

The Rule Against Scandal

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Theorizing about religious liberty and the Constitution tends too often to operate in a sphere untouched by fact, or at least, touched only by a narrow set of decided cases. Cases are couched in the following terms: a sincere religious believer is pitted against an impersonal government. That is not to say the believer always wins, but rather to point out that most of the disputes that occupy constitutional scholars involve this inherent imbalance of power and involve no one beyond the believer and the state. From within this narrow confine, it becomes nearly irrational to take the government's position and irresistibly tempting to assume that the religious believer is part of a "minority religion" that cannot operate the levers of power effectively. Thus, the "high ground" is identified as that occupied by the believer while all other interests are low.

I have written fairly extensively on the fact that this is not a very enlightened framework from within which to judge theories of religious liberty. In fact, it is dangerous for the vulnerable.¹ Moreover, it is not empirically sound to jump to the conclusion that any particular religious entity is an oppressed institution in the political

¹ See generally Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-up*, 19 CARDOZO L. REV. 225 (2007-2008); MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2007).

context, even if it is small. In fact, the majority in *Employment Div. v. Smith*, was correct to point out that in the United States there is a general preference for religious liberty, which is felt in the legislative process.

Just as a society believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of states have made exception to their drug laws for sacramental peyote use.²

“Minority” and even hated religions have done quite well in the legislative process, from peyote exemptions, to medical neglect exemptions for faith-healing, and the use of communion wine during Prohibition.³

Add to this mix a powerful social taboo against criticizing religious entities, clergy, or beliefs in public, and you end up with a set of discussions and doctrine that are anemic. The sometimes thin gruel of discourse about religious liberty is not solely the responsibility of scholars of religion or societal taboos, though. It is also a result of religious beliefs that forbid believers from telling outsiders about internal bad behavior. In other words, religious institutions act to suppress negative information in ways that then falsify reality to outsiders.

There has been an enormous amount of information regarding the internal operation of religious organizations coming to the public’s attention in the last five to ten years as a result of the child sex abuse issues within the Roman Catholic Church (RCC),⁴

² *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990).

³ See generally MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2007).

⁴ The story of the internal dynamics within the RCC related to child sex abuse was first broken by the Boston Globe. MATT CARROLL ET AL., *BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH: THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE*, (2002).

the Fundamentalist Latter-Day Saints (FLDS),⁵ the Jehovah's Witnesses (JW)⁶ and more recently the Orthodox Jewish community (Orthodox).⁷ While there had been coverage of childhood sexual abuse by clergy in the RCC since the 1980s, the institutional role in furthering the abuse did not come to public light until reporters at the *Boston Globe* in 2002 broke the story of the coverup of abuse and the moving around of pedophile priests by bishops.

In each of these religious communities (among others), there has been an acknowledged rule (or theological principle) that forbade the airing of dirty laundry to outsiders. In the RCC, there has been a rule against "scandal," which included stiff penalties, including excommunication, if believers told those outside the faith about problems within it.⁸ In the Orthodox community, it is referred to as "chilul hashem." The phrase literally means "desecration of God's name," but is used to prohibit giving the community a bad name.

Theories about institutions indicate that they often operate to perpetuate themselves, and this is obviously one way that religious institutions can secure themselves from public criticism. This is a rule, though, that ensures that the vulnerable within the organizations will not receive the protection they need. It guarantees not only that the organization's reputation is not defiled but also that a cycle of abuse or mistreatment is fueled. The problem, actually, does not stop at children, but also extends to emotionally and otherwise disabled adults.

⁵ JON KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH* (2004); CAROL JESSOP, *ESCAPE* (2007).

⁶ See, e.g., [http:// www.silentlambs.org](http://www.silentlambs.org).

⁷ Erica Schacter Shwartz, *Who Will End the Abuse?*, *THE WALL STREET JOURNAL*, Dec. 11 2008, [://online.wsj.com/article/SB122904966846300955.html](http://online.wsj.com/article/SB122904966846300955.html).

⁸ Crimen Sollicitationis.

Why is this relevant to constitutional discourse? For two reasons. First, there has been a recent uptick in interest regarding theories of “religious autonomy” for religious institutions.⁹ Purely as a matter of operation, autonomy would reach the same results legally as the scandal rule. Second, the appearance of legislative free exercise statutes enacting the constitutional standard of strict scrutiny, such as the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, and the state rfras. If the former were to come into effect or the latter were applied enthusiastically, there is the potential that constitutional doctrine might work hand in glove with hiding and perpetuating abuse of the vulnerable.

I. The Scandal Rule

For ease of discussion, I will refer to the principle of internal secrecy that runs across religious entities as the “scandal rule.” The rule operates primarily to block the flow of information. First, and most obviously, it impedes the movement of information from within the organization to the following: (1) law enforcement; (2) the media (including news coverage and commentary and talk shows like Oprah and Larry King); (3) state agencies and lawmakers; and (4) other nonprofit organizations, social leaders, and powerful philanthropists. Except for the last category, each of these information recipients are the usual means of passing information of interest on to the public. With the information stopping at the edge of the religious organization, the people have very

⁹ Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); *Church Autonomy Conference: February 6-7, 2004 - J. Reuben Clark Law School, Brigham Young University: Church Autonomy and the Free Exercise of Religion*, 2004 BYU L. REV. 1093-1999 (2004).

little chance of learning the existence of the bad behavior. This means that the ability of outsiders to stop the bad behavior – even when those outsiders are charged with punishing, deterring, or monitoring that particular form of behavior -- is stymied from the beginning.

Second, it blocks information flow between believers within the organization. The way the rule typically operates, the information is shared with as few people as possible even within the organization. Thus, in the RCC, until the *Boston Globe* stories, there was no open sharing of information between priests about the abusive practices of their fellow priests. This means that insiders, who are the most invested in the organization, lack the information necessary to reform the organization.

The scandal rule is not just a regulation of information, though. It is also an important means by which clergy maintain power over their flocks. When bad behavior (especially when it has a criminal element) can only be addressed in-house, the leadership's role of spiritual advisor expands to include civil judge, jury, and/or case worker. That does not mean they take on all of the functions of these social actors, but rather that they displace them.

The scandal rule makes the vulnerable even more vulnerable than one might think, because even when outsiders become aware of the harm occurring and therefore might intervene, co-religionists¹⁰ will enforce the scandal rule. A recent confirmation of this reality involved Justice Prosser on the Wisconsin Supreme Court. When he was a prosecutor, parents learned of their child's abuse by a priest and intended to press charges. The local prosecutor at the time, Prosser, accompanied by a deacon and another

¹⁰ Or public officials seeking votes from a religious bloc, which they assume the clergy will deliver.

member of the parish, went to the family's home to urge the parents not to publicly embarrass the RCC.¹¹

Not only co-religionists will acquiesce – consciously or unconsciously -- in the rule of secrecy, though. It is common knowledge that prosecutors across the country received reports regarding sexual abuse by RCC priests and when approached by the local bishop agreed to let the diocese handle its own “dirty laundry.” Prosecutors assumed that they were hearing about isolated events, not a church-wide, mandated process for handling abuse secretly. Their lack of information was attributable to the relative success of the scandal rule; prosecutors simply did not have the quantum of information needed for them to suspect the larger, insidious pattern. Alternatively, prosecutors saw a pattern but believed in the social myth that religious entities are equipped to handle the suffering of anyone hurt, including those sexually abused.

Similarly, numerous news sources furthered the scandal rule when the bishops pressured them to keep the abuse and the bishops' knowledge of the abuse secret. The *Philadelphia Inquirer* fired reporter Richard Cipriano for writing a story exposing the Philadelphia Archdiocese's handling of clergy abuse and the *Milwaukee Journal Sentinel* moved Maria Rohde off the church beat when she started to dig too deeply. And while the *Boston Globe* broke the coverup story first, they sat on the story for well over a year before going to press.

Religious organizations also invest in keeping the information protected by the scandal rule out of the public eye. Right now, in New York, the Catholic Conference is investing \$100,000/year for a public relations firm to kill legislation pending in the New

¹¹ Marie Rohde, *Justice Prosser's link to priest case assailed: As DA in '79, he decided not to prosecute, records indicate*, JSONLINE, Feb. 5 2008, <http://www.jsonline.com/news/milwaukee/29510659.html>.

York legislature that would eliminate the statute of limitations for child sex abuse for a year. In Colorado, Archbishop Chaput hired the most expensive public relations firm in Denver to accomplish the same end. Why? Because such legislation forces their secret information public, as happened in California when similar legislation was in place during 2003. The FLDS has one of the most expensive and effective public relations firms in Utah go into hyperdrive whenever news leaks out about its polygamous practices.

Look at the reality of what has happened in the FLDS community, one of the most secretive organizations (with dazzling resources and public relations). For years, Warren Jeffs routinely took underage girls across state and international lines to be married to much older men in plain violation of the Mann Act.¹² Only intense pressure on the FBI, mostly coming from groups like Tapestry and CPP (groups of formerly polygamous wives and/or children) led it to name him one of the Top 10 Most Wanted and then to apprehend him. In 2008, Texas Child Protective Services responded to a report of abuse at the FLDS's Yearning for Zion Ranch compound in Eldorado, Texas, and took all of the children into custody. Based on the TCPS most recent report, over 25% of pubescent girls at the Yearning for Zion Ranch compound in Texas had been the victims of statutory rape, with over half of those resulting in pregnancies: "12 girls were 'spiritually' married at ages ranging from 12 to 15, and seven of these girls have had one or more

¹² *Crimes Associated with Polygamy: The Need for a Coordinated State and Federal Response: Hearing Before the U.S. Senate Committee on the Judiciary*, 110th Cong. (testimony of Stephen Singular) (stating that Jeffs violated the Mann Act).

Once he was arrested, the states started to line up to prosecute him, and those prosecutions have occurred before federal prosecution. He was convicted in Utah for accomplice to rape. He is on trial in Arizona on four counts of incest and four counts of sexual contact with a minor. He also was arraigned on two additional counts of sexual conduct with a minor and one count of conspiracy to sexual conduct with a minor.

children."¹³ Willie Jessop responded to the report with the claim that it was just a “sensational bid” to make the sect look bad. The numbers, though, are in all likelihood an undercount, because girls were instructed to lie about their ages and the sect does not file birth certificates, making it impossible to verify exact age.

The ultra-Orthodox community has enforced the scandal rule vigilantly and successfully until very recently. Now, there is an ongoing debate among rabbis regarding the appropriateness of telling the authorities about child sex abuse, with some adhering to the scandal rule while others are putting together a proposal that would send the information through inside channels and then to the authorities, an approach that the RCC crafted at its Dallas meeting following the *Boston Globe*'s revelations. Suffice it to say that the scandal rule has not been removed from the culture of the RCC, with Cardinal George of Chicago and Archbishop Timothy Dolan of Milwaukee (now New York) most recently covering up information about abusers.

Two contemporary developments in the field of religious liberty threaten to intensify the negative externalities generated by the scandal rule. They have been attractive to religious entities and extremely troubling to children's advocates and those who work to protect the vulnerable from religious entities. First is the notion of religious “autonomy,” a benign enough label papering over peril for children and disabled adults. Second is the movement to enact laws that protect religious exercise by imposing strict scrutiny across the board, like RFRA, RLUIPA, and the state Rfras.

II. The Theory of Religious Autonomy (for Institutions)

¹³ Robert T. Garrett, *Child Protective Services says 12 girls in polygamous sect abused*, Dallas Morning News (Dec. 24, 2008).

The notion of “autonomy” from the law is couched in libertarian terms, but creates the opportunity for licentiousness of the people or institutions, which the founding generation rightly feared. Although there are various iterations of it, Douglas Laycock describes the principle as follows: “[F]rom the view that religious liberty consists of minimizing governmental influence and maximizing individual choice, government best protects religious liberty in the usual case by exempting religious practices from regulation.”¹⁴

With the scandal rule in place, there is no need for an autonomy rule – if the information regarding bad behavior never goes beyond the elite clergy and isolated clusters of members, the law cannot be enforced and need not be avoided in the courts or the public. That means that the autonomy theory, if it were to become law, would operate as a substitute for the disabled scandal rule; if the secrets cannot be kept and, therefore, the law will be brought to bear, legal autonomy would be needed to avoid accountability, legal punishment and penalties.

The primary problem with autonomy in general is that it often incorporates unaccountability. The law is not only a burden on relevant conduct but also an impetus to act in certain ways. For example, look at the experiences in the states regarding child abuse reporting. When reporting requirements started to appear, either it did not occur to legislators that they would need to impose such a requirement on clergy and religious institutions or religious entities requested exemptions and legislators knew too little to

¹⁴ Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 200 (2004).

challenge them.¹⁵ When religious entities operate with the scandal rule in place, lawmakers are disabled from protecting the vulnerable due to lack of knowledge. It should not be surprising that once the “scandal” broke in 2002, states with clergy exemptions started to change their statutes to include reporting for clergy.¹⁶

The Supreme Court has never adopted the “autonomy” theory in the sense that some today advance it.¹⁷ At most, it has forbidden courts from interpreting religious doctrine or making ecclesiastical choices.¹⁸

This is an odd cultural environment, with the burgeoning information about abuse, within which to push the autonomy theory. Finally, the long-hidden abuse in multiple religious communities has come to the public’s attention. On further reflection, though, perhaps the current push for legal autonomy is reactionary.

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¹⁶ See, e.g., Colorado.

¹⁷ Kathleen Brady, *Religious Organizations and Free Exercise: the Surprising Lessons of Smith. Church Autonomy Conference: February 6-7, 2004 - J. Reuben Clark Law School, Brigham Young University: Church Autonomy and the Free Exercise of Religion*, 2004 BYU L. REV. 1633, 1647 (2004) (Thus, the Court seems to reject a broad right of church autonomy while it leaves open the possibility of narrower protections where government regulation interferes with religious belief and practice.). Richard Garnett, *The Freedom of the Church*, 4 J. CATH. SOCIAL THOUGHT 59 (2006).

¹⁸ *Watson v Jones*, 80 U.S. 679, 727 (1871). (In this class of cases we think the rule of action which should guide the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and binding on them, in their application to the case before them.); *Jones v Wolf* U.S. 443 U.S. 595, 609 (1979) (If a state law provides that the identity of a local church is to be determined according to the laws and regulations of the general hierarchical church, then the First Amendment requires that state courts give deference to a determination of that church’s identity by the authoritative ecclesiastical body); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969) (the First Amendment forbids civil courts from awarding church property based on an interpretation, and significance assigned thereto, of church doctrine); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good: Church Autonomy Conference: February 6-7, 2004: J. Reuben Clark Law School, Brigham Young University: Foundations of Church Autonomy*, 2004 BYU L. REV. 1099, 1115 (2004) (There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. But [the Supreme Court] never has suggested that those constraints similarly apply outside the context of intraorganizational disputes).

It is evident that the RCC bishops yearn to return to the era when the scandal rule held significant sway.¹⁹

III. RFRA, RLUIPA, and State Rfras

Like “autonomy,” the RFRA strict scrutiny formula looks most appropriate when untethered to unpleasant facts. When passed, members of Congress had good intentions but too little information, in part because of the success of the scandal rule across religious denominations. From 1990-93, when RFRA was being formulated and debated, there were inklings of a pattern of abuse within the RCC, but there was no widespread or public knowledge of the complicity of bishops and the Vatican. The last question members of Congress would have asked is whether RFRA would impact negatively on children. That is not just a result of the general taboo against talking negatively about religion (a most potent taboo for politicians seeking voting blocs), but also the success of the scandal rule, which secured the facts in “secret archives,” to which only bishops were admitted, and far from collective consciousness.

I do not want to overexaggerate the success of the scandal rule. When the issue is abuse, keeping a tight lid on information has been increasingly difficult as the legal status of children and abuse victims in general has improved. State agencies charged with children’s welfare were aware of children being hurt in religious environments before

¹⁹ “We, I thought maybe when the Report to the People of God came out, they, somebody might raise some questions, because we admitted everything in there. Never, never happened. And all the years since, we reached a settlement with the plaintiffs, and that's all behind us, so exactly what's motivating this, I think only the U.S. Attorney, Mr. O'Brien, can tell us.” Interview by Dick Helton & Vickey Moore with Cardinal Roger Mahoney KNX 1070 radio (Jan. 29, 2009), *available at* http://www.bishop-accountability.org/news5/2009_01_29_Mahony_CardinalResponds.htm (Remarks of Cardinal Mahoney)

2002, to be sure, and they strongly opposed RFRA once they understood that it would impact their efforts to save children. One of the most serious problems with RFRA was its enormous scope and the impossibility for those whose interests would be harmed to comprehend its impact when it was being enacted. The verbiage surrounding its passage was all about “religious liberty.” Indeed, there was an agreement among religious groups that they would not discuss the particular policy reasons they sought under RFRA, because it would lead to too much in-fighting. For example, the Christian Legal Society was most interested in RFRA because it wanted to create opportunities for evangelical Christians and others to refuse to rent apartments to homosexuals or unmarried couples, a principle that the progressive mainstream Protestants could not have supported. So everybody spoke solely about the virtue of religious liberty and overruling the Supreme Court’s decision in *Employment Div. v. Smith* without any really serious discussion about what practices the religious groups hoped to be able to engage in that were at risk if they did not have the benefit of strict scrutiny. In other words, there was a secrecy agreement. Abstraction and political rhetoric were the order of the day, not facts.

In operation, RFRA did affect children’s issues, leading children’s advocates to oppose re-enactment of RFRA after it was held unconstitutional in *Boerne v. Flores*.²⁰ They were one of the main reasons (along with the cities and municipalities) that the Religious Liberty Protection Act (RLPA) was never passed,²¹ which illustrates that once the facts are brought to the attention of legislators, they are capable of denying demands by religious entities. But in the absence of facts, the balance almost always tips in favor of the religious lobbyists.

²⁰ 521 U.S. 507 (1997).

²¹ See generally Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311 (2003).

Conclusion

The scandal rule creates an environment within religious organizations that is propitious for those who would abuse children and disabled adults. But it also has external effects that make it much more difficult for those in civil society to protect the vulnerable. When discussing the merits of autonomy or high protection of religious liberty, the scandal rule needs to be one of the foci for debate. Without acknowledging its powerful presence and operation, it is far too easy to permit religious entities to operate in a sphere that perpetuates suffering.