished his son for what he thought was a vicious lie against the clergy"); Sandra G. Goodman, *How Deep the Scars of Abuse? Some Victims Crippled; Others Stay Resilient*, WASH. POST, July 29, 2002, at A1 (reporting a story where a victim's parents didn't believe him when he told them about the abuse as a child, and they cut their son off when he and his wife sued the St. Louis archdiocese).

that a child had been abused, the organization or the hierarchy would importune the prosecutors and/or the newspapers, and typically persuade them to permit the religious organization to "handle" the issue internally. In addition, children are the last frontier for civil rights, and, therefore, until very recently, their needs have not dominated either sophisticated legal scholarship, especially constitutional and First Amendment law, or legislative concern.[14] Sadly, perpetrators have been more protected under existing law than victims, e.g., an egregious legal failure for victims of clergy abuse has been the extraordinarily short statutes of limitations in many states that deterred the vast majority of victims because of difficulties in coming forward.[15] In sum, law enforcement, the press, families, churches, and the law itself let these children down.

Some might argue that since the problem of clergy abuse has been with us for centuries,[16] a modern free exercise doctrine cannot be blamed for any aspect of it. That is a fair point, but it misses the mark. The question here is how the law has failed to *alter* the course of clergy abuse. Regardless of the religious organization's practices, when there is an abhorrent social practice like clergy abuse and organizational cover up, the issue is whether the law has aided in putting a halt to the problem.[17] If the First Amendment has undermined the deterrent effect of the tort laws at issue, there is reason to question the doctrine.[18] After all, the intent of the Constitution is to permit the United States to

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[14] *See* James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making about Their Relationships*, 11 WM. & MARY BILL RTS. J. 845 (2003).

[15] I will address this issue in detail in my book, HOW TO DELIVER US FROM EVIL (forthcoming Fall 2007).

[16] *See generally* DOYLE et al., *supra* note 10.

[17] This essay is focused on First Amendment doctrine, but it would not be the only legal rule that has contributed to the problem of clergy abuse. One other element is that actions governing negligent hiring, retention, and supervision are relatively modern theories. *See* RESTATEMENT (SECOND) OF AGENCY § 213 (1958) ("A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others; (c) in the supervision of the activity"); *see also* 1 J.D. LEE & BARRY LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 7:19 (2d ed. 2006) ("In recognizing the tort of negligent hiring or retention of an incompetent, unfit or dangerous employee, the employee's conduct which may form the basis of the cause of action need not be within the scope of employment. This is because liability of the employer is direct and not based upon respondent superior principles; rather, the liability of the employer is based upon its failure to exercise reasonable care in selecting the employee, and thus exposing third parties to an unreasonable risk of harm. Stated another way, liability results not because of the employer-employee relationship, but because the employer had reason to believe that an undue risk of harm to others would exist as a result of the employment of the employee.").

[18] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 19 (Tentative Draft No. 1, Mar. 28, 2001) (noting that tort law has a deterrent effect); Anthony J. Sperber, Comment, *When Nondisclosure Becomes Misrepresentation: Shaping Employer Liability for Incomplete Job References*, 32 U.S.F. L. REV. 405 (1998) (giving policy reasons for recognizing the tort of negligent misrepresentation which includes negligent hiring liability and its deterrent effect).

achieve the common good, not just to generate theoretically or logically appealing doctrines. As society has moved toward a more protective stance toward children, religious institutions seem to have been singularly unresponsive to these legal developments. They have been shielded by the so-called "ministerial exception" in employment disputes brought by clergy in many jurisdictions, which seems to have led them to assume that any decision involving clergy might be immune from secular regulation.[19] Reinforcing this attitude are the many exemptions they receive[20] and the constitutional theories that would permit churches to believe that they are beyond the reach of the law whenever the issue involves internal affairs or clergy, such as church autonomy theory and strict scrutiny of neutral, generally applicable laws under the Free Exercise Clause.[21]

This Essay focuses on one legal element in this social mix that has contributed to the morass that put so many children at needless risk—the legal academy's theoretical construction of a sphere of autonomy for religious organizations.[22] In Part I.A, I will detail and critique the

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[19] *See, e.g.*, Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698 (7th Cir. 2003) (holding that the ministerial exception precludes any inquiry into reasons behind church's ministerial employment decision); *see also* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006); Werft v. Desert Sw. Annual Conf. of United Methodist Church, 377 F.3d 1099 (9th Cir. 2004); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999); Combs v. Cent. Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); Bell v. Presbyterian Church, 126 F.3d 328 (4th Cir. 1997); E.E.O.C. v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); Scharon v. Saint Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991).

[20] In addition to the lesser known exemptions I document in *God vs. the Gavel*, religious organizations receive numerous exemptions, including income tax exemptions, property tax exemptions, parsonage exemptions, bankruptcy law exemptions, elective Social Security tax exemption, and even pension fund exemptions. *See generally* WILLIAM W. BASSETT, RELIGIOUS ORGANIZATIONS AND THE LAW § 1:11 (updated 2006); Basil Facchina, Evan A. Showell, & Jan E. Stone, *Privileges & Exemptions Enjoyed by Nonprofit Organizations*, 28 U.S.F. L. REV. 85 (1993).

[21] This phenomenon is still in place in states like Wisconsin, which has employed the First Amendment as a bar in clergy abuse cases. *See* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995); L.L.N. v. Clauder, 563 N.W.2d 434 (Wis. 1997). *But see* Mary Doe SD v. Salvation Army, No. 4:07CV362MLM, mem. at 10-13 (E.D. Mo. Sept. 20, 2007) (holding that plaintiff's claim for negligent supervision of clery in a sexual abuse case is not barred by the Free Exercise Clause or the Establishment Clause of the First Amendment).

[22] I suppose there will be those who might argue that even though the academy might theorize, it cannot be held responsible for the real-world application of some theories. Perhaps that perspective might have some purchase in other arenas, but there is no doubt that the scholars in the law and religion arena, including myself, play a significant role in the actual application of legal theory of the Religion Clauses, in both judicial and legislative spheres. For example, Professor Laycock represented Archbishop Flores in *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding Religious Freedom Restoration Act unconstitutional), while I represented the City of Boerne. *See also* Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 774-75 (1998) (describing role in "shaping" disingenuous legislative history behind Religious Freedom Restoration Act); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH L. REV. 841, 851-56 (1992) (advocating passage

"church autonomy" theory, especially as articulated by Professor Douglas Laycock and more recently, Mark Chopko, General Counsel to the United States Conference of Catholic Bishops and Adjunct Professor of Law at Georgetown University Law Center. In Part I.B, I will turn my attention to the theory that the Free Exercise Clause mandates strict scrutiny for any law that burdens religious conduct, whether or not it is neutral or generally applicable, and how such free exercise rights can disable the tort laws that would otherwise protect children. This theory has been most enthusiastically endorsed by then-Professor Michael McConnell, Professor Laycock, and others. I conclude that the Supreme Court's current articulation of free exercise principles, which does not create such an expansive sphere of autonomy for religious entities, is the far preferable approach if the cycle of clergy abuse is ever to end.

I. MISGUIDED FIRST AMENDMENT THEORIES

One of the primary problems with so much discussion concerning the Religion Clauses in the United States is that it is too often theoretical, abstract, and unmoored from reality. I wrote *God vs. the Gavel* in order to bring to the public's attention some of the facts that are swept away or simply not known when legal academics, judges, or commentators start to theorize. The clergy abuse crisis, which cannot be avoided in any part of the country, is the Waterloo for many of these theories. No one would sanction a First Amendment theory that would permit the murder of others to occur without accountability to society. There is hardly more reason to defend a First Amendment theory that would forbid society from using the law to deter religious organizations from permitting, aiding and abetting, and furthering the childhood sexual abuse of children by their clergy, employees, and volunteers.

In order to ground the following discussion, it is worthwhile to detail at least one case of clergy abuse. One difficulty in these situations for legal academics is that the discussions of these issues occur at such an abstract level, so it is worthwhile to provide a concrete example of the type of case at the heart of this debate. This is a classic story of institutional knowledge, cover up, and the failure to protect further victims from a child predator.

Between 1973 and 1976, Fr. Siegfried Widera sexually abused four boys at St. Andrew's Parish in Delavan, Wisconsin. He had been criminally convicted of child molestation, a fact known to Fr. John Theisen, director of the Milwaukee Archdiocese's Personnel Board in

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of the Religious Freedom Restoration Act of 1993 (RFRA)).

1973, and preserved in Archdiocese records. In the same year, the Archdiocese received a letter from one of Widera's former colleagues, which detailed Widera's inappropriate conduct with respect to children. The next year, the Milwaukee Archdiocese transferred Widera from Port Washington, Wisconsin to St. Andrew's without informing members of the parish of Widera's criminal conviction, probation, or the concerns expressed by those who knew him. In 1976, the Archdiocese was alerted that Widera had sexually molested another child and its notes indicate that the decision was made to keep that fact quiet in order to avoid police records. In 1976, Widera was discharged from probation, because the state had no knowledge he had violated his probation by further abusing children, and then he was transferred to California, where he molested more boys.[23]

A. *The Pernicious Church Autonomy Doctrine*

The first time that I read a brief filed by the Roman Catholic Church hierarchy in a clergy abuse case alleging hierarchical cover up of egregious child abuse, I literally could not believe what I was reading. The abuse was grotesque in individual cases and en masse, and the orchestrated cover up was patently offensive. Waving the American Constitution's First Amendment seemed like the last appropriate response.

In fact, when the clergy abuse scandal first broke in Boston in 2002, the Church did not raise the First Amendment as a defense to its culpability for enabling the heinous acts of child abuse by its priests by concealing its knowledge of the sexual proclivities of some of its clergy and moving them from parish to parish once those sexual proclivities were discovered.[24] That seems appropriate. One's natural reaction, as

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[23] For many years, Wisconsin First Amendment and statute of limitations jurisprudence barred the victim's claims. *See* Complaint at, ¶¶ 4-11, 18-28, 30-31, 33-34, John Doe I v. Archdiocese of Milwaukee, 2006 WI App 194, 722 N.W.2d 400. In an opinion that opened the door for survivors, the Wisconsin Supreme Court recently permitted allegations of fraud by clergy abuse survivors to go forward. John Doe I v. Archdiocese of Milwaukee, 2007 WI 95, 734 N.W.2d 827 (Wis. 2007) (affirming the dismissal of negligent supervision claims as barred by the statute of limitations, but reversing and remanding dismissal of fraud claims). Even though the case is still pending, the facts are stated as true rather than "alleged," because of the recent release of church documents involving Widera as a result of California clergy abuse litigation. *See, e.g.*, Tom Heinen, *$17 Million Settles 10 Abuse Cases: Archdiocese Will Sell Cousins Center; Insurance to Pay Half*, MILWAUKEE J. SENTINEL, Sept. 2, 2006, at A1; Tom Heinen, *supra* note 11, at B7; Bruce Murphy, *supra* note 12; Marie Rohde, *Records of Pedophile Priest to Become Public*, *supra* note 11, at B1; Marie Rohde, *Covering for an Abusive Priest*, *supra* note 11, at B1.

[24] *See* Thomas Farragher, *Church Cloaked in Culture of Silence*, BOSTON GLOBE, Feb. 24, 2002, at A1; Michael Rezendes, *Priest Says Church Sought to Cover Up Suit against Him*, BOSTON GLOBE, Jan. 31, 2002, at B3; Walter V. Robinson, *Scores of Priests Involved in Sex*

an American citizen, to being charged with covering up the sexual abuse of hundreds of children would not be to invoke the First Amendment. Given that the modus operandi was cover up, the first response to the public revelations had to be one of shock, but it did not take long for the Church's lawyers to start raising the First Amendment as a defense to its liability for the cover up and the harm.[25] The First Amendment arguments have ranged far afield, but the consistent theme has been a claim to "church autonomy," which is a term first adopted in the literature by Professor Laycock.[26]

On its face, the term of art is absurd, because no entity in the United States' system of judgment is autonomous from the law. This is a system of "ordered liberty," first and foremost,[27] and the only absolute right that exists is the right to believe what one chooses.[28] In most

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Abuse Cases, BOSTON GLOBE, Jan. 31, 2002, at A1. Complete coverage of the clergy abuse scandal by BOSTON GLOBE is available at http://www.boston.com/globe/spotlight/abuse.

[25] Walter V. Robinson, *Church Seeks Exemption in Suit*, BOSTON GLOBE, Mar. 13, 2002, at B3; Marci A. Hamilton, *Sacrificial Lambs? Child Abuse, Religious Exemptions, and the Separation of Church and State*, http://writ.news.findlaw.com/hamilton/20020328.html (last visited June 10, 2007).

[26] Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

[27] It was commonplace at the time of the framing to pair liberty with the necessity of order. For example, many state constitutions had free exercise provisions with exceptions for safety, health and welfare. City of Boerne v. Flores, 521 U.S. 507, 539 (1997) (Scalia, J. concurring) ("Religious exercise shall be permitted *so long as it does not violate general laws governing conduct*. The 'provisos' in the enactments negate a license to act in a manner 'unfaithful to the Lord Proprietary' (Maryland Act Concerning Religion of 1649), or 'behave' in other than a 'peaceable and quiet' manner (Rhode Island Charter of 1663), or 'disturb the public peace' (New Hampshire Constitution), or interfere with the 'peace [and] safety of the State' (New York, Maryland, and Georgia Constitutions), or 'demean' oneself in other than a 'peaceable and orderly manner' (Northwest Ordinance of 1787)."). *See also* Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J.L. & POL. 387, 392 (2002):

> The latter eighteenth century sermons reveal that religious leaders of the day did not envision a society that would permit any person to be a "law unto himself." Their vision was more collective, or at least more community-based. For believers to achieve true liberty they needed to obey the laws enacted by the duly elected legislatures, for the sake of order and the public good.

In addition, an influential religious document at the time of the framing, the Westminster Confession of 1788, rests on the same pairing of order and liberty. It forbids public officials from administering religion, requires the protection of religious liberty, and makes it

> the duty of civil magistrates to protect the person and good name of all their people, in such an effectual manner as that no person be suffered, either upon pretence of religion or of infidelity, to offer any indignity, violence, abuse, or injury to any other person whatsoever; and to take order, that all religious and ecclesiastical assemblies be held without molestation or disturbance.

SYNOD OF PHILADELPHIA AND NEW YORK, PRESBYTERIAN CHURCH IN AMERICA, WESTMINSTER CONFESSION OF FAITH (revised and adopted May 28, 1788). For advocacy of this concept in the context of clergy sexual abuse, see Angela Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. REV. 1031 (2003).

[28] A Lexis search indicates that the Supreme Court has used the phrase "ordered liberty" in 116 cases in its history. *See generally* HAMILTON, *supra* note 5, at 207 n.17.

cases, however, its proponents have limited it to the "internal" aspects of a church. It is not at all clear what constitutional value is served by this theory of autonomy, because it is based on unstated or unexamined assumptions.

For example, Laycock's article on church autonomy presumes autonomy from the law is a positive good throughout, but he never provides a theoretical or empirical foundation that would justify the anomalous idea that churches, which, after all are run by humans, need not be deterred from bad behavior any more than other organizations. More than once, though, he seems to say that the church autonomy theory is necessary because it prevents "interfere[nce] with the very process of forming the religion as it will exist in the future."[29] In other words, the law should not have an impact that would alter the course of the church's future. Thus, he has posited a high degree of self-determination for religious organizations, which is intended to isolate them from legal obligations imposed on others.[30]

The universe of Laycock's church autonomy is quite capacious: His theory "of autonomy logically extends to all aspects of church operations"[31] and sees particularly "strong claims to autonomy with respect to employment of teachers."[32] Moreover, he argues that "[t]he state has no legitimate interest sufficient to warrant protection of church members from their church with respect to discrimination, economic exploitation, or a wide range of other evils that the state tries to prevent in the secular economy."[33]

Laycock has not argued, however, that religious entities deserve a right to immunity from the law in all circumstances. He divides the possibilities into internal and external affairs, with internal affairs virtually immune from the law, while issues dealing with those external to the church subject to the law. While "[a]lleged state interests in regulating internal church affairs—e.g., protection of church members

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[29] Laycock, *supra* note 26, at 1391; *see also id.* at 1400 (arguing need for autonomy so that "the further development of the religion" is unhindered).

[30] Douglas Laycock, *Academic Freedom and the Free Exercise of Religion*, 66 TEX. L. REV. 1455, 1461 (1988); *see also* Kathleen Brady, *Religious Group Autonomy: Further Reflections About What Is At Stake*, 22 J. L. RELIGION 153 (2006); Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633; Mark E. Chopko, *Church Autonomy and Religious Group Liability: Continuing the Lord's Work and Healing His People: A Reply to Professors Lupu and Tuttle*, 2004 BYU L. REV. 1897 (2004); Mark E. Chopko, *Stating Claims against Religious Institutions*, 44 B.C. L. REV. 1089 (2003); Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 131 (2003); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409 (1986). *But see* Marci A. Hamilton, *A Response to Professor Brady*, 22 J. L. RELIGION (forthcoming 2007); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099.

[31] Laycock, *supra* note 26, at 1397.

[32] *Id.* at 1411.

[33] *Id.* at 1403.

and church workers from exploitation—are usually illegitimate and should not count at all,"[34] "[t]here is no free exercise problem in holding churches responsible to outsiders under the ordinary rules of contract, property, and tort."[35]

Mark Chopko, who is responsible for legal strategy for American Catholic bishops, has built on Laycock's work, and argued for the same sort of immunity for internal actions, regardless of motivation.[36] He advocates a "free space for a Bishop—free of the demands of government officials, insurers, church bureaucrats, litigants, and anyone else who would force a particular decision or approach on a Bishop."[37] Like Laycock, he fails to see the need for the law or society to act as a deterrent to certain actions within the organization, saying, "[r]eligious institutions have broad autonomy to order their internal affairs according to religious doctrine and should not have to recede from religiously motivated actions for fear of legislators, regulators, or courts."[38] Neither Chopko nor Laycock seem to apprehend the folly of immunizing institutions and their leaders from social accountability, but that is in part, at least in Chopko's case, because he has an overly optimistic assessment of the law relating to clergy abuse.[39]

It is precisely this internal/external distinction that church lawyers defending against the clergy abuse claims have tried to exploit in order to avoid liability for covering up the identity of known child predators. In California, to avoid discovery requests aimed at their employment files that typically document the cover up, the hierarchy's lawyers repeatedly resorted to "privilege," which included many privileges such as the attorney-client privilege, the priest-penitent privilege, and the psychotherapist-patient privilege, usually to no avail.[40] They also

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[34] *Id.* at 1374.

[35] *Id.* at 1406.

[36] Chopko, *Shaping the Church*, *supra* note 30, at 142 ("Any governmental attempt to intrude into the inner order and governance of a church by artificially classifying certain matters as non-religious is per se unconstitutional.").

[37] *Id.* at 130 ("Each institution—religion and government—has autonomy appropriate to its sphere.").

[38] *Id.* at 131.

[39] *Id.* at 152 (stating that "[t]he actions of religious superiors might have been misguided, but not criminal. . . . [T]here is no liability in the Holy See"). But for the statute of limitations, many in the hierarchy would have been subjects of criminal investigation and charges. *See, e.g.*, HEED, *supra* note 11 (New Hampshire Attorney General filed charges which were then dismissed on statute of limitations grounds); REPORT OF THE GRAND JURY, *supra* note 9, at 1 (but for the statute of limitations Philadelphia Archdiocese officials including Cardinal Bevilacqua may well have violated criminal laws); Doe v. Holy See, 434 F. Supp. 2d 925 (D. Or. 2006) (permitting clergy abuse action to proceed against Holy See); O'Bryan v. Holy See, 471 F. Supp. 2d 784 (D. Ky. 2007) (permitting clergy abuse class action to proceed against Holy See).

[40] Roman Catholic Archbishop of Los Angeles v. Superior Court, 32 Cal. Rptr. 3d 209, 231, 239 (Cal. Ct. App. 2005) (rejecting clergy-penitent privilege; psychotherapist-patient privilege shields only one document out of hundreds of documents subpoenaed); The Clergy Cases I, No. JCCP4286 (Cal. Super. Ct. July 26, 2006) (attorney-client privilege, Fifth Amendment privilege,

asserted that there was a privilege created by the First Amendment, though not recognized before in state law, for discussions between clergy and the hierarchy. They dubbed it the "formation privilege."[41] The argument is typically raised as follows:

> Roman Catholic priests owe a lifelong allegiance to the bishop that incardinated them, and are expected to confide in him completely on matters, including intimate personal problems, that affect their ability to represent Christ; when they have problems, the bishop is obligated to help them overcome those problems. That relationship is essential to the practice of their Catholic faith.[42]

Therefore, because "exercise of legitimate governmental powers may be prohibited when they have the effect of chilling or discouraging exercise of religious rights" the communications between a bishop and his priests, as memorialized in "a priest's records, both personnel and confidential" should be privileged.[43]

As one can see from the foregoing, the reasoning of the formation privilege is built on the shaky theoretical foundation of "church autonomy." Laycock had presaged the defense twenty years earlier: "When the state interferes with the autonomy within a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future."[44] The hierarchy's lawyers were arguing that the internal sphere of clergy-hierarchical relations was properly immune from judicial examination. For them, the church autonomy approach meant that all of the cases should be dismissed.

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or First Amendment claims did not bar discovery); The Clergy Cases II, No. JCCP4297 (Cal. Super. Ct. Sept. 25, 2006) (holding that First Amendment, clergy-penitent privilege, and attorney-client privilege as to seven documents sent to third parties do not bar production); Charissa W. v. Watchtower Bible & Tract Soc'y of N.Y., Inc., No. 26-22191 (Cal. Super. Ct. Oct. 16, 2006) (ruling on submitted discovery motions that clergy-penitent privilege does not apply; attorney-client and work product privileges shield only two items).

41 Roman Catholic Archbishop of L.A., 23 Cal. Rptr. 3d 209 (Cal. Ct. App. 2005) (describing at length and rejecting the formation of clergy theory).

42 Petition for a Writ of Certiorari, Does 1 and 2 v. Superior Court of L.A. County, No. 05-1039, 2006 WL 368846, at *24 (Feb. 14, 2006), *cert. denied*, 547 U.S. 1071 (2006).

43 *Id.* at *24-26.

44 Laycock, *Towards a General Theory of the Religion Clauses*, *supra* note 26, at 1391. The difference with Laycock's theory is that he was arguing for the necessity of internal autonomy in order to protect the formation of the entire organization. The Catholic hierarchy has limited its arguments to the narrower sphere of the relationship between clergy and their superiors. *See also* Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725, 726-27 ("In practical effect, however, 'neutral' and 'generally applicable' regulations sustainable under *Smith* can have a devastating impact on religious liberty. Such regulations hamper the ability of adherents to both practice firmly held religious beliefs and to gather together with co-believers in a place of worship where they may learn from one another, edify each other, instruct one another, and receive important rites, sacraments, and blessings. . . . The growth of government at all levels, combined with government's tendency to over-regulate, demand additional protection for religious practice if we are to realize a full measure of religious liberty.").

Though this reasoning has not prevailed in recent clergy abuse cases,[45] it seems to have influenced the hierarchy's decisions with respect to the movement of clergy.

The clergy abuse cases have made it quite clear that a distinction between internal and external affairs is unsupportable. With respect to the general theory, the clergy abuse crisis puts the lie to the notion that the First Amendment should protect a religious organization's right to evolve at will. Everything about clergy abuse happens inside the religious organization—the victim, usually a member of the church, is acquainted with the perpetrator through his role as clergy, the reporting of the abuse to the hierarchy (or other members) occurs within the organization, as does the subsequent cover up, and all of the proof is held within the organization's employment files. Each of Laycock's markers for invoking the church autonomy thesis are present here—internal decision-making, church members, clergy, often church teachers, and issues involving employment. If church autonomy is at its strongest when everything occurs internally, then what is meant by church autonomy is immunity from tort and criminal law when the religious organization is involved in hiding criminal activity from the authorities and its own members, whose children are at risk. That cannot be squared with what is in the best interest of the larger society, children, or even the church, let alone common sense. It turns the First Amendment into a shield for the most heinous of behaviors, as it perpetuates the unacceptable behavior.

There is very strong reason to doubt the soundness of a doctrine that would protect churches from legal liability based on their need for self-determination. While their right to determination of their religious belief and orthodoxy cannot be dictated by the courts,[46] their ability to engage in conduct that harms others cannot be so unencumbered by legal obligation.[47] There are plenty of behaviors that churches (as well as every other organization) should be deterred from pursuing, even if it were the natural product of the organization's most dearly held beliefs. Society should not have to pretend that religious organizations do not engage in socially dangerous behaviors, and, therefore, suffer the harmful consequences of their unchecked behaviors. Laycock concedes

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[45] *See supra* notes 41-42; *see also* Melanie H. v. Doe, Civ. No. 04 CV 1596 WQH-(WMc) (S.D. Cal. Dec. 21, 2005) (one year window reviving otherwise time-barred claims relating to sexual abuse does not violate First Amendment protections for religion); *In re* the Roman Catholic Bishop of San Diego, No. 07cv1355-IEG(RBB) at 3-4 (S.D. Cal. Aug. 20, 2007) (denying Debtor's challenge to the constitutionality of California's window statute under the due process, ex post facto, and bill of attainder clauses of the U.S. Constitution).

[46] *See* HAMILTON, *supra* note 5, 240-43; *see also* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. 679 (1872).

[47] *See generally* HAMILTON, *supra* note 5, at chs. 1-7.

contract law, property law, and tort law in disputes involving outsiders (and, apparently, when the issues do not affect internal aspects of the organization) are properly applicable to religious organizations, but I did not find an instance where he does the same for criminal law, or employment law. He admits two exceptions to autonomy when the issue is internal, to cases involving young children or bodily harm.[48] That would leave out the many clergy abuse cases involving adolescents and presumably sexual touching that does not result in bodily harm.[49] It would appear that his theory leaves tremendous room for religious organizations to harm children without accountability.

The clergy abuse cases bring to the fore the inherent weaknesses of an autonomy theory for religious organizations. There is no necessary good in the development of a religious organization when that organization is orchestrating a worldwide system of covering up the abuse of children by its clergy. The myth of autonomy led these institutions to believe that they had a right to handle repeated crimes in private and to place their public image above the interests of vulnerable children. The results of such a world view—the permanent emotional disability of thousands of children and, therefore, their families as well—are anathema to any rational moral or democratic system. The legal system failed to deter them, and thereby contributed to the exponential increase in child abuse within these institutions.

B. *The Free Rein, Free Exercise Clause*

There has been sharp debate regarding the level of scrutiny to be applied under the Free Exercise Clause, when the law at issue is neutral and generally applicable. As I explain in *God vs. the Gavel: Religion and the Rule of Law*, the dominant approach at the Supreme Court has been to apply such laws to religious entities.[50] This approach culminated in 1990 with the Supreme Court's affirmation of the dominant approach, in *Employment Division v. Smith*.[51] Legal scholars at the time like now-Judge Michael McConnell and Professor Laycock, among others, strongly resisted, to state it mildly, the Court's embrace of low-level scrutiny for neutral laws of general applicability.[52] They

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[48] Laycock, *supra* note 26, at 1406.

[49] On this reading, Laycock's theory is not far from that of Professors Lupu and Tuttle, who would permit religious organizations to negligently fail to protect children. *See* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, *supra* note 30, at 1171-73 (citing Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1845-73).

[50] HAMILTON, *supra* note 5, at 205-14.

[51] 494 U.S. 872 (1990).

[52] Douglas Laycock, *The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 848 (1992)

passionately advocated strict scrutiny across all laws, including when the issue is the liability of a religious organization.[53] Laycock, in fact, places his church autonomy theory in the Free Exercise Clause, which, on his terms, "forbids government interference with church operations unless there is, to use the conventional phrase, a compelling governmental interest to justify the interference. Identifying those governmental interests that are sufficient is a complex task that requires further exploration."[54] Suffice it to say that the category of societal or governmental interests that trump the religious organization's needs is quite small, on their reasoning, because "[a] church's legitimate interest in autonomy has few natural limits," so that the analysis should be "tilted in favor of the constitutional right,"[55] which really means tilted in favor of the religious organization since there is no constitutional right to autonomy in the sense that he would posit.

Thus, strict scrutiny under the Free Exercise Clause sends the same message as "autonomy"—religious organizations need not be concerned with the vast majority of secular law. They have free rein to operate without reference to just about any outside interest. Laycock has pushed this notion as a matter of "deregulating," religious practices,[56] as has Michael McConnell.[57] Under their thinking, this is a matter of

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(referring to *Smith* as "the near total loss of any substantive constitutional right to practice religion" and talking about "our despair over the loss of protection for religious exercise").

[53] They have not been terribly concerned whether strict scrutiny is obtained through the courts or the legislatures. Having lost the battle at the Supreme Court, they turned to the legislatures to institute strict scrutiny through the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (2000), the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C.A. § 2000cc (2007), and thirteen state religious liberty statutes. *See* ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01 (2006); CONN. GEN. STAT. § 52-571b (2006); FLA. STAT. § 761.03 (2006); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. 35/1 (2007); MO. REV. STAT. § 1.302 (2007); N.M. STAT. § 28-22-3 (2007); OKLA. STAT. tit. 51 § 258 (2006); 71 PA. CONS. STAT. § 2401 (2006); R.I. GEN. LAWS § 42-80.1-3 (2007); S.C. CODE ANN. § 1-32-40 (2006); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001 (2006). RFRA only applies to the federal government, because it has been held unconstitutional as applied to the states, City of Boerne v. Flores, 521 U.S. 507 (1997), and RLUIPA applies solely to land use and government institutionalization, e.g., prisons and hospitals. The thirteen state religious liberty statutes have a wide range of exceptions for particular areas of the law, depending on the state.

[54] Laycock, *supra* note 26, at 1392; *see also* Michael McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1414-15 (1990) (arguing in favor of mandatory judicial exemptions); Chopko, *Shaping the Church*, *supra* note 30, at 134.

[55] Laycock, *supra* note 26, at 1402.

[56] Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 200 (2004). Laycock has also used the term "nonmolestation" of religion. Laycock, *supra* note 52, at 846 (citing Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 688-95 (1992)).

[57] Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 157-60 (1997). McConnell suggests that the "natural tendency of regulatory regimes is to make no exceptions for private concerns and to overinflate the

"simply" not regulating religious institutions, as though the absence of regulation is a pure and natural state (which goes without saying, they assume is beneficial for society). Moreover, the religious entities' free rein becomes entrenched so that it is gradually transformed into an entitlement.[58] In other words, application of the law to a religious entity becomes constitutionally and morally offensive, not just a "burden," which is the actual language of the doctrine. That point is particularly troublesome when religious institutions take these messages to mean that covering up child abuse is within a constitutionally protected sphere. When the Los Angeles District Attorney subpoenaed the Los Angeles Archdiocese for the personnel records of two former priests in a criminal child molestation investigation, the Archdiocese refused to comply.[59] Cardinal Roger Mahony's argument in court was that the subpoena constituted "an unconstitutional intrusion on private church affairs" and even though the request was only for 21 pages of documents, that the subpoena "inherently entangles the state in the internal religious life of churches and intrudes into religious practice."[60] The Cardinal's argument did not persuade the Superior Court of California, which ruled that the Archdiocese would have to turn over the documents; after the Court of Appeal affirmed, both the California Supreme Court and the United States Supreme Court declined to review the ruling.[61]

The strict scrutiny that has been advocated under the Free Exercise Clause would only recognize compelling interests that involve, for example, health and safety, and would impose a "least restrictive means" analysis that requires the courts to shape the law to accommodate the religious entity to the "maximum" extent possible.[62] Thus, the argument is made that negligence torts should not be applied to religious entities, because the lesser restrictive alternative is an intentional tort.[63] The result, if this view were to prevail, which it has

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importance of their own objectives—even when those private concerns are rooted in constitutional rights and accommodation could be made at reasonably low cost to public purposes," *id.* at 157, and that "governmental action at every level, of every description, and regardless of subject matter, can intrude deeply into the freedom of Americans to practice their religion in accordance with the dictates of conscience." *Id.* at 160. While these extremely broad assertions carry some truth, they fail to take account of the harm that religious conduct can cause and inescapably lead to the conclusion that conduct based on religious belief, no matter how harmful, cannot be regulated by secular law.

58 *See generally* Marci A. Hamilton, *Free? Exercise*, 42 WM. & MARY L. REV. 823 (2001).

59 Randal C. Archibald, *Archdiocese Loses Case to Keep Former Priests' Records Secret*, N.Y. TIMES, Apr. 18, 2006, at A24.

60 *Id.*

61 *Id.*

62 Laycock, *supra* note 52, at 854; Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality toward Religion, 39 DEPAUL L. REV. 993, 1018 (1990).

63 This is essentially Lupu and Tuttle's suggestion in their article on church autonomy. *See* Lupu and Tuttle, *supra* note 49.

not, is that the religious institutions would be protected at tremendous cost to society, which remains uninformed regarding the identity of many child predators.

Chopko has applied this reasoning to the clergy abuse context, in a way that severely limits the ability of victims of the Church's cover up to obtain relief. First, Chopko suggests that theories of respondeat superior bar an action against a religious employer, because the criminal act of the perpetrator could not have been within the scope of employment.[64] He correctly notes that this is the view of a majority of jurisdictions, with an exception for the Oregon courts.[65] The problem with this reasoning is that it fails to take into account the role of the religious organization in the placement of a known child predator in an employment position with access to children. Child abuse may not be one of the employment obligations of the clergy employee, but at least one state has taken a more expansive approach to scope of employment.

In *Fearing v. Bucher*, the Oregon Supreme Court was asked to determine whether or not a priest's acts in connection with his sexual abuse of a child were within the scope of his employment with the Archdiocese of Portland.[66] The court stated that the priest's "alleged sexual assaults on plaintiff clearly were outside the scope of his employment, *but our inquiry does not end there*. The Archdiocese still could be found vicariously liable, if acts that were within [the priest's] scope of employment resulted in the acts which led to injury to plaintiff."[67] In other words, the employer could be liable if the perpetrator used his position with the employer in order to achieve his criminal goals, and the employer knew that such actions could result from placing the perpetrator in that position. The complaint in *Fearing* included allegations that the priest used his position to access the child and gain the child and his family's trust, and that these grooming activities were done in connection with the priest's employment. The court concluded that allegations outside of the sexual abuse allegations were sufficient for "establishing that employee conduct was within the scope of employment."[68] The Oregon court's reasoning rejects the notion that the employer should not have any vicarious liability in a situation where the position of employment sets the stage for the child abuse. It is akin to the "ratification" theory adopted elsewhere.[69]

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[64] Chopko, *Stating Claims Against Religious Institutions*, *supra* note 30, at 1113-14.

[65] *Id.*

[66] 977 P.2d 1163, 1164 (Or. 1999).

[67] *Id.* at 1166 (internal quotations omitted) (emphasis added).

[68] *Id.* at 1167.

[69] *See, e.g.*, Jameson v. Gavett, 71 P.2d 937 (Cal. Dist. Ct. App. 1937); Fretland v. County of Humboldt, 82 Cal. Rptr. 2d 359 (Cal. Ct. App. 1999); Herrick v. Quality Hotels, Inns & Resorts, 24 Cal. Rptr. 2d 209(Cal. Ct. App. 1993); Rita M. v. Roman Catholic Archbishop, 323 Cal. Rptr. 685(Cal. Ct. App. 1986); Coats v. Construction & Gen. Laborers Local No. 185, 93 Cal. Rptr.

The better fit, admittedly, are claims based on negligence. The cases where abuse was known and then concealed feature negligent hiring, retention, and supervision. Chopko rejects negligent hiring and retention because he posits that courts in such cases are required to delve into religious questions. He is making the argument that the interpretation of terms like "appropriate investigation" or "unsuitability" are terms that cannot be applied by courts to religious entities "without probing deeply into basic religious questions for a faith community."[70] While these arguments might have some traction outside the universe of child abuse, it is difficult to see why a court cannot make a determination regarding an appropriate investigation involving child abuse or unsuitability of clergy to be near children without reference to religious doctrine.[71] Chopko's problem is that he has turned autonomy into a justification for looking at all legal problems through the lens of the religious organization. In these cases, though, the central issue always involves children, and it is both logical and sensible to pose the legal question as whether the person being considered or retained is appropriate for a job involving access to children, period. The secular courts need not look at the church's beliefs in order to take evidence of the organization's actions solely relating to children, just as it need not investigate beliefs when it weighs evidence involving a bounced check or a breach of contract. The church, of course, can also place religious restrictions on candidates and use religious principles in choosing any particular person for ministry. The question here is not qualifications for ministry per se, but rather employment for a position relating to children. Analogously, a Catholic hospital that employed a doctor who later turned out to have faked her credentials could not argue that its belief in reconciliation and forgiveness justify keeping the individual on as a doctor. Identifiable, neutral criteria must be satisfied for someone to be a doctor just as neutral criteria can be identified with respect to the choice of any employee—inside or outside of a religious organization—who will work near children.

If the institution chooses to place this person near children, it must act in ways that do not negligently put children at risk. Does this secularize the institution? No, it just makes it less dangerous to others.

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639 (Cal. Ct. App. 1971).

70 Chopko, *Stating Claims against Religious Institutions*, *supra* note 30, at 1115.

71 This is why an increasing majority of states are moving in the direction of applying neutral tort law principles in clergy abuse cases. *See, e.g.*, Malicki v. Doe, 814 So. 2d 347, 351 (Fla. 2002) (joining "the majority of both state and federal jurisdictions that have found no First Amendment bar" to civil litigation in clergy abuse cases, including: Colorado, Illinois, Indiana, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, Texas, Washington, Second Circuit, Fifth Circuit, Eighth Circuit, District of Rhode Island, Northern District of Iowa, Northern District of Texas, District of Connecticut, and the Eastern District of Michigan); Mary Doe SD v. Salvation Army, No. 4:07CV362MLM, mem. at 10 (E.D. Mo. Sept. 20, 2007) (stating that "religious entities remain subject to generally applicable, neutral employment law.").

This interest is undoubtedly compelling, but the compelling interest test is wrongheaded in the first place as it gives religious organizations hope that they need not take into account the needs of children as they make placement decisions involving clergy.

Chopko rightly concedes that it is more difficult to shield religious entities from negligent supervision claims, but he still pursues the path of arguing that churches should be able to avoid such claims. He says that "if the plaintiff's claims depend on a court reviewing internal policies and protocols, scrutinizing a religious chain of discipline, and assessing culpability because the religious entity emphasized reconciliation and not punishment, the 'very process of inquiry' may lead to an unconstitutional exercise."[72] Once again, if the arena were other than the welfare of children, he might have some small point, but when the question is the safety of children, it is very hard to argue against the notion that the general social norms that dictate certain minimum actions to protect children from harm must be followed by all organizations, religious or not. Whether or not the religious organization believes in reconciliation for its errant clergy is simply irrelevant to whether it acted negligently in persisting in employing a particular member of the clergy in a position that has access to children.

Chopko's real objection, though, appears to be the possibility that the law might alter the church; he would define the harm done to a church as follows: "The imposition of such a secular duty carries a risk of subtly altering the church's internal structure."[73] Like Laycock's discussion of "autonomy," he assumes that alteration in a church's internal affairs is necessarily problematic. Yet, when the issue is the systematic cover up of clergy abuse, it is hard to believe anyone would argue in favor of preserving present practices, though when one inhabits the universe of "church autonomy" and strict scrutiny, there are many arguments that take one down the path that bypasses common sense.

While Laycock has not weighed in specifically on clergy abuse issues, he has advocated "maximum religious liberty" as the goal of the Religion Clauses.[74] He sees it as an obvious social good. For Laycock, as for Chopko, his theories sound relatively sound, until they are tested by the realities of how religious organizations operate in the real world. As I document in *God vs. the Gavel*, the reality is that religious institutions have a significant potential for harm to others. If one knows and accepts the facts about religious entities, rather than operating from either an abstract or romantic assessment of religion, it is hard to justify the notion that the Religion Clauses exist to prevent the law from

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[72] Chopko, *Stating Claims against Religious Institutions*, *supra* note 31, at 1117.

[73] *Id.* at 1118.

[74] Laycock, *Formal, Substantive, and Disaggregated Neutrality toward Religion*, *supra* note 62, at 1018.

effecting change in religious organizations. If religious organizations that are harboring child predators are not forced to change, the result is obvious and wholly unacceptable.

CONCLUSION

General Counsel to the United States Bishops, Mark Chopko, would shield the Catholic Church from too much judicial interference as a result of the clergy abuse cases, because he would hate to see the Church remade "in dangerous ways."[75] One can only marvel at statements like this. What could be more dangerous than the Church's continuing history of covering up the sexual abuse of children? It has not ended. In 2007, Cardinal Francis George of the Chicago Archdiocese is desperately trying to explain away the fact he failed to report Father Daniel McCormack to the authorities, and, therefore, a boy was recently abused. When McCormack pled guilty to sexual assault, the Archdiocese issued a statement that McCormack's crimes were not really that bad—after all, he had pled guilty to sexual assault, not rape.[76]

It is hard to find a crime or social harm that is more heinous than childhood sexual abuse, other than, say, murder. The reality is that if the law does not push churches to be accountable for the child abuse within their organizations, there will be more child abuse. Nor has the theory of autonomy within the internal dynamics of a church yielded positive results. There is no evidence that leaving religious entities to their own devices results in a safer world for the children in their care.

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[75] Chopko, *Shaping the Church*, *supra* note 30 at 148-49.

[76] *See, e.g.*, Sue Ontiveros, *Mishandling of McCormack Case Shakes Faith*, CHIC. SUN TIMES, July 7, 2007, *available at* http://www.suntimes.com/news/ontiveros/459256,07 ontiveros.article; Letters to the Editor, *Betrayed Again by the Church: Three Takes on Father Daniel McCormack's Punishment*, CHIC. SUN TIMES, July 4, 2007, *available at* http://www.suntimes.com/news/commentary/letters/455414,CST-NWS-lightning04.article; Charles Sheehan et al., *George: 'I Take Responsibility': Monitoring of Priests to Change Now, He Says*, CHI. TRIB., Feb. 3, 2006, at 1 (noting that soon after Reverend Daniel McCormack of St. Agatha's Church in Chicago appeared in court to face charges of abusing a third boy since the first accusation of abuse surfaced in August 2005, Cardinal Francis George said that "he would immediately reform the monitoring program that should have kept the priest away from children"); Jay Weaver, *Ex-priest Doherty Implicated in Another Sex-abuse Suit*, MIAMI HERALD, Jan. 3, 2007, *available at* http://www.miami.com/mld/miamiherald/16374514.htm (reporting another child molestation suit filed against Reverend Neil Doherty of St. Vincent Catholic Church of the Archdiocese of Miami); Jim Doyle, *Bishop Avoids Charge in Failure to Swiftly Report Abuse Claims: Counseling instead of Misdemeanor for Delay in Notification*, S.F. CHRON., Nov. 21, 2006, at B2 (reporting that Bishop Daniel Walsh will enter a "pre-filing diversion" program in order to avoid being charged with violating a state mandatory sexual abuse reporting law when he failed to report serial child abuse by Rev. Francisco Ochoa-Perez, who is believed to have fled to Mexico); Editorial, *Notes on a Scandal: NH Clergy Abuse Five Years on*, UNION LEADER, Feb. 15, 2007, at A16.

Indeed, there is contrary evidence. None of the reforms embraced to date by the Catholic Church were taken as a result of autonomous actions. Rather, they were triggered by scandal and litigation, and there is good question how effective they have been, as evidence of further abuse and cover up continues to appear.

The Supreme Court has reached the correct balance—absolute protection of belief, but "[its] cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government."[77] Unless the issue is belief, "autonomy" is the wrong metaphor; it is too close to the licentiousness the framing generation feared,[78] and the Supreme Court has been right all along—ordered liberty is what the Constitution rightly demands. As I argue throughout *God vs. the Gavel: Religion and the Rule of Law*, the facts about religious conduct establish that autonomy is a mistake for which the vulnerable pay the price—nowhere is that as true as it is in the clergy abuse context.

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[77] Employment Div. v. Smith, 494 U.S. 872, 882 (1990) (quoting Gillette v. United States, 401 U.S. 437, 461 (1971)).

[78] *See generally* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, *supra* note 30, at 1156; Steven J. Heyman, *Righting the Balance: An Inquiry Into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1292 (1998); Henry Paul Monaghan, *We the Peoples, Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 142 (1996).