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# THE PRIEST-PENITENT PRIVILEGE REVISITED: A REPLY TO THE STATUTES OF ABROGATION

JUDE O. EZEANOKWASA\*

## *Introduction*

There is no gainsaying the fact that the near-pandemic social ill of child sex abuse calls for urgent attention given the many dire effects of the crime.<sup>1</sup> Harm to children is not suffered by them alone. The immediate family, parents, and friends also suffer with them. Moreover, society is burdened by the existence of child sex abuse as it is called on to restore the physical and mental health of these often traumatized younger members.

To nip this problem in the bud, pursuing the philosophy of early detection,<sup>2</sup> all fifty states, the District of Columbia, American Samoa, Guam, Puerto Rico, and the Virgin Islands have enacted statutes that mandate certain individuals to report known or suspected cases of child abuse to stipulated authorities<sup>3</sup> and criminal

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<sup>1</sup> *Facts for Families, Child Sexual Abuse*, AACAP (Mar. 2011), available at [http://www.aacap.org/cs/root/facts\\_for\\_families/child\\_sexual\\_abuse](http://www.aacap.org/cs/root/facts_for_families/child_sexual_abuse). Problems associated with child sex molestation vary. They may include depression, withdrawal, loss of self-esteem, and more serious disorders such as suicidal behavior and trauma. In some victims, these problems remain for the rest of their lives. Child sexual abuse has been reported “up to 80,000 times a year.” *Id.*

<sup>2</sup> Robert J. Shoop & Lynn M. Firestone, *Mandatory Reporting of Suspected Child Abuse: Do Teachers Obey the Law?* 46 EDUC. L. REP. 1115, 1116-7 (1988).

<sup>3</sup> William A. Cole, *Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis*, 21 COLUM. J. L. & SOC. PROBS. 1, 5 (1987).

sanctions are imposed for failing to report.<sup>4</sup>

The Catholic Church has been, in recent times, on the front pages of newspapers regarding instances of child sex abuse.<sup>5</sup> Priests have been accused<sup>6</sup> and, in fact, convicted of the crime.<sup>7</sup> As a consequence, there has been a call for the repeal of priest-penitent privilege statutes in cases of child sex abuse.<sup>8</sup> While many states

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<sup>4</sup> U.S. DEP'T HEALTH & HUMAN SERVICES, *Clergy as Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws*, CHILD WELFARE & INFORMATION GATEWAY, available at <http://www.childwelfare.gov>. [hereinafter CHILD WELFARE]

<sup>5</sup> See generally Cathy Lynn Grossman, *Clergy sex abuse settlements top \$2.5 billion nationwide: There have been nearly 17,000 victims of clergy sexual abuse since 1950 and legal settlements for their suffering continue to climb*, USA TODAY (Mar. 13, 2013), <http://www.usatoday.com/story/news/nation/2013/03/13/sex-abuse-settlement-cardinal-roger-mahony/1984217/>; *Report: Accused priests shuffled worldwide*, USA TODAY (June 19, 2004), [http://usatoday30.usatoday.com/news/religion/2004-06-19-church-abuse\\_x.htm](http://usatoday30.usatoday.com/news/religion/2004-06-19-church-abuse_x.htm) (stating that hundreds of priests have moved out of countries where they were accused of abuse to new unsuspecting countries); Jon Henley, *How the Boston Globe exposed the abuse scandal that rocked the Catholic church*, THE GUARDIAN (Apr. 21, 2010), <http://www.theguardian.com/world/2010/apr/21/boston-globe-abuse-scandal-catholic>; Jim Yardley, *Pope Asks Forgiveness From Victims of Sex Abuse*, N.Y. TIMES (July 7, 2014), <http://www.nytimes.com/2014/07/08/world/europe/pope-francis-begs-forgiveness-of-victims-of-sex-abuse.html> (still facing criticism due to the Vatican's lack of accountability on the matter, Pope Francis asks for forgiveness from victims of clerical sexual abuse by condemning the practice and admitting fault by omission from church leaders who did not respond adequately to related reports by abuse victims. Changes during his papacy include appointing a "special commission to address the abuse"). See also Michael Pearson, Daniel Burke & Holly Yan, *Catholic bishops will be Held Accountable for Not Protecting Youths, Pope Says*, CNN.COM (July 7, 2014), <http://www.cnn.com/2014/07/07/world/pope-clerical-sex-abuse/>.

<sup>6</sup> See, e.g., David Bailey & Mary Wisniewski, *Minnesota Archdiocese Reveals Names of 30 Priests Accused of Abusing Minors*, HUFFINGTON POST (Feb. 4, 2014), [http://www.huffingtonpost.com/2013/12/05/minnesota-archdiocese-priest-abuse\\_n\\_4393192.html](http://www.huffingtonpost.com/2013/12/05/minnesota-archdiocese-priest-abuse_n_4393192.html).

<sup>7</sup> See, e.g., Steve Eder, Jennifer Levitz & Peter Loftus, *High-Level Catholic Priest Is Convicted*, WALL ST. J. (Jun. 22, 2012), available at <http://online.wsj.com/news/articles/SB10001424052702304765304577482741702908490>.

<sup>8</sup> Rachel Goldenberg, *Unholy Clergy: Amending State Child Abuse Reporting Statutes to Include Clergy Members as Mandatory Reporters in Child Sexual Abuse Cases*, 51 FAM. CT. REV. No. 2, 298-315 (2013) (arguing that priest-penitent

retain the priest-penitent privilege,<sup>9</sup> some states, such as Connecticut,<sup>10</sup> Mississippi,<sup>11</sup> New Hampshire,<sup>12</sup> North Carolina,<sup>13</sup> Oklahoma,<sup>14</sup> Texas,<sup>15</sup> and West Virginia,<sup>16</sup> abrogated it in cases of child abuse.

This paper intends to examine the constitutionality of these priest-penitent privilege-abrogating statutes. The effect of the abrogation is that priests would be compelled on subpoena to disclose the confessions of an alleged child sex abuser.<sup>17</sup> They would also be required to testify in court about allegations of child abuse,

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privilege should be abrogated in cases of child sex abuse); Peter Smith, *Lawmaker Tackles Clergy Abuse Cases: Bill would unseal abusers' confessions*, available at <http://susanwestrom.com/lawmaker-tackles-clergy-abuse-cases-bill-would-unseal-abusers-confessions/> (last visited Mar. 9, 2013). See also Paul Winters, *Whom Must the Clergy Protect? The Interests of At-Risk Children in Conflict with Clergy-Penitent Privilege*, 62 DEPAUL L. REV. 187 (2012).

<sup>9</sup> See Ashley Jackson, *The Collision of Mandatory Reporting Statutes and the Priest-Penitent Privilege*, 74 UMKC L. REV. 1057, 1066 (2006). See also ARK. CODE ANN. § 12-18-803(B) (West 2009); FLA. STAT. ANN. § 39.204 (West 2002); IDAHO CODE ANN. § 16-1605 (West 2012); 735 ILL. COMP. STAT. ANN. § 5/8-803 (2012); KY. REV. STAT. ANN. § 620.030(1), (3)(4) (West 2012); MD. CODE ANN., FAM. LAW § 5-705 (a)(1), (a)(3) (West 2011); MINN. STAT. ANN. § 626.556 (3)(a) (West 2012); MO. ANN. STAT. § 352.400(2) (West 2012); MONT. CODE ANN. § 41-3-201(6)(b) (2013); NEV. REV. STAT. ANN. § 432B.220(4)(d) (2012); N.D. CENT. CODE § 50-25.1-03(1) (2011); OHIO REV. CODE ANN. § 2151.421 (A)(4)(a) (West 2011); OR. REV. STAT. ANN. § 419B.010(1) (West 2012); S.C. CODE ANN. § 63-7-420 (2012); UTAH CODE ANN. § 62A-4a-403 (West 2011); VT. STAT. ANN. tit. 33, § 4913(a), (f)-(h) (2012); VA. CODE ANN. § 63.2-1509 (2012); WIS. STAT. ANN. § 48.981(2)(b)(3) (West 2012).

<sup>10</sup> CONN. GEN. STAT. ANN. § 17a-101(b) (West 2012), available at <http://www.cga.ct.gov/2011/pub/chap319a.htm#Sec17a-101b.html/>.

<sup>11</sup> MISS. CODE ANN. § 43-21-353(1) (2012).

<sup>12</sup> N.H. REV. STAT. ANN. § 169-C:32 (2012).

<sup>13</sup> N.C. GEN. STAT. § 7B-310 (2012).

<sup>14</sup> TEX. FAM. CODE ANN. § 261.101(a-c) (West 2012).

<sup>15</sup> OKLA. STAT. ANN. tit. 10A, § 1-2-101 (West 2012).

<sup>16</sup> W. VA. CODE ANN. § 49-6A-7 (West 2012).

<sup>17</sup> E.g., OKLA. STAT. ANN. tit. 10A, § 1-2-101C (stating that any person with prolonged knowledge of ongoing child abuse or neglect who knowingly and willfully fails to promptly report such will, on conviction, be guilty of a misdemeanor).

even if they learned about it in confidential counseling sessions.<sup>18</sup> The statutes, in plain language, are telling child abusers, especially sexual abusers, that they no longer have a hiding place and can no longer use the seal of confession as a protective shield. The implied assumptions of these statutes are: (1) that the seal of confession aids and abets child abuse; and (2) priests have caused the high prevalence of child sex molestation in society.

The declared purpose of advancing the protection of children from sex predators is obviously wholesome, but the legitimacy of the statute is not based solely on its intent. Equally important is the protocol a statute adopts for reaching this *bona fide* goal. It is equally important that established rights are respected while new worthwhile interests are being pursued. If these rights are to be burdened, they must be burdened constitutionally. A key right affected by these abrogating statutes is the First Amendment right of Catholics to the free exercise of religion entailed in practicing the sacrament of reconciliation or penance<sup>19</sup> without priests being compelled to turn over confessions to the court in child sex abuse cases or any case at all.

The doctrine of the judicial review of legislative acts under the Constitution implies the obligation of the legislature to defer to constitutional rights. If a statute violates any of these rights, it will be declared null and void to the extent of the breach.<sup>20</sup> Nonetheless, the doctrine of judicial review does not enrobe these rights with the blessings of absoluteness. As a matter of principle, they can be limited under set conditions.<sup>21</sup> The U.S. Supreme Court has established the compelling state interest test for any legislation or

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<sup>18</sup> *Id.*

<sup>19</sup> 1983 Code of Canon Law, can. 959; no. 1422 Catechism of the Catholic Church (CCC). The sacrament of reconciliation or penance is the means by which the faithful who are sorry for their sins and have a purpose of amendment, confess their sins to a lawful minister, receive from God, through the absolution given by that minister, forgiveness of sins they have committed after baptism, and by the same token they are reconciled with the Church, which by sinning they wounded.

<sup>20</sup> *Marbury v. Madison*, 5 U.S. 137 (1803), the landmark United States Supreme Court case setting the stage for the judicial review of legislative acts.

<sup>21</sup> For further discussion, see *Reynolds v. United States*, 98 U.S. 145 (1879), *infra* note 143, *et seq.*

measure to pass in order to constitutionally burden the free exercise of religion.<sup>22</sup> When the compelling state interest test is applied to these priest-penitent privilege-abrogating statutes, the strong conclusion is that they grossly violate the free exercise rights of Catholics.

### *I. The Constitutional Right to the Free Exercise of Religion*

Religious freedom in the United States of America (U.S.) is a constitutional right founded in the First Amendment to the Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>23</sup> Technically, the provision contains two clauses, the Establishment Clause and the Free Exercise Clause. The former prohibits government from either directly or indirectly designating a religion as a state religion.<sup>24</sup> Instances of such measure would include buying property or extending special favors to a particular religion.<sup>25</sup> Inviting a clergy by a school district to perform non-denominational prayer at elementary or secondary school graduation was held by the U.S. Supreme Court in *Lee v. Weisman*<sup>26</sup> to violate

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<sup>22</sup> *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). And in *Wisconsin v. Yoder*, 406 U.S. 205, 227-29 (1972), the U.S. Supreme Court held, *inter alia*, that stopping child labor is not a compelling enough state interest to allow the state to impose compulsory education past the 8<sup>th</sup> grade, even though it is an important state interest.

<sup>23</sup> U.S. CONST. amend. I.

<sup>24</sup> See generally *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (discussing the distinction between the First Amendment's Establishment and Free Exercise Clauses); see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839-46 (1995).

<sup>25</sup> E.g., *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 15-16 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another; . . . [n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations.").

<sup>26</sup> 505 U.S. 577 (1992). See also *Allegheny County v. ACLU*, 492 U.S. 573 (1989), where the U.S. Supreme Court ruled that the display of a nativity scene inside a government building violates the Establishment Clause.

the Establishment Clause as it entailed government sponsorship of worship. Conversely, no religion should impose its dogmas on the state. The Establishment Clause is the basis of church and state separation that sees to it that neither interferes with the jurisdiction of the other. The latter confers on persons the liberty to have or not have a religion and prohibits government from discriminating against a person for either having one or not having one.<sup>27</sup> The U.S. Supreme Court found the free exercise right breached in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*<sup>28</sup> when the City of Hialeah intended<sup>29</sup> to ban and indeed banned<sup>30</sup> the Santeria Church from killing animals for religious sacrifices while at the same time allowing other religions to follow their rituals of killing animals.

What constitutes religion has defied consensus amongst

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<sup>27</sup> E.g., *Everson*, 330 U.S. at 15-16 ("No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance").

<sup>28</sup> *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>29</sup> The records of the meeting of the Hialeah City Council presented to the court indicate this intention. The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. For instance, "Councilman Martinez, after noting his belief that Santeria was outlawed in Cuba, questioned: '[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?' Councilman Cardoso said that Santeria devotees at the Church 'are in violation of everything this country stands for.' Councilman Mejides indicated that he was 'totally against the sacrificing of animals' and distinguished kosher slaughter because it had a 'real purpose.' The 'Bible says we are allowed to sacrifice an animal for consumption,' he continued, 'but for any other purposes, I don't believe that the Bible allows that.' The president of the city council, Councilman Echevarria, asked: 'What can we do to prevent the Church from opening?'" *Id.* at 541.

<sup>30</sup> The various prohibitions, definitions, and exemptions contained in the Ordinances that followed Resolution 87-66 were held by the U.S. Supreme Court to have been tailored to proscribe religious killings of animals by Santeria church members but to exclude almost all other animal killings. *Id.* at 533-40. For instance, Ordinance 87-71 prohibits the sacrifice of animals and defines sacrifice as "to unnecessarily kill ... an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *Id.* at 536.

scholars.<sup>31</sup> However, judging from the spectrum of views on what the essence of religion is, certain features have been broadly accepted as characteristics of that concept. These features include the belief in a Supreme Being, the belief in spiritual beings, distinctions between the sacred and the profane, myths and creation stories, related concepts of community, worldview, expressive rituals and symbols, and ethical rules and values.<sup>32</sup> The sacrament of reconciliation is an instance of such an expressive ritual, and will be explained below.

The guarantee of the free exercise of religion enshrined by the U.S. Congress in the First Amendment is extended to the states through the Fourteenth Amendment, section 1:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

According to the doctrine of incorporation, the obligation of respecting the free exercise right of each person binds every state of the union via the gateway of the Due Process Clause of the Fourteenth Amendment.<sup>33</sup>

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<sup>31</sup> JUDE OSELOKA EZEANOKWASA, *THE LEGAL INEQUALITY OF MUSLIM AND CHRISTIAN MARRIAGES IN NIGERIA: CONSTITUTIONALLY ESTABLISHED JUDICIAL DISCRIMINATION* 13-16 (2011).

<sup>32</sup> *Id.* at 16-25.

<sup>33</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940), where the U.S. Supreme Court held that the Free Exercise Clause was applicable to the states on the basis that religious freedom is part of the 14<sup>th</sup> Amendment's Due Process Clause, which protects "life, liberty and property" against arbitrary interference by the states. *A Delicate Balance: The Free Exercise Clause and the Supreme Court*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (Oct. 2007), available at <http://www.pewforum.org/files/2007/10/free-exercise-1.pdf>. Prior to *Cantwell*, the Free Exercise Clause regulated solely the actions of the federal government and did not in any way apply to state laws or actions regarding religion.



*II. The Confessional Seal*

One of the seven sacraments<sup>34</sup> – the doctrinal pillars – of the Catholic Church is the sacrament of reconciliation or penance by which a person conscious of a grave sin after baptism, being sorry for those sins and with a resolution for amendment, confesses to a lawful minister and receives from God, through the absolution given by that minister, forgiveness of the sins he or she has committed.<sup>35</sup> At the same time the penitents are reconciled with the Church, which

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<sup>34</sup> The other six sacraments are: Baptism, Confirmation, the Holy Eucharist, Anointing of the Sick, Holy Orders, and Matrimony. Baptism is the first sacrament of Christian initiation and by it a person becomes a member of the church, the body of Christ and a subject of rights and obligations. Catechism of the Catholic Church No. 1267; 1983 Code of Canon Law, can. 96. Confirmation is the second sacrament of Christian initiation and by it the baptized is enriched with the gift of the Holy Spirit and more closely linked to the Church. They are made strong and more firmly motivated by words and deed to witness to Christ and to spread and defend the faith. Catechism of the Catholic Church No.128; 1983 Code of Canon Law, can. 879. The Holy Eucharist is the third sacrament of Christian initiation in which Christ the Lord himself is contained, offered and received, and by which the Church continually lives and grows. It is the source and summit of all worship and Christian life. Catechism of the Catholic Church Nos. 1322 -27; 1983 Code of Canon Law, cann. 897-98. The anointing of the sick together with the prayer of the priest the whole Church commends those who are ill to the suffering and glorified Lord, that He raise them up and save them. By it the sick are exhorted to contribute to the good of other People of God by freely associating themselves to the Passion and death of Christ. Catechism of the Catholic Church No.1499; 1983 Code of Canon Law, cann. 1003-1007. The Holy Orders is that sacrament by which some among Christ's faithful are marked with an indelible character and are thus constituted sacred ministers who, each according to his own grade, fulfils the person of Christ the Head, the offices of teaching, sanctifying and ruling and by so doing nourishes the people of God. 1983 Code of Canon Law, can. 1008; Catechism of the Catholic Church No. 1536. The Holy Matrimony is that relationship by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children. Between the baptized this relationship has been raised by Christ the Lord to the dignity of a sacrament. 1983 Code of Canon Law, can. 1055; Catechism of the Catholic Church No.1601.

<sup>35</sup> See 1983 CODE C.959.

by sinning they wounded.<sup>36</sup> A priest is the only minister of the sacrament of reconciliation.<sup>37</sup> Confession of venial sins is equally recommended<sup>38</sup> and a time element is attached to the obligation of confession as all who have reached the age of discretion are bound to confess their grave sins at least once a year.<sup>39</sup> In order to provide for the possibility of a language barrier between a penitent and the priest, canon law allows penitents the freedom to use interpreters, but on the condition, *inter alia*, that the Confessional Seal is not breached.<sup>40</sup> The Confessional Seal connotes absolute confidentiality on the part of not only the priest but also of any other person who in any way whatsoever has come to know the sins from a confession.<sup>41</sup>

The present code of Canon Law, the law of the Catholic Church, the 1983 Code, continues the traditional absolute prohibition of any violation of the seal of the confessional and states in canon 983 §1: "The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion."<sup>42</sup> The prohibition against the violation of the seal is not merely moral but also legal. The Catechism of the Catholic Church states, "... [I]t is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason."<sup>43</sup> This attracts the gravest punishment of automatic excommunication.

Canon 1388 §1 states:

A confessor, who directly violates the sacramental seal,  
incurs a *latae sententiae* excommunication reserved to the

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<sup>36</sup> *Id.*

<sup>37</sup> 1983 CODE C.965: "Only a priest is the minister of the sacrament of penance."

<sup>38</sup> 1983 CODE C.988 §2.

<sup>39</sup> 1983 CODE C.989.

<sup>40</sup> 1983 CODE C.990: "No one is forbidden to confess through an interpreter, provided however that abuse and scandal are avoided, and without prejudice to the provision of can. 983 §2."

<sup>41</sup> 1983 CODE C.983 §1 and §2.

<sup>42</sup> 1983 CODE C.983 §1.

<sup>43</sup> 1983 CODE C.983 §1.

Apostolic See; he who does so only indirectly is to be punished according to the gravity of the offence.<sup>44</sup>

Paragraph 2 of the same canon prescribes a just penalty, not excluding excommunication for interpreters and any other persons who in any way whatsoever have come to know the sins from a confession.

Ever since the institution of the sacrament by Jesus Christ, the founder of the Church, the doctrine has been faithfully practiced as a central pillar of the Catholic faith till the present day.<sup>45</sup> After his resurrection Jesus appeared to his apostles and said to them: "Receive the Holy Spirit. Whose sins you forgive are forgiven them, and whose sins you retain are retained."<sup>46</sup> As early as the late 4<sup>th</sup> and early 5<sup>th</sup> centuries after Christ, St. Augustine in defense of this doctrine admonished the faithful: "Let us not listen to those who deny that the Church of God has power to forgive all sins."<sup>47</sup> St. Ambrose who died at the close of the 4<sup>th</sup> century after Christ rebuked the Novatianists who:

professed to show reverence for the Lord by reserving to Him alone the power of forgiving sins. Greater wrong could not be done than what they do in seeking to rescind His commands and fling back the office He bestowed. . . . The Church obeys Him in both respects, by binding sin and by loosening it; for the Lord willed that for both the power should be equal.<sup>48</sup>

It is not in doubt that the inviolability of the seal has existed all these years. The Gratian *Decretum* of 1151 that compiled the edicts of earlier church councils named the inviolability of the seal of

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<sup>44</sup> 1983 CODE C.1388 §1.

<sup>45</sup> Catechism of the Catholic Church No 1467; 1983 CODE Cc. 983 §1 and §2, 1388 §1 and §2.

<sup>46</sup> The Holy Bible, John 20:22-23.

<sup>47</sup> De agon. Christ., iii.

<sup>48</sup> On Penance I.2.6

confession as an outstanding principle of Church law whose infringement attracted very severe punishment: “*Deponatur sacerdos qui peccata penitentis publica repræsumit*,”<sup>49</sup> i.e., “Let the priest who dares to make known the sins of his penitent be deposed,” and it goes on to say that the violator of this law should be made a life-long, ignominious wanderer.<sup>50</sup> With traditional resolve and firmness, canon 21 of the Fourth Lateran Council (1215) codified this obligation of secrecy for the universal Church:

Let the priest absolutely beware that he does not by word or sign or by any manner whatever in any way betray the sinner: but if he should happen to need wiser counsel let him cautiously seek the same without any mention of person. For whoever shall dare to reveal a sin disclosed to him in the tribunal of penance we decree that he shall be not only deposed from the priestly office but that he shall also be sent into the confinement of a monastery to do perpetual penance.<sup>51</sup>

In all its journeys through the ages and encounters with different cultures to date, the discipline of the inviolability of the seal of the confessions has remained unchanged as it is of the essence of the sacrament of penance. The issue is to what extent it is protected against the demands of secular governments to secure evidence in criminal or civil proceedings. This is the history of the priest-penitent privilege.

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<sup>49</sup> Secunda pars, dist. VI, c. II.

<sup>50</sup> *The Law of the Seal of Confession*, THE NEW ADVENT CATHOLIC ENCYCLOPEDIA (Apr. 29, 2014, 11:45 PM), <http://www.newadvent.org/cathen/13649b.htm>. Due to the high regard for the Confessional Seal, violation of it by a priest attracts the heaviest punishment under canon law, *latae sententiae* excommunication. 1983 CODE C. 1388 §1. Interpreters and other persons who come to know of a sin through confession and who violate the seal are to be punished with a just penalty, not excluding excommunication. *Id.* C. 1388 §2.

<sup>51</sup> HEFELE-LECLERCQ, HISTOIRE DES CONCILES (1930); see also Mansi or Harduin, Coll. Conciliorum.

### III. Priest-Penitent Privilege as a Free Exercise Right

#### A. The People v. Daniel Phillips<sup>52</sup>

The history of the priest-penitent privilege law in the U.S. is rooted in the 1813 New York state case of *People v. Daniel Phillips*.<sup>53</sup> No formal report of this case is readily available, but it is found in private reports and archives such as The RJ & L Religious Liberty Archive.<sup>54</sup> Through priest-penitent privilege statutes, the *ratio* in this case has remained relevant till the present day even though the New York Court of General Sessions deciding *Daniel Phillips* was only the equivalent of today's county court. In this case, Mr. Phillips received restitution for lost belongings from his pastor, Reverend Kohlmann.<sup>55</sup> When the Reverend gentleman was summoned by the court, he appeared but respectfully declined to answer questions about the identity of the person who delivered the goods into his hands.<sup>56</sup> From other testimonies, bills of indictment were drawn up against the suspected thief as principal defendant, and against Mr. Phillips and his wife as receivers.<sup>57</sup> The prosecution named Kohlmann as its witness and testified regarding restitution of the goods.<sup>58</sup> In a very becoming manner, he entreated that he should be excused on grounds of religious discipline.<sup>59</sup> He pointed out that all he knew about the investigation derived from his functions as a minister of the Roman Catholic Church in the administration of penance, one of the seven sacraments of the Church, and bound by the norms of the Church as well as the obligations of his clerical office to the highest inviolable secrecy. Reverend Kohlmann argued

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<sup>52</sup> *People v. Phillips*, 1 W.L.J. 109 (1843); see also THE RELIGIOUS LIBERTY ARCHIVE (1813), (last accessed Apr. 29, 2014, 11:54 PM), <http://www.churchstatelaw.com/cases/peoplevphillips.asp>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

that breaching the sacrament would expose himself to degradation in office, to the violation of his own conscience, and to the contempt of the Catholic world. The courteous but firm refusal of the Reverend gentleman to turn over the confidence of the penitent to the court raised the issue of the evidentiary obligation of a witness under subpoena to disclose to the court all he or she knows relative to the question put to him or her. This is a duty a witness bears in service to the administration of justice. It is a common law rule<sup>60</sup> that is also applicable in the U.S.<sup>61</sup> Issues were joined on this point based on the prosecution's contention that Reverend Kohlmann was bound to discharge this public-interest duty by disclosing the identity of the thief that made the restitution. This was a novel case for the U.S. judiciary as no precedent existed.<sup>62</sup> The New York State Court of General Sessions rendered a landmark decision whose logic has remained formidable and convincing down the centuries. The court critically weighed the practice of the rule under common law against New York constitutional provisions pertaining to freedom of religion and interpretations of the freedom of religion. After weighing these two bodies of law, the court unanimously held that Reverend Kohlmann should not be compelled to betray the confidence of the confessional. For purposes of this article, the discourse is limited to freedom of religion arguments.<sup>63</sup> Then, as today, it was a crime under

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<sup>60</sup> *Common Law & Legal Definition*, USLEGAL.COM, <http://definitions.uslegal.com/c/common-law/> (last visited Mar. 10, 2013). The common law is a system of deciding cases that originated in England and was later adopted in the U.S. It is based on precedent (legal principles developed in earlier case law) instead of statutory laws. In England it developed as the traditional law of an area or region created by judges when deciding individual disputes or cases. It changes over time. The U.S. is a common law country. With the exception of Louisiana, which is based on the Napoleonic code, the common law of England was adopted in all the states of the union as the general law of the state, unless varied by statute. Today almost all common law has been enacted into statutes with modern variations by all the states. *Id.*

<sup>61</sup> *Wolfe v. United States*, 291 U.S. 7, 12 (1934) (upholding that “the competence of witnesses in criminal trials in the federal courts... are governed by common-law principles as interpreted and applied by the federal courts in the light of reason and experience”).

<sup>62</sup> *Phillips*, 1 W.L.J. 109.

<sup>63</sup> *Id.*

canon law punishable with automatic excommunication for a priest to violate the Confessional Seal.<sup>64</sup>

*1. Inviolability of the Confessional Seal as a Free-Exercise Right*

The court found the refusal of Reverend Kohlmann to divulge the confession of the penitent fully protected by the religious freedom sections of both the New York State Constitution and the First Amendment to the U.S. Constitution. The New York State Constitution reads:

And whereas we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance, wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further in the name, and by the authority of the good people of this state, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state, to all mankind. Provided, that the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.<sup>65</sup>

Section One of the Fourteenth Amendment,<sup>66</sup> through its due process

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<sup>64</sup> 1983 CODE C.983 §1; *see also* 1983 CODE C.1388, §1.

<sup>65</sup> N.Y. CONST. art. XXXVIII; *see also* *The Constitution of New York*, (Apr. 20, 1777), available at [http://avalon.law.yale.edu/18th\\_century/ny01.asp](http://avalon.law.yale.edu/18th_century/ny01.asp).

<sup>66</sup> U.S. CONST. amend. XIV, §1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

clause under the doctrine of incorporation, makes the free exercise provision of the First Amendment binding on the states. The New York state constitutional provision on freedom of religion stands as an expression of the spirit of the First Amendment on the subject.

By talking of “civil tyranny,” “spiritual oppression and intolerance,” and “bigotry and ambition of weak and wicked priests and princes,” the New York Constitution makes a strong reference to the ugly state of things prior to the constitutional guarantee of this free exercise of religion.<sup>67</sup> At this time, people were being compelled to act against their religious consciences.<sup>68</sup> The framers of the New York State Constitution wanted to avoid this type of mischief, and like the framers of the U.S. Constitution sought to eliminate that possibility by enshrining the free exercise of religion as a constitutional liberty.<sup>69</sup> Reference to this historical fact is not casual but purposeful; it stands as an interpretative backdrop that reminds judges of the situations the law wants to avoid and which their interpretation of the law must not result in. The court in the *Phillips* case was aware of this and did not want to return to the prior state of civil tyranny, spiritual oppression and intolerance. Therefore, the court refrained from compelling Reverend Kohlmann to testify in violation of his religious obligations.<sup>70</sup>

The court found for a fact that the right to free exercise of religion could not exist without the corresponding entitlement to the exercise of the ceremonies and essential practices of the religion including the sacraments in the Catholic Church.<sup>71</sup> However, constitutionally guaranteed religious ceremonies or practices must still scale the hurdles set by the constitution.<sup>72</sup> The religious rite must

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protection of the laws.

*Id.*

<sup>67</sup> N.Y. CONST. of 1777, art. XXXVIII.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Phillips*, 1 W.L.J. 109.

<sup>71</sup> *Id.*

<sup>72</sup> Concerning the Constitution of the State of New York, the action must not be licentious or inconsistent with the peace or safety of the state. N.Y. CONST. of



not be a licentious action, or a practice inconsistent with the peace or safety of the state.<sup>73</sup> The question before the court then was whether confessional secrecy was a licentious act or one inconsistent with the peace or safety of the state.<sup>74</sup>

The finding of the court answers this question in the negative. An action is licentious if it is morally revolting.<sup>75</sup> First the court looked critically at the words of the constitutional provision. The constitution talks of 'acts of licentiousness.' A licentious action must be a behavior that is offensive by commission and not by omission or forbearance.<sup>76</sup> It refers to an action committed and not an action omitted.<sup>77</sup> In other words, a licentious action or practice inconsistent with the peace or safety of the state must be positively put in place. It must not be negatively constituted. The court had no difficulty in concluding that it would be stretching the words of the constitution to consider the forbearance of the Catholic minister to disclose what he heard at confession as a licentious act or an act inconsistent with the safety or peace of the state.<sup>78</sup> The presiding judge, Hoffman, stated most emphatically:

To assert this as the genuine meaning of the constitution would be to mock the understanding, and to render the liberty of conscience a mere illusion. It would be to destroy the enacting clause of the proviso – and to render the exception broader than the rule, to subvert all the principles of sound reasoning, and overthrow all the convictions of common sense.<sup>79</sup>

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1777, art. XXXVIII.

<sup>73</sup> *Id.*

<sup>74</sup> *Phillips*, 1 W.L.J. 109.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Phillips*, 1 W.L.J. 109; see also *New York, Court of General Sessions*, *supra* note 55.

<sup>78</sup> "It would be stretching it on the rack so [to] say, that it can possibly contemplate the forbearance of a Roman Catholic priest, to testify what he has received in confession, or that it could ever consider the safety of the community involved in this question." *Id.*

<sup>79</sup> *Id.*

Equally examined was the substantive nature of the practice of the inviolability of the seal of confession, that is, to see if in its essence the practice of confessional secrecy is offensive to the state. The finding was that it constituted an exercise that socially aimed and still aims at turning people around in a positive, not a sinister or immoral, sense.<sup>80</sup> Thus the court flatly dismissed the contention that confessional secrecy was subversive to the peace and safety of the state. It noted that the apprehension originated from theological thoughts rather than political and civil concerns.<sup>81</sup> It held that since the existence of the Catholic Church, the sacrament of reconciliation has never been thought of as inimical to the peace and safety of the society notwithstanding a few cases of abuse that belong to the personal choices of bad men and not to the nature of the practice.<sup>82</sup> In other words, what is relevant in determining whether a practice genuinely comes under the free exercise right is not the personal life of individual members but the official doctrinal position of the religion in question.<sup>83</sup>

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<sup>80</sup> "If a religious sect should rise up and violate the decencies of life, by practicing their religious rites, in a state of nakedness; by following incest, ... then the licentious acts and dangerous practices, contemplated by the constitution, would exist, and the hand of the magistrate would be rightfully raised to chastise the guilty agents. But until men under pretence of religion, act counter to the fundamental principles of morality, and endanger the well-being of the state, they are to be protected in the free exercise of their religion." *Id.*

<sup>81</sup> "The apprehensions which have been entertained of this religion, have reference to the supremacy, and dispensing power, attributed to the bishop of Rome as head of the Catholic Church." *Id.*

<sup>82</sup> "The Roman catholic religion has existed from an early period of Christianity – at one time it embraced almost all Christendom, and it now covers the greater part ... but we are yet to learn, that the confession of sins has ever been considered as of pernicious tendency, in any other respect than it being a theological error – or its having been sometimes in the hands of bad men, perverted to the purposes of peculation, an abuse inseparable from all human agencies." *Id.*

<sup>83</sup> *Cf. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal (UDV)*, 546 U.S. 418 (2006) (providing the argument of the U.S. Government for proscribing the use of *hoasca*, which contained hallucinogen regulated under the Controlled Substances Act by the Federal Government, for communion by a Christian sect in the U.S.A. on the ground, *inter alia*, that it was open to abuse and diversion to recreational use; this argument was rejected by the District Court on

The court concluded that free exercise of religion would be meaningless if a religion was not free to practice any of its doctrines.<sup>84</sup> One such doctrine for the Catholic Church is the sacrament of reconciliation.<sup>85</sup> It further held that removing secrecy—the core of the sacrament of reconciliation—is to demand that the sacrament of reconciliation be extinguished.<sup>86</sup> Such a move evidently runs counter to the meaning of free exercise of religion, and therefore is unconstitutional.

On the authority of *Phillips*, four years later, the New York Court of Oyer and Terminer<sup>87</sup> in *The People v. Smith*<sup>88</sup> held that the testimony of a protestant minister who had a conversation with the defendant in detention was admissible since he had no religious objection to disclosing such a conversation unlike the case with Reverend Kohlmann.<sup>89</sup> As a result, his free exercise right was not infringed.

The following year, 1818, the Supreme Judicial Court of Massachusetts decided *Commonwealth v. Drake*<sup>90</sup> along the line of *Smith*. Mr. Drake had disclosed his crime to some members of his Baptist church: none of them expressed any conscientious objection to testifying about it.<sup>91</sup> On appeal, the defense counsel argued that it would be “an infringement of the rights of conscience, to make use

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the basis that the Church made sufficient efforts to see that it was not abused or diverted). The U.S. Supreme Court upheld the decision. *Id.* at 426.

<sup>84</sup> *Phillips*, 1 W.L.J. 109 (“It is essential to the free exercise of religion that its ordinance should be administered – that its ceremonies as well as its essentials should be protected.”).

<sup>85</sup> “The sacraments of a religion are its most important elements.” *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Records Relating to Criminal Trials, Appeals, and Pardons*, available at [http://www.archives.nysed.gov/a/research/res\\_topics\\_legal\\_trials.pdf](http://www.archives.nysed.gov/a/research/res_topics_legal_trials.pdf) (last visited Apr. 9, 2013) -- another county court, but one with jurisdiction over cases punishable by death or life imprisonment.

<sup>88</sup> *People v. Smith* (1817), 2 Rogers' N.Y. City-Hall Recorder 77 (Ct. Oyer & Term. 1817), reproduced in 1 AMERICAN STATE TRIALS 779 (John D. Lawson ed., 1914). See Walter J. Walsh, *The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence*, 80 IND. L.J. 1037, 1051 (2005).

<sup>89</sup> Walsh, *id.*

<sup>90</sup> *Commonwealth v. Drake*, 15 Mass. 161 (1818).

<sup>91</sup> *Id.* at 161.

of confessions made under these circumstances . . . [where] in a theological view, he is obliged in conscience to perform it.”<sup>92</sup> The court accepting the position of the prosecution held that Drake’s confession was “purely voluntary” and not “required by any known ecclesiastical rule.”<sup>93</sup>

Today the range of judicial decisions upholding the constitutionality of clergy-penitent privilege extends to the U.S. Supreme Court. In *Trammel v. United States*,<sup>94</sup> the U.S. Supreme Court echoing *Phillips* acknowledged the human, social and even civil relevance of the privilege: “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.”<sup>95</sup> In *Mockaitis v. Harclerod*,<sup>96</sup> the Ninth Circuit of the U.S.

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 162.

<sup>94</sup> *Trammel v. United States*, 445 U.S. 40, 51 (1980).

<sup>95</sup> In this case the appellant was convicted by the District Court based only on the adverse testimony of his wife. Unsuccessfully he challenged the conviction at the Court of Appeals on the ground that the admission of his wife’s adverse testimony was a reversible error as it contravened the teaching of the U.S. Supreme Court in *Hawkins v. United States*, 358 U.S. 74 (1958), to the effect that the testimony of one spouse against the other is barred unless both consent. *Id.* at 358 U.S. 78. However, the U.S. Supreme Court made it clear that its decision was not meant to “foreclose whatever changes in the rule [that] may eventually be dictated by reason and experience.” *Id.* at 358 U.S. 79. This is an indication that the spousal privilege recognized by *Hawkins* was under attack. Many more attacks came after it such that by the time of the *Trammel’s case*, 445 U.S. 40, 51 (1980), support for the spousal privilege upheld by *Hawkins* had been significantly eroded. 445 U.S. 48. The Court of Appeals, denying the appeal of Mr. Trammel, held that *Hawkins* did not prohibit “the voluntary testimony of a spouse who appears as an unindicted coconspirator under grant of immunity from the Government in return for her testimony.” 583 F.2d 1166, 1168 (10<sup>th</sup> Cir. 1978). Mr. Trammel took his appeal further to the U.S. Supreme Court where the apex court, after reexamining the rule in *Hawkins* along the lines of the evolution in the Rule of Evidence concerning spousal privilege, modified the rule in *Hawkins*. The apex court found that the spousal privilege granted by *Hawkins* stood apart from other recognized privileges like the priest-penitent, attorney-client, and physician-patient privileges. 445 U.S. 51. It held that while “these privileges are rooted in the imperative need for confidence and trust” the spousal privilege is “invoked not to exclude private

Court of Appeals held that the prison warden who surreptitiously tape-recorded a prisoner's confession substantially burdened Father Mockaitis' exercise of religion under the Religious Freedom Restoration Act since Father Mockaitis was participating in the Sacrament of Penance as understood by the Catholic Church.<sup>97</sup>

## 2. *Effects of the Phillips Case Revolution: Priest-Penitent Privilege Statutes*

One major effect of *Phillips* is that it became the motivation for states to consolidate this aspect of the free exercise right through specific statutes regulating the right. The statutes broadened the concept of priest-penitent privilege to embrace other religions that may not, unlike the Catholic Church, have the sacrament of reconciliation.

Again, the State of New York took the lead. On December 10, 1828, the New York state legislature codified the *Phillips* decision into the first priest-penitent privilege statute in the union.<sup>98</sup> Gradually, other states followed and by 1991 all fifty states and the District of Columbia had statutorily embraced the priest-penitent privilege.<sup>99</sup> Each state's statute requires a religious figure to be the party receiving the communication.<sup>100</sup> The statutes further define

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marital communications, but rather to exclude evidence of criminal acts and of communications made in the presence of third persons." *Id.*

<sup>96</sup> *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997).

<sup>97</sup> *Id.* at 1530-31.

<sup>98</sup> Walsh, *supra* note 88, at 1056-57.

<sup>99</sup> *Id.* at 1057; see generally Julie Ann Sippel, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U. L. REV. 1127 (1994).

<sup>100</sup> ARK. CODE ANN. § 505(a)(1) (1994) (defining a clergyman as "minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him"); CONN. GEN. STAT. ANN. § 52-146b (1991) (including "a clergyman, priest, minister, rabbi or practitioner of any religious denomination accredited by the religious body to which he belongs"); FLA. STAT. ANN. § 90.505 (1994) (specifying that "[a] 'clergyman' is a priest, rabbi, practitioner of Christian Science, or minister of any religious organization or denomination usually referred to as a church, or an individual reasonably believed so to be by the person

broadly the type of communication the privilege covers<sup>101</sup> and stipulate the necessary context in which this communication has to be made in order to be privileged.<sup>102</sup>

With respect to who holds the privilege, these statutes are not uniform. The statutes can be classified as follows: clergy alone, communicant alone, and both clergy and communicant statutes.<sup>103</sup> Eleven states make the clergy the only subject of the privilege.<sup>104</sup> He asserts the privilege in his own person and cannot be compelled to testify to matters concerning confession or communication made with confidence by a person seeking spiritual advice or consolation.<sup>105</sup> The Maryland statute which represents the general wording of this class of statutes provides: “[a] minister of the gospel, clergyman, or priest of an established church or any denomination may not be compelled to testify on any matter in relation to any

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consulting him”).

<sup>101</sup> KAN. STAT. ANN. § 60-429(5) (1983) (including within the privilege penitential communications that are defined as communication between a penitent and a regular or duly ordained minister of religion seeking to obtain “God’s mercy or forgiveness for past culpable conduct”); NEB. REV. STAT. ANN. § 27-506 (1989) (stating that “communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication”); *see also* OKLA. STAT. ANN. tit.12, § 2505 (1980).

<sup>102</sup> D.C. CODE ANN. § 14-309(1) (2001) (protecting the disclosure of any communication “made to [the priest], in his professional capacity in the course of discipline enjoined by the church or other religious body to which he belongs”); R.I. GEN. LAWS ANN. § 9-17-23 (1985) (mandating the communication to be ‘properly entrusted to [the priest], in his professional capacity, and necessary and proper to enable him to discharge the functions of his office in the usual course of practice or discipline”).

<sup>103</sup> *See, e.g., State v. Szemple*, 622 A.2d 248, 255-56 (N.J. 1993) (outlining who holds the privilege in the fifty-one clergy-penitent statutes); *aff’d*, 640 A.2d 817 (N.J. 1994). It is only the person that holds the privilege that can assert it and prevent a priest from divulging a communication.

<sup>104</sup> CAL. EVID. CODE § 1034 (1966); GA. CODE ANN. § 38-419.1 (West 1981); 735 ILL. ANN. STAT.5/8-803 (West 1984); IND. CODE ANN. § 34-46-3-1 (West 1998); MD. CODE ANN. CTS. & JUD. PROC. § 9-111 (West 1989); MICH. COMP. LAWS ANN. § 600.2156 (West 1986); MISS. CODE ANN. § 13-1-22 (West 2013); N.J. STAT. ANN. § 2A:84A-23 (West 1994); VT. STAT. ANN. tit. 12, § 1607 (2003); VA. CODE ANN. § 8.01-400 (1994) WYO. STAT. ANN. § 1-12-101(a)(ii) (1991).

<sup>105</sup> MD. CODE ANN. CTS. & JUD. PROC. § 9-111 (1989).

confession or communication made to him in confidence by a person seeking his spiritual advice or consolation.”<sup>106</sup> Thirty eight states<sup>107</sup> confer the privilege on only the communicant and it can be exercised in two forms. First, the statutes grant the privilege to the penitent, but authorize the priest to assert it on behalf of the communicant.<sup>108</sup> The priest asserts the privilege not in his own name but vicariously in the name of the penitent.<sup>109</sup> Second, the statutes grant the privilege to the communicant by prohibiting the priest from testifying unless the communicant agrees or waives his or her right to invoke the privilege.<sup>110</sup> The waiver could be explicit. In this case, the penitent expressly authorizes the cleric to divulge the communication. Moreover, the waiver could be implicit if the communication was

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<sup>106</sup> *Id.*

<sup>107</sup> ALASKA STAT. ANN. § 506 (West 1994); ARIZ. REV. STAT. ANN. § 13-4062 (1989); ARK. CODE ANN. § 505 (1987); COLO. REV. STAT. ANN. § 13-90-107(1)(c) (West 2013); CONN. GEN. STAT. ANN. § 52-146(b) (West 1967); DEL. CODE ANN. tit. 505 (2014); D.C. CODE § 14-309 (1989); FLA. STAT. ANN. § 90.505 (West 1995); HAW. REV. STAT. § 626-1 (2013); IDAHO CODE ANN. § 9-203(3) (1990); IOWA CODE ANN. § 622.10 (West 2012); KAN. STAT. ANN. § 60-429 (1983); KY. REV. STAT. ANN. § 505 (West 2013); LA. CODE EVID. ANN. art. 511 (2013); ME. REV. STAT. ANN. § 505 (2014); MASS. GEN. LAWS ANN. ch. 233, § 20A (2014); MINN. STAT. ANN. § 595.02(1)(c) (West 2013); MO. ANN. STAT. § 491.060(4) (West 2013); MONT. CODE ANN. § 26-1-804 (West 2013); N.H. REV. STAT. ANN. § 516:35 (2013); N.M. STAT. ANN. § 11-506 (West 2013); N.Y. C.P.L.R. 4505 (CONSOL. 1963); N.C. GEN. STAT. § 8-533.2 (1986); N.D. R. EVID. 505; OKLA. STAT. ANN. tit. 12, § 2505 (1980); OR. REV. STAT. § 40.260 (1989); PA. CONS. STAT. ANN. § 5943 (1982); R.I. GEN. LAWS § 9-17-23 (1985); S.C. CODE ANN. § 19-11-90 (1985); S.D. CODIFIED LAWS ANN. § 19-13-16 to -18 (1987); TENN. CODE ANN. § 24-1-206 (1980); TEX. R. EVID. 505; UTAH CODE ANN. § 78-78-24-8(3) (West 1987); WASH. REV. CODE ANN. § 5.60.060(3) (West 1963); W. VA. CODE § 57-3-9 (1991); WIS. STAT. ANN. § 905.06 (West 1975).

<sup>108</sup> The pertinent statutes include those of the following states: Alaska, Arkansas, Delaware, Florida, Hawaii, Kansas, Maine, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wisconsin.

<sup>109</sup> If the penitent waives the privilege the priest has no privilege on which to fall back on since he is not personally a subject of the privilege.

<sup>110</sup> The statutes include those of the following states: Arizona, Colorado, Connecticut, the District of Columbia, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, and Washington.

made in the presence of a third party.<sup>111</sup> Alabama and Ohio are the only states to recognize the privilege for both the priest and the communicant.<sup>112</sup> Both states, however, interpret the privilege differently.<sup>113</sup> In Alabama, either the communicant or the clergyperson has the privilege “to refuse to disclose and to prevent the other from disclosing” the communication in a legal or quasi-legal proceeding.<sup>114</sup> In the same way, the Ohio Statute grants the privilege to both parties even though the right of the priest is limited. The priest has the privilege but can be relieved from the obligation of not divulging the communication by the communicant.<sup>115</sup> The only ground on which the priest may assert the privilege against the consent of the communicant for a disclosure is when such a disclosure would be “in violation of his sacred trust.”<sup>116</sup> Some scholars, from the perspective of the free exercise of religion, find the clergy-alone and communicant-alone statutes to be errant as they do not equally protect both the priest and the penitent.<sup>117</sup>

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<sup>111</sup> *E.g.*, *State v. Melvin*, 132 N.H. 308, 309 (1989) (holding that the defendant waived the right to invoke the privilege because he made the statements in the presence of the minister’s wife).

<sup>112</sup> ALA. CODE § 12-21-166 (1986 & Supp. 1990); OHIO REV. CODE ANN. § 2317.02(C)(1) (2013); *see also* Seward P. Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 60 (1963) (discussing a New Jersey Supreme Court case in which the court determined who holds the privilege in each of the 51 statutes).

<sup>113</sup> Walsh, *supra* note 88, at 1057; *see generally* Sippel, *supra* note 99.

<sup>114</sup> ALA. CODE § 12-21-166(6) (stating that “[i]f any person shall communicate with a clergyman in his professional capacity and in a confidential manner (1) to make a confession, (2) to seek spiritual counsel or comfort, or (3) to enlist help or advice in connection with a marital problem, either such person or the clergyman shall have the privilege, in any legal or quasi legal proceeding, to refuse to disclose and to prevent the other from disclosing anything said by either party during such communication”).

<sup>115</sup> OHIO REV. CODE ANN. 2317.02 (C) (providing that a priest shall not testify as to a religious communication unless “by express consent of the person making the communication, except when the disclosure of the information is in violation of his sacred trust”).

<sup>116</sup> *Id.*

<sup>117</sup> *E.g.*, Sippel, *supra* note 99, at 1163 (“The most effective priest-penitent statute will grant the right to assert a testimonial privilege to both the priest and the penitent to avoid violations of the First Amendment right to the free exercise of



### 3. *The Priest-Penitent Privilege-Abrogating Statutes*

From the perspective of the priest-penitent privilege, the mandatory reporting statutes passed by states to curb the incidence of child abuse come within one of the following classes:<sup>118</sup> (1) statutes that specifically abrogate the priest-penitent privilege in cases dealing with suspected child abuse;<sup>119</sup> (2) statutes that require “any person” to report known or suspected child abuse;<sup>120</sup> (3) statutes that maintain the clergy privilege by exempting members of the clergy from reporting;<sup>121</sup> and (4) statutes that do not address the privilege at

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religion.”).

<sup>118</sup> Ashley Jackson, *supra* note 9; *see also* Goldenberg, *supra* note 8, at 302.

<sup>119</sup> Goldenberg put the number of these states at fifteen: ALA. CODE § 26-14-3(a),(f) (2012); ARIZ. REV. STAT. ANN. § 13 -3620(A)-(B) (2012); COLO. REV. STAT. ANN. § 19-3-304(2)(aa) (West 2012); CONN. GEN. STAT. ANN. § 17a-101(b) (West 2012); LA. CHILD. CODE ANN. art. 603(15)(b)-(c) (2012); ME. REV. STAT. ANN. tit. 22, § 4011-A (1)(A)(27) (2009); MICH. COMP. LAWS ANN. § 722.631 (West 2012); MISS. CODE ANN. § 43-21-353(1) (West 2012); N.H. REV. STAT. ANN. § 169-C:32 (2012); N.M. STAT. ANN. § 32A-4-3(A) (West 2012); N.C. GEN. STAT. § 7B-310 (2012); OKLA. STAT. ANN. tit. 10A, § 1-2-101 (West 2012); TEX. FAM. CODE ANN. § 261.101(a)-(c) (West 2012); WASH. REV. CODE ANN. § 26.44.060(3) (West 2012); W.VA. CODE ANN. § 49-6A-2 (West 2012). Goldenberg, *supra* note 8 at 311. But a closer study of above statutes reveals that there are seven states that actually abrogate the priest-penitent privilege in cases of child abuse: Connecticut, Mississippi, New Hampshire, North Carolina, Texas, Oklahoma, and West Virginia.

<sup>120</sup> *See, e.g.*, IND. CODE ANN. § 31-33-5-1 (West 2012); NEB. REV. STAT. ANN. § 28-711 (West 2011); N.J. STAT. ANN. § 9:6-8.10 (West 2012); P.R. LAWS ANN. tit. 8, § 446(b) (2012); R.I. GEN. LAWS § 40-11-11 (2012); TENN. CODE ANN. § 37-1-605(a) (2012); WYO. STAT. ANN. § 14-3-205(a) (2012).

<sup>121</sup> *See* Jackson, *supra* note 9, at 1066. *See also* ARK. CODE ANN. § 12-18-803(B) (2009); FLA. STAT. ANN. § 39.204 (West 2002); IDAHO CODE ANN. § 16-1605 (2012); 735 ILL. COMP. STAT. ANN. § 5/8-803 (West 2012); KY. REV. STAT. ANN. § 620.030(1), (3) (West 2012); MD. CODE ANN., FAM. LAW § 5-705 (a) (1), (a)(3) (West 2011); MASS. GEN. LAWS ANN. Ch. 119, § 21 (West 2012); MINN. STAT. ANN. § 626.556 (3)(a) (West 2012); MO. ANN. STAT. § 210.115 (West 2012); MONT. CODE ANN. § 41-3-201(6)(b) (2013); NEV. REV. STAT. ANN. § 432B.220(3)(d) (Lexis Nexis 2012); N.D. CENT. CODE § 50-25.1-03(1) (2011); OHIO REV. CODE ANN. § 2151.421 (A)(4)(a) (West 2011); OR. REV. STAT. ANN. § 419B.010(1) (West 2012); S.C. CODE ANN. § 63-7-420 (2012); UTAH CODE ANN. § 62A-4a-403 (2011); VT. STAT. ANN. tit. 33, § 4913(a),(f)-(h) (2012); VA. CODE

all.<sup>122</sup> For the purposes of this paper attention is focused on the following seven state statutes that specifically abrogate the priest-penitent privilege in cases of child abuse: Connecticut,<sup>123</sup> Mississippi,<sup>124</sup> New Hampshire,<sup>125</sup> North Carolina,<sup>126</sup> Texas,<sup>127</sup> Oklahoma,<sup>128</sup> and West Virginia.<sup>129</sup> The language and contents of these abrogating statutes, which vary amongst themselves, can be reduced into four classes. First, the class of Connecticut<sup>130</sup> and Mississippi<sup>131</sup> whose statutes explicitly include the clergy in the list of mandatory reporters without additionally excepting any privilege. Their list of mandatory reporters include physicians, nurses, dentists, psychologists, social workers, family protection workers, family protection specialists, child caregivers, law enforcement officers, and public and private school employees. While the Connecticut list talks of “member of the clergy,”<sup>132</sup> the Mississippi list speaks of “Minister.”<sup>133</sup> The Mississippi statute also lists attorneys as mandatory reporters.<sup>134</sup> Second, the class of New Hampshire,<sup>135</sup> North Carolina,<sup>136</sup> and West Virginia<sup>137</sup> whose statutes abrogate in a general manner all privileged communication but make exceptions for attorney-client privilege. For instance, the New Hampshire statute

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ANN. § 63.2-1509 (West 2012); WIS. STAT. ANN. § 48.981(2)(b) (2012).

<sup>122</sup> CHILD WELFARE, *supra* note 4. For instance, states such as Alaska, Georgia, Hawaii, Iowa, Kansas, New York, and South Dakota as well as Washington, D.C. are completely silent about the privilege. *See also* Goldenberg, *supra* note 8, at 302, 312.

<sup>123</sup> *Supra* note 10.

<sup>124</sup> *Supra* note 11.

<sup>125</sup> *Supra* note 12.

<sup>126</sup> *Supra* note 13.

<sup>127</sup> *Supra* note 14.

<sup>128</sup> *Supra* note 15.

<sup>129</sup> *Supra* note 16.

<sup>130</sup> *Supra* note 10.

<sup>131</sup> *Supra* note 11.

<sup>132</sup> *Supra* note 10.

<sup>133</sup> *Supra* note 11.

<sup>134</sup> *Id.*

<sup>135</sup> *Supra* note 12.

<sup>136</sup> *Supra* note 13.

<sup>137</sup> *Supra* note 16.

reads:

The privileged quality of communication between husband and wife and any professional person and his patient or client, except that between attorney and client, shall not apply to proceedings instituted pursuant to this chapter and shall not constitute grounds for failure to report as required by this chapter.<sup>138</sup>

Third, the class of Oklahoma uses the all-inclusive phrase "any person" in mandating the reporting of child abuse without specifically affirming any privilege.<sup>139</sup> Any person who knowingly and willfully fails to promptly report suspected child abuse or neglect may be reported for criminal investigation and, if found guilty, will be convicted for misdemeanor or felony depending on the time that elapsed between the time he knew of the child abuse and the time he was arraigned for failing to report it.<sup>140</sup> Knowledge of the abuse for a period of six months and longer is punished as a felony while a period less than that is treated as a misdemeanor. With the all-inclusive language, the priest-penitent privilege is not spared.<sup>141</sup> Fourth, the class of Texas whose statute effectuates a general abrogation of all privileged communication and gives an explicit list of some earlier privileged communications that the statute abrogates. Priest-penitent and attorney-client communications make this list.<sup>142</sup>

#### *IV. Limiting the Free Exercise Right*

That the free exercise of religion, like other constitutional rights, as a matter of principle, can be limited or overridden is hardly ever in dispute.<sup>143</sup> What has been the subject of jurisprudential

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<sup>138</sup> *Supra* note 12.

<sup>139</sup> *Supra* note 15.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Supra* note 14.

<sup>143</sup> In *Reynolds v. United States*, 98 U.S. 145 (1879), at 166-7, the U.S.

dispute is the size of the legal rampart to be built around it. Should it be a dwarf wall that government can easily get over, or a very tall structure that will not be scaled easily? The judiciary, and particularly the U.S. Supreme Court, has led the way in establishing equitable conditions for constitutionally burdening the free exercise right. These conditions strike a balance between legitimate interests of the state on the one hand and the guaranteed rights of the individual on the other.

Since the mandatory-reporting statutes sweep away the free exercise right of Catholics by compelling the divulgence of confessional secrets in order to advance the protection of children from sex molestation or abuse in general, the issue for our purpose here is whether this class of statutes satisfies the conditions for limitation of the constitutional right laid down by the Supreme Court.

#### *A. Developing Limitation Standards for the Free Exercise Right*

Up until the Warren Court (1953-1969), the Supreme Court jurisprudence developed in *Reynolds v. United States*,<sup>144</sup> which distinguished between the freedom of religious belief and the

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Supreme Court held that the claim to polygamy on the ground of free exercise of religion could not stand against the criminal prohibition of polygamy (stating “we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice.”). In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the U.S. Supreme Court equally held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. In *Braunfeld v. Brown*, 366 U.S. 599 (1961), the same Supreme Court upheld Sunday closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette v. United States*, 401 U.S. 437, 461 (1971), the U.S. Supreme Court also sustained the military selective service system against the claim that it violated free exercise by conscripting persons who opposed a specific war on religious grounds. More recently in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court held that religion-neutral and generally applicable law or directive is constitutional if it burdens only incidentally the free exercise right.

<sup>144</sup> *Reynolds v. United States*, 98 U.S. 145 (1879).

freedom to express religious belief on the one hand, and the freedom to take religiously motivated action on the other,<sup>145</sup> meant that the free exercise of religion had little or no judicial protection from government incursion. The high court held in *Reynolds* that, though the constitution protected religious beliefs and opinions, actions inspired by religion were not all that protected.<sup>146</sup> They were instead subordinate to secular legitimate goals, meaning that the free exercise right was very easily sacrificed if it conflicted with the least state need. The result was that "*Reynolds*' belief-action distinction reduced the free exercise clause to a primarily rhetorical commitment to protecting religious liberty. . . . [It] served as a fine mesh that few free exercise claims could penetrate."<sup>147</sup> It created a fairly absolute state, hardly tolerant of religious freedom.<sup>148</sup>

The Warren Court in *Sherbert v. Verner*<sup>149</sup> implicitly rejected the belief-action distinction<sup>150</sup> and restored the anthropological bond between belief and action thereby guaranteeing a more civilly tolerant jurisprudence by introducing the compelling state interest test.<sup>151</sup> The compelling state interest test concept requires that the free exercise right can only be legitimately burdened, first, for a compelling state interest, and second, the restrictive measure adopted in pursuing the compelling state interest must be the least intrusive means available.<sup>152</sup> Religious thought, belief and action was considered a composite whole and accorded a greater measure of protection. In *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>153</sup> the U.S. Supreme Court found fault with the compelling state interest test because it considered it to be too broad, to be possibly used as a ready tool for anybody to assail

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<sup>145</sup> *Id.* at 166.

<sup>146</sup> *Id.* at 166-67.

<sup>147</sup> Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 938 (1989).

<sup>148</sup> *Id.*

<sup>149</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>150</sup> See generally Lupu, *supra* note 147.

<sup>151</sup> See *id.* at 941-42.

<sup>152</sup> *Sherbert*, 374 U.S. at 406-407.

<sup>153</sup> *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884-85 (1990).

any religion-neutral and generally applicable law. Here the respondents were two members of the Native American Church who were fired from their jobs on account of using the controlled substance peyote. The Employment Division denied their claim for unemployment compensation because they had been fired for misconduct.<sup>154</sup> In court the respondents contended that their religious beliefs compelled them to use the drug peyote. The members argued the refusal to grant unemployment benefits amounted to criminalizing their religious practice.<sup>155</sup> The Supreme Court refused to use the compelling state interest test to determine whether the burden placed on the respondents by the denial of the unemployment benefits was justifiable. It argued instead that the Unemployment Benefit Act was not specifically directed at their religious practice and held that the Free Exercise Clause permits a state to enforce a neutral and generally applicable law.<sup>156</sup> It held further that applying the compelling state interest test in all cases of a religiously motivated practice would result in the creation of constitutionally required exemptions from every imaginable civic obligation.<sup>157</sup> In other words, the compelling state interest test could not be applied with respect to a religiously neutral or generally applicable policy.<sup>158</sup> The free exercise right does not relieve one from complying with a generally applicable law solely because the law proscribes (or prescribes) conduct that one's religion prescribes (or proscribes).<sup>159</sup> A

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<sup>154</sup> *Id.* at 874.

<sup>155</sup> *Id.* at 878 (arguing that "their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice.")

<sup>156</sup> *Id.* at 901 (relying on earlier precedent stated, "Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.")

<sup>157</sup> *Id.* at 888-89 (holding that "[t]he rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind....The First Amendment's protection of religious liberty does not require this.")

<sup>158</sup> *Id.*

<sup>159</sup> *E.g.*, *United States v. Lee*, 455 U.S. 252, at 258-61 (1982) (rejecting the claim of an Amish employer that Social Security taxes went against his Amish faith which prohibited participation in governmental programs); *Gillette v. United*

religiously neutral or generally applicable law is therefore not targeted at any religion, but impinges on the free exercise right only incidentally. In practical terms, *Smith* does not eliminate the compelling state interest but only qualifies or moderates it. It will apply only when a law burdening the exercise of religion is neither religion-neutral nor generally applicable. Consequently, that will be a law that targets a religious practice. Unprecedented objections and criticism from religious groups and civil liberties movements immediately followed the *Smith* ruling, which was perceived as having removed all judicial safeguards for the free exercise right, thereby leaving it at the mercy of government and politics.<sup>160</sup>

In response to the public outrage, Congress enacted the Restoration of Freedom of Religion Act (RFRA)<sup>161</sup> in 1993 which restored the compelling state interest by codifying it<sup>162</sup> and also countered explicitly the ruling in *Smith* stating: "Government shall not substantially burden a person's exercise of religion even if the

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States, 401 U.S. 437, 461 (1971) (sustaining the military selective service system against the claim that it breached the free exercise clause by conscripting persons who were against a particular war on religious grounds); *Braunfeld v. Brown*, 366 U.S. 599, 608-09 (1961) (upholding the Sunday closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days); *Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1944) (holding that a mother could be prosecuted under the child labor laws for having children dispense literature in the streets, her religious motivation notwithstanding).

<sup>160</sup> Bette Novit Evans, *Religious Freedom vs. Compelling State Interests*, 9 KRIPKE CTR. FOR THE STUDY OF RELIGION AND SOC. 2 (Spring 1998) (Feb. 26, 2014, 7:46 AM), available at <http://moses.creighton.edu/csrs/news/S98-1.html> (stating that the decision in *Employment Division, Department of Human Resources of Oregon v. Smith* throws the protection of religious liberty back to the political process).

<sup>161</sup> The Restoration of Freedom of Religion Act of 1993 (RFRA), 42 U.S.C.A. Ch. 21B.

<sup>162</sup> *Id.* at § 2000bb(b) ("The purposes of this Act are (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.").

burden results from a rule of general applicability”<sup>163</sup> except “in furtherance of a compelling governmental interest” and where the governmental measure is “the least restrictive means of furthering that compelling governmental interest.”<sup>164</sup> Congress made the Act a broad basis for a claim or defense against any government measure, whether federal or state that substantially burdened the free exercise of religion.<sup>165</sup> RFRA actually did not save the compelling state interest test at the expense of the decision in *Smith*, but modified the ruling in *Smith*. It agrees with the *Smith* ruling that generally applicable rules that burden the exercise of religion incidentally are consistent with the Constitution. The only difference is when the restriction is substantial. A generally applicable law that burdens religious practice substantially can only be justified if it is for a compelling state interest and the measure adopted is the least restrictive possible.

However, the authority of RFRA as an applicable law in the states was shot down by the U.S. Supreme Court in *City of Boerne v. Flores*.<sup>166</sup> It held that the RFRA crossed the lines of the principle of separation of powers between the state and the federal government as it is a substantive legislation redefining the free exercise right rather than remedying or preventing the breach of the free exercise right as defined by the First Amendment.<sup>167</sup> As it is not an act enforcing the First Amendment, for which the Fourteenth Amendment makes an act of Congress binding on the states, the RFRA exceeded the powers of Congress and so was not binding on the states. For our immediate purpose of assessing the constitutionality of the priest-penitent privilege-abrogating statutes, the RFRA therefore falls off the radar. The result is that the decision in *Smith* applies, i.e. a law or measure that is religion-neutral or generally applicable cannot be set aside because it incidentally burdens a religious practice. The question then is whether this category of statutes is religion-neutral or generally applicable. If the response is in the affirmative, then the

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<sup>163</sup> *Id.* at § 2000bb-1(a).

<sup>164</sup> *Id.* at § 2000bb-1(b)(1).

<sup>165</sup> *Id.* at § 2000bb-1(b)(2).

<sup>166</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>167</sup> *Id.* at 519.



statutes would not need to face the compelling state interest test even if they incidentally burdened the absolute inviolability of the Confessional Seal.<sup>168</sup> If, on the other hand, the response is in the negative, then they would be deemed to target the religious practice of confessional secrecy and would be required to go through the crucible of the compelling state interest test.<sup>169</sup>

*B. Standard of Review for Religion-Neutral and Generally Applicable Laws*

The Supreme Court in *Hialeah* defined a religion-neutral law as one that does not purposefully discriminate against a religion by singling it out for disfavor or restriction.<sup>170</sup> A law is not generally applicable when the "legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."<sup>171</sup> Such a law offends the principle that the free exercise clause protects religious observers against unequal treatment.<sup>172</sup> In this case, the appellants wanted to build a cultural center that would include their place of worship, the Santeria church, in the City of Hialeah. The appellant had obtained all the necessary licenses and permits.<sup>173</sup> The central element of Santeria worship is animal sacrifice.<sup>174</sup> The idea of a Santeria church

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<sup>168</sup> *City of Hialeah*, *supra* note 28, 508 U.S. at 531 (stating that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice" (citing *Smith*, 494 U.S. at 886-90)).

<sup>169</sup> *Id.* at 531 (stating that the compelling state interest test is applied once a law fails to meet the *Smith* principle).

<sup>170</sup> *Id.* at 532.

<sup>171</sup> *Id.* at 548.

<sup>172</sup> *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987).

<sup>173</sup> *City of Hialeah*, 508 U.S. 520 (1993).

<sup>174</sup> The Santeria Church originated in Cuba in the 19<sup>th</sup> century. When hundreds of thousands of members of the Yoruba people of West Africa were brought to Cuba as slaves, their traditional religion adopted significant elements of Roman Catholicism. The result of the fusion became known as Santeria, that is, "the way of the saints." The Cuban Yorubas worship spirits, called *orishas*,

in the community was distressing to many. As a result, the city council decided to hold an emergency public session, whereby it passed resolutions and ordinances prohibiting the church from opening in the community.<sup>175</sup> The declared policy of the resolution opposed the ritual sacrifices of animals within Hialeah and it provided that any person or organization practicing it would be prosecuted.<sup>176</sup> The ordinances, *inter alia*, restricted the animal sacrifice prohibition to any individual or group that killed, slaughtered or sacrificed animals for any type of ritual regardless of whether or not the flesh or blood of the animal was to be consumed.<sup>177</sup> However, exceptions were made for slaughtering animals by licensed establishments for animals specifically raised for food purposes.<sup>178</sup> Further exceptions were made for the slaughter or processing for sale of small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law. Animal sacrifices within the city were declared to be contrary to public health, safety, welfare and morals of the community.<sup>179</sup> In reaction to this prohibition the appellants filed complaints against the respondent at the District Court alleging, among other things, violation of their free exercise rights and sought declaratory, injunctive and monetary

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through the images of Catholic saints. 723 F. Supp. 1467, 1469-1470 (S.D. Fla. 1989); 13 ENCYCLOPEDIA OF RELIGION 66 (M. Eliade ed. 1987). Santeria religion aims at nurturing a personal relation with the *orishas*, and one of the principal forms of devotion is animal sacrifice. *Id.*; 1 ENCYCLOPEDIA OF THE AMERICAN RELIGIOUS EXPERIENCE 183 (C. Lippy & P. Williams eds., 1988). The Santeria religion believes that each individual has a destiny from God; this destiny is realized with the help and energy of the *orishas*. *Id.*

<sup>175</sup> *City of Hialeah*, 508 U.S. at 526.

<sup>176</sup> *Id.* at 527.

<sup>177</sup> *Id.* Ordinance 87-52 adopted by the City Council in September 1987, among other things, prohibited owning or possessing an animal for food purposes. It restricted the application of the prohibition, however, to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed," *id.* at 527, while at the same time excepting the kosher slaughtering of animals. *Id.* at 536, 539, 541.

<sup>178</sup> *Id.* at 528.

<sup>179</sup> *Id.*

relief.<sup>180</sup> Dissatisfied with the decision of this court, the appellants went through the Court of Appeals to the U.S. Supreme Court, which held that the ordinances were neither religion-neutral nor generally applicable as they targeted only conduct with religious motivations, that is, animal sacrifice, which was the central element of the Santeria faith.<sup>181</sup> The high court found discrimination in the text of the regulation.<sup>182</sup> The minimum required of a law that is religion-neutral is that it does not bear discrimination on its face. Resolution 87-66, one of the two made prior to the passage of the four ordinances, recited that residents of Hialeah have expressed their "concern" that certain religions may propose to engage in practices which are inconsistent with "public morals, peace or safety," and reiterated the city's commitment to prohibit any such acts of any religious groups.<sup>183</sup> The court found this to refer to no other religion than Santeria. The federal apex court held further that facial neutrality is not determinative of a generally applicable or religion-neutral legislation;<sup>184</sup> discrimination against a religious practice could be hidden.<sup>185</sup> It stated that the Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination.<sup>186</sup> The Clause "forbids subtle departures from neutrality,"<sup>187</sup> and "covert suppression of particular religious beliefs."<sup>188</sup> Official action that

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 532 (relying on *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), the Supreme Court stated, "These ordinances fail to satisfy the *Smith* requirements" of neutrality and general applicability.)

<sup>182</sup> Per Justice Kennedy, reading the opinion of the court: "We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." *Id.* at 545. Per Justice Blackmun, concurring in judgment, "When a law discriminates against religion as such, as do the ordinances in this case, it automatically will fail strict scrutiny under *Sherbert v. Verner*, 374 U. S. 398, 402-403, 407 (1963)." *Id.* at 579.

<sup>183</sup> *Id.* at 527.

<sup>184</sup> *Id.* at 534.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*; see also *Gillette v. United States*, 401 U.S. 437, 452 (1971).

<sup>188</sup> *City of Hialeah*, 508 U.S. at 534; see also *Bowen v. Roy*, 476 U.S. 693,

targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.<sup>189</sup> The Free Exercise Clause protects against governmental hostility which is masked as well as overt.<sup>190</sup> Since free exercise of religion goes beyond facial discrimination, the court assessed the general objective of the ordinances and found the three substantive ones were drafted with the common aim of proscribing animal sacrifice, the religious practice of Santeria.<sup>191</sup> For instance, Ordinance 87-71 prohibits the sacrifice of animals and defines sacrifice as “to unnecessarily kill . . . an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.”<sup>192</sup> The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting Kosher slaughter<sup>193</sup> since the prohibited animal sacrifice does not cover situations where animals are killed for food consumption.<sup>194</sup>

The idea of covert discrimination against a religion was further developed by the ruling of the U.S. Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (UDV)*.<sup>195</sup> The high court found the action of government in trying to suppress a statutory exemption given to a religious community for the religious use of *hoasca*, which contained a controlled substance, under the guise of uniform enforcement of the Controlled Substances Act, as a form of covert discrimination.<sup>196</sup> As a result, the high court ruled that the government action needed to pass the compelling state interest test.<sup>197</sup> In this case, a Brazilian Christian sect with a branch

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703 (1986) (opinion of Burger, C. J.).

<sup>189</sup> *City of Hialeah*, 508 U.S. at 534.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 536.

<sup>194</sup> *Id.*

<sup>195</sup> *UDV*, 546 U.S. 418 (2006).

<sup>196</sup> *Id.* at 439.

<sup>197</sup> *Id.*

in the United States,<sup>198</sup> O Centro Espirita Beneficente Uniao do Vegetal (“UDV”), received communion by drinking a tea containing *hoasca*,<sup>199</sup> which contains a hallucinogen listed in Schedule I of the Controlled Substances Act.<sup>200</sup> After the United States Customs Inspectors intercepted a shipment to UDV containing three drums of *hoasca*, the government threatened UDV with prosecution.<sup>201</sup> In response, UDV filed suit against the U.S. Attorney-General and other federal law enforcement agencies on the basis of RFRA,<sup>202</sup> seeking declaratory and injunctive relief.<sup>203</sup> Its application for a preliminary injunction in order to enable it to continue with its sacramental tea rituals pending the determination of the principal suit was granted by

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<sup>198</sup> *Id.* at 425.

<sup>199</sup> *Id.* Hoasca is pronounced, “wass-ca.” *Id.* “[H]oasca . . . [is] made from two plants unique to the Amazon region. One of the plants, psychotriavidis, contains dimethyltryptamine (‘DMT’), a hallucinogen whose effects are enhanced by alkaloids from the other plant, banisteriopsiscaapi.” *Id.* DMT is the substance listed in Schedule I of the Controlled Substances Act. *Id.*

<sup>200</sup> *Id.* ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/eb/article-9038956/hallucinogen>; last accessed December 11, 2012. A hallucinogen is a “substance that produces psychological effects that are normally associated only with dreams, schizophrenia, or religious exaltation. It produces changes in perception, thought, and feeling, ranging from distortions of what is sensed (illusions) to sensing objects where none exist (hallucinations).”

<sup>201</sup> *UDV*, 546 U.S. at 425.

<sup>202</sup> RFRA was enacted by Congress in response to the Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. *Id.* at 888-90. Under RFRA, “[the Federal] Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000bb-1 (2006). The only exception in the statute requires the United States government to satisfy the Court’s compelling interest test. *Id.* at § 2000bb-1(b) (“Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”); *Id.* at § 2000bb-1(c). A person whose religious practices are burdened in violation of RFRA “may assert that violation as a claim or defense in judicial proceedings and obtain appropriate relief.”

<sup>203</sup> *UDV*, 546 U.S. at 425; *id.* at 425-26 (“The complaint alleged, *inter alia*, that applying the Controlled Substances Act to the UDV’s sacramental use of *hoasca* violates RFRA.”).

the District Court. The government appealed the ruling up to the U.S. Supreme Court where the decision of the District Court was upheld. At the U.S. Supreme Court, the government argued, *inter alia*, that the uniform application of the Controlled Substances Act (“Act”) was in itself a compelling state interest and so needed no further proof.<sup>204</sup> In other words, the effectiveness of the Controlled Substances Act will be “necessarily . . . undercut” if the Act was not uniformly applied, without regard to burdens on religious exercise;<sup>205</sup> an argument analogous to the principle in *Smith*<sup>206</sup> that a religion-neutral and generally applicable law does not need to pass the compelling state interest test.<sup>207</sup>

The U.S. apex court found that for over 35 years there had been a regulatory exemption for the use of peyote – a Schedule I substance – by the Native American Church,<sup>208</sup> an exemption the Congress extended in 1994 to all members of every recognized Indian Tribe.<sup>209</sup> In effect, the exemption had been there from the outset of the Controlled Substances Act, and there was no evidence that it was undercutting the government’s ability to enforce the ban on peyote use by non-Indians.<sup>210</sup> Dismissing the argument of the government, and holding that a compelling state interest was needed to suppress such a statutory exemption, the high court stated:

We do not doubt that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under the RFRA. But it would have been surprising to find that this was such a case, *given the longstanding exemption from the Controlled Substances Act for religious use of peyote.*<sup>211</sup>

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<sup>204</sup> *Id.* at 430 (noting that the policies, listed in the Controlled Substances Act, include findings that DMT has a high potential of abuse, as there is no currently accepted medical use of DMT in the United States for treatment purposes and there is a lack of accepted safety use of DMT under medical supervision).

<sup>205</sup> *UDV*, 546 U.S. at 434.

<sup>206</sup> 494 U.S. 872.

<sup>207</sup> *Id.* at 878.

<sup>208</sup> *UDV*, 546 U.S. at 433; *see also* 21 CFR § 1307.31 (2005).

<sup>209</sup> *Id.*; *see also* 42 U.S.C. § 1996a(b)(1).

<sup>210</sup> *Id.* at 435.

<sup>211</sup> *Id.* at 436 (*emphasis added*).

The legal principle flowing from this ruling is that a long-standing statutory exemption or privilege concerning the free exercise of religion right cannot be abrogated without a compelling state interest even if the proscribing legislation is planned to be applied to all conduct similar to that over which a religious community enjoys a privilege.<sup>212</sup> Such legislation would be covertly discriminatory since under the guise of uniform application it deprives the religious community of the use of a long-established privilege. The legislation, thus, would be neither generally applicable nor religion-neutral and, therefore, would need to pass the compelling state interest test. The fact that *UDV* is based on the RFRA is of no moment, as the privilege granted a religion under the Controlled Substances Act lifts it beyond the specific purpose for which the RFRA was created, i.e. the area of religion-neutral statutes, and leaves it also within the ambit of the general free exercise clause, as interpreted, e.g., in *City of Hialeah*.

*C. The Abrogating Statutes Are Neither Religion-Neutral Nor Generally Applicable*

The two principles of neutrality and general applicability as explained in *Hialeah* provide a backdrop for examining the mandatory-reporting statutes that abrogate the priest-penitent privilege particularly as they relate to the Catholic Church. These statutes on their face appear to be religion-neutral by the way they effectuate a sweeping abrogation of existing communication privileges. They also make professionals and persons that could possibly learn about child abuse mandatory reporters. But a closer examination reveals the opposite: they more or less subtly target the Catholic Confessional Seal.

In discussing the targeting of the sacramental seal, the priest-penitent privilege-abrogating statutes are grouped into two camps: (1) those that make no exceptions for any class of communication, and (2) those that exclude attorneys when representing suspected

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<sup>212</sup> See *id.*

child sex abusers. The statutes that make no exceptions for any class of communication concerning child sex abuse appear to treat everybody concerned uniformly by compelling them to report known or suspected cases of child sex abuse. But in reality they are not level for everybody. Prior to the enactment of the statutes, these people were not on the same pedestal with regard to the evidentiary obligation of disclosing all that one knows about a matter under trial in a court of law. A nurse and a Catholic priest, for instance, were in two different statutory positions: a nurse had no communication privilege whereas a Catholic priest had one when acting as a minister of the sacrament of reconciliation and so could not be compelled to disclose confessions. What the priest-penitent privilege-abrogating statutes have done is to create a false equality by abrogating the priest-penitent privilege and compelling everybody to report child sex abuse.

If justice is treating equals equally;<sup>213</sup> injustice, then, is treating unequals equally. The leveling away of the confessional privilege of a priest in order to make him as compellable as a nurse is, in the absence of a particular justification, discriminatory to him. This is like trying to create a match-box type of equality in height in people of different height. The statutes make no change in the status of a nurse because the nurse has always been under the duty to disclose a known or suspected child sex abuser under subpoena. The only tangential difference is that with the mandatory reporting statutes the nurse is to report the crime *suo motu*, on his own initiative. But for the priest, the statutes abrogate the long established statutory exception from disclosing information received in confession.

This scenario compares with that in *UDV*<sup>214</sup> where the government, under the guise of a uniform enforcement of the Controlled Substances Act, tried to suppress *UDV*'s use of *hoasca*, which contained a controlled substance, for sacramental tea. Meanwhile, Native American Indians enjoyed a statutory exemption from the operation of the Controlled Substances Act – a kind of

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<sup>213</sup> See J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 173 (2003).

<sup>214</sup> *Supra* note 81.



privilege. The U.S. Supreme Court ruled that the move was unconstitutional unless it was done for a compelling state interest.<sup>215</sup> In other words, without a compelling state interest, the attempt to suppress the *hoasca* use by UDV was religiously prejudicial and discriminatory.

The religious bias of these statutes is not healed by the fact that other communication privileges, such as the attorney-client privilege, are equally abrogated. A legal privilege is a favor, special right or immunity legally granted to a specific person, or class of people.<sup>216</sup> It is granted for a particular reason and benefit to the beneficiaries. There may be many privileges, but each stands on its own special justification or purpose. Thus no two privileges are the same. Each privilege, even if it is for a community or a class of people, is a particular law and the law abrogating it is correspondingly a particular law and so not generally applicable. The nature of a statutory privilege as a particular law is clearly brought out in the fact that some statutes that abrogate existing privileged communications retain the attorney-client privilege in cases of child sexual abuse. Attorney-client privilege is retained only after particular considerations are made as to its merits and demerits, if any. The law abrogating priest-penitent privilege concerns only the subjects of the privilege just as the law abrogating attorney-client privilege concerns only attorneys, the subjects of the privilege, and no other persons. Since the statutes abrogating priest-penitent privilege are not generally applicable and burden radically the free exercise of religion right of Catholics, they do not come under the authority of the ruling in *Smith*.

For these reasons the statutes abrogating the priest-penitent privilege are, in fact, neither religion-neutral nor generally applicable and so not protected by the decision in *Smith*. In determining whether they are constitutional, they need to pass strict scrutiny.

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<sup>215</sup> *Id.* at 439

<sup>216</sup> BRYAN A. GARNER, BLACK'S LAW DICTIONARY 23 (2d Pocket ed., West Group 2001) (defining "privilege" as "[a] special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty").

### *D. The Abrogating Statutes and Strict Scrutiny*

The elements of strict scrutiny are: (1) the challenged law or policy must serve not just an important government interest, but a compelling one; and (2) the means chosen by that law or policy must be narrowly tailored to advance this interest.<sup>217</sup>

#### *1. Do the Abrogating Statutes Serve a Compelling Governmental Interest?*

The online Merriam-Webster dictionary defines ‘compel’ as “to drive or urge forcefully or irresistibly.”<sup>218</sup> The term “compelling state interest” suggests an interest that the state cannot resist pursuing. Matters that the state cannot resist pursuing become a range, a spectrum of things indispensable for the existence of the state. The U.S. Supreme Court, in *Sherbert v. Verner*,<sup>219</sup> defined compelling state interest in terms of state needs at the highest level. It stated that “only the gravest abuses, endangering paramount interests, give occasion for permissible limitation”<sup>220</sup> of the free exercise right. In *Wisconsin v. Yoder*,<sup>221</sup> the high court held that such a level of interest arises when the existence of the state is in danger.<sup>222</sup> Laws or measures that advance the interest of the state under such circumstances can legitimately burden the free exercise of religion. Many reasons justify considering the protection of children from sex abuse as a matter of utmost necessity for the existence of the state. Children hold the promise of the future and

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<sup>217</sup> See *City of Hialeah*, 508 U.S. at 531-2 (where the U.S. Supreme Court held that where a law that burden religious practice is not neutral or not of general application, it must undergo the most rigorous of scrutiny; it must be “justified by a compelling governmental interest and must be narrowly tailored to advance that interest”).

<sup>218</sup> MERRIAM WEBSTER’S DICTIONARY (2014), available at <http://www.merriam-webster.com/dictionary/compel>.

<sup>219</sup> *Sherbert*, 374 U.S. 398 (1963).

<sup>220</sup> *Id.* at 406.

<sup>221</sup> *Yoder*, 406 U.S. at 212-16.

<sup>222</sup> *Id.*

continuity for the state and therefore constitute an essential segment of the state. As young, inexperienced and very vulnerable members of society, the trauma of molestation and exploitation could be rather devastating with long and possibly life-long emotional and psychological impediments that will deplete the state's wealth of human resources.<sup>223</sup> Taken by itself, it will constitute a compelling governmental interest.

But the discriminatory manner in which states like New Hampshire,<sup>224</sup> North Carolina,<sup>225</sup> and West Virginia<sup>226</sup> treat two practices that have similar bearings to child sex molestation – clergy-penitent privilege and attorney-client privilege – put this conclusion into question as highlighted by the *Hialeah* case. Just as a priest could learn of child sex abuse at confessions, attorneys could learn of the crime from their communications with clients.<sup>227</sup> In the end both priests and attorneys exercise the same civil role of not betraying the confidences of their dependents. The only difference between these two privileges is that the clergy-penitent privilege is religiously motivated while the attorney-client privilege is inspired by civil considerations. The mandatory reporting statutes of these states retain the attorney-client privilege<sup>228</sup> while proscribing the priest-penitent privilege. In *Hialeah*, the U.S. Supreme Court found for a fact that the four ordinances enacted by the Hialeah City Council for proscribing killing of animals pursuant to the goal of, *inter alia*, safeguarding public health and protecting animals from cruelty targeted the animal sacrifice of the Santeria Church since all

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<sup>223</sup> See *Child Sexual Abuse*, AM. HUM. ASSOC. (2013), available at <http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/child-sexual-abuse.html>.

<sup>224</sup> *Supra* note 12.

<sup>225</sup> *Supra* note 13.

<sup>226</sup> *Supra* note 16.

<sup>227</sup> See *Trammel*, *supra* note 94, at 51. The U.S. Supreme Court stated that “the lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.”

<sup>228</sup> *E.g.*, N.H. REV. STAT. ANN § 169-C:32 (2012). (stating that the privileged quality of communication between husband and wife and any professional person and his patient or client, except that between attorney and client, shall not apply to proceedings instituted pursuant to this law).

other forms of animal killing were exempted. Reacting to the argument by the City of Hialeah that the goals, *inter alia* of securing public health and protecting animals from cruelty were compelling state interests, the U.S. Supreme Court stated that there could be no compelling state interest in pursuing a goal when religiously-motivated conduct and non-religiously motivated conduct related to the stated goal are not treated alike. The apex court stated:

... where, as here, government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the governmental interests given in justification of the restriction cannot be regarded as compelling.<sup>229</sup>

Analogously, if the mandatory statutes of these states exempt the attorney-client privilege from the obligation of reporting child abuse, then they cannot claim to be pursuing a compelling state interest only in suppressing the clergy-penitent privilege under which priests, no more than attorneys, could learn about child abuse.

## 2. *The Burden Must Be Narrowly Tailored to Advance the Purpose of the Law*

We agree that stopping child sex abuse is fit to be a compelling state interest. That alone, however, does not make the measure adopted by government in breach of the free exercise right constitutional. The second leg of the strict scrutiny test – that the burden on the free exercise right must be narrowly tailored to advance the stated governmental interest of stopping child sex abuse – also needs to be satisfied. This leg of the strict scrutiny rule

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<sup>229</sup> *City of Hialeah*, at 546-7. A similar ruling was given by the U.S. Supreme Court in *UDV* decided under the RFRA to the effect that a measure advancing a compelling state interest has to be generally applied without an exception, unless the exception is justified by yet another compelling state interest. *Id.* at 432-4. Without the exception so justified, the objective pursued is not a compelling state interest. *Id.*

involves two elements: (1) that the measure adopted by government must be a proper means for realizing the stated compelling governmental interest, and (2) that the measure adopted by government must be narrowly tailored to that interest. Something is a proper means for achieving an end if that thing actually leads to the actualization of the set goal; otherwise it is not a measure connected to the stated goal.<sup>230</sup> In other words, if the burden is narrowly tailored but cannot actually lead to the realization of the stated compelling governmental interest, the strict scrutiny test is not passed. Equally, the strict scrutiny test will not be met if the burden is a means for achieving the stated goal but is not narrowly tailored to achieve the end.<sup>231</sup> The measure enacted for securing a compelling state interest must in actuality deliver on target.<sup>232</sup> It must specifically realize the designated state interest.<sup>233</sup>

In the context of the priest-penitent privilege-abrogating statutes, the questions covered under this second leg of the strict scrutiny test are (1) will abrogating priest-penitent privilege stop child sex abuse? and (2) is abrogating priest-penitent privilege narrowly tailored to the end of stopping child sex abuse?

*a. Will Abrogating the Priest-Penitent Privilege  
Stop Child Sex Abuse?*

If protecting children from abuse is a compelling state interest, it still needs to be shown that removing the priest-penitent

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<sup>230</sup> See [http://www.oxforddictionaries.com/us/definition/american\\_english/means](http://www.oxforddictionaries.com/us/definition/american_english/means).

<sup>231</sup> In a case under RFRA, *Burwell, Secretary of Health and Human Services, et al. v. Hobby Lobby Stores, Inc., et al.*, No. 13-354 (S. Ct. Jun. 30, 2014), available at [http://www.supremecourt.gov/opinions/13pdf/13-354\\_olp1.pdf](http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf). The U.S. Supreme Court held that the least-restrictive-means standard is exceptionally demanding and that it is not satisfied in this case since the HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties.

<sup>232</sup> *City of Hialeah*, 508 U.S. at 528 (discussing the Court's strict scrutiny test).

<sup>233</sup> *Id.*

privilege will accomplish the stated goal of eliminating child abuse. This condition touches radically on the implied premise of the statutes abolishing priest-penitent privilege: that clergy-penitent privilege produces or enhances the chance of child abuse. Child abuse is a social, psychological and moral problem that has nothing to do with the absolute secrecy of penitential confessions. This will be proven by statistics and other facts discussed later. In the end as we shall shortly begin to see, the statutes abolishing priest-penitent privilege are like a bridge to nowhere in terms of having any significant impact on stopping or mitigating the prevalence of child abuse.

*i. The Catholic Church and Child Sex Abuse*

Studies commissioned by the U.S. Conference of Catholic Bishops and conducted by the John Jay College of Criminal Justice show that Catholic priests' child sex abuse cases stand at a rate far lower than that of other males in the general population.<sup>234</sup> Amongst priests who were active between the years of 1950 and 2002, the studies found the total number of priests accused of abuse to be 4,392. And after using two sets of numbers to estimate the total number of active priests, it found that four percent of priests in this period were alleged to be abusers.<sup>235</sup> The report also captured the distribution of the abuses by year and found that they peaked in the decade of 1970-80,<sup>236</sup> meaning that the vast majority of reported cases occurred within a narrow historical window when the country witnessed cultural tumult between the 1960s and 1980s.<sup>237</sup> Even

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<sup>234</sup> John Jay College of Criminal Justice (2004), *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950-2002*, United States Conference of Catholic Bishops, at 4, available at <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf>.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 5.

<sup>237</sup> See Mona Charen, *Blame the Sexual Revolution, Not Men*, Oct. 28, 2011, available at <http://www.nationalreview.com/articles/281490/blame-sexual-revolution-br-not-men-mona-charen>.

then, in handling the cases, the Church followed the best scientific method at that time based on the finding that child molesters could be reformed by rehabilitation without the necessity of reporting them to police.<sup>238</sup> Evidence shows that during this period, the government believed in the same scientific findings and acted like the Catholic Church by sending convicted child molesters to rehabilitation rather than to prison.<sup>239</sup> In an institution of about 77 million people in the U.S., the number of credible accusations by current minors is low,<sup>240</sup> even though this is no justification for the horrid crime of child sex abuse.

Findings in connection with Catholics in general on this matter go in the same direction with the ones relating to priests. Ernie Allen, president of the National Center for Missing and Exploited Children could not agree more. She wrote:

[B]ased on the surveys and studies conducted by different denominations over the past 30 years, experts who study child abuse say they see little reason to conclude that sexual abuse is mostly a Catholic issue. 'We don't see the

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<sup>238</sup> Monica Applewhite, director of Confianza, LLC, a consulting firm based in Austin, Texas, specializing in standards of care and the dynamics of abuse in educational and religious environments and who worked with many organizations serving children including 28 Catholic Dioceses, the U.S. Conference of Catholic Bishops, the U.S. Jesuit Conference, and the Congregation for Institutes of Consecrated Life and Societies of the Apostolic Life in Rome, wrote: "We began studying sexual abuse in the 1970s, discovered it caused real harm in 1978, and realized perpetrators were difficult to rehabilitate in the 1990s. During the '70s when we were sending offenders to treatment, the criminal justice system was doing the very same thing with convicted offenders — sending them to treatment instead of prison." See 'Change in Vatican Culture,' in *National Catholic Register*, [http://www.ncregister.com/daily-news/change\\_in\\_vatican\\_culture/](http://www.ncregister.com/daily-news/change_in_vatican_culture/) (last accessed on Jan. 5, 2013).

<sup>239</sup> *Id.*

<sup>240</sup> See FRED L. EDWARD, *THE EVIL SIDE OF THE ROMAN CATHOLIC CHURCH: THE INFAMOUS TRIO: WE MUST PROTECT OUR PRIESTS AND LET THE LITTLE CHILDREN BE DAMNED* 12 (2005) (where the author noted that out of the 898 allegations of abuse of minors by the Church in the U.S. in 2004, 22 allegations, or 2 percent were made by boys and girls who were under 18 years in 2004. 876 allegations were from adult men and women alleging abuse as minors in previous years).

Catholic Church as a hotbed of this or a place that has a bigger problem than anyone else.<sup>241</sup>

The prevalence of sexual molestation of children among the general American male population is also captured by statistics even though disagreement exists among experts on the specific ratio.<sup>242</sup> Allen placed the ratio conservatively at one in ten,<sup>243</sup> i.e. 10 percent, while Margaret Leland Smith, a researcher at the John Jay College of Criminal Justice, says that her review of the numbers show that it is closer to one in five,<sup>244</sup> i.e. 20 percent.

On the other hand, the statistics of child sexual molestation in society at large is alarming. According to government records, in 2010 alone, there were some 63,527 reported cases of child sexual abuse in the United States.<sup>245</sup>

These facts cannot suggest that child sex abuse is prevalent in the Catholic Church whether on the part of the clergy or within the

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<sup>241</sup> Pat Wingert, *Priests Commit No More Abuse than Males*, NEWSWEEK MAGAZINE (Apr. 7, 2010), available at <http://www.thedailybeast.com/newsweek/2010/04/07/mean-men.html>. Pat Wingert reports further: "Since the mid-1980s, insurance companies have offered sexual misconduct coverage as a rider on liability insurance, and their own studies indicate that Catholic churches are not higher risk than other congregations ... It's been that way for decades." *Id.* Dr. Philip Jenkins, a professor of history at Pennsylvania State University considers the claim that Catholic priests offend more in child molestation as a sensational assertion lacking in verifiable bases. According to him, "*If anyone believes that priests offend at a higher rate than teachers or non-celibate clergy, then they should produce the evidence on which they are basing that conclusion. I know of none.*" Saying 'everybody knows' does not constitute scientific methodology." (emphasis added). Philip Jenkins, *How Serious is the 'Predator Priest Problem*, USA TODAY (Jun. 6, 2010), available at [http://usatoday30.usatoday.com/news/opinion/forum/2010-06-07-column07\\_ST\\_N.htm](http://usatoday30.usatoday.com/news/opinion/forum/2010-06-07-column07_ST_N.htm).

<sup>242</sup> Wingert, *id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> See Child Maltreatment 2010 – Data Tables, available at <http://www.acf.hhs.gov/programs/cb/resource/child-maltreatment-2010-data-tables#page=61>. See also Steven Mintz, *Sex Abuse in the Catholic Church: Placing Childhood Sexual Abuse in Historical Perspective*, available at <http://blogs.ssrc.org/tif/2012/07/13/placing-childhood-sexual-abuse-in-historical-perspective/>.



wider Catholic population. Records indicate that measures put in place today by the Catholic Church for the protection of children from abuses of all kinds are reputed to be unparalleled by any other organization.<sup>246</sup> To be sincere and credible, any attack on the Catholic Church for child sexual abuse should be based on current and accurate statistics.

As an institution, the Catholic Church does not support child sex abuse or any form of sex abuse, but calls her children to chastity and condemns all lust, particularly with children.<sup>247</sup> No greater administrative evidence of this fact can be tendered than the initiative of the current Pontiff, Pope Francis, to establish a commission advising him on sex abuse policy, whose members include a woman abused by a priest when she was a minor.<sup>248</sup> He spares no member of the hierarchy that is found wanting in his duty to protect children from sex abuse.<sup>249</sup> Demonstrating in concrete terms the church's responsibility for the safety of children, dioceses in the United States, for instance, have adopted stringent measures geared towards protecting children from sex abuse.<sup>250</sup>

If child sex abuse is not a particularly Catholic matter as per

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<sup>246</sup> See 2010 Annual Report on the Implementation of the Charter for the Protection of Children and Young People, United States Conference of Catholic Bishops, Washington, DC, available at <http://old.usccb.org/ocyp/annual-report-2010.pdf>.

<sup>247</sup> See Catechism of the Catholic Church, Nos. 2332-2390.

<sup>248</sup> Nicole Winfield, *Pope Francis Announces Names of Sex Abuse Commission*, March 22, 2014, available at [http://www.huffingtonpost.com/2014/03/22/names-of-vatican-sex-abuse-commission-\\_n\\_5012597.html](http://www.huffingtonpost.com/2014/03/22/names-of-vatican-sex-abuse-commission-_n_5012597.html).

<sup>249</sup> See, e.g., Liam Moloney, *Pope Francis Removes Bishop in Paraguay*, September 25, 2014, available at [http://online.wsj.com/news/article\\_email/pope-francis-removes-bishop-in-paraguay-linked-to-child-abuse-1411671492-lMyQjAxMTE0MjIzNTAyMDUwWj](http://online.wsj.com/news/article_email/pope-francis-removes-bishop-in-paraguay-linked-to-child-abuse-1411671492-lMyQjAxMTE0MjIzNTAyMDUwWj).

<sup>250</sup> See, e.g., the VIRTUS Program: an initiative of the Catholic Bishops of the United States and the product of the National Catholic Risk Retention Group in response to the growing public awareness of child sexual abuse. The purpose of VIRTUS and its "Protecting God's Children" component is to educate and train adults (clergy, religious, teachers, staff, volunteers, and parents) who teach in religious institutions, about the dangers of abuse, the warning signs of abuse, the ways to prevent abuse, the methods of properly reporting suspicions of abuse, and responding to allegations of abuse. <https://www.virtus.org/virtus/>.

the studies cited above, there is no sense in targeting the Catholic Church and threatening the very practice (the sacrament of reconciliation) that conscientiously helps people turn away from sins, including child sex abuse.

*ii. Confessional Secrecy Does Not Induce Child Sex Abuse*

The attack on the confessional would have been very worthwhile if it engendered child sex molestation. But it does not. Instead, it enables penitents to step forward and benefit from the faith-based counsel of the priest and turn their lives around for their personal good.<sup>251</sup>

At the confessional the priest serves not just a spiritual need, but also acts as an agent of human and social renewal. There is no greater attestation to this than the declaration of the U.S. Supreme Court in *Trammel*<sup>252</sup> that the clergy-penitent privilege serves the need of a human person to disclose his misdeeds and receive guidance and consolation. This declaration recognizes that this is not possible if not under the condition of absolute and inviolable confidence.<sup>253</sup> This undermines the view of some writers that the Confessional Seal is inconsistent with public safety or tranquility.<sup>254</sup>

Moreover, Judge Hoffman, a protestant for that matter, in *Phillips* responded to this insinuation. He stated:

[B]y putting hypothetical cases, in which the concealment of a crime communicated in penance, might have a pernicious effect, is founded on false reasoning, if not on false assumptions: To attempt to establish a general rule, or to lay down a general proposition from accidental circumstances which occur but rarely, or from extreme cases, which may sometimes happen in the infinite variety

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<sup>251</sup> See generally *Trammel*, *supra* note 94, at 51 (1980) (where the U.S. Supreme Court noted the purpose of the priest-penitent privilege).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> See *supra* note 8.

of human actions, is totally repugnant to the rules of logic and the maxims of law. The question is not, whether penance may sometimes communicate the existence of an offence to a priest, which he is bound by his religion to conceal, and the concealment of which, may be a public injury, but whether the natural tendency of it is to produce practices inconsistent with the public safety or tranquility. There is in fact, no secret known to the priest, which would be communicated otherwise, than by confession – and no evil results from this communication – on the contrary, it may be made the instrument of great good. The sinner may be admonished and converted from the evil of his ways: Whereas if his offence was locked up in his own bosom, there would be no friendly voice to recall him from his sins, and no paternal hand to point out to him the road to virtue.<sup>255</sup>

The number of would-be molesters that would have been roaming the streets if not for the grace of the confessional and the atmosphere of absolute secrecy should be appreciated. At the same time the Church does not hold out the confessional as an alternative to the civic responsibility of owning up and reporting oneself to the appropriate civil agencies for any breach of the law.<sup>256</sup> It encourages people to live up to their civic responsibilities, but does not betray the confidence of the confessional. Even after a penitent has received spiritual absolution for his sins, nothing prevents him or her from reporting any crime committed to the state.

Of the cases of child sex abuse in the Catholic Church, there is no information that any of them were disclosed in a confessional environment. The ministry of divine mercy exercised by the priest at

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<sup>255</sup> *Phillips*, 1 W.L.J. 109.

<sup>256</sup> The duty of a Catholic to report himself to the state for the breach of any state law comes under the general duty to seek the common good. Catechism of the Catholic Church, no.1905. The common good is defined as “the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily.” *Id.* no. 1906. One such condition is discharging one’s civic duties, which include self-reporting for offences committed.

the confessional is revered and kept inviolate by the Church.<sup>257</sup> It is a crime heavily punished under canon law for a priest to exploit the confessional for any sexual impropriety. Canon 1387 of the 1983 Code enacts:

A priest who in confession, or on the occasion or under the pretext of confession, solicits a penitent to commit a sin against the sixth commandment of the Decalogue, is to be punished, according to the gravity of the offence, with suspension, prohibitions and deprivations; in the more serious cases he is to be dismissed from the clerical state.<sup>258</sup>

To ensure that a priest distances himself from any sexual challenges he may have from the confessional, he is forbidden to absolve an accomplice in the sin against the sixth commandment of the Decalogue.<sup>259</sup> Canon 1378 §1 provides that “A priest who acts against the prescription of can. 977 incurs a *latae sententiae* (automatic) excommunication reserved to the Apostolic See.”<sup>260</sup> Canon 977 makes the absolution of a partner in a sin against the sixth commandment of the Decalogue invalid, except in danger of death.<sup>261</sup>

An absurd angle to the discourse would be to suggest that the Confessional Seal is an enabler for child sex abuse particularly when there is recidivism on the part of a penitent. A genuine confession is subordinated to the penitent having a firm purpose of amendment,<sup>262</sup> which corresponds to personal responsibility for sins committed. If it happens that a penitent failed to reach this degree of interior repentance, neither the sacrament nor the Confessional Seal is to be held culpable.<sup>263</sup> Rather, it is a matter of the penitent’s conscience.

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<sup>257</sup> See *supra* note 50.

<sup>258</sup> 1983 CODE c.1387.

<sup>259</sup> *Id.* c.977.

<sup>260</sup> *Id.* c.1378, §1.

<sup>261</sup> *Id.* c.977.

<sup>262</sup> *E.g.*, cc. 959, 987.

<sup>263</sup> *E.g.*, *id.*

Blaming the sacrament of penance or the Confessional Seal for this lack of interior repentance is unreasonable and is analogous to blaming government penitentiary institutions for recidivists' relapse to crime after doing time in these establishments.

Since the Confessional Seal does not induce child sex abuse, it is simply logical that removing it will not make any difference in the quantum of child sex abuse that has infected society.

*iii. The Priest-Penitent Privilege-Abrogating Statutes Are Difficult to Enforce*

For any legal initiative to achieve its set goal, it is imperative that it be enforceable. Historical precedents strongly indicate that priests are not to betray the confidence of the confessional. There is no sign that a change in this respect is under way. The stated goal of the statutes would not be served by citing and possibly convicting priests, including Reverend Kohlmann, who insist on the sanctity of the Confessional Seal, for contempt of court. All it does is to intimidate and harass priests without in any way securing a reduction in the incidence of child sex abuse. Moreover, even the possibility of citing a resolute priest for contempt will be problematic if he chooses to declare that he has no recollection of what the penitent confessed. This creates difficulties in citing him for contempt, let alone convicting him. There is no obligation, and ultimately it is not commendable for him, to store up people's confessions in his memory. They are ultimately confessions to God and not to him as a person. It is preposterous for any statute to impose the duty of recording confessions for judicial purposes. Such an act will run afoul of the principle of separation of Church and State,<sup>264</sup> by which the government should not impose doctrinal practices on any religion.<sup>265</sup> Since confession is dialogical and confidential, the

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<sup>264</sup> See generally *Everson*, 330 U.S. at 16 (discussing the First Amendment's separation of Church and State). The First Amendment to the U.S. Constitution prohibits government from imposing doctrinal practices on any religion or any religion imposing its beliefs on the state. *Id.*

<sup>265</sup> *Id.* at 15-16.

possibility of a third party stepping in to testify against such a priest is ruled out. Even in the rare case of confession through an interpreter, the declaration of memory failure on the substance of a confession by a priest remains an unassailable steel gate. The testimony of the interpreter - if he chooses to breach the seal - remains his and not that of the priest. Can the penitent himself testify against the priest? His testimony becomes a confession, thus making it fundamentally irrelevant to compel the priest to violate the Confessional Seal in the first place. In the end the priest has not betrayed the confidence of the confessional and at the same time cannot be cited for contempt of court. The statutes will end up not being of any use in combating child sex abuse, but rather a needless stalking of priests in their millennial religious duty.

*b. Is Abrogating Priest-Penitent Privilege Narrowly Tailored to Advancing the End of Stopping Child Sex Abuse?*

If the measure employed by government in advancing a stated goal can actually deliver on the target, the next question is whether the measure is narrowly tailored toward achieving the designated end. The operative word is ‘narrow,’ and as an adjective, it refers to ‘being small in width’ or ‘being limited in range or variety.’<sup>266</sup> A narrowly tailored measure for a stated governmental interest must be precisely cut out for achieving the stated governmental interest. In *Hialeah*, the U.S. Supreme Court threw more light on the idea of a narrowly tailored measure for achieving a stated governmental interest. Finding the four Ordinances enacted by the Hialeah City Council to be offensive to the free exercise right of the Santeria Church it held:

The ordinances cannot withstand the strict scrutiny that is required upon their failure to meet the Smith standard. They are not narrowly tailored to accomplish the asserted governmental interests. All four are overbroad or underinclusive in substantial respects because the proffered

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<sup>266</sup> See <http://www.macmillandictionary.com/us/dictionary/american/narrow>.

objectives are not pursued with respect to analogous nonreligious conduct and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.<sup>267</sup>

From the above statement of the apex court, certain elements of a narrowly tailored measure pursuant to a stated governmental interest emerge: (i) the measure must not be overbroad in substantial respects, (ii) the measure must not be under-inclusive in substantial respects, and (iii) there must not be narrower measures that burden religion to a far lesser degree. These features are not alternatives, but form an integral concept of the narrowly-tailored rule such that a government policy that fails to satisfy any of them fails to pass the narrowly-tailored standard. We shall shortly relate these elements to the priest-penitent privilege-abrogating statutes.

A measure is substantially overbroad if its provisions are more than required for securing the stated governmental interest.<sup>268</sup> The U.S. Supreme Court specifically found three of the four ordinances to be overbroad because they ultimately target the suppression of animal sacrifice, the central element of the Santeria worship service.<sup>269</sup>

Ordinance 87-40, while incorporating Florida animal cruelty laws, broadly punishes "[w]hoever ... unnecessarily or cruelly ... kills any animal." Meanwhile, Ordinance 87-52, defines "sacrifice" as "to unnecessarily kill ... an animal in a ... ritual ... not for the primary purpose of food consumption," and prohibits the "possess[ion], sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempts "any licensed [food] establishment" if the killing is otherwise permitted by law. Ordinance 87-71 prohibits the sacrifice of animals, and defines "sacrifice" in the same manner as Ordinance 87-52. Even Ordinance 87-72, that was not found to be particularly overbroad, was held to be so because it operated together with the other three in

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<sup>267</sup> *City of Hialeah*, at 546-7.

<sup>268</sup> *Id.* at 546, referring to where a stated governmental interest could be achieved by narrower ordinances that burdened religion to a far lesser degree.

<sup>269</sup> *Id.* at 534.

attempting to suppress animal sacrifice by the Santeria Church.<sup>270</sup>

The high court felt that these Ordinances were over and above what was necessary for achieving the stated governmental interest of securing public health and protecting animals from cruelty.<sup>271</sup> It reasoned that “the legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a fiat prohibition of all Santeria sacrificial practice.” Other forms of animal killing, apart from animal sacrifice done by the Santeria Church, were permitted by the Ordinances. Though the apex court noted, relying on its decision in *McGowan v. Maryland*,<sup>272</sup> that an adverse impact will not always lead to a finding of impermissible targeting, it held that the prohibitive intention of the Hialeah City Council was found not only in the text of the ordinances, but also in their operation.<sup>273</sup>

Similarly, the priest-penitent privilege-abrogating statutes can be viewed as overbroad. The stated aim of protecting children from child sex abuse can be realized without proscribing the Confessional Seal which is at the center of the Catholic Church’s sacrament of reconciliation. Of all the cases of child sex abuses against Catholic priests, there is no known case that occurred in the environment of confession. The Catholic Church has no problems with priests reporting child sex abuse learned about in circumstances other than confession.<sup>274</sup> Thus the attempt to protect against child sex abuse by outlawing the Confessional Seal is not narrowly tailored to the goal of stopping child abuse.

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<sup>270</sup> *Id.* at 540. Ordinance 87-72 defines “slaughter” as “the killing of animals for food” and prohibits slaughter outside of areas zoned for slaughterhouses, but includes an exemption for “small numbers of hogs and/or cattle” when exempted by state law. *Id.*

<sup>271</sup> *Id.* at 538, where the U.S. Supreme Court stated that, “The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a fiat prohibition of all Santeria sacrificial practice.”

<sup>272</sup> 366 U. S., at 442

<sup>273</sup> *City of Hialeah*, at 535, where the U.S. Supreme Court stated: “It becomes evident that these ordinances target Santeria sacrifice when the ordinances’ operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object.”

<sup>274</sup> See *supra* note 250.



Ordinances 87-40, 87-52, and 87-71 in *Hialeah* were found to be equally under-inclusive pursuant to the two stated governmental interests of protecting public health and preventing cruelty to animals since they failed to prohibit non-religious conduct that endangered these interests in a similar or greater degree than Santeria sacrifice.<sup>275</sup> For example, fishing and extermination of mice and rats within a home were permitted.<sup>276</sup> The priest-penitent privilege-abrogating statutes of New Hampshire, North Carolina, and West Virginia suffer from a similar handicap. They leave out attorney-client privilege under which knowledge of child sex abuse, no less than in priest-penitent privilege, can be gained. In addition, the priest-penitent privilege is religion-motivated, whereas the attorney-client privilege is not.

Finally, there must not be narrower measures that burden religion to a far lesser degree. In essence, this requirement goes back to the least-restrictive means test articulated by the U.S. Supreme Court in 1981 in *Thomas v. Review Board of Indiana Employment Section Division*.<sup>277</sup> This decision held that Indiana's unemployment compensation scheme giving the appellant the option of choosing between the freedom of religion and the receipt of a substantial social benefit was not a least restrictive burden.<sup>278</sup> Here, Eddie C. Thomas, a Jehovah's Witness, on the ground of his religion's objection to war, had asked his employer to lay him off when all operations of the business were transferred to weapons manufacturing.<sup>279</sup> When his employer refused, he resigned. The Review Board of the Indiana Employment Security Division denied his application for unemployment benefits under the Indiana Employment Security Act reasoning that his religious objections were not good grounds to qualify him for benefits.<sup>280</sup> Mr. Thomas pursued his free exercise right claim to the U.S. Supreme Court, in which the following findings were made.

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<sup>275</sup> *City of Hialeah*, at 543.

<sup>276</sup> *Id.* at 543-4.

<sup>277</sup> *Thomas v. Review Bd. of Ind. Emp't Section Div.*, 450 U.S. 707 (1981).

<sup>278</sup> *Id.* at 718-19.

<sup>279</sup> *Id.* at 710.

<sup>280</sup> *Id.* at 711-12.

First, Indiana's refusal of unemployment compensation benefits to a Jehovah's Witness, who quit his employment because he could not participate in the production of weapons, violated his First Amendment right to the free exercise of religion.<sup>281</sup> Second, Mr. Thomas sincerely believed that his religion demanded him to end the employment.<sup>282</sup> Finally, the high court found that the state's denial of unemployment compensation was a burden on the free exercise of religion because a person may not be compelled to choose between the exercise of a First Amendment right and receipt of an otherwise important benefit.<sup>283</sup> Relying on these findings, the Supreme Court held that Indiana's unemployment compensation scheme was not the least restrictive means of achieving the stated public interest.<sup>284</sup> The state interest furthered by the Indiana unemployment benefit law focused on deterring unemployment resulting from people leaving their jobs for religious beliefs and to prevent employers from inquiring into an individual's religious beliefs.<sup>285</sup>

The logic of the Supreme Court was unambiguous: a measure that confronts somebody with the option of choosing between a First Amendment right and the receipt of a substantial social benefit cannot be a least restrictive burden.<sup>286</sup> It is a grave burden that completely restricts the free exercise right if a person must choose between it and a government benefit. First Amendment rights, as constitutional rights, are non-negotiable. They are guaranteed to

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<sup>281</sup> *Id.* at 719 (stating that "the interests advanced by the State do not justify the burden placed on free exercise of religion").

<sup>282</sup> *Thomas*, 450 U.S. at 715-16. The Court observed that "the guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect." *Id.* at 715-16. The Court further noted that "the narrow function of the reviewing court in this context is to determine whether there was an appropriate finding that the petitioner terminated his work because of an honest conviction that such work was forbidden by his religion." *Id.* at 716.

<sup>283</sup> *Id.* at 717-18 (holding that a law burdens an individual's right to the free exercise of religion when there exists "substantial pressure on an adherent to modify his behavior and to violate his beliefs").

<sup>284</sup> *Id.* at 719.

<sup>285</sup> *Id.* at 718-19.

<sup>286</sup> *Id.*

citizens as inalienable rights that are not to be traded for any government benefit.

The mandatory reporting statutes abolishing the priest-penitent privilege in child abuse cases are radical because they sweep off everything about the sacrament of reconciliation. It is not just the free exercise right of the alleged child molester that is eroded but also that of the priest<sup>287</sup> and innocent third parties who, out of the reasonable fear of losing their trust will no longer approach the sacrament.<sup>288</sup>

As depicted in *Thomas*, a Catholic priest is faced with the dilemma of either renouncing his sincere religious discipline of the secrecy of confessions or be cited for contempt of court.<sup>289</sup> If he breaks the Confessional Seal, he is subject to the extreme canonical punishment of automatic excommunication.<sup>290</sup> The sacrament of reconciliation would be made odious and very few people, if any, would still go to it. It is immaterial that it is divulged only in child sex abuse cases. Relevant evidence in child sex abuse does not necessarily need to be evidence of an act of sex molestation. This class of statutes therefore is not a least restrictive means but radical ones that strike at the core of the Catholic Church, the sacrament of reconciliation and the office of the priest.

Judge Hoffman, in *Phillips*, captured the gravity of the burden and declared: "To decide that the minister shall promulgate

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<sup>287</sup> See generally *Mockaitis*, 104 F.3d at 1530-33.

<sup>288</sup> Judge Hoffman, in *Phillips*, referring to this conclusion, said: "To decide that the minister shall promulgate what he receives in confession is to declare that there shall be no penance. . . ." *Phillips*, 1 W.L.J. 109.

<sup>289</sup> Sending a priest to prison for insistence on the inviolability of the confessional must be distinguished from cases of people like journalists who are jailed for refusing on grounds of professional ethics to disclose sources of their information. Inviolability of the Confessional Seal as a matter under the First Amendment right of freedom of religion enjoys a constitutional guarantee that rules of professional ethics do not have. Rules of professional ethics are private norms of organizations and so bind only such bodies whereas the Amendment rights are constitutional rights that bind the federation and states of the union.

<sup>290</sup> 1983 Code of Canon Law, can. 1388 §1 provides that a confessor who directly violates the sacramental seal, incurs a *latae sententiae* excommunication the absolution from which is reserved to the Apostolic See.

what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman Catholic religion would be thus annihilated.”<sup>291</sup> In the end these statutes are not narrowly tailored and thus unconstitutional.

### *Conclusion*

It is not difficult to comprehend the reality of child sex abuse and its traumatic effects on children, families, and society. Any sincere effort at combating child sex is a matter of urgency and necessity. The mandatory reporting statutes that oust the priest-penitent privilege seek to remove the Confessional Seal in an ill-advised and unconstitutional attempt to protect children from sex abuse. The Confessional Seal is a First Amendment right that cannot be constitutionally set aside other than in accordance with established conditions, i.e. the requirements of strict scrutiny. This test aims at straddling a mid-course between the free exercises of religion on the one hand and the utmost interests of the state on the other in order to avoid the inequitable situation of robbing Peter to pay Paul.

Unfortunately, the test is not satisfied by the statutes at issue. First, their burden on the sacrament of reconciliation amounts to scrapping a fundamental doctrinal practice of the Catholic Church. It is drastic indeed.<sup>292</sup> Priests would be prevented from ministering according to their religious norms and consciences while penitents would be debarred from approaching their priests because without absolute confidentiality, penitential confession is dead. Most importantly, the Catholic Church would lose the right to live according to its *bona fide* doctrine. Separation of religion and state, the hallmark of American democracy would be breached by these statutes since complying with them would result in the Catholic Church running not according to its own doctrine but in tandem with a doctrine imposed by the states that passed these laws.

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<sup>291</sup> *Phillips*, 1 W.L.J. 109.

<sup>292</sup> *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (stating that in pursuing a compelling interest, the state must choose “less drastic means”).

Second, and more importantly, the statutes have no potentiality of rescuing children from sexual molestation. It is akin to fishing in a dry pond. The object of their attack – the Confessional Seal – does not induce child sexual exploitation of children. Instead, it turns people around from sins generally, including child sex predation, to virtue and responsible living. The Catholic Church calls her children to shun lust in all its forms. It leaves therefore no surprise that sexual solicitation in the environment of confession is severely condemned and punished under canon law, as it can lead to a priest's dismissal from the clerical state. Furthermore, except in danger of death, a priest is prohibited from absolving a partner in any infringement of the sixth commandment of the Decalogue and breach of this prohibition welcomes automatic excommunication. What is needed in the attack against the sacramental seal is the number of child sex molestation cases by priests that occurred in the environment of confession. The absence of this statistic indicates that the sacrament of reconciliation, the ultimate object of the attack, had not been sullied by any instance of child sex molestation. These statutes will end up having the effect of intimidating and hassling the Catholic Church, priests, and faithful rather than effectively and sincerely protect children from sex molestation. They cannot make any difference in the pervasive incidence and prevalence of child sex abuse in society at large. Out of nothing, nothing comes (*ex nihilo, nihil fit*). Since the Confessional Seal does not engender child sex abuse, suppressing it cannot effectuate any change in the incidence of the crime.

Moreover, the statutes cannot achieve their mission of arresting child sex abuse through proscribing the priest-penitent privilege because any such measure would be difficult to enforce. Priests have not, and are not going to, let down their millennial commitment to the Confessional Seal. Convicting them for contempt of court will never translate into the eradication of child sex abuse.<sup>293</sup> Moreover, the chances of citing and convicting a priest for contempt of court based on his failure to recall the substance of a confession is

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<sup>293</sup> See Kari Mercer Dalton, *The Priest-Penitent Privilege v. Child Abuse Reporting Statutes: How to Avoid the Conflict and Serve Society*, 18 WIDENER L. REV. 1, at 20 (2012).

very slim for want of independent evidence since confession is dialogical and secret.

Furthermore, while safeguarding children from sex molestation should be a compelling state interest, the priest-penitent privilege-abrogating statutes are not narrowly tailored toward achieving the stipulated end of stopping child sex abuse because they are both overbroad and under-inclusive in substantial respects.

In particular, the priest-penitent privilege-abrogating statutes of New Hampshire,<sup>294</sup> North Carolina,<sup>295</sup> and West Virginia<sup>296</sup> which abrogate the priest-penitent privilege but retain the attorney-client privilege are under-inclusive and thus not narrowly tailored toward achieving the end of stopping child sex abuse. Securing children from sex abuse cannot legitimately be a compelling state interest only in suppressing conduct with a religious motivation -clergy-penitent privilege - whereas similar conduct without a religious motivation – the attorney-client privilege - is allowed to stand.<sup>297</sup> Otherwise, a compelling state interest would be needed to justify this apparent discrimination.

In any case, mowing down the attorney-client privilege alongside the priest-penitent privilege on the principle of parity of treatment does not satisfy the narrowly-tailored rule. Every statutory privilege is a kind of special creature, the abrogation of which calls for a particular constitutional justification. In regards to the priest-penitent privilege, as a free exercise privilege, the crucible of passing the compelling state interest test and the narrowly-tailored rule would be needed.

In the final analysis, these statutes are veiled unconstitutional attacks on the First Amendment right of Catholics to freely practice their sacrament of reconciliation in the environment of absolute inviolability of the Confessional Seal. A sincere interest in stemming the deluge of child sex abuse in society should see the clergy-penitent privilege as a loyal ally rather than as an enemy because of

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<sup>294</sup> *Supra* note 12.

<sup>295</sup> *Supra* note 13.

<sup>296</sup> *See supra* note 16.

<sup>297</sup> *City of Hialeah*, at 543.

the opportunity it gives people to turn around their lives from within the temple of conscience and God.

I would like to end with the concluding admonition of the U.S. Supreme Court to government agents in the *Hialeah* case:

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. ... Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.<sup>298</sup>

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<sup>298</sup> *City of Hialeah*, 508 U.S. at 547.