Roger Williams University Law Review

Volume 10 | Issue 1 Article 2

Fall 2004

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> *If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.*
>
> Justice O'Connor[1]

INTRODUCTION

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."*[2]

It is, at least at this juncture, a well settled principle of Free Exercise jurisprudence that, while the freedom of religious belief

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1. Employment Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring).

2. U.S. CONST. amend. I.

is absolute, the freedom to follow the dictates of conscience into the realm of conduct may be sharply circumscribed.[3] The origins of this idea date back to *Reynolds v. United States*,[4] in which the Court afforded no constitutional protection for religiously inspired action in contravention of duly enacted polygamy laws.[5] To permit judicial meddling with the governmental power to shape and order human behavior, the *Reynolds* Court reasoned, would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[6] *Sherbert v. Verner*[7] and its progeny[8] theoretically undermined the *Reynolds* philosophy by erecting a strict scrutiny regime for religious conduct incidentally burdened by regulations of general applicability.[9] However, the stark pattern of unsuccessful free exercise claims advanced outside the narrow unemployment compensation context is a testament to the Court's undeniably diluted application of heightened scrutiny and its duplicitous adher-

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3. *See Smith*, 494 U.S. at 879. The *Smith* Court stated:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

Id. (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594-595 (1940)); Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles . . . ."); Braunfeld v. Brown, 366 U.S. 599, 603 (1960) ("[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."); Reynolds v. United States, 98 U.S. 145, 164 (1878) ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive or good order.").

4. 98 U.S. 145 (1878).

5. *Id.* at 165-66.

6. *Id.* at 167.

7. 374 U.S. 398 (1963).

8. *E.g.*, Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); United States v. Lee, 455 U.S. 252 (1982); Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972).

9. *Yoder*, 406 U.S. at 406-07 (demanding a showing of a "compelling state interest" and a lack of "alternative forms of regulation" in order to justify "substantial infringement of religious liberties").

ence to the belief/conduct distinction of *Reynolds*.[10]

Employment Division v. Smith,[11] therefore, is probably rightly regarded as merely a formal recognition of the Court's time-honored abhorrence of constitutionally protected "lawlessness" – of the religious citizen becoming, in a sense, her own lawgiver due to some religious tenet or sacramental rite. To assuage this fear, the Court in *Smith* explicitly abandoned the strict scrutiny test, opting instead for a rational basis test for all facially neutral and generally applicable laws.[12] In the immediate post-*Smith* era, there was much lamentation over the draconian implications of a rule relegating the Free Exercise Clause to the function of policing only those laws rife with religious animus.[13] But now that the tide of criticism against *Smith* has subsided somewhat, many commentators have directed their attention to the protective nuances of *Smith*, particularly the nondiscrimination idea implicit in the neutrality and general applicability requirements.[14] *Smith* has been characterized largely as safeguarding a right against disparate treatment: when lawmakers decide to carve out *secular* exceptions in order to alleviate a secular burden of some sort, *Smith* may provide a window or trigger to strict scrutiny for claimants seeking a corresponding *religious* exception.[15] Accordingly, *Smith* enforces a basic rule couched in the idiom of equal protection: The

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10. Of the plethora of free exercise claims brought, the Court has recognized only one. *See Yoder*, 406 U.S. at 234 (1972) (invalidating compulsory school-attendance policy as applied to Amish parents objecting on religious grounds to send their children to school).

11. 494 U.S. 872 (1990).

12. *Id.* at 878-79. The Court explained:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate . . . . Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'

Id. (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

13. *Infra* Part II.

14. *Infra* Part I.

15. *See* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 638 (2003).

law must treat similar religious and secular conduct equally in order to pass constitutional muster.

Smith left some major questions unanswered as to the meaning and scope of the neutrality and general applicability requirements, and *Church of the Lukumi Babalu Aye v. City of Hialeah*,[16] handed down three years after *Smith*, offered little in the way of elucidation. *Lukumi* stands for the general proposition that a law burdening *only* religious conduct is neither neutral nor of general application.[17] However, *Lukumi* merely reaffirmed the intuitively obvious: that *specifically* applicable laws are not *generally* applicable. The Court in *Smith* essentially said as much when it opined that a prohibition on "bowing down before a golden calf" would "doubtless be unconstitutional."[18] The more fruitful inquiry, however, is whether a law applicable to a broad class of secular and religious entities with only a single exemption for a particular form of non-religious conduct would violate the rule of *Smith*. Until the Court confronts a more difficult fact-pattern than that presented in *Lukumi* – one involving a generally, though not universally, applicable law – the precise contours of the Free Exercise Clause will likely remain indiscernible.

Certain state mandatory reporting laws on child abuse and neglect provide a useful backdrop against which one might explore the reach of the *Smith/Lukumi* regime.[19] These laws are variegated as to who must report, what information must be reported, and in what manner the reports must be made. All fifty states currently have clergy-communicant privilege statutes that have been (1) completely preserved, (2) partially suspended or (3) wholly suspended for purposes of either (a) the reporting duty or (b) the admissibility of evidence in proceedings initiated pursuant to their respective reporting laws, or (c) both the reporting duty and the admissibility of evidence.[20] A majority of jurisdictions,

16. 508 U.S. 520 (1993).

17. *See id.* at 543 ("The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens *only* on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.") (emphasis added).

18. 494 U.S. at 877-78.

19. For a brief discussion on this topic, see Andrew Beerworth, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 T. JEFFERSON L. REV. 333, 380, 383 (2004).

20. *Infra* Part IV.

particularly in the wake of the Catholic Church abuse scandal, have imposed a reporting duty on clergy members in addition to a litany of secular agents, such as social workers, physicians, psychiatrists, firefighters and child care providers. Many of these states have expressly left the clergy-communicant privilege intact while imposing stringent reporting duties on a host of secular entities. Several of them, however, have destroyed the clergy-communicant privilege while simultaneously preserving the attorney-client privilege. This article examines the constitutional implications of reporting statutes that fall into this latter category.

Mandatory reporting schemes have been hotly debated in contexts other than free exercise. Issues related to the efficacy of mandatory reporting laws have been amply discussed elsewhere,[21] and are beyond the scope of this article. Instead, this article attempts to analyze the constitutionality of certain reporting laws utilizing the neutrality and general applicability requirements that steer current free exercise doctrine. The unique design of reporting laws that treat spiritual and legal counselors differently furnishes an optimal crucible for measuring the sensitivity of the nondiscrimination principle to unjustifiable disparities in treatment. The Court has left several tell-tale signs in the post-*Smith* era that the Free Exercise Clause has been whittled down to protect against only those laws abounding with animus, and not necessarily against those laws that contain more subtle prejudices, or more finely drawn devaluations of the reasons for engaging in religious conduct.[22] All things considered, the nondiscrimination rule appears extremely limited; thus, there may be renewed cause to believe the rule of *Smith* should be seriously reevaluated. Or at least that is the burden of this article.

This article consists of five sections. Section I examines the strict scrutiny exceptions to the *Smith* rule of rational basis review for generally applicable laws that incidentally burden certain forms of religiously motivated conduct. Furthermore, Section I examines the philosophical bases of the majority opinion in *Smith*

21. *See generally* Victor I. Vieth, *Passover in Minnesota: Mandatory Reporting and the Unequal Protection of Abused Children*, 24 WM. MITCHELL L. REV. 131 (1998); Steven J. Singley, Comment, *Failure to Report Suspected Child Abuse: Civil Liability of Mandatory Reporters*, 19 J. JUV. L. 236 (1998).

22. *Infra* Part V.

from the standpoint of its principal author, Justice Scalia. Section II of this article discusses the ostensible meaning of the neutrality and general applicability requirements in *Smith* and *Lukumi*. Section III examines two Third Circuit decisions, *Fraternal Order of Police v. Newark*[23] and *Tenafly Eruv Association, Inc. v. Borough of Tenafly*,[24] that provide credible bases for extending the non-persecution principle well beyond the facts of *Lukumi*. Section IV provides an overview of mandatory reporting laws at the state-level, compares the attorney-client and clergy-communicant privileges, and proposes a cogent methodology for assessing the constitutionality of mandatory reporting laws consistent with current free exercise doctrine. Section V analyzes the impact of the newly minted *Locke v. Davey*[25] on the Court's free exercise doctrine, a case that could likely result in even greater governmental burdens upon religiously motivated conduct. Finally, the conclusion of this article argues that a free exercise challenge to the various mandatory reporting laws that abrogate the clergy-communicant privilege while preserving the attorney-client privilege may prompt the Court to reexamine, or at least qualify, the rational basis test established in *Smith*.

I. *SMITH* AND THE RESIDUAL EXCEPTIONS TO RATIONAL BASIS REVIEW

Smith arose from the denial of unemployment benefits to members of the Native American Church for engaging in the sacramental ingestion of peyote in violation of an employment policy and Oregon's "controlled substance" prohibition.[26] The religious claimants sought an exemption under the Oregon law based on the *Sherbert* standard whereby only a "compelling state interest"[27] and a lack of "alternative forms of regulation"[28] could justify "substantial infringement"[29] on religious exercise. Because illegal traffic in peyote was virtually nonexistent,[30] the State's health and safety reasons for denying a narrow exemption for its sacramental

23. 170 F.3d 359 (3d Cir. 1999).
24. 309 F.3d 144 (3d Cir. 2002).
25. 124 S. Ct. 1307 (2004).
26. *Smith*, 494 U.S. at 874.
27. Sherbert v. Verner, 374 U.S. 398, 406 (1963).
28. *Id.* at 407.
29. *Id.*
30. *See Smith*, 494 U.S. at 916 (Blackmun, J., dissenting) ("There is . . . practically no illegal traffic in peyote.").

use could scarcely have been deemed "compelling."

But Justice Scalia, authoring the majority opinion in *Smith*, dodged heightened scrutiny altogether and altered the doctrinal landscape: "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[31] The Court thereby refused "to breathe into Sherbert some life beyond the unemployment compensation field."[32] In addition to claims arising in unemployment compensation systems of "individualized exemptions" that utilize a "good cause" standard for eligibility,[33] strict scrutiny analysis after Smith applies only to "governmental regulation of religious beliefs as such,"[34] free exercise challenges involving a "hybrid-right,"[35] laws requiring the "compelled expression"[36]of certain beliefs, and to laws prohibiting religiously motivated behavior that fail the neutrality/general applicability test.[37]

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31. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)).

32. *Id.* at 884.

33. *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

34. *Id.* at 877 (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

35. *Id.* at 881.

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

Id.

36. *Id.* ("Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion.").

37. *See id.* at 878-80. *Smith* has also been interpreted as preserving "church autonomy" or institutional decisions involving religious property and personnel. *See id.*at 877 ("The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma."); *see also,* Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 576 (1999). Lupu explained:

> [N]o court in the last decade has held [*Smith*] to have undermined the pre-existing constitutional principles of church autonomy in matters of property or personnel . . . . [D]espite Title VII's generally applicable ban on sex discrimination in employment, *Smith* will not require the Catholic Church or

A. *The Hybrid-Right Exception*

Smith supposedly carved out a strict scrutiny niche for "hybrid-right" situations in which a free exercise claim is bound to a constitutionally protected "communicative activity or parental right."[38] Scalia, however, made no attempt in *Smith* to explain the logic of a rule conditioning religious liberty on the fortuitous collision of free exercise and another colorable constitutional claim. In the post-*Smith* era, the freewheeling hybrid-right exception has left the lower federal courts hopelessly perplexed, and most of them have given the exception little or no credence.[39] Justice Souter has identified the ineluctable flaw of the hybrid-right exception:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . . But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[40]

Scalia concluded in *Smith* that the communal ingestion of peyote is not sufficiently communicative or expressive to trigger the hybrid exception.[41] Conversely, religiously impelled anti-government epithets would be entitled to the utmost constitutional protection quite apart from any free exercise dimension. In theory, then, the hybrid-right exception may cover a hitherto uncharted middle ground between the donning of a yarmulke or the

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> Orthodox Jewish congregations to allow women into the clergy.

Id.

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

39. *See* Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 138 (2000) ("Only a few . . . decisions have earnestly tried to make sense of the vague dicta in *Smith* about hybrid situations. . . . ").

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

41. *Smith*, 494 U.S. at 882 ("The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.").

ingestion of peyote, and outright religious speech.[42] In *Wisconsin v. Yoder*,[43] one of the decisions that Scalia distinguished on the "hybrid-right" basis,[44] the Court recognized that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*."[45] Thus, the hybrid-exception is perhaps rightly regarded as an insincere and inartful attempt to distinguish undesirable precedent.[46] Practically speaking, few courts and commentators consider the hybrid-right exception to be a viable route for proponents of religious liberty.[47] As such, it is a remnant of *Smith* bereft of any real vigor.

B. *The "Hollow Freedom" of Religious Belief*

The Court has consistently proclaimed the fundamentality of religious belief, affording it the utmost protection.[48] Fortunately, this absolutist ethos emerged from *Smith* completely unscathed.[49] Perhaps the most enduring conceptual nexus between the Religions Clauses has been the "inviolable citadel of the individual heart and mind,"[50] which is besieged both when the machinery of government is used to impose a religious orthodoxy on its citizens (such as laws favoring theistic prayer),[51] and when the government discriminates on the basis of religious viewpoint.[52] Religious

42. *See* Beerworth, *supra* note 19, at 372.
43. 406 U.S. 205 (1972).
44. *Smith*, 494 U.S. at 881.
45. *Yoder*, 406 U.S. at 220 (emphasis added).
46. Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 267 (1993).
47. *See* Timothy J. Santoli, Note, *A Decade After* Employment Division v. Smith: *Examining How Courts are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649, 672 (2001).
48. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such."); Braunfeld v. Brown, 366 U.S. 599, 603 (1960) ("[T]he freedom to hold religious beliefs and opinions is absolute.").
49. *See Smith*, 494 U.S. at 877 ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.").
50. Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 226 (1963).
51. *See* Lee v. Weisman, 505 U.S. 577, 592 (1992).
52. *See Smith*, 494 U.S. at 877 ("It would be true . . . that a State would

conscience, unlike religious *conduct*, is constitutionally impervious to governmental coercion.

The revered status of religious conscience, however, has often been of little avail from the standpoint of the believer. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[53] the Court upheld the Forest Service's road-building and timber-harvesting project on government land that had been a sacred site of the centuries-old Yurok, Tolowa and Karok religions.[54] The Court acknowledged the fact that road construction over the hallowed parcels posed an "extremely grave" threat to Native American religious practices,[55] but consolingly reminded the religious claimants of their inviolable freedom to believe.[56] As Justice Brennan so eloquently wrote in his *Lyng* dissent: "that freedom amounts to nothing more than the right to believe that their religion will be destroyed."[57] So long as the body is not at liberty to obey the spiritual dictates of the mind, the oft-touted liberty of conscience is what Brennan termed a "hollow freedom"[58] for many religious citizens.

Under *Smith*, religiously motivated conduct is not entitled to heightened scrutiny unless the claimant can show that its legal proscription is not neutral or not generally applicable.[59] This belief/conduct distinction is akin to the speech/conduct distinction in free speech jurisprudence and weakens the Free Exercise Clause in two major respects. First, such a distinction flies directly in the face of the plain meaning[60] and original understanding[61] of the

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be 'prohibiting the free exercise of [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.").

53. 485 U.S. 439 (1988).

54. *Id.* at 446.

55. *Id.* at 451.

56. *Id.* at 453.

57. *Id.* at 477 (Brennan, J. dissenting).

58. *Id.* ("The safeguarding of such a *hollow freedom* . . . fails utterly to accord with the dictates of the First Amendment."); *see* Beerworth, *supra* note 19, at 370.

59. *Smith*, 494 U.S.at 879.

60. *See id.*, 494 U.S. at 893 (O'Connor J., concurring) ("Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause.").

61. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S 520, 575-576. In his concurrence, Justice Souter stated:

> There appears to be a strong argument from the Clause's

Free Exercise Clause. On a purely textual plane, the Clause encompasses religious belief *and* conduct, thereby requiring (at a minimum) a rigorous balancing test presumptively protecting religiously impelled action, irrespective of a law's character.[62] Second, the belief/conduct dichotomy relegates the Clause to the function of protecting religion in its *expressive* manifestations, thereby placing religion under the rubric of free speech. Equating religion with speech in this manner has led to a kind of doctrinal conflation whereby free exercise has been eclipsed by the distinctly free speech hallmarks of viewpoint neutrality[63] and expressive association.[64] This doctrinal conflation (or confusion), though protective of religious belief, "undermines our commitment to the idea that there is something unique and distinctive about religion in life and in constitutional law."[65]

C. *Neutrality and General Applicability: Free Exercise as Equal Protection*

All laws that fail the neutrality or general applicability requirements "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[66]

> development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State.

Id. (Souter, J., concurring). *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (arguing that the Free Exercise Clause was originally understood as protecting action as well as belief, namely through mandatory exemptions from generally applicable laws); Beerworth, *supra* note 19, at 373.

62. *See Smith*, 494 U.S. at 877.

63. *See* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 845-46 (1995) (holding that exclusion of a student religious magazine from university program covering printing costs of similar nonreligious publications constituted viewpoint discrimination under the Free Speech Clause).

64. *See* Widmar v. Vincent, 454 U.S. 263, 273-77 (1981) (holding unconstitutional, on an expressive association rationale, a university policy excluding student religious groups from an "open forum" on campus).

65. Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 184 (2002).

66. *Lukumi*, 508 U.S. at 531-532.

The Court in *Lukumi* recognized that general applicability – the animating theme of free exercise doctrine – leads inexorably to a distinctly "equal protection mode of analysis."[67] Indeed, the Court's opinion in *Lukumi* is replete with equal protection allusions, particularly as it grapples with problems of overbreadth[68] and underinclusion.[69] The Free Exercise Clause is cast as a bulwark against "unequal treatment"[70] and an antidote for the "evil" of a "prohibition that society is prepared to impose upon [a religious minority] but not upon itself."[71]

Justice Scalia, the creator of the general applicability rule as applied within the free exercise context,[72] offered two illustrations of the protective dynamic of free exercise doctrine after its permutation in *Smith*: the Free Exercise Clause, he conceded, would compel invalidation of a ban on the "casting of 'statues that are to be used for worship purposes,'"[73] and a prohibition on prostrating oneself before a golden calf.[74] These hypothetical enactments, however, are patently violative of long-established free exercise and equal protection principles.[75] The *Carolene Products* philosophy contemplated application of "a more searching judicial inquiry" for "statutes directed at particular *religious*, or national, or racial minorities."[76] The Warren Court, in particular, realized the necessity of utilizing a heightened scrutiny standard when the Madisonian model of pluralistic bargaining collapsed under com-

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67. *Id.* at 540.

68. *See id.* at 538 ("We also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends.").

69. *See id.* at 543 (finding the ordinances "underinclusive" for the ends of public health and preventing cruelty to animals because "[t]hey fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does.").

70. *Id.* at 542 (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in judgment)).

71. *Lukumi*, 508 U.S. at 545 (quoting Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in judgment)).

72. For Scalia's discussion on the general applicability rule, see *Smith*, 494 U.S. 878-82.

73. *Smith*, 494 U.S. at 877-878.

74. *See id.* at 878.

75. *See* McDaniel v. Paty, 435 U.S. 618, 626 (1978); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953).

76. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (citations omitted) (emphasis added).

mon prejudices against certain racial, ethnic and religious groups.[77] Thus, religion was treated as a suspect class for Fourteenth Amendment purposes well before *Smith*, quite apart from its explicit protection within the First Amendment.

Lukumi places religion-specific classifications on par with race-specific classifications – both of which are to be strictly scrutinized using equal protection analysis[78] – and the Free Exercise Clause becomes something of a constitutional tautology.[79] Under the race model, disparate treatment challenges to facially neutral laws must show a "racially discriminatory intent or purpose."[80] But just as "disproportionate impact . . . is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution,"[81] so it is that the *Lukumi* model for religion requires proof of a discriminatory intent or purpose.[82] Both models permit inferences of a discriminatory purpose "from the totality of the relevant facts,"[83] or "from both direct and circumstantial evidence."[84] In the end, *Smith* and *Lukumi* do not *add* any protections to the Free Exercise Clause; they simply allow judicial enforcement of a preexisting bare essential, namely the "fundamental nonpersecution principle."[85] And, it seems, the Equal Protection Clause is the preferable means by which to enforce it. Consequently, the Free Exercise Clause has become a platitudinous provision devoid of any independent potency.

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77. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 79-81 (1980); Beerworth, *supra* note 19, at 359.

78. The Court has held that even benign religion and race-specific classifications violate principles of formal neutrality and equality. *See* Bd. of Ed. v. Grumet, 512 U.S. 687, 690 (1994) (invalidating a pro-religious gerrymander delegating school district authority to a sect of Hasidic Jews under the Establishment Clause); *cf.* Adarand Constr., Inc. v. Pena, 515 U.S. 200 (1995) (holding, on equal protection grounds, that all governmental race based "affirmative action" policies must survive "strict scrutiny").

79. *See* Beerworth, *supra* note 19, at 377.

80. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

81. Washington v. Davis, 426 U.S. 229, 242 (1976).

82. *See Lukumi*, 508 U.S. at 540.

83. *Davis*, 426 U.S. at 242.

84. *Lukumi*, 508 U.S. at 540.

85. *Id.* at 523.

D. Smith *and the Scalian Conception of Judicial Discretion*

Smith allows democratic majorities to prohibit religious practices to their liking so long as the prohibition is generally applicable.[86] The religious citizen has been lost in the vicissitudes of judicial process because there is no qualitative difference to her between a persecutory law and a generally applicable one. Under either scheme, she is forced to render to Caesar that which most emphatically belongs to God. As Justice O'Connor reminded the Court in *Smith*, "[a] person who is barred from engaging in religiously motivated conduct . . . is barred from exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons."[87]

Smith, however, is justifiable on some levels. Scalia voiced a valid concern in *Smith* that a continued weak application of the "compelling interest" test in free exercise cases could spill over into other contexts, such as for content-based restrictions on speech or race-specific classifications, producing a kind of cross-doctrinal dilution.[88] Scalia also expressed a profound distaste for discretionary balancing tests: "[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[89] What Scalia might have found so "horrible" was the prospect of judges masking their predilections and prejudices toward certain religions (or religion generally) in easily manipulated and nebulous balancing tests.[90] The discretion to judge the relative weight of competing interests (religious and governmental) is also the discretion to dis-

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86. *Smith*, 494 U.S. at 890. The Court stated:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id.

87. *Id.* at 893 (O'Connor, J., concurring).

88. *See id.* at 888 ("[W]atering down [the compelling state interest test] would subvert its rigor in the other fields where it is applied.").

89. *Id.* at 889 n.5.

90. *See* Beerworth, *supra* note 19, at 377-78.

criminate, especially against religious practices that offend prevailing social mores.

The specter of judicially imposed value judgments, along with the oft-repeated fear of promoting "a system in which each conscience is a law unto itself,"[91] led Scalia to the solution of "leaving accommodation to the political process."[92] The *Smith* majority's preference for legislative accommodation of religious liberty meshes nicely with Scalia's broader judicial philosophy. Scalia has forcefully advocated the "democratic government" solution in other areas in which certain "liberty interests" are at stake. For example, he has sharply criticized the "undue burden" standard used in the Court's abortion jurisprudence as an "amorphous"[93] and "inherently standardless" inquiry that "invites the . . . judge to give effect to his personal preferences about abortion."[94] As with religion, he has proposed a "state-by-state resolution"[95] of the abortion matter because the "permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[96]

Advancing a similar argument against a constitutionally recognized liberty interest to refuse life-sustaining medical treatment, Scalia has expounded a theory of democratic government and of the role of the federal judiciary:

> *Our salvation is the Equal Protection Clause*, which requires the *democratic majority* to accept for themselves and their loved ones what they impose on you and me. This Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself.[97]

Smith effectively incorporates this Scalian conception of judi-

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91. *Id.* at 890.
92. *Id.*
93. Planned Parenthood v. Casey, 505 U.S. 833, 985 (1992) (Scalia, J., dissenting).
94. *Id.* at 992.
95. *Id.* at 995.
96. *Id.* at 979.
97. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 300-01 (1990) (Scalia, J., concurring) (emphasis added).

cial discretion by giving the content of the Free Exercise Clause to the "democratic majority," subject only to the strictures of the Equal Protection Clause. Scalia concedes that this concept tolerates some modicum of "irrationality and oppression" as an "unavoidable consequence of democratic government."[98] In the context of religion, "those religious practices that are not widely engaged in" are placed "at a relative disadvantage"[99] because religious minorities lack the political capital necessary to procure exemptions from generally applicable laws. As noted above, Scalia advances a very convincing argument for judicial restraint in the context of reproductive rights and the right to die, both of which have arisen under the broader right to privacy rubric. He asserts that any detached observer armed with the text or original understanding of the Due Process Clause is forced to conclude that the Constitution is inscrutably silent even with regard to the threshold question of whether there is some "right to privacy" in the first place.[100] Of course, this argument cannot be tenably advanced against the right to practice one's religion free from governmental intrusion, a right anchored more cognizably in the text and history of the Constitution.

It is one thing to decry the dubious exegetical vacuum that is substantive due process analysis, but it is quite another to ignore rights explicitly rooted in the constitutional text.[101] Of course, religious freedom falls within this latter category. The *Smith* majority glossed over this important distinction and granted the majoritarian process considerable latitude in an area in which the Constitution quite unequivocally maintains that the free exercise of religion is to be prohibited by "*no* law." On the battleground of *Smith*, Scalia's textualist creed clashed irreconcilably with his "restraintist" convictions, and the impulse to cabin judicial discretion prevailed over his usual preference for textual fidelity.

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98. *Smith*, 494 U.S. at 890.

99. *Id.*

100. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 39 (1997).

101. *See* Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 136 (1992).

II. DEFINING THE CONCEPTS OF NEUTRALITY AND GENERAL APPLICABILITY

The Court in *Smith* gave little meaningful content to the concepts of neutrality and general applicability. But *Smith* is illuminating in at least two respects. First, the so-called "generally applicable" Oregon drug prohibition itself contained an exception for substances prescribed by a medical practitioner.[102] The fact that the Oregon law was not free from exceptions, considered alongside the fact that peyote had no medicinal value, raises the question of just how closely related a nonreligious exception must be to a prohibition on religious exercise in order to fail the general applicability test. The *Smith* Court made no effort to determine whether the sacramental use of peyote undermined health and safety concerns any more or less than the medicinal use of other hallucinogenic drugs.[103] Would an exception premised on the medicinal usefulness of peyote have furnished such a basis? More questions spring from this seemingly inessential feature of *Smith*. For instance, can a single nonreligious exception ever fail the *Smith* test, or must there be several exceptions cut into a law for it to shed its generally applicable character? Or is the thrust of *Smith* that a law becomes constitutionally suspect upon a finding that a nonreligious exemption actually thwarts the purported governmental interests in regulating similar, but religiously motivated, conduct?

Second, the Court in *Smith* seemed to relate the necessity of heightened scrutiny to the *type* of regulatory scheme at issue. Among the Court's reasons for confining the compelling interest standard to the unemployment compensation context was that the "good cause" standard for determining compensation benefits eligibility "'created a mechanism for individualized exemptions.'"[104] In such a context-dependent and potentially value-laden exemption system, a state "may not refuse to extend that system to cases

102. *See Smith*, 494 U.S. at 874.

103. *Id.* The Oregon statute under review in *Smith* defined a "controlled substance" as "a drug classified in Schedules I through V of the Federal Controlled Substances Act." ORE. REV. STAT. § 475.005(6) (1987) (citing 21 U.S.C. §§ 811-812). However, the statute provided a general exemption for substances "prescribed by a medical practitioner." *Id.* § 475.992(4).

104. *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

of 'religious hardship' without compelling reason."[105] The Court couched the unemployment compensation cases in terms of general applicability[106] but failed to indicate whether individualized exemption systems are illustrative or exhaustive of the types of laws that are not generally applicable under *Smith*. It would not be extravagant to maintain that the general applicability requirement might be so limited as to insulate *categorical* exemptions from ready constitutional challenges.[107] Indeed, at least two federal circuit courts have concluded that the non-discrimination principle of *Smith* does not apply to regulatory schemes containing "objectively-defined categories" of selection. [108]

A. *The "Easy" Case of* Lukumi

Lukumi involved four city ordinances drafted for the specific purpose of prohibiting sacrificial animal slaughter, a central ritual of the Santeria religion.[109] In a concurring opinion, Justice Blackmun (in conjunction with Justice O'Connor) pointed out that the *Lukumi* case was "an easy one to decide."[110] As the Court concluded, the "ordinances by their own terms target [Santeria] religious exercise"[111] and "it is *only* conduct motivated by religious conviction that bears the weight of the governmental restrictions."[112] In other words, *Lukumi* involved a form of outright persecution, not merely unconscious prejudice.

The Court stated that the "minimum requirement of neutrality is that a law not discriminate on its face."[113] Although the

105. *Id.*
106. *See id.*
107. Am. Friends Serv. Comm. v. Thornburgh, 951 F.2d 957, 961 (9th Cir. 1991).
108. *Id.*; Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 701 (10th Cir. 1998) (holding that *Sherbert* is inapplicable in the absence of "a system of *individualized* exceptions that give rise to the application of a subjective test.").
109. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 526-28 (1993).
110. *Id.* at 580 (Blackmun, J., concurring) ("It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such. Because respondent here does single out religion in this way, the present case is *an easy one to decide.*") (emphasis added).
111. *Id.* at 542.
112. *Id.* at 547 (emphasis added).
113. *Id.* at 533.

Court noted the "strong religious connotations" of certain language referring to "ritual" and "sacrifice," textual analysis alone was a thin reed upon which to build a case for a religion-specific classification.[114] Declaring that "the effect of a law in its real operation is strong evidence of its object,"[115] the Court plunged into the circumstances surrounding the enactments and their functional effect to infer invidious motivation.[116] The willingness of the Court in *Lukumi* to go beyond purely textual analysis sheds some light on the meaning of the neutrality requirement: facial discrimination is a *sufficient* but not a *necessary* condition for application of strict scrutiny. Although the Court conflates the twin *Smith* requirements to a considerable degree in *Lukumi*,[117] neutrality seems to entail textual analysis as well as substantive review to ferret out animus, with particular attention directed at the overinclusive attributes of a given classification.[118] Gleaning from the "events preceding their enactment" that "the ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice," the Court deduced that they were "not neutral."[119]

Lukumi suggests the general applicability test is really one of "fit" between legislative means and ends. The Court revealed the discordant relationship between the classifications drawn by the ordinances and their purported objectives:

> [The city] claims that [the ordinances] . . . advance two

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114. *Id.* at 533-34.

115. *Id.* at 535.

116. *Id.* at 534-35 ("The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances.").

117. *See id.* at 531 ("Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.").

118. *See id.* at 542. The Court held:

> [The]ordinances are not neutral because the ordinances by *their own terms* target this religious exercise; the texts of the ordinances were *gerrymandered* with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress *much more* religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense.

Id. (emphasis added).

119. *Id.* at 540.

> interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does.[120]

If the general applicability test is essentially a hunt for underinclusiveness, then strict scrutiny is triggered by secular exceptions that actually frustrate legislative ends in a roughly commensurate or more deleterious manner when compared to religiously inspired conduct that is subject to the law.[121] The ordinances in *Lukumi* exempted secular and kosher slaughter even though such conduct threatened the asserted interests in public health and in the prevention of animal cruelty.[122] Santeria animal sacrifice was analogous in all relevant respects to the exempted forms of animal slaughter; thus, the Court found sufficient evidence of "discriminatory treatment"[123] in the apparent *de*valuation of religious reasons for engaging in animal slaughter (or conversely, in the excessive *over*valuation of secular reasons for doing so). Indeed, the ordinances in *Lukumi* were doubly flawed in terms of fit. They were overinclusive as well in proscribing Santeria slaughter "even when it [did] not threaten the city's interest in the public health."[124]

The substantially overinclusive *and* underinclusive attributes of the ordinances, coupled with the traditional practice of judicial minimalism,[125] allowed the Court to duck the more cumbersome task of fine-tuning the general applicability doctrine: "[W]e need

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120. *Id.* at 543.

121. *See* Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 867 (2001).

122. *Lukumi*, 508 U.S. at 536-37.

123. *Id.* at 537-39.

124. *Id.* at 538-39.

125. *See* Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885).

> [T]he Court . . . is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

Id.

not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights."[126] Thus, there are essentially two free exercise maxims to take from *Lukumi*. The first is that the neutrality test contemplates the use of circumstantial evidence. The second is that "[l]egislators may not devise mechanisms, overt or disguised, designed to *persecute or oppress* a religion or its practices."[127]

In *Lukumi*, the distinction drawn between religious and secular animal slaughter was constitutionally irrelevant, and therefore infirm, because these forms of slaughter posed virtually identical threats to animal cruelty and public health interests.[128] So, perhaps *Lukumi* reveals that the touchstone of the neutrality and general applicability requirements is that a law must not be underinclusive in exempting certain secular conduct that frustrates legislative purposes to a comparable or greater degree than would an exemption for religious conduct.[129] If this is so, the nondiscrimination rule of *Smith* presupposes some dissonance between the exceptions and the proffered legislative goals. The *Lukumi* Court applied strict scrutiny because the myriad nonreligious exceptions produced an anti-religious gerrymander of "*substantial*, not inconsequential," underinclusion.[130] But again, it seemed an "easy case" decided on the narrowest of grounds. However, the *Lukumi* Court did not explain what sorts of underinclusive classifications were "inconsequential," nor did it identify a point at which underinclusion became consequential enough to become constitutionally problematic.

The *Lukumi* Court was somewhat ambivalent as to whether the general applicability requirement extends beyond individualized exemption systems. The *Lukumi* Court remarked concerning one of the ordinances: "because it requires an evaluation of the particular justification for the [animal] killing, this ordinance represents a system of 'individualized governmental assessment of the reasons for the relevant conduct.'"[131] On the other hand, only

126. *Lukumi*, 508 U.S. at 543.
127. *Id.* at 547 (emphasis added).
128. *See id.* at 543-45.
129. *See* Beerworth, *supra* note 19, at 379.
130. *Id.* at 543 (emphasis added).
131. *Id.* at 537 (quoting Employment Div. v. Smith, 494 U.S. 872, 884

one of the four ordinances fit this mold and the Court later stated, "*categories* of selection are of paramount concern when a law has the incidental effect of burdening a religious practice."[132] Because the Court in *Lukumi* relied on categorical exceptions for fishing within the city, for exterminations of mice and rats within the home, for medical science experiments, and for euthanasia of certain animals,[133] the neutrality and general applicability requirements most likely extend to categorical exemption systems as well. Indeed, "[w]holesale secular exceptions make the law even less generally applicable than individualized secular exceptions."[134]

III. THE THIRD CIRCUIT'S INTERPRETATION OF NEUTRALITY AND GENERAL APPLICABILITY

In two recent cases, the Third Circuit Court of Appeals has interpreted the non-persecution principle of *Lukumi* fairly broadly. In *Fraternal Order of Police v. City of Newark*,[135] two Islamic police officers fulfilled a religious obligation to grow their beards[136] and were subsequently reprimanded pursuant to an internal order prohibiting full beards, goatees, and other facial hair growth aside from mustaches and sideburns.[137] The order contained two exceptions: one for undercover officers and another for sufferers of pseudo folliculitis barbae (PFB), a medical condition endemic to African and Arab-Americans with curly facial hair.[138] PFB occurs, if at all, when shaving sharpens stubble that eventually grows back into the skin; abstention from shaving allows facial hair to grow to lengths at which PFB is no longer possible.[139]

The Newark Police Department asserted interests in uniformity, discipline and esprit de corps.[140] The undercover officer excep-

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(1990)).

132. *Id.* at 542 (emphasis added).

133. *Id.* at 543-44.

134. Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATHOLIC LAW. 25, 32 (2000).

135. 170 F.3d 359 (3d Cir. 1999).

136. *Id.* at 360-61 ("The refusal by a Sunni Muslim male who can grow a beard, to wear one is a major sin . . . the penalties will be meted out by Allah.").

137. *See id.* at 360.

138. *See id.*

139. *See* Lund, *supra* note 15, at 647.

140. *See Newark*, 170 F.3d at 366.

tion to the no-beard policy did not threaten these goals because "undercover officers 'obviously are not held out to the public as law enforcement personnel.'"[141] The medical exemption, however, inescapably jeopardized the "uniform appearance" rationale. "[T]he medical exemption raises concern," the Court stated, "because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not."[142] The Department attempted to tie "uniformity of appearance" to the public interest in a "sense of security in having readily identifiable and trusted public servants."[143] The Court summarily rejected this argument, saying that "[u]niformed officers, whether bearded or clean-shaven, should be readily identifiable."[144] But the strength of the stated interests was beside the point because the religious and medical exemptions posed similar threats to the proffered objectives of the order. In other words, the central problem was one of tailoring, not of interest. The secular/religious distinction, because inexplicable in relation to the purpose of the order, appeared to be rooted in a desire "to suppress manifestations of the religious diversity that the First Amendment safeguards."[145] The order's underinclusiveness in favor of secular conduct was therefore sufficient to trigger heightened scrutiny.[146]

Newark is a consistent, albeit broad, interpretation of *Lukumi*. The Court in *Newark* acknowledged the "individualized exemption" rule implicit in *Smith* and *Lukumi*, but noted that the overarching concern in those cases "was the prospect of the government's deciding that secular motivations are more important than religious motivations."[147] The *Newark* Court went on to reason, "this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for in-

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 367.
146. The court applied an intermediate level of scrutiny "since this case arose in the public employment context." *Id.* at 366 n.7.
147. *Id.* at 365.

dividuals with a secular objection but not for individuals with a religious objection."[148] Moreover, the no-beard policy did not solely target religious conduct by exempting all (or even most) secular motivations for shaving. Indeed, the single problematic secular exemption was sufficient to invoke the nondiscrimination principle of *Smith*. Recall the *Lukumi* Court's statement that anti-religious gerrymanders "fall well below the minimum standard" laid out in *Smith*.[149] *Newark* synthesized *Smith* and *Lukumi* in a way that highlighted the thrust of general applicability. In distinguishing the facts in *Newark* from those in *Smith*, the Third Circuit opined that Oregon's medical prescription exception to the drug prohibition did "not necessarily undermine Oregon's interest in curbing the unregulated use of dangerous drugs,"[150] whereas the secular and kosher animal slaughter exceptions in *Lukumi* – like the PFB exception in *Newark* – plainly frustrated the respective regulatory goals.[151]

Newark also illuminates the brittle logic upon which *Smith* rests.[152] For example, the Islamic officers were granted an exemption from the no-beard policy because a medical exemption for the skin condition, PFB, had previously been made.[153] However, the medical exemption would not have existed in the first place had the occurrence of PFB in the city been minimal or nonexistent. That is, the religious claimants could not have prevailed had the climate and demographics of the city in which they were employed not been conducive to the prevalence of PFB.[154] A favorable outcome depended on the fortuitous existence of some significant secular burden that prompted the creation of a secular exemption. Had an identical fact-pattern arisen in Alaska or Wisconsin where PFB is virtually nonexistent, there would have been no secular exemption and, by extension, no victory for religious liberty.[155] The departmental order would have remained generally applicable.

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148. *Id.*
149. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993).
150. *Newark*, 170 F.3d at 366.
151. *See id.*
152. Lund, *supra* note 15, at 649.
153. *Newark*, 170 F.3d at 366.
154. Lund, *supra* note 15, at 647-48.
155. *Id.*at 647-49.

In *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*,[156] the Third Circuit continued to interpret neutrality and general applicability in a relatively expansive manner. *Tenafly* involved a facially neutral town ordinance prohibiting "any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public place, excepting such as may be authorized by this or any other ordinance of the Borough."[157] In practice, however, the town had "tacitly or expressly granted exemptions from the ordinance's unyielding language for various secular and religious – though never *Orthodox Jewish* – purposes."[158] By municipal order, the Orthodox Jewish residents of Tenafly were prohibited from attaching lechis – "thin black strips made of the same plastic material as, and nearly identical to, the coverings on ordinary ground wires"[159] – to town utility poles. According to ancient religious practice, lechis demarcate the boundaries of an eruv, a space within which Sabbath observers may transport objects on Yom Kippur or the Sabbath.[160] Without a well-defined eruv, Orthodox Jews who use strollers, wheelchairs, walkers and canes are unable to leave their homes and attend synagogue.[161]

Reaffirming the *Newark* doctrine that "government officials . . . contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct," the Court invalidated the ordinance.[162]

> From the drab house numbers and lost animal signs to the more obtrusive holiday displays, church directional signs, and orange ribbons . . . the Borough has allowed private citizens to affix various materials to its utility poles. Apart from their religious nature, the *lechis* are comparable to the postings the Borough has left in place. If anything, the *lechis* are less of a problem because they are so unobtrusive; even observant Jews are often unable

156. 309 F.3d 144 (3d Cir. 2002).
157. *Id.* at 151 (quoting TENAFLY, N.J., ORDINANCE 691 art. VIII § 7 (1954)).
158. *Id.* at 167 (emphasis added).
159. *Id.* at 152.
160. *Id.* at 152.
161. *Id.*
162. *Id.* at 165-66.

to distinguish them from ordinary utility wires.[163]

The town contended that the lechis were intended to be permanent fixtures, but the Court determined that at least the "house numbers nailed to utility poles are intended to be permanent."[164] Thus, the various secular and would-be Orthodox Jewish exceptions frustrated the town's interest in monolithic, fixture-free utility poles to *at least* a comparable degree, thereby implicating the nondiscrimination principle. *Tenafly* is perhaps most notable, however, for its holding that "[u]nder *Smith* and *Lukumi* . . . there is no substantial burden requirement when government discriminates against religious conduct,"[165] and concomitantly, that there is no "compulsory" practice requirement. [166] In other words, the Free Exercise Clause applies with equal force to even the slightest burden on even an "optional" religious practice, so long as there is a "sincere desire" to engage in that practice.[167] As to the suspension of the "substantial burden" requirement, *Tenafly* is a particularly ambitious exposition of free exercise doctrine because the vast majority of federal circuit courts have retained the requirement as an indispensable component of the *Smith-Lukumi* methodology.[168]

IV. STATE MANDATORY REPORTING LAWS ON CHILD ABUSE

All fifty States have enacted statutes preserving the clergy-communicant privilege in some form or another. But when news reports surfaced of Catholic clergy having engaged in and presided over the sexual abuse of children for decades, public outrage and strenuous pleas for accountability pervaded the political climate. In the Boston Archdiocese alone, law enforcement officials catalogued 789 victims of abuse by Catholic priests and church workers over the last sixty years, and the actual number of victims is estimated to exceed 1,000.[169] As the anti-clerical clamor intensi-

163. *Id.* at 167.
164. *Id.* at 167-68.
165. *Id.* at 170.
166. *Id.* at 171.
167. *Id.*
168. *See id.* at 170-71 & n.31.
169. Christopher R. Pudelski, Comment, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-*Smith *World*, 98 NW. U.L. REV. 703, 712-13 (2004).

fied, many state legislatures returned to the drawing boards with an eye toward bringing clergy within the scope of their mandatory reporting laws.[170] The jurisdictions that have decided to impose a general reporting duty on clergy have had to further decide whether to extend the duty to confidential communications with parishioners, or to retain the clergy-communicant privilege and thereby avoid a direct conflict between God and Caesar.

Current mandatory reporting laws address this societal problem vis-à-vis clergy in at least three manners. One approach has been to preserve the clergy-communicant privilege in full, either by an explicit privilege-preservation clause,[171] or by omitting clergy members from veritable laundry lists of mandatory reporters with no catchall clause.[172] A second and widely shared strategy has been to include clergy in the laundry list of professionals who have a duty to report.[173] A third approach has been either to omit clergy from a list of reporters and bring them within the purview of the law through inclusion of an "any person" catchall phrase, or to eschew the laundry-list approach altogether for a sweeping reporting requirement applicable to "any person."[174]

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170. *See id.* at 704.

171. *See* ARK. CODE ANN. § 12-12-507 (Michie 2003); FL. STAT. ANN. § 39.204 (West Supp. 2004); IDAHO CODE § 16-1619 (Michie 2001); LA. CHILD. CODE ANN. art. 603 (West 2004); ME. REV. STAT. ANN. tit. 22, § 4011-A (West 2004); MD.CODE ANN., FAM. LAW § 5-705 (2003); MINN. STAT. ANN. § 626.556 (West 2003 & Supp. 2004); MONT. CODE ANN. § 41-3-201 (2003); N.M. STAT. ANN. § 32A-4-3 (Michie 2004); OR. REV. STAT. § 419B.010 (2003); UTAH CODE ANN. § 62A-4a-403 (2000); VT. STAT. ANN. tit. 33 § 4913 (Supp. 2003).

172. *See* ALASKA STAT. § 47.17.020 (Michie 2003); GA. CODE ANN. § 19-7-5 (2003); HAW. REV. STAT. § 350-1.1 (2002); IOWA CODE § 232.69 (2002); KAN. STAT. ANN. § 38-1522 (2002); N.Y. SOC. SERV. LAW § 413 (McKinney 2003); OHIO REV. CODE ANN. § 2151.421 (West 2004); S.D. CODIFIED LAWS § 26-8A-3 (Michie 2003); VA. CODE ANN. § 63.2-1509 (Michie 2002); WASH. REV. CODE § 26-44.030 (West 2004).

173. *See* ARIZ. REV. STAT. § 13-3620 (West 2003); CAL. PENAL CODE § 11165.7 (West 2004); COLO. REV. STAT. § 19-3-304 (2003); CONN. GEN. STAT. ANN. § 17A-101 (West 2004); 325 ILL. COMP. STAT. 5/4 (Supp. 2004); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2003 & Supp. 2004); MICH. COMP. LAWS ANN. § 722.623 (West Supp. 2004); MISS. CODE ANN. § 43-21-353 (1999 & Supp. 2003); MO. ANN. STAT. § 210.115 (West 2004); N.D. CENT. CODE § 50-25.1-03 (1999); 23 PA. CONS. STAT. ANN. § 6311 (West 2001 & Supp. 2004); S.C. CODE ANN. § 20-7-510 (LAW. CO-OP. 2002); TEX. FAM. CODE ANN. § 261.101 (Vernon 2002).

174. *See* DEL. CODE ANN. tit. 16, § 903 (2003); IND. CODE ANN. § 31-33-5-1 (West 1999); KY. REV. STAT. ANN. § 620.030 (Michie 1999); NEB. REV. STAT. §

Concerns of a constitutional magnitude arise in the differential treatment of the legal and clerical privileges because some reporting laws expressly and fully preserve the attorney-client privilege while completely or partially abrogating the clergy-communicant privilege.[175] Complete abrogation of the clergy-communicant privilege means that both "spiritual advice" and confessional communications are vitiated for purposes of reporting *and* for purposes of evidentiary admissibility in proceedings involving allegations of child abuse or neglect.[176] Reporting laws that completely abrogate the clergy-communicant privilege, while fully preserving the attorney-client privilege, represent the apogee of unequal treatment. Other reporting laws achieve a slightly lower degree of inequality either by (1) completely preserving the attorney-client privilege and only partially preserving the clergy-communicant privilege,[177] or by (2) partially abrogating the attorney-client privilege and completely abrogating the clergy-communicant privilege.[178] Partial abrogation entails a suspension of the privilege in *either* the reporting *or* evidentiary context.

A. *North Carolina and Tennessee*

North Carolina's reporting statute seemingly imposes a generally applicable duty to report on "any person or institution who has cause to suspect that any juvenile is abused, neglected . . . or has died as the result of maltreatment."[179] However, a subsequent section of the statute declares: "No privilege shall be grounds for any person or institution to report . . . even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from

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28-711 (1995); NEV. REV. STAT. ANN. 202.882 (Michie 2001); N.J. STAT. ANN. § 9:6-8.10 (West 2002); OKLA. STAT. ANN. tit. 10, § 7103 (West 2004); TENN. CODE ANN. § 37-1-403 (2001); WIS. STAT. § 48.981 (West 2003); WYO. STAT. ANN. § 14-3-205 (Michie 2003).

175. *See* N.C. GEN. STAT. § 7B-310 (2003); N.H. REV. STAT. ANN. § 169-C:32 (2001); R.I. GEN. LAWS § 40-11-11 (1997); TENN. CODE ANN. § 37-1-614 (2003); W. VA. CODE ANN. § 49-6A-7 (Michie 2001).

176. *See* Norman Abrams, *Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C. L. REV. 1127, 1149-50 (2003).

177. *See, e.g.*, § 325 ILL. COMP. STAT. ANN. 5/4 (2004); ALA. CODE § 26-14-10 (2004).

178. *See, e.g.*, TEX. FAM. CODE § 261.202 (Vernon 2002).

179. N.C. GEN. STAT. § 7B-301 (2004).

that attorney's client."[180] The statute further provides that "[n]o privilege, except the attorney-client privilege, shall be grounds for excluding evidence of abuse, neglect, or dependency in any judicial proceeding."[181]

The Tennessee reporting statute also includes a catchall provision requiring "any person" with knowledge or suspicion of child abuse to report such information to state authorities.[182] Moreover, the Tennessee reporting law unambiguously abolishes the clergy-communicant privilege by voiding the privileged quality of communication between any professional person and his client, and "any other privileged communication except that between attorney and client" for reporting and evidentiary purposes.[183] Thus, both North Carolina and Tennessee have achieved complete abrogation of the clergy-communicant privilege on the one hand, and complete preservation of the attorney-client privilege on the other.

B. *Rhode Island, New Hampshire and West Virginia*

Rhode Island has opted for a catchall clause in order to bring clergy within the purview of the reporting duty.[184] It has completely vitiated the privileged quality of communications between "any professional person and his or her patient or client, except that between attorney and client."[185] New Hampshire specifically lists any "priest, minister, or rabbi"[186] as mandated reporters and suspends, for reporting and evidentiary purposes, all professional privileges "except that between attorney and client."[187] West Virginia includes clergy in an exhaustive list of mandated reporters that does not include attorneys.[188] A subsequent provision of the statute eviscerates the "privileged quality of communications . . . between any professional person and his patient or his client, except that between attorney and client."[189] Due to shoddy drafting, it is more difficult to determine the extent to which West Virginia

180. *Id.* § 7B-310.
181. *Id.*
182. TENN. CODE ANN. § 37-1-605(a) (2001).
183. *Id.* § 37-1-614 (2001).
184. *See* R.I. GEN. LAWS § 40-11-3 (2004).
185. *Id.* § 40-11-11.
186. N.H. REV. STAT. ANN. § 169-C:29 (2003).
187. *Id.* § 169-C:32 (2003).
188. W. VA. CODE § 49-6A-2 (2003).
189. *Id.* § 49-6A-7.

has suspended the clergy-communicant privilege. The statute declares abrogation "in situations involving suspected or known child abuse and neglect."[190] This language is certainly broad enough to encompass both the reporting duty and issues of evidentiary admissibility in proceedings related to child abuse, but its notable lack of specificity renders its scope ambiguous.

Rhode Island, New Hampshire and West Virginia have preserved the attorney-client privilege and abolished all other privileges between "any professional person and his or her patient or client." If construed narrowly, the clergy-communicant privilege might survive such abrogation clauses. On the other hand, these statutes obligate clergy to report information relating to child abuse, and they do so in the absence of either a partial or complete privilege-preservation clause. Although susceptible to more than one interpretation, these laws may be properly interpreted as completely eviscerating the clergy-communicant privilege.[191]

C. *Alabama, Illinois and Texas*

Like many other states, Alabama designates "members of the clergy"[192] as mandated reporters along with a host of secular agents such as physicians, dentists, school teachers and officials, law enforcement officials, pharmacists, social workers, day care workers, mental health professionals and "any other person called upon to render aid or medical assistance to any child."[193] Attorneys are not listed and do not seem to be implicated by the profession-specific catchall clause. The Alabama statute thereafter proclaims: "The doctrine of privileged communication, with the exception of the attorney-client privilege, shall not be ground for excluding any evidence regarding a child's injuries or the cause thereof in any judicial proceeding."[194] The statute does, however, exempt members of the clergy from the reporting duty insofar as the relevant information is "gained solely in a confidential com-

190. *Id.*

191. *See* Abrams, *supra* note 176, at 1140; *see also* Shawn P. Bailey, Note, *How Secrets are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege*, 2002 B.Y.U. L. REV. 489, 499 (2002).

192. ALA. CODE § 26-14-3(a) (2004).

193. *Id.*

194. *Id.* § 26-14-10.

munication."[195] By fully preserving the attorney-client privilege and only partially abrogating the clergy-communicant privilege, Alabama has settled for a slightly smaller quantum of differential treatment.

Like Alabama, Illinois has preserved the attorney-client privilege in its entirety while chipping away considerably at the clergy-communicant privilege. A shrewdly worded section suspends the "privileged quality of communication between *any professional person required to report* and his patient or client" with respect to the reporting duty.[196] The statute designates "any member of the clergy" as a reporter but omits any reference to attorneys.[197] Although the evidentiary dimension of the clergy-communicant privilege remains intact,[198] attorneys are free to use their professional privilege as a shield against the reporting duty *and* the admissibility of evidence in court proceedings.

The Texas scheme explicitly cancels both the attorney-client and clergy-communicant privilege with respect to the reporting duty.[199] However, it also states "evidence may not be excluded on the ground of privileged communication except in the case of communications between an attorney and client."[200] Thus, Texas has opted for full abrogation of the clergy-communicant privilege and only partial abrogation of the attorney-client privilege. Though all of the foregoing reporting laws vary in language, structure and degree of differential treatment, none seem to satisfy even the baseline requirement of facial neutrality as defined in *Smith* and *Lukumi*.

It is beyond all doubt that reporting laws exist for the purpose of detecting and eradicating child abuse. Nevertheless, several statutes contain prefatory clauses in which governmental interests, moral truisms and policy aims are specifically cataloged. For example, Kentucky's statute proclaims:

> Children have certain fundamental rights which must be protected and preserved, including but not limited to, the rights to adequate food, clothing and shelter; the right to

195. *Id.* § 26-14-3(f).
196. § 325 ILL. COMP. STAT. ANN. 5/4 (West 2004) (emphasis added).
197. *Id.*
198. *Id.*
199. TEX. FAM. CODE § 261.101(c) (Vernon 2004).
200. *Id.* § 261.202.

> be free from physical, sexual or emotional injury or exploitation; the right to develop physically, mentally, and emotionally to their potential; and the right to educational instruction and the right to a secure, stable family.[201]

The protection of children from physical harm or death is indubitably an interest of the highest order in our society. Basic rights of self-preservation, personal security and individual autonomy comprise the core justification for the very existence of a social contract.[202] But the admittedly "compelling" nature of the governmental interest in preventing child abuse is really inapposite here. Rather, the determinative inquiry is whether lawmakers have decided that legal counselors are so prized as to overcome the imperative of protecting children whereas similarly situated spiritual counselors are not. The constitutionality of mandatory report-

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201. K.Y. REV. STAT. ANN. § 620.010 (Michie 2002).

202. *See, e.g.*, U.S. CONST. PREAMBLE:

> We the People of the United States, in Order to form a more perfect Union, *establish domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity*, do ordain and establish this Constitution for the United States of America.

Id. (emphasis added); *see also* THOMAS HOBBES, LEVIATHAN, *reprinted in* MODERN POLITICAL THOUGHT: READINGS FROM MACHIAVELLI TO NIETZSCHE 189 (David Wootton ed., 1996):

> A commonwealth is said to be instituted, when a multitude of men do agree, and covenant, every one, with every one, that whatsoever man, or assembly of men, shall be given by the major part, the right to present the person of them all, (that is to say, to be their representative) every one, as well he that voted for it, as he that voted against it, shall authorize all the actions and judgments, of that man, or assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men.

Id.; JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, *reprinted in*, MODERN POLITICAL THOUGHT: READINGS FROM MACHIAVELLI TO NIETZSCHE 341 (David Wootton ed., 1996):

> The only way, whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community, for their comfortable, safe, peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.

Id.

ing laws should turn on whether they are "narrowly tailored" to advance their laudable goals. In order to sharpen this analysis, it is important first to briefly compare the attorney-client and clergy-communicant privileges.

D. *The Clergy-Communicant Privilege*

All fifty states have secured some form of clergy-communicant privilege through statutory law.[203] These privilege statutes are driven primarily by a respect for free exercise and church autonomy principles.[204] Although only the Roman Catholic, Lutheran, Latter-day Saints and Eastern Orthodox churches recognize the formal sacrament of confession,[205] many statutes protect not only "penitential" communications but also "counseling" or "spiritual advice" communications, which include any confidential communication made by the communicant to a clergy member in his capacity as a spiritual advisor.[206] Moreover, the majority of statutes provide that the privilege survives the death of the communicant.[207]

It is noteworthy that the religious profundity of maintaining a scrupulous code of confidentiality is considerably greater for the Catholic priest than for the Presbyterian minister. If the minister reveals a communication imparted to him in confidence, he may invite the ire of his congregation and forfeit his ministerial position within a particular community of faith.[208] The Catholic Church, on the other hand, has unwaveringly treated the confessional relationship as sacrosanct.[209] Indeed, the Sacrament of Reconciliation is one of the seven sacramental pillars of the Catholic

203. *Supra* Part IV.

204. Bailey, *supra* note 191, at 519-20.

205. *See id.* at 502; R. Michael Cassidy, *Sharing Sacred Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege*, 44 WM. & MARY L. REV. 1627, 1641 (2003).

206. J. Michael Keel, Comment, *Law and Religion Collide Again: The Priest-Penitent Privilege in Child Abuse Reporting Cases*, 28 CUMB. L. REV. 681, 689 (1998) ("[M]any of the statutes broaden the scope of the privileged communications between the priest and the penitent by extending the privilege to communications made to a minister during a counseling session.").

207. *See* Cassidy, *supra* note 205, at 1639.

208. *See* Shannon O'Malley, Note, *At All Costs: Mandatory Child Abuse Reporting Statutes and the Clergy-Communicant Privilege*, 21 REV. LITIG. 701, 711 (2002).

209. *See id.* at 712.

Church; it "relieves the burden of individual sinfulness and draws one closer to the life and mission of the Church – the mystical body of Christ."[210] As admonished by ancient Canon Law:

> Let the priest be absolutely aware that he does not by word or sign or by any manner whatsoever in any way betray the sinner. . . . 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.[211]

Mandatory reporting laws that abrogate spiritual codes of confidentiality clearly implicate free exercise rights. Presently, the Code of Canon Law of the Catholic Church states: "The sacramental seal is inviolable; accordingly, it is absolutely wrong for a confessor in any way to betray a penitent, for any reason whatsoever, whether by word or in any other fashion."[212] According to this spiritual law, "the priest has no mortal remembrance of what has been confessed, but rather possesses knowledge meant solely for God's ears."[213] Violation of the seal is a "crime" against the Church and a sin against God, and the penalty prescribed in most cases is automatic excommunication – a permanent alienation from the Church and from God Himself.[214] Because reporting laws essentially render certain spiritual and civil obligations mutually antagonistic, they constitute a discernible burden on church autonomy and religious exercise.[215]

The evidentiary privilege has roots in utilitarian legal thought that justifies nondisclosure on the grounds that confidential communication between clergy and communicant is crucial to the

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210. *See* Anthony Merlino, Comment, *Tightening the Seal: Protecting the Catholic Confessional from Unprotective Priest-Penitent Privileges*, 32 SETON HALL L. REV. 655, 695 (2002).

211. R.S. Nolan, *The Law of the Seal of Confession*, *in* 13 THE CATHOLIC ENCYCLOPEDIA 649 (Charles G. Herbermann et al. eds., 1912).

212. 1983 CODEX IURIS CANONICI c.983, 1, 2.

213. *See* Merlino, *supra* note 210, at 746-47.

214. *Id.* at 703-04.

215. *See* Keel, *supra* note 206, at 702-703 ("[T]he clergyman . . . could adhere to his religious beliefs and accept the criminal penalties levied against him, or he could obey the law by turning his back upon his religious convictions. This choice essentially pressures the clergyman to forego his religion to comply with government mandates.").

maintenance of an important and socially desirable relationship. With respect to the fiduciary relationship between clergy and communicant, "the injury that would inure to the relation by the disclosure of the communications [is] *greater than the benefit* thereby gained for the correct disposal of litigation."[216] The cost-benefit balance is struck in favor of preserving the privilege "because the cost of a privilege (measured in undiscoverable evidence) would not properly include information that would not exist but for that privilege."[217] Because it is widely believed that the confidentiality guarantee facilitates the communicant's admissions, the cost side of the equation must include only volunteered information, or information that would likely have been relayed to clergy in the absence of the privilege.[218] Outside the reporting context, countervailing societal (and constitutional) considerations have outweighed interests in the availability of evidence and the "truth" seeking function of the accusatorial system.

The privilege is also invaluable to the communicant. Roman Catholics must make a *full* confession at least once annually.[219] Christian eschatology holds that failure to obtain absolution or do penance for one's sins before death is met with the prospect of eternal damnation.[220] Thus, the Sacrament of Penance is valued both for its inherent sanctity and for its edifying effect on the penitent. Cardinal Bevilacqua has explained that, "[w]ere the Sacrament rendered difficult or odious to the faithful they would be deterred from approaching it, thereby undermining the Sacrament itself to the great spiritual harm of the faithful, as well as to the entire Church."[221] Even in denominations that do not recognize *sacramental* confessions, the maintenance of a private clergy-penitent relationship is integral to one's eternal salvation. C.S.

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216. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (John T. McNaughton ed. 1961).

217. Bailey, *supra* note 191, at 505.

218. *Id.*

219. CATECHISM OF THE CATHOLIC CHURCH § 1457 (Doubleday, 1995).

220. *E.g.*, Matthew, 3:11-12 ("I baptize you with water for repentance, but the one who is more powerful than I is coming after me. . . . His winnowing fork is in his hand, and he will gather his wheat into the granary. But the chaff he will burn with an unquenchable fire.").

221. Cardinal Anthony Bevilacqua, *Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L. A. L. REV. 1733, 1736 (1996).

Lewis, the great scholar, writer, and Christian apologist, defined the "clergy" as "those particular people within the whole Church who have been specially trained and set aside to look after what concerns us as creatures who are going to live forever."[222] If one accepts Lewis' foundational premise that we are eternal creatures, it is difficult to imagine any relationship in the temporal world that would be of greater importance than that between a spiritual counselor and his communicant.

E. *The Attorney-Client Privilege*

Unlike the statutorily protected clergy-communicant privilege, the attorney-client privilege has common-law origins.[223] Otherwise, the two privileges are very similar. Like the clergy-communicant privilege, confidentiality is "essential" to the maintenance of the attorney-client relationship.[224] It is difficult to imagine that a client would reveal criminal wrongdoings in the absence of the privilege, so "the loss of evidence is more apparent than real."[225] Moreover, abrogation of the privilege would have a chilling effect on communication because attorneys would inform their clients of an abuse-exception, thereby undermining the goal of full and candid disclosure.[226]

The efficacious operation of the American legal system is said to depend on "sound legal advice or advocacy" which, in turn, "depends upon the lawyer's being fully informed by the client."[227] Like many clergy-communicant privilege statutes, the Federal Rules of Evidence assure the posthumous application of the attorney-client privilege because "full and frank communication . . . promote[s] broader public interests in the observance of law and the administration of justice."[228] Furthermore, just as the clergy-

222. C.S. LEWIS, MERE CHRISTIANITY 75 (1952) (Fontana Books, 1960).
223. *See* Bailey, *supra* note 191, at 509.
224. WIGMORE, *supra* note 216, at § 2285.
225. Swidler & Berlin v. United States, 524 U.S. 399, 408 (1998) ("[T]he loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place.").
226. *See* Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 230-32 (1992).
227. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
228. *Swidler & Berlin*, 524 U.S. at 403 (citation omitted).

communicant privilege is buttressed by concerns for church autonomy, rights-based justifications of the attorney-client privilege strongly discourage interference with client autonomy and control over private information.[229] Perhaps most importantly, the privilege is afforded a measure of constitutional protection as a prerequisite to the exercise of the Sixth Amendment right to the effective assistance of counsel.[230] Thus, like the clergy-communicant privilege, the attorney-client privilege implicates interests of a constitutional caliber.

However, there is one significant distinction between these two evidentiary privileges: the attorney-client privilege contains a "crime-fraud exception" where "the client's purpose is the furtherance of a future intended crime or fraud."[231] In order to fall within the exception, however, the client must attempt to use the attorney's expertise for some prospective criminal or fraudulent act.[232] The clergy-communicant privilege, on the other hand, does not contain such an exception as it is generally held to be absolute in coverage.[233] Privilege statutes would presumably respect the uncompromising tenor of canon law in even the most compelling exigencies.

F. *A Modest Proposal for Protecting Religion*

Smith and *Lukumi* may be regarded as poles on each end of the largely uncharted spectrum of general applicability. On one end, *Smith* suggests that the mere existence of a single nonreligious exception does not implicate the nondiscrimination principle.[234] On the other end, *Lukumi* intimates that the existence of

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229. *See* Mosteller, *supra* note 226, at 266.

230. *See id.* at 270-71.

231. CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 95 (John W. Strong et. al. eds., 4th ed. 1992).

232. *See* Mosteller, *supra* note 226, at 246.

233. *See* Merlino, *supra* note 210, at 748 ("In short, the Catholic Church defends sacramental confession with absolutism that is foreign to and in direct conflict with state laws that are quite stingy in privileging certain communications in order to further the truth-seeking function of legal tribunals.").

234. The Oregon controlled substance statute provided an exemption for substances "prescribed by a medical practitioner." Employment Div. v. Smith, 494 U.S. 872, 874 (1990). Nonetheless, the Court refused to provide an exemption for the religious use of peyote. *Id.* at 888-90.

myriad nonreligious exceptions does implicate the nondiscrimination principle.[235] If the creation of the neutrality and general applicability requirements inaugurated no more than a jurisprudence of exemption head-counting, then the task of identifying the point at which a law becomes sufficiently discriminatory would be susceptible of arbitrary line-drawing. As *Newark* illustrates, there is good reason to conclude that the doctrinal analyses of *Smith* and *Lukumi* do not turn on the *quantity* of exceptions alone, provided that a law is not entirely exceptionless. Rather, the Third Circuit's decision in *Newark* characterizes these seminal decisions as encapsulating the more substantive inquiry of whether there is a (1) nonreligious (or secular) exception that (2) damages the governmental interest in the challenged law in a way that is (3) similar to or greater than some analogous religious activity that is prohibited.[236]

The facially discriminatory character of the foregoing reporting laws obviates a survey of circumstantial evidence, even though their legislative histories may very well reveal visceral policy judgments lurking behind the statutory language. Violation of the general applicability requirement flows automatically from a violation of facial neutrality. The classic gerrymander could conceivably fail the former test and satisfy the latter, but no law that is non-neutral on its face can possibly function neutrally in practice.[237] Reporting laws that abrogate the clergy-communicant privilege and preserve the attorney-client privilege are problematic under a broad formulation of *Lukumi* because they prohibit certain religious conduct but do not pursue the objective of protecting children with respect to virtually identical nonreligious conduct.

The proposition that attorneys may conceal crucial information with impunity establishes an exception inimical to the governmental interest in protecting children. Moreover, the only relevant difference between the attorney-client and clergy-communicant privileges as they relate to the governmental interest is that the former does not protect communications of intent to

235. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 536-37 (1993).

236. *See* Fraternal Order of Police v. City of Newark, 170 F.3d 359, 365-66 (3rd Cir. 1999).

237. *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring).

commit a *future* criminal act, whereas the latter admits of no such exception.[238] However, the client must actually intend to enlist lawyerly acumen in the pursuit of such an act for the communication to lose its privileged status.[239] Though perhaps foreseeable, the scenario of a client using legal advice as a tool for inflicting a future act of violence upon a child seems highly improbable. And even if such attempts occurred with alarming frequency, the governmental interests could be achieved by a narrower means that burden clergy members to a far lesser degree. For example, an explicit statutory retention of a *qualified* clergy-communicant privilege – one that contains a similar "dangerous person" exception – would satisfy the "narrow tailoring" prong of strict scrutiny analysis.[240]

In light of the governmental objectives to ensure the "health and welfare" of children and to "make the home safe for children by enhancing the parental capacity for good child care,"[241] the only other relevant difference between spiritual and legal counselors in this context actually *supports* the retention of the clergy-communicant privilege:

> While the attorney will address the client's legal concerns, the member of the clergy will address the moral or spiritual well-being of the penitent. Although the attorney will facilitate an efficient and fair disposition of any legal problems, she is not likely to concern herself with the underlying causes of the behavior that made legal representation necessary in the first place. In contrast, the cleric specifically addresses the underlying causes to

238. *See* Michael J. Mazza, Note, *Should Clergy Hold the Priest-Penitent Privilege*, 82 MARQ. L. REV. 171, 186 (1998) ("The priest-penitent privilege has generally been considered absolute, prohibiting any revelation of the protected communication, unlike the other evidentiary privileges with their numerous exceptions.").

239. MCCORMICK, *supra* note 231, at § 95 ("[I]t is settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended crime or fraud.").

240. *See generally* Cassidy, *supra* note 205, at 1696-97 (arguing that members of the clergy should be required to disclose information of a penitent's intention to commit a future crime involving serious bodily injury or death).

241. CONN. GEN. STAT. § 17a-101 (2003).

help the penitent overcome them.[242]

The penitent is encouraged to mitigate the harm caused by his transgressions, which may include the return of stolen items, compensation (monetary or otherwise) for injuries, or an admission of culpability to the proper authorities. In sum, the confessional relationship "*promotes* the reparation and atonement the legal system seeks to achieve on behalf of society."[243] In comparison, attorneys work zealously and indefatigably to rid their clients of legal encumbrances, whereas clergy members strive to inculcate moral virtue and transform the penitent into a spiritually rejuvenated and law-abiding citizen. Rather than impede the disclosure, detection and punishment of child abuse, a robust clergy-communicant privilege may actually effectuate these ends.

Discriminatory reporting laws are not teeming with pernicious desires to persecute members of the clergy. The underinclusion of these statutes is not as substantial as in *Lukumi* because the burden falls not only on religious, but countless other secular entities as well. These laws are more likely the result of a semi-conscious devaluation of religion – a subtle yet persistent proclivity that must be exposed and uprooted.[244] Justice Kennedy has astutely observed:

> Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.[245]

The disparities in treatment may be partly explained by the fact that many legislators are attorneys who naturally (albeit wrongly) tend to value the attorney-client privilege more than the clergy-communicant privilege. Legislators may simply fold under constituent pressure to suspend evidentiary privileges and decide, amid cacophonous criticism, to strike the political bargain in favor

242. Bailey, *supra* note 191, at 511.
243. *See* Merlino, *supra* note 210, at 743 (emphasis added).
244. *See* Beerworth, *supra* note 19, at 383.
245. Bd. of Trustees v. Garrett, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

of their own profession.[246] At a time when public sentiment toward clerical personnel is less than favorable, lawmakers stand to win popularity points by simply tossing out the clergy-communicant privilege altogether rather than retaining or qualifying it.

The Third Circuit in *Newark* applied the non-discrimination principle of *Lukumi* beyond the extreme instance in which lawmakers decide to inflict particularized harm on a discrete and insular religious minority.[247] If the cornerstone of refurbished free exercise doctrine is underinclusion, then some reporting laws do not pass constitutional muster. In fact, the very presence of the attorney-client privilege exception renders the law unconstitutional per se, because an exception that is patently inconsistent with the legislative purpose compels a finding that the law could be more narrowly tailored to further that purpose.[248] There is more than one way to comply with *Smith* and *Lukumi* in the reporting context. A state could either remove the secular exception entirely (making the statute generally applicable), or allow an equivalent exception for religiously motivated conduct (removing the free exercise burden altogether). Even a reporting law that exempts only the clergy-communicant privilege would not likely present Establishment Clause problems,[249] particularly if the privilege would enable religious organizations to define and carry out their own doctrine free from governmental interference.[250]

The overall tenor of the *Lukumi* opinion gives proponents of a more expansive Free Exercise Clause reason to hold out some hope.[251] On the other hand, *Lukumi* could be confined to those

246. *See* Bailey, *supra* note 191, at 522-23.

247. *See* Fraternal Order of Police v. City of Newark, 170 F.3d 359, 360 (3rd Cir. 1999).

248. *See Lukumi*, 508 U.S. at 546 (finding that the fact that the "proffered objectives are not pursued with respect to analogous nonreligious conduct . . . suffices to establish the invalidity of the ordinances.").

249. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987) (rejecting an Establishment Clause challenge to a Title VII exemption for religious organizations and stating that "[w]here . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.").

250. *See id.* at 339.

251. *Lukumi*, 508 U.S. at 547 ("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

rare instances in which lawmakers engage in extreme undervaluation or persecution of religion.[252] Even assuming, arguendo, that strict scrutiny applies not only to underinclusive individualized exemption systems but also to "categories of selection," serious concerns abound.[253] It is uncertain how the Court would wrestle with legislation like mandatory reporting statutes that contain *far fewer* and *more principled* secular exceptions.[254] Despite the disparate treatment in such laws, they contain only one exception that is amply supported in common law, constitutional law, and public policy.

If the Court rejects the *Tenafly* reasoning and reaffirms either a "substantial burden" or "compulsory" practice requirement (or both), many non-Catholic clergy members may not successfully assert free exercise challenges despite serious problems of underinclusion. Recall that most clergy-communicant privilege statutes protect "spiritual advice" communications so as to extend the confidentiality guarantee to all religions.[255] The Catholic priest must

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practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.").

252. Locke v. Davey, 540 U.S. ___; 124 S. Ct. 1307, 1314-15 (2004) (distinguishing the suppression of Santeria worship in *Lukumi* from the decision of state officials to deny funding under a state scholarship program to a student seeking a degree in "devotional theology"); *see also* Davey v. Locke, 299 F.3d 748, 762 (9th Cir. 2002). The dissent in that opinion stated:

> [In Lukumi], the challenged ordinances were the rare but quintessential example of laws that directly prohibit certain religious practices . . . Nothing could have more clearly prohibited the church members' religious exercise than these criminal sanctions: their choice was to practice their religion upon threat of persecution. In contrast, Davey's decision to pursue a degree in theology carries no such ominous retribution . . . I do not find any guidance in Lukumi beyond the criminal ordinances at issue there as to what might constitute an impermissibly burdensome law prohibiting religious exercise.

Id. (McKeown, J., dissenting).

253. *Lukumi*, 508 U.S. at 542.

254. *See* Kenneth D. Sansom, Note, *Sharing the Burden: Exploring the Space Between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 TEX. L. REV. 753, 768 (1999).

255. *See supra* note 206 and accompanying text. In contrast, Delaware has preserved the clergy-communicant privilege only insofar as the communication takes place in a "sacramental confession." DEL. CODE ANN. tit. 16, § 909 (2003). Although such a provision raises non-establishment concerns because of its limited applicability, this issue is beyond the scope of this article.

assiduously conceal *confessional* communications as a matter of religious obligation. On the other hand, to compel disclosure of information gathered in a spiritual advice setting is not to force clergy to transgress a tenet of their faith. That is, there is no *religiously* imposed oath to secrecy in the non-sacramental setting, or at least it could be described as less than compulsory.[256] For these reasons, the burden placed on a large class of clergy may not be deemed "substantial." Unless *Tenafly* is followed in this regard, a constitutional challenge to reporting laws will be difficult to mount successfully for those religions that do not recognize the formal sacrament of confession.

V. *LOCKE V. DAVEY*: ANOMALY OR PRESAGE?

This term, the Court altered the *Smith/Lukumi* calculus, though "the decision may be properly regarded as an unusually narrow one."[257] *Locke v. Davey*[258] involved a Washington state scholarship program for academically gifted students who attended either a public or private (including religiously affiliated) postsecondary institution, provided the institution was duly accredited.[259] In accordance with a provision in the state constitution prohibiting public funding for "any religious worship, exercise or instruction . . . ,"[260] the scholarship program explicitly excluded any student who sought a "degree in theology."[261] As a matter of federal constitutional law, it is nearly axiomatic that public financial aid to a student seeking a degree in theology does not violate the Establishment Clause.[262] *Locke*, therefore, posed the question of whether a state, pursuant to its own non-establishment provision, could essentially overprotect its taxpayers' "freedom of conscience" without running afoul of the federal Free Exercise Clause.[263]

256. *See* Abrams, *supra* note 176, at 1144.
257. Beerworth, *supra* note 19, at 383.
258. 540 U.S. ____, 124 S. Ct. 1307 (2004).
259. *Id.* at 1309-10.
260. *Id.* at 1312 n.2 (quoting WASH. CONST. art. I, § 11).
261. *Id.* at 1310.
262. *See* Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 489 (1986) (upholding against an Establishment Clause challenge a state tuition grant for a blind student who planned to use the funds at a Christian college in preparation for the ministry).
263. *Locke*, 124 S. Ct. at 1312 & n.2.

The Ninth Circuit had invalidated the scholarship program under *Lukumi*, holding that religion had been facially targeted for unfavorable treatment and that "the State's own antiestablishment concerns were not compelling."[264] Writing the opinion for the majority in *Locke*, Chief Justice Rehnquist reversed and declared: "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[265] Rehnquist then plunged into state constitutional history and uncovered evidence supporting the prerogative of the state to prevent the procurement of tax funds to support ministerial endeavors.[266] As such, the State's antiestablishment interests were deemed "historic and substantial."[267] The Court's emerging jurisprudential philosophy of *permissible* accommodation had evidently created the requisite "play in the joints"[268] between the Religion Clauses in which the states could protect nonestablishment interests not guaranteed by the federal Establishment Clause. However, one might argue that going *above* the minimum federal floor as to the Establishment Clause means going well *below* the minimum federal floor as to the Free Exercise Clause.

Accordingly, then, *Locke* cabined *Lukumi* in some potentially cataclysmic respects. First, the Court refused to attach a presumption of invalidity to the scholarship program even though the program violated the facial neutrality requirement by isolating the study of theology for disfavored treatment. The Court reasoned that application of strict scrutiny was inappropriate because nothing in the "history or text" of the State Constitution or the scholarship program "suggests animus towards religion."[269] Rather, the disparate treatment at issue in *Locke* was "of a far milder kind" than that at issue in *Lukumi*.[270] The Court justified the religion-specific classification on what seemed like rational basis grounds, stating that "training for religious professions and training for secular professions are not fungible."[271] Of course, Santeria animal sacrifice and secular modes of butchery are not

264. *Id.* at 1311.
265. *Id.*
266. *See id.* at 1313-14.
267. *Id.* at 1315.
268. *Id.* at 1311.
269. *Id.* at 1315.
270. *Id.* at 1312.
271. *Id.* at 1313.

fungible either. They are just very similar. Like the study of history and the study of religion, the minute differences between these forms of slaughter cannot justify gaping disparities in treatment.

Beyond animus, the Court intimated that heightened scrutiny applies to a law that is not neutral or generally applicable *and* either: (1) imposes criminal or civil penalties on a religious practice, (2) excludes ministers from participation in the political community, or (3) puts students to a choice between their religious convictions and the receipt of a government benefit.[272] Apparently, a desire to obtain a degree in theology did not constitute a religious conviction. The Court also noted the "relatively minor burden" placed on scholars seeking degrees in theology as an additional reason to avoid the stringent *Lukumi* test.[273] Fortunately, mandatory reporting laws remain constitutionally problematic even under *Locke* inasmuch as they are both facially nonneutral and impose criminal and civil penalties on a religious sacrament.

In a strange twist, Justice Scalia's dissent in *Locke* adhered most faithfully to *Lukumi* and railed against any further narrowing of the Free Exercise Clause. Applying the baseline requirement of facial neutrality, Scalia asserted that "[n]o field of study but religion is singled out for disfavor" in this "generally available public benefit."[274] Far from demanding a "special benefit to which others are not entitled,"[275] scholars who sought devotional degrees sought "only equal treatment"[276] in the disbursement of a public benefit. In contrast with the majority, Scalia asserted that the State had a compelling interest only in avoiding *actual* Establishment Clause violations.[277] Since the prospect of such a violation was nonexistent in these circumstances, the differential treatment of religious and secular academic degrees was impermissible under *Lukumi*. Scalia chastised the majority for essentially limiting the protections of the Free Exercise Clause to cases involving animus toward religion:

The Court does not explain why the legislature's motive

272. *See id.* at 1312-13.
273. *Id.* at 1315.
274. *Id.* at 1316 (Scalia, J., dissenting).
275. *Id.*
276. *Id.*
277. *See id.* at 1318 n.2.

> matters, and I fail to see why it should . . . It is sufficient that the citizen's rights have been infringed . . . We do sometimes look to legislative intent to smoke out more subtle instances of discrimination, but we do so as a *supplement* to the core guarantee of facially equal treatment, not as a replacement for it.[278]

Scalia also scolded the Court for weighing the religious burden under laws that fail *Smith*'s minimum facial neutrality requirement: "[B]eing singled out for special burdens on the basis of religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial. The Court has not required proof of 'substantial' concrete harm with other forms of [facial] discrimination, and it should not do so here."[279] In sum, the Court in *Locke* suspended the facial neutrality requirement of *Smith*, confined *Lukumi* to animus toward religion and imposed a "substantial burden" requirement even for challenges to facially discriminatory laws (in opposition to *Tenafly*).

Read broadly, *Locke* not only confines *Lukumi* to its facts, but also emasculates the very precedent that supports the nonpersecution principle, at least insofar as facial discrimination triggers heightened scrutiny.[280] On the other hand, *Locke* can be understood as merely the latest pronouncement that the Bill of Rights protects only negative, rather than positive, liberties. The Court has recognized that the Free Exercise and Due Process Clauses carve out freedoms from government interference, not entitlements to government assistance.[281] The Court in *Locke* alluded to

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278. *Id.* at 1319.

279. *Id.* at 1318-19 (citations omitted).

280. *See* McDaniel v. Paty, 435 U.S. 618, 629 (1978) (invalidating a state constitutional provision facially disqualifying clergy from sitting in the legislature).

281. *See* DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189 (1989) (holding that the Due Process Clause contains no affirmative right to governmental assistance, even where such assistance would have prevented the physical abuse of a child); Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439, 451 (1988) ("the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."); Harris v. McRae, 448 U.S. 297, 316-17 (1980) (upholding, against a due process and equal protection challenge, the denial of federal funding for abortions on the grounds that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the

this distinction between negative and positive liberties in its justification of the exclusionary scholarship program: "The State has merely chosen *not to fund* a distinct category of instruction."[282]

Scalia emphasizes the free exercise dimension of exclusionary educational aid programs and asserts that, "if the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones."[283] The facial neutrality shibboleth that guided the Court in *Smith* and *Lukumi* was suddenly and casually cast aside in *Locke*. Perhaps it was the price paid for judicial solicitude of local "antiestablishment interests" not recognized by the federal Constitution.[284] At bottom, Scalia and the *Locke* majority sharply diverge on the fundamental doctrinal question of whether the inclusion of religion in educational aid programs is merely *permissible* under the Establishment Clause or *mandatory* under the Free Exercise Clause. The crux of *Locke* is that the invocation of antiestablishment liberties *not* protected under the Establishment Clause trumps liberty interests (namely, the interest in not being singled out for disfavored treatment) otherwise protected under the Free Exercise Clause. Even if *Locke* is readily distinguishable as an "educational aid" or "positive rights" exception to free exercise methodology, its weak characterization of *Lukumi* portends a further diminution of religious liberty.[285]

CONCLUSION

In the post-*Smith* era, the Free Exercise Clause has been hailed a "leaner, meaner religious-liberty-protecting machine."[286] Its leanness is readily observable, but its ferocity has yet to be tested by the right fact pattern. If, in fact, newly refurbished Free Exercise doctrine has any teeth, States that exempt attorneys from mandatory reporting requirements must either provide a correspondingly protective exemption to clergy or extend the legal duty to attorneys as well as to clergy in an effort to comport with the apparent mandate of *Smith*. If the Free Exercise Clause is to

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product not of governmental restrictions on access to abortions, but rather of her indigency.").

282. *Locke*, 124 S. Ct. at 1313 (emphasis added).

283. *Id.* at 1317 (Scalia, J., dissenting).

284. *Id.* at 1313.

285. *See* Beerworth, *supra* note 19, at 384.

286. Duncan, *supra* note 121, at 883.

be of any practical use to the religious citizen, the narrow tailoring analysis must develop a keen sensitivity to the subtlest devaluation of religion in regulatory schemes.

Clerical personnel comprise the engine of many mainstream institutional faiths that boast scores of followers. It would be remiss, however, to assume a priori that clergy have the ability to marshal veritable armies of parishioners to their side whenever the political tide turns unfavorably against them. Recall that Rhode Island has enacted a reporting statute that preserves the attorney-client privilege, yet presumably abolishes the clergy-communicant privilege in full. If the religious liberties of clergy are insecure in one of the most Catholic states in the nation – a state steeped in the life and thought of Roger Williams,[287] with a rich historical legacy of spearheading the national commitment to religious pluralism[288] – how secure can these liberties be else-

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287. Having been banished from the Massachusetts Bay Colony in 1635 for expressing vehement opposition to a law compelling church attendance and monetary contribution, Roger Williams fled into a wilderness now known as Providence. Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 433 (1999). Williams influenced the governmental structure and principles of the Providence colony and helped to shape the first legislation in the Western world that safeguarded the "liberty of conscience" for all believers. PATRICK T. CONLEY, RHODE ISLAND CONSTITUTIONAL DEVELOPMENT, 1636-1775: A SURVEY 7, *reprinted from* RHODE ISLAND HISTORY XXVII (April and June, 1968). Under Williams' influence, "the complete freedom of mind and conscience from all civil bonds" became the "actual reason and purpose of the state's existence." SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 423 (Burt Franklin 1970) (1902).

288. Throughout the eighteenth century, Rhode Island was known throughout the New England colonies for its "unsavory reputation for religious radicalism and libertinism." THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 90-91 (1986).Unlike most New England colonies, Rhode Island had no established church. *Id.* As such, Rhode Island law required that "all ministers be supported by voluntary contributions." *Id.* During the infancy of the Republic, Rhode Island was counted among the few states in which the utmost level of constitutional protection for religious conduct was extended to all persons; it became one of only three states to grant exemptions from military conscriptions to Quakers, Mennonites and other groups who voiced religious objections to the bearing of arms. *See* McConnell, *supra* note 101, at 1468.

Additionally, Rhode Island enacted an act in the 1790s, entitled "Relative to Religious Freedom and the Maintenance of Ministers", declaring:

> [N]o man shall be compelled to frequent or support any religious worship, place or ministry whatsoever; nor shall be enforced, restrained, molested, or bothered in his body or goods,

where? It seems as though reporting laws such as this demonstrate that clergy are no less a religious minority than Santeria worshippers. As Scalia so poignantly remarked in his *Locke* dissent:

> Most citizens of this country identify themselves as professing some religious belief, but . . . those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry are a far narrower set. One need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction.[289]

It is perhaps tempting to take solace in Professor Douglas Laycock's remark that "[j]ust as it is better to light a candle than to curse the darkness, so it is better to develop the exceptions than to curse the adverse holdings."[290] Application of this treasured adage to free exercise doctrine suggests that a hard-nosed pragmatic strategy of limiting *Smith*'s potential breadth is preferable to assailing its core premises outright. The prominence of this view in academic and juristic circles may be partly explained by the fact that, in the fourteen years since *Smith* was decided, no solid coalition on the Court has formed to overrule it.[291] But even if we avert our eyes from the glaring frailties of *Smith*, there are no ironclad assurances that future doctrinal development will expand, rather than severely limit, the narrow exception to the *Smith* rule as recognized in *Lukumi*.

However narrow or anomalous *Locke* may seem, it is a useful tool for those who favor greater restraints on religious liberty. Faced with such ominous uncertainty, perhaps we would do better

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> nor shall otherwise suffer on account of his religious opinion or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.

PATRICK T. CONLEY, DEMOCRACY IN DECLINE: RHODE ISLAND'S CONSTITUTIONAL DEVELOPMENT 1776-1841, 173 (1977). One historian has described this statute as a "vigorous reaffirmation of Rhode Island's long-standing commitment to the principles of religious liberty and church-state separation." *Id.*

289. *Locke*, 124 S. Ct. at 1320 (Scalia, J., dissenting).

290. Laycock, *supra* note 134, at 57.

291. Presently, only Justices O'Connor, Souter, and Breyer have expressed a willingness to seriously reconsider or overrule *Smith*. City of Boerne v. Flores, 521 U.S. 507, 544-45, 565-66 (1997).

to heed the poet's plea and "not go gentle into that good night" but rather "rage, rage against the dying of the light."[292] Such staunch opposition to *Smith* may prove more efficacious in restoring the Free Exercise Clause to its rightful function as a palladium – rather than a crumbling colonnade – of religious liberty in our constitutional democracy. Despite disagreements over strategy, most agree that *Smith* painted a jurisprudential picture that depicts a setting sun for a freedom vital to many. A duly brought free exercise challenge to discriminatory reporting laws would elicit a more definite answer to the critical question of just how dark the canvass will become.

292. DYLAN THOMAS, *Do Not Go Gentle Into That Good Night*, in THE COLLECTED POEMS OF DYLAN THOMAS 128 (New Directions 1971) (1939).