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On the Cover

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Artist Norman Laliberté's drawings of the first 10 Amendments to the Constitution are displayed at the New York State Bar Association in Albany in an area suitably named "The Gallery of the Bill of Rights." This panel depicts the Gutenberg-style printing press which printed Thomas Paine's revolutionary pamphlet, *Common Sense,* and later helped win popular support for the draft Constitution proposed by the 1787 Constitutional Convention. The font of type in the upper right corner reflects the opening words of the 1776 Declaration of American Independence which was widely distributed as a printed broadside. The Greek letters of Alpha and Omega symbolize the beginning and the end of the alphabet, and represent freedom of religion in the new nation.

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Message from the Chair

By Barbara F. Smith

In Search of Satisfaction

Recently, the Judicial Institute on Professionalism in the Law hosted a convocation on "The Face of the Profession: The First Seven Years of Practice." In my capacity as a member of the NYSBA Committee on Attorney Professionalism, I attended. I thought the proceedings would be of interest to our readers.

"[L]egal employers have a better chance of attracting and retaining staff if they provide . . . advancement opportunities, availability of mentors, professional development opportunities, and individual control over the attorney's own work."

Created in 1999 by Chief Judge Judith S. Kaye, the Judicial Institute is a permanent commission established in the Office of Court Administration, dedicated to nurturing professionalism among members of the bar. Louis A. Craco chairs the 19-member board, which includes attorneys from various areas and settings of practice, judges, law faculty, and at least one public member. The Institute's purposes include promoting the awareness of and adherence to professional values and ethical behavior by lawyers; promoting scholarship regarding and attention to issues of professionalism and legal ethics; and facilitating cooperation in the legal community to address professionalism, ethics and public understanding of the legal profession.[1]

Following an earlier convocation that focused on lawyers' education from college through law school graduation, this event—introduced by the Chief Judge—studied the pressures and incentives that new attorneys face in the first seven years of practice. Individual speakers and panels focused on education in professional values and conduct, the value of mentors, and the types of ethical problems new lawyers face and how they deal with them. Other discussions explored obstacles to professional and personal fulfillment and considered which practices might best guide new attorneys in the formative years. Many distinguished members of the legal profession offered remarks.

Several obstacles to satisfaction common to practice in a private setting were identified. A number of speakers decried the burden to achieve necessary billable hours: many firms require lawyers to produce 2,100 hours/year, which works out to 65-70 hours/week.[2] In such a system, compensation is not related to quality or efficiency in an attorney's work product but, rather, to the number of hours worked and charged. Other speakers faulted the need to repay enormous law school debt (currently averaging $80,000) as the factor driving the choice of high-paying private sector jobs over potentially more personally rewarding positions at lesser pay. Several new attorney panelists registered disappointment in the lack of role models and support provided at work. I was surprised to learn from this panel of new lawyers that the expectation of a new law graduate is to change jobs every two years for the first several years of practice.

Anne Weisberg of the Catalyst organization offered information on the changing demographics in the profession. More than 50 percent of incoming law school students are women, and minorities account for another 12 percent. Work/life balance is the most important priority for women and the third most important for men. Catalyst's research has confirmed that legal employers have a better chance of attracting and retaining staff if they provide the following options: advancement opportunities, availability of mentors, professional development opportunities, and individual control over the attorney's own work.[3]

Henry Greenberg, former Chair of CAPS,[4] offered remarks with a public sector perspective. Factors putting the public bar "at peril" in comparison with the private sector are less pay—salaries that are essentially flat; less job security as fewer attorneys are hired in civil service positions; and law school debt, which deters attorneys from entering public service. He urged the profession to change and show leadership in tackling issues, noting that the current crop of Gen X attorneys have issues and needs different from the Baby Boomer generation. Managers in the public setting need to be flexible and open to new and improved management approaches. The quality of life for public attorneys may be improved in a variety of ways, including alternative work schedules and telecommuting. Greenberg called on public managers to improve communications with staff, including those from the bottom up; he urged the empowerment and consultation of staff before making decisions that affect work life. Above all, he advocated that managers be effective listeners and committed to staff professional development.

What solutions were recommended to bring more satisfaction to the practice of law? As individual attorneys, we work within a system, whether that is a government agency, a corporation, or a private firm. Those of us who are managers should take valuable lessons from the convocation's discussion to nurture our staff members. While many of us may not be in a position to work systemic change, there are always means to find more satisfaction from our careers and to encourage satisfaction for our co-workers.

I recognize that there are obstacles to selecting public service as a career. Certainly, as Greenberg discussed, the monetary compensation does not rival what the private sector offers. But for the satisfaction of hands-on experience and responsibility in an endless variety of settings, with the opportunity to influence public policy and, thus, to make a difference on a broad scale, public service is an excellent, logical choice.

But I will go one step further. Ethical Consideration 6-2 of the Code of Professional Responsibility provides that a "lawyer has the additional ethical obligation to assist in improving the legal profession, and should do so by participating in bar activities . . ." Participation in activities of this Committee is one possibility. Joining other Bar Association sections or committees of specific subject matter interest provides the opportunity for professional networking and enhancement. And, finally, many opportunities to provide pro bono services await. CAPS is working with the Pro Bono Director for NYSBA to develop a directory of opportunities geared to government attorneys to provide pro bono services around the state. On Law Day of 2003, CAPS expects to link interested government lawyers with local bar associations who sponsor Law Day events, to provide information on the variety of government services, programs and regulations for citizens. For the increased satisfaction of "doing the public good," I urge readers to consider this opportunity and volunteer.

Just a final note on activities at the 2003 NYSBA Annual Meeting, at which the Committee hosted a full-day CLE event. Capitalizing on the recent publication of our first book, *Ethics in Government, The Public Trust: A Two-Way Street*, the morning panel featured three authors who contributed essays: Karl Sleight (New York State Ethics Commission), Mark Davies (Conflicts of Interest Board), and Ralph Miccio (New York State Temporary Commission on Lobbying), along with Patricia Salkin (Director of Albany Law School's Government Law Center), one of the book's co-editors. That session was the first in what I expect will be a series of CLE events based on chapters in the book. A special thanks to the sixteen government attorneys, and one manager, who contributed to the book.

The afternoon session featured the returning team of Erwin Chemerinsky (University of Southern California Law School) and Susan Herman (Brooklyn Law School), who provided insight into cases of interest from the U.S. Supreme Court's 2001-02 term. Their concise review and perceptive analysis of cases and voting patterns proved popular with participants.

Finally, at the evening reception, the Office of the Attorney General, under the leadership of the Hon. Eliot Spitzer, received the 2003 CAPS award for Excellence in Public Service. NYSBA President Lorraine Power Tharp presented the award on behalf of CAPS, and Attorney General Spitzer spoke warmly about his colleagues whose hard work and dedication, often unsung, represent the best in public service.

"But for the satisfaction of hands-on experience and responsibility in an endless variety of settings, with the opportunity to influence public policy and, thus, to make a difference on a broad scale, public service is an excellent, logical choice."

Endnotes

1. Administrative Order 147, Mar. 3, 1999. For further information on the Institute visit www.courts.state.ny.us/jipl/.
2. The American Bar Association recently released a report from its Commission on Billable Hours. In his foreword to the report, Supreme Court Associate Justice Stephen G. Breyer wrote, "[t]he Committee's technical task . . . concerns how to create a life within the firm that permits lawyers, particularly younger lawyers, to lead lives in which there is time for family, for career, and for the community. Doing so is difficult. Yet I believe it is a challenge that cannot be declined, lest we abandon the very values that led many of us to choose this honorable profession." The full text of the report is available at www.aba.org.
3. From a 2001 study of men's and women's career paths in the legal profession sponsored by Columbia University School of Law, Harvard Law School, The University of California at Berkeley Law School, The University of Michigan Law School, and Yale Law School. Additional information is available at www.catalystwomen.org.
4. Recent Counsel at the New York State Department of Health, and former Assistant U. S. Attorney and law clerk to Judge (now Chief Judge) Judith S. Kaye of the Court of Appeals.

Barbara F. Smith is Chair of the NYSBA Committee on Attorneys in Public Service and a member of the Committee on Attorney Professionalism. She currently serves as the Executive Director of the Lawyer Assistance Trust. The views expressed are not necessarily those of the Trust.

Editor's Foreword

By Vincent Martin Bonventre

In the oft-quoted words of William O. Douglas, perhaps the most libertarian Justice in Supreme Court history, "We are a religious people whose institutions presuppose a Supreme Being." And yet, that unassailable verity has engendered the most vexatious, divisive and persistent questions in the nation's constitutional jurisprudence.

"How does a society dedicated to protecting religious freedom draw a line on impermissible preference or privilege for religion itself?"

The wall of separation, religion free from government and government free from religion, excessive entanglements, secular purposes, sectarian effects, endorsement, hostility and neutrality. Metaphors and tests that have provided insight in some contexts have later revealed their own inadequacy and impropriety in others. The questions are perennial and fundamental. They avoid final resolution but, nevertheless, cannot be avoided.

How does a society dedicated to protecting religious freedom draw a line on impermissible preference or privilege for religion itself? At the same time, what can the guarantee of free exercise mean if not special recognition and exemptions for religious practice? Recent developments and issues have raised anew the historic, lingering questions about the place of religion in a free society, if only in somewhat different contexts.

The *GLP Journal* is pleased to offer an examination of those intractable religion and law questions as they have again come to the fore. We are very fortunate that a group of distinguished scholars and prominent participants in current controversies have contributed to this issue of the *Journal*. Their collective efforts have produced a most enlightening and provocative exploration of critical church-state topics of the day.

Three authors use last year's *Zelman* decision to critique the Supreme Court's jurisprudence on government-subsidized religious activities. Alan Brownstein argues that the 5-4 ruling contributed little to the ongoing debate; upholding publicly funded school vouchers against Establishment Clause challenge merely lifted the lid on most Constitution-related issues and left their resolution with lower courts and state legislatures. James Dwyer distills the Court's jurisprudence to the "remarkable principle" that even purely religious activities may be funded if the request is by a private party and some non-religious activities, at least superficially analogous to the religious ones, might be proper beneficiaries. Daniel Gordon chastises the dissenting Justices for failing to make their strongest argument: Madison's warnings about the inevitable harm to religion when sects compete for public dollars.

Several authors address other perceived dangers, both to and from religion, that arise out of current law and have surfaced in recent events. Thomas Marcelle decries the censorship of religious speech that results from government efforts to avoid unlawfully endorsing religion; that censorship will continue until the concept of non-establishment is recognized as a protection of conscience, not discrimination against religion. Kathleen Boozang explores the tension between community health care needs and the free exercise rights of religious health care providers; only creative public policy will insure the availability of needed services which often include those provided by Catholic hospitals. On another matter of accommodation, Helene Weinstein outlines a recently enacted statute she sponsored that requires employers in New York to make good faith efforts to accommodate employees' religious practices; the law expands protection previously provided only for Sabbath observance.

Scott Idleman explores the possible First Amendment obstacles to tort claims against religious defendants; constitutional free exercise may well preclude claims that implicate church decision-making and autonomy, but not those targeting individual conduct. The confidentiality of church communications, such as Catholic confessions and other clergy-penitent conversations, is examined by Michael DeBoer and Seymour Moskowitz; they argue that the harm to religious communities and institutions must not be disregarded

when church disclosures are sought in clergy abuse cases. A different perspective is taken in the final article; Marci Hamilton urges a reconsideration of the protections and privileges afforded to churches to the extent that the interests of children have been, and continue to be, sacrificed.

Finally, a public forum at Albany Law School on the clergy sexual abuse crisis in the Catholic Church includes prepared remarks from panelists and a question-and-answer session with a community audience. The four panelists, representing a wide diversity of expertise and experience, were: Howard Hubbard, the Bishop of the Albany Roman Catholic Diocese; Charles Reid, a canon law scholar; Barbara Blaine, the founder and President of SNAP (Survivors Network of those Abused by Priests); and Leslie Griffin, a legal ethicist and religion scholar. The presentations are insightful, moving, thoughtful and heartfelt; the responses to audience queries are lively, pointed, passionate and compassionate. The implications for the Church, the victims and the law are profound.

The Bar Association, the Committee on Attorneys in Public Service, the GLP Board and the Government Law Center of Albany Law School make this publication possible. People like Barbara Smith, Chair of the Committee, and Patty Salkin, Director of the Government Law Center, provide essential support and suggestions. The Bar Association's publications staff, especially Lyn Curtis, as well as Pat Wood at Membership, have been invaluable. And, of course, the student editorial board was responsible for the nitty-gritty sub-editing and tech checks and for much that is needed to prepare a manuscript for the published page. Thanks to them, and especially to Executive Editor Kathryn Mazzeo, who oversaw all editorial assignments, and Cynthia Beaudoin, who both Kathryn and I could rely on to review manuscripts and transcripts in crunch time. Whatever is lacking or flawed in these pages falls on me. Comments, commentary, complaints and suggestions may be directed to me at Albany Law School or at vbonv@mail.als.edu.

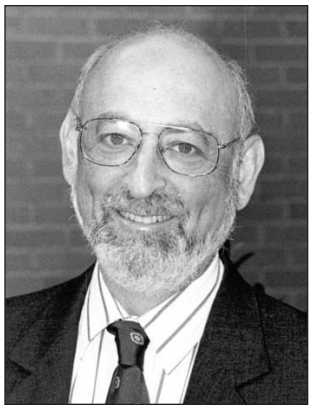
"The presentations [at the public forum] are insightful, moving, thoughtful and heartfelt; the responses to audience queries are lively, pointed, passionate and compassionate. The implications for the Church, the victims and the law are profound."

Vincent Martin Bonventre, Editor-in-Chief of the *GLP Journal*, is Professor of Law at Albany Law School. He is also the Editor of *State Constitutional Commentary*, published annually by the *Albany Law Review*.

Kathryn Mazzeo, the Executive Editor of the *GLP Journal* for the 2002-03 academic year, is a member of the Albany Law School class of 2003 and a member of the *Albany Law Review* and its editorial board.

Debating Vouchers After *Zelman*

By Alan E. Brownstein



In *Zelman v. Simmons-Harris*,[1] by a 5-4 vote, the Supreme Court upheld the constitutionality of a publicly subsidized school voucher program in Cleveland, Ohio that included a high percentage of religious schools. In doing so, it rejected an Establishment Clause challenge protesting the use of government funds to support institutions that have as one of their primary missions the inculcation of religious faith.

"Now that voucher funding of religious schools is constitutional, just how much freedom do legislatures retain in structuring these programs?"

According to the Court, government funding of religious schools was constitutional if it was "neutral in all respects toward religion,"[2] and part of a "program [] of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[3] As long as the state did not stack the voucher deck in favor of religious schools, Establishment Clause concerns about state aid to religious institutions were fully satisfied. Indeed, the majority appeared to believe that subsidizing religious schools through vouchers as opposed to some direct-aid formula obviously resolved any constitutionally salient church-state issues that might arise. The majority was so confident of this that it did not even bother to respond to Justice Souter's contention in dissent "that every objective underlying the prohibition of religious establishment is betrayed by . . . [the Cleveland voucher] scheme."[4]

As a matter of constitutional law, of course, the Establishment Clause means what the Court says that it means. A significant piece of the voucher debate relating to religious schools is clearly foreclosed by the *Zelman* decision. Voucher opponents can no longer argue that voucher programs are per se violations of the Establishment Clause. But in another sense, *Zelman* may have simply shifted the forum in which important separation of church and state issues are to be resolved in our society from federal constitutional adjudication to a more political, and potentially more coherent, venue—the legislative arena. Inquiries about whether the Constitution prohibited state funding of religious schools often led even informed questioners into a labyrinth of confusing precedent and inconsistent historical events and anecdotes. In a political forum, the specifics of history and case law have far less relevance. The question of whether government support of religious schools offends constitutional values, if not the letter of the Constitution itself, might be addressed more directly and, one hopes, more persuasively, in this alternative forum.

If this new debate in political forums is to occur in any meaningful way, however, two questions must be answered. First, and most obvious, is there anything of importance left to talk about from a constitutional perspective? If voucher programs that support religious schools do not violate the Constitution, and *Zelman* holds they do not, what exactly are these quasi-constitutional issues that remain to be discussed? Second, are there constitutional law constraints that limit the legislature's discretion in determining whether or not to fund religious schools and how such funding programs might operate? Now that voucher funding of religious schools is constitutional, just how much freedom do legislatures retain in structuring these programs? The *Zelman* decision itself provides us little help in addressing either of these issues, but it does provide a foundation for both inquiries.

1. The Continuing Debate

The majority opinion in *Zelman* has little, if anything, to contribute to public discourse on the funding of religious schools. By summarily avoiding any real discussion of the reasons why Justice Souter and other Justices, past and present, rigorously insisted that the Establishment Clause prohibited state funding of religious schools, the Court undermined its own ability to persuade the public that sound constitutional values underlie its *analysis and judgment.* People may approve or disapprove of the Court's decision in *Zelman*, but no one could be convinced or persuaded by it.

Justice Souter's dissent begins to identify some of the constitutional interests that justify Establishment Clause constraints on state funding of religious schools.[5] Initially, he argues that coercing taxpayers to contribute to the inculcation of religious beliefs other than their own involves a unique affront to the conscience of the individual. Souter believes this concern

was the foundation of Madison's and Jefferson's resistance to state aid to religious institutions.[6]

Freed from its historical moorings, and as a justification for a constitutional prohibition on funding religious schools, however, does this argument still retain political potency? True, taxpayers are routinely forced to support public policies to which they are adamantly opposed. However, religion, unlike other publicly debated matters which are the proper subject of governmental debate and support or censure, involves something uniquely important that plays a distinctive role in the life of the individual and his community. As a matter of principle, if not law, legislatures may reasonably conclude that the argument that support for religion should not be commandeered by government continues to have some force.

Second, and of more contemporary significance, there is arguably an implicit principle underlying our system that suggests public funds should be reserved for the support of publicly accessible institutions. If government taxes individuals to provide a service, such as teaching children math, or Spanish, or biology, those same individuals, if qualified, should be eligible to be hired to provide those services, and their children should have full access to the programs receiving government subsidies. Religious schools, however, often reserve the right to discriminate on the basis of religion and sometimes discriminate on the basis of other generally prohibited grounds in hiring staff and providing services. Thus, by including religious schools in voucher programs, public resources are allocated to and controlled by institutions that may be exclusionary both in the services they provide and the means by which those services are made available to the community.

To put it a slightly different way, it seems equitable and unobjectionable to provide various benefits, such as public transportation or police protection, to religious institutions or individuals. It is far less acceptable to place the resources to provide those benefits under the control of religious institutions, particularly if they are allowed to dictate the beliefs or affiliation of the individuals who deliver and receive those services. A city may provide a crossing guard at a busy intersection in front of a religious school, but it should not allow the school to determine the religion of the individual hired to provide this service or to impose religious conditions on the children availing themselves of that benefit.[7]

Third, there are the continuing conflicts between autonomy and accountability, and the corollary tensions between independence and dependence that Justice Souter emphasizes in his dissent.[8] If religious schools receive government funds, they will necessarily be subject to government regulations and conditions that accompany state financial support. He who takes the King's shilling is the King's man. Further, as the percentage of voucher students that attend a religious school increases, the school necessarily becomes more and more dependent on the government to continue to provide the funds on which its students rely for their tuition.[9]

"[T]he stark independence of religion from government that served to insure its stature as a distinct moral voice in our society—one of the few with the credibility to act as a check and critic of the state—will have been tarnished, if not sacrificed."

Souter notes that the Cleveland voucher scheme the Court upheld in *Zelman* imposes several demands on schools as a condition to their participation in the voucher program. Voucher-eligible schools cannot give admission preferences to children of a particular faith. They may not "teach hatred of any person or group on the basis of . . . religion."[10] Also, they may be limited in their ability to discriminate on the basis of religion in hiring staff.[11] Obedience to these conditions may mitigate some of the concerns about discrimination and public access noted above, but it does so at a serious price. The traditional sphere of autonomy of religious institutions that government had previously respected will have been breached. Further, the stark independence of religion from government that served to insure its stature as a distinct moral voice in our society—one of the few with the credibility to act as a check and critic of the state—will have been tarnished, if not sacrificed.[12]

I do not suggest that these concerns about taxpayer conscience, *nondiscriminatory hiring in government-supported programs*, public access to publicly funded services, and religious independence represent constitutional rules of decision. I believe they reflect constitutional values that inspired earlier Supreme Court majorities to be far more wary than the current Court about government funding of religious schools. Certainly, they are values that deserve to be taken into account by political leaders and the electorate.

The debate that develops after *Zelman* should address the importance of these values, whether they are outweighed by countervailing constitutional values and policy concerns, and the extent to which they are mitigated by the fact that the funding of religious schools is accomplished by vouchers rather than direct grants.

It is on this latter point, in particular, that I think the Court has been most conclusory in its opinions and has offered the polity little in the way of satisfactory justifications for its decisions.[13] Does the interposition of parental choice between the state as the source of funds and the religious school receiving state-subsidized tuition alter in some fundamental way the alleged affront to conscience that occurs when taxpayers are coerced to support religions other than their own? In *Santa Fe School District v. Doe*,[14] the Supreme Court indicated that constitutional concerns are not mitigated when government delegates its regulatory authority to private entities, such as the student body of a school, and empowers the private group to offer prayers at a school function.[15] There is certainly an argument that this principle operates differently when resources rather than regulatory power are at issue, and funds are distributed to individuals who make decisions independently of each other rather than through some group decision-making process.

"Only a voucher program of sufficient size is likely to create the kind of powerful temptation that all but coerces religious schools to obey the state's conditions and regulations, and thus risks leading religions, over time, into subservient positions because of their reliance on state support."

The issues of discrimination and public access may be the most important and problematic ones for legislatures to address. Do vouchers make a difference here? One analogy that may be useful in resolving these questions involves the distinction between the government purchasing products from private entities and the government using private conduits for the provision of taxpayer-supported services. Assume the government buys goods manufactured by a religious entity or food produced by a religious group. Bread produced by a monastery might be a not-too-far-fetched example. Intuitively, the fact that the supplier of this product is religiously motivated, discriminates on the basis of religion in selecting its workers, and uses the revenue it receives for religious purposes does not seem to offend constitutional values. Government is buying the end result of a production process. The manner of production is purely a private concern.[16]

When the government contracts with a religious group to provide services, however, our intuitions arguably point in the opposite direction. Here the religious group appears to be taking on what we traditionally recognize to be a government function, and the manner in which the service is provided is an intrinsic aspect of what the state supports. Thus, as previously noted, churches and synagogues receive mail, garbage collection services, and police and fire protection like all non-religious entities, but it would strike us as inconsistent with constitutional values for these religious entities to be given some final say on the religious identity of the person who delivers them their mail. Fragmenting these, and other services, along religious lines, even through private conduits, raises issues that seem inapplicable to the purchase of a product. Religious schools arguably fall on the services side of this analogy. That they receive funds through vouchers does not seem to alter the analysis.

On the issue of autonomy and independence, one might argue that the majority in *Zelman* may be correct in at least one sense. The question is not so much whether a large percentage of schools receiving vouchers are religious in nature, it is whether or not a substantial percentage of the students attending religious schools receive vouchers. Only a voucher program of sufficient size is likely to create the kind of powerful temptation that all but coerces religious schools to obey the state's conditions and regulations, and thus risks leading religions, over time, into subservient positions because of their reliance on state support. This contention also seems directed more at the size of the program rather than the indirect mechanism of funding. Still, the idea is an important one and *mitigates against creating* expansive voucher programs rather than limited and focused programs.

2. Constitutional Constraints on Legislative Discretion

Assume a legislative body is persuaded by the above arguments or other concerns relating to the funding of religious schools. To what extent may it exercise its discretion in creating a voucher program to prohibit funding religious schools altogether? Alternatively, may a legislative body impose regulations that, for example, prohibit participating schools from discriminating on the basis of religion in hiring teachers or admitting students? Here the constitutional shoe is on the other foot, and it is voucher proponents who argue that the Constitution restricts public choice—in this case by limiting the legislature's ability to structure voucher programs to preclude or regulate religious schools' involvement in such subsidy arrangements.

Zelman, of course, only allows legislatures to include religious schools in a voucher program. It says nothing about requiring their inclusion in indirect funding schemes. It is argued, however, that free exercise cases such as *Church of Lukumi Babalu Aye v. Hialeah*[17] prohibit discrimination against religious practices or

institutions. Further, the free speech clause of the First Amendment prohibits viewpoint discrimination. In a long line of cases including *Rosenberger v. Rector and Visitors of University of Virginia*,[18] and more recently, *Good News Club v. Milford Central School*,[19] the Court has made it clear that religion often constitutes a viewpoint of speech and the exclusion of religion from otherwise generally accessible forums violates free speech mandates.

These doctrinal contentions are vulnerable to powerful counter-arguments, however. Most of the free exercise and free speech cases rejecting religious discrimination deal with discriminatory regulations, not discrimination in funding. Cases such as *Rust v. Sullivan*[20] hold that government has far more discretion to discriminate in the allocation of subsidies than it does when regulations of conduct are at issue. Further, as *Rust* makes clear, this principle applies even when constitutional rights such as freedom of speech and the right to have an abortion are at issue.

Rosenberger[21] is the only funding case that is arguably on point. But the Court itself is hopelessly conflicted as to the meaning of this very fact-specific decision.[22] Certainly, it may be argued that the state's funding of important civic functions such as primary and secondary education bears little resemblance to the University of Virginia's use of student fees to subsidize student expressive activities as to which it disavowed any responsibility or control.[23]

The state's strongest argument supporting its ability to exclude religious schools from voucher programs goes beyond the existing case-law, which is admittedly inconclusive. The state's own public schools must operate within constitutional parameters. They cannot provide religious instruction or promote religious beliefs. If the state elects to offer public services through private conduits such as private schools *to serve any of a variety of policy goals*, it is difficult to understand why the state cannot insist that these publicly supported, private institutions must abide by the same constitutionally mandated principles that public institutions obey. In essence, the state would require that private organizations follow constitutional norms regarding equal protection, the establishment of religion, and freedom of speech as a condition for receiving financial support. *The state would be exercising its regulatory power to prevent* the use of private conduits *from circumventing* constitutional guarantees. No constitutional rule requires the state to impose such conditions on the institutions it subsidizes, but it *is* difficult to explain why the Constitution should be interpreted to prohibit such a requirement.

If the state does include religious schools in a voucher program, either as a matter of choice or out of constitutional obligation, may it regulate schools receiving vouchers as to curriculum, discrimination in hiring, or the admission of students? As noted previously, the Cleveland program that survived *an* Establishment Clause challenge included several regulations of this kind, but the majority opinion did not explicitly address their constitutionality despite the provocation of Justice Souter's dissent. Thus, it remains to be determined whether the free exercise—or free speech rights of religious schools and families seeking a religious education for their children—requires some level of immunity from state regulatory control.

Given the precedent of *Rust v. Sullivan* and other cases, the argument that all private schools receiving voucher support must be free from any regulatory conditions surely stands on shaky ground. Indeed, the political cost of such a constitutional interpretation might prove disastrous for voucher programs. Both legislatures and taxpayers may be reluctant to approve voucher programs that are entirely free of public oversight and regulation. Thus, to the extent that the argument for regulatory immunity has either constitutional support or acceptable political consequences, it must be limited to religious schools alone.

As a free exercise matter, the Court's holding in *Employment Division v. Smith*,[24] twelve years ago, all but completely undermines the validity of this argument. *Smith* denies the existence of free exercise protection against neutral laws of general applicability. If religious institutions lack free exercise protection against direct regulations that apply to both religious organizations and their secular counterparts, there is little basis for believing that they will receive such protection against general regulations accompanying public subsidies.[25]

Indeed, not only is it doubtful that religious schools are constitutionally protected against most regulatory conditions accompanying vouchers, it may be unconstitutional for legislatures to grant them exemptions from general conditions that secular schools participating in the voucher program must obey. The *Zelman* decision itself emphasized that the Cleveland voucher program did not violate the Establishment Clause because it was based on true private choice and "was neutral in all respects toward religion."[26] That neutrality is arguably vitiated by a program that exempts religious schools from requirements their secular counterparts must accept and implement.[27]

In addition to the neutrality framework required by the Establishment Clause, free speech clause prohibitions against viewpoint discrimination also may undercut any legislative attempts at religious accommodation. Here, the same free speech argument proposed by voucher proponents to challenge *the* exclusion of religious schools from voucher programs could preclude

regulatory exemptions that favor religious schools. Viewpoint neutrality is a two-way street. If it protects religious institutions engaged in expressive activities from discriminatory limits on the funding they may receive, it applies with equal rigor to prohibit preferential treatment for religious schools with regard to conditions that accompany such funding.[28]

In a real sense, the *Zelman* decision creates far more questions about voucher programs than it purports to answer. The Establishment Clause lid on voucher programs that include religious schools has been removed. Now, both legislatures and courts must wrestle with their respective and inter-connected roles in managing the constitutional and quasi-constitutional issues spilling out from the doctrinal box that had previously kept them securely contained.

Endnotes

1. ___ U.S. ___, 122 S. Ct. 2460 (2002).
2. *Id.* at 2467.
3. *Id.* at 2465 (citing *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993)).
4. *Id.* at 2498 (Souter, J., dissenting).
5. Justice Souter's dissent in *Zelman*, *id.* at 2485, and his earlier dissent in *Mitchell v. Helms*, 530 U.S. 793, 867 (2000) provide a spirited but incomplete defense of separation of church and state doctrine. *See* Alan E. Brownstein, "The Souter Dissent: Correct but Inadequate in Church-State Relations" *in* Crisis: Debating Neutrality 151 (Stephen V. Monsma ed., 2002).
6. *Zelman*, 122 S. Ct. at 2499 (Souter, J., dissenting).
7. This argument is discussed at greater length in other articles, *see, e.g.* Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 243, 254-55, 265-66 (1999) [hereinafter "Religion Clauses"]; Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 Conn. L. Rev. 871, 895-96, 909-920 (1999) [hereinafter "Evaluating Vouchers"].
8. *Zelman*, 122 S. Ct. at 2499-2501 (Souter, J., dissenting).
9. *See* Brownstein, Evaluating Vouchers, *supra* note 7, at 896-98.
10. *Zelman*, 122 S. Ct. at 2463 (quoting Ohio Rev. Code Ann. § 3313.976 (A)(6) (Anderson 1999 & Supp. 2000).
11. *Zelman*, 122 S. Ct. at 2499-2500 (Souter, J., dissenting).
12. *See* Brownstein, Evaluating Vouchers, *supra* note 7, at 901-02.
13. *Zelman* does little to defend the legitimacy of this distinction. Justice O'Connor's attempt to defend the distinction between direct aid and voucher systems in her concurring opinion in *Mitchell v. Helms*, 530 U.S. at 842-44 includes a series of conclusory assertions but they are not supported by adequate argument.
14. 530 U.S. 290, 316-17 (2000).
15. For additional discussion of this analysis, see Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5 NEXUS 61 (2000).
16. The analogy of religious organizations producing products that are sold to the government was suggested to me by Jesse Choper.
17. 508 U.S. 520 (1993).
18. 515 U.S. 819, 893-95 (1995).
19. 533 U.S. 98, 120 (2001).
20. 500 U.S. 173, 203 (1991).
21. 515 U.S. 819 (1995).
22. As to the meanings assigned to *Rosenberger*, compare Justice Scalia's concurring opinion in *National Endowment of the Arts v. Finley*, 524 U.S. 569, 598-99 (1998), with Justice Souter's dissenting opinion in the same case, *id.* at 613-14.
23. *Rosenberger*, 515 U.S. at 835. Indeed, in distinguishing the subsidies at issue in *Rosenberger* from the University's own curriculum decisions, the Court explained, "When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Id.* at 833. When government regulates the curriculum of primary schools it subsidizes through vouchers—"to determine the content of the education it provides"—the same principle should apply.
24. 494 U.S. 872, 890 (1990).
25. *See* Brownstein, Evaluating Vouchers, *supra* note 7, at 891-92.
26. *Zelman*, 122 S. Ct. at 2467.
27. For further discussion of this point, *see* Brownstein, Religion Clauses, *supra* note 7, at 247-49; Brownstein, Evaluating Vouchers, *supra* note 7, at 898-99.
28. For additional analysis of this issue, *see* Brownstein, Religion Clauses, *supra* note 7, at 271-76; Brownstein, Evaluating Vouchers, *supra* note 7, at 898-99.

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Funding Religion in a Post-*Zelman* World

By James G. Dwyer

In *Zelman v. Simmons-Harris*,[1] the Supreme Court upheld against Establishment Clause challenge the Ohio Pilot Project Scholarship Program, also known as the Cleveland school voucher program. That program facilitates transfer of children from one of the worst public school systems in the nation to private schools in the Cleveland area. As such, the Cleveland program, like similar programs in Milwaukee and Florida, undoubtedly benefits some children. From a child welfare perspective, then, there is reason to be pleased with the Court's decision.

However, the Court in *Zelman* also established—not explicitly, but in effect—a legal principle with far-ranging and troubling implications. This principle becomes apparent when one reads the Court's explicit analysis in light of the fact that the Cleveland program, like the other voucher programs currently in place, contains no restrictions on how private schools use voucher money and no meaningful educational requirements for recipient schools.[2] The Court's only reference to the nature of the schools to which children are transferred under the program is to say that a private school "may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards."[3] The Court manifested no awareness that statewide educational standards for private schools in Ohio, as in other states, are quite superficial and by no means ensure that private schools provide significant secular education, let alone secular education of any particular quality.[4] Absent meaningful regulation, in the voucher program or in general state laws governing private schools, the state can, under the voucher program, fund almost the entire operating budget of a school that provides little or no secular education, a school that might instead have children spending the entire day reading the Bible and saying prayers or, as was true in at least one school participating in the program, watching religious videos.[5] The Cleveland program therefore can, and the evidence suggests actually does, pay for purely religious activity. More disturbingly, it is also facilitating transfer of some children from public schools, which at least aim to provide a secular education, to private schools that do not aim to provide a secular education.

In the Court's analysis, two perceived aspects of the voucher program were sufficient to immunize it from Establishment Clause challenge—first, that state payments to religious schools are indirect,[6] and second, that the program does not coerce parents into sending their children to religious schools.[7] The payments to schools are indirect, in the Court's view, even though the state in fact sends a check directly to participating schools, because schools receive a check from the state only after parents who have received state-issued vouchers choose the school for their children and bring the voucher to the school. The program does not coerce parents, because parents have a variety of school alternatives available to them, including non-sectarian private schools that participate in the voucher program, as well as several public school options, such as community schools and magnet schools.

". . . the state can, under the voucher program, fund almost the entire operating budget of a school that provides little or no secular education, a school that might instead have children spending the entire day reading the Bible and saying prayers or . . . watching religious videos."

In light of the fact that nothing in the voucher program ensures that recipient schools provide any secular education, the Court's analysis thus implicitly rests on the remarkable principle that states may pay for purely religious activities, so long as (1) states do so only when asked to do so by private parties, and (2) the private parties could instead have directed the state to pay for non-religious activities that take place in a setting resembling, at least superficially, the setting in which the religious activities take place.[8] If the Court were to apply this principle consistently in the future, states might be permitted to pay for every aspect of religious practice in America. As illustrated below, it would not be difficult for a state to find some loosely analogous secular activity to include in a program of funding and to issue vouchers to individuals to use either at the religious or the secular activity.

This principle is clearly at odds with one the Court had affirmed in numerous prior cases involving state aid to private entities—namely, that any program of

state aid for private service providers must contain safeguards (i.e., regulations) to ensure that the public money is used by private recipients, even those affiliated with religious organizations, only for secular functions. In *Roemer v. Maryland Public Works Board*,[9] for example, every member of the Court took the view that state aid may not be used for the religious functions of any private entity. The plurality opinion in that case stated, with respect to educational institutions specifically, that

> a secular purpose and facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.[10]

Remarkably, the *Zelman* majority did not even mention *Roemer*, yet implicitly overturned this aspect of the *Roemer* decision. *Zelman* implicitly holds that states may pay not only for religious instruction, but also for religious worship.

". . . states wishing to pay for Sunday school and church construction could lend an air of religious neutrality to their spending by structuring the programs to subsidize 'any Sunday morning educational programs for children' or 'any construction of buildings in which non-profit organizations hold regular gatherings open to the public.'"

Along the way to establishing this new and remarkable principle, the Court (a) further trivialized the secular-purpose prong of the post-*Agostini Lemon* test, (b) effectively gave private individuals the power to waive constitutional restrictions on state action, and (c) further entrenched an approach to deciding constitutional disputes relating to children's education that treats as relevant only the effects of state action on adults.

Although the secular-purpose requirement was not contested, the Court indicated that it perceived a valid secular purpose, and in doing so signaled a willingness to allow the most general characterization of the state's motivation to serve as a basis for finding a valid purpose.[11] As such, it would appear virtually impossible for a state with a minimally competent legal staff to fail to satisfy the requirement. The Court articulated the purpose of the Cleveland voucher program in two ways.

First, in its summary of the facts, the Court repeatedly described the purpose of the Pilot Project Scholarship Program as one of providing choice for parents,[12] rather than one of improving secular education for children. The Court thereby masked the reality that the Cleveland program, by design, facilitates the choice of schooling that provides little or no secular education, but instead provides primarily or solely religious instruction and worship. If a purpose so general as "providing choice" suffices for Establishment Clause purposes, it is difficult to imagine a program of public subsidies that could not satisfy the purpose prong. Payments for Sunday school could be said to have the very same purpose as that identified for Cleveland's voucher program—namely, providing educational choices for parents. A state could justify paying for construction of churches and synagogues by asserting a purpose of providing citizens choices with respect to social activities or forms of self-expression, or a purpose of providing more buildings for people to use. While the Court's discussion of the secular-purpose requirement in *Zelman* does not suggest the need to do so, states wishing to pay for Sunday school and church construction could lend an air of religious neutrality to their spending by structuring the programs to subsidize "any Sunday morning educational programs for children" or "any construction of buildings in which non-profit organizations hold regular gatherings open to the public."

Second, in its constitutional analysis, the Court cursorily dispensed with the secular-purpose requirement by stating that there was "no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."[13] "Educational assistance" is less amorphous than "choice," but it is also a very broad concept, sufficiently so as to accommodate assistance for Sunday school or mid-week after-school catechism classes, given that the ordinary meaning of "educational" includes religious instruction, no matter how indoctrinatory in nature. Similarly broad purposes could be ascribed to state subsidies for any other kind of religious activity; subsidies for worship by religious congregations would provide "assistance for social activities" or "self-expression support," subsidies for purchase of Bibles for distribution on the streets would provide "assistance for purchase and public distribution of ancient texts," and subsidies for Catholic priests to perform sacraments, such as baptisms and last rites, would provide "assistance for stage-of-life ceremonies performed by recognized lead-

ers of cultural groups." Such purposes might seem more disingenuous than "educational assistance" seems in the circumstances of the Cleveland program, but presumably a vague reference to "providing educational assistance" will also satisfy the secular-purpose requirement in the potentially far different circumstances in which other voucher programs will likely be created following *Zelman*, where the actual motivation is more clearly to advance religion.

If the Court had wished to characterize the state's purpose in a more specific, and thereby meaningful way, it would have had a couple of choices. The Court could have said the purpose of the program is to improve the secular education that children in Cleveland receive. Justice Rehnquist, who authored the majority opinion, might have avoided characterizing the purpose of the program in this way because nothing in the design of the program supports a conclusion that this was actually the state's purpose. As noted above, the program does not contain academic requirements and standards that would ensure schools receiving state money actually provide a minimally adequate secular education. The Court might also have avoided characterizing the purpose in this way because doing so would have made it more difficult to ignore, in its effects analysis, whether that purpose is actually being served by the program as a whole, or by payments to each participating private school. By characterizing the purpose as "choice," the Court could instead focus exclusively on whether parents in fact have a choice.

Alternatively, the Court might have characterized the state's purpose as one of paying for children to attend whatever sort of non-public school their parents wish them to attend, within the range of schools that satisfy the state's superficial curricular requirements for operating a non-public school. The Court might have avoided characterizing the purpose of the program in this way because it would make it more apparent that the state must have known some parents would use the state money to place their children in schools that provide little or no secular education, a use of state money for which it would be difficult to discern a secular purpose.

Because the plaintiffs actually did not contest the existence of a secular purpose, the bulk of the Court's analysis in *Zelman* is devoted to the question of whether the voucher program has the effect of advancing or inhibiting religion. In answering that question, the Court appeared simply to assume that the program does nothing other than provide "educational assistance,"[14] which the Court must have understood to mean money to purchase what *the state* regards as "education" for children and what the state can permissibly aim to assist—that is, instruction in secular subjects. The Court never grappled with the problem that the voucher program does not actually require parents to use the vouchers to purchase that kind of schooling, and does not preclude them from using state money to pay for purely religious activities. For the Court, where the state money went and what it was used for were rendered irrelevant by the fact that parents decided those things.

But this position is equivalent to holding that private parties are empowered to waive constitutional restrictions on state spending, or that the state is free to do indirectly what it may not constitutionally do directly, another principle that the Court had rejected in prior cases, albeit in other contexts.[15] The Court acknowledged that if the state simply started sending money to private schools, including religious schools, without also creating slips of paper called "vouchers" that the state mails to parents, parents give to schools, and schools send back to the state, it could not constitutionally do so. Presumably this would be true even if the state made the payments on a per-pupil basis. By reaching the opposite outcome based solely on the fact that Ohio does first issue a slip of paper called a "voucher" to parents and sends money to a religious school only after the parents give the paper to the school and the school returns the paper to the state, the Court in effect held that states may do something otherwise unconstitutional so long as they create a mechanism for making apparent to the world that some private parties want them to do it.

There is nothing in the Court's decision to prevent this holding from being extended to state payment for private schools that admit only white people and/or only males (as long as vouchers are also available for non-exclusionary schools), or to state subsidies for racially exclusive parks, clubs, and residential developments (e.g., by issuing user fee, dues, or housing vouchers). At a further reach, the principle might extend to non-spending state activity. May police now assist private business owners in keeping all African-Americans out of their establishments, because this state assistance is provided only at the request of a private party? The Court might some day develop a way of distinguishing Establishment Clause constraints from other constitutional constraints, but it might find it difficult rationally to do so, and it would still have to grapple with the possibility of state vouchers for every other kind of religious activity.

The reason why the Court focused on parental choice and the range of school options available to parents—in terms of the superficial characteristic of being affiliated with a religious denomination or not, rather than on what was actually going on in the schools receiving state aid—is that its perspective is entirely

adult-centered. All of the Justices were preoccupied with whether parents were being coerced to patronize religious schools, and for the majority that was all that mattered. The dissenters were also concerned about taxpayers having to pay for religious indoctrination. None of the Justices manifested concern that some children might be denied a secular education as a result of the voucher program, if their parents shifted them from a public school to a religious school that provided little or no secular education, or that the state might be paying for some parents to place their children in an environment hostile to the children's interests in autonomy, in freedom of thought and expression, and in gender equality. Insofar as these things are happening, the state is clearly advancing religion, and potentially violating the rights of some children.

"[T]he public controversy over school vouchers has not really been very much about helping children."

More generally, the public controversy over school vouchers has not really been very much about helping children. For most voucher supporters, it has been about increasing the power of parents over their children's lives, advancing the cause of religious groups that run schools, and reducing the redistribution of wealth that state spending on education entails. For their part, most opponents of vouchers have not argued that voucher programs should be designed so as to advance the educational interests of all children (e.g., by requiring that spending on public schools remain constant or increase and by requiring voucher schools to satisfy academic standards), but rather have taken a stance of absolute opposition to any and all subsidies for private schools. This suggests that their concerns, too, are other than for the well-being of children. They have manifested no concern, for example, about the fact that many children are currently in private schools that, like many public schools, lack adequate resources.

As noted at the outset, the Cleveland voucher program is probably doing good for some students, so it is not tragic that the Court has allowed the program to continue. What is regrettable is that the Court did not command Ohio and other states that are operating voucher programs, or that might do so in the future, to do it right—that is, to incorporate into their voucher programs adequate regulations to ensure that state money is actually spent for the valid public purpose of enhancing the secular education children receive. The Court has instead let states loose to fund any and all kinds of schools, regardless of whether the schools are providing for children what the state regards as an education. Indeed, the Court has implicitly let states loose to fund every kind of religious practice in every kind of setting, so long as the states are able to include superficially analogous secular activities in the same funding program, and so long as they allow private parties to decide how much they spend on religious practices and how much on the secular analogues. If states run with this new license, the Court might find itself in the future scrambling to scale it back by creating new limiting principles, and if so we can look forward to many more years of incoherent Establishment Clause doctrine.

Endnotes

1. *Zelman v. Simmons-Harris*, ___ U.S. ___, 122 S. Ct. 2460 (2002).
2. *See id*. at 2473 (O'Connor, J., concurring) ("These cases are different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds.").
3. 122 S. Ct. at 2463.
4. For a description of the superficial requirements imposed on recipient schools by the voucher legislation and by the general laws governing private schools in Ohio, see James G. Dwyer, Vouchers Within Reason: A Child-Centered Approach to Education Reform, 178-80 (2002). The other two existing voucher programs that allow religious schools to participate, in Milwaukee and Florida, likewise contain no restrictions on how religious schools use state money and likewise impose no meaningful academic requirements on recipient schools. *See id.* at 175-78, 180-82. For a description of typical general state requirements for operating a private school, see James G. Dwyer, Religious Schools v. Children's Rights (1998): 8-13 and James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Law As Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. Rev. 1321, 1338-46 (1996).
5. There is great variety among the religious schools operating in the United States, ranging from those almost exclusively focused on secular education to those opposed in principle to most aspects of secular education. *See* Dwyer, Religious Schools, *supra*, at ch. 1 (1998). The Christian video school was discovered by a newspaper reporter. *See* Scott Stephens and Mark Vosburgh, *Voucher School Relies on Videos as Teachers*, Plain Dealer (Clev.), Jul. 10, 1999, at 1A.
6. 122 S. Ct. at 2465 ("our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools . . . and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.") (citations omitted).
7. *Id.* at 2468-71.
8. Some commentators view the Court's decision in *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986), as having established this principle, because in that case the state was paying part of the cost for a blind man to attend a seminary. However, the activity funded in *Witters* was not a purely religious one. The funding in *Witters* was for advanced training in a career chosen by adult aid recipients, designed to create equal opportunity for disabled persons. The primary, if not sole, function of religious instruction and worship in religious elementary and secondary schools, on the other hand, is religious indoctrination of children. While it is surely a legitimate aim of the state to create equal opportunity for disabled persons, it is as surely not a legitimate aim of the state to have children religiously indoctrinated.

9. 426 U.S. 736, 747 (1976) (upholding noncategorical grants to sectarian and non-sectarian colleges and universities, where recipients were permitted to use the grants only for the secular aspects of their operations).

10. *Id.* at 747 (plurality opinion). *See also id.* at 768 (White, J., concurring) ("'It is enough for me that the [State is] financing a separable secular function of overriding importance in order to sustain the legislation here challenged'") (quoting *Lemon v. Kurtzman,* 403 U.S. 602, 664 (1971) (White, J., concurring)); *id.* at 770 (Brennan, J., dissenting) (opposing the grants because they might benefit the religious functions of the recipients); *id.* at 773 (Stewart, J., dissenting) (opposing the grants because they might be used to support compulsory theology classes). *See also Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding federal grants to programs for sex counseling of teens, while emphasizing the necessity of ensuring grant money is used only for secular counseling services).

11. One could say, alternatively, that the Court has made the secular purpose requirement too easily manipulable by judges to reach an outcome they desire, in precisely the same way the Court has made the "fundamental liberty" inquiry of substantive due process too easily manipulable—namely, by making it possible to articulate the fact in question (the state's purpose in an Establishment Clause analysis, the liberty at stake in a due process analysis) at any level of generality.

12. *See, e.g.*, *Zelman*, 122 S. Ct. at 2462 ("The State of Ohio has established a pilot program designed to provide education choices to families with children who reside in the Cleveland City School District"); *id.* at 2463 ("The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district"); *id.* at 2464 ("The program is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren"). As is evident from these quotations, the majority had some difficulty figuring out who exactly does the choosing with respect to where children attend schools. The reality, of course, is that children generally do not make the decision; rather, parents do the choosing, and typically do so without giving children a vote in a "family decision."

13. *Id.* at 2465.

14. *Zelman*, 122 S. Ct. at 2468.

15. *See, e.g.*, *Norwood v. Harrison*, 413 U.S. 465, 465 (1973) (holding that providing textbooks to children attending schools with racially exclusive admissions policies amounts to state encouragement of such discrimination, and stating that it is "'axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'") (citation omitted). Voucher supporters sometimes liken voucher payments to a tax refund, and point out that surely it is all right for private citizens to spend a tax refund on religious activity. But the two things are actually quite different. When the state refunds taxes to all taxpayers across the board in proportion to their relative tax liability, the state is acknowledging that it has taken private money that it should never have taken. If a taxpayer uses the refund to support a church, the taxpayer is spending private money. Far different is a government program under which money properly collected by the state is directed by the state to a particular type of activity engaged in by only a subset of citizens (some of whom might not be taxpayers). That is state spending and subject to constitutional constraints.

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A Madisonian Moment the Supreme Court Missed: The Florida Example

By Daniel R. Gordon

I. Introduction

The United States Supreme Court in *Zelman v. Simmons-Harris*[1] found that Ohio could provide publicly funded vouchers to parents for use at private schools in Cleveland. The Supreme Court allowed the expenditures of public funds where 96 percent of children who utilized vouchers enrolled in religiously affiliated schools where the voucher program is neutral with respect to religion, and government aid is directed to religious schools only as a result of the independent, genuine, and truly private choices of parents.[2] In the Supreme Court's 5-4 decision, Justices Souter and Breyer, among others, wrote dissenting opinions.[3] These dissenting opinions missed the mark on how vouchers will create problems for religion in America.

"State constitutions, specifically the Florida constitution, provide good evidence of how religion will lose its special place in American society where religion becomes the beneficiary of public funding."

Souter and Breyer failed to sway a fifth member of the Court to their side partly because they missed a Madisonian moment for pointing out how vouchers will ultimately harm religion. James Madison clearly warned that governmental financial support would undermine religion.[4] Though both Souter and Breyer focused on the divisiveness caused by public expenditures on religion in a diverse society,[5] they overlooked, or only implicitly and tangentially focused on, a much more basic problem for religion caused by vouchers. Souter and Breyer overlooked how vouchers would deflate religions into mundane public interests vying for scarce public monies. State constitutions, specifically the Florida constitution, provide good evidence of how religion will lose its special place in American society where religion becomes the beneficiary of public funding.[6]

II. Souter and Breyer Losing the Argument

Souter and Breyer recognized the negative impacts of publicly funded vouchers utilized to pay for religious schools or religions. Souter implicitly noted that religious school administrators would become devotees of state legislative politics and, in the future, will have to become savvy about the use of political leverage.[7] He suggested that the political branches of government, presumably including state legislatures and local school boards, would have to save America from the majority's decision in *Zelman* allowing the expenditure of public monies on religious indoctrination. Souter referred to salvation from religious conflict between sects and regulation of religious belief and education by state educational regulatory authorities. Though he noted "expectable friction can be gauged by realizing that the scramble for money will energize not only contending sectarians," Justice Souter was referring not to a political and social leveling of religion but instead to intense doctrinal conflicts between religious bodies.[8]

Breyer's whole dissent focused on the problem of religious divisiveness. He even went so far as to provide examples from American history of religious hatred and violence.[9] Like Souter, Breyer touched on the political impact of public funding of religion on religious organizations. Breyer noted that if voucher programs are widely adopted, American governments may spend billions of dollars on sectarian education. Breyer asked, "[w]hy will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools?"[10] Like Souter, Breyer discussed religious political involvement with American government, not to condemn the social leveling of religion into just another lobbying group seeking scarce public dollars, but to warn that religions will try to utilize government to regulate doctrine and doctrinal teaching, especially to the young and faithful.[11] Breyer and Souter feared the rise of sectarian unrest in America, in part because religions would compete for public monies, and in part because religions would clash doctrinally in the teachings supported by public monies. Both concerns are weighty and deserve attention, but both concerns overlook a much more basic problem for religion in America.[12] Turning religions into publicly funded educational service programs transforms religion into just another American public function that must compete for taxpayer dollars. The Florida constitution and Florida government illustrate the risk for

religions if religions become substitutes for public programming rather than providers of wholly religiously controlled and funded private education and private programming.

III. The Florida Constitution and Florida Government: Public Needs and Fiscal Pressures

By accepting public monies, American religions enter into a competition for scarce public funds that must cover a wide variety of public services. The Florida constitution and Florida government serve as roadmaps of what religions face in the future if religions allow themselves to become public service and public program substitutes. First, in Florida, religious schools must compete with a public school system mandated by the Florida constitution. Article IX of the Florida constitution limits the Florida legislature in disbanding or weakening a public school system. Though a Florida District Court of Appeals in *Bush v. Holmes*[13] found that the Florida legislature may make a well-delineated use of public funds for private school education,[14] the Florida constitution states, "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education."[15] Although the *Holmes* Court found that the Florida constitution "does not unalterably hitch the requirement to make adequate provision for education to a single, specified engine, that being the public school system,"[16] the Court never even implied that public schools could be abolished or under-funded. In fact, the Florida constitution provides that "[t]he income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools."[17] Though the legislature may be free to use general funds for well-tailored private school programs, funds earmarked for education must go to public schools.

Not only must the religious schools compete for public monies with the public schools mandated by the Florida constitution, but they also must compete with agencies and other entities provided for by the Florida constitution. Some examples of Florida's constitutionally mandated groups receiving public funds include a militia organized in accord with Florida law,[18] an Everglades Trust Fund which can accept monies from general state revenues as determined by the legislature,[19] state attorneys and public defenders,[20] along with a judiciary funded from state revenues appropriated by state law.[21] Furthermore, the Florida constitution provides that executive functions of the state of Florida shall be administered by no more than twenty-five state departments in addition to cabinet departments administered by the attorney general, chief state financial officer and commissioner of agriculture.[22] Additionally, the Florida constitution allows the legislature to create Departments of Veteran Affairs and Elderly Affairs.[23] The constitution also authorizes the creation of counties[24] and municipalities.[25] The functions of the state of Florida are varied, and include such functions as managing Florida's waters and preventing flooding.[26]

Not only must religious schools compete with a dizzying array of public services meeting a large variety of public needs, but the competition for public monies is an intense one, as the Florida constitution restricts the taxing powers of all state and local governments in Florida. The Florida constitution restricts an income tax[27] and inheritance taxes.[28] Tax rates are capped for many statewide[29] and local taxes.[30] Homestead property tax increases are limited by economic standards written into the Florida constitution.[31] Tax rates are capped by local school purposes.[32] Overall, Floridians avoid spending tax monies. In 2000, Florida ranked 47th nationally in social welfare spending and in the bottom third of states for per capita spending for elementary schools.[33] Florida has a large older retirement community that avoids paying taxes on lifetime accumulations of wealth.[34]

Overall, religious schools and institutions in Florida will enter a competitive public funding environment if they gain the opportunity to use publicly funded vouchers. That competitive environment will transform Florida's religious institutions, and, by necessity, the religions that support them, into just another group of public interests vying for access to the public fisc. Religions will have to be competitive to jockey with those interests that support elder affairs, veteran affairs, the militia, and water and flood control. The question becomes what effect this competitive role will have on religion.

IV. Conclusion: Competing for Public Monies and the Rise of a Madisonian Moment

Publicly funded voucher programs utilized to purchase services from religious schools will force American religion into a political competition for limited monies. Justices Souter and Breyer acknowledge as much in their dissents in *Zelman*, but even as they acknowledge that problem, Souter and Breyer miss an important Madisonian moment in which the Justices could point to the warnings of James Madison about mixing religion and governmental policy and spending. Souter and Breyer both point to frictions that will arise as sects compete for government dollars, but the two Justices only really point to doctrinal frictions that will arise among religions.[35] The Justices avoid analyzing the broader implications for religion where religions not

only compete amongst themselves, but also with a broader array of public interests such as the elderly, veterans, the state militia, and flood control advocates. Souter mentioned that James Madison protested a three pence Virginia tax to support religious education as a violation of conscience and as corrupting religion.[36] However, Souter and Breyer missed a much more basic Madisonian point about the dangers of spending public monies on religion.

Madison wrote that religion exists outside of the "cognizance of Civil Government."[37] In fact, for Madison, religion remained exempt from the cognizance of civil society, because religion existed within its own special and protected sphere of human life separate from civil society created by and for humans. Madison noted, "Before any man can be considered as a member of civil society, he must be considered as a subject of the Governor of the Universe."[38] Madison conceived of religion as not only separate from the mundane sphere of secular society, but he noted that religion and the relationship of people to God took precedence over the relationships of people to each other and to their governments. Again, Madison wrote, "[a]nd . . . a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority."[39] For Madison, religion represented a higher state of existence than politics, government, and the human social system.

The Florida constitution demonstrates how public funding for religious schools will undermine this special place, recognized by James Madison, that religion holds in American society. If religious schools take publicly funded vouchers and other religious institutions take public monies to subsidize their propagation of doctrine, those religious schools and institutions level themselves with all other interest groups that must compete for scarce tax revenues and expenditures. In doing so, religions risk losing the precedence that religion should take over civil society and government. Religion risks becoming just another public interest serving society like a Department of Elderly Affairs, a Department of Veteran Affairs, a free and uniform public school system, a militia, and a floodwater control agency. Religion even risks being assigned a lower priority than other public interests such as public safety and medical emergency care. No guarantee exists that religion will compete well with other public interests. Justices Souter, Breyer, and the Supreme Court majority overlooked Madison's implicit warning that religion and the relationship of G-d with people would lose its special significance to people when religion becomes the beneficiary of the public fisc. The Supreme Court would do well to review James Madison and the state constitutions, including Florida's, that either mandate or provide for services and revenues for a wide variety of mundane human activity.

Endnotes

1. ___ U.S. ___, 122 S. Ct. 2460 (2002).
2. *Id*. at 2463-64, 2467.
3. *Id*. at 2485 (Souter, J., dissenting), 2502 (Breyer, J., dissenting).
4. *See* Memorial and Remonstrance Against Religious Assessments to the Honorable General Assembly of the Commonwealth of Virginia, A Memorial and Remonstrance found in *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 63 (1947) [hereinafter "A Memorial and Remonstrance"].
5. *Zelman*, 122 S. Ct. at 2501, 2505.
6. *See generally* Martin E. Marty, Pilgrims In Their Own Land, 500 Years of Religion in America (1984) and Harold Bloom, The American Religion, The Emergence Of The Post-Christian Nation (1992) (discussing the intersection of religion and American society).
7. *Zelman*, 122 S. Ct. at 2500-01.
8. *Id*. at 2501.
9. *Id.* at 2503-04.
10. *Id*. at 2505.
11. *Id*. at 2505-06.
12. *See* Daniel Gordon, *Into The "Breyer" Patch: Religious Division and the Establishment Clause*, Rutgers J.L. & Religion (forthcoming 2002).
13. 767 So. 2d 668 (2000).
14. *Id*. at 675.
15. Fla. Const. Art. IX, § 1.
16. *Holmes*, 767 So. 2d at 675.
17. Fla. Const., Art. IX, § 6.
18. Fla. Const., Art. X, § 2.
19. Fla. Const., Art. X, § 17.
20. Fla. Const., Art. V, §§ 17, 18.
21. Fla. Const., Art. V, § 14.
22. Fla. Const., Art. IV, §§ 4(a), 6.
23. Fla. Const., Art. IV, §§ 11, 12.
24. Fla. Const., Art. VIII, § 1.
25. Fla. Const., Art. VIII, § 2.
26. Almanac of Florida Politics 2000, The Comprehensive Guide to Power, Places and Policymakers 38 (2000) [hereinafter "Almanac of Florida Politics 2000"].
27. Fla. Const., Art. VII, § 5(a)-(b).
28. Fla. Const., Art. VII, § 5(a).
29. Fla. Const., Art. VII, § 2.
30. Fla. Const., Art. VII, § 9.
31. Fla. Const., Art. VII, § 4(c).
32. Fla. Const., Art. VII, § 9(b).
33. Almanac of Florida Politics 2000, *supra* note 26, at 9.
34. *Id*. at 10-11.
35. *Zelman*, 122 S. Ct. at 2501, 2505.
36. *Id*. at 2499.
37. A Memorial and Remonstrance, *supra* note 4, at 8.
38. *Id*. at 1.
39. *Id*.

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Censoring Religious Speech in the Name of Non-Establishment

By Thomas Marcelle

Can the Establishment Clause be used by the government as a weapon to impose censorship on religious speakers?[1] Recently the Northern District of New York ruled, at least in theory, that the government can use the Establishment Clause to justify the censorship of private religious speakers on government property.

In *Anderson v. Mexico Academy*,[2] a school district, in order to raise money, created a walkway in front of the school out of bricks purchased and inscribed by the community. Over 1,500 people bought and inscribed bricks, including several bricks that contained religious messages. There was a brick from a local Catholic priest that read "God bless you/ Fr. Wirkes/ St. Mary's Church"[3] and several bricks from a local Protestant minister, Rev. Ronald Russell, including one that read "Jesus Loves You/ Rev. Russell."[4]

The school board, after receiving a complaint about the bricks with religious expressions in the walkway, decided to remove bricks with Christian expressions, like Rev. Russell's brick. However, bricks that just made reference to God, like Father Wirkes' brick, were permitted to stay in the walkway.[5] The school district believed this censorship was required by the Constitution. The school superintendent testified, "it was our responsibility under the United States Constitution to remove the bricks . . . which made explicit reference to a Christian God."[6]

Rev. Russell sued, demanding that the school district replace his brick in the walkway. In deciding a motion for a preliminary injunction, the district court found that the school had violated Rev. Russell's free speech right because the school could not constitutionally discriminate between theistic expression and Christian expression.[7] Nevertheless, the court held that the school district did not need to replace Rev. Russell's brick because the school district might be able to prove an Establishment Clause violation—i.e., that references to Christ might cause the public to believe that the school district endorsed the Christian religion.[8]

Implicit in the district court's reasoning was that the protection accorded citizens under the Free Speech Clause and the Establishment Clause are in conflict with each other. The theory that government can violate the Establishment Clause by allowing religious speakers to speak on government property has been recognized by the Supreme Court.[9]

However, the Supreme Court, in *Good News Club v. Milford Central School*,[10] recently dropped an anvil-like hint that the government may no longer use the Establishment Clause to censor religious speakers. In *Good News Club*, a school district maintained that the Establishment Clause required it to close the schoolhouse door to religious youth groups for after-school meetings, even though the door was open to secular youth groups.[11] In particular, the school district believed that young students might perceive that the religious club and its activities were school-endorsed.[12] The school district argued that the perception that the school endorsed religion required it to censor religious speakers.[13]

"The Supreme Court should take the final step and hold outright that protections afforded the people against government regulating speech and from government establishing a religion are not in conflict."

The fact the school district argued that a perception of endorsement justified its censorship of religious speech was not novel; it had been often made.[14] What was novel and has been overlooked by most observers,[15] was that for the first time, a majority of the Supreme Court cast doubt on whether the government can use the Establishment Clause as a weapon to silence religious speakers. The Court explained that "it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination."[16]

The Supreme Court should take the final step and hold outright that protections afforded the people against government regulating speech and from government establishing a religion are not in conflict. There are six reasons for this conclusion.

First, it is per se unreasonable to allow government to censor speech because some people (or some students in the school setting) may not comprehend the concept that the government does not endorse everything it fails to censor.

The truth, which must count for something, if not everything, is that the government, just by opening its property equally for all to speak, "does not thereby endorse any of the particular ideas aired there."[17] For example, in both *Good News Club* and *Mexico Academy,* the inspiration and language of the religious speech was a product of free thought by free people, not government.

"The constitutional right to free speech would be extremely fragile if it could be shattered by the false perceptions of a child. The First Amendment was not meant to be fragile, but robust."

In an effort to circumnavigate the mountain of truth, the government, especially school districts, often posits that a young child might falsely perceive private religious speech as the government's speech. Whatever validity an approach that substitutes a reasonable observer with a child observer may have had, the Supreme Court has rejected it stating, "[w]e decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which . . . [private] religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."[18]

The Supreme Court was right to resist this argument. An argument that government should be given a license to censor to protect against the potential false impression of children should be rejected if we are to preserve a vigorous free marketplace of ideas.[19] The constitutional right to free speech would be extremely fragile if it could be shattered by the false perceptions of a child. The First Amendment was not meant to be fragile, but robust.[20]

Second, assuming the theory that the protections afforded the people by the Free Speech and the Establishment Clauses are in conflict with one another, there is no principal way to choose which clause is more important. Why, for example, resolve the conflict between the clauses by tipping the balance in favor of no-establishment and cutting back on the free speech rights of citizens? Why is the government's duty to comply with the Establishment Clause more important than its duty to comply with the Free Speech Clause? The ranking of the protections contained in the First Amendment via litigation would involve ultimately a subjective (and probably different) call by the courts. An interpretation of the First Amendment that would leave ranking of rights to the courts would only serve to politicize the courts, which is not desirable.[21]

Third, supposing that a court may rank the relative harms caused when the government violates both the Free Speech Clause and the Establishment Clause, the harm caused by the government discriminating against a speaker's religious viewpoint is greater than the harm caused by the misperception that government has endorsed religion. On the one hand, viewpoint discrimination is the most "egregious" violation of the First Amendment.[22] On the other hand, the least harmful Establishment Clause violation would be a case where the government does not actually endorse religious expression, but is *falsely* perceived to have endorsed religious expression—(i.e., a case where fiction triumphs over truth). Thus, in a balancing test, the protection of the religious speaker's free speech rights would outweigh a person's false perception that government endorsed the religious speaker's viewpoint.

Fourth, censorship of religious viewpoints from a public forum would itself violate the Establishment Clause.

The Establishment Clause prohibits government "[from making] adherence to a religion relevant [in any way] to a person's standing in the political community."[23] When government invites and welcomes those members of the community who wish to speak about secular ideas, but expels those who wish to express religious ideas, government makes religion relevant to participation in the forum. This is exactly the evil (religious exclusion) that the Establishment Clause was designed to prevent.

The message of exclusion is not a misperception; it is a message the government affirmatively communicates by excluding religious speakers from a government forum that is open to the rest of the community. For example, in the *Mexico Academy* case, by allowing those citizens who express favored religious thoughts (e.g., "God bless you") to participate in the community forum, the school district is telling citizens who want to express the disfavored religious thoughts (e.g., "Jesus loves you") "that they are outsiders . . . [and less than] full members of the political community."[24] In another case, *Good News Club*, the school district suggested that the club could use a location other than the school. In particular, the school district proposed that "Christian" children leave the school and walk a short distance to a private building.[25] Under the school district's proposal, Good News Club members would assemble outside the

school while members of the 4-H Club, Daisy Scouts, and Cub Scouts would assemble inside the school. Club members would then march from the schoolhouse steps down the street to the other location in full public view. The school district's message to the public was clear: secular activities such as the 4-H Club are welcome, but religious clubs are not. This is religious discrimination, and it violates the Establishment Clause.

The Establishment Clause, which was crafted to protect the rights of the religious from exclusion from the community, should not be used as a weapon to exclude religious speakers from participation in a broad community forum. Therefore, the theory that an alleged false perception of religious endorsement requires the suppression of disfavored religious viewpoints from a government created public forum should be rejected.

"The Establishment Clause, which was crafted to protect the rights of the religious from exclusion from the community, should not be used as a weapon to exclude religious speakers from participation in a broad community forum."

Fifth, censorship of religious speakers from public facilities is not the only remedy to protect against the mistaken impression that government has endorsed the religious speakers. A falsely perceived endorsement of religion can be met with education rather than censorship. More speech has always been the First Amendment's solution to misunderstanding. More speech, not less, should be the solution to false impressions of endorsement. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.[26]

Sixth, the collision between the Free Speech Clause and the Establishment Clause will persist until we return to the concept that the Establishment Clause is to protect individual freedom of conscience and not discrimination against religious minorities. The transformation of the Establishment Clause from an individual right to a group right is beyond the scope of this article. However, recent scholarship details the transformation and the implicit battle between free speech and non-establishment.[27]

Conclusion

Can the Establishment Clause be used by the government as a weapon to impose censorship on religious speakers? The Supreme Court has cast doubt on the inherently flawed concept that the Establishment Clause and the Free Speech Clause are not in conflict with each other. The federal courts should pick up on the Supreme Court's hints and reject arguments by the government that they must censor religious speakers because of Establishment Clause concerns.

Endnotes

1. The First Amendment to the United States Constitution provides "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I, although what exactly constitutes as an establishment of religion has undergone an evolution over time. *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 Cal. L. Rev. 673 (2002). Currently the Supreme Court has said that Establishment Clause prevents the government from endorsing a religion. Under the endorsement test, the government violates the Establishment Clause if a reasonable observer believes that the government either endorsed (preferred) or was hostile to religion. *See Board of Ed. of Westside Schools v. Mergens*, 496 U.S. 226, 248 (1990). In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) Justice O'Connor defined the endorsement test in the following manner, "[a]s a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by a message that religion or a particular religious belief is favored or preferred." *Id.* at 627 (O'Connor, J., concurring). *See also Zelman v. Simmons-Harris*, ___ U.S. ___, 122 S. Ct. 2460, 2468-69 (2002) (adopting the endorsement test in the context of school vouchers).
2. 186 F. Supp. 2d 193 (N.D.N.Y. 2002)
3. *Id.* at 196.
4. *Id.* at 196-97.
5. On March 8, 2000, then Mexico Academy Superintendent Michael Havens wrote a letter to Rev. Russell explaining why bricks which made a reference to God were permitted, but those that made a reference to Christ or "Jesus" were not permitted in the school walkway:

   > As a result of the continuing complaint [by Ms. Passer] and as a resulting [sic] inquiry from Senator Schumer's office, we asked our attorneys about our legal right to keep the bricks as part of the sidewalk.
   >
   > We have been informed that bricks which promote a particular religion cannot legally be part of the sidewalk. Bricks which speak about God are acceptable since they do not refer to a particular religion. Bricks such as yours, which include the word Jesus, are prohibited in publicly funded schools since they promote a particular religion (Christianity). I regretfully inform you that we have therefore reluctantly removed your bricks.

   The letter can be found in the joint appendix of *Kiesinger v. Mexico Academy* (no. 02-7270 7878, 2d Cir.) at 25.
6. *Anderson*, 186 F. Supp. 2d at 201-02; the testimony can be found in the joint appendix of *Kiesinger* at 62.
7. *Anderson*, 186 F. Supp. 2d at 205.
8. *Id.* at 208.
9. *See e.g. Capitol Square Review Board v. Pinette*, 515 U.S. 753, 761-62 (1995) (plurality opinion) (holding that "[t]here is no doubt that

compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech").

10. 533 U.S. 98 (2001).
11. *Id.* at 102-03.
12. *Id.* at 112-13.
13. *Id.* at 117-18.
14. *See Good News Club*, 533 U.S. at 117-19 (arguing that it would be a government endorsement of religion to allow a private religious club to use a public elementary school at the end of the school day for Bible instruction); *Capitol Square Review Board*, 515 U.S. at 763-66 (arguing that it would be a government endorsement of religion to allow a privately owned cross on state-owned land in front of the state capitol building); *Board of Ed. v. Mergens*, 496 U.S. 226, 248-53 (1990) (arguing that it would be a government endorsement of religion to allow Bible club conducted by students (who are private citizens) on school property); *Lamb's Chapel v. Center Moriches Union Free School*, 508 U.S. 384, 395 (1993) (arguing that it would be a government endorsement of religion to allow a private group to show a religious film on school property); *Rosenberger v. Rector and Visitors of the University of Va.*, 515 U.S. 819, 839-40 (1995) (arguing that it would be a government endorsement of religion to spend school funds on a private group's Christian newspaper).
15. *See e.g.,* Austin W. Bramwell, Note, *Juris Doctors or Doctares Diviniatis:* Good News Club v. Milford Central School*, 533 U.S. 98 (2001)*, 25 Harv. J.L. & Pub. Pol'y 385 (2002); Amy D. Smith, Note, *Constitutional Law—Freedom of Religion and the Establishment Clause—School Board Refuses to Allow Religious Group to Meet in Public Forum Constitutes Viewpoint Discrimination*, 32 Cumb. L. Rev. 463 (2001).
16. *Good News Club*, 533 U.S. at 113.
17. *Widmar v. Vincent*, 454 U.S. 263, 276, n.10 (1981).
18. *Good News Club*, 533 U.S. at 119.
19. Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 17-20 (1986) (arguing that censoring speech based on misperceptions is at war with First Amendment values).
20. *See New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).
21. *See* Jack M. Balkin, Essay, Bush v. Gore *and the Boundary Between Law and Politics*, 110 Yale L.J. 1407 (2001).
22. *See Rosenberger*, 515 U.S. at 829.
23. *Capitol Square Review Bd.*, 515 U.S. at 772 (internal quotation marks and citation omitted) (O'Connor, J., concurring).
24. *Id.* at 773 (internal quotation marks and citation omitted) (O'Connor, J., concurring).
25. This testimony is contained in the Joint Appendix before the Supreme Court at 99-100.
26. *See* Laycock, *supra* note 19, at 17-20 (arguing forcefully that neutrality and education, not censorship, is the solution for misperceptions of government endorsement of religious speech). Professor Laycock also notes that both the "secular left" and the "religious right" make the same mistake about government neutrality—"Both sides take the position that if the school is not for them, it is against them. Both sides say neutrality will be interpreted as supporting the other side. . . . Neutrality is seen as support for the other side because it might be misunderstood as support for the other side." *Id.* at 19-20.
27. *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 Cal. L. Rev. 673 (2002).

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Reconciling Health Care Needs and Religious Practice

By Kathleen M. Boozang

Challenged from Every Direction

Catholic health care institutions, particularly hospitals, face a confluence of unprecedented challenges. First, Catholic hospitals are attempting to chart a path that will preserve their long-term economic survival without compromising their mission. In some instances, the most promising opportunities for preservation of both the Catholic health care ministry and any hospital presence in a particular community, are partnerships with out-of-state systems or non-Catholic health care providers. These opportunities present two distinct challenges, religious and secular.

In June 2001, the United States Conference of Catholic Bishops issued the fourth edition of the *Ethical and Religious Directives for Catholic Health Care Services* (the "*Directives*"),[1] which explicates the moral guidelines to which Catholic health care providers must adhere. These guidelines clarify some ambiguities pursuant to which some Catholic institutions, with the aid of their attorneys, had been negotiating creative arrangements with non-Catholic providers that were designed to satisfy the tenets of Catholicism as well as the expectations of state governments about the range of health care services that licensed hospitals should provide.[2]

Aware of the proscriptions of the *Directives*, citizen groups have mobilized throughout the country to ensure that communities do not lose access to services that are likely to be discontinued by a merged community hospital that is governed by the *Directives*. Of greatest concern to these groups are limitations on access to reproductive health services. Although many groups include appropriate end-of-life care among the services denied by Catholic hospitals, this represents a misperception of Catholic moral teaching. Other community groups simply seek to prevent large corporations, whether or not they are for-profit, from controlling their community hospital, and, in some cases, using the resources of their financially viable hospital to subsidize other less financially stable facilities in other communities. What both of these interest groups have in common is their creative deployment of charitable trust and not-for-profit corporate law to attempt to preclude or limit affiliations that they deem harmful to their communities.

This essay briefly surveys the salient features of the *Directives*, as well as two of the more interesting cases in which objectors to Catholic-secular hospital affiliations have attempted to use corporate and trust law to frustrate such collaborations. Interestingly, the First Amendment is absent from the resolution of these conflicts, which are being played out in the corporate-law arena. This raises the question of whether the courts or attorneys general's offices are appropriate venues to resolve the complex issues of public health, access to care and free exercise of religion that are at stake.

Many communities that require tertiary care cannot support multiple community hospitals; likewise, many community hospitals cannot survive as stand-alone facilities, and require the financial support and managerial infrastructure of a system. Catholic hospitals historically and currently commit to underserved areas that are not appealing or profitable to less mission-oriented providers. Catholic health care remains necessary to the health care system both at the service level and at the political level where it is one of the consistently unwavering voices supporting systemic change in the United States that will achieve universal access to health care. However, Catholic health care will only continue its mission if the state allows it to do so consistent with its religious principles. On the other hand, women and men require access to appropriate reproductive health services. This quandary suggests that the public health system must work by itself, or with private partners, to complement the services provided by Catholic health care in those communities where it is the sole or significant community provider.[3]

The Commands of the *Directives*

The *Directives*, promulgated in 2001 by the United States Conference of Catholic Bishops,[4] explicate the basic moral principles that constitute the parameters within which Catholic providers must serve their patients. This discussion merely highlights a few of the many directives. To begin, the *Directives* articulate the mission of Catholic health care:

> Catholic health care should distinguish itself by service to and advocacy for those people whose social condition puts them at the margins of our society and makes them particularly vulnerable to discrimination: the poor; the uninsured and the underinsured; children and the unborn; single parents; the elderly; those with incurable dis-

> eases and chemical dependencies; racial minorities; immigrants and refugees. In particular, the person with mental or physical disabilities, regardless of the cause or severity, must be treated as a unique person of incomparable worth, with the same right to life and to adequate health care as all other persons.[5]

Catholic health care is unremittingly committed to the underserved. Thus, from a public health perspective, at least as long as the United States retains its current health system, Catholic health institutions are essential to the national health care infrastructure. Few quibble with the importance of Catholic health care. Rather, they resent the limitations on access to certain kinds of health care that are imposed by the *Directives*. Most detractors' attention focuses upon reproductive services and end-of-life care.

"Few quibble with the importance of Catholic health care."

Actually, the fear about Catholic hospitals' interference with termination of treatment is misplaced. Ironically, the *Directives* are significantly more permissive than New York law with respect to end-of-life decision-making.[6] The *Directives* recognize the legitimacy of surrogate decision-making pursuant to an advance directive, but also anticipate the need for substitute decision-making where no advance directive exists. Further, the *Directives* allow for decision-making pursuant to the patient's wishes or, if such wishes are unknown, in accordance with the best interests of the patient.[7] The *Directives* appear to recognize the legitimacy of withholding futile treatment,[8] which remains an unanswered legal question.[9] The *Directives* explicitly allow palliative care, even if it indirectly shortens the patient's life;[10] they are conservative but not prohibitive on the question of terminating nutrition and hydration.[11] Finally, Catholic teaching, which is the source of the proportionate benefit concept employed in many civil law contexts, allows for consideration of excessive expense to the family or community—factors with which many courts remain uncomfortable.[12]

Opponents of the extension of the *Directives* to gynecological services are generally more accurate in their understanding of Catholic teaching. The most recent edition of the *Directives* eliminates any ambiguity or room for moral rationalization. For example, "[t]he Church cannot approve contraceptive interventions that 'either in anticipation of the marital act, or in its accomplishment in the development of its natural consequences, have the purpose, whether as an end or a means, to render procreation impossible'";[13] "[a]bortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted";[14] "[d]irect sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available."[15]

Catholic hospitals seeking to partner with non-sectarian institutions are increasingly required by their bishops to ensure that neither entity engages in activities that run afoul of the *Directives*. As a result, community activists have been aggressive in enlisting the aid of the state to preserve access to essential services. They frequently point out that it is most likely poor women, who are the traditional constituency of Catholic hospitals, who will most suffer from the limitations on access to reproductive services.

New Legal Challenges

Two recent hospital mergers, one in New York, and one in New Hampshire, illustrate the creative employment of the principles governing the operation of nonprofit corporations to attempt to enjoin the extension of the *Directives* to newly affiliated hospitals. *Nathan Littauer Hospital Association v. Spitzer*[16] involved an affiliation between Littauer Hospital and St. Mary's Hospital, both not-for-profit hospitals in Fulton and Montgomery Counties, respectively. The consummation of the hospitals' affiliation would produce a newly created common parent corporation, Tri-County Health System (TCH). The New York Attorney General sought to require the hospitals to obtain approval of the Supreme Court, and give notice to the Attorney General, contending that the hospitals' respective restated certificates of incorporation would change the enumerated powers or purposes in their original certificates of incorporation.[17] The court, however, rejected the contention that changing the membership of Littauer, and reserving to the new parent (TCH) the corporate powers previously held by Littauer constituted a change to corporate powers requiring judicial approval.

Amicus briefs filed by Save Our Services-Gloversville, Planned Parenthood Mohawk-Hudson, Inc., Family Planning Advocates of New York State and Citizen Action of New York argued that a requirement in the restated certificates of incorporation that the newly affiliated facility comply with the *Directives* constituted a change in corporate powers necessitating court approval under the same statutory provisions invoked by the Attorney General. The *Littauer* court acknowledged that the contested provision would result in the elimination of abortion-related services, as

well as contraceptive services and counseling. Nonetheless, the court distinguished between a corporation's powers and the services that it provides, and concluded that it is within the business judgment of the corporation to determine what services are consistent with its mission and corporate purposes.

The New Hampshire Attorney General was more successful in his challenge of a merger between Elliot Hospital and the Catholic Medical Center, resulting in the dissolution of the affiliation four years after it occurred.[18] The facts and legal arguments asserted by the New Hampshire Attorney General are too complex for full recitation here. The bottom line, however, was that the Attorney General successfully deployed charitable trust law to challenge the continuity of mission and identity between the newly merged entity and its predecessors. The New Hampshire Attorney General articulated specific concerns about the Catholic entity's loss of its unique spiritual mission by affiliation with a secular institution, and the confusion created by the unclear means by which the *Directives* apply (or not) to the new entity, Optima. The Attorney General's Report states:

> As the ongoing controversy regarding abortion procedures indicates, there is considerable concern within the medical and general communities of greater Manchester as to whether Catholic doctrine may come to control the provision of healthcare at Elliot Hospital. Necessarily, this issue is most acutely drawn in the area of reproductive services and abortion, though it may also have implications for other areas of health care, including care at the end of life.[19]

Conclusion

Local communities have a clear interest in preserving access to health care services. How best to negotiate the tension between Catholic hospitals' rights of free exercise and these communities' health care needs is more challenging today than it was a decade ago. In the end, however, it will be to no one's benefit to pursue policies that evict Catholic health care from the extant health care system; Catholic health providers are essential participants both nationally and locally. Further, it remains unclear whether attorneys general's offices are the ideal venues for resolving what are ultimately public health issues. Many complained about the inconsistency among dioceses and the uncertainty regarding what Catholic hospitals were allowed to do in this health care market. The United States bishops have clarified their position. It is now up to those in health care public policy to identify creative models that communities can implement to preserve the complement of services required by the community which, in most cases, includes the services provided by their Catholic hospital.

". . . it will be to no one's benefit to pursue policies that evict Catholic health care from the extant health care system; Catholic health providers are essential participants both nationally and locally."

Endnotes

1. U.S. Conf. of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services (4th ed. 2001), *available at* http://www.usccb.org/bishops/directives.htm.
2. *See generally*, Catholic Health Association, Physician-Hospital Joint Ventures: Ethical Issues (1991); Carol Weisbrod et al., Affiliations Between Catholic and Non-Catholic Health Care Providers and the Availability of Reproductive Health Services: Is There a Common Ground? (Kaiser Family Foundation 1997).
3. *See generally*, Kathleen M. Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 Hous. L. Rev. 1429 (1995).
4. U.S. Conf. of Catholic Bishops, *supra* note 1.
5. U.S. Conf. of Catholic Bishops, *supra* note 1, Directive 3.
6. *See, e.g.*, *Matter of Westchester County Medical Center on behalf of O'Connor*, 534 N.Y.S.2d 886 (1988).
7. U.S. Conf. of Catholic Bishops, *supra* note 1, Directive 25.
8. U.S. Conf. of Catholic Bishops, *supra* note 1, Directive 27 (referring to the right to receive information about "any reasonable and morally legitimate alternatives").
9. *See generally*, Kathleen M. Boozang, *Death Wish: Resuscitating Self-Determination for the Critically Ill*, 35 Ariz. L. Rev. 23 (1993).
10. U.S. Conf. of Catholic Bishops, *supra* note 1, Directive 61.
11. U.S. Conf. of Catholic Bishops, *supra* note 1, Directive 58.
12. U.S. Conf. of Catholic Bishops, *supra* note 1, Directive 32.
13. U.S. Conf. of Catholic Bishops, *supra* note 1, Part IV Introduction & Directive 52.
14. U.S. Conf. of Catholic Bishops, *supra* note 1, Directive 45. The Directive also warns against any association with abortion providers.
15. U.S. Conf. of Catholic Bishops, *supra* note 1, Directive 53.
16. 734 N.Y.S.2d 671 (App. Div., 3d Dep't 2001).
17. *See id*. at 675 (citing N.Y. Not-for-Profit Corp. Law § 804(a)(ii) (McKinney 2001)).
18. N.H. Att'y Gen., Report on Optima Health, *available at* http://www.state.nh.us/nhdoj/CHARITABLE/optima1.html (Mar. 10, 1998).
19. *Id.* at § 5(3)(b).

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Freedom of Religion at Work

By Helene E. Weinstein

Legislation was recently enacted in New York to give employees greater civil rights protection for religious observance and expression.[1] This legislation amends N.Y. Executive Law § 296(10) in order to further protect employees from being forced to choose between their job and their religious observance. The enactment of this statute has aligned New York state law with the protections already in New York City's Administrative Code. Under the new statute, the employer must engage in a bona fide effort to reasonably accommodate the employee's sincerely held religious practices without undue hardship. The new statute expands employment discrimination protection from Sabbath and holy day observances to also include other sincerely held religious practices. Additionally, the statute provides better guidance to employers by defining "undue hardship." The employer's burden of proof as defined in common law is still applicable to cases brought under the new legislation, but now there is a clear legislative mandate to determine whether an accommodation caused the employer an undue hardship.

This new law is modeled on the New York City Administrative Code, which had already adopted this expanded prohibition of discrimination based upon an employee's religious practices.[2] The City Code had also previously adopted similar provisions requiring reasonable accommodations with a similar definition of undue burden.[3] The new law now provides these protections statewide, which clearly gives the Attorney General (AG) authority to pursue state claims implicating the City Code. For example, the AG has recently been involved in cases where a Jewish employee was prohibited from wearing a yarmulke, a Rastafarian employee was prohibited from wearing dreadlocks, and Sikhs were prohibited from wearing turbans and beards. Now, similar cases can be pursued statewide if employers do not take reasonable steps to accommodate these religious practices.

This legislation provides additional civil rights protection for employees by expanding the types of religious practices requiring accommodation and by extending protection beyond simply obtaining and retaining employment. The earlier version of this statute protected employees only from employment discrimination based upon religious observance of a Sabbath or holy day. The new law has expanded to additionally protect employees from discrimination that is based upon "a sincerely held practice of [the employee's] religion."[4] The previously specified provision for observance of a Sabbath or holy day is now listed as just one example of a "practice" of religion protected by the statute. For example, these changes would now require employers to reasonably accommodate an employee whose religion requires him to wear a beard in contravention of company rules requiring him to be clean-shaven.[5] An additional protection for employees is the expansion from the prior law, protecting employees only from discrimination in obtaining and retaining employment, to the new law, which now includes protection from discrimination in "promotion, advancement or transfers."[6]

". . . the AG has recently been involved in cases where a Jewish employee was prohibited from wearing a yarmulke, a Rastafarian employee was prohibited from wearing dreadlocks, and Sikhs were prohibited from wearing turbans and beards."

The new law also clarifies the employer's responsibilities. The common-law requirement that an employer make a "good-faith" effort to accommodate[7] is now codified as a "bona fide" effort.[8] The employer's defense for failure to accommodate is to show that the reasonable accommodations would have caused the employer an undue hardship. Prior to this enactment, the New York Court of Appeals defined "undue economic hardship" in *State Division of Human Rights v. Carnation Co.*[9] as "a palpable increase in costs or risk to industrial peace." This was a slightly higher standard for employers to meet than the federal *de minimis* standard.[10] Under the new statute, undue hardship is defined as "an accommodation requiring significant expense or difficulty."[11] This includes "a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system."[12] Factors used to determine an economic hardship include an identifiable cost, including loss of productivity, the number of people needing accom-

modation, and the degree that geographic distance between facilities makes an accommodation difficult or expensive. If an employee is unable to perform essential functions of the job, then that automatically qualifies as an undue economic hardship. Also, where an employee works a shift that normally pays an increased wage as a part of a religious accommodation, the employee will not be entitled to the wage increase.

New York City Transit Authority v. Meyers[13] illustrates how the New York Court of Appeals construed the employer's burden under the prior statute. This case still provides guidance under the new statute because the employer failed to show that it had made reasonable efforts, or what the burden, if any, of those efforts would have been. In *Meyers*, the employee was a newly trained bus driver who alleged that her employer, the New York City Transit Authority (NYCTA), had not made accommodations for her Sabbath observances in violation of Executive Law § 296. Under the terms of the bargaining agreement between the NYCTA and the Transport Workers Union, a seniority system gave the employees with the most seniority preference in choosing their days off. As a result of this policy, the people lowest on the seniority list usually had to work on the weekends for at least five years before getting weekends off. This, in effect, forced this employee to choose between keeping her job and observing her religion since, as a Seventh Day Adventist, she was prevented from working from sundown on Friday until sundown on Saturday, which directly conflicted with the hours her employer expected her to work.[14]

The NYCTA did not accommodate their employee's request for a split shift so that she could start work on Saturday at 5:00. They reasoned that since there was no bus run scheduled to start at that time and she was not trained to do other available work, she would not be authorized to work a split shift. The employee was also told that she should try to find another driver to swap shifts with her. She was given no assistance in arranging a swap, so she had to wait at the door to ask the other drivers to exchange shifts with her as they were leaving the building. These attempts were fruitless, so after several unexcused absences—due to the employee's Sabbath observances—she was fired.[15]

The New York Court of Appeals first addressed the issue of whether the statute could be applied to the Transport Workers Union. The Court declined to extend the statute to cover labor unions because the statute explicitly referred to only the employer, and therefore decided to defer to the legislature.[16] In the most recent amendment of this statute, the legislature declined to extend this provision to labor unions, but it has added employees or agents of the employer to those prohibited from discriminatory practices.[17]

Next, the Court turned to the issue of whether NYCTA violated the statute by failing to make a good-faith effort to accommodate her religious observation.[18] It is clear that an employer who makes no effort to accommodate an employee violates the statute. However, when the employer cited a union agreement with a seniority clause as the reason for not accommodating, this raised the issue of the employer's responsibility to work with the union to try to accommodate the employee. After discussing the statutory requirement that the employer should take reasonable steps, short of "undue economic hardship" to accommodate Sabbath observers, the Court held that NYCTA did have a duty to take reasonable steps short of labor litigation in an effort to accommodate its employee under the union rules. Reasonable steps the employer could have made included an effort to negotiate a plan to accommodate Sabbath observers, or an effort to obtain a waiver of the seniority rules for the particular employee, or a waiver of the rule against splitting days off.[19] The Court emphasized that the union's seniority arrangement itself was anti-discriminatory because it provided "a neutral and fair method for allocating scarce benefits and privileges among employees" where there was no prior history of invidious discrimination.[20] The Court also emphasized that the employer's efforts did not have to be successful in order to satisfy the statute, but that they did need to show that efforts were made.[21]

Aside from the union complication, the Court found that NYCTA could have taken other steps to accommodate this employee. For example, NYCTA presented no proof that "it would have been impractical to give her whatever training was required" for her to start her Saturday shift in the evening. Also, it was not clear from the record that a Saturday accommodation could not have been made with minimal cost or inconvenience to NYCTA. Since NYCTA did not offer sufficient proof of the cost or inconvenience of this reasonable accommodation, the Court held that NYCTA failed to meet its burden of proving "undue economic hardship."

Meyers illustrates the type of analysis that would still be applied to see if the employer made reasonable efforts to accommodate its employee's religious observances, which will now also include practices such as wearing a yarmulke to work. In other cases that do reach "undue burden" analysis, however, the courts will now be guided by statutory guidelines rather than the "palpable increase in costs or risk to industrial peace" test.

This new statute balances an increase in New York employees' religious freedoms with their employers' business concerns so that both parties are in a better

position than they were before. Employees are now able to enjoy a greater degree of religious freedom in their workplace, and employers have been given definitive guidelines to follow in their efforts to accommodate their employees' religious practices.

Endnotes

1. A.7340-A, ch. 539, N.Y. 2001-2002 Reg. Sess. (enacted Sept. 17, 2002).
2. N.Y. City Admin. Code § 8-107(3).
3. *Id.; see id.* § 8-102(18).
4. A.7340-A, ch. 539, N.Y. 2001-2002 Reg. Sess. (enacted Sept. 17, 2002).
5. *See Eastern Greyhound v. State Div. of Human Rights*, 265 N.E.2d 745 (1970).
6. *Id.*
7. *See, e.g., New York City Transit Authority v. Meyers*, 89 N.Y.2d 79 (1996) (citing Schweizer Aircraft Corp. v. State Div. of Human Rights, 48 N.Y.2d 294, 299 (1979).
8. A.7340-A, ch. 539, N.Y. 2001-2002 Reg. Sess. (enacted Sept. 17, 2002).
9. 42 N.Y.2d 873 (1977).
10. *Compare Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), *with State Div. of Human Rights v. Genesee Hosp.*, 418 N.Y.S.2d 687, 694 (1979), *rev'd sub nom. Genesee Hosp. v. State Div. of Human Rights*, 409 N.E.2d 995 (N.Y. 1980) on dissenting opinion of App. Div.
11. A.7340-A, ch. 539, N.Y. 2001-2002 Reg. Sess. (enacted Sept. 17, 2002).
12. *Id.*
13. 89 N.Y.2d 79 (1996).
14. *Id.* at 84-86.
15. *Id.*
16. *Id.* at 86.
17. A.7340-A, ch. 539, N.Y. 2001-2002 Reg. Sess. (enacted Sept. 17, 2002).
18. *Meyers*, 89 N.Y.2d at 86-87 (citing *Schweizer Aircraft Corp. v. State Div. of Human Rights*, (48 N.Y.2d 294, 299) (1979)).
19. *Id.* at 88-89.
20. *Id.* at 88.
21. *Id.* at 88-89.

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Tort Claims Against Religious Defendants and the Guarantee of Free Exercise

By Scott C. Idleman

Few tort plaintiffs evoke as much public sympathy, or as much media attention, as those who allege harm by their own religious institutions, particularly when the allegation is that a clergy-member has sexually exploited a child under his care. For the very reason that religious leaders possess authority and provide instruction regarding matters of morality and virtue, their apparent wrongdoing can often be nothing short of scandalous, both publicly and theologically. What many litigants and observers may be surprised to discover, however, is that the First Amendment Free Exercise Clause, which initially guarantees the right to worship at the institution of one's choice, may ultimately prohibit one's efforts to seek legal redress against the institution or its representatives. This article will examine the structure, logic, and limits of this prohibition.[1]

Possible Tort Actions Against Religious Defendants

In order to discern the relationship among tort law, religious defendants, and the Free Exercise Clause, it is helpful to first get a sense of the tort actions that such defendants, particularly in clergy misconduct cases, may face. For convenience, these actions can be divided into standard claims and customized claims, depending on the degree to which the *prima facie* elements are tailored to the defendant's religious nature or clerical responsibilities.

Broadly speaking, the standard tort claims are more commonly asserted and less likely to run afoul of the First Amendment. Several of these focus exclusively on how a religious institution has employed or managed its clergy; consequently, they can be asserted only against the institution or its corporate representatives. Such claims can cover virtually any stage of the employment or managerial relationship, from negligent hiring, training, and ordination, to negligent placement and supervision, to negligent retention, transfer, and termination.[2] In addition, there are a number of claims that involve allegations of wrongdoing by either the institution or an individual clergy-member; as a result, they can be leveled against either the institution, the individual, or both, depending upon the state's law of *respondeat superior*.[3] These include, among other things, breach of fiduciary duty,[4] negligent or intentional infliction of emotional distress,[5] and various expressive torts such as defamation.[6]

Customized tort claims are, by comparison, both more exotic and more likely to create First Amendment problems. Some customized claims are simply standard causes-of-action that have been modified by calibrating the scope of duty or the standard of care to the peculiar responsibilities of the institution or clerical office. As a formal matter, however, courts have generally been reluctant to adopt this approach, even though some degree of customization may subconsciously and thus unavoidably affect the decision-making of judges and juries.[7] There is also, in theory, an independent tort of clergy malpractice—alleging that a clergy member has violated a professional standard unique to the cleric's position—but no court to date has recognized this as a viable cause of action.[8] Finally, there have been efforts to adjudicate and impose liability for uniquely religious acts, such as excommunication or shunning or exorcism,[9] although most courts, again and for many of the same reasons underlying the rejection of customization and clergy malpractice, have refused to entertain such suits.[10]

Two Apparent Modes of Free Exercise Analysis

When a litigant alleges church or clergy wrongdoing through one or more of these tort theories, courts are faced with at least two potential First Amendment problems. The first is that the adjudicatory process itself may excessively entangle the court with religious doctrine in violation of the Establishment Clause, a concern that this author, among others, has previously addressed.[11] The second potential problem, and the focus of this article, is that the adjudicatory process and especially the imposition of liability may impede or interfere with the defendant's religious liberty in violation of the Free Exercise Clause.

A free exercise defense of this nature may apparently be presented and analyzed in two ways. One is through the so-called church autonomy doctrine,[12] which originated in the area of church property disputes[13] and has since given rise to, among other things, a constitutionally-based but non-textual "ministerial exception" to federal employment discrimination law.[14]

Under this doctrine, "[a] religious organization is protected from restrictions that invade its institutional autonomy," that is, the "sphere within which a religious organization may provide for the definition, development, and transmission of the organization's beliefs and practices . . . and may freely select, promote, discipline, and dismiss its clerics, officers, and members."[15] Only when the claim involves non-core matters, and then only if the claim can be resolved using neutral principles of law, will a religious institution be clearly exposed to potential liability.[16]

Perhaps the most distinctive feature of this doctrine is that, like the Establishment Clause, to which it is closely related,[17] it frequently functions as an absolute bar. Once an actual infringement of church autonomy is discerned, the judicial analysis ceases (at least regarding the claim in question) and there is no subsequent assessment or weighing of harms, benefits, government interests, and the like.[18] Conversely, where there is no meaningful infringement, either because the suit is directed at institutionally peripheral matters or because the application of neutral legal principles does not directly entangle the court with religious precepts, the doctrine provides little or no protection at all.

The other option for litigants and courts is to approach the claim using a traditional free exercise analysis. The tort law—whether on its face or as applied to the defendant's conduct—is subjected either to strict scrutiny (under which the plaintiff, effectively on behalf of the government, must demonstrate that the law or its application is necessary to achieve a compelling state interest) or to rational-basis review (under which the defendant must demonstrate that the law or its application is not rationally or reasonably related to a legitimate state interest).[19] There are both advantages and disadvantages to the traditional approach, especially in comparison to the church autonomy doctrine. On the one hand, the threshold showing that a religious defendant must make under the traditional analysis (a substantial burden on a religious practice) may in some cases be easier than demonstrating an infringement of church autonomy,[20] the latter of which for certain individual defendants may simply not be possible.[21] On the other hand, unlike the analytical methodology for church autonomy claims, traditional free exercise claims ordinarily involve judicial balancing rather than an absolute bar, which could doom the religious defendant should the balance happen to favor the tort law or its application. Even under strict scrutiny this remains a genuine risk, given the apparent judicial tendency to be less than "strict" in the free exercise context.[22] In addition, modern free exercise doctrine as defined by *Employment Division v. Smith*[23] contemplates a fairly limited role for strict scrutiny.[24] As a result, most litigants are left with rational-basis review, which nearly always proves impossible to satisfy.

Four Questions for Litigants and Courts

Due to the apparent coexistence of these two doctrines as well as the uncertain nature of each, tort actions against religious defendants can pose for litigants and courts an array of significant, often threshold, questions. Identified and examined here are four such inquiries. First, is the church autonomy doctrine still viable in light of the *Smith* decision? Second, assuming its viability, does it even apply to tort claims, especially those which are neither property- nor employment-related? Third, if it is applicable, when specifically should the doctrine apply—to which species of tort actions and against what types of defendants—and what might be the consequence of its application to these various scenarios? Fourth and finally, if the church autonomy doctrine is not viable or does not otherwise apply, under what conditions should strict scrutiny as opposed to rational-basis review then be employed? The balance of the article will address each of these questions in turn.

Among all of the inquiries, the first—whether the church autonomy doctrine survives *Smith*—yields the clearest, though not necessarily the final, answer. In fact, virtually every court that has confronted this question (including several federal courts of appeals) has held that the doctrine does remain viable and that the otherwise constrictive holding of *Smith* does not affect it in the least.[25] The one tribunal that has not addressed this question, however, is the *Smith* court itself. And, as one state jurist has remarked of the autonomy doctrine, especially in relation to tort suits, "[i]t is generally acknowledged that this area of First Amendment law is in flux and the United States Supreme Court cases offer very limited guidance."[26] In turn, to the extent that the doctrine does not survive *Smith*, its potential utility to religious defendants is obviously nil and questions about its scope, such as those addressed in the succeeding paragraphs, become entirely irrelevant.

Assuming the doctrine's viability, however, the next inquiry is whether the doctrine even has any relevance to the tort context, given its origin in the area of property disputes and its modest extension to employment discrimination and contract claims. This, too, is an issue on which the Supreme Court has provided no specific guidance,[27] despite ample opportunity and a mounting necessity for it to do so.[28] Unlike the question of the doctrine's viability, though, there is at least implicit disagreement among lower courts as to whether the church autonomy doctrine, as opposed to a traditional free exercise analysis, should govern tort suits involving religious defendants.[29] Such disagreement is not surprising, for there is little or nothing in the doctrine itself—either in the property or in the employment cases—that emphatically permits or precludes its extension to the tort context. Accordingly, it may simply depend, as it does in the employment realm, on

whether a particular action, judged on a case-by-case basis, truly implicates church autonomy in a core institutional sense.[30] To the extent that such an approach is actually applied, however, it would likely mean that suits against individuals, even clergy, where religiously informed institutional decision-making is not at issue, would generally not implicate the doctrine.

This prospect leads naturally to the third question, namely, in which tort actions and for which religious defendants would the church autonomy doctrine be implicated, and what would be the likely consequence of its invocation? Although this is probably the most complicated of the inquiries, nonetheless it is possible to state a few basic postulates. For example, the doctrine should presumptively apply to highly discretionary clerical decision-making concerning matters that are central to the institution's nature, purposes, and functions. This is certainly the approach of the ministerial exception cases, which frequently bar employment discrimination suits against a religious institution or its officers that challenge the hiring, placement, transfer, or termination of clergy or clergy-like personnel. As the Fifth Circuit stated in its landmark ministerial exception decision:

> The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.[31]

This reasoning, and the line of ministerial exception cases, in turn suggests that tort suits involving such issues ought likewise to be barred.[32] This could include several if not most aspects of the relationship between an institution and its clergy or clergy-like personnel, regardless of whether the tort claim is framed in standard or customized terms and even if the adjudication process does not excessively entangle the court with religious doctrine.

Correspondingly, as one moves away from core institutional decision-making by high-level officials, the viability of any given tort action would presumably increase. Unfortunately, courts will likely have difficulty determining this threshold of viability and, thus, defining the church autonomy doctrine's external perimeter. Two factors underlie this prediction. First, even though courts describe the doctrine's application in the employment context as functional,[33] the doctrine is nevertheless substantially formalistic. It operates by placing a set of facts within one of two predetermined categories (within or without the doctrine's protective scope), and this placement process is effectively outcome-determinative. Second, the experience of the doctrine in the property dispute and employment discrimination contexts has itself been marked by line-drawing difficulties, and there is no reason to believe that the tort context will prove any easier. Assuming, however, that courts must draw lines, some of the factors that they will presumably consider include: (1) whether the defendant's position or status is "important to the spiritual and pastoral mission of the [religious institution]"[34] or "significant in the expression and realization of [its] beliefs;"[35] (2) whether the defendant is "engaged in activities traditionally considered ecclesiastical or religious;"[36] and (3) whether "the relationship between the [defendant] and the [institution] is so pervasively religious that it is impossible to engage in [the necessary legal] inquiry without serious risk of offending the First Amendment."[37]

The church autonomy doctrine is, of course, not the only mode of analyzing free exercise claims. In fact, should that doctrine be deemed either categorically irrelevant to tort suits in general or specifically inapplicable to any particular suit, one may still advert to a traditional free exercise analysis, under which the tort law or its invocation would then be subjected either to strict scrutiny or to rational-basis review. *Smith* itself indicates that strict or heightened scrutiny is available under only four circumstances: (1) if the tort law or its application is intentionally or textually non-neutral with regard to religion;[38] (2) if the law, to a substantial degree, is not generally applicable;[39] (3) if the law, to the extent that it allows for discretionary non-application in justified circumstances, categorically excludes religious justifications;[40] or (4) if the defendant's free exercise claim is asserted in tandem with another cognizable constitutional right.[41] Precisely because the level of scrutiny can substantially affect a lawsuit's outcome, it is necessary to examine each of these conditions more closely to determine when, if ever, they might be satisfied by religious defendants.

As a starting premise, it is fair to assume that the tort law of the states, facially assessed, would be considered both neutral and generally applicable. There is no reason to believe that any state's tort law "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[42] Moreover, while it is true that tort law traditionally has exceptions—thus raising the specter of non-general applicability—as long as these exceptions are not inconsistent with the deterrent, compensatory, or

police-power objectives of tort law, then the law would still be deemed generally applicable.[43] By comparison, one could imagine the non-neutral *application* of a state's tort law, by grossly altering the rules of evidence, for example, or by imposing unprecedented damage awards. But these are case-by-case aberrations that undermine neither the tort law's overall neutrality nor its potentially valid application, and, in all events, they are deviations that can be corrected on appeal without even implicating the First Amendment. In short, it is unlikely that the criteria of neutrality and general applicability will prove useful to a religious defendant seeking to trigger strict scrutiny.

"The contemporary relevance of the Free Exercise Clause to tort actions against religious defendants, especially when compared to the Establishment Clause, is an issue of enormous potential significance yet relative doctrinal uncertainty."

Of greater utility may be the requirement that a discretionarily enforceable law, if it takes cognizance of secular reasons for its non-application, cannot categorically refuse to consider religious reasons, which in some cases may simply be a variation on the inquiry into general applicability. It is conceivable, for example, that a judge's or jury's negligence-related determination of reasonableness, which can plainly serve as a locus of discretionary decision-making, might not include religious considerations that bear, at least from the defendant's perspective, on the reasonableness of his conduct. This type of issue has periodically arisen in the mitigation-of-damages context, where a party's religious refusal to undergo conventional medical treatment exacerbates his injury, or even causes death, and the court must decide whether the party's religious beliefs can be included in the determination of whether he has satisfied his duty to reasonably mitigate damages.[44] To the extent that secular reasons may lessen this duty, but religious reasons may not, the law may be considered non-neutral—although the court's exclusion of religious reasons may legitimately be designed to prevent the Establishment Clause problem posed by judges or juries effectively assessing the reasonableness of the religion itself.

In the case of a religious defendant, there is similarly the possibility that theological considerations allegedly influenced the defendant's conduct (e.g., where a bishop, due to the bishop's understanding of healing, reconciliation, and the unique nature of the priesthood, transfers—rather than places on leave—an allegedly malfeasant priest), but a court refuses to allow this evidence to be introduced even though it might allow analogous secular justificatory reasoning into evidence in a case not involving a cleric (e.g., where a doctor wishes to explain her conduct with reference to the Hippocratic oath or another ethical precept). If the exclusion is defensibly based on preventing an Establishment Clause violation, then it would presumably be subjected to, and could very well satisfy, strict scrutiny, insofar as preventing Establishment Clause violations can be a compelling interest and excluding such evidence may be the only means to prevent excessive entanglement. If, however, the exclusion is based on some other ground, even a seemingly neutral one such as a judicial determination that it is legally irrelevant, then it would less likely satisfy strict scrutiny.

The remaining basis for heightened review under *Smith* requires the defendant to assert a free exercise claim in conjunction with another cognizable constitutional claim, creating a so-called "hybrid situation."[45] Courts have had tremendous difficulty defining both the universe of cognizable conjunctive claims and the degree to which a conjunctive claim must be independently viable. The Supreme Court in *Smith* explicitly identified the "freedom of speech and of the press, . . . the right of parents . . . to direct the education of their children"[46] and possibly the freedom of association,[47] but did not indicate whether this enumeration is illustrative or exhaustive, nor did it delineate how viable the conjunctive claim must be. Lower courts, for their part, have countenanced the hybridization of free exercise with constitutional guarantees relating to the nonestablishment of religion,[48] the rights of property,[49] and the right to life,[50] and several have indicated that the conjunctive claim must be "colorable,"[51] that is, having "a fair probability or a likelihood, but not a certitude, of success on the merits."[52]

Having set forth these issues, it should be further noted that their resolution may, in fact, affect very few tort suits involving religious defendants. Whether the universe of cognizable hybrid claims is limited to those mentioned in *Smith*—that is, speech, association, and parental decision-making—or whether it encompasses any number of liberties, it does not seem obviously relevant to most such tort suits. Speech or association may be implicated in some cases, such as those alleging defamation or wrongful expulsion. But it is difficult to imagine that cases involving clergy sexual contact with minors, for example, would implicate any liberty other than free exercise—and even the free exercise claim would presumably be tenuous.

Conclusion

The contemporary relevance of the Free Exercise Clause to tort actions against religious defendants, especially when compared to the Establishment Clause,

is an issue of enormous potential significance yet relative doctrinal uncertainty. The church autonomy doctrine, if applicable, can render entire tort actions unadjudicable or at least preclude the imposition of liability. But whether the doctrine is still viable, whether (if viable) it even applies to tort suits, and whether it would offer any protection to individual clergy whose conduct does not involve core institutional decision-making are all questions that, at this time, have no definitive answer. By contrast, the traditional free exercise analysis necessarily exists, can clearly apply to tort actions, and is generally available to any type of defendant. But whether it should give rise, under the exceptions of *Smith*, to strict scrutiny rather than rational-basis review is a matter of considerable uncertainty, despite the potentially outcome-determinative nature of the choice.

Generally speaking, the Free Exercise Clause will likely be most potent when the tort claim implicates core institutional decision-making and the defendant frames the free exercise issue as one of church autonomy. Indeed, to the extent that the church autonomy doctrine remains viable, it may very well preclude the claim entirely in such a situation. By comparison, the clause will likely be least potent when the tort claim is asserted against an individual defendant regarding conduct unrelated to core institutional decision-making. In this latter circumstance, the church autonomy doctrine would presumably not apply and the defendant would be left with the narrow prospect of triggering heightened scrutiny under one of *Smith*'s four exceptions. Even where strict scrutiny is applied, moreover, the defendant should not expect a favorable outcome, given an apparent judicial under-enforcement of the Free Exercise Clause over the past decades. Finally, where circumstances fall between these two scenarios, the mode of analysis and the outcome of the suit will simply depend on the relative nature and institutional function of the defendant's allegedly tortious conduct.

Endnotes

1. Often these suits are barred as well by state statutes-of-limitation, but the article will assume that any given claim, apart from its First Amendment significance, is otherwise viable.
2. *See, e.g.*, *Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998) (hiring), *aff'd*, 185 F.3d 873 (10th Cir. 1999); *Isely v. Capuchin Prov.*, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995) (hiring and retention); *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) (hiring and supervision); *Rashedi v. Gen. Bd. of Church of the Nazarene*, 54 P.3d 349, 351 (Ariz. 2002) (hiring, supervision, and retention); *Doe v. Evans*, 814 So. 2d 370, 371 (Fla. 2002) (hiring and supervision); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 444-45 (Me. 1997) (supervision); *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1997) (en banc) (hiring, ordination, supervision, and retention).
3. Regarding vicarious or corporate responsibility, see Mark E. Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 Am. J. Trial Advoc. 289 (1993).
4. *See, e.g.*, *Martinelli v. Bridgeport Roman Catholic Diocese Corp.*, 196 F.3d 409 (2d Cir. 1999); *Schmidt*, 779 F. Supp. at 328; *Evans*, 814 So. 2d at 373-77; *Langford v. Roman Catholic Diocese of Brooklyn*, 271 A.D.2d 494, 705 N.Y.S.2d 661 (2d Dep't 2000); *Jones v. Trane*, 153 Misc. 2d 822, 591 N.Y.S.2d 927 (Sup. Ct., Onondaga Co. 1992).
5. *See, e.g.*, *Rashedi*, 54 P.3d at 351; *Gibson*, 952 S.W.2d at 248-49; *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996).
6. *See, e.g.*, *Hutchison v. Thomas*, 789 F.2d 392, 393-96 (6th Cir. 1986); *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732, 741 (D.N.J. 1999), *aff'd*, 263 F.3d 158 (3d Cir. 2001); *Jackson v. Presbytery of Susquehanna Valley*, 179 Misc. 2d 704, 705-06, 686 N.Y.S.2d 273, 274-75 (Sup. Ct., N.Y. Co. 1999), *aff'd*, 265 A.D.2d 253, 697 N.Y.S.2d 26 (1st Dep't 1999).
7. *See, e.g.*, *L.L.N. v. Clauder*, 563 N.W.2d 434, 443-44 (Wis. 1997) (refusing to impose a duty on a diocese in supervising its priests which exceeds the duty normally imposed on employers in supervising their employees simply because a priest is subject to vows as a matter of church law).
8. *See* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 70 Ind. L.J. 219, 232 (2000).
9. *See, e.g.*, *Grunwald v. Bornfreund*, 696 F. Supp. 838, 840-41 (E.D.N.Y. 1988) (excommunication).
10. *Compare* Idleman, *supra* note 8, at 237-38 & nn.50-51 (asserting this position), *with* Nicholas Merkin, Note, *Getting Rid of Sinners May Be Expensive: A Suggested Approach to Torts Related to Religious Shunning Under the Free Exercise Clause*, 34 Colum. J.L. & Soc. Probs. 369 (2001) (discussing shunning cases that have gone both ways, and proposing that certain shunning suits be allowed).
11. *See, e.g.*, Idleman, *supra* note 8; James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St. Thomas L. Rev. 31 (1994); David J. Young & Stephen W. Tigges, *Into the Religious Thicket—Constitutional Limits on Civil Court Jurisdiction over Ecclesiastical Disputes*, 47 Ohio St. L.J. 475 (1986). To be sure, it is normally an entanglement or related concern that prompts courts to reject claims of customized negligence or clergy malpractice or to dismiss suits asserting harm by uniquely religious conduct.
12. *See McKelvey v. Pierce*, 800 A.2d 840, 850 (N.J. 2002) (explaining that "[t]he . . . 'church autonomy doctrine' arose out of the Free Exercise Clause"); *Newport Church of Nazarene v. Hensley*, 56 P.3d 386, 392 (Or. 2002) (explaining that "[r]ecent federal cases have identified the Free Exercise Clause as the basis for the autonomy doctrine").
13. *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *cf. Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872). For commentary, see Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 Cal. L. Rev. 1378 (1981); 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, 1394-97 (1981); Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 Fordham L. Rev. 335 (1986).
14. *See, e.g.*, *Smith v. Raleigh Dist. of N.C. Conf. of United Methodist Church*, 63 F. Supp. 2d 694, 707 (E.D.N.C. 1999) (noting this genealogy). In actuality, the property dispute cases express principles from *both* religion clauses and, accordingly, they have generated at least two lines of corresponding precedent. The prohibition on adjudicating religious questions, which often arise in such cases, springs primarily from the Establishment Clause, while the prohibition on regulating the core decision-making (and thus the autonomy) of religious institutions is primarily a doctrine of the Free Exercise Clause.

15. Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 Notre Dame L. Rev. 581, 600 & n.72 (1995). *See generally EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

16. Neutral principles are legal rules or standards that have been developed and are regularly applied in a given field of law without particular regard to religious institutions or doctrines. *See Jones*, 443 U.S. at 602-04; *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1249 (9th Cir. 1999). Because the neutral principles method "relies exclusively on objective, well-established concepts of . . . law familiar to lawyers and judges . . . [i]t . . . promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Jones*, 443 U.S. at 603.

17. *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002) (explaining that "[t]he doctrine is rooted in the First Amendment's Free Exercise and Establishment Clauses."); Esbeck, *supra* note 15, at 600 n.71 (noting that "[b]ecause the Establishment Clause, not just the Free Exercise Clause, protects religious freedom, the Supreme Court is careful to premise church autonomy cases on both clauses.").

18. *See, e.g.*, *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4th Cir. 2000) (explaining that the ministerial exception to Title VII, which manifests the church autonomy doctrine, "is robust where it applies" and "precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision").

19. If, as is often the case, the relevant tort law of a state is defined by common law rather than by statute, a facial challenge would simply be leveled against an authoritative rendition of that tort doctrine as found in judicial precedent.

20. *See, e.g.*, *Rayburn*, 772 F.2d at 1168 (finding that "[*a*]*ny* attempt by government to restrict a church's free choice of its leaders thus constitutes a burden on the church's free exercise rights." (emphasis added)).

21. Some courts, moreover, have indicated that where a law is not neutral with regard to religion, the claimant need not demonstrate a substantial burden in order to trigger strict scrutiny. *See, e.g.*, *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002); *Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995). This seems logical to the extent that religion is a suspect classification under the Equal Protection Clause.

22. *See* Scott C. Idleman, *Why the State Must Subordinate Religion*, *in* Law and Religion: A Critical Anthology 175, 180 (Stephen M. Feldman ed., 2000).

23. 494 U.S. 872 (1990).

24. *See infra* notes 38-52 and accompanying text.

25. *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 656-57 (10th Cir. 2002); *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 800 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303-04 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 348-51 (5th Cir. 1999); *EEOC v. Catholic Univ.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996). *But cf. Newport Church of Nazarene v. Hensley*, 56 P.3d 386, 392 (Or. 2002) (stating that "[t]he applicability of *Smith* in the context of church autonomy is not clear").

26. *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 794 (Wis. 1995) (Abrahamson, J., dissenting).

27. *See* Idleman, *supra* note 8, at 260 & n.117.

28. *See id*. at 269 & nn.145-46.

29. *See id*. at 227 nn.26-27.

30. *See, e.g.*, *Roman Catholic Diocese*, 213 F.3d at 801 (explaining that "the ministerial exception['s] . . . contours are not unlimited and its application in a given case requires a fact-specific inquiry" and that it "would not apply to employment decisions concerning purely custodial or administrative personnel" insofar as it only "shelters certain employment decisions from the scrutiny of civil authorities so as to preserve the independence of religious institutions in performing their spiritual functions").

31. *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972).

32. In suits by congregants or other non-personnel, however, courts have sometimes avoided this inference by emphasizing the third-party nature of the plaintiff's relationship to the institution. *See, e.g.*, *Paul v. Watchtower Bible & Tract Soc'y*, 819 F.2d 875, 883 (9th Cir. 1987); *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1323-24 (Colo. 1996) (en banc); *Konkle v. Henson*, 672 N.E.2d 450, 455 n.6 (Ind. Ct. App. 1996).

33. *See, e.g.*, *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985).

34. *Rayburn*, 772 F.2d at 1169.

35. *Id*. at 1168.

36. *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 284 (5th Cir. 1981).

37. *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1044 (8th Cir. 1994).

38. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 546 (1993); *Smith*, 494 U.S. at 877-78; *Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead*, 98 F. Supp. 2d 347, 352-54 (S.D.N.Y. 2000); *Storm v. Town of Woodstock*, 32 F. Supp. 2d 520, 527 (N.D.N.Y.), *aff'd*, 165 F.3d 15 (2d Cir. 1998).

39. *See City of Hialeah*, 508 U.S. at 531, 542, 546; *Smith*, 494 U.S. at 877-78; *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-67 (3d Cir. 1999); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850 (2001).

40. *See City of Hialeah*, 508 U.S. at 537; *Smith*, 494 U.S. at 884; *Swanson by Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701-02 (10th Cir. 1998).

41. *See Smith*, 494 U.S. at 881-82.

42. *City of Hialeah*, 508 U.S. at 532.

43. *See Fraternal Order of Police*, 170 F.3d at 366.

44. *See, e.g.*, *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991); *Corlett v. Caserta*, 562 N.E.2d 257 (Ill. Ct. App. 1990); Barry Nobel, *Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers*, 16 U. Puget Sound L. Rev. 599, 625-29 (1993).

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

46. *Id*. at 881.

47. *See id*. at 882.

48. *See EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996).

49. *See Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 707-09 (9th Cir. 1999), *withdrawn by* 192 F.3d 1208 (9th Cir. 1999).

50. *See In re Baby K*, 832 F. Supp. 1022, 1030-31 (E.D. Va. 1993), *aff'd*, 16 F.3d 590 (4th Cir. 1994).

51. *See, e.g.*, *Miller v. Reed*, 176 F.3d 1202, 1207-08 (9th Cir. 1999); *Swanson by Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998).

52. *Miller*, 176 F.3d at 1207

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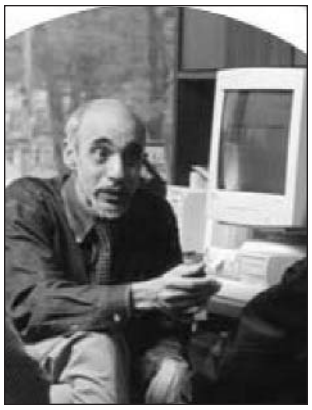
Church Communications Involving Clergy Sex Abuse

By Michael J. DeBoer and Seymour H. Moskowitz



Seymour H. Moskowitz

The recent news stories regarding sexual abuse by Catholic priests have refocused attention on communications within religious communities and institutions.[1] In the sexual abuse scandal, prosecutors, grand juries, and civil litigants have sought, through subpoena and other means, the personnel files and records regarding offending priests; some of these materials have been released in the investigative and discovery processes.[2] Although dioceses in various parts of the United States have paid tens of millions to settle lawsuits by victims of past abuse,[3] the secrecy of these settlements, combined with the failure to effectively remove repeat offenders from contact with children, has produced wide-spread condemnation. The Catholic Church is presently considering new policies and procedures that would govern how it handles abuse cases.[4]

In considering these issues, several questions arise, including what interests religious communities have in protecting the privacy of such communications, what interests governments have in the content of such communications, what potential harms are presented by disclosure, what legal safeguards exist, and how these interests are best served. This article explores aspects of these questions by examining clergy relationships, roles, and responsibilities, factors shaping clergy and institutional conduct, and the legal protections for church communications.

Influences on Clergy

Clergy are part of a network of relationships that includes parishioners and non-parishioners, the general public and governmental actors, denominational and institutional elements and members of other religious communities. Clergy are spouses and parents, members of extended families and neighbors, friends and citizens, preachers and teachers, counselors and administrators. Their responsibilities include caring for family members, ministering to the needs of parishioners, managing their parishes, serving those in the larger community, safeguarding their respective traditions, and leading within their denominational contexts. Although many of these relationships and responsibilities have a religious and professional quality, many also have a more personal and social character.

Although these relationships, roles, and responsibilities involve communication by clergy, not all is church-related, and the legal protections vary. Thus, church communications include a vast range of interactions, from homilies to liturgy, organizational management to employment practices and decisions, ministerial misconduct to parishioner discipline, religious confessions to business contracting.

"Although dioceses in various parts of the United States have paid tens of millions to settle lawsuits by victims of past abuse, the secrecy of these settlements, combined with the failure to effectively remove repeat offenders from contact with children, has produced wide-spread condemnation."

A wide range of factors, both legal and "non-legal," influence clergy and institutional conduct. Sacred texts, doctrines, and traditions play primary roles in shaping clergy conduct. These texts, teachings, and traditions are not merely aspirational or instructive; they are often obligatory. Clergy and institutional conduct is also influenced by moral and ethical factors, including those reflected in the "cardinal virtues" (i.e., prudence, justice, self-control, and courage), the theological virtues (i.e., faith, hope, and love), and modern ethical codes followed by other professions, especially the helping professions. Behavior is also shaped by practical factors, such as trust and respect, institutional and financial stability, institutional integrity and purpose, community relations and public perceptions. For instance, the strength and quality of relationships within religious communities depend upon the trust that parishioners place in clergy, and the ability of clergy to care for the needs of parishioners effectively depends upon trust and the quality of these relationships.

Furthermore, legal factors influence clergy and institutional conduct. Increasingly, clergy and churches are subject to a broad range of legal obligations and liabilities, such as various tort actions, defamation suits, reporting requirements in abuse situations, and regulations governing tax exemption. In judicial and administrative proceedings, the content of church communications will often be sought by way of discovery, subpoena, testimony, and other forms of disclosure.

Legal Protections

When the content of church communications becomes the target of disclosure demands in legal proceedings, federal and state laws protecting religion must be considered. The First Amendment to the United States Constitution prohibits Congress from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof."[5] Under Establishment Clause jurisprudence, civil courts are prohibited from resolving disputes on the basis of religious doctrine and practice, are generally reluctant to become entangled in church controversies, and thus seek to avoid resolving questions of religious doctrine, polity, and practice.[6] With churches having a hierarchical organization, courts defer, in matters of religious doctrine and polity, to resolutions by the highest courts in the church organization, and with churches having a congregational organization, courts defer to resolutions by local churches or bodies within them.[7]

"Churches and religious communities possess a sphere of authority into which governments may not intrude, especially as to ecclesiastical and doctrinal matters."

Before 1990, free exercise of religion claims were analyzed under the "strict scrutiny" standard; thus, government burdens on religion had to promote a compelling government interest and be narrowly tailored to achieve the government's purpose.[8] In 1990, however, the Supreme Court substantially weakened this standard, allowing generally applicable laws to burden the free exercise of religion as long as the laws are facially neutral.[9] Nevertheless, the Court has preserved the strict scrutiny standard in "hybrid" cases in which free exercise and other constitutional rights are concurrently infringed,[10] and in those cases in which laws are not neutral and generally applicable because of exemptions and exceptions.[11] The federal Religious Freedom Restoration Act of 1993 was enacted to reinstate the strict scrutiny standard under federal statutory law, not constitutional law,[12] but the Supreme Court found this statute unconstitutional as applied to the states.[13] Regardless, whether the proper analysis be under the strict scrutiny standard or the weakened standard, this line of jurisprudence has not figured prominently in resolving issues involving church communications.

Most crucial to the issue of church communications is the doctrine of church autonomy.[14] This doctrine, whether grounded in the Establishment Clause, the Free Exercise Clause, or some blend of protections granted by both, recognizes that religious organizations must remain free of government interference and independent of secular control. Churches and religious communities possess a sphere of authority into which governments may not intrude, especially as to ecclesiastical and doctrinal matters.[15] Early in this nation's history, Thomas Jefferson wrote:

> I consider the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, and exercise. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. . . .
>
> Every religious society has a right to determine for itself the times for [its religious] exercises, & the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.[16]

Important sources of protection for religious liberty are also found under state law, such as state constitutions.[17] Section 3 of Article I of the New York State Constitution provides in part:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.[18]

The New York Court of Appeals has declared that these provisions "manifest the importance which our State attaches to the free exercise of religious beliefs, a liberty interest which has been called a 'preferred right.'"[19] Although state courts have recognized that the religious freedom of New York citizens is greater than exists in other jurisdictions,[20] the right to the free exercise of religion is not absolute and cannot interfere with the laws that New York enacts for its preservation, safety, or welfare.[21] Thus, the exercise of religious liberty, to the extent that it involves conduct, may be subjected to reasonable regulations.[22]

Clergy-Penitent Privilege

The clergy-penitent testimonial privilege, recognized to some degree in every state, is the best-known bar to release of information communicated between

lay persons and clergy.[23] Indeed, as long ago as 1813, a New York court recognized the privilege, grounding it in religious liberty protection:

> It is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected. The sacraments of a religion are its most important elements. . . . Suppose that a decision of this court, or a law of the state should prevent the administration of [a sacrament], would not the constitution be violated, and the freedom of religion be infringed? . . . Secrecy is of the essence of penance. The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed: To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman catholic [sic] religion would be thus annihilated.[24]

By 1828, the New York legislature passed a statute codifying the privilege.[25] Presently, it provides:

> Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor.[26]

Numerous legal issues emerge from this statute, but the Court of Appeals has held that a single inquiry determines application of the privilege: "whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance."[27]

Not all communications to clergypersons are entitled to the protection of the privilege, and the burden rests upon the individual invoking the privilege to establish that the communication was for religious counsel.[28] Conversations with clergy outside their confessional role or for secular purposes must be revealed in appropriate circumstances. For example, the Appellate Division has considered whether a conversation between a man alleged to have sexually abused his step-daughter and a priest was protected by the clergy-penitent privilege and declared:

> Respondent did not seek out the priest for spiritual advice, but was responding to the latter's request to see him for the purpose of informing him of the allegations that had been made against him by his wife and step-daughter, and to warn him that the authorities would be advised unless he quit his job at the daycare center. As the priest was clearly not acting or purporting to act as respondent's spiritual advisor, the communication was not privileged.[29]

Moreover, the privilege may not be invoked to shield criminal activities in which a member of the clergy is involved.[30]

Disputes over the disclosure of possibly privileged information or material may arise during trial or some earlier phase of civil or criminal proceedings. The privilege can be asserted by either the penitent or the clergy member on behalf of the penitent. Once the penitent has waived the right to the privilege, however, the clergy member cannot refuse to disclose the information.[31]

The emerging scandal concerning abuse of minors by clergy has refocused attention upon the intersection of mandatory reporting statutes and the clergy-penitent privilege.[32] Reporting laws seek to initiate social and legal interventions by protective services into mistreatment cases by requiring certain individuals to report information to designated public authorities.[33] Doctors, nurses, and psychological and social service professionals are commonly designated, but at least eleven states now specifically require clergy to report known or suspected child abuse.[34] Most of these laws preserve the clergy-penitent privilege as an exception to the reporting requirement, but the information must be received under specific confessional circumstances.[35] At least one state denies any exceptions to a clergyperson's duty to report abuse or neglect of a child.[36] Moreover, clergy often function in roles in which secular professionals filling the same roles are specifically mandated to report.[37]

Currently, New York law requires specified professionals to report reasonably suspected abuse or maltreatment of a child.[38] Clergy are not presently required reporters, but both the New York Assembly and Senate passed bills in the 2002 Session to add clergy to the list of mandatory reporters, with an exception for information gained in confessional rites.[39] Differences in language prevented final passage, but such a statute will be reintroduced in the 2003 Session.[40]

Conclusion

Lawyers, courts, government actors, religious officials, and the public will continue to grapple with the legal issues surrounding the child sex abuse scandal. As disclosure of church communications is sought, it will

be important for the parties involved to be mindful of the larger issues involved, including the potential harm to religious communities and institutions and the protections available under federal and state law. Only then can a proper balance be achieved between the interests of government, victims, and the public and the interests of religious communities and institutions.

Endnotes

1. The authors will use the term "church communications" generically to refer to communications within religious communities and institutions.

2. Michael Rezendes & Sacha Pfeiffer, *Diocese Records Show More Coverups*, Boston Globe, Sept. 13, 2002, at B1; Farah Stockman, *Papers Target Priest Linked to Reardon*, Boston Globe, Apr. 18, 2002, at A14; Walter V. Robinson, *Attorneys See Cases' Scope Expanding Still*, Boston Globe, Apr. 14, 2002, at A1; Fred Kaplan, *N.Y. Grand Jury to Investigate Diocesan Actions*, Boston Globe, Apr. 12, 2002, at A19; Diego Ibarguen, *Priests May Face Charges in N.Y.*, San Antonio Express-News, April 4, 2002, at 10A; Bill Dedman, *Philadelphia Inquiry Finds Evidence of 50 Abuse Cases*, Boston Globe, Feb. 23, 2002, at A11.

3. One of the most highly publicized recent settlements occurred in Boston. Denise Lavoie, *$10 Million Approved for Alleged Abuse Victims Judge Says She Wants Plaintiffs to Know Court Recognizes Boston Priest Did What They Allege*, Akron Beacon Journal, Sept. 20, 2002, at 11. The $10 million paid to 86 victims was relatively minimal compared to other settlements. The Tucson diocese apparently paid 16 victims $14 million. Michael Rezendes, *$10M Geoghan Deal Is Dwarfed by Others*, Boston Globe, Sept. 8, 2002, at A1. Although Bishop Slattery denied the existence of any settlements, a victim in Oklahoma apparently received $750,000 in her settlement with the Tulsa diocese. Ziva Branstetter, *Diocese Approved Settlement Payment to End 1991 Lawsuit*, Tulsa World, Aug. 10, 2002, at A1.

4. Kari Lydersen & Alan Cooperman, *Cardinal: Sex-abuse Policy Will Be Revised U.S. Bishops and Vatican Officials Have Decided to Reimpose Limitations on Accusations Against Priests*, The Piladelphia Inquirer, Nov. 1, 2002, at A02; Michelle Munn, *Bishops' Panel Meets Amid Dissent Scandal: Critics Charge the Church Leaders' New Sex Abuse Policy Lacks Toughness in Practice,* Los Angeles Times, July 31, 2002, at A11.

5. U.S. Const. amend. I. These First Amendment protections and prohibitions apply to state and local governments in addition to the federal government. *Cantwell v. Connecticut*, 310 U.S. 296, 303-07 (1940) (discussing the Free Exercise Clause); *Everson v. Board of Educ.*, 330 U.S. 1, 15-18 (1947) (analyzing the Establishment Clause).

6. *See, e.g., Watson v. Jones*, 80 U.S. 679, 727-34 (1871); *Jones v. Wolf*, 443 U.S. 595, 602-04 (1979); *id.* at 616-17 (Powell, J., dissenting) (citing Supreme Court precedent); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

7. *See, e.g., Jones*, 443 U.S. at 602; *id.* at 619 (Powell, J., dissenting) (citing *Watson*, 80 U.S. at 724-26); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25 (1976).

8. *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

9. *See Employment Div. v. Smith*, 494 U.S. 872 (1990); *but see Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (affirming trial court's injunction preventing city from dispersing homeless individuals who slept on church's outdoor property and finding that church's provision of outdoor sleeping space for the homeless effectuates a sincerely held religious belief, that this practice is protected under the Free Exercise Clause, and that the city failed to show either the existence of a relevant law or policy that is neutral and of general applicability or a compelling government interest to overcome strict scrutiny).

10. *See Smith*, 494 U.S. at 881-82.

11. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993).

12. 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

13. *See City of Boerne v. Flores*, 521 U.S. 507, 533-36 (1997). The Act still applies to federal government actors and thus provides important protections for religious freedom. *See, e.g., Kikumura v. Hurley*, 242 F.3d 950, 959 (10th Cir. 2001); *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir.), *as modified by* 265 F.3d 1072, 1073 (D.C. Cir. 2001).

14. See *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 655 (10th Cir. 2002) (declaring that "churches have autonomy in making decisions regarding their own internal affairs. This church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity."). *Cf. Gibson v. Brewer*, 952 S.W.2d 239, 246-50 (Mo. 1997) (en banc) (finding that the religion clauses of the First Amendment barred the adjudication of claims of negligent hiring, ordination, and retention of clergy, negligent failure to supervise clergy, negligent infliction of emotional distress, and negligence on the part of the diocese).

15. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1 (1998). Esbeck understands this doctrine to be grounded in the Establishment Clause and has argued:

> [T]he Establishment Clause presupposes a constitutional model consisting of two spheres of competence: government and religion. The subject matters that the Clause sets apart from the sphere of civil government—and thereby leaves to the sphere of religion—are those topics "respecting an establishment of religion," e.g., ecclesiastical governance, the resolution of doctrine, the composing of prayers, and the teaching of religion.

Id. at 10-11.

16. Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808) *in* Thomas Jefferson: Writings, at 1186-87 (Merrill D. Peterson ed., 1984).

17. In many states, courts have interpreted state constitutional provisions to provide strict scrutiny protection. *See* Seymour Moskowitz & Michael J. DeBoer, *When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect*, 49 DePaul L. Rev. 1, 79-80 (1999). In other states, courts have adopted standards that afford religious freedom broad protection, even if not under the strict scrutiny standard. For example, the Indiana Supreme Court has interpreted the religious liberty provisions of the Indiana Constitution to provide expansive protection, declaring:

> [T]he framers and ratifiers of the Indiana Constitution's religious liberty clauses did not intend to afford only narrow protection for a person's internal thoughts and private practices of religion and conscience. By protecting the right to worship according to the dictates of conscience and the rights freely to exercise religious opinion and to act in accord with personal conscience, [the religious liberty clauses] advance core values that restrain government interference with the practice of religious worship, both in private and in community with other persons.

City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment, 744 N.E.2d 443, 450 (Ind. 2001). Additionally, several states have passed legislation that protects religious freedom under the strict scrutiny standard. *See, e.g.*, Conn. Gen. Stat. Ann. § 52-571b (West Supp. 2002); Fla. Stat. Ann. §§ 761.01-761.05 (West Supp. 2002); 775 Ill. Comp. Stat. 35/15 (West 2001); R.I. Gen. Laws §§ 42-80.1-1 to 42-80.1-4 (1998).

18. N.Y. Const. art. I, § 3.

19. *Rivera v. Smith*, 63 N.Y.2d 501, 511 (1984) (quoting *Brown v. McGinnis*, 10 N.Y.2d 531, 536 (1962)).

20. *Rivera v. Smith*, 99 A.D.2d 672, 672 (4th Dep't 1984) (citations omitted), *aff'd*, 63 N.Y.2d 501 (1984).

21. *Thomas v. Lord*, 174 Misc.2d 461, 467 (Sup. Ct., Westchester Co. 1997) (citing *People v. Sandstrom*, 279 N.Y. 523, 530 (1939)).

22. *See Thomas*, 174 Misc.2d at 467 (citing *Brown*, 10 N.Y.2d at 536)) (distinguishing absolute freedom to believe from freedom to act and indicating that the latter is subject to regulation for the protection of society); *id.* at 469.

23. The United States Supreme Court has declared in dicta that the evidentiary privileges protecting communications "are rooted in the imperative need for confidence and trust." *Trammel v. United States*, 445 U.S. 40, 51 (1980). The Court added: "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.*

24. *See People v. Phillips* (N.Y. Ct. of Gen. Sessions 1813). Although this decision was not reported, it was reprinted in *Privileged Communications to Clergymen*, 1 Cath. Law. 199, 207 (1955), and is discussed in Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5612, 44-47 (1992). The decision may also be found at http://www.churchstatelaw.com/cases, as part of a religious liberty archive service provided by Rothgerber, Johnson & Lyons LLP.

25. *See* Wright & Graham, *supra* note 23, at § 5612, 46-47 (stating that this early statute provided: "No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.").

26. N.Y. Civil Practice Law & Rules 4505 (CPLR) (McKinney 1992). This privilege extends to communications by "electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication." CPLR 4548 (McKinney Supp. 2002). In addition, the rules of evidence applicable in civil cases also apply, where appropriate, in criminal proceedings. N.Y. Crim. Proc. § 60.10 (McKinney 1992).

27. *People v. Carmona*, 82 N.Y.2d 603, 608-09 (1993) (citations omitted).

28. *People v. Drelich*, 123 A.D.2d 441, 442-43 (2d Dep't 1986).

29. *In re N & G Children*, 176 A.D.2d 504, 504 (1st Dep't 1991) (citations omitted).

30. *See In re Fuhrer*, 100 Misc.2d. 315 (Sup. Ct., Richmond Co. 1979), *aff'd* 72 A.D.2d 813, 421 N.Y.S.2d 906 (2d Dep't 1979).

31. *De'Udy v. De'Udy*, 130 Misc.2d 168, 172-74 (Sup. Ct., Nassau Co. 1985).

32. For a discussion of the application of reporting requirements to clergy, *see generally* Moskowitz & DeBoer, *supra* note 17, at 1-83.

33. *See* Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 Conn. L. Rev. 77 app. B & E, col. 1-11 (1998) (elder abuse reporting laws).

34. *See, e.g.*, Cal. Penal Code § 11165.7 (West Supp. 2002); Conn. Gen. Stat. Ann. § 17a-101 (West 1998 & Supp. 2002); Me. Rev. Stat. Ann. tit. 22, § 4011-A (West Supp. 2001); Minn. Stat. Ann. § 626.556 (West Supp. 2002); Mont. Code Ann. § 41-3-201 (2001); N.D. Cent. Code § 50-25.1-03 (1999); Or. Rev. Stat. § 419B.010 (2001); W. Va. Code Ann. § 49-6A-2 (2001). Three of the eleven statutes were added in the last year. *See, e.g.*, 2002 Colo. Sess. Laws 295, § 1 amending Colo. Rev. Stat. § 19-3-304; 2002 Mass. Legis. Serv. Ch 107 (West), revising Mass. Gen. Laws 119 § 51A (West 1993 & Supp. 2002); Mo. Ann. Stat. §§ 210.115, 198.070 (West, Westlaw through 2002 legislation).

35. *See* statutes *supra* note 34.

36. Tex. Fam. Code Ann. § 262.101 (Vernon 2002). *See also* Tex. Hum. Res. Ann. § 48.051 (Vernon 2001 Supp. 2003) (mandating same for elder abuse).

37. *See* Moskowitz & DeBoer, *supra* note 17, at 34-35 & n. 201.

38. *See* N.Y. Soc. Serv. Law § 413 (SSL) (McKinney Supp. 2002). *See also* SSL § 412 (McKinney Supp. 2002) (defining abused or maltreated child by referring to the Family Court Act § 1012(e)(iii)).

39. 2001 N.Y. Senate Bill No. 6625, and 2001 N.Y. Assembly Bill No. 10569, 225th Leg. Session.

40. John J. McEnery, *Jack's Still Pushing for the Clergy Reporting Bill*, July 31, 2002, *at* http://www.assembly.state.ny.us/mem/?ad'104&sh'story&story'4706.

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Sacrificial Lambs: Subjugating Children to Religious Exemptions

By Marci A. Hamilton

The Vatican recently stood at a crossroads: it could choose a radical turn toward the many victims of clergy abuse or it could choose to act as an institution intent on protecting itself and its own. It chose the latter. Instead of pledging to cooperate with civil authorities to prosecute child abuse criminals to the limits of the law, it opted for secret tribunals, an internal statute of limitations, and a decision to report the crime of child abuse only when explicitly required by law. The sad truth is that this Church does not stand alone in subjugating the interests of children.

"Instead of pledging to cooperate with civil authorities to prosecute child abuse criminals to the limits of the law, . . . [the Vatican] opted for secret tribunals, an internal statute of limitations, and a decision to report the crime of child abuse only when explicitly required by law."

The History of Subjugating Children's Interests to Religious Interests

The Catholic Church's current position is egregious in that it is protecting not religiously required conduct, but rather criminal conduct decried by the Church itself. The Church appears all too willing to sacrifice the interests of children to the interests of priests.[1] Though this may seem shocking, religious institutions have a long history of willingly sacrificing the interests of children. States have exempted clergy members from having to report known child abuse.[2] A number of states have given faith-healing parents exemptions from vaccination and medical neglect charges even though their children could suffer terribly and even die from easily prevented or treated diseases.[3] Other states have ignored the polygamy laws and the polygamous practices that include marriage to young teenagers.[4]

Some soul-searching is required to learn why the United States has been so willing to accommodate religious institutions at the risk of children's welfare. In the landmark case, *Wisconsin v. Yoder*,[5] the Supreme Court addressed the issue of whether an Amish family had the right to end their children's education at eighth grade in violation of the state's compulsory education law.[6] The Court held that the family did,[7] with Justice Douglas writing a particularly interesting partial dissent that raises important issues today.[8] He argued that the Court should not have been so quick to have treated the case as one between solely the parents and the state. There was a third party: the child. Where the child embraced the parents' values, then the issue was moot. But what, he asked, about the situation where the child wants to go to high school, or, I would add, what about the daughter of the faith-healing family who is ill and wants to see a doctor? For Douglas, the child was not a pawn, but rather a citizen.[9]

Douglas was ahead of his time. Children were at one time the property of their parents, but their standing under the law has gradually improved. They now receive representation independent of the two parents in custody disputes, while legislatures are given fairly broad latitude to protect children's interests even at the risk of encroaching on constitutional guarantees.[10]

Even so, the state and federal legislatures have been willing to give religions special exemptions in a number of arenas regardless of the harm to children. Even when children's advocates succeed in repealing laws that hurt children, they must be constantly vigilant of later amendments that may reinstate the law protecting religious institutions or parents while sacrificing children's interests.

The Era of Religious Subordination of Children's Interests Is Not Over

There are two pressing questions for children (some now adults) victimized by members of the clergy. First, will states that had exempted clergy from reporting child abuse continue to give the clergy a pass? Before the Vatican weighed in, the Boston archdiocese had favored including clergy under the general abuse reporting requirements, if the confessional remained off-limits.[11] After the Vatican's strong message against cooperation, one must wonder whether such support will continue.

Second, will states with short statutes of limitations governing child abuse lengthen them? There have been reports that the Catholic Church has been lobbying in

several states against such changes.[12] The Vatican's internal statute of limitations certainly means the Church will not be supportive of such changes in the future. Had the Church taken the other fork in the road, it might have been the leader of legal reform that would make it easier for victims to sue and states to prosecute clergy abuse, but it did not.

A further danger to children's interests from religious institutions exists in the form of state Religious Freedom Restoration Acts (RFRA). Roughly a dozen states have such laws.[13] These benign-sounding disasters prohibit the application of *any* state or local law unless the law satisfies a "compelling state interest" and it is the "least restrictive means" of achieving that interest.[14] The federal RFRA was held unconstitutional by the Supreme Court in 1997,[15] but that has not stopped various states from enacting their own versions.[16] Like the federal RFRA, which I litigated before the Supreme Court, the state RFRAs are blind accommodation, special privileges for religious individuals and institutions handed out by legislators who have no real understanding of their effect.

With a state RFRA, a religious institution can impede a clergy abuse or medical neglect prosecution by forcing the government to meet this extraordinarily difficult standard with respect to *every* law involved, from discovery requests to application of the elements of the crime to punishment. The RFRAs could be used as a tool to make it difficult to impose a reporting requirement or a lengthy statute of limitations.

As Chief Justice Rehnquist pointed out long ago, one can always imagine a less restrictive means than the one the state chose. In tune with the Vatican's non-cooperation position, the Catholic Conference pushed hard to get the newest RFRA passed in Pennsylvania, arguably in order to be able to impede ongoing and future clergy abuse litigation in that state.

Church-protective efforts that have the potential to harm children do not end with the RFRAs. At the same time religious interests have been pursuing the RFRAs, they have been lobbying to avoid fiduciary duties for abuse by a member of their clergy. In Colorado, a bill that would have immunized church coffers in the case of clergy abuse (of children or disabled adults) narrowly avoided passage. Had the bill passed, even if a victim were able to meet the statute of limitations requirements, she may still discover that the result of a civil suit against the church is limited to the means of a clergy member.

What Is a Child to Do?

While the statutes too often weigh against children's interests, constitutional parameters of religious liberty do not require the government to back off in the face of weighty evidence of a concerted enterprise to harm children. At the time of the framing of the United States Constitution, religious leaders reiterated over and over again that religious liberty required the freedom to believe and to worship, but that when such belief broke into overt acts injurious to others, the state legitimately could punish the wrongdoer.[17]

This was true across a broad sweep of Christian denominations. Religious believers were not to be protected from the force of the law, but rather were expected to set an example for society, to try to serve the good of the whole by refraining from harming others in violation of the law. In other words, religious believers had a special obligation to obey the law, not a right to avoid it, as some have misguidedly argued in recent years.

"[T]he Catholic Church is attempting to handle criminal allegations in secrecy, even when the issue is an alleged crime against a child by one of its own clergy. This is wrong-headed and I would even say contrary to the foundational principles of the Constitution."

Over 200 years later, the Catholic Church is attempting to handle criminal allegations in secrecy, even when the issue is an alleged crime against a child by one of its own clergy. This is wrong-headed and I would even say contrary to the foundational principles of the Constitution. The clergy at the time of the framing of the Constitution and the Supreme Court in its free exercise cases are right that general criminal laws may apply to everyone, including religious believers.[18] If the imposition is so serious as to place a substantial burden on the religious individual or entity, let the religious believers argue to the state legislatures for a practice-specific accommodation—an exemption from the law, as contemplated by the Supreme Court in *Employment Division v. Smith*.[19] The legislature may then consider those requests against the greater good, including the interests of those who cannot protect themselves.

Perhaps most important, instead of providing religious institutions quiet accommodation, accommodation requests need to be debated in the harsh light of public scrutiny. The medical neglect exemptions, the vaccination exemptions, the child abuse exemptions, the abuse reporting requirements, the RFRAs, and the statutes of limitations should not be under-the-table deals quietly handed to powerful religious entities, but rather full-scale public debates that force representatives to consider not just favors for religious leaders, but also the public interest. The vast majority of the people have no idea such exemptions or special treat-

ment exist and certainly have no idea that they are a product of lobbying by religious entities behind closed doors. With a more public discussion of these issues, the religious lobbyists can be unmasked, and their requests subjected to close examination for consistency with the public good.

While there is no constitutional right to have any legislative issue publicly debated, once legislators learn that they can aid and abet harm to children through religion-friendly legislation, they may well want to move the discussion from the backroom to the legislative floor. That would be good for the public interest, and good for the children.

Endnotes

1. *See Why Exempt Churches from Reporting Child Abuse*, USA Today, Mar. 22, 2002 at A14.
2. *See id.; see, e.g.*, Mich. Comp. Laws Ann. § 722.623 (West 2001); N.Y. Soc. Serv. Law § 413 (McKinney Supp. 2002); Vt. Stat. Ann. tit. 33 § 4913 (2001); Wash Rev. Code Ann. § 26.44.030 (West 1997 Supp. 2002).
3. *See* Valerie Richardson, *Faith Healing Vilified in Wake of Girl's Death: Colorado Eyes Ending Law Exemption*, Washington Times, Feb. 23, 2001, at A2; Eric Gorski, *A Matter of Life and Faith/Religion, Government Clash in Legislation on Healing*, The Gazette, Mar. 25, 2001, at A1; Lionel VanDeerlin, *When Leaving Health Care to Faith Can Mean Death*, San Diego Union-Tribune, May 23, 2001 at B9.
4. *See* Julie Cort, *Utah Paying a High Price for Polygamy Law: Child Abuse and Welfare Fraud are Part of Plural Marriage's Toll. Still There is a Reluctance to Pursue Lawbreakers*, Los Angeles Times, Sept. 9, 2001, at A1.
5. 406 U.S. 205 (1972).
6. *See id.* at 207.
7. *See id.* at 234-35.
8. *See id.* at 241-49 (Douglas, J., dissenting).
9. *See id.* at 241-43 (Douglas, J., dissenting).
10. *See* Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 Ohio St. L.J. 519, 537-38 (1996).
11. *See* Benjamin Gedan, *In Reversal, Church Backs a Bill on Reporting Abuse: Church Now Backs Child Abuse Bill*, Boston Globe, Aug. 8, 2001, at B1.
12. *See* Seth Stein, *More States Moving to Tighten Sex-abuse Laws for Clergy; Bills Call for Clergy to Report Alleged Abuse or Extend Time Period for Victims to File Suits*, Christian Science Monitor, June 10, 2002, at O4.
13. *See* John Kincaid, *The State of U.S. Federalism, 2000-2001: Continuity in Crisis,* Publius, July, 1, 2001 at 48 (stating that several states enacted acts equivalent to the Federal Religious Freedom Restoration Act and voters in Alabama approved a state constitutional amendment); *The Eyes Don't Have It*, Denver Post, July 2, 2002, at B6.
14. *See e.g.* Ala. Const. Amend. No. 622 § V.
15. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).
16. *See e.g.* Ala. Const. Amend. No. 622 § II.
17. Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J.L. & Pol. (forthcoming 2002).
18. *Employment Div. v. Smith,* 494 U.S. 872 (1990); *Reynolds v. United States,* 98 U.S. 145 (1879).
19. 494 U.S. 872 (1990).

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Public Forum: Legal Perspectives on the Catholic Crisis

On December 3, 2002, Albany Law School hosted a public forum to explore some of the legal issues arising from the recent revelations of sexual abuse by Catholic priests and the Church's treatment of victims, discipline of priests, and recent response to the nationwide scandal. Before the floor was opened for questions and comments, presentations were made by a panel that included the Bishop of the Albany Diocese, the founder of a national victims/survivors group, a scholar in canon law, and a prominent legal ethicist.

Howard J. Hubbard

Charles J. Reid, Jr.

Leslie C. Griffin

DEAN THOMAS GUERNSEY: On behalf of Albany Law School, I welcome you to the Public Forum. The forum was initiated in the Fall of 2001 to sponsor programs related to political issues, political ideas, and legal issues of widespread public concern. Since that time, the public forum has sponsored forums on the death penalty, prayer in public schools and legal aspects of the war on terror. I would like to recognize Professor Timothy Lytton, who organized tonight's event on the current crisis in the Catholic Church.

Our format will be a brief 10-minute presentation by each of the panelists and then an open discussion. To get things started, it is my pleasure to introduce a 1978 alumnus of the Albany Law School, the Rev. Kenneth Doyle, Chancellor of the Albany Diocese.

REV. KENNETH DOYLE: I was thinking as I came in here this evening how nice these new surroundings are and how much different it looks from the times that I used to be here 25 years ago when I would sit bewildered in Tax class day after day. The material seemed so complex to me and so unrelated to anything that I might ever be doing later as a priest that I just couldn't get myself to dig into it. But, what I have come to learn over the years is that a lot of things that you will never imagine you would wind up doing, you actually get involved in the middle of. I certainly never dreamed that I would spend the majority of my time during an entire year, this year, working with the media and Diocese on the issue of clergy sex abuse. I remember one week in March where the local media asked me to do 22 different interviews. So, it certainly has been a very popular media topic, but I think it is the kind of topic that is complex and that cannot be solved just by headlines and sound bytes. That is why I think it was a wonderful idea to hold a forum where we could address this issue through civil and rational discourse and among people who are given to serious study of the law.

So, I am delighted to be here and to introduce the panelists. In alphabetical order, first is Barbara Blaine, who is a lawyer, the founder and president of SNAP, Survivors Network of those Abused by Priests. She works as a public guardian in Cook County, Illinois. She has her Masters Degree in social work from Washington University in St. Louis and a law degree from DePaul in Chicago.

Next is Professor Leslie Griffin, who teaches legal ethics at the University of Houston Law Center. She also teaches constitutional law, torts and a course in law and religion. She previously was a faculty member at Santa Clara Law School and an ethics professor at the University of Notre Dame from which she also holds her Bachelor's degree. She also has a Doctorate in religious ethics from Yale and a law degree from Stanford.

Bishop Howard Hubbard has been a Catholic priest for the last 39 years and was ordained after study at North American College in Rome. He served his early years as a parish priest in the South End of Albany, where he established some social ministries addressing the needs of people living in poverty—for example, Hope House, which was a center for people struggling with addiction. When he was named Bishop of Albany in March of 1977, he was the youngest bishop to head a diocese in the United States at that time. He has served on various committees of the United States Bishops Conference and also at the Vatican, where he has served on their commission for dialogue with people of other faiths. He has degrees in philosophy and theology and also did post-graduate work in social services at the Catholic University in Washington. Bishop Hubbard in the present context has achieved some media coverage because he introduced an amendment at the meeting in Dallas of the Bishops on Clergy Sex Abuse—an amendment which suggested that there be a case-by-case examination of offenses going back many years. That amendment was defeated in the vote and Bishop Hubbard voted in favor of the document that came out of Dallas, and immediately implemented it by removing

six priests who had abused minors from 15 to 35 years ago.

Next and finally, is Professor Charles Reid, who teaches canon law, jurisprudence, and legal history at the University of St. Thomas in Minnesota. He has also taught at Emory University Law School in Atlanta. He was a law student at Catholic University in Washington during the early 80s when the bishops were working on a pastoral letter on war and peace, particularly on nuclear war and whether there could be a first nuclear strike. Professor Reid organized seminars and listening sessions and symposia around the country on this issue and then wrote them up in a book that was published by the Catholic University of America Press. He is widely published in the history of English Common Law, he holds a law degree and a license which is the equivalent of a Masters Degree in Canon Law from Catholic University and a Doctorate from Cornell. So I welcome the panelists and thank them very much for coming. Our first speaker tonight is Bishop Hubbard. He will be followed by Barbara Blaine, then Professor Reid, and then Professor Griffin.

"[L]et me acknowledge that this matter of abuse of minors by Catholic priests is a scandal of monumental proportions that has shaken the Church to the core, shocked the general public, angered and embarrassed our own Catholic people, besmirched the reputation of the vast majority of priests who have never offended in this regard, and undermined substantially the credibility of the leadership of the Roman Catholic community."

—Bishop Howard Hubbard

BISHOP HOWARD HUBBARD: Good evening. I am honored and privileged to be able to participate in this forum sponsored by the Albany Law School desiring to address the legal issues arising from the scandal of clergy sexual misconduct in the Roman Catholic Church. At the outset of my presentation, I would like to make two disclaimers. First, I am not a lawyer, and make no pretense to offer any expertise regarding the legal issues involved: civil, criminal or canonical. In this regard, I am reminded of an incident in the life of Pope John Paul II. He was being interviewed by a journalist and he told the journalist that if he knew he was going to become Pope, that he would have studied harder. Well, if I knew I was going to be a bishop, in this age of the church, I would have gone to law school. I must say too that I am somewhat intimidated both by the expertise of my fellow panelists and by the legal experts that are in the audience this evening. Second, given the magnitude and the complexity of the topic, there is no way to do justice to this serious issue in the time frame that has been allotted. However, to discipline myself to cover as much material as possible within this limited time frame, I want to apologize for doing something that I prefer not to do, namely read my text.

First let me acknowledge that this matter of abuse of minors by Catholic priests is a scandal of monumental proportions that has shaken the Church to the core, shocked the general public, angered and embarrassed our own Catholic people, besmirched the reputation of the vast majority of priests who have never offended in this regard, and undermined substantially the credibility of the leadership of the Roman Catholic community. Although I have some criticism of the way the media has covered this story, especially with regard to blurring the time frame as to when the problem occurred, and measuring bishops' decisions by psychological knowledge and other insights that were years later in coming, I do not want in any way to sugar-coat the problem or to deflect blame for this scandal onto the media or to those both within and without the Church who have been critical of priests and bishops, or who seek to employ this scandal to advance agendas unrelated to the problem at hand. Indeed, the media did not create this problem, but exposed it. The damage has been inflicted not by critics of the Church, but by the reprehensible behavior of some priests and the failure of bishops like myself to deal with this misconduct in the most appropriate way—either because of ignorance, fear, or the misguided attempt to protect the Church from scandal. In fact, this moral ineptitude in giving greater priority to the Church's image than to the protection of children, has now become the scandal.

With this preparatory comment, let me state that the issue of clergy sexual misconduct was never condoned, ignored or taken lightly in our diocese, although as is now painfully evident, it was not always handled appropriately. In 1993, in accord with the guidelines developed by the National Conference of Catholic Bishops, we in the Diocese of Albany published our policies on clergy sexual misconduct and established a Sexual Misconduct Panel. That panel, composed primarily of lay people not in the employ of the diocese, reviewed allegations of sexual misconduct and made recommendations as to whether a priest should be restored to ministry following rehabilitation. While this reassignment policy was well-intentioned, and many priests were treated successfully, I must acknowledge that we bishops presumed wrongly that our Catholic people would appreciate the value of maintaining priests in ministry if the abuse seemed firmly in the past, if they

had been treated and competent professionals deemed that they did not pose a threat to anyone and if they were now offering effective service to people. I realize now that the safer or more prudent course is the one adopted in Dallas, whereby no priest is ever to be assigned to public ministry following misconduct with minors. Further, in retrospect, I regret that when these priests were removed or restored to ministry, there was no public notice made to the community. Far better, I think, is our current policy, whereby, in June of this year, we announced the names of the six priests we were removing from ministry permanently because they had sexually abused minors. That transparency comports much better not only with parishioners' right to know, but with children's right to be protected and the victim's needs to have his or her trauma validated.

With regard to reporting cases of clergy sexual misconduct to the criminal authorities for investigation, most of the allegations were received years after the occurrence, well beyond the criminal and civil statute of limitations. Our policy was to advise the victims and their families that they had the option of bringing this matter to the authorities themselves and we would cooperate with the law enforcement process. Never did we deter victims from doing this. The diocese, however, did not take the initiative to report the allegations to criminal authorities, partially because in a majority of the cases, the very reason the victim had come to the diocese and not to public authorities was that they did not want to make the matter a public one. Also, many times, the victims, through their attorneys, insisted on confidentiality. Further, in several of the incidents, the matter itself was brought to my attention by criminal or civil authorities. In this latter regard, I would suggest that there has been a change over the past few decades in the way that child abuse has been handled by law enforcement. In the not-too-distant past, there was the sense that this issue should not be dealt with too publicly. It was deemed ugly and publicity was thought to have the potential of re-victimizing a minor. As a result, many cases went unprosecuted. Obviously, things have changed for the better.

Our diocese's current policy, based upon the recommendations of 12 local district attorneys, is to hand over to criminal authorities any credible allegations within the statutes of limitations. For any allegations of abuse beyond that time frame, we have retained the services of a former BCI investigator to discern the facts and report to our Diocesan Misconduct Panel.

Recognizing the deep and lasting trauma of sexual abuse, our diocese, since the 1980s, has been offering counseling for victims and their families irrespective of culpability, and in some cases, settlements for emotional and psychological damages endured. These settlements did, in the past, include confidentiality agreements, which have reinforced the image of cover-up, but even more significantly, impeded some victims from telling their stories to others, which can be a significant step in the healing process. Our diocese decided more than a year ago that there would be no confidentiality agreements in the future, and the Dallas meeting in June affirmed that as national policy.

In tracing the history of sexual abuse, it should be understood that most of the reported incidents of clergy misconduct with minors took place prior to the mid-1980s. In our diocese, for example, even with all the widespread publicity over the past 11 months and the encouragement for victims to come forward, we are only aware of three incidents which have occurred in the past 16 years. These statistics, I believe, which are pretty much paralleled nationally, are not a matter of mere coincidence.

While we in Church leadership have responded too slowly and too tentatively, nonetheless, we have made serious efforts to address this issue. With regard to the recruitment of candidates, for example, over the past two decades we have had an aggressive program in place to root out individuals who might be prone to act out inappropriately. The formal process for acceptance into the seminary is quite thorough, requiring multiple references, a criminal background check, extensive psychological testing and interviews by three psychologists. Once admitted to the seminary, a candidate for the priesthood is regularly monitored and evaluated throughout his five- to six-year period of training and is offered courses and programs which would have been considered taboo as recently as a quarter of a century ago—for example, in sexuality, addiction and the struggle to be celibate.

I offer this background on seminary admission and formation policies to underscore that over the past quarter of a century the Church in general and our diocese, specifically, have been putting into place policies and procedures that will screen out people who are not emotionally or psychologically capable of assuming the position of sacred trust which the priesthood entails. These policies, I believe, are proving effective. Among priests ordained for the Diocese of Albany over the past 20 years, there has only been one accusation of misconduct with a minor. One case of such reprehensible behavior, of course, is one too many, but compared to the number of allegations of misconduct which have come to light against those ordained at an earlier time, there is a markedly significant difference.

Also, in the early 90s, we, along with other dioceses throughout the country, put into place comprehensive guidelines about sexual misconduct and conducted workshops and seminars for those already ordained about standards of ministerial behavior and boundary issues, as well as clear policies for offering spiritual,

pastoral and counseling assistance to victim/survivors. The Charter for the Protection of Children and Young Adults adopted by the Catholic bishops this past June in Dallas is designed to build upon these efforts. Locally, we have hired a Victim's Assistance Coordinator, and are in the process of employing a coordinator to oversee the implementation of the Charter's policies, which will not only address the problem of clergy sexual misconduct, but of sexual misconduct by anyone representing the Roman Catholic Church, salaried or volunteer, as well as the much wider problem of sexual abuse within the general society, of which the approximate 2 percent of Catholic priests involved is but a small subset. Unfortunately, it is estimated that one out of every eight males and one out of every five females is abused sexually before the age of 18, usually by a family member or a trusted person in the individual's life. My hope, then, is that the crisis we have been through in the Church over the last year may have the indirect but beneficial effect of focusing our resources on this broad societal problem and its solutions.

". . . a priest who is engaged in even a single act of sexual abuse will be removed permanently from any public ministry in the Church and may be dismissed from the clerical state."
—Bishop Howard Hubbard

With regard to offending priests, I would note that the policy adopted at Dallas in June was reiterated last month in Washington; namely, that a priest who is engaged in even a single act of sexual abuse will be removed permanently from any public ministry in the Church and may be dismissed from the clerical state. To insure the due process rights of the accused priest, once an allegation is received, a preliminary investigation is to be conducted and here the misconduct panel can be most helpful. If it is deemed that an act may have occurred, the priest will be placed on administrative leave and this action will be made known publicly. Then the bishop must apply to the Congregation for the Doctrine of the Faith at the Vatican to receive a dispensation from the statute of limitations, if such is applicable (which is 10 years beyond the victim's 18th birthday), and ask permission to conduct a tribunal or canonical trial. It is anticipated that this request, both to waive the statute and to impanel a tribunal, will be granted readily in the great majority of instances, although the Vatican might reserve cases involving multiple jurisdictions or particularly notorious cases to itself. Throughout the process, the accused priest has a right to both civil and canonical representation. The result of this process will be made public. This revised process is not intended to delay or thwart justice, but to accomplish the same purpose as our own penal system in the United States—namely justice for the victim and due process for the accused. The rights of both can and must be protected. While I suspect there will be some difficulties initially in employing a process with which many are unfamiliar, ultimately I am confident that the new procedure and protocol will respect the rights of both victims and the accused. These procedures will be Church law for all dioceses in the United States and, along with the Charter, will be reviewed after a two-year period, as well as monitored and evaluated by the National Review Board headed by Governor Frank Keating of Oklahoma.

Three other notes. The preliminary church investigation is not designed to hinder or impede any criminal investigation and can be delayed so as not to obstruct the efforts of law enforcement and civil authorities. Second, even if the priest is convicted in criminal court and sent to prison, he still remains a priest, although one without an assignment. Hence, the process I just outlined would still be necessary in a Church court to remove the priest from ministry permanently. We will cooperate fully with law enforcement and civil authorities in such investigations and comply with all reporting requirements. Also, even if the canonical process exonerates the priest, the bishop has been given the authority to bar the priest from public ministry if, in the bishop's judgment, the act of misconduct has occurred or if the common good demands such protection.

In conclusion, I reiterate my apology for the way in which I and other bishops have mishandled this issue. I acknowledge that serious mistakes were made, which I regret deeply and that I am committed to rectify. Most especially, I regret that too little attention was given to the plight of victims of the heinous crime of clergy sexual misconduct. While Church authorities like myself always knew that such behavior was morally wrong, and in many instances, a crime, we in the Church, as within the wider society, were not aware of the devastating and life-long consequences for victims resulting from this violation of sacred trust. It was only gradually that I and others in Church leadership began to appreciate the tremendous long-term damage which victims suffer at the hands of their offenders. Having reviewed the scientific research and more significantly, having met with victims of clergy sexual misconduct, I have come to understand and appreciate more fully that such misconduct is not only traumatic and painful at the time of its occurrence, but can lead to life-long problems with trust, intimacy and sexuality. Very often, victims feel guilty, as if they were the ones who did something wrong and thus become filled with shame and self-loathing. Since victims are frequently reluctant to reveal the misconduct to others, they suffer the trauma alone, often filled with rage, anger, hopelessness and

despair, much of the time unaware of the source of or the reason for these feelings. When left untreated, these deep wounds can result in low self-esteem, poor interpersonal relationships, substance abuse and suicide. Also, since the perpetrator was a trusted representative of the Church, victims tend to identify his behavior with the Church itself, and that frequently leads to the loss of faith and even to the rejection of God. I sincerely hope that the transparency now required and the pastoral, spiritual and psychological assistance now available, will encourage victims and their families to come forward and to receive the help that they truly deserve. I pledge to do all in my power to insure that this happens. I thank you for according me this opportunity and for your kind attention.

BARBARA BLAINE, ESQ.: I also want to thank all of you for being here and the Albany Law School for putting on the symposium this evening. I think it is a great testament to this law school to venture out and take a risk to put on such a discussion, and it shows the law school's commitment to justice and I think to also to bring about some peace and healing for victims. I want to thank Bishop Hubbard for being here and for his remarks this evening. I believe that in a sense, together, we can create an atmosphere where the Church can be healed and can help victims to be healed.

I was victimized by a priest growing up in Toledo, Ohio. In a sense, the Bishop already told you the effects of abuse on victims, so I won't go over that. I can only tell you that from my perspective, what he described is very accurate. Having met with hundreds of survivors myself, I can say that would be the experience of most of the victims that I have met. Basically, victims suffer alone in silence, in secrecy and in shame. We do feel that it is our entire fault that anything happened and because of that, we don't tell. I think that my case is classic and that is why I want to tell you a little bit about it, because I think it is what happened to hundreds of victims like myself. I think that it is also the exact same experience—it does not matter what diocese or what religious community that victims go to—our experience has by and large, been the same. I first began to realize that I had been abused when I was 29 years old. I have to tell you that is very young. Most victims of sexual abuse do not even begin to understand the implications of the abuse until we are well into adulthood. Most of us are in our 30s or 40s, some even into their 50s or 60s before we are able to talk about what happened to us or before we are able to really understand that what happened to us was abusive and that what happened to us has caused damage in our lives. So, with that in mind, I think one key piece of information is that the current statutes of limitations, both the one that the bishops just voted to reinstate, as well as the statute of limitations in most states across the United States, are such that they protect child molesters.

What happens is that the psychological impact of the abuse on the victim prevents the victim from coming forward until he or she is well into adulthood. By that time, for me it was age 29, and I came forward and told the provincial of this religious community and I told the bishop. The priest who molested me was still in ministry, and I found out much later that they had known he was a child molester for a long time. The thing is, when I did come forward and tell about the abuse, the statute of limitations had run, so there could not be any criminal case brought against Father Warren, and he had moved on to a whole new generation of victims. So the cycle was continuing, and that is why it is so wrong to have the statute of limitations—it allows the perpetrator to move on to a new generation of victims—because the abuser will never be held accountable based on the laws as they stand now and based on the norms that the bishops proposed in Washington.

"The Dallas document allowed for child molesters to remain within the priesthood. From my perspective, I believe that the bishops and religious communities can find better candidates to fill the roles of priesthood than child molesters."

—Barbara Blaine

Now, I want to talk a little bit about the Bishop's Charter that Bishop Hubbard talked about. From the perspective of the victim, I think that it is important to understand that the document that the bishops voted on this last month in Washington, D.C. is a major step back from the document that they voted on in Dallas last summer. Let me tell you why I think that is true. First of all, the whole spirit of the Dallas document was one of transparency and openness. No more secrecy, no more confidentiality. The bishops were making a stand that they were going to report information to law enforcement, prosecutors, the people, and the laity. They were going to allow laity to be involved in the decision-making when allegations came forward. The Dallas document was a clear set of regulations that bishops would follow. Now, don't get me wrong, from my perspective, the Dallas document was very weak. The Dallas document allowed for child molesters to remain within the priesthood. From my perspective, I believe that the bishops and religious communities can find better candidates to fill the roles of priesthood than child molesters.

Now the other significant thing is that the Washington document came up with these fuzzy guidelines. We call them norms and the major thing lacking is that there is no mechanism for any bishop accountability. It is just not there. Nowhere will there be consequences that a bishop who disregards the norms would be removed or that he would face any kind of criminal or any type of reprisals other than some possible publicity against him, but he will remain in his position. He can decide whether he wants to follow these guidelines or whether he chooses not to follow the guidelines. The major problem with that is that the norms as the bishops have them now, while they claim that it offers an opportunity for due process for the priests, from my perspective, every person in America is already afforded due process. Anyone who commits a crime in the United States is granted due process and just because you are a priest does not mean that you have less due process or more due process. In the same way that anyone else in America is held to the standards of criminal law, so too should priests. Priests should not be held above the law. Now, I believe that the way the document has been changed creates loopholes which would permit child molesters to either remain in ministry or to return to ministry, and the reason I think that this is so crucial is because of the fact that it leaves children at risk.

Now, you can look at me today, and I am a grown-up and I am articulate. I am able to stand up for myself in a sense. Obviously, I couldn't do that when I was young and I think it is very important to realize that children are still vulnerable and they will not be able to speak out even if they have been taught or educated in ways that I certainly never was. Now, the thing about these loopholes is that they are created by the initial investigation, which Bishop Hubbard alluded to. The way that the Dallas document was written, the priest would be removed when an allegation is made, probably almost immediately. Now the way that the norms are written, the bishop will do an investigation first and then, if the bishop determines that there is enough evidence, the bishop will decide whether or not to remove the priest and then whether or not to turn over information to law enforcement. Now, I understand and Bishop Hubbard made clear that if there were an allegation involving a child today, it would be turned over to police. My sense is that this is probably true all across the country. If a child makes an allegation, in any Catholic institution today, that allegation would be turned over to the authorities, to whatever the state programs are for children and family services, or to child abuse hotlines, and police and prosecutors would be involved.

The problem is that most victims will not tell about the abuse until they are well into adulthood. So in one sense, we should not be too surprised that we do not have any allegations from the 1990s, or as Bishop Hubbard said, since 1985. Maybe it is because of the fact that the bishops changed or began to deal with the crisis in a better way. I don't know. I don't think we know that and we won't know it for another decade or two because the victims who are currently being victimized probably won't be talking about it for another decade or two because that is the impact of the psychological damage that we suffer.

I think it is important for us to realize that the bishops themselves, who are now requiring us to trust that they will make the decisions appropriately when allegations come to them are the same bishops that got us into this situation in the first place. These are the same bishops that have transferred perpetrators over and over in the past few decades and maybe longer.

The other possibility of a loophole exists because of the fact that now the bishops will have tribunals, which will be some type of Church court where these trials will occur. From a victim's perspective, you have to realize that the victim's interests will not really be protected because there is no guarantee that the victim will even be involved in these hearings. Most likely they won't be, and we as victims will be forced to rely on a priest to represent us in the context of these tribunals. Remember, it was a priest that abused us; it is a priest that we have difficulty trusting after what happened to us, and now we would be forced to have to rely on a priest to represent our interests and we cannot even be there for it. So, clearly from the victim's perspective, the tribunal sets up difficulties.

The loophole also allows the priests who have been removed to appeal their removal. I am not familiar necessarily with the Albany Diocese, but I believe that Bishop Hubbard said that after the Dallas meeting that he came back and removed six priests. Now, in the Archdiocese of Chicago, where I live, eight priests were removed after the Dallas event. These eight priests in Chicago were known child molesters. They were admitted child molesters who were reformed and they were being monitored, and the Church authorities were ensuring that they weren't going to molest any more children. Now, it is my understanding that of those eight, five are appealing their removal. Those five will be allowed a trial. So, either these trials become a sham, and the outcomes are predetermined, or we leave open the possibility for child molesters to return to ministry.

The Bishop started his talk tonight by describing the fact that he does not have a legal degree. I can appreciate that. It has only been recently that I have even received my legal degree, but I must say and I say this to you Bishop Hubbard and to those of you who are here, that we as victims when we go to the Church leaders and we are looking for help and we want a response, we are not looking for a legal response. What

we need is a pastoral response, and what we have coming out of the bishops' meeting is a legal document, filled with legal loopholes that will allow Church leaders to continue to go on with business as usual. The spirit of healing, the spirit of offering a pastoral response to victims is not what is driving this document. It is not the heart and soul of the document and unfortunately, and I speak to victims all across the country, and what victims are encountering when they contact Church authorities is not a positive response for the most part. I used to have to say it was never a positive response and at least today there are some cases where people do feel that the Church leaders respond appropriately, but it is few and far between. For the most part, what victims encounter when they contact the Church leaders is a lot of questions and then lots and lots of waiting. Throughout the waiting, the victims are told there is an investigation occurring. The victims never know what that really entails—what does the investigation mean.

Back in August, the bishops came back to their home dioceses and many had announcements in parish bulletins and they asked parishioners in all of the parishes, if you have been abused, come forward. Lots and lots of victims came forward for the first time right after that. I can tell you that what has happened in some of those cases is that the victims came forward and told what happened to them and then within weeks, they themselves were being sued by the priest who they named as their perpetrator. Now, that is one example of how in a sense, the bishops still follow a path of defensiveness and a path of using legal hardball tactics. While the Dallas document talked about an end to confidentiality agreements and talked about transparency and openness, what happened in the Washington experience from the Washington document is that we have gone back to the secrecy. I am not sure, and maybe Bishop Hubbard will explain this later for us, whether or not the Washington document still says that we will not engage in any more of the confidentiality agreements. But, I can tell you this, the Dallas document did not go so far as to say that we will release everyone who has signed confidentiality agreements. I can appreciate and I do appreciate the fact that Bishop Hubbard said that frequently the Church leaders want to protect confidentiality for the sake of the victim, because lots of victims and most victims, do want to maintain their confidentiality. At the same time, it should be the victims themselves who make the determination whether or not they should speak out. The victims themselves should be deciding if it is healing for them to talk to others, if it is healing for them to speak out. Because of the fact that what has happened is that there are hundreds, possibly thousands, but certainly hundreds of victims who have signed those confidentiality agreements, and probably at least once a week, I will get a phone call from a victim. For example, there was a call I received last week from a man who is in his early 40s, who signed a confidentiality agreement with an archdiocese and received a settlement of money about seven or eight years ago. He was told that the priest would not be ever allowed to return to ministry, and now he has found out that the priest has moved to a new state and is in ministry. He is calling to tell me that he is in a quandary because he is afraid to break the confidentiality agreement because, if he does, he said to me, "Barbara, I have two things in the world, one is our home and the other one is this fund we have set up for our kids' college." He said, "I am trying to weigh my responsibility—whether it is to protect my own children's college fund and our home for my children, or whether it is to the potential children who could be molested where this priest is now serving." He said, "I am just not sure which is the best moral response for me at this time." I don't have the answer, but I do believe that our bishops should release all the victims from having to maintain the confidentiality agreements. If the victims feel it is useful and helpful for them to break these agreements, then they should be permitted to.

". . . I don't believe that the crisis today would exist if the Church authorities would reach out with compassion and care to victims when they come forward"

—Barbara Blaine

In closing, I would just say that I don't believe that the crisis today would exist if the Church authorities would reach out with compassion and care to victims when they come forward. For example, when I came forward, they told me, "Barbara, you are the first one to ever tell us that Father Warren abused children." They said no one else had ever come forward. They kept making empty promises to me that they would do minimal things. They should have made sure that he received counseling; made sure that his boss knew (he was a hospital chaplain). I asked if the hospital administration knew that he was a child molester. They wouldn't do these bare minimum things. Then I came to the point where I said that he does not belong in ministry and you should remove him from ministry. It took them seven years and then, when I finally told them that I was going to give his name on a national talk show, that is when they removed him from ministry, which was in 1992. Then I found out, when his name did come forward in 1992, some of these other girls, women today, contacted me and said that Father Warren had molested them too, that some of them had

told authorities as early as 1971. I cannot begin to tell you how many times that I have heard that story. The victims find out that the Church leaders knew, not for a year or two (I mean a week or two is too long to leave a priest in ministry where children could be at risk), but we are talking about a couple of decades. Then, when I came forward, still to this day, the Church leaders won't pick up the phone and call my mother to apologize to her or return phone calls. They just don't respond in a pastoral way to me and to my family and that is the plight of most victims. If the Church leaders would respond to people like me the way they should, SNAP, our organization would not exist and we probably wouldn't be here today. Thank you.

PROFESSOR CHARLES REID: My contribution to this evening's discussion of the pedophilia crisis is to identify the three basic values at stake. These values, which might be seen by some as competing, are actually complementary. Any effort to resolve the crisis canonically, I will propose, must in fact achieve an integration of these basic values. Anything less will result in failure.

I. The Position of the Ordained Priest in Catholic Theology and Law

The first value I must address is the sacred calling of the ordained ministry. In the decree *Lumen Gentium*, the Second Vatican Council recognized a universal priesthood of all believers.[1] The laity and "the ministerial priesthood or hierarchical priesthood are . . . ordered one to another; each in its own proper way shares in the one priesthood of Christ."[2] But the ordained priest and the laity are nevertheless called to separate duties or functions within the Church of God. By virtue of the power of Orders, the ministerial priest is called to preach the Gospel, govern the Church and to effect the Eucharist, the central feature of Christian life. The laity, for their part, is to share in the universal priesthood through participation in the Eucharist, reception of the sacraments, and a life of holiness in the world.[3]

Let us focus more clearly on the responsibilities of the ordained priest. *Presbyterorum Ordinis*, a second decree of the Second Vatican Council, concerned itself with the nature of the ordained priesthood. We are told that through their ordination, "priests are promoted to the service of Christ the Teacher, Priest, and King; they are given a share in his ministry, through which the Church here on earth is being ceaselessly built up into the People of God."[4]

Priests, in virtue of Holy Orders, participate in a subordinate way in the power bishops themselves possess by their standing as successors of the Apostles.[5] Through Holy Orders, "priests . . . are signed with a special character and so are configured to Christ the Priest in such a way that they are able to act in the person of Christ the Head."[6] It is uniquely the priest's responsibility to preside at the sacrifice of the Eucharist, to hear confession and reconcile sinners to God, and to administer other sacraments such as the anointing of the sick.[7]

"Priests [also] exercise the function of Christ as Pastor and Head."[8] It is the responsibility of the priest to "educat[e] people to reach Christian maturity."[9] Priests are especially called to look to the needs of "the poor and the weaker ones . . . in a special way."[10] Priests, the Second Vatican Council instructs, "will look after young people with a special diligence."[11]

Like all Christians, priests are obliged to pursue a life of spiritual perfection. "But priests are bound by a special reason to acquire this perfection. They are consecrated to God in a new way in their ordination and are made the living instruments of Christ the eternal priest. . . ."[12] Priests should be "prepared to listen to the inspiration of the Spirit of Christ who gives them life and guidance."[13] In this way, they are enabled to carry out their ministry and achieve a holy way of life. A life of self-sacrifice, of mortification of the flesh, of submissiveness to the demands of the Holy Spirit, allows priests to become "more effective instruments for the service of all God's people."[14]

The Western Church's adoption of a celibate priesthood is a practical consequence of this theology. Priestly celibacy promotes "a deep connection . . . [with] the priesthood of Christ."[15] Celibacy "signifies a love without reservations, it stimulates . . . a charity which is open to all."[16] "[I]t is modeled on the total and exclusive dedication of Christ to His mission of salvation. . . ."[17] Standing against the materialism of the age, "transcending every contingent human value,"[18] "the celibate priest associates himself in a special way with Christ as the final and absolute good. . . ."[19] "Through celibacy, priests are more easily able to serve God with undivided heart and spend themselves for their sheep. . . ."[20]

Recent papal teaching has reasserted the sacred dimensions of the priesthood and has also reaffirmed the significance of priestly celibacy for members of the Latin-rite clergy. Thus Pope John Paul II has taught that "[a]ccording to the faith of the Church, priestly ordination not only confers a new mission in the Church, a ministry, but a new 'consecration' of the person, one linked to the character imprinted by the sacrament of Orders as a spiritual, indelible sign of a special belonging to Christ in being and, consequently, in acting."[21] This "sharing in Christ's priesthood" must "arouse in the presbyter a sacrificial spirit . . . [which is] the burden of the cross."[22] The result of this sacrifice is total "dedicat[ion] to the service of the people."[23]

Celibacy makes this dedication more complete. The priest is enabled to "love[] and serve[] with an undivid-

ed heart" and is given "greater availability to serve Christ's kingdom . . . leading a life more like that definitive one in the world to come, and therefore, more exemplary for life here below."[24]

The 1983 Code of Canon Law for the Latin Church similarly reflects this understanding of priesthood. All clerics are obliged to pursue holiness in the conduct of their lives, in virtue of their reception of Holy Orders.[25] This pursuit must embrace "above all else" (*imprimis*) "the faithful and indefatigable fulfillment of the duties of pastoral ministry."[26] All priests work toward the achievement of a single purpose—"the building up of the Body of Christ."[27]

Clerics are obliged to keep perfect and perpetual continence as a sign of the Kingdom of Heaven, and in order to serve Christ and the people of God with an undivided heart.[28] Priests are obliged to avoid associating with those who might endanger their continence.[29] Violations of the requirement of celibacy are to be punished by a "just penalty."[30] A cleric who engages in sexual activity with a minor below the age of 18 may be punished "by just penalties," including "dismissal from the clerical state."[31]

The Second Vatican Council, the teachings of the popes, and the Code of Canon Law have combined to bring into being a doctrine of the priesthood that confers on ordained ministers some extraordinary responsibilities. Priests are configured in a special way to Jesus Christ and are called to lives of leadership, service, and sacramentality. Priests are to lead lives of denial, lives that witness to the transcendence of the Kingdom of God, and lives of undivided service to others. Within Catholic theology and canon law, the priest occupies a position of unparalleled trust. The call to be celibate, at least in the Western Church, is a central feature of this calling to ministry, to service, and to trust. According to the 1983 Code of Canon Law, a violation of this trust, where pedophilia is concerned, constitutes grounds for removal of a priest from ministry.

II. Broken Trust: The Impact of Pedophilia on Victims

The second value that I should like to address is that of trust—the trust that must prevail between a priest and those entrusted to his care. In a system of theology and law which places such enormous emphasis on the sacred character of the ordained ministry, it is fair to conclude that pedophilia constitutes an almost uniquely monstrous violation of trust. Far from building up the Body of Christ or showing a special solicitude for young people, the pedophiliac priest violates his promise of continence and preys upon those who have placed trust in him because of their beliefs about God and the sanctity of the priest's calling.

There is now a substantial body of literature establishing the range of injuries that can occur because of acts of pedophilia. Boys, as well as girls, "show marked impact as a result of sexual abuse both early and long term."[32] Among the short-term effects are "fears, sleep problems, and distractedness."[33] Longer term, men who have been sexually abused are more likely to develop problems with alcohol.[34] Both men and women who have been abused are more likely to develop clinical depression than those who have not been abused.[35] Other long-term effects include "anxiety, feelings of shame, and poor self-esteem."[36] Abuse can also result in "uncertainty in future sexual unfoldment, . . . guilt (instilled by the perpetrator), and years of blocked enjoyment of life."[37]

"In a system of theology and law which places such enormous emphasis on the sacred character of the ordained ministry, it is fair to conclude that pedophilia constitutes an almost uniquely monstrous violation of trust."
—Professor Charles Reid

Research also indicates that "a significant fraction of sexual-abuse victims suffer from [post-traumatic stress disorder]-type symptoms (flashbacks, nightmares, numbing of affect, a sense of estrangement, sleep problems) in the immediate aftermath and even long term."[38] It has also been cautioned, however, that post-traumatic stress disorder should not serve "in itself as an adequate conceptualization" of the emotional damage caused by abusive conduct, "although it has added some insight to the understanding of the trauma of some abuse victims."[39]

There is evidence as well that abuse begets more abuse. A childhood victim of abuse is more likely to become an abuser himself or herself.[40] A recent British study focused on male sexual offenders has thus determined: "[T]he risk of being a perpetrator is enhanced by prior victim experiences, doubled for incest, more so for paedophilia, and even higher for those exposed to both paedophilia and incest."[41] This study, however, also cautions that prior victims of abuse do not constitute a majority of subsequent abusers, noting that "prior victimisation may have some effect in a minority of abusers. . . ."[42] In essence, this study makes the point that a history of having been abused is a risk factor that might incline some victims to repeat this pattern in their own lives. We have seen, in the press accounts concerning a few of the most notorious serial priestly pedophiles that previous abuse by a priest was a factor in their own backgrounds.[43]

Sexual abuse by a priest appears to result in its own special set of horrors. A counselor experienced in treating the victims of abuse has described the impact such abuse can have: "The image of the priest is supposed to be the image of Christ; your truest image of God was defiled and ripped from you. You feel that your childhood was lost in so many ways. You fear what people will think of you now. You fear some will think you had a part in this. You are afraid to claim your God-given sexuality for fear it is somehow sullied. You would rather wither away spiritually than take the chance to love and to trust others fully again."[44]

A second writer has stressed that "the most damaging aspect of childhood sexual abuse is a betrayal of trust. . . ."[45] This author stresses as well the profound spiritual damage caused specifically by priestly abuse. "[I]t is not uncommon for victims to report an inability to pray. . . . If a child learns that adults cannot be trusted, it is highly unlikely that he or she will learn to trust God."[46]

Yet another writer, who has studied the damage caused specifically by priestly pedophilia has observed: "Most survivors try harder to be intimate. Many fail. Children abused by priests are hypersensitive to danger. They are unable to trust. . . . Some people lose their families, who can't cope with what's happened and shut them out. Others feel as if they've lost God, or that God doesn't exist. 'If God is speaking through this person, what the hell is he doing allowing this abuse to go on?' That's the question."[47]

Some specific examples might elucidate the kind of emotional damage that follows in the train of priestly pedophilia. Eleanor Burkett and Frank Bruni, in their 1993 study of priestly pedophilia, *A Gospel of Shame*, provide some excellent examples of the severe human costs of allowing abusive priests to remain in a position to prey on more victims. We encounter there, for instance, Dennis Gaboury, who at the age of ten was raped—not too strong a word—by Fr. James Porter. Porter had just finished serving Mass when he invited Gaboury, his altar server, to come into his office.[48] Gaboury did so, and was kept there for two hours, while Fr. Porter sought sexual gratification.[49]

Gaboury has suffered numerous consequences because of this encounter. He was always guarded in his dealings with others.[50] He turned to alcohol, marijuana, and even LSD in an effort to forget the effects of what he experienced.[51] He thought he might purify himself by entering the priesthood although his stay in a high-school seminary was a brief one.[52] He traveled extensively, from California, to Washington, DC, to Puerto Rico, engaging in self-destructive behavior everywhere he went.[53] Only gradually, ten years after entering recovery for his problems with substance abuse, was he able to confront the memories inflicted by Fr. Porter and achieve a level of emotional healing.[54]

Gaboury's story is far from alone. Burkett and Bruni provide other examples of lives ruined by pedophilia. We find, for instance, Christopher Schultz, whose Franciscan teacher and scoutmaster asked him to beat the older man with a cat o' nine tails and act out the stations of the cross in the nude.[55] Unable to rid himself of morbid thoughts about this episode, Schultz committed suicide while still in the sixth grade.[56] We learn of Jennifer Kraskouskas, whose pastor both befriended her and took advantage of her, all when she was nine years of age.[57] These examples can be multiplied.

A lesson Burkett and Bruni stress is that abuse by a Catholic priest is nearly unique even when compared to other forms of abuse in the way it damages the capacity to trust. They interviewed "Alexander Zaphiris, a therapist who evaluated more than a dozen victims of Father Gilbert Gauthe,"[58] whose serial molestations in Lafayette, Louisiana, in the early 1980s probably mark the starting point of the modern pedophilia crisis within the Church.[59] Zaphiris observed:

> I've seen kids abused by a YMCA leader. I've seen kids abused by Boy Scout leaders. This is different. These victims were much more vulnerable and much more traumatized. They didn't respect their parents. They didn't respect their Church. They didn't respect anyone. They were completely empty. I saw bodies, empty bodies. That's something I had not seen before in my work.[60]

III. The Value of Justice

The third value we must explore is the value of justice. This value embraces both the proposition that those guilty of committing these sorts of atrocities should be appropriately punished—ecclesiastically and civilly—as well as the proposition that such punishment must take place in accord with basic principles of due process. No one's interest is served if the guilty evade punishment or, just as significant, if the innocent are improperly punished.

There are law professors who claim to be unable to think outside the framework of a case. I am not such a professor, but I think we can frame our discussion of the issue of due process by considering a series of cases, one real, three hypothetical. In good law-professor fashion, I shall not take up the clear case, but the difficult ones. Hard cases might or might not make bad law—I tend to think that they sharpen the intellect—but they are the law professor's stock in trade.

The first case is real. This is the case of Michael Smith Foster. Foster is a highly respected canon lawyer and the judicial vicar of the Archdiocese of Boston. In August 2002, a lawsuit was filed against Foster by a certain Paul Edwards alleging that Foster had sexually abused Edwards.[61] Within days, in conformity with Boston's "zero tolerance policy," Foster was suspended from office.[62] Also within days, Edwards' own circle of family and friends criticized him publicly, raising doubts about his credibility.[63] Friends, including many former students of Fr. Foster, rallied to his defense, although this is not unusual in abuse cases.[64]

The case against Foster began to crumble within a week and a half. His attorney withdrew from the case and Judge Constance Sweeney, who has presided over the abuse cases in Boston, expressed her own "significant concerns" about the credibility of the charges.[65] In early September, *The Boston Globe* criticized the process by which Foster remained suspended even as the case against him fell apart.[66] Edwards subsequently dropped his case "with prejudice," Foster was reinstated, but in a subsequent meeting with archdiocesan officials,[67] Edwards repeated his charges. Despite serious questions about Edwards' credibility, despite his dropping of civil charges against Foster "with prejudice"—thus precluding their revival at some later date—Foster was once again suspended.[68] Foster remained suspended another two months, before the archdiocese finally acted, once again, to clear his name.[69]

Foster, furthermore, is not alone as having been wrongly accused. We know that other clerics have also been improperly accused, among them Roger Mahony, the Cardinal-Archbishop of Los Angeles, and the late Joseph Cardinal Bernardin of Chicago.

Let us now consider some hypothetical "hard cases": suppose a priest, 28 years of age, newly ordained. The year is 1971. This priest, confused, nervous about his sexual identity, walks into a gay bar where he meets a young man who claims to be 22. They have relations. The priest's sexual partner is actually 17, a fact that is later acknowledged. The priest's sexual partner never subsequently makes any kind of complaint against the priest. The priest, however, remorseful over what he has done, admits everything to his bishop who, acting in his administrative and not his sacramental capacity, makes a notation in the priest's personnel file.

Suppose a priest, with an unblemished record. A single allegation of abuse is brought against him in the early 1990s. He vigorously denies the allegation, but his bishop and the diocesan attorney have no desire to see the matter contested. They urge the priest to agree to a settlement, assuring him that there will be no future consequences. He agrees to the settlement and, as is standard in such agreements, makes no admission of wrongdoing. The priest continues in his ministry, and his record remains otherwise unblemished.

Suppose, finally, a priest who has committed serious acts of pedophilia. He has acknowledged his wrongdoing and has paid for his crimes by serving a sentence in a penitentiary. Upon release, he is given hospitality at a monastery. He works in areas at the monastery, such as grounds-keeping, where he has no contact with the public, and he is under good supervision. But he continues to celebrate Sunday liturgy with his community.

Let us now turn to the law, and see how these cases might be handled. Let us start with the Dallas norms, which were announced in June 2002, and which were reissued in revised form in November 2002. The Dallas norms contemplated an investigative process which included a review board charged with conducting the initial investigation and an appellate board responsible for reviewing the first-instance process.[70] The majority of the boards at both levels were comprised of lay persons, although at least one member of the first-instance board was to be a priest and at least one member of the appeals board was to be a bishop.[71]

Presumably, a properly conducted investigation under the Dallas norms should lead to a finding of facts that would allow an innocent priest to be restored to ministry and to regain, to the extent possible, an unblemished reputation. Indeed, this seems to be what occurred in the case of Fr. Foster of Boston.

But the Dallas norms would allow for little flexibility in the three hypothetical cases I have set out. Presuming that the young priest's brief encounter in a gay bar thirty years ago constitutes a form of abuse, he would now be permanently barred from ministry.[72] The norms indeed emphasized, in a strange twist of phrase, that "even a single act of abuse—past, present, or future—"resulted in automatic dismissal from ministry.[73] How one was to determine future abuse was thankfully omitted from the document.

Similarly, the Dallas norms would seem to prevent the cleric who agreed to an out-of-court settlement from re-litigating these issues. He might be, to use legal language, permanently estopped from asserting his innocence, despite the absence of any pattern of misconduct, despite perhaps the lack of any evidence at all, aside from his own agreement to settle the case.[74] Complicating such a result, however, is the fact that in most settlement agreements there is no concession of wrongdoing.

The easiest case would seem to be the priest who has served his time and now wishes to live out his days in a monastery. The Dallas norms would have prevent-

ed him from celebrating the liturgy with his community, even though he has no contact with the public.[75] No discretion to consider the particular circumstances of his case would be possible. Indeed, in each of these three cases, the norms removed the exercise of discretion from the relevant ecclesiastical authority. A one-size-fits-all policy would remove all three from any kind of public ministry.

The Dallas norms, however, are no longer in effect. In response to concerns voiced by the Holy See, a revised set of norms was issued on November 13, 2002. These norms make clear, first of all, that "the universal law of the Church . . . has traditionally considered sexual abuse of minors a grave delict and punishes the offender with penalties," including "dismissal from the clerical state" in the appropriate case.[76]

As in the case of the Dallas norms, so also with the revised norms, a review board is empowered to conduct an initial investigation,[77] which is required to be in conformity with the penal norms of canon law.[78] As with the Dallas norms, lay persons not otherwise employed by the diocese were to comprise a majority of the board's members.[79]

Unlike the Dallas norms, however, the revised norms allow for involvement by Rome. "Where there is sufficient evidence that sexual abuse of a minor has occurred, the Congregation of the Doctrine of the Faith shall be notified."[80] Only then is the accused to be suspended from office, prohibited from public celebration of the Mass, and subjected to having restrictions placed on his travel or his residence, pending the outcome of the Congregation's own investigation.[81]

The revised norms go on to specify sanctions where abuse has either been established or admitted: "When even a single act of sexual abuse by a priest or deacon is admitted or is established after an appropriate process in accord with canon law, the offending priest or deacon will be removed permanently from ecclesiastical ministry, not excluding dismissal from the clerical state, if the case so warrants."[82] Gone is the language about future abuse.

A time limit is also imposed on when the sanction of removal might be applied. The norms of the Congregation for the Doctrine of Faith provide for a "prescription," i.e., a statute of limitations of ten years in abuse cases.[83] The revised norms of November 2002, however, also specify that "[i]f the case would otherwise be barred by prescription, because sexual abuse of a minor is a grave offense, the bishop/eparch shall apply to the Congregation for the Doctrine of the Faith for a dispensation from the prescription, while indicating the appropriate pastoral reasons."[84] Further reducing the possibility of ever applying the statute of limitations is the language of norm nine, which provides that "the diocesan bishop/eparch shall exercise [the] power of governance to ensure that any priest who has committed even one act of sexual abuse of a minor . . . shall not continue to serve in active ministry."[85]

Now, let us see how our cases will be resolved under this new legal regime. Presumably, the Foster case would have been adequately investigated by the review board. In all likelihood, the case would have collapsed under its own weight prior to its transfer to the Congregation for the Doctrine of Faith. If the charges' weaknesses had become apparent at this early stage, Foster would have been spared the damage to his reputation that occurred following his very public suspension from duties, which occurred in conformity with the Dallas norms. The revised norms stress the importance of reputation when they indicate that the review board is to serve "as a confidential consultative body to the bishop/eparch in discharging his responsibilities."[86]

Under the revised norms, presuming that the young gay priest's sexual encounter in the gay bar is deemed abusive, competent ecclesiastical authority must report the matter to the Congregation for the Doctrine of the Faith and apply for a dispensation from prescription, even though the encounter occurred 31 years before and no one subsequently came forward to make a complaint against the priest. It remains an open question whether the Congregation would grant the dispensation in these circumstances, although it seems likely that the priest would be barred from ministry. This much seems to be the meaning of revised norm nine, which constitutes a kind of pledge that the power of governance shall be used to eliminate from active ministry of those guilty of even a single instance of abuse.

Let us turn to the final two of the more difficult cases. First, let us consider the case of the priest who agreed to the settlement. Under the Dallas norms, the priest would have been suspended once the diocese received notice of credible allegations. The existence of the settlement decree would likely have constituted at least prima facie evidence of credible allegations. The priest would face, at best, an uphill struggle to prove the untruth of the allegations.

The revised norms, on the other hand, would seem to allow somewhat more flexibility in allowing an investigation of these charges. The preliminary investigation would be confidential and if evidence of abuse was forthcoming it would be forwarded to the Congregation for the Doctrine of the Faith. Only at this stage of the process would the priest be suspended from ministry. There would not be the rush to judgment one might have seen under the Dallas norms. The underlying truthfulness of the settlement agreement could be investigated carefully and confidentially and, where abuse occurred, the priest would be dealt with appropriately.

Regarding the priest who has chosen to live out his days in the monastery: Under the Dallas norms, where, "for reasons of advanced age or infirmity" the priest has not been dismissed from the clerical state, "the offender is to lead a life of prayer and penance. He will not be permitted to celebrate Mass publicly, to wear clerical garb, or to present himself publicly as a priest."[87]

This provision seems to take as normative the life of diocesan priests. The policy behind the Dallas norms clearly—and should clearly be—to remove such priests from dealings with the public. But is this policy served by forbidding a man from celebrating the liturgy with his religious community when he is otherwise quarantined from the public? The Dallas norms prevented this question from even being asked. The revised norms at least permit the question to be posed. Again, presuming the abuse occurred more than ten years ago, competent authority would be required to request a dispensation from the statute of limitations in order to remove the priest from ministry. Bishops, furthermore, are committed to using the power of governance to remove such a man from ministry of any kind. There may, furthermore, be good reasons to prohibit such a man from presenting himself in any kind of public venue as a priest. Again, however, assuming that the granting of dispensations by the Congregation is not automatic, some kind of weighing of the reasons why this man should be removed from community celebrations of the liturgy ought to occur at some stage of the process.

The great danger of the revised norms is that we see a return to business as it has been conducted in some dioceses. Allegations of abuse must not be disregarded. I think that the chance of cover-ups is at least lessened by the specification of the revised norms that its majority must consist of persons not otherwise employed by the diocese[88] and by the further provision that "at least one member should have particular expertise in the treatment of the sexual abuse of minors."[89] These provisions at least reduce the possibility that conflicts of interest and old friendships might get in the way of an investigation while also ensuring that some level of expertise is to be brought to bear on the resolution of particular allegations.

The revised norms represent a significant advance beyond the Dallas norms in some crucial respects other than those highlighted by my hypothetical hard cases. Perhaps most significant, the revised norms contain a definition of abuse, unlike the Dallas norms, which seemed to leave this concept undefined.[90] "Sexual abuse of a minor" in the revised norms is now defined as "sexual molestation or sexual exploitation . . . and other behavior by which an adult uses a minor as an object of sexual gratification."[91]

The preamble to the revised norms indicates that the document does not adopt any specific definition of abuse promulgated by civil authorities. Rather, "the norm to be considered in assessing an allegation of sexual abuse of a minor is whether conduct or interaction with a minor qualifies as an external, objectively grave violation of the sixth commandment [citation omitted]."[92] An act of abuse "need [not] involve force, physical contact, or a discernible harmful outcome."[93] The "moral responsibility" for such an act, furthermore, "is presumed upon external violation. . . ."[94]

If there is one potential problem with the revised norms it is the danger that the process appears or actually becomes a means of shielding misconduct. This problem, after all, seems to be at the root of the present crisis. It is not that a small minority of priests violated their calling and abused the most vulnerable of those entrusted to their spiritual care. It is that persistent patterns of such abuse were tolerated, excused, and overlooked sometimes for decades. The "unholy silence" and the "unhealthy denial" that "have held sway" in many places must be broken.[95] The revised norms must not become a mechanism by which these destructive patterns are allowed to repeat.

"If there is one potential problem with the revised norms it is the danger that the process appears or actually becomes a means of shielding misconduct. This problem, after all, seems to be at the root of the present crisis."

—Professor Charles Reid

Due process requires both that the innocent be protected and that the guilty be punished. In this life, there are no guarantees that justice will always be done. In this world, justice is always, at best, approximate. But canon law, which in many respects back in the twelfth and thirteenth centuries invented the idea of due process, should not become a means by which victimizers are shielded or the innocent cast out with ruined reputations. I believe that the revised norms provide a better vehicle for the doing of justice, generally speaking, than did the Dallas norms.

PROFESSOR LESLIE GRIFFIN: "Child sexual abuse is a crime in every jurisdiction of the United States."[96] Across the nation, state legislatures and courts have recognized the horror of child sexual abuse and developed legal tools to combat it. For example, they have worked diligently to craft constitutional limitations on child pornography.[97] The recidivism of sexual offenders has

persuaded some states to impose civil commitment on offenders after their criminal punishment has ended.[98] All 50 states, including New York, have passed "Megan's Laws" that require convicted sexual offenders to register with local police.[99] Tort damages are available to plaintiffs injured by abusers or the employers who negligently hire them.

Although citizens may disagree about the range of punishment for and the best means to prevent child sexual abuse, criminal prosecution and tort liability for child sex offenders are not controversial. As Professor Adler has written, "[t]here is not an acceptable 'liberal' position when it comes to the sexual victimization of children."[100] The law, as always, is imperfect, but our courts remain the institutions best suited to handle these questions of abuse of some citizens by others.

"Throughout the pedophilia crisis, the Church has abused its religious freedom by hiding behind the First Amendment, i.e., by arguing that the government may not intrude upon its decisions about priests."

—Professor Leslie Griffin

Despite these clear criminal and civil prohibitions of the sexual abuse of minors, many leaders of the American Catholic Church have resolutely and repeatedly protected clergy from criminal prosecution and other legal sanction. In these matters the Church has and continues to operate as a law unto itself. The First Amendment protects religious institutions against improper intrusion by the government upon religious freedom. Throughout the pedophilia crisis, the Church has abused its religious freedom by hiding behind the First Amendment, i.e., by arguing that the government may not intrude upon its decisions about priests. Hence the Church has used the First Amendment's immunity to protect clerical and episcopal wrongdoing from appropriate punishment and liability. The consequences have been severe; already many criminal prosecutions and civil lawsuits about cases known to the Church have been barred by statutes of limitations.

Such hiding behind the First Amendment is most evident in court holdings in three areas: jurisdiction, discovery and reporting. Moreover, none of the latest reforms proposed by the American bishops would change this legal situation; indeed, they exacerbate them. Thirty years of horror stories confirm that the Church will not police itself. Hence, the courts, the legislature and citizens must be resolute in holding the Church accountable to the law. First Amendment precedent now provides that the Church must be subject to "neutral laws of general applicability";[101] courts must enforce this standard in tort law. No matter what the Vatican says, in the United States no prelate should be above the law.

I. Jurisdiction

Jurisdictional rules control who gets into court. Courts allow many victims to sue their abusers, even clergy, for intentional or criminal sexual conduct and to sue regular employers for negligence. The rules are more complicated when victims seek to sue church employers for their negligent hiring, ordination, retention or supervision of molesters, or to sue priests for malpractice. Nonchurch employers who continued to recommend and re-employ molesting employees would undoubtedly appear in court and pay huge damages. Other professionals are sued for malpractice. But the Church has a special defense, recognized in many states, that the government may not intrude upon the Church's freedom by subjecting its employment decisions to legal analysis. Only the Church knows who is fit to be a priest. If state law accepts this First Amendment defense, the plaintiff never gets a day in court. The courts refuse jurisdiction and the case is dismissed.

In tort law, employers are usually liable for the negligence of their employees under the doctrine of *respondeat superior*. Although some jurisdictions have held bishops and dioceses liable to abuse victims under this theory of vicarious liability, New York courts have not permitted abuse victims to recover under *respondeat superior* because the abuser's conduct was "outside the scope of employment."[102]

The alternative is to sue episcopal employers for their own negligence in hiring or supervising the abusive priest. Under standard tort law, "[t]he employer is responsible for negligence in the hiring, supervision, and retention of an employee known to be dangerous to the health and safety of others."[103] In addition to a duty to exercise reasonable care while hiring employees, "[a]n employer has a continuing duty to retain only those employees who are fit and competent."[104]

Although the elements of the tort should be the same for religious and non-religious employers,[105] religious employers have used a defense not available to regular defendants, namely that courts may not intrude upon Church decisions about employment. They argue that the bishop/clergy interaction is not a traditional employer/employee relationship. Any judicial scrutiny of churches' hiring or retention policies would involve the government in the kind of the entanglement with religion that the First Amendment prohibits.

Although the new national trend is toward allowing such causes of action against churches,[106] many

states continue to prohibit the lawsuits.[107] The facts are not developed and juries do not hear the cases because the First Amendment functions as a jurisdictional bar to prevent the lawsuits from being heard. New York's precedents on these lawsuits are mixed. In one case, the court noted that the employee Presbyterian minister (who actually bore the name of Reverend Joseph Bishop) "might well have been prosecuted for criminal sexual abuse"[108] for sexual contact that began when the plaintiff Christine Schmidt was sent to him for counseling at age twelve. Some sexual contact continued between them for almost thirty years. Nonetheless, the Southern District, applying New York law, ruled that "the pastor of a Presbyterian Church is not analogous to a common law employee."[109] Hence

> any inquiry into the policies and practices of the Church Defendants in hiring or supervising their clergy raises the same kind of First Amendment problems of entanglement . . . which might involve the Court in making sensitive judgments about the propriety of the Church Defendants' supervision in light of their religious beliefs. . . . It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.[110]

Christine Schmidt was sent to Reverend Bishop for counseling. Another court allowed Martin Jones' lawsuit to proceed because the abuse (the priest kissed and fondled Jones when he accompanied him to the swimming pool) did not occur in the counseling setting.[111] Religious counseling, even when accompanied by inappropriate sexual behavior, enjoys special First Amendment protection.

Recently the Florida Supreme Court vigorously endorsed the trend to permit plaintiffs to sue churches for their negligence in handling abusive employees. The court stated that "[t]he First Amendment cannot be used at the initial pleading stage to shut the courthouse door on a plaintiff's claims, which are founded on a religious institution's alleged negligence arising from the institution's failure to prevent harm resulting from one of its clergy who sexually assaults and batters a minor or adult parishioner."[112] In contrast, "[t]he supreme courts of Wisconsin and Maine have each rejected a claim against an archdiocese and a bishop for the negligent hiring and retention of a priest who was a pedophile."[113] The current Catholic crisis confirms the wisdom of Florida's ruling that courts should not bar the courthouse door to plaintiffs by letting religious defendants hide dangerous conduct behind the First Amendment.

"Many courts who reject clergy malpractice also disallow regular negligence suits . . . against clergy, fearing that such lawsuits are an end run around the First Amendment restriction on examining clerical conduct."

—Professor Leslie Griffin

Less controversial than lawsuits against the abusers' employers should be suits against the abusers themselves. Here too the courts have permitted some priests to hide behind the First Amendment. Although plaintiffs may recover civil damages from their abusers in the worst cases of criminal sexual conduct, other abusive behavior falls outside the jurisdiction of the courts. In some cases, women who are sick, or need advice in difficult circumstances, have gone to clergy for counseling. Married couples have also sought counsel; over time sexual contact ensued with priest or minister. Lawsuits against such clergy, for negligent counseling or other misconduct, are frequently dismissed on First Amendment grounds. The courts are wary of anything that resembles "clergy malpractice" because they do not want to define a standard of care for clergy. The same courts that regularly hear malpractice lawsuits against doctors, lawyers and psychoanalysts do not take jurisdiction over clerical misconduct if it involves scrutiny of religious advice. Despite numerous court decisions since the first clergy malpractice suit was brought in California in the 1980s, no court has recognized the tort of clergy malpractice.[114]

Many courts who reject clergy malpractice also disallow regular negligence suits (negligence, breach of fiduciary duty, negligent counseling, negligent infliction of emotional distress) against clergy, fearing that such lawsuits are an end run around the First Amendment restriction on examining clerical conduct. Florida has also rejected this argument. In *Doe v. Evans*, its Supreme Court permitted Jane Doe to sue Pastor Evans for breach of fiduciary duty, ruling that "Doe's breach of fiduciary duty claim is not tantamount to a clergy malpractice claim."[115] Nonetheless, "the overwhelming majority of jurisdictions continue to be extremely reluctant in giving specific recognition to clergy malpractice

as a separate cause of action. Instead, most courts continue to allow relief for such actions only under existing cognizable claims."[116]

In New York, Susan Langford saw Monsignor Nicholas Sivillo for counseling after she developed multiple sclerosis.[117] A sexual relationship developed. Monsignor told her "that only his prayers were keeping her well and preventing her illness from recurring."[118] The Supreme Court ruled that her negligence claims "in fact stated a claim for malpractice" that could not be heard. "[A]ny attempt to define the duty of care owed by a member of the clergy to a parishioner fosters excessive entanglement with religion."[119]

The same result was reached for Schmidt, in counseling at age twelve, in *Schmidt v. Bishop*.[120] He "invoked God as supporting the conduct in which he allegedly engaged, and informed her that 'the relationship was special and acceptable in the eyes of the Lord' and that 'it was not something [she could] share with others.'"[121] Despite these interactions, her lawsuit was dismissed because it "would of necessity require the Court or jury to define and express the standard of care" for clergy. Letting a jury decide the case would be unconstitutional, an "excessive entanglement with religion," [122] too much intrusion upon religious freedom.

The complications of tort liability for churches are evident in *Kenneth R. v. Roman Catholic Diocese of Brooklyn*.[123] Father Jimenez pleaded guilty to sexual abuse in the third degree. Kenneth R. sued the Brooklyn Diocese for negligent ordination, hiring, retention and supervision and Jimenez for negligence. The court rejected *respondeat superior* liability for the diocese because the acts were outside the scope of Jimenez's employment.[124] Father Jimenez could not be liable for clergy malpractice.[125] The court did not reach the constitutional merits of liability for ordination because Father Jimenez was ordained in Venezuela. Because Father Jimenez "came to [Brooklyn] with a *letter of reference* from his Archbishop," the negligent hiring suit was dismissed. The negligent retention and supervision suit withstood a motion to dismiss "because there is no indication that requiring increased supervision of Jimenez or the termination of his employment" would violate any religious doctrine or inhibit any religious practice.[126]

Sometimes plaintiffs get their day in court. But too often the First Amendment bars the door. Courts who have allowed plaintiffs their day in court have correctly concluded that the Free Exercise Clause permits courts to enforce "neutral laws of general applicability" against clerical tortfeasors. Of course the Church's lawyers zealously advocate the First Amendment defense.[127] Still pending in Massachusetts is "a church argument that all clergy abuse lawsuits be dismissed on grounds that they violate the constitutional protection of the separation of church and state."[128]

II. Discovery

Father Jimenez "came to [Brooklyn] with a letter of reference from his Archbishop."[129] The pedophilia crisis has demonstrated that bishops' letters of recommendation are unreliable.[130] To know that, you have to have access to the documents, as plaintiffs' lawyers did in Boston. In civil litigation the courts permit broad discovery of corporate documents. But the Church argues that the state may not intrude upon religious freedom by acquiring any of its files. When the Church seeks dismissal of lawsuits under the First Amendment, it also asks the courts to stop discovery.[131]

Relying on another clause of the First Amendment, early in 2002 the *Boston Globe* convinced a Boston court to unseal legal records of some settlements between the Church and abuse victims. Then plaintiffs' lawyers pushed to discover the Church's employment records. Father Paul Shanley was the priest who received glowing references from Boston's Cardinal Bernard Law despite reports that he publicly advocated man-boy love.[132] Plaintiffs in the Shanley civil lawsuits argued that the archdiocese should produce the employment documents that demonstrated how Cardinal Law sent Shanley from church to church without reproach.

The Church relied on the First Amendment to argue that it did not have to produce those documents.[133]

> Wilson Rogers Jr., the Church's lead attorney, argued in his motion for the order that the courts can make no rulings on the Church's personnel actions about Shanley "without direct involvement in the teachings of the Roman Catholic Church." Because of the presumed constitutional protections, Rogers wrote, "clergy members cannot be treated in the law as though they were common law employees." He asserted that the documents . . . "all pertain to the inner workings" of the Church, and are protected by the First Amendment.[134]

Rogers also inserted a permanent objection to the cardinal's deposition into the record because "a deposition was an inappropriate 'inquiry into the internal working of the church.'"[135]

In 1990 Auxiliary Bishop A. James Quinn advised a group of bishops to "purge the archives" and to send some documents to the papal nuncio, where they would be unreachable.[136] Moreover, under Roman Catholic canon law, some Church files must be kept private through placement in "secret archives" that are inaccessible to anyone but the bishop.[137] Among the documents in the secret archives are criminal cases that concern moral matters. "It is likely that the bishop or

archbishop will place in the secret archives any records dealing with priest pedophilia."[138] Secret archives, governed by canon law, may be exempt from court scrutiny under either the First Amendment or the clergy-penitent privilege.[139]

This level of secrecy (secret archives, papal immunity, canon law, privileges, immunity) requires lawyers who litigate against the Church to "have a focused discovery plan. You will probably find that the defense will try to obstruct full discovery."[140] Such obstruction has occurred in Boston, where Superior Court Judge Constance Sweeney has commented on the Church's "deliberate attempt to sidestep her orders that the documents be made public" as well as the inconsistencies between the cardinal's sworn testimony and those records.[141]

III. Reporting Requirements

Although every state has some type of child abuse reporting law, the statutes offer a patchwork of conflicting obligations.[142] In only twelve states are clergy always required to report sexual abuse of minors. Other states list some professionals—doctors, nurses, social workers—as mandatory reporters but don't put clergy on the list.[143] Even states that identify clergy as mandatory reporters often negate that obligation by recognizing a clergy-penitent privilege that protects clergy from reporting abuse learned in the confessional or counseling setting.[144] A privilege keeps the priest from testifying in court. There are different rules for clergy.

We do not know if vigorous enforcement of the reporting statutes would have made a difference in the Catholic pedophilia cases. Such statutes are rarely enforced in any state. Nonetheless, the exceptions and privileges for clergy may have reinforced clerical belief that their obligation to sexual abuse victims was moral and spiritual rather than legal.

The crisis has led many states to reconsider their reporting statutes.[145] This year New York debated a bill that would make clergy mandatory reporters.[146] Assemblyman Jack McEneny (D-Albany) proposed new reporting legislation; the Senate and Assembly reached an impasse over wording. Neither bill would have changed the clergy-penitent privilege or broken the seal of the Catholic confessional.[147] As Assemblyman McEneny stated, "The confessional is as close a thing as a blood oath that you will find on this earth. There is no movement anywhere that I am aware of that would eliminate the confessional."[148]

Confessional conversations are privileged. Yet the confessional remains one location in which bishops and clergy are likely to learn of sexual abuse by fellow priests. Who decides what's confessional? The clergy, who could sweep many conversations, especially bishop-priest ones, into the confessional seal and never face a duty to report. The bishops protest that this would never occur.[149] Yet they ignored evidence that the scandal itself would occur. The Church has already revealed its determination to hide documents behind the First Amendment.[150] There is no reason to believe that communications of abuse will be reported.

IV. The Vatican's Reforms

Jurisdiction, discovery, reporting. In all three areas there are mechanisms for the Church to hide behind the First Amendment. The recent Vatican/American bishops' proposed reforms suggest that, despite new rhetoric from the bishops, the Church will continue to do so.[151]

Jurisdiction

The new reforms authorize Church tribunals to weigh any complaints against priests. The tribunals are secret and composed of Catholics, primarily clergy, who work under the norms of canon law. Beware. By adding a new level of Church bureaucracy to the process, the Church has strengthened its First Amendment defense. Surely civil courts may not intrude into Church tribunals who rule on claims about priests.

Discovery

The records of these priest tribunals will be sent to Rome, which is unlikely to turn its records over to American courts. Moreover, the new norms state that these priest cases are covered by "pontifical secrecy . . . a grade of confidentiality just short of sacramental confession."[152] Anticipate claims of First Amendment protection and clergy-penitent privilege, i.e., no release of documents.

Reporting

The first American bishops' policy, adopted in Dallas in June 2002, required reporting of sexual abuse to civil authorities.[153] After Vatican revision, the new regulations state only that the Church will comply with civil law, which, as you recall, mandates reporting in only twelve states. So, one cannot be sure that most Catholic clergy and bishops will report new allegations of abuse. This is especially true if the Church continues to invoke a clergy-penitent privilege that courts are reluctant to pierce, especially when the seal of confession is involved. In Massachusetts, even after the crisis had started, the Church persuaded the state senate to exempt it from reporting misconduct learned in religious counseling.[154]

The bishops, including the Bishop of Albany, have given us their word that they will no longer protect abusive priests from civil law. But in their policies and in their legal arguments, the future Church looks a lot like the past: exercising its own jurisdiction over cases

of abuse and keeping the information secret. The Church is a tough litigator and has demonstrated that it will push the First Amendment precedents to the limits. So the burden falls on citizens, especially Catholic citizens, and courts and legislatures, to hold the Church to the same standards as everyone else and to make sure that no prelate is above the law.

PROFESSOR TIMOTHY LYTTON: The purpose of the public forum is to provide a kind of town hall atmosphere in which to talk about these issues. Hence, at this point in the program, we will open the floor for comments, questions or any other contributions from the audience. The panelists will then have an opportunity to respond.

AUDIENCE: Comment expressing disappointment with the Church's past handling of sexual abuse. Why didn't the Church turn investigations over to law enforcement agencies?

BISHOP HUBBARD: Well, I certainly understand your anger and upset and acknowledged at the outset of my presentation that we, and I personally, have not always handled these things in the best manner in the past. As I indicated, there are no more confidentiality agreements. I also indicated that anything that is required to be reported to the legal authorities or anything within the statute of limitations will be turned over to the proper authorities. This was an agreement that we had with the local district attorneys at their request, and I am complying with that. Furthermore, we have hired an investigator with 28 years of experience with the BCI to investigate any cases beyond the statute of limitations. Those investigations will be reported to our Misconduct Panel, which is composed mostly of lay people, who are not in the employ of the Church. They will review the investigation reports and make recommendations to me as to the next step that needs to be taken. So, our commitment in Dallas and in Washington is that if any priest has engaged in misconduct with a minor, he will be removed from ministry.

I would acknowledge that in the past we did not always handle the issue well. At one point in time, sexual abuse of a minor was looked upon primarily as a moral/spiritual problem. It was always taken seriously, but having been diagnosed as a moral/spiritual problem, a moral/spiritual remedy was applied.

It was only in the late 70s that the Church authorities began to appreciate the compulsive and addictive character of sexual misconduct. At that point in time, when a priest was accused of misconduct, he was sent to a treatment center and we worked with the therapists and psychologists at the treatment centers, and followed their recommendations. If they indicated that a priest should not be restored to ministry then he wasn't. If they indicated that he could be restored to ministry under certain limitations, he was. That policy is now abolished. Reassignment will not happen in the future. But in fairness to bishops like myself, we were relying upon the experts at the time as to how best to deal with this issue. With the new norms that have been adopted both in Dallas and in Washington, there will be no reassignment to ministry for anyone who has engaged in sexual misconduct with a minor. I have committed myself to follow this policy and I will do that regardless of whether it is a current case or a past case, no matter how far back.

AUDIENCE: Comment about bishops not paying for their wrongs.

BISHOP HUBBARD: I don't know if I understand that comment. But I certainly would agree with what Professor Griffin said, namely that there should be no special protection nor any special privileges for priests. But I think that they deserve and need the same rights as any other citizen.

AUDIENCE: Professor Griffin, I wonder if you have some thoughts, or perhaps Ms. Blaine has some thoughts, with respect to some of the negative issues of mandatory reporting?

PROFESSOR GRIFFIN: My real worry is inter-clergy conversations—the clergy knowing what has been going on with the clergy, and not caring about the minor. So the reporting has not been focused on protecting the victims, it has been a way to avoid making any kinds of duties that even a lawyer would make about criminal activity. Of course, the negative side is that at some point, that would get into problems for the victims. But my starting point is the concern for crime. That is the huge issue with sexual abuse of minors—people who have a past history of it appear to be about to do it again. They're recidivists. So at some point you could pick up the duty to make that person's dangerousness known to the police and maybe in a way that says that you need to be careful about releasing victims' names. But you always have to protect future victims.

MS. BLAINE: I would concur with that and just say that I think most states protect the identity of sexual abuse victims regardless of their age, and especially the identities of children are protected. So I just think that the larger value of protecting children has to be first. I think that is even stronger than the privilege of even the confessional because it seems to me that there is Catholic teaching, you can even go back to the New Testament where I believe it was Matthew's Gospel, where Jesus makes a statement, "suffer the little children, come unto me." I just think that the Catholic tradition is one where children are uplifted. It would seem to me that protecting children—it is always a balancing

act. I think that you have to choose which side you are going to err on. From my perspective, if you are comparing for example, the reputation of the adult who may be falsely accused, versus the possibility of destroying the life of the child, you have to err on the side of protecting the child.

AUDIENCE: Comment about the Church hiding behind the First Amendment and comment about the attorney-client privilege and confidentiality. Professor Griffin, what do you propose that we change?

PROFESSOR GRIFFIN: Well, right now the constitutional standard for the free exercise clause of the First Amendment has been set in the *Smith* case, which says that churches are subject to neutral laws of general applicability. So without changing that constitutional standard, there are plenty of ways for the courts to treat the churches like everyone else and that is what the Florida Supreme Court did recently when they said we are going to let these negligent hiring cases against bishops and maybe priests proceed. You know, beforehand, the courts were saying that we can't have those. That is not allowed by the free exercise clause of the First Amendment because you are intruding too much. So I think we have the legal standard in the free exercise clause of the Constitution now that permits the courts to say we are going to hold you to the regular rules of liability, we are going to hold you to the same standard. But, as you well know from law school, just because you have a Supreme Court case setting the First Amendment standard, doesn't mean that all the issues connected with tort liability for churches or all the issues about can you really sue somebody for negligent hiring of a priest—those have not been worked out in case law yet. They are still coming through the courts in a way that means that First Amendment defenses are still up for grabs in some ways, up for litigation.

You also raised the legal ethics point. You know if you step out of the clergy context and think, the ABA has had this intense debate this year. They have it every year about what exceptions there can be to the confidentiality that a client gets. Years ago, they worked out an imminent bodily harm exception, which has not been accepted in every jurisdiction. California, where I am a member of the Bar, does not have it. Lawyers say "no exceptions to confidentiality," but the move has been to have exceptions when people's lives or health is in danger. Now the battleground is the release of some types of information about financial fraud. Congress is trying to legislate that. I say, in the same way, there could be breaks in a confessional privilege or in a clergy-penitent privilege. These are things that people are afraid of now. Right now, the attorney-client privilege is kind of sacred, but the confessional privilege is really sacred. The law could move around the edges of both of those to protect people from harm.

PROFESSOR REID: If I could respond for a minute. Regarding the confessional privilege, yes, it is sacred. Every Catholic here in this room is required to go to confession at least once a year during Lent. It is sacred. It protects Catholics generally. It protects Catholics revealing their secrets to priests, and for those who believe in the sacrament of confession and its healing power, it provides a powerful sacramental aid to that whole process. I worry that discussions of the seal of confession are a distraction from the major issues here—the major issues being priestly pedophilia, being the proper instrument of justice by which pedophilia is dealt with. I think that talking about the seal of confession, I cannot myself envision many situations where the seal of confession could be decisive in preventing access to a range of documents simply not issued, or signed or witnessed under the seal of confession. I think alternatives abound by which one can obtain the documents one needs.

PROFESSOR GRIFFIN: What about conversations between priests about abuse or confession of abuse?

PROFESSOR REID: I think a conversation between two priests about abuse where absolution is not sought is perfectly discoverable.

PROFESSOR GRIFFIN: How about a confession, that is broad enough that it is a confession of child abuse and an indication that it could be continuing? Like a person who is not really expressing repentance?

BISHOP HUBBARD: In that case, where there is no repentance and a person is trying to use the sacrament to avoid detection, absolution is not granted. But, where absolution has been granted, I think you have to protect the sacramental seal.

MS. BLAINE: I just want to add to that. I appreciate what Professor Reid said because of the fact that you have to look at justice here. I so often hear that we have to be concerned, but the majority of priests are good priests. It is only a very small percentage who have engaged in sexual misconduct with young people and I would agree with that, except for the fact that during the time that I was being molested at St. Pius X Parish in Toledo, there were always at least four priests living in the rectory at that time. Now, Father Warren had tons of young girls into his "office," but you know—you all are Catholic. The priest's rectory, the office, is connected to the bedroom. So, now you tell me, what in the world did the other three priests think was going on with Father Warren and myself, and all of these other young girls? So, when you talk about their having the right to keep this confidential, you know, why should they? Why wouldn't they have had some duty or responsibility to me or to the other girls that he was molesting? Shouldn't they have contacted my parents? God forbid they actually called the police on their brother priest.

PROFESSOR REID: I think absolutely in those circumstances they do have a duty and they breached their duty severely. I think there is no question that they have a duty. There has been no confession, no absolution given in those circumstances. Someone looking the other way, someone excusing misconduct is breaching a serious duty. I think those priests should be brought up on a witness stand and subjected to cross-examination. But I would like to preserve, very narrowly the seal of confession, which is sacramental and sacred, as others have observed.

BISHOP HUBBARD: To pick up on that point, I also want to preserve the sacramental seal of confession. But I think it would be inappropriate to avoid disclosure by converting an administrative inquiry into a sacramental confession. I earlier asked Professor Griffin if she had any knowledge of any court case where a Church authority, like a bishop, would say that he did not disclose information because he received it under the sacramental seal. I think the bishop, as the administrator of the diocese, in investigating a case of that nature, could not allow the priest to translate this inquiry into the sacrament of confession. That would be a breach of his responsibilities. The bishop would have to divide the administrative and sacramental roles he has. As administrator, then, you cannot be simultaneously the sacramental confessor. However, I do not think this is a real issue in today's world. I know of no place in this country where the sacramental seal of confession has been asserted as the basis for lack of disclosure.

MS. BLAINE: But maybe that is because of the fact that there are only 12 states that do require clergy to make those reports. If it were required in every state, maybe there would not be as much sexual abuse of children within the Catholic Church.

BISHOP HUBBARD: Let me respond to that. I certainly am not opposed to mandatory reporting laws, as long as they are even-handed for all people within society. So I don't think we should have different standards for the clergy. I would note, however, that I have had two instances within the past several months, where I have been contacted by attorneys who have had clients come to them and make allegations of sexual abuse. These attorneys wanted to know from me what my responsibility as bishop would be, if this information was brought to my attention. I told them that under the present statutes in New York State, I am not a mandatory reporter, and if, as adults, they shared that information with me confidentially, I would address the issue with the priest. But I am not mandated currently to turn over their allegations to the civil authorities. If, however, the legislation, as proposed, was enacted, then I would be, and there would be a 20-year look-back. So, I told these attorneys that if their clients came forward now, I would accept the information in confidence, do the investigation and deal with the allegations. But I could not give them assurance that if the present legislation was passed that I would not have to turn the case over to the public authorities. Hence, in both these instances, the clients of these attorneys have refused to come forward. The result is that you have a victim who is not getting treatment, and there may be a priest who is not reported and I remain unaware of his misconduct. So, I am not saying that there is a right or wrong here. I am just saying that it is very complex.

PROFESSOR GRIFFIN: Let me phrase it a different way. The Bishop began by saying that he was not a lawyer, and so what is the way a lawyer has to look at this, is to really raise questions about—well, how should the law handle this. Learning what we have learned, how should the law handle these? And so some of my suggestions are in that light. You figure right now, we as states and as a nation are struggling even though we have Megan's Laws. California changed the statute of limitations on pedophilia cases. Both of those issues are before the Supreme Court of the United States now. We are trying to figure in all different ways, just for all of the cases of sexual abuse, how to handle them legally. So we have to look and think, well, what is it that you could change about the laws that would handle some of the situations? Why do I raise the confessional? Because given the past bad history, a good lawyer has to anticipate what bad things people would do next or what other ways there could be to hide or fail to report child sexual abuse, and so you want to anticipate. Can we set laws in certain ways that will mean there are times when everybody has to be a reporter, or times when we won't give attorneys or clergy privileges to not testify in court?

AUDIENCE: If there were a criminal conviction of a child molester, that criminal conviction would not in itself automatically lead to the removal of a priest from the clergy—is that accurate?

BISHOP HUBBARD: That is correct. The same as if a doctor was convicted of a crime and imprisoned; he is still a doctor. Then, whoever credentials doctors (I do not know who that is in the state of New York) would have to initiate a separate process to remove him from the medical profession. What I am saying is that even though a priest might be convicted in court and sent to prison, there still has to be a separate process in the Church to remove him from priestly ministry. The same way as other professionals would have to be removed from their professions.

PROFESSOR REID: If I could step in here, it might help to clarify thinking also for everybody concerned, if we bear in mind that canon law is a separate legal system. It is the law governing the internal governance and structure of the Catholic Church; and so when you

talk about removing the priest from ministry, we are talking about steps being taken within the canonical system. We can certainly utilize the evidence generated in a criminal process to investigate a claim of child abuse. But we are also considering this separately within a system of law known as canon law, which is the law governing the Church, which is the law that establishes requirements to be a priest, among other things. So, we are looking at all the civil remedies—the remedies imposed by the civil law of the United States, but we are also considering—my talk was primarily on the canonical side of the issue—what the Church does to a priest who has committed these grave acts of wrongdoing.

AUDIENCE: Comment about the canon law being elevated above the penal law. I think that the message that sends is that even if you are convicted and put in jail for 20 years, you could still be a priest.

BISHOP HUBBARD: The point is that the Dallas Charter says that the priest is to be removed. But Church law says that the bishop cannot be the prosecutor, judge and jury in the case. He cannot remove a priest from ministry permanently by his administrative act. In other words, although the bishop will not restore such a priest to ministry, there is a formal process for the bishop to follow, so that the priest will not be able to exercise public ministry in the Church again.

MS. BLAINE: But just so you know that even though that occurs, there are lots of priests who have molested children who have been removed from ministry and still function as priests, wear the Roman collar and hold themselves out as priests. From my perspective, from the victim's perspective, the bishops and the religious community leaders do not do enough to try and stop that.

BISHOP HUBBARD: My understanding of the Dallas Charter is that once a priest has been removed from ministry because of sexual misconduct, he is no longer able to wear the Roman collar, no longer able to function publicly. He might be able to live in a religious house, but he cannot function publicly as a priest and cannot present himself as a priest. The purpose of the National Review Board is to receive complaints that bishops are not following that protocol and procedure. This is an added protection that the Dallas Charter included.

AUDIENCE: A local abuse victim spoke of her experience with the Albany Diocese and had complaints about the quality of counseling provided for victims. The priest involved had been removed. Bishop Hubbard apologized to her, but not the priest that abused her.

BISHOP HUBBARD: We met before personally and I expressed at that time, my deepest apology to you for the injury that you suffered. I also was under the impression that you were receiving counseling from a therapist. I was not aware that you were looking for additional counseling and I would be happy to meet with you or to be responsive to what your needs and concerns are. The policy that the diocese has had is that when a victim/survivor comes forward, we do offer counseling to that person. We have a format for doing that. As I indicated in my presentation, in accordance with the Dallas Charter, we have hired a Victim's Assistance Coordinator. This person will be aboard formally by the end of the month. The name of the person will be announced later this week, and that person will be developing further ways in which we can implement the norms of the Dallas Charter, which call for more aggressive pastoral and spiritual outreach to those who have been abused by clergy. So, I assure you that when this woman is on board, she will receive the names of any victims who have been in contact with me and she will make further contact to assess what other needs that they may have. I give you my assurance on that.

The other point that I would like to make is that there have been people who have requested that we facilitate a meeting between the priest/perpetrator and the victim/survivor. I have conducted a number of those meetings, or have had those meetings facilitated. If such a meeting is something that you would find helpful, I would certainly comply. While I cannot mandate the removed priest to participate, I would certainly request his participation in such a face-to-face meeting. I have done that on a number of occasions in the past, and will be open to do it in the future.

MS. BLAINE: It took lots of courage to speak up, thanks for sharing.

BISHOP HUBBARD: Yes, it did take great courage.

AUDIENCE: Ms. Blaine, assume an innocent priest is accused. While the diocese is investigating those accusations, would you at least allow confidentiality during that brief interim?

MS. BLAINE: The problem is that of course, in theory, it sounds good to allow confidentiality for that alleged perpetrator. But the problem is that we have the bishops themselves determining the credibility of the allegation. These are the same bishops who have transferred these guys how many times and allowed hundreds of us to be molested. So, it is a balancing act. Someone has to suffer here. Is it going to be potentially a child, whose life is devastated, or is it going to be the reputation of an adult? From our perspective, it is far easier for an adult to repair his reputation, even in the

scenario that Professor Reid gave. We heard that the reality was that within ten days, it was clear that the allegation was false. I would ask the Bishop to tell you how many times he has encountered a false allegation. I met personally with Cardinal George of Chicago right after he returned from Rome last summer. He told me that he had met with Cardinal Bevilacqua, and that the two of them together had never experienced a false allegation. It is just so rare. From our perspective, we should not be setting up a policy to protect this hypothetical that rarely, if ever, happens. Rather we should be worrying about protecting our children. Maybe it is hard for everyone to look at me as an adult or look at another grown child-victim as an adult and realize what impact this might have had on us as young girls. But it is devastating. I don't see how you could say that we would risk even one more child being abused to protect the reputation of an adult man, of a priest.

BISHOP HUBBARD: Let me say that I certainly understand Barbara's perspective. If I had been abused as she was, I would probably have the same perspective. I do think we have to lean in favor of protecting children and responding to the needs of victims. I also believe that it is very important that we understand, as Barbara has just pointed out so well, that the numbers of false allegations are relatively rare. That has been my experience, and I think it has been the experience of most bishops around the country. So, I think that there always has to be a presumption in favor of the victim's allegation. However, to protect the due process rights of the priest, I think it appropriate to take a short period of time to assess, not whether the allegation is true or false, but whether it is credible. Then it is not just the bishop alone making the determination of credibility. Every one of these allegations has to be brought to our misconduct panel that consists primarily of people outside of the Church structure. In a certain sense, they can function like a grand jury does in the criminal system in our society. They do not have to determine guilt or innocence, but whether there is reason to believe that something happened. If they do make such a finding, then at that point it is appropriate to announce publicly that there has been an allegation against Father So-and-So and that he is being removed from ministry until the allegation is investigated more thoroughly, or tried either in a criminal or canonical court. But I think that to do an initial preliminary investigation is not dissimilar to what we do in our criminal justice system.

PROFESSOR REID: If I could add, false accusations are rare, but they do happen. The Michael Smith-Foster case is not the only case. You have Cardinal Mahony in Los Angeles who was falsely accused earlier this year; Cardinal Bernardin in Chicago a few years ago was. I agree that there should be a presumption in favor of the accuser. I don't think accusations are made lightly. On the other hand, I do think that evidence bears out that there is a certain small subset of accusations that are, for whatever reason, falsely made.

AUDIENCE: Comment about trusting Bishop Hubbard and other bishops; criticism of the persistence of victims' groups.

BISHOP HUBBARD: I want to respond to that. I certainly appreciate the trust that you profess in the bishops. I understand that many people have lost trust in bishops, and, as I have acknowledged, we have not handled the situation well. By our actions we have to re-earn your trust. I also want to say that I admire people like Barbara, who have been willing to go public and to put their lives on the line. She has rendered a service to the Church. She has rendered a service to our society. I don't necessarily agree with all of her perspectives and I think we can disagree respectfully, but I admire what she has done, and I think that it has taken a lot of courage.

MS. BLAINE: Thank you.

Endnotes

1. Lumen Gentium, no. 11, in Austin Flannery, O.P., ed., Vatican Council II: The Conciliar and Post-Conciliar Documents 361 (new rev. ed., 1992).
2. *Id.*
3. *Id.*
4. *See Presbyterorum Ordinis*, § 1, in Flannery, ed., Vatican II Decrees, p. 863.
5. *Id.* § 2.
6. *Id.*
7. *Id.* § 5.
8. *Id.* § 6.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* § 12.
13. *Id.*
14. *Id.*
15. *Sacerdotalis Coelibatus*, § 21, *quoted in* The Dimensions of the Priesthood 98 (Boston: Daughters of St. Paul, 1973).
16. *Id.* § 24.
17. *Id.* § 25.
18. Ministerial Priesthood, Nov. 1971, Synod Document, *quoted in* Dimensions of the Priesthood 113.
19. *Id.*
20. *Id.* at 114.
21. *See* John Paul II, *Priests: Consecrated to God*, General Audience of May 26, 1993, *reprinted in* James P. Socias, ed., Priesthood in the Third Millenium: Addresses of Pope John Paul II 52 (Princeton, NJ: Scepter Publishers, 1994).
22. *Id.* at 53.
23. *Id.*

24. *See* John Paul II, *Priests: Consecrated to Christ Through Celibacy*, *in* Priesthood in the Third Millenium 84, 85.
25. *See* Code of Canon Law, c. 276, § 1.
26. *Id.* c. 276, § 2(1).
27. *Id.* c. 275.
28. *Id.* c. 277, § 1.
29. *Id.* c. 277, § 2.
30. *See id.* c. 1393; c. 1394 §§ 1, 2; c. 1395, § 1.
31. *Id.* c. 1395, § 2 (specifying that sexual activity with a minor below the age of sixteen qualified for dismissal, although this was derogated by rescript issued by the Secretary of State in the name of the Holy Father in April, 1994); *see* Kevin W. Vann and James I. Donlan, Roman Replies and CLSA Advisory Opinions 20-21 (Washington, DC: Canon Law Society of America, 1994).
32. *See* David Finkelhor, *Early and Long-Term Effects of Child Sexual Abuse*, 21 Professional Psychology: Research and Practice 325 (1990).
33. *Id.*
34. *Id.* at 326.
35. *See* John B. Murray, *Psychological Profile of Pedophiles and Child Molesters*, 134 The Journal of Psychology 211ff. (2000).
36. *Id.*
37. *See* Clarissa Pinkola Estes, *A Slaughter of Innocence*, 67 U.S. Catholic 6 (June 1, 2002).
38. *See* Finkelhor, *supra* note 32, at 328.
39. *Id.* at 329.
40. *See* M. Glasser, D. Campbell, A. Leitch, S. Farrelly, *Cycle of Child Sexual Abuse: Links Between Being a Victim and a Perpetrator*, 179 British Journal of Psychology 482-494 (2001).
41. *Id.* at 488.
42. *Id.*
43. Concerning Paul Shanley, for instance, who stands accused of a pattern of abusive behavior stretching over three decades in the Archdiocese of Boston, it has been observed: "He has said he was molested by a priest at age 12, forced to have oral sex, according to notes of a psychiatrist's interview with him at the Institute of Living in Hartford, Conn., in 1994." *See* Fox Butterfield & Jenny Hontz, *A Priest's Two Faces: Protector, Predator*, The New York Times, May 19, 2002, at 1.
44. *See* Estes, *supra* note 37.
45. *See* Mollie Brown, *From Victim to Survivor: The Treatment of Adults Who Have Been Sexually Abused as Children*, in Stephen Rosetti, ed., Slayer of the Soul: Child Sexual Abuse and the Catholic Church 83, 91 (Mystic, CT: Twenty-Third Publications, 1990).
46. *Id.* at 89.
47. *See* Elinor Burkett & Frank Bruni, A Gospel of Shame: Children, Sexual Abuse and the Catholic Church 140, 141 (New York, NY: Viking Books, 1993).
48. *Id.* at 132.
49. *Id.*
50. *Id.* at 131.
51. *Id.* at 131-132.
52. *Id.* at 133.
53. *Id.* at 134.
54. *Id.* at 135-136.
55. *Id.* at 139.
56. *Id.*
57. *Id.* at 72-75.
58. *Id.* at 138.
59. On Gilbert Gauthe, *see id.*, at 30-31, 98-101, 123-126.
60. *Id.* at 138.
61. *See* Walter V. Robinson, *Lawsuit Alleges Abuse*, The Boston Globe, Aug. 17, 2002, at A6.
62. *See* Michael Paulson, *Priests' Organization Seeks Rights for Accused; Letter to Law Cites Due Process Concerns*, The Boston Globe, Aug. 21, 2002, at A1.
63. *See* Matt Carroll & Sacha Pfeiffer, *Allegations Against 2 Priests Draw Scrutiny*, The Boston Globe, Aug. 22, 2002, at A1. "Edwards, according to many of his childhood friends, has a long history of embellishment, from claiming a role in a hit movie to boasting that he was a semipro hockey player." Reporters for the *Boston Globe*, investigating these doubts, concluded at this early phase of the process that "[i]nquiries this week . . . appear to support their skepticism." *Id.*
64. *Id.*; *see also* Walter V. Robinson, *More Doubts Surface About Abuse Allegations*, The Boston Globe, Aug. 23, 2002, at B4.
65. *See* Walter V. Robinson & Matt Carroll, *Judge Voices Concerns on Suit vs. Priests*, The Boston Globe, Aug. 30, 2002, at A1.
66. *See* Sacha Pfeiffer & Stephen Kurkjian, *Rights of Priests At Issue in Probes; Church is Accused of Overreacting*, The Boston Globe, Sept. 1, 2002, at A1. In this same article, the authors called attention to the case of Fr. William Butler, accused in the summer of 2002 of a single act of abuse in 1966, a charge which Fr. Butler vigorously contested. The authors of the article raised the concern "that as church officials struggle to maintain a groundswell of abuse complaints, accused priests are flung into limbo, their careers derailed and reputations sullied until their cases are resolved."
67. *See* Walter V. Robinson, *Church Clears Foster of Abuse; Monsignor to Regain Job as Canon Lawyer*, The Boston Globe, Sept. 12, 2002, at B1.
68. *See* Walter V. Robinson, *Church Reverses Return of Priest; Talk With Accuser Extends Inquiry*, The Boston Globe, Sept. 15, 2002, at A1.
69. *See* Peter DeMarco, *Church Marks Its Ties to Justice System; Cleared Priest Returns to Altar*, The Boston Globe, Nov. 18, 2002, at B3; *see also* Walter V. Robinson, *Reinstated Priest: 'Yes, I am Angry;' Reinstated Priest Critical of Treatment*, The Boston Globe, Nov. 24, 2002, at A1; Ralph Ranalli, *Homecoming Joyous; At His Vindication, a Newton Parish Welcomes Monsignor Michael Smith Foster*, The Boston Globe, Nov. 25, 2002.
70. *See* United States Conference of Catholic Bishops, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests, Deacons, or Other Church Personnel*, June 14, 2002, norm 4 A-C (establishing the investigative review board); and norm 6 (establishing the appellate board) [hereinafter "Dallas Norms"].
71. *Id.* norms 5, 6.
72. *Id.* norm 9A.
73. *Id.*
74. *Id.*
75. *Id.*; *see also id.* norm 9C.
76. *See* United States Conference of Catholic Bishops, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*, Nov. 13, 2002, Preamble [hereinafter "Revised Norms"].
77. *Id.* norm 5.
78. *Id.* norm 6; *cf.* Code of Canon Law, c. 1717 (1983).
79. *See* Revised Norms, *supra* note 76, norm 5.
80. *Id.*

81. *Id.* The norms to be employed by the Congregation for the Doctrine of Faith appear on the website of the National Catholic Reporter; *see Vatican Norms Governing Grave Offenses, Including Sexual Abuse of Minors*" [hereinafter "CDF Norms"].

82. *See* Revised Norms, *supra* note 76, norm 8.

83. *See* CDF Norms, *supra* note 81, article 5, § 1.

84. *See* Revised Norms, *supra* note 76, norm 8A.

85. *See* Revised Norms, *supra* note 76, norm 9.

86. Revised Norms, *supra* note 76, norm 4.

87. Dallas Norms, *supra* note 70, norm 9C.

88. *See* Revised Norms, *supra* note 76, norm 5.

89. *Id.*

90. *See* Revised Norms, *supra* note 76, Preamble. The Dallas Norms specified that "the processes provided for in canon law must be observed, and the various provisions of canon law must be considered," and cited to the National Conference of Catholic Bishops' *Canonical Delicts Involving Sexual Misconduct and Dismissal from the Clerical State* (Washington, DC, 1995), but did not seem to adopt, even by reference, its definition. The definition found in *Canonical Delicts* specified that a sexual offense "need not be a complete act of intercourse, nor should the term be equated with the definitions of sexual abuse or other crimes in civil law." *Canonical Delicts* specified that the violation had to be "an *objectively grave violation of the sixth commandment*" (emphasis in original) and referred readers to "the writings of recognized moral theologians and, if necessary, obtain the opinion of a recognized expert." *See Canonical Delicts* 6.

91. *See* Revised Norms, *supra* note 76, Preamble.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See* Donald Cozzens, Sacred Silence: Denial and the Crisis in the Church 8 (Collegeville, MN: Liturgical Press, 2002). One does not have to agree with Cozzens' proposed solutions—I have my own share of reservations—to acknowledge with Cozzens the dangers inherent in a culture that minimizes clerical misconduct and that sees complainants as somehow "anti-Church."

96. John Paul Serketich, *A Conflict of Interests: The Constitutionality of Closed-Circuit Television in Child Sexual Abuse Cases,* 27 Val. U. L. Rev. 217, 220 (1992).

97. Amy Adler, *The Perverse Law of Child Pornography*, 101 Columbia L. Rev. 209, 210 (2001).

98. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

99. *See generally* Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 Am. Crim. L. Rev. 333, 335 (1998) (including a comprehensive survey of the laws of the fifty states and the District of Columbia); Jane A. Small, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. Rev. 1451, 1459, n.41 (1999); *Doe I. v. Otte*, 259 F.3d 979 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 1062 (2002).

100. Amy Adler, *The Perverse Law of Child Pornography*, 101 Columbia L. Rev. 209, 210 (2001).

101. *Employment Division v. Smith*, 494 U.S. 872 (1990).

102. *See Jones by Jones v. Trane*, 591 N.Y.S.2d 927, 933 (Sup. 1992); *Paul J. H. v. Lum*, 736 N.Y.S.2d 561 (App. Div. 2002); Joseph B. Conder, *Liability of Church or Religious Society for Sexual Misconduct of Clergy*, 5 A.L.R.5th 530 (1993) ("In considering cases brought under the *respondeat superior* theory, all courts have followed the rule that the church or religious society will not be liable for the acts of its clergy unless those acts were within the scope of employment. However, courts have followed two distinct approaches in determining whether sexual conduct is performed within the scope of a clergy member's employment. One approach considers the conduct to be within the scope of employment where the alleged conduct arose within the time and space limits of the employment, and the employee is at least partially motivated by a desire to serve the employer. Most courts, however, have taken a narrower view of the meaning of scope of employment, holding that the conduct must be in accordance with the principles of the church or in some way in furtherance of the purpose of the church or religious society, or foreseeable or characteristic of the church or religious society.").

103. Paul H. Tobias, *Litigating Wrongful Discharge Claims*, Lit. Wrong. Discharge Claims 6:57 (2000) (citing *Haddock v. New York City*, 75 N.Y.2d 478 (1990)).

104. Marjorie A. Shields, *Liability of Church or Religious Organization for Negligent Hiring, Retention, or Supervision or Priest, Minister, or Other Clergy Based on Sexual Misconduct*, 101 A.L.R.5th 1, § 2 (2002).

105. *See id.* ("For negligent hiring, the plaintiff must prove: "(1) that the employer knew, or in the exercise of ordinary care should have known, of its employee's unfitness at the time of hiring; (2) that through the negligent hiring of the employee, the employee's incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries; and (3) that there is some employment or agency relationship between the tortfeasor and the defendant employer.").

106. *See Malicki v. Doe*, 814 So.2d 347, 351 (Fla. 2002) ("We thus join the majority of both state and federal jurisdictions that have found no First Amendment bar under similar circumstances."); *id*. at 351 n.2 (citing majority cases).

107. *See id*. at 351 n.3.

108. *Schmidt v. Bishop*, 779 F. Supp. 321, 324 (S.D.N.Y. 1991) (applying New York law).

109. *Id.* at 332.

110. *Id.*; *but see Jones by Jones v. Trane*, 591 N.Y.S.2d 927 (Sup. 1992) (allowing lawsuit against priest in non-counseling situation).

111. *Jones by Jones v. Trane*, 591 N.Y.S.2d 927 (Sup. Ct. 1992).

112. *See Malicki*, 814 So.2d at 365.

113. Richard Serbin, *When Clergy Fail Their Flocks*, 38-MAY Trial 35, 36 (2002) (citing *Pritzlaff*, 533 N.W.2d 780; *Swanson*, 692 A.2d 441).

114. *See Nally v. Grace Community Church*, 47 Cal.3d 278 (1988); Pamela Berry, *Lawsuit against church could set precedent*, The Clarion-Leader, May 29, 2002, at 1A.

115. *Doe v. Evans*, 814 So.2d 370 (2002); *see also Odenthal v. Minnesota Conference of Seventh Day Adventists*, 649 N.W.2d 426 (Aug. 15, 2002) (allowing lawsuit against minister who had an affair with the wife while counseling a couple about their marriage by using the "unlicensed mental health practitioner" standard); *F.G. v. MacDonell*, 150 N.J. 550 (1997) (allowing F.G. to sue rector who seduced her during counseling for breach of fiduciary duty but not for clergy malpractice); *but see Swanson v. The Roman Catholic Church of Portland*, 692 A.2d 441 (Maine 1997) (First Amendment bars lawsuit against priest who had sexual relationship with wife while counseling couple).

116. Paul A. Clark, *Clergy Malpractice after* F.G. v. MacDonell *and* Sanders v. Casa View Baptist Church, 22 Am J. Trial Advoc. 209 (1998).

117. *Langford v. Roman Catholic Diocese of Brooklyn*, 705 N.Y.S.2d 661 (2000).

118. *Id*. at 664 (Miller, J., concurring).

119. *Id*. at 662.

120. 779 F. Supp. 321 (S.D.N.Y. 1991).

121. *Schmidt*, 779 F. Supp. at 324.

122. *Schmidt*, 779 F. Supp. at 328.

123. *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159 (2d Dep't), *cert. denied*, 118 S. Ct. 413 (1997).

124. *Id*. at 161.

125. *Id*.

126. *Id*.

127. *See, e.g., Fortin v. Melville & the Roman Catholic Bishop of Portland*, 2002 WL 1978891 (Me. Super. July 15, 2002).

128. Michael Rezendes & Walter V. Robinson, *Church tries to block public access to files*, The Boston Globe, Nov. 23, 2002.

129. *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159 (2d Dep't 1997), *cert. denied*, 118 S. Ct. 413 (1997).

130. *See generally Spotlight Investigation: Abuse in the Catholic Church*, The Boston Globe, *available at* http://www.boston.com/globe/spotlight/abuse/.

131. *See, e.g., Fortin v. Melville & the Roman Catholic Bishop of Portland*, 2002 WL 1978891 (Me. Super. July 15, 2002).

132. Associated Press, *DA: Shanley Likely to Post Bail This Week*, The Boston Globe, Dec. 10, 2002.

133. Walter V. Robinson, *Church seeks exemption in suit*, The Boston Globe, Mar. 12, 2002, at B3, *available at* http://www.boston.com/globe/spotlight/abuse/print/031202_suit.htm

134. *Id.*

135. Michael Powell and Lois Romano, *Roman Catholic Church Shifts Legal Strategy; Aggressive Litigation Replaces Quiet Settlements*, The Washington Post, May 13, 2002, at A01.

136. *Id*; *see also* Investigative Staff of the Boston Globe, *Betrayal: The Crisis in the Catholic Church* 40 (2002).

137. *Id.; see also* Nicholas P. Cafardi, *Discovering the Secret Archives: Evidentiary Privileges for Church Records*, 10 J.L. & Relig. 95 (1993/94).

138. Richard Serbin, *When Clergy Fail Their Flocks*, 38-MAY Trial 35, 36 (2002) (citing *Pritzlaff*, 533 N.W.2d 780; *Swanson*, 692 A.2d 441.

139. *Id.*

140. *Id.*

141. Walter V. Robinson, *Judge finds records, Law at odds*, The Boston Globe, Nov. 26, 2002.

142. *See* National Clearinghouse on Child Abuse and Neglect Information, *Reporting Laws: Clergy as Mandated Reporters, available at* http://www.calib.com/nccanch/pubs/readref/mandclergy.cfm; *see also Reporting child abuse*, The Boston Globe, *available at* http://www.boston.com/globe/spotlight/sexabuse/popup_usmap.htm

143. *Id.; see also* Shawn P. Bailey, *How Secrets are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege*, 2002 B.Y.U. L. Rev. 489 (2002).

144. *See id*.; *see also* Deirdre Davidson, *Reporting Abuse: When Laws Are Not Enough*, The Legal Intelligencer, Apr. 25, 2002, at 4.

145. John Caher, *Westchester D.A. Slams Bishops' Sex-Abuse Policy*, N.Y.L.J., Nov. 18, 2002, p. 1 (Westchester County District Attorney calling for state legislation making clergy mandatory reporters).

146. For New York's mandating statute, which does not include clergy, *see* N.Y. Soc. Serv. Law § 413(1) (West 2002).

147. *See* N.Y. CPLR 4505 (McKinney's 1992) (stating that "[u]nless the person confessing or confiding waives the privilege, a clergyman shall not be allowed [to] disclose a confession or confidence made to him in his professional character as spiritual advisor").

148. Greg Barrett, *Do reporting laws protect victim or abuser in church scandals?*, Gannett News Services, Apr. 5, 2002, *available at* 2002 WL 5257246.

149. *See, e.g.*, discussion *supra*.

150. Walter V. Robinson, *Judge finds records, Law at odds*, The Boston Globe, Nov. 26, 2002.

151. Alan Cooperman, *Church's Revised Abuse Rules Stir Debate; Canon, Civil Law May Conflict, Experts Say*, The Washington Post, Nov. 10, 2002, at A03.

152. David O'Reilly, *Report cites 'secret' Vatican abuse policy*, The Times Union, Nov. 23, 2002, at A4; *see also* John L. Allen Jr., *Secret Vatican norms on abuse show conflicts with U.S. policy*, National Catholic Reporter, Nov. 29, 2002, *available at* http://www.natcath.org/NCR_Onlione/archives/112902/112902f.htm; *Vatican Norms Governing Grave Offenses, Including Sexual Abuse of Minors*, *available at* http://www.natcath.org/NCR_Online/documents/CDFnorms.htm.

153. *See* article four of the United States Conference of Catholic Bishops, [Dallas] *Charter for the Protection of Children and Young People*, June 14, 2002, *available at* http://www.boston.com/globe/spotlight/abuse/documents/bishops_charter_print.htm.

154. Sacha Pfeiffer & Kevin Cullen, *AG Wants Church to Report Past Sex Abuse*, The Boston Globe, Jan. 17, 2002.

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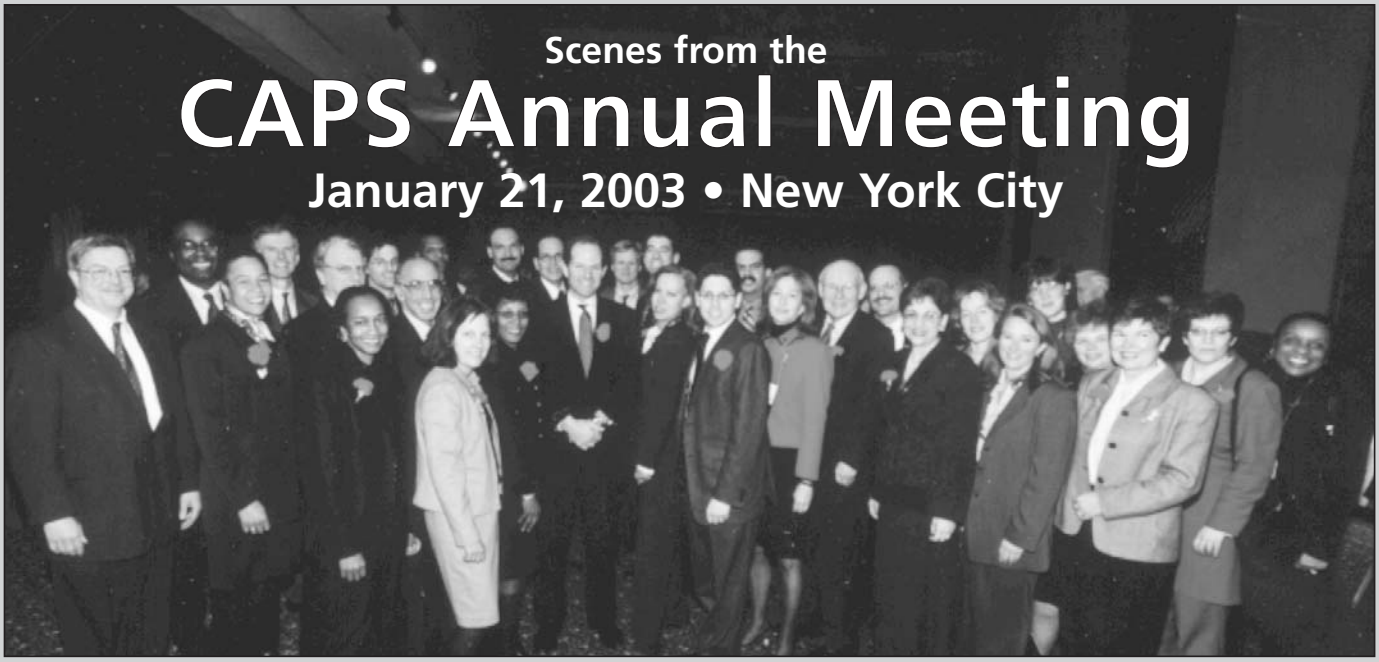

Attorney General Eliot Spitzer and members of his staff gather for a group photo. The Attorney General's Office was selected as the winner of CAPS 2003 Award for Excellence in Public Service.

2003 Annual Meeting Highlights: Committee on Attorneys in Public Service Events

The Committee on Attorneys in Public Service (CAPS) hosted several educational events and its annual Award for Excellence in Public Service Reception at NYSBA's 2003 Annual Meeting.

Two educational events took place on Tuesday, January 21, 2003. "Ethics in Government: The Public Trust: A Two–Way Street" was the morning program, featuring Karl Sleight (NYS Ethics Commission), Mark Davies (Conflicts of Interest Board), and Ralph Miccio (NYS Temporary Commission on Lobbying), and CAPS member Patricia Salkin (Albany Law School, Government Law Center.)

The afternoon program, "Waiting in the Wings—The Supreme Court's 2001-2002 Term: Civil Liberties and Terrorism Issues in the Lower Courts" featured the return of two nationally renowned scholars, Erwin Chemerinsky of the University of Southern California Law School and Susan Herman of Brooklyn Law School.

The 4th Annual CAPS Award for Excellence in Public Service Reception took place after the conclusion of the educational programs. The Office of the Attorney General, under the direction of Eliot Spitzer, was honored for its exemplary contributions to the public. The Attorney General accepted the award on behalf of his office.

Barbara Smith, CAPS chair, Pat Bucklin, NYSBA executive director, Attorney General Eliot Spitzer, and Tyrone Butler, CAPS vice chair, at the Award reception.

A gathering of CAPS award winners: Patricia Salkin, (2002 Award honoree), Kay Murray, (2002 award, presented posthumously to her husband, Archibald Murray), New York County District Attorney Robert Morganthau (2001 honoree), Lorraine Power Tharp and Eliot Spitzer.

Erwin Chemerinsky (photo at left) and Susan Herman (photo at right) speaking at the annual "Supreme Court Update" program.

Ralph Miccio at the "Ethics in Government" educational program.

Attorney General Eliot Spitzer and NYSBA president Lorraine Power Tharp at the Awards ceremony.

Barbara Smith, Karl Sleight and Ralph Miccio at the "Ethics in Government" educational program.

Patricia Salkin, Barbara Smith and Karl Sleight at the "Ethics in Government" educational program.

(photo at left) John A. Williamson, Jr., NYSBA associate executive director, Barbara Smith, and CAPS member Marjorie S. McCoy enjoy a moment at the Award Reception.

(photo at right) Attorney General Eliot Spitzer and NYSBA president Lorraine Power Tharp at the Awards ceremony.

Government Attorneys and Pro Bono

TRUE OR FALSE

1. Pro bono is only for private sector attorneys.

☐ **TRUE** ☑ **FALSE**

The Code of Professional Responsibility (EC 2-25) says *all* attorneys should do pro bono, and the New York State Bar Association encourages *all* attorneys to do 20 hours a year of pro bono.

2. Government attorneys serve the public so, in a sense, they are already doing pro bono.

☐ **TRUE** ☑ **FALSE**

Pro bono means providing free legal services to the poor or to groups serving the poor. You are a paid public servant, and your job is not representing the poor.

3. My pro bono help is not needed.

☐ **TRUE** ☑ **FALSE**

Your help is urgently needed. Only 20% of the needs of the poor for civil legal assistance are being met.

4. I do not have the expertise needed to do pro bono work.

☐ **TRUE** ☑ **FALSE**

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☐ **TRUE** ☑ **FALSE**

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7. I have a unique contribution to make to pro bono.

☑ **TRUE** ☐ **FALSE**

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GLC Endnote

Patricia E. Salkin

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

—The First Amendment to the U.S. Constitution

Rose Mary K. Bailly

Although government lawyers are constantly challenged to interpret and apply a variety of difficult constitutional concepts to the public sector setting, the First Amendment is perhaps the most often analyzed, discussed and strongly debated.

The language of the First Amendment respecting religion presents a host of intriguing issues, many of which center on the separation of church and state. Government lawyers must make sense of complex jurisprudence. U.S. Supreme Court decisions that prohibited school-sponsored prayer in the public school classroom several decades ago have given way to more recent cases that have required that religious groups be allowed to meet for prayer on public school property. Cases delineating what resources private parochial schools and students could obtain from public school districts form the backdrop to the current debates over the use of public vouchers for private (religious) schools and charter schools operated by religious organizations. The constitutionality of religious symbols on public property is a proverbial concern. The passage of the federal Religious Land Use and Institutionalized Persons Act on the heels of the Supreme Court's striking down a similar act (Religious Freedom Restoration Act) has set the stage for another round before the nation's final arbiter of constitutional questions. The recent crisis in the Catholic Church raises questions about the legal and constitutional propriety of government interventions in addressing the problems that have been publicly exposed.

The deceptively simple language of the First Amendment regarding freedom of speech has likewise given rise to a host of issues in the public sector.

Government lawyers must address concerns about the use of the spoken and written word as well as ideas expressed in symbols and signs in a variety of settings. The free speech rights of public employees in the workplace have been hotly debated. The rights of students to express themselves verbally, on paper, and in what they choose to wear on school grounds can raise difficult questions. Regulation of signs and regulation of adult business uses can frequently create a community battleground.

This issue of the *Government, Law and Policy Journal* has provided a lively discussion of these and other issues involving religion and government; it will likely provoke reflection and reaction among our readers. As always, we are grateful to all of the wonderful people who contributed articles for this publication. We especially thank our student editors at Albany Law School, as well as our editor-in-chief for having the determination to bring these crucial, controversial issues to the pages of this *Journal*.

Patricia E. Salkin
Director, Government Law Center
Associate Dean and Professor of Government Law,
Albany Law School

Rose Mary K. Bailly
Associate Editor, *GLP Journal*
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