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# WHEN MUST A PRIEST REPORT UNDER A CHILD ABUSE REPORTING STATUTE? — RESOLUTION TO THE PRIESTS' CONFLICTING DUTIES

## I. INTRODUCTION

The priest-penitent privilege is a testimonial privilege that grants protection from compelled disclosure to certain confidential communications between a priest and a penitent.<sup>1</sup> The granting of a testimonial privilege is based upon a policy decision favoring protection of individual privacy interests, government secrets, and specific relationships over the court's right to "everyman's testimony."<sup>2</sup> Forty-eight states, the District of Columbia, and the Virgin Islands have all codified their policy<sup>3</sup> in statutes granting a privi-

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1. Privilege rules against compelled testimony must be distinguished from other exclusionary rules of evidence. Generally, rules of exclusion, such as the hearsay and opinion rules, are designed to keep out unreliable, misleading or prejudicial evidence and thereby facilitate the ascertainment of facts. Privileges keep out evidence that would otherwise be competent in order to protect and promote other interests and relationships valued by society. C. McCORMICK, *LAW OF EVIDENCE* §§ 72-77 (3d ed. 1984). See also, McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 447-48 (1938).

2. See C. McCORMICK, *supra* note 1, at § 72. The creation of a testimonial privilege represents a judicial or legislative decision that the value of protecting certain relationships outweighs the potential benefit to the judiciary in compelled testimony. Generally, testimonial privileges are granted to relationships that require confidentiality and privacy to effectively operate. See also *In re Agosto*, 553 F. Supp. 1298, 1302 (D. Nev. 1983) (case acknowledges existence of child-parent testimonial privilege).

3. ALA. CODE § 12-21-166 (1986); ALASKA R. EVID. 506; ARIZ. REV. STAT. ANN. § 12-2233 (1978 & Supp. 1986); ARIZ. REV. STAT. ANN. § 13-4062(3) (1982 & Supp. 1986); ARK. STAT. ANN. § 28-1001, R. 505 (1979); CAL. EVID. CODE §§ 1030-1034 (West 1966); COLO. REV. STAT. § 13-90-107 (1974 & Supp. 1986); CONN. GEN. STAT. ANN. § 52-146(b) (West Supp. 1986); DEL. R. EVID. 505; D.C. CODE ANN. § 309 (1981); FLA. STAT. ANN. § 90.505 (West 1979); GA. CODE ANN. § 24-9-22 (1982 & Supp. 1986); HAWAII REV. STAT. § 626-506 (1981); IDAHO CODE § 9-203 (1979 & Supp. 1986); ILL. ANN. STAT. ch. 110, para. 8-803 (Smith-Hurd 1984); IND. CODE ANN. § 31-1-14-5 (West 1985); IOWA CODE ANN. § 622.10 (West 1950 & Supp. 1986); KAN. STAT. ANN. § 60-429 (1983); KY. REV. STAT. ANN. § 421.210 (Baldwin 1981 & Supp. 1986); LA. REV. STAT. ANN. § 15:477 (West 1981); ME. REV. STAT. ANN. tit. 22, § 4015 (Supp. 1986); MD. CTS. & JUD. PROC. CODE ANN. § 9-111 (1984); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1986); MICH. COMP. LAWS § 600.2156 (1986); MINN. STAT. ANN. § 595.02 (West 1947 & Supp. 1987); MISS. CODE ANN. § 13-1-22 (Supp. 1986); MO. ANN. STAT. § 491.060 (Vernon 1952 & Supp. 1987); MONT. CODE ANN. § 26-1-804 (1986); NEB. REV. STAT. § 27-506 (1985); NEV. REV. STAT. ANN. § 49.255 (Michie 1985); N.H. REV. STAT. ANN. § 516.35 (Supp. 1986); N.J. STAT. ANN. § 2A:84A-23 (West Supp. 1986); N.M. STAT. ANN. § 38-6-6 (1986); N.M.R. EVID. 11-506; N.Y. CIV. PRAC. L.

lege of confidentiality to communications between priest and penitent<sup>4</sup> when specific prerequisites are met. The communication must be made to a clergyman who is acting in his professional capacity, in confidence, and for spiritual purposes.<sup>5</sup>

The confidentiality granted to the priest-penitent relationship went virtually unchallenged until the recent expansions of child abuse reporting statutes.<sup>6</sup> Every state has enacted a child abuse reporting statute that provides for the identification and investigation of suspected child abuse and the possible intervention where child abuse is proven.<sup>7</sup> The sections of the

& R. § 4505 (McKinney 1963 & Supp. 1986); N.C. GEN. STAT. § 8-53.2 (1986); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. § 2317.02(c) (Baldwin 1984); OKLA. STAT. ANN. tit. 12, § 2505 (West 1980); OR. REV. STAT. § 40.260 (1984); 42 PA. CONS. STAT. ANN. § 5943 (Purdon 1982); R.I. GEN. LAWS § 9-17-23 (1985); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. §§ 19-13-16 to -18 (1979); TENN. CODE ANN. § 24-1-206 (1980); TEX. R. EVID. 505; UTAH CODE ANN. § 78-24-8 (1977 & Supp. 1986); VT. STAT. ANN. tit. 12, § 1607 (1973); VA. CODE ANN. § 8.01-400 (1984); V.I. CODE ANN. tit. 5, § 857 (1982); WASH. REV. CODE ANN. § 5.60.060 (1963 & Supp. 1987); W. VA. CODE § 48-2-10(a) (1986); WIS. STAT. ANN. § 905.06 (West 1975); WYO. STAT. § 1-12-101 (1977). [hereinafter PRIEST-PENITENT PRIVILEGE STATUTES].

4. "Penitent" means any person who communicates with a clergyman for purposes of making a confession of wrongdoing and for spiritual guidance. See, e.g., CAL. EVID. CODE. § 1031 (West 1966) defining a penitent as: "a person who has made a penitential communication to a clergyman."

5. See Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 108-14 (1983). See also Smith, *The Pastor on the Witness Stand: Toward a Religious Privilege in the Courts*, 29 CATH. LAW. 1 (1984). A majority of states grant the privilege if these prerequisites are met. However, some states also require confidentiality of communications be part of the "discipline enjoined" of the religion. See *infra* notes 86-94 and accompanying text.

6. See Silas, *Embattled Clergy — Is Confession Always Private?* 72 A.B.A.J. 36 (Feb. 1986). See also Ostling, *Confidence and the Clergy*, TIME, Oct. 1, 1984, at 66.

7. ALA. CODE §§ 26-14-1 to -13 (1986); ALASKA STAT. §§ 47:17:010-070 (1984 & Supp. 1986); ARIZ. REV. STAT. ANN. § 13-3620 (1978 & Supp. 1986); ARK. STAT. ANN. §§ 42-807 to -818 (1977 & Supp. 1985); CAL. PENAL CODE §§ 11165-11174.5 (West 1982 & Supp. 1987); COLO. REV. STAT. §§ 19-10-101 to -117 (1986); CONN. GEN. STAT. §§ 17-38a to -38f (1975 & Supp. 1986); DEL. CODE ANN. tit. 16, §§ 901-909 (1983); D.C. CODE ANN. §§ 2101-2162 (1981 & Supp. 1986); FLA. STAT. ANN. §§ 415.101-.608 (West 1986); GA. CODE ANN. § 19-7-5 (1982); HAWAII REV. STAT. §§ 350-1 to -7 (1985); IDAHO CODE §§ 16-1601 to -1630 (1979 & Supp. 1986); ILL. ANN. STAT. ch. 23, paras. 2051-2062 (Smith-Hurd Supp. 1986); IND. CODE ANN. §§ 31-6-11-1 to -21 (West 1979); IOWA CODE ANN. §§ 232.67-.77 (West 1985 & Supp. 1986); KAN. STAT. ANN. §§ 38-1521 to -1529 (Supp. 1985); KY. REV. STAT. ANN. §§ 620.010-.090 (Baldwin Supp. 1986); LA. REV. STAT. ANN. § 14:403 (West 1986); ME. REV. STAT. ANN. tit. 22, §§ 4011-4017 (Supp. 1986); MD. FAM. LAW CODE ANN. §§ 5-901 to -912 (1984 & Supp. 1986); MASS. GEN. LAWS ANN. ch. 119, §§ 51A-51G (West Supp. 1986); MICH. COMP. LAWS ANN. §§ 722.621-.636 (West Supp. 1986); MINN. STAT. ANN. § 626.556 (West 1983 & Supp. 1986); MISS. CODE ANN. § 43-23-9 (1981); MO. ANN. STAT. §§ 210.110-.165 (Vernon 1983 & Supp. 1987); MONT. CODE ANN. §§ 41-3-201 to -208 (1985); NEB. REV. STAT. §§ 28-701 to -727 (1985); NEV. REV. STAT. ANN. §§ 432B.010-.400 (Michie 1986); N.H. REV. STAT. ANN. §§ 169C:29-.32 (Supp. 1985); N.J. STAT. ANN. § 9:6-

child abuse reporting statutes that require reporting and testifying in cases of suspected child abuse present a direct challenge to the confidentiality granted in the priest-penitent privilege statutes.<sup>8</sup> Originally, the reporting and testifying sections of the child abuse reporting statutes required only physicians to report.<sup>9</sup> Many legislatures have recently expanded the reporting sections of these statutes to require other professionals who observe children and who suspect child abuse to report.<sup>10</sup> If the priest is among the group of those required or permitted to report and testify in cases of suspected child abuse, and if his suspicions of child abuse arise from a confidential communication, then he is faced with a legal and ethical dilemma of whether to report or to keep his confidence.<sup>11</sup>

The unclear effect of the overlap between the privilege statutes and the reporting statutes causes a legal dilemma for the priest.<sup>12</sup> An example of this dilemma occurred recently in Florida where a pastor, Reverend Melish, was jailed for contempt of court after refusing to testify in a case in-

8.10 (West 1976 & Supp. 1986); N.M. STAT. ANN. §§ 32-1-15 to -16 (1986); N.Y. SOC. SERV. LAW §§ 411-438 (McKinney 1983 & Supp. 1987); N.C. GEN. STAT. §§ 7A-542 to -552, 8-53.1 (1986); N.D. CENT. CODE §§ 50-25.1-01 to -14 (1982 & Supp. 1985); OHIO REV. CODE ANN. § 2151.421 (Baldwin 1978 & Supp. 1985); OKLA. STAT. ANN. tit. 21, §§ 845-848 (West 1983 & Supp. 1987); OR. REV. STAT. §§ 418.740-.755 (1985); 11 PA. CONS. STAT. ANN. §§ 2201-2224 (Purdon Supp. 1986); R.I. GEN. LAWS §§ 40-11-1 to -16 (1984 & Supp. 1985); S.C. CODE ANN. §§ 20-7-480 to -569 (Law Co-op. 1985); S.D. CODIFIED LAWS ANN. §§ 26-10-10 to -18 (1984 & Supp. 1986); TENN. CODE ANN. §§ 37-1-401 to -413, 37-1-605 to -616 (Supp. 1986); TEX. FAM. CODE ANN. §§ 34.01-.08 (Vernon 1975 & Supp. 1986); UTAH CODE ANN. §§ 78-3b-1 to -16 (Supp. 1986); VT. STAT. ANN. tit. 33, §§ 681-689 (Supp. 1985); VA. CODE ANN. §§ 63.1-248.1-.17 (1980 & Supp. 1986); V.I. CODE ANN. tit. 5 § 2532 (Supp. 1985); WASH. REV. CODE ANN. §§ 44.010-.900 (1986 & Supp. 1987); W. VA. CODE §§ 49-6A-1 to -10 (1986); WIS. STAT. ANN. § 48.981 (West 1979 & Supp. 1986); WYO. STAT. §§ 14-3-201 to -215 (1986). [hereinafter REPORTING STATUTES].

8. A report or testimony from a priest in a case of child abuse would violate the privilege if the priest's knowledge of the child abuse was derived from a confidential communication. This conflict is similar to the dilemma faced by psychotherapists. See Comment, *Duties in Conflict: Must Psychotherapists Report Child Abuse Inflicted by Clients and Confided in Therapy?* 22 SAN DIEGO L. REV. 645 (1985).

9. See Fraser, *A Glance At The Past, A Gaze At The Present, A Glimpse At The Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 650 (1977-1978). The initial child abuse reporting statutes required only physicians to report. Legislatures assumed that physicians were the only professionals competent to recognize and diagnose cases of child abuse and neglect.

10. See Fraser, *supra* note 9, at 651. See also Note, *Reporting Child Abuse: When Moral Obligations Fail*, 15 PAC. L.J. 189, 190 (1983). The expansion of the group of professionals to include others was undertaken in an effort to identify child abuse at the earliest stages possible, presumably prior to the need for medical treatment by a physician.

11. See generally Yellin, *supra* note 5, at 149. Before the states expanded the reporting statutes, the privilege of confidentiality was granted to the priest-penitent relationship as long as the prerequisites previously mentioned were met.

12. See Comment, *supra* note 8, at 645. Like the psychotherapist, the priest is placed in a position of encountering conflicting duties.

volving child abuse.<sup>13</sup> After receiving the defendant's confession of child abuse, the pastor encouraged the defendant to turn himself in to the proper authorities.<sup>14</sup> Thereafter, the pastor accompanied the defendant to the police station but did not report the child abuse or make a statement.<sup>15</sup> At the trial, the pastor was called to testify but refused, claiming a privilege of confidentiality.<sup>16</sup> The judge refused to honor the long-standing privilege and cited the pastor for contempt.<sup>17</sup>

The priest is left with a dilemma and no longer knows what to do when the confidence made by the penitent deals with child abuse. Under the priest-penitent privilege statutes, confidentiality is unconditionally granted to the priest-penitent relationship.<sup>18</sup> However, this confidentiality conflicts with the child abuse reporting statutes, which require reporting and testifying and which apparently abrogate privileges in cases of suspected child abuse.<sup>19</sup> The reporting statutes are not clear as to whether the priest-penitent privilege is abrogated. The reporting statutes and the cases to date do not clearly explain the effect of the overlap and, as a result, the priest is unsure as to whether he may uphold the confidence of the confession made to him.

Out of necessity, courts will decide the problem these conflicting statutes present. For several reasons, courts should attempt to resolve the conflict in a way that preserves the confidentiality between a priest and penitent. First, revocation of the confidentiality granted under priest-penitent privilege statutes would violate free exercise of religion guaranteed under the constitution. Second, as a practical matter, the priest is unlikely to be the only source of the requested information. Thus, a report or testimony would not be needed from the priest and would unnecessarily burden the relationship with the penitent. Finally, priests who are bound by their church to keep communications confidential will refuse to report and testify, even though compelled by law and courts. A court may be forced to incarcerate a priest who refuses to testify. However, if the court resolves the

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13. See *Florida v. Mellish*, 84-9852CF810, discussed in *Silas*, *supra* note 6, at 36. The case was appealed to the 4th District Court of Appeals in West Palm Beach. *Mellish v. State of Florida*, 84-1930, discussed in *Silas*, *supra* note 6, at 36. While on appeal, the 1985 session of the Florida legislature amended the Child Abuse Statute to exempt clergymen. *Id.* See also *Ostling*, *supra* note 6, at 66.

14. See *Ostling*, *supra* note 6, at 66.

15. See *Ostling*, *supra* note 6, at 66.

16. See *Ostling*, *supra* note 6, at 66.

17. See *Ostling*, *supra* note 6, at 66.

18. See *Yellin*, *supra* note 5, at 110. Texas, however, does not apply the privilege when, in the interests of justice, the testimony is required.

19. See *Comment*, *supra* note 8, at 649. If the priest is required to report all suspicions of child abuse, including those suspicions obtained during a confidential communication with a penitent, then the priest faces a conflict of duties. By reporting, the priest breaches his duty of confidence, and by not reporting he breaches a potential duty to report.

conflicting statutes by interpreting them to not abrogate and mandate disclosure, these constitutional problems and unconstitutional results could be avoided.

This note will attempt to present courts with a means to avoid the potential problems, and to resolve the dilemma presented by the conflict between the priest-penitent privilege statutes and the child abuse reporting statutes. First, in order to resolve this dilemma, testimonial privileges must be examined. The history, scope, and purpose of both the priest-penitent privilege and the child abuse reporting statutes will be discussed to determine the legislature's intent. Next, the various overlaps and conflicts between these statutes will be defined to clarify the problem for each state. Finally, this note will resolve the dilemma and apparent conflicts under principles of statutory construction, and will propose a resolution based upon a common-law analysis of the effect of the reporting statutes' requirements on other testimonial privileges, such as the attorney-client privilege and the psychotherapist-patient privilege.

## II. PRIEST-PENITENT PRIVILEGE

### A. Evidentiary Privilege in General

As a general rule of evidence law, all federal and state courts have the right to obtain testimonial evidence from all relevant sources.<sup>20</sup> Thus, when a witness is called to the stand he must testify to all matters that are within his knowledge and competence.<sup>21</sup> This rule is based upon society's interest in a properly and effectively functioning judicial system.<sup>22</sup> The general proposition is that the truth can best be obtained by examining the testimony of all competent witnesses. However, legislatures and courts have carved out certain exceptions to this rule of obligatory testimony.<sup>23</sup>

One exception to the general rule of obligatory testimony involves the area of testimonial privileges.<sup>24</sup> Under this exception, a person is not re-

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20. In Lord Hardwicke's words, "the public has a right to every man's evidence." 8 J. WIGMORE, EVIDENCE § 2192 (McNaughtan rev. ed. 1961).

21. See C. McCORMICK, *supra* note 1, at §§ 10-15. The common law required that the witnesses testify to facts that could be perceived by the senses, and that the witnesses had actually observed. This rule is commonly referred to as the rule of first-hand knowledge. Thus, a witness cannot testify to a matter unless he has personal knowledge of the matter.

22. See C. McCORMICK, *supra* note 1, at § 10. See also 8 J. WIGMORE, *supra* note 20, at § 2192.

23. See C. McCORMICK, *supra* note 1, at § 10. Examples of exceptions to the general rule of obligatory testimony include the opinion rule, the hearsay rule, and the testimonial privilege rules.

24. See Note, *Evidence Law—The Psychotherapist-Patient Privilege In Federal Courts*, 59 NOTRE DAME L. REV. 791, 793-94 (1983-1984). See also C. McCORMICK, *supra* note 1, at § 72. The rules of testimonial privilege are unique rules of evidence as they do not foster the

quired or allowed to testify because of specified relationships,<sup>25</sup> circumstances,<sup>26</sup> or rights.<sup>27</sup> Unlike most exclusionary rules,<sup>28</sup> a testimonial privilege allows a witness to withhold information that would otherwise be relevant and helpful to the court.<sup>29</sup> The granting of the testimonial privilege, like the general rule of obligatory testimony, is based upon a careful balancing of individual and societal interests in protecting specific relationships, circumstances, rights, and the judicial interest in obtaining all relevant evidence.<sup>30</sup> When a testimonial privilege is granted, the individual and societal interests in protecting certain rights and relationships is deemed paramount to the judicial interests in obtaining all relevant evidence in the pursuit of truth.<sup>31</sup>

One area protected by testimonial privileges involves private and professional relationships.<sup>32</sup> In this area, the privilege attempts to protect the atmosphere of confidentiality that is necessary for the proper and effective functioning of the relationship.<sup>33</sup> Examples of protected relationships include the attorney-client, the physician-patient, the psychotherapist-patient, and the husband-wife relationship.<sup>34</sup> Although the privileges in this area deal with the functioning of the relationship, they also involve the extensive

judicial fact-finding system. The justifications for such rules are not based on the need to exclude unreliable or misleading evidence; rather, the justifications are based on the benefit society receives as a result of protecting communications within specific relationships.

25. Relationships that are granted confidentiality include the attorney-client relationship, the husband-wife relationship, the physician-patient relationship, and the priest-penitent relationship. *See generally* C. McCORMICK, *supra* note 1, at §§ 72-105 (the rationale for these privileges is that public policy requires the encouragement of the communications without which these relationships could not effectively function).

26. Circumstances that are granted confidentiality include government-held secrets or classified military material. *See generally* C. McCORMICK, *supra* note 1, at §§ 106-13 (generally, the rationale forwarded for these privileges is that disclosure would be injurious to the public interest).

27. Rights that involve confidentiality or nondisclosure of testimony include the right against self-incrimination and the right against illegally obtained evidence. *See generally* C. McCORMICK, *supra* note 1, at §§ 114-83. Under these privileges, the innocent individual is protected from the danger of creating an unreasonable prejudice and the guilty individual is assured treatment in a manner consistent with basic respect and dignity. Also, the accused is protected against abuse of the judicial process.

28. Generally, exclusionary rules are designed to exclude evidence that would be unreliable, misleading, or prejudicial. *See* C. McCORMICK, *supra* note 1, at § 72.

29. Note, *supra* note 24, at 793.

30. *See* C. McCORMICK, *supra* note 1, at § 72. *See also* 8 WIGMORE, *supra* note 20, at 2285 (by protecting these interests, a privilege encourages open communication within specified relationships and at the same time preserves the right of privacy).

31. *See* C. McCORMICK, *supra* note 1, at § 72.

32. *See In re Agosto*, 553 F. Supp. 1298, 1306 (D. Nev. 1983) (holding child could claim parent-child privilege for testifying adversely against father).

33. *Id.* *See also* Note, *supra* note 24, at 794; C. McCORMICK, *supra* note 1, at § 72.

34. *See* C. McCORMICK, *supra* note 1, at §§ 72-105.

and correlative privacy interests mentioned in other protected privilege areas.<sup>35</sup> Thus, the areas and interests that testimonial privileges protect, to some extent, overlap and are interrelated.<sup>36</sup>

The priest-penitent privilege is similar to other testimonial privileges that involve an evidentiary exception to obligatory testimony and are based upon several interrelated interests.<sup>37</sup> Initially, the priest-penitent privilege could be classified within the realm of testimonial privileges designed to protect specific professional relationships. The priest-penitent privilege protects the priest-penitent relationship.<sup>38</sup> In addition, this privilege of confidentiality is designed to protect the individual's interest in privacy.<sup>39</sup> Further, the priest-penitent privilege involves the priest's and penitent's interests in free exercise of religion.<sup>40</sup> Although the priest-penitent privilege involves several different interests, an examination of the history, justifications, and present applications of the privilege will clarify its scope and purpose.

### B. History

The history of the priest-penitent privilege reveals that the evidentiary problem of whether a testimonial privilege exists for confidential communications between a priest and penitent is not new.<sup>41</sup> The first known case was reported in 1606 under King James I.<sup>42</sup> In the United States the privilege was recognized as early as 1813.<sup>43</sup> However, even though the existence of a priest-penitent privilege was recognized early in our country's history, the question of the privilege's existence has not been extensively litigated.<sup>44</sup>

The first court in the United States to recognize the existence of a

35. C. McCORMICK, *supra* note 1, at § 72.

36. Note, *supra* note 24, at 794.

37. See Yellin, *supra* note 5, at 108-14 (the priest-penitent privilege involves interests in the right to privacy, the interest in free exercise of religion, and the interest in protecting the priest-penitent relationship).

38. See Yellin, *supra* note 5, at 95-96. See also 8 J. WIGMORE, *supra* note 20, at §§ 2394-96.

39. See C. McCORMICK, *supra* note 1, at § 72.

40. Yellin, *supra* note 5, at 112. See also *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1560 (1985).

41. See Yellin, *supra* note 5, at 95.

42. Garnett's Trial, 2 How. St. Tr. 218 (1606), cited in 8 J. WIGMORE, *supra* note 20, at § 2394 n.1.

43. *People v. Phillips*, N.Y. Ct. Gen. Sess. (1813). This is an unreported case found in 1 W.L.J. 109 (1843), cited in Tinnelly, *Privileged Communications to Clergymen*, 1 CATH. LAW. 198 (1955). See also Yellin, *supra* note 5, at 104. See also 8 J. WIGMORE, *supra* note 20, at § 2394 n.7.

44. See Yellin, *supra* note 5, at 96. According to Yellin, only 70 cases have dealt with the privilege between 1658 and 1980.



priest-penitent privilege based its decision on the free exercise of religion clause of the first amendment.<sup>45</sup> In *People v. Phillips*, a priest refused to testify because his knowledge involving the investigation was derived from his functions as a Roman Catholic priest.<sup>46</sup> The priest was engaged in the administration of penance, one of the seven Sacraments of his church, when he learned of the child abuse. The priest argued that since his knowledge was obtained through the sacrament of penance, he was bound by the canons of his church and the obligations of his clerical office to inviolable secrecy.<sup>47</sup> The court agreed and held that to deny the privilege would infringe upon the Catholic priest's and the penitent's free exercise of religion.<sup>48</sup>

Free exercise of religion failed to remain a consistent reason for granting confidentiality to a confession.<sup>49</sup> The free exercise argument failed to sustain confidentiality for a confession to a Protestant minister.<sup>50</sup> In *People v. Smith*, the court distinguished *People v. Phillips* by finding that the minister in the case at bar was a Protestant and thus, not bound by the seal and sanctity of the confessional, as a confidential confession was not a sacrament of the Protestant Church.<sup>51</sup> Although the Protestant minister was bound by an oath of secrecy in his function as a minister, the court denied the confidentiality of the privilege.<sup>52</sup> Thus, confidentiality was only granted when confidentiality of confession was a basic tenet of the church.

In response to the inconsistent and harsh denial of confidentiality to confessions, legislatures across the country enacted priest-penitent privilege statutes.<sup>53</sup> New York enacted the first statute.<sup>54</sup> The New York statute

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45. Tinnelly, *supra* note 43, at 209. The court said religious freedom was guaranteed by the constitution and consecrated by the social compact. The court further said:

In this country there is no alliance between church and state . . . but religious freedom [is] guaranteed by the constitution and consecrated by the social compact.

It is essential to the free exercise of a religion, that its ordinances should be administered — that its ceremonies as well as its essentials should be protected. . . . To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman catholic religion would be thus annihilated.

*Id.* at 207.

46. Tinnelly, *supra* note 43, at 199.

47. Tinnelly, *supra* note 43, at 200.

48. Tinnelly, *supra* note 43, at 207.

49. See Yellin, *supra* note 5, at 106.

50. See *People v. Smith*, N.Y. City Hall Rec. 77 (1817). This case was not officially reported, but is cited in Tinnelly, *supra* note 43, at 209.

51. Tinnelly, *supra* note 43, at 211. See also Yellin, *supra* note 5, at 106.

52. Tinnelly, *supra* note 43, at 209.

53. See PRIEST-PENITENT PRIVILEGE STATUTES, *supra* note 3.

54. N.Y. REV. STAT. § 72, pt. 3, ch. VII, tit. III, art. 8 (1828), quoted by Tinnelly, *supra* note 43, at 213. The statute read: "No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional

granted confidentiality to confessions made to a minister when secrecy of confessions was a rule or practice of the religion.<sup>55</sup> By granting confidentiality in such instances, the New York legislature eliminated the restricted interpretation in *Phillips*, which basically limited the application of the privilege to sacramental confessions of the Catholic Church.<sup>56</sup> Although all have different requirements and applications, forty-nine states, the District of Columbia, and the Virgin Islands have statutes dealing with the priest-penitent privilege.<sup>57</sup>

### C. Modern Application of the Priest-Penitent Privilege

#### 1. Clergyman

Although every state codified its own version of a priest-penitent privilege, the majority of the statutes generally contain five prerequisites to application of confidentiality.<sup>58</sup> One common prerequisite is that the communication must have been made to a "clergyman."<sup>59</sup> The definition of who qualifies as a clergyman varies from state to state depending upon the state's method of classification.<sup>60</sup> Thus, the general application of the priest-penitent privilege will depend upon the individual state's privilege statute. However, the majority of states limit the application of the privilege to communications made to those defined as clergymen.<sup>61</sup>

One interpretation of who should be classified as clergymen was explained in *In Re Murtha*.<sup>62</sup> In *Murtha*, a nun attempted to invoke the priest-penitent privilege when asked to testify to confessions made to her by a member of the church.<sup>63</sup> The court denied the privilege since *Murtha* was not a clergyman within the definition of the statute nor the canons of the religion.<sup>64</sup> Thus, the definition of a clergyman was limited by the statute

character, in the course of discipline enjoined by the rules or practice of such denomination." *Id.*

55. See Tinnelly, *supra* note 43, at 213.

56. Yellin, *supra* note 5, at 106.

57. See PRIEST-PENITENT PRIVILEGE STATUTES, *supra* note 3.

58. See generally Smith, *supra* note 5, at 6. Generally, for the priest-penitent privilege to apply, the testimony sought must deal with: 1) a confidential communication; 2) made to a clergyman; 3) who is acting in his professional character; 4) for religious or spiritual purposes; and 5) confidentiality must be a discipline enjoined of the church or denomination. *Id.* at 6.

59. See generally Smith, *supra* note 5, at 7.

60. For example, twenty-four states specifically define the term "clergymen." Twenty-five states compile a list of persons considered "clergymen." Three states, Louisiana, Nevada and Rhode Island, state only that "clergymen" are given the privilege without any listing or definition. See PRIEST-PENITENT PRIVILEGE STATUTES, *supra* note 3.

61. See Smith, *supra* note 5, at 7. See also Yellin, *supra* note 5, at 115.

62. 115 N.J. Super. 380, 279 A.2d 889 (1971).

63. *Id.* at 380, 279 A.2d at 890.

64. *Id.* at 383, 279 A.2d at 892.

and church canons. In a similar case involving a nun who attempted to invoke the privilege, the court in *Masquat v. McGuire* refused to grant the privilege of confidentiality; the court held that at the time the nun received the communication, she was acting in her capacity as a hospital administrator and not as a spiritual counselor.<sup>65</sup> Although the *Masquat* court denied application of the privilege to the nun, the ruling left open the possibility that the general definition of "clergyman" was governed by the function, and thus, might include a nun acting as a spiritual counselor.<sup>66</sup>

The general definition of "clergymen" was recently extended to include a nun acting as a spiritual director.<sup>67</sup> Sister Dominic, the nun in *Eckmann v. Board of Educ. of Hawthorn School Dist.*,<sup>68</sup> served as a spiritual director. Sister Dominic submitted affidavits showing that the office of spiritual director was a recognized office within the Catholic Church.<sup>69</sup> The evidence also showed that both sisters and priests performed the function of spiritual director.<sup>70</sup> The court held that Sister Dominic was in such a position and performed such a function as to entitle her to the priest-penitent privilege.<sup>71</sup> Therefore, "clergymen" has been functionally defined to encompass those persons acting as spiritual directors/advisors, including nuns.

## 2. Professional Capacity

Closely related to the question of who is a clergyman under the priest-penitent privilege statute is the second prerequisite—that the communication must be made to a clergyman acting in his professional capacity.<sup>72</sup> That is, if the communication is made to the clergyman conversationally or as between friends, the relationship and communication is not protected by the priest-penitent privilege.<sup>73</sup> Thus, the confidentiality of the privilege is granted only under limited circumstances.<sup>74</sup>

65. 638 P. 2d 1105 (Okla. 1981).

66. *Id.* at 1106.

67. 106 F.R.D. 70 (E.D. Mo. 1985).

68. *Id.* at 71.

69. *Id.* at 72.

70. *Id.*

71. *Id.* at 73.

72. See Yellin, *supra* note 5, at 121-24. See also Smith, *supra* note 5, at 11.

73. See Yellin, *supra* note 5, at 121; Smith, *supra* note 5, at 11. See also Keenan v. Gigante, 47 N.Y.2d 160, 166, 390 N.E.2d 1151, 1154 *cert. denied*, 444 U.S. 887 (1979); *In re Fuhrer*, 100 Misc.2d 315, 320, 419 N.Y.S.2d 426 (1979) (both disallowing privilege where priest was implicated in crime).

74. See Yellin, *supra* note 5, at 121. Because the priest-penitent privilege is a derogation from the general rule that courts are entitled to every person's testimony, courts strictly apply this prerequisite. Thus, not all communications to a clergyman are privileged. *Id.*

### 3. *Spiritual Communication*

A third prerequisite deals with the content of the communication.<sup>75</sup> That is, the communication must be related to religion or religious guidance. Every state, in varying degree, has limited the realm of protected communications.<sup>76</sup> Vermont, for example, has limited the privilege to statements made in "the sanctity of a religious confession."<sup>77</sup> The majority of states, however, have less restrictive limits, and some allow the privilege to be invoked for any communication that is made in the course of spiritual guidance.<sup>78</sup>

### 4. *Confidential in Character*

The fourth prerequisite for application of the priest-penitent privilege is that the communicant intend the communication be confidential in character.<sup>79</sup> Hence, a priest must testify to matters that do not involve confidential communications.<sup>80</sup> This requirement was illustrated in *In Re Williams*.<sup>81</sup> In *Williams*, a priest refused to testify to all matters, including issues that would not involve confidential communications.<sup>82</sup> Since the testimony sought would not have involved or violated a confidential communication, the priest was required to testify. Because the priest refused, he was

75. Smith, *supra* note 5, at 10-11 (if the communication is not related in some way to religion or religious guidance, then the privilege does not apply).

76. Yellin, *supra* note 5, at 121.

77. VT. STAT. ANN. tit. 12 § 1607 (1973). Several states have limited the protection to those communications that involve confessions, spiritual advice, and marriage counselling. Twelve states have restricted the application of the privilege to confessions. See PRIEST-PENITENT PRIVILEGE STATUTES, *supra* note 3.

78. States that apply the privilege to all confidential communications made to a clergyman include: Alabama, Alaska, Arkansas, California, Connecticut, Delaware, The District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin, and Texas. See PRIEST-PENITENT PRIVILEGE STATUTES, *supra* note 3.

79. Smith, *supra* note 5, at 6. The privilege does not apply if the communication was not confidential in character. See 8 J. WIGMORE, *supra* note 20, at § 2285. This prerequisite fulfills the first prong of Wigmore's privilege test, which requires that the communication originate in confidence. *Id.*

80. See Smith, *supra* note 5, at 10. See also *Keenan*, 47 N.Y.2d at 166, 390 N.E.2d at 1154, cert. denied, 444 U.S. 887 (1979) (priest's invocation of privilege denied as the testimony sought did not deal with confidential communication nor did the testimony deal with spiritual communications).

81. *In re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967). The court held that since no confidential communication was involved the priest-penitent privilege statute was inapplicable. Further, the court held that the lack of confidential confessions prevented a free exercise argument. *Id.*

82. *Id.* at 70, 152 S.E.2d at 319.

jailed for contempt of court.<sup>83</sup> Similarly, in *People v. Thompson*, the communication between the defendant and the priest was held to be non-confidential in nature.<sup>84</sup> The defendant, a penitent, gave the priest information that he intended to be relayed to the penitent's attorney for purposes of plea bargaining.<sup>85</sup> As in *Williams*, since the communication was not intended to be kept confidential, the privilege did not apply.<sup>86</sup>

### 5. Discipline Enjoined

The fifth prerequisite found in many states is that confidentiality must be part of the "discipline enjoined" by the church.<sup>87</sup> In other words, the denomination must require confidentiality of communication as part of its discipline before the privilege of confidentiality will be granted to communications between the denomination's ministers and members.<sup>88</sup> The factor, when required, is interpreted in varying degrees of restrictiveness.<sup>89</sup> A broad interpretation of this requirement appears in *In Re Swenson*, which recognized that all churches have as a discipline enjoined the confidentiality of confessions.<sup>90</sup> However, not all states use this broad interpretation of the "discipline enjoined" requirement, and for those states that have a restricted interpretation of the discipline enjoined requirement, the application of the privilege is greatly restricted.<sup>91</sup> The practical effect of the "discipline enjoined" requirement is that churches are forced to formally enact and adopt rules making confidential communications a part of the religious practice.

All of these requirements limit the application and scope of the priest-

83. *Id.*

84. *People v. Thompson*, 133 Cal. App. 3d 422, 184 Cal. Rptr. 72 (1982).

85. *Id.* at 426, 184 Cal. Rptr. at 76.

86. *Id.*

87. Twenty-two states require confidentiality as a part of the "discipline enjoined" of the religion. The states include: Arizona, California, Colorado, The District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Montana, New Jersey, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, The Virgin Islands, and Washington. See PRIEST-PENITENT PRIVILEGE STATUTES, *supra* note 3.

88. See Yellin, *supra* note 5, at 126. See also Kuhlman, *Communications to Clergymen—When Are They Privileged?* 2 VAL. U.L. REV. 265, 268 (1967).

89. See Kuhlman, *supra* note 88, at 274-75. See also Smith, *supra* note 5, at 11-13; Yellin, *supra* note 5, at 126. The rationales and interpretations of this requirement vary from state to state. In the strictest interpretation it would be limited to the Catholic Church. *Id.*

90. *In re Swenson*, 183 Minn. 602, 237 N.W. 589 (1931). *Swenson* was a divorce case in which a Lutheran minister claimed the privilege for confessions made by the husband. The court held that since the communication was for spiritual guidance the priest-penitent privilege applied. See also Yellin, *supra* note 5, at 133. The *Swenson* interpretation used to be the most liberal judicial interpretation of the "discipline enjoined" requirement, but is now commonly used. *Id.*

91. Smith, *supra* note 5, at 13-14.

penitent privilege. For most states the privilege will not apply unless the testimony sought deals with a communication made in confidence to a clergyman acting in his professional capacity.<sup>92</sup> Some states limit application of the privilege further with the "discipline enjoined" requirement.<sup>93</sup> Clearly, the statutory scope of the privilege is by no means broadly applied. In fact the privilege may be too narrowly applied where it is restricted to sacramental confessions.<sup>94</sup> Regardless of how limited the priest-penitent privilege already is, the expanded applications of the child abuse reporting statutes may result in further unjustified restrictions upon the privilege.

### III. CHILD ABUSE REPORTING STATUTES

#### A. History

Child abuse has existed in the United States for over two hundred years.<sup>95</sup> In many situations, child abuse has gone unnoticed except in the most serious circumstances.<sup>96</sup> In part, child abuse was unrecognized because parents were given the broadest discretion in raising and disciplining their children.<sup>97</sup> The earliest statutes prohibiting child abuse were directed only at the most serious cases of abuse.<sup>98</sup> Therefore, a broad range of child abuse was not illegal, and many children were unprotected.<sup>99</sup>

In the early 1960s, the problem of child abuse became more public with the medical profession's recognition of what was termed the "battered child syndrome."<sup>100</sup> In all fifty states, as well as the Virgin Islands and the District of Columbia, child abuse reporting statutes were enacted to confront the problem of undetected child abuse.<sup>101</sup> In 1974, Congress passed the Child Abuse Prevention and Treatment Act to aid in attacking the

92. Yellin, *supra* note 5, at 149-50.

93. Yellin, *supra* note 5, at 149-50. Yellin argues, however, that the "discipline enjoined" requirement should be abolished. Instead he argues the courts should not involve themselves in the doctrine and policy of various religious groups to determine the discipline. Thus, the courts should take judicial notice that the sharing of confidences with a minister is a legitimate and common practice of all churches and religious denominations. *Id.* at 150.

94. See generally Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses*, 20 U. PITT. L. REV. 27 (1967) (Stoyles argues that where the privilege is applied too narrowly, an establishment of religion occurs, as the doctrines of the Catholic Church would be advanced in exclusion of others).

95. See Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458 (1977-1978).

96. *Id.* at 459.

97. *Id.*

98. *Id.*

99. See Fraser, *supra* note 9, at 650.

100. Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered-Child Syndrome*, 181 J.A.M.A. 17 (1962).

101. See REPORTING STATUTES, *supra* note 7.

problem of child abuse.<sup>102</sup>

The first enactment of child abuse reporting statutes marked the beginning of several legislative attempts to solve the problem of unidentified child abuse. Initially, child abuse reporting statutes dealt primarily with "identifying" abused children.<sup>103</sup> However, the identification of the abused child was insufficient to combat the problem because the statute lacked provisions regarding procedures once the abuse was identified.<sup>104</sup> The second enactment of reporting statutes attempted to resolve the problem of investigative inaction by mandating investigative procedures upon identification of the abuse. Although this was an important addition, the statutes still lacked provisions defining relief once child abuse was proven by the investigator. To resolve this problem, legislatures added provisions dealing with relief and remedies in the form of state intervention. Thus, present reporting statutes deal with identification, investigation, and intervention in cases of child abuse.<sup>105</sup> The overall effectiveness of each state's child abuse statute depends, however, upon the elements that make up the statute's structure.

### *B. Present Application of Child Abuse Reporting Statutes*

Although each state has enacted a different version of a child abuse reporting statute, the statutes all contain common elements in their basic structure and scope.<sup>106</sup> The purpose clause<sup>107</sup> of the reporting statutes states the legislative intent. The intent behind most child abuse reporting statutes is threefold: 1) early identification; 2) mandated investigation; and 3) intervention where appropriate.<sup>108</sup> The mandatory and permissive reporting sections define the people required or permitted to report.<sup>109</sup> Over the years, the list of those required to report has grown to include several professionals outside of the medical profession.<sup>110</sup> Today, those included in the list of mandated reporters could be categorized as those people whose professions

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102. 42 U.S.C. §§ 5101-06 (Supp. IV 1974). The act allocates money to be distributed to each state that meets the conditions set out in the act. The passage of the act has played a major part in the states' efforts to combat child abuse through reporting statutes.

103. See Fraser, *supra* note 9, at 650.

104. See Fraser, *supra* note 9, at 650.

105. See Besharov, *supra* note 95, at 464.

106. Fraser, *supra* note 9, at 650. The reason the states have a common format is due in part to the requirements of the Child Abuse Prevention and Treatment Act, which requires the states to meet ten conditions to be eligible for federal funds.

107. Fraser, *supra* note 9, at 651. See also Besharov, *supra* note 95, at 464.

108. Fraser, *supra* note 9, at 651.

109. Fraser, *supra* note 9, at 656.

110. Fraser, *supra* note 9, at 657. Initially the physician was singled out as the sole, mandated reporter. However, the whole medical profession was later added to the group of professionals required to report. Today the group of mandated reporters has become even broader with the addition of teachers, policemen, and social workers. *Id.*

bring them into contact with children and families.

The sections of the child abuse reporting statutes that determine when a person or professional must make a report have also evolved since the enactment of the first reporting statute.<sup>111</sup> Initially, a report was required when child abuse was suspected.<sup>112</sup> Today, however, reports are also required when the reporter observes the child being threatened under circumstances which would reasonably result in abuse.<sup>113</sup> This addition of required reports of potential abuse helps to protect and identify the child prior to the occurrence of severe abuse.<sup>114</sup>

Legislatures added an immunity section to reporting statutes to elicit the cooperation during the identification stage from individuals who would not otherwise comply with the statute for fear of being sued if an investigation failed to find child abuse.<sup>115</sup> The immunity section gives a child abuse reporter immunity from civil and criminal liability when a report of suspected child abuse is made in good faith.<sup>116</sup> Reports of suspected child abuse are also encouraged by a section that abrogates certain statutory privileges in cases of suspected child abuse.<sup>117</sup> This section removes an obstacle to certain professionals who would otherwise be unable to report or testify in cases of suspected child abuse because of the confidentiality of a statutory privilege.<sup>118</sup> By having these privileges abrogated in cases involving child abuse, the investigators and the courts are able to discover the facts of abuse that otherwise would remain secret. The system is thus better able to protect the child.<sup>119</sup>

111. See Fraser, *supra* note 9, at 659-60.

112. See Fraser, *supra* note 9, at 659.

113. See Fraser, *supra* note 9, at 659-60.

114. See Fraser, *supra* note 9, at 660. See also Besharov, *supra* note 95, at 465.

115. Fraser, *supra* note 9, at 663. See also Saltzman, *Protection for the Child or the Parent? The Conflict Between the Federal Drug and Alcohol Abuse Confidentiality Requirements and the State Child Abuse and Neglect Reporting Laws*, 1985 S.I.U.L.J. 181, 183 (1985).

116. In sixteen states a report of suspected child abuse carries a presumption of good faith. The sixteen states are: Arkansas, Colorado, The District of Columbia, Florida, Illinois, Indiana, Maine, Michigan, New Mexico, New York, North Dakota, Pennsylvania, South Carolina, Tennessee, Wisconsin, and Wyoming. See, REPORTING STATUTES, *supra* note 7.

117. Fraser, *supra* note 9, at 664.

118. Fraser, *supra* note 9, at 664.

119. Cf. McCoid, *The Battered Child and Other Assaults Upon the Family: Part One*, 50 MINN. L. REV. 1, 34-36 (1965). McCoid challenges the wisdom of expanding the group of mandated reporters from physicians to others. In part, McCoid argues for non-expansion due to the confidential duty some professionals owe to the adult abuser. By requiring professionals like the attorney and priest to report, the reporting statutes place the professional in a precarious position in regard to their obligations owed to the adult abuser. Also, McCoid argues that physicians, by the nature of their profession are more likely to be aware of the existence of child abuse than an attorney or priest. *Id.*



#### IV. CONFLICT BETWEEN PRIEST-PENITENT PRIVILEGE AND CHILD ABUSE REPORTING STATUTES

The conflict between the privilege statutes and reporting statutes invokes several questions involving the effect of the reporting statute and the status of the priest-penitent privilege. In regard to the abrogation of privileges for certain professional relationships, a question arises as to whether it is in the child's best interest to repeal the privilege and require a report.<sup>120</sup> As for the priest-penitent relationship, questions arise as to whether the privilege is abrogated, and as to the application and effect the reporting statute has on the privilege. The questions invoked by the conflict could be resolved by examining the overlap that occurs between the statutes.

Overlap between the privilege and the reporting statute occurs in two ways. First, if the priest is required to report suspected child abuse and his suspicion of abuse is based upon a privileged confidential communication, the priest must choose between two conflicting duties. A priest faces a penalty regardless of which duty he chooses to uphold.<sup>121</sup> If the priest reports the child abuse, he faces potential penalties from his church and also violates the priest-penitent privilege statute; if he does not report, then he faces prosecution under the reporting statute. The statutes and duties can also conflict if the reporting statute requires the priest to testify in cases involving child abuse. Again, if the priest's knowledge of the child abuse was obtained in a confidential communication, then by testifying the priest would violate his sacred trust. If the priest refuses to testify, then he may be held in contempt of court and possibly sentenced to jail. In both situations, the priest's knowledge and suspicions of child abuse that are obtained in a confidential communication pose a serious dilemma for the priest, the resolution of which may or may not be found in the statutes.

Whether a resolution to his problem can be found within the conflicting priest-penitent privilege or child abuse reporting statutes depends upon several statutory variables.<sup>122</sup> One variable that effects the resolution is

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120. See generally Comment, *supra* note 8, at 649. See also Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1 (1980). Smith argues that the state's interest in preventing child abuse is not significantly advanced by laws requiring psychotherapists to report all instances of child abuse discovered during therapy. If therapy is not granted confidentiality, abusers will not seek treatment for the problems that cause them to abuse their children. *Id.*

121. For example, if a Catholic priest violates a confidence of the confessional, he will be excommunicated from his office and the church. See Yellin, *supra* note 5, at 110, citing Ponder, *Will Your Pastor Tell?*, Liberty, May-June, 1978, at 2,3. On the other hand, if the priest fails to report or testify when mandated, he is subject to legal penalties under the reporting statute. See Fraser, *supra* note 9, at 665.

122. For each state the resolution of the priest's dilemma will be dependent upon the combination of reporting and abrogation sections in the reporting statute.

whether the priest is a mandated reporter under the child abuse reporting statute. If the priest is merely a permissive reporter, the solution to the conflict is different because in this situation there would be no conflict of duties regarding a report of child abuse. Another variable which will affect the resolution is whether the child abuse reporting statute abrogates the priest-penitent privilege. The priest must ask if the privilege is abrogated, and under what circumstances it is abrogated. For example, the privilege may be repealed in all cases of child abuse, or it may be repealed only when the priest has made the report. Also, the question of whether the state has a testimonial privilege for the priest-penitent relationship will affect the resolution for testimonial purposes. Finally, the combinations of these variables will also affect the possible resolutions and, thus, should be examined in order to ascertain the legislature's intent and to obtain a justifiable resolution.

One possible combination of these statutory variables would be a child abuse reporting statute that explicitly requires the priest to report and explicitly abrogates the privileged communication.<sup>123</sup> In this situation, there would seemingly be no uncertainty as to the effect of the statutory overlap. However, the degree to which this situation will advance the purposes of the reporting statute seems uncertain and may even have a negative effect on the statute's purposes.<sup>124</sup> If priests are required to report and testify in all cases of child abuse, the parent abuser may not confess his offense of child abuse to the priest.<sup>125</sup> Thus, the priest may never become aware of the abuse, and the child would still be endangered.

A child abuse reporting statute that explicitly requires the priest to report child abuse, but does not explicitly abrogate the privilege, would be another combination of these sections.<sup>126</sup> In this situation, the priest is left with the uncertainty of the effect of making a required report. Another combination would be the child abuse statute that implicitly requires the priest to report but does not abrogate the privilege.<sup>127</sup> Again, the question

123. An example of this statutory combination is found in NEV. REV. STAT. §§ 432B.010-400 (1986). Nevada requires the priest to report and also abrogates privileges. The statute reads in part: "Reports must be made by every attorney, clergyman, social worker, school authority, and teacher. Further, evidence . . . shall not be excluded on the ground that the matter would otherwise be privileged against disclosure under chapter 40 of NRS."

124. See Fraser, *supra* note 9, at 657. See also McCoid, *supra* note 119, at 27. McCoid argues that the group of mandated reporters should be limited to the medical profession.

125. See generally Smith, *supra* note 120, at 1 (like the patient in the psychotherapist-patient relationship, the penitent would be deterred from confessing child abuse if the communication was not kept confidential).

126. An example of this statutory combination is found in CONN. GEN. STAT. §§ 17-38a to -38f (Supp. 1986). The Connecticut reporting statute requires the clergyman who has reason to suspect child abuse or neglect to report. However, the statute does not repeal the priest-penitent privilege.

127. An example of this statutory combination is found in 11 PA. CONS. STAT. ANN. §§

arises as to what effect a report would have on the priest's duty under the privilege.

Two other possible combinations would also cause conflicting duties for the priest. One combination would involve a child abuse reporting statute that does not require the priest to report, but abrogates the communicant's privilege.<sup>128</sup> Again, the priest would be uncertain as to what status a confidential communication made to him would have. A second combination would be a reporting statute that makes the priest a permissive reporter and does not abrogate the communications privilege.<sup>129</sup> Again, the application of the privilege would be uncertain if the priest believed a report was necessary. Although the legislatures of all states meant to achieve clarity in the child abuse reporting statutes, all of the above mentioned statutory combinations have the potential of leaving the priest in turmoil as to what his responsibilities may be in child abuse cases.

The priest is confronted with a priest-penitent privilege statute and a child abuse reporting statute which conflict and present the priest with unclear duties. This lack of clarity is seen in the several combinations of the reporting statutes and privilege statutes. Compounding the problem of the overlap is the application of each statute to the individual circumstances of each case. Thus, the resolution of the dilemma necessarily depends upon the states' intended application of the child abuse reporting statute.

## V. RESOLUTION

A resolution to the priest's problem may be found in the basic principles of statutory construction.<sup>130</sup> Applying principles of statutory construc-

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2201-04 (Purdon Supp. 1986). Pennsylvania requires any person who, in the course of their employment, occupation, or in the practice of their profession comes into contact with children shall report suspected cases of child abuse. The statute then lists professionals who may encounter child abuse and be required to report but fails to mention the clergyman as a professional who is required to report.

128. An example of this statutory combination is found in ILL. ANN. STAT. ch. 23 para. 2051-62 (Smith-Hurd 1985). In Illinois the priest is not required, but may report. Thus, the priest is a permissive reporter. However, the statute abrogates privileges for all those who do report, as "no evidence shall be excluded by reason of a common law or statutory privilege relating to communications between the alleged abuser and the reporter of the suspected abuse."

129. An example of this statutory combination is found in ARIZ. REV. STAT. ANN. § 13-3618 (1978 & Supp. 1985). Arizona does not list clergymen in the group of mandated reporters. Thus, clergymen are permissive reporters. Also Arizona specifically retains the priest-penitent privilege. As stated in § 13-3620(E) "a clergyman or priest shall not, without his consent be examined as a witness concerning any confession made to him in his role as a clergyman or a priest in the course of the "discipline enjoined" by the church to which he belongs."

130. See C. SANDS, 2A STATUTES AND STATUTORY CONSTRUCTION § 51 (4th ed. 1984). Where statutes overlap and unclarity exists as to the effect of the overlap, the courts can use

tion to the conflict between the privilege and reporting statutes may result in one solution to the dilemma. A common-law analysis will present a second resolution to this problem.<sup>131</sup> An examination of the courts' current application of the child abuse reporting statute to other statutory privileges and a comparison with the priest-penitent privilege will provide the common-law solution to the problem.

#### A. Statutory Analysis

Several factors must be considered in designing a solution to the conflict under a statutory or common-law analysis. Since each statute has its own separate purpose, the conflict of the privilege and reporting duties should be resolved by examining the purpose of both statutes in order to avoid frustrating the purposes of the statutes. The dilemma must also be resolved in light of the basic circumstances under which the conflicts occur. Whether the priest received his suspicions based upon an observation or a communication will affect the resolution. If the circumstances of the conflict and the purposes of the statutes are both considered, a justifiable and reasonable solution to the priest's problem may be found.

The basic problem faced by the priest is whether protection will be granted to confidential communications made to him in light of the child abuse reporting statute.<sup>132</sup> The communication may be subject to disclosure in a report, or it may be subject to compelled disclosure in proceedings that result from reports of child abuse. In states where the priest is a mandatory reporter and the priest-penitent privilege has been abrogated, the communication may not be kept confidential if the communication contains information of child abuse.<sup>133</sup> However, in states where the priest is required to report but the privilege is not abrogated, the communication should remain confidential.<sup>134</sup> In still other states, the priest may not be required to report,

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principles of statutory construction to determine the purposes of both statutes and to resolve the conflict in light of the purposes. *Id.*

131. Under a common-law analysis the dilemma faced by the priest will be compared to the dilemma faced by other professionals. Based upon the similarities and dissimilarities of these professional relationships, a resolution will be proposed.

132. See Comment, *supra* note 8, at 653. See also Ostling, *supra* note 6, at 66.

133. See, e.g., DEL. CODE ANN. tit. 16, § 903 (1983), which states in part, "Any [person] who knows or reasonably suspects child abuse or neglect shall make a report. . . ." Further, "The physician-patient privilege, husband-wife privilege, or any privilege except the attorney-client privilege . . . shall not pertain . . . in any judicial proceeding resulting from a report submitted pursuant to this chapter."

134. See, e.g., UTAH CODE ANN. § 78-3b-1 (Supp. 1986). Utah's statute states in part, "Whenever any person . . . has reason to believe a child has been subject to abuse or observes a child being subjected to conditions which would reasonably result in . . . abuse . . . shall [report]." Thus, the priest is a mandatory reporter. However, the Utah statute only abrogates the physician-patient privilege, so the priest-penitent privilege is retained. *Id.*

yet the privilege is abrogated.<sup>138</sup> In these states, the conflict would result in a violation of the communication's confidentiality in the courtroom if the priest is required to testify. Finally, there are states which allow, but do not require the priest to report and that do not abrogate the privilege.<sup>138</sup> Under all of these combinations, the priest is presented with a problem when a confidential communication involves child abuse. However, an analysis using principles of statutory construction will aid in resolving the apparent conflict.

### 1. Principles of Statutory Construction

A basic principle of statutory construction dictates that when statutes relate to the same subject matter, the more recent provision is presumed to be in accord with the legislative policy of the previous statute, absent an express repeal or amendment.<sup>137</sup> This principle assumes that whenever the legislature enacts a provision, it considers previous statutes on the same subject matter and other related statutes.<sup>138</sup> Hence, if statutes cover the same subject matter, they are construed to be in harmony if reasonably possible, even though an apparent conflict exists.<sup>139</sup>

The apparent conflict between the priest-penitent privilege and the child abuse reporting statutes could be resolved under the foregoing principle. Although the statutes deal on a broad scope with completely unrelated matters, they do overlap, and in a narrower sense, cover the same subject matter of confidential communication. The crux of the priest-penitent privilege statute is confidential communications. Under the child abuse reporting statutes, the subject of confidential communications is only a subsection to the overall subject matter of the statute. Therefore, where possible, the priest-penitent privilege statute and child abuse reporting statute should be construed in harmony, unless there is an express repeal or amendment found in the subsequent statute, in this case the reporting statute.<sup>140</sup>

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135. See, e.g., ALA. CODE § 26-14-3 (1977 & Supp. 1985). Alabama's statute only requires persons who work with or treat children to report suspected cases of child abuse. However, the statute also states, "the doctrine of privileged communication, with the exception of the attorney-client privilege, shall not be a ground for excluding any evidence regarding a child's injuries or the cause thereof in any judicial proceeding resulting from a report pursuant to this chapter." *Id.* Thus, the priest-penitent privilege is repealed.

136. See, e.g., S.C. CODE ANN. § 20-7-480 to -560 (Law Co-op. 1985). *Id.* The South Carolina statute does not require the priest to report. Thus, the priest is a permissive reporter. Also, the statute retains the priest-penitent privilege. In part the statute states, "the privileged quality of communication . . . except that between attorney-client or priest-penitent, is abrogated." *Id.*

137. See C. SANDS, *supra* note 130, at 450.

138. See C. SANDS, *supra* note 130, at 450.

139. See C. SANDS, *supra* note 130, at 450.

140. See C. SANDS, *supra* note 130, at 450.

An intent to repeal may be inferred from a conflict if one statute deals with the subject matter in general terms and the other statute deals with the subject matter more specifically.<sup>141</sup> If at all possible, the general and special acts should be harmonized.<sup>142</sup> However, if the conflict is irreconcilable, the special act prevails over the general act unless it appears the legislature intended a contrary interpretation.<sup>143</sup> Thus, whether the provisions in the child abuse reporting statute repealed the confidentiality granted by the priest-penitent privilege statute depends upon the intent of the legislature.

## 2. Mandatory Reporter and Abrogated Privilege

In states where the child abuse reporting statute requires a report from the priest and also abrogates the testimonial privilege, the courts could infer that the legislature intended that every case of suspected abuse be reported regardless of the origin of the reporter's suspicion.<sup>144</sup> Further, the legislature apparently intended that all proceedings from such a report be unhindered by privileges.<sup>145</sup> The apparent legislative intent when using this combination of requirements in their reporting statutes would, in effect, repeal the testimonial privilege for all confidential communications in cases of suspected child abuse. Whether the legislature intended to require reports based on all suspicions depends upon an interpretation of the child abuse reporting statute and an examination of the underlying purposes and interests of the statute.

Theoretically, the suspicions that result in a report or testimony under the child abuse reporting statute could arise in three potential ways that would affect the priest-penitent privilege statute. The suspicion could be based upon a purely confidential communication, a pure observation, or a confidential communication and observation combined. An initial reading of the statute suggests that suspicions based on any of the above situations and relationships would require a report and testimony. However, an examination of the purposes and interests of the reporting statute reveals that this might not be the case. The purposes of child abuse reporting statutes are: 1) identification; 2) investigation; and 3) intervention.<sup>146</sup> The section requiring reports deals primarily with the identification purpose. Under the reporting section, the legislature could have intended the requirements to compel a report of abuse under all circumstances leading up to a suspicion of abuse. According to *State v. Fagalde*, reportable suspicions of abuse include com-

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141. See C. SANDS, *supra* note 130, at 499.

142. See C. SANDS, *supra* note 130, at 499.

143. See C. SANDS, *supra* note 130, at 499.

144. See, e.g., 11 PA. CONS. STAT. ANN. §§ 2201-04 (Purdon Supp. 1986), *supra* note 127.

145. See Fraser, *supra* note 9, at 664.

146. See Fraser, *supra* note 9, at 645-48.

munications between psychotherapists and their patients.<sup>147</sup> Under this interpretation, the statute gives priority to identifying child abuse even if it requires the court to infringe upon a confidential communication. Other courts restrict this interpretation to allow for the infringement upon the psychotherapist privilege when there are no other means available to the court.<sup>148</sup> Some legislatures, however, appear to have limited the reportable suspicions to "observed" circumstances or conditions of the child that would arouse suspicion of abuse.<sup>149</sup> Accepting this limitation, the reporting section could be construed to be in harmony with the privilege statute's purpose of keeping confessional-type communications confidential, because a pure "communication" would not fall within the category of a pure "observation" of child abuse. Thus, a report would not be required from a priest if the suspicion is based upon a pure communication or a communication coupled with observation.

The reporting statutes could be interpreted to limit reports to suspicions based on pure observations of potential child abuse, when the relationship between a priest and penitent is involved. An examination of the reporting statutes reveals a purpose of identifying and protecting abused children, rather than a purpose of locating child abusers.<sup>150</sup> Thus, limiting reports to suspicions based upon pure observations of the child would be reasonable. Accordingly, if a priest obtains suspicions from a confidential communication with the abuser, a report would not be required because the suspicion would not be based on a pure observation of the child. Also, if a priest's suspicions were based upon observations of a child during a confidential communication with the child he would not be required to report. However, if the priest observed the child in the absence of a confidential communication, a report would be required, and the privilege statute would not be violated. By limiting the priest's required reports to suspicions based on pure observations, the reporting section of the child abuse reporting statute could be construed in harmony with the privilege statute, without vio-

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147. *State v. Fagalde*, 85 Wash. 2d 730, 733, 539 P.2d 86, 90 (1975). Fagalde involved a conflict between psychotherapist-patient privilege and duty to report, and held that the abrogation of the privilege under the Child Abuse Reporting Act included the communications between the therapist and child abuse. Thus, for the psychotherapist in Washington, reports of child abuse are not limited to observed suspicions. *Id.*

148. *People v. Stritzinger*, 34 Cal. 3d 505, 514, 694 Cal. Rptr. 431, 437 (1983). This case dealt with the conflict between psychologist-patient privilege and the child abuse reporting statute. The court held the psychologist was not under a duty to make a second report of suspicions upon further counseling of the abuser. *Id.*

149. See, e.g., MISS. CODE ANN. § 43-23-9 (1981). Mississippi clearly limits mandatory reports of child abuse to "observed" suspicions.

150. See *State v. Groff*, 409 So.2d 44, 45 (Fla. Dist. Ct. App. 1982). The courts refused to convict a psychiatrist for not reporting when he had not treated the child. The court held a mandatory report was qualified by the terms "serving the children." *Id.*

lating the purposes of either.<sup>151</sup>

The section in the reporting statutes that abrogates the testimonial privilege is more closely related to the purposes of investigation and intervention. However, for some states the abrogation clause also applies to the identification purpose. Under the investigation and intervention process, the legislature attempts to protect the child and provide treatment for the family if deemed appropriate.<sup>152</sup> Again, conflict exists between the two statutes. Apparently, the reporting statutes expressly repeal the privilege for all confidential communications in all cases involving child abuse, since the statutes appear to repeal all privileges regardless of who made the report or how the reporter obtained his suspicions of abuse. If the statutory principle, which states that the specific governs over the general, were applied, the reporting statute would govern over the privilege statute since it limits the privilege by imposing a specific exception.<sup>153</sup> However, the statutes must be construed together whenever possible, absent an express repeal.<sup>154</sup>

The statutes can be construed together in the context of testifying in the states that have abrogated all privileges, if the legislature did not intend to abrogate the privilege for all confidential communications with regard to all cases of child abuse. If the legislature only abrogated the privilege for observations of an abused child during a confidential communication, then a more harmonious interpretation would exist.<sup>155</sup> Although this interpretation could still have a chilling effect on confidential communications, the purpose of confidential communications and the priest-penitent relationship could still be protected.

The practical result of this interpretation would limit testimony to cases where the priest obtains his suspicions during a confidential communication with a child he observes and suspects is abused. Also, it would not repeal the confidentiality of a communication between the priest and parent/abuser. Hence, a confidential confession made to the priest would be retained because the privilege would only be repealed in the limited circumstances in which the priest's observations of the child lead to a suspicion of abuse. Therefore, the essential element of trust between the priest and penitent would remain in this relationship, and at the same time, the privilege

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151. This interpretation may also be supported by the statutory language. See, e.g., MISS. CODE ANN. § 43-23-9 (1981), which states in part: "Any [person] having reasonable cause to suspect that a child brought to him or . . . of whom he has knowledge through observation is . . . abused . . . shall . . . report."

152. Fraser, *supra* note 9, at 648.

153. See C. SANDS, *supra* note 130, at 499.

154. See C. SANDS, *supra* note 130, at 499.

155. This interpretation seems reasonable in light of Mississippi's statute and the other like statutes, as all require reports from professionals who come into contact with the abused child and not necessarily with the abuser. See Fraser, *supra* note 9, at 658.



would not bar the priest from testifying as to "observations" of a child he suspects is abused.

### 3. Mandatory Reporter—Privilege Not Abrogated

In states where the reporting statute requires the priest to report child abuse but does not abrogate the priest-penitent privilege, the status of the confidential communication is challenged only in the context of the required report and not in the context of required testimony.<sup>156</sup> This apparent conflict can be reconciled and the statutes can be construed harmoniously by interpreting the reporting requirement to encompass only observed suspicions of child abuse,<sup>157</sup> when dealing with a priest. Under this interpretation, the priest would be required to report when his suspicions of child abuse arise from his observations. Arguably, the courts could interpret these statutes to require the priest to report even if his suspicions were based upon confidential communications. However, in these states the legislatures have not repealed the priest-penitent privilege; yet, they have repealed the privileges for other professionals who are required to report.<sup>158</sup> The legislature apparently intended to retain the status of the priest-penitent privilege, since an expression of certain exceptions is generally intended to be an exclusion of others.<sup>159</sup> Following this approach, the priest could be required to report suspected cases of child abuse; thus, the identification purpose of the reporting statute would be fulfilled without violating the privilege statute's purpose of keeping communications confidential.

The interpretation of the child abuse reporting statute that requires a report only when the suspicion is based upon an observation is reasonable and justifiable when the reporting requirement is examined in light of the entire statute.<sup>160</sup> The first indication that the priest is only required to report suspicions based on observation is that the statute has not abrogated the priest-penitent privilege.<sup>161</sup> In retaining the privilege that applies to "communications," the legislature basically exempts confidential communications from the factors that give rise to a reasonable suspicion of abuse.<sup>162</sup>

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156. See *supra* note 128 and accompanying text.

157. See KY. REV. STAT. ANN. § 620.010-.090 (Baldwin Supp. 1986) (effective July 1, 1987). An examination of the list of mandated reporters reveals that they all work with children or come into visual contact with children.

158. See *supra* note 134 and accompanying text.

159. *Koerner v. Westland*, 48 Ill. App. 3d 172, 177, 362 N.E.2d 1153, 1156 (1977). (dealing with exceptions to psychiatrist-patient privilege and holding the testimony was erroneously admitted in lieu of the privilege statute).

160. See C. SANDS, *supra* note 130, at 454. By interpreting the statute in light of its development, we are better able to determine the legislature's intent.

161. See *supra* note 128 and accompanying text.

162. See C. SANDS, *supra* note 130, at 453. If a report were required in this situation, then the legislature would have to specifically state and abrogate the privilege. Otherwise, the

Another factor within the reporting requirement that seems to limit reportable abuse to cases of observed suspicion involves a recent addition to the circumstances under which a report must be made. Originally, a report had to be made whenever the person had reason to suspect that the child was abused.<sup>163</sup> However, today a report is required when the person has reason to suspect the child was abused or observes a child being subjected to conditions or circumstances that would reasonably result in abuse.<sup>164</sup> This addition to instances in which reports are required qualifies the previous requirement since the term "observes" is used. Hence, a reasonable interpretation of the circumstances that would lead to a required report includes instances where a person observes a child who has been abused or who observes a child being subjected to conditions that will result in abuse; then the professional must report.

The specific exemptions and limitations within the reporting sections themselves also indicate that the suspicion should be based upon "observations" rather than "confidential communications." Oregon places an exemption within the reporting section that excludes from required reports those suspicions that are based upon a confidential communication.<sup>165</sup> Arizona limits the duty to report to observations that give rise to a suspicion of abuse.<sup>166</sup> From these statutes, it becomes apparent that the priest could be required to report without violating confidential communications under the privilege statute, because the statutes specifically exempt reports where the suspicion is based upon confidential communications.<sup>167</sup> Similarly, priests of other states that require reports, but that do not abrogate privileges, could also report without violating confidential communications. In these states, the priest should be required to report his observed and non-confidential suspicions of child abuse. This would be a reasonable interpretation of the reporting requirement because the legislature has retained the priest-penitent privilege. By interpreting the reporting requirement in this manner, the reporting statutes and the priest-penitent privilege statute could exist harmoniously because priests would be able to report child abuse yet retain the confidentiality of penitential communications.

#### 4. Permissive Reporter—Privilege Abrogated

In states where the reporting statute permits, but does not require the priest to report, and the reporting statute abrogates the priest-penitent priv-

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overlapping statutes are construed in harmony. *Id.* at 453, 550.

163. See Fraser, *supra* note 9, at 659-60.

164. See, e.g., NEB. REV. STAT. § 28-711 (1985).

165. OR. REV. STAT. § 418.762 (1980).

166. ARIZ. REV. STAT. ANN. § 13-3620 (Supp. 1986).

167. See text accompanying note 146. As mentioned previously, the priest could report observed suspicions of abuse without violating the confidence of the privilege.

ilege, there is also an apparent conflict.<sup>168</sup> The conflict arises in the reporting statute's apparent elimination of privileges in all cases of child abuse. This conflict could be resolved by applying the statutory principle that a specific statute dealing with privileges governs over a more general statute.<sup>169</sup> Under this principle, the abrogation of the privilege in cases of child abuse would be a justified exception to the general rule. However, absent a clear express repeal, courts should try to construe the conflicting statutes in a manner that advances and furthers the intent and purposes of both statutes.<sup>170</sup>

Construing these two statutes in a manner that would further the purposes of both may seem impossible, because it appears that the reporting statutes abrogate the priest-penitent privilege in all cases of child abuse.<sup>171</sup> This would be a reasonable interpretation if this clause were examined in isolation. The reporting statute as a whole, however, reveals that an express repeal of the priest-penitent privilege may not exist.

Two states expressly refer to the priest's privilege;<sup>172</sup> the remaining states speak in general terms of a professional-client or patient privilege.<sup>173</sup> For the states that expressly mention the priest's privilege, the rule of construing statutes together seems inapplicable, and hence, in cases involving child abuse there would be no priest-penitent privilege. However, the abrogation clause is only one section of the child abuse statute, and the scope and application is limited and should be interpreted in light of the statute as a whole.<sup>174</sup> Following this principle, the abrogation of the priest-penitent privilege may be limited to a narrow set of circumstances which allows for a construction that forwards the purposes of both, without violating the general interests of either.

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168. See *supra* note 129 and accompanying text.

169. See C. SANDS, *supra* note 130, at 499.

170. See generally C. SANDS, *supra* note 130, § 51.05.

171. A reading of the abrogation section alone gives the impression that if suspected child abuse is reported, then the investigatory board can go behind all doors, including the confessional doors, to ask questions concerning child abuse. For example, see LA. REV. STAT. ANN. § 14:403(F) (West 1986).

172. See ARK. STAT. ANN. § 42-815 (Supp. 1985); LA. REV. STAT. ANN. § 14:403(F) (West 1986).

173. See ALA. CODE § 26-14-10 (1986); ILL. ANN. STAT. ch. 23, para. 2060 (Smith-Hurd Supp. 1986); KAN. STAT. ANN. § 38-1521 (Supp. 1985); LA. REV. STAT. ANN. § 14:403(F) (West 1986); ME. REV. STAT. ANN. tit. 22, § 4011 (Supp. 1986); MICH. COMP. LAWS ANN. § 722.623 (West Supp. 1986); MO. ANN. STAT. § 210.140 (Vernon 1983); MONT. CODE ANN. § 41-3-204 (1986); OHIO REV. CODE ANN. § 2151.421 (Baldwin 1985); OKLA. STAT. ANN. tit. 21, § 845 (West Supp. 1987); V.I. CODE ANN. tit. 5, § 2532 (Supp. 1985); W. VA. CODE § 49-6A-7 (1986).

174. See C. SANDS, 2A STATUTES AND STATUTORY CONSTRUCTION § 53.01 (4th ed. 1984). The principle that statutes involving different subject matter should be construed harmoniously, also includes the construction of different sections within the same statute.

The purposes and interests of the reporting statute and the priest-penitent privilege statute can both be furthered if the abrogation clause in the reporting statute is limited to the privileged relationship between the priest and the abused child. Under this interpretation, the purpose of the reporting statute's abrogation clause would be furthered because evidence could be obtained as to the origin of the abused child's injury through the priest's contact with the child. At the same time, the priest-penitent privilege would remain in effect as to confidences between the priest and the parent. Under this limitation, the priest, after seeing the child, could report to the authorities if he felt it was in the child's best interest. Furthermore, the priest could participate and aid in the follow-up investigation and the priest-penitent relationship could remain intact because his knowledge could be based solely upon his observations of the child. Thus, this limitation and interpretation of the abrogation clause would harmonize the reporting and privilege statutes in these two states.

The other states have statutes that do not require the priest to report, but which seemingly abrogate the priest-penitent privilege through a general provision. These statutes can also be interpreted in such a way that the priest-penitent privilege is not violated.<sup>176</sup> Again, a harmonious construction can be achieved by interpreting the abrogation clause in light of the statute as a whole.

Typically, the clause that abrogates privileges is interconnected with the clause requiring reports.<sup>176</sup> For example, Oklahoma's abrogation clause states that the contents of a report shall not be excluded on grounds of privilege.<sup>177</sup> Illinois, New Mexico, and Montana also abrogate privileges with reference to the effect of a privilege on a report.<sup>178</sup> For states that abrogate privileges only in connection with a report, the abrogation clause could be reasonably interpreted to abrogate only the privileges of those who are required or who do report. Thus, when the priest is merely a permissive reporter and when the priest does not make a report, the priest-penitent privilege is not in conflict with the abrogation clause.

An examination of other abrogation clauses reveals that their scope may be limited by the specific wording of the clauses. West Virginia, for example, abrogates privileged communications between any "professional

175. *Cf.* *CP v. Laramie County Dep't. of Pub. Assistance and Social Serv.*, 648 P.2d 512, 517 (Wyo. 1982) (involving abrogation of privileges in light of child abuse reporting statute and holding that the statute did not limit the abrogation clause to communications between the child and physician, but also extends to communications between adult abuser and physician).

176. *See* text accompanying notes 139-46.

177. *OKLA. STAT. ANN.* tit. 21, § 845 (West Supp. 1987).

178. *ILL. ANN. STAT.* ch. 23, para. § 2060 (Smith-Hurd 1986); *MONT. CODE ANN.* § 41-3-204 (1986); *N.M. STAT. ANN.* § 32-1-16 (1986).

person and his patient or his client."<sup>179</sup> Under this wording the privilege between a physician and patient and between the social worker and client would be abrogated. However, this wording does not necessarily abrogate the privilege between the priest and penitent as the priest-penitent relationship is unique and, strictly speaking, is not a professional-client or patient relationship. As commonly defined a client is a customer or person who has engaged the services of another.<sup>180</sup> A patient is defined as a person who is under some type of medical treatment.<sup>181</sup> A penitent is one who seeks to atone for past sins by confession to a priest.<sup>182</sup> Hence, a harmonious construction can be achieved between the abrogation clause and the priest-penitent privilege when the abrogation clause speaks in terms of a professional-client or patient privilege, if the terms are given a strict interpretation. Abrogation clauses that refer to professional-client privileges or that seem to intertwine the abrogated privileges with the reporting clauses can be construed to prevent conflict with the priest-penitent privilege.

In states where the abrogation clause repeals privileges solely for the purpose of revealing evidence in a child abuse proceeding, a harmonious construction may also be achieved with the priest-penitent privilege.<sup>183</sup> A stricter and more reasonable interpretation of this type of clause would be that the doctrine of privileged communications is repealed only in regard to those who are required or who do report. Under this interpretation, the evidence of the child's injuries obtained through a medical professional-patient relationship would be admissible evidence in proceedings that result from a report of abuse. However, evidence of a penitent's confidential communication to a priest would not be admissible where the priest has not made a report. Thus, when the abrogation clause is interpreted in light of the reporting section of the statute, and limited to reports required and/or made, a harmonious construction can be achieved.

##### 5. Permissive Reporter—Privilege Not Abrogated

A final category of reporting statutes involves statutes that do not require the priest to report and do not abrogate the priest-penitent privilege.<sup>184</sup> In states with this combination of clauses, there should be no over-

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179. W. VA. CODE § 49-6A-7 (1986).

180. Client is defined as "a person who engages the professional advice or services of another." WEBSTER'S NINTH COLLEGIATE DICTIONARY 248 (1984).

181. Patient is defined as "an individual awaiting or under medical care and treatment." *Id.* at 863.

182. Penitent is defined as "a person who repents sin; a person under church censor but admitted to penance especially under the direction of a confessor." *Id.* at 870.

183. ALA. CODE § 26-14-3 (1986). Alabama abrogates the privilege in regard to reports of child abuse.

184. *See supra* note 130 and accompanying text.

lap or conflict with the priest-penitent privilege statute. However, conflict between reporting procedures and the privilege may arise if the priest wishes to report a suspected case of abuse.

When a priest wishes to report suspected child abuse and the priest-penitent privilege has not been abrogated, a conflict of duties arises for the priest.<sup>185</sup> Resolution of that conflict may be dependent upon the circumstances of the case. If the priest wishes to report suspected child abuse after contact with the child, he may make a report and not violate the confidence of the communication, since the suspicion of abuse could have arisen from his observation of the child. A report under these circumstances would not violate the priest-penitent privilege, but would advance the purpose of the child abuse reporting statute and would ease the priest's anxieties about aiding and protecting a child he believes to be in danger.

In order for the authorities to effectively protect the child, the reporting statutes require several pieces of information in the report of child abuse. The information required in a report generally includes: the child's name, the parent's name, the alleged abuser's name, and, if the report was required, the name of the reporter.<sup>186</sup> The priest may be able to simply make an anonymous report, giving the name of the child he feels is in danger. Under an anonymous report, the priest could alert the authorities of a need to protect an endangered child without having to give the name of the abuser. This type of action would only involve the priest in the identification section of the child abuse reporting statute and would not violate the statutory priest-penitent privilege. However, such a report may still violate the confidence made to the priest by the abuser. In the final analysis, the priest must decide whether to report, after balancing the competing duties and interests. Allowing the priest in this instance to balance the interests may be the least violative of the priest-penitent relationship as communications could be kept confidential. The purposes of the reporting statutes would also be fulfilled as reports would be made when the priest observes endangered children.

### B. Common-Law Analysis

Alternatively, an analysis of the common law could resolve the priest's dilemma. In order to accomplish this analysis, the priest-penitent relationship will be compared to the relationships of other professionals. Then an examination of how the courts have resolved the dilemma in cases involving other professionals will be made. Finally, a resolution to the priest's di-

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185. See Comment, *supra* note 8, at 647. If the priest reports, he violates a confidence, but if the priest does not report, he fails to protect a child he believes is in danger. This is similar to the conflict faced by the psychotherapist.

186. See, e.g., ARIZ. REV. STAT. ANN. § 13-3620 (1986).

lemma will be made based on the similarities to other privileges and the courts' decisions regarding those privileges.

To make this comparative analysis, the priest-penitent privilege must be compared to other privileges. The privileges that will be compared to the priest-penitent include: the physician-patient privilege, the psychotherapist-patient privilege, the husband-wife privilege, and the attorney-client privilege. All of these privileges promote and protect these relationships through confidentiality rather than requiring compelled testimonial disclosure.<sup>187</sup> At this level of comparison the privileges are all equivalent, and they are all recognized as fulfilling the requirements of Wigmore's four-pronged test.<sup>188</sup> However, a comparison of the interests and justifications for each privilege indicates that although the privileges are similar in some respects, they may not stand on equal footing in regard to the justifications of each privilege.

One interest that is common among the privileges mentioned is the constitutional right to privacy.<sup>189</sup> For the physician-patient privilege, the individual's privacy interest is found in the non-disclosure of medical records and communications.<sup>190</sup> The psychotherapist-patient privilege involves similar privacy interests in not having evidence of treatment or communications disclosed.<sup>191</sup> The husband-wife privilege involves privacy interests in not having family affairs disclosed to the public.<sup>192</sup> The attorney-client privilege contains the client's privacy interests in not having his discussions with the attorney disclosed in court or elsewhere.<sup>193</sup> Finally, the priest-penitent privilege also involves the privacy interests of the penitent in not having his confessions of sin disclosed.<sup>194</sup>

The privacy interest found in the priest-penitent relationship is closely related to the privacy interest found in the psychotherapist-patient relationship. In the psychotherapist-patient relationship, the patient reveals his innermost secrets to the therapist. The only reason the patient is able to do

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187. See *supra* notes 20-27 and accompanying text.

188. Under Wigmore's test, four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
- (3) The relationship must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit gained thereby for the correct disposal of litigation.

See 8 J. WIGMORE, *supra* note 20, at § 2285.

189. See C. McCORMICK, *supra* note 1, at § 72.

190. See *In re Agosto*, 553 F. Supp. 1298, 1302 (D. Nev. 1983).

191. See Comment, *supra* note 8, at 646.

192. See *In re Agosto*, 553 F. Supp. at 1310.

193. *Id.* at 1306-07.

194. See 8 J. WIGMORE, *supra* note 20, at § 2395.

this is because the psychotherapist promises confidentiality.<sup>196</sup> If the patient is not assured that everything he says will be kept confidential, he will not disclose his innermost secrets, and thus, treatment is hindered. Hence, the relationship and effective therapy depend upon the protection of the individual's interests in privacy through confidentiality.<sup>196</sup>

Similarly, the priest-penitent relationship involves the same type of privacy interests as the psychotherapist-patient relationship. The penitent, like the patient, reveals his innermost secrets to the priest. The penitent discloses his secrets or sins, with the expected guarantee that the priest will keep them confidential. If confidence were not promised, the penitent would be less likely to disclose his sins, and the purpose of the relationship would be diminished.<sup>197</sup> However, if a parishioner believes confession to be necessary to save his soul, almost nothing would keep him from confessing. Thus, the psychotherapist-patient relationship is similar to the priest-penitent relationship in that each depends upon the protection of the individual's privacy interests through confidentiality.

The courts have decided several cases involving the conflict between the psychotherapist-patient privilege and child abuse reporting statute.<sup>198</sup> In all of these cases, the courts have held that the psychotherapist-patient privilege is waived under the child abuse reporting statutes. In *People v. Younghanz*, the court determined that the interests involved in the reporting statute overrode the interests in the privilege statutes.<sup>199</sup> In *Younghanz*, the court decided that "the right of privacy was not absolute, and in some circumstances subordinate to the states' fundamental right to enact laws that promote public health, welfare, and safety, even though such laws might invade the offender's right of privacy."<sup>200</sup> Furthermore, the disclosure requirement of the Child Abuse Reporting Act fell within the category of permissible intrusions upon the right to privacy. As stated in *Younghanz*,<sup>201</sup> the right to privacy does not insulate a person from all judicial inquiry.<sup>202</sup> The court further stated that the state's interest in protecting children justi-

195. See Comment, *supra* note 8, at 646.

196. *Id.*

197. See Yellin, *supra* note 5, at 109.

198. See, e.g., *In re Brenda H.*, 402 A.2d 169 (N.H. 1979); *People v. Battaglia*, 156 Cal. App. 3d 1016, 203 Cal. Rptr. 330 (1984) (both cases held that the privilege was abrogated by reporting statutes).

199. *People v. Younghanz*, 156 Cal. App. 3d 811, 202 Cal. Rptr. 907 (1984) (the court held that a statute requiring reports of all known and suspected instances of child abuse was not unconstitutional despite father's claim that it interfered with his right to seek cure for his illness or that it compelled him to testify against himself).

200. *Id.* at 816, 202 Cal. Rptr. at 910.

201. *Id.*

202. *Id.*



fies the intrusion imposed by the reporting statute.<sup>203</sup> Clearly for the psychotherapist-patient relationship, which is normally mentioned and abrogated in the child-abuse reporting statutes, no privilege exists when the communication involves child abuse.

Although the priest-penitent privilege involves the same interest in privacy as the psychotherapist-patient privilege, the priest-penitent privilege should not be abrogated like the psychotherapist-patient privilege because the priest-penitent privilege also involves an additional interest in the constitutional right to free exercise of religion.<sup>204</sup> The confidentiality of a confession to a priest is arguably a religious belief held by many churches.<sup>205</sup> If the confession is not kept confidential, many people would not confess. For the Catholic Church this would be a serious infringement upon the free exercise of religion, as confession of its members is a sacrament of the religion. This would also be an infringement on the free exercise of other religions that use confession as a means of spiritual counselling and guidance.<sup>206</sup> Therefore, the priest-penitent relationship involves more than the constitutional right of privacy and should be distinguished from the psychotherapist-patient privilege when applying the child abuse reporting statute.

In addition to the right to privacy, the attorney-client relationship similarly involves a constitutional interest in the client's constitutional due process rights.<sup>207</sup> The attorney-client relationship depends upon the full and truthful disclosure by the client to the attorney. The client, however, will not be completely open to the attorney if he is not promised absolute confidentiality. Hence, in order to insure a fair trial and to insure that the client is fully represented in a manner that meets due process requirements, the attorney-client relationship is granted confidentiality.<sup>208</sup>

In cases involving child abuse, courts interpret the statutes to have clearly retained the confidential status of the attorney-client privilege.<sup>209</sup> As mentioned, this is in part based upon the need for fair and adequate repre-

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203. *Id.*

204. See Yellin, *supra* note 5, at 112. See also *Developments in the Law — Privileged Communication*, *supra* note 40, at 1560.

205. See *supra* note 85 and accompanying text. See also Yellin, *supra* note 5, at 112. Although there is an opposing argument that the privilege involves an establishment of religion, the religion clauses of the first amendment are designed to protect religious freedom. Thus, compelling a minister to testify against his beliefs is contrary to the interests of a free society and religious freedom.

206. See Yellin, *supra* note 5, at 128-33. As Yellin points out, the Catholic Church, the Lutheran Church, and the Episcopal Church all require or use confession in their religious practice. *Id.*

207. See *In re Agosto*, 553 F. Supp. 1298, 1306-07 (D.Nev. 1983).

208. *Id.*

209. See, e.g., *In re Brenda H.*, 402 A.2d 169 (N.H. 1979) (stating the reporting statute did abrogate all privileges except the attorney-client privilege).

sentation of the individual. Because the relationship has this added dimension, over and above the privacy interest involved in the other privileged relationships, legislatures and courts have carefully guarded the confidentiality found in the attorney-client privilege.<sup>210</sup>

The priest-penitent privilege is similar to the attorney-client privilege in that it has an added dimension beyond the interests in privacy. Like the added dimension of the attorney-client privilege, the constitutional interest or right to free exercise of religion makes the priest-penitent privilege unique. Arguably, the priest-penitent privilege should be treated similar to the way the attorney-client privilege is treated in cases of child abuse. Since the priest-penitent privilege, like the attorney-client privilege, is based on an additional constitutional interest, greater weight should be given to the protection of the privilege than is given for other privileges. Thus, the priest-penitent privilege should be protected and retained in cases involving child abuse, and therefore, confidences would remain privileged.

The priest-penitent privilege involves rights in free exercise of religion, as many churches in practice and belief keep confessions confidential. When the constitutional right to free exercise of religion is involved, only a compelling state interest will override the interest being protected.<sup>211</sup> Thus, the confidentiality granted under the priest-penitent privilege statutes should be protected and retained, absent a compelling state interest.

Arguably, identifying and protecting abused children is a compelling state interest.<sup>212</sup> Thus, if the state could show that the interest in protecting children from abuse outweighs the interests of confidentiality in the free exercise of religion, the priest may be required to report and possibly to testify. However, whether the priest should be required to report or testify depends upon whether the state can show it is the least restrictive means available of achieving the state's interest.

Requiring the priest to report suspected cases of child abuse, regardless

210. Cf. NEV. REV. STAT. § 432B.010 (1986). Nevada requires reports from every attorney who suspects a child has been abused, and also abrogates all privileges in regard to cases of child abuse.

211. The free exercise of religion is impaired, not only by governmental prohibition of that which one's religious beliefs demand, but also by governmental compulsion of that which one's religious beliefs forbid. Thus, if the priest's religious beliefs forbid him to disclose a confidential communication, he should not be compelled to testify, absent a compelling state interest that can be achieved by no less drastic means. See also *Thomas v. Review Bd. of the Indiana Emp. Sec. Div.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963). Cf. *In re Williams*, 269 N.C. 68, 77, 152 S.E.2d 317, 326 (1967) (holding need for testimony overrides any free exercise arguments).

212. See *People v. Younghanz*, 156 Cal. App. 3d 811, 816, 202 Cal. Rptr. 907, 910 (1984).

of the manner in which the priest obtained the suspicion, is not the least restrictive means available for identifying abused children. The state could also identify suspected child abuse by limiting the priest's reports to observable suspicions.<sup>213</sup> Although this may hinder the state's efforts in identifying abused children in cases where the priest obtains suspicions of abuse from the child abuser, it would still advance the state's general interest in identifying observed abused children. In addition, the right to free exercise of religion involved in keeping communications confidential between priest and penitent would also be advanced. For purposes of reporting, the least restrictive means would be to limit reports to those instances in which the priest observes a child he suspects to have been abused.

For purposes of testifying, the least restrictive means of achieving the state's interest would be to require the priest to testify when the state cannot obtain the information from other sources.<sup>214</sup> If the testimony is reasonably obtainable from other sources, then the interest in free exercise of religion should outweigh the state's interest.<sup>215</sup> Thus, in suspected cases of child abuse the priest should be required to testify as to confidential communications only when he is the person who reported the abuse. In all other cases of suspected child abuse the information of the suspicion could be readily obtainable from the individual who made the report. A contrary interpretation would lead to intolerable results.

Courts should not allow the states' interests in investigating child abuse to violate the confidential communication and infringe upon the free exercise of religion when the evidence is obtainable from other sources. A contrary result would leave the states an unwarranted ability to open the doors to confidential communications between the priest and penitent in every case of suspected child abuse. An intrusion of this magnitude should not be tolerated in light of the interests in free exercise of religion.<sup>216</sup> However, when the priest has reported the suspected child abuse, states should be allowed to invade the confidentiality of the communication upon a showing of compelling need, as evidence, arguably, would not be readily obtainable

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213. See, e.g., 11 PA. CONS. STAT. ANN. § 2204 (Purdon 1982) which states, "Any persons who . . . come into contact with children shall report." See also MISS. CODE ANN. § 43-23-9 (1981) which states "Any [person] . . . having reasonable cause to suspect a child . . . whom he has knowledge through observation is . . . an abused child . . . shall . . . report."

214. See *Port v. Heard*, 764 F.2d 423 (5th Cir. 1985) (the court held the parents had no right under free exercise clause of first amendment to refuse to testify against their son).

215. *Id.* at 433.

216. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Supreme Court held that the Amish right to free exercise of religion outweighed the state's interest in compulsory education past the eighth grade. The courts must be sensitive to the rights of citizens to freely exercise their religious beliefs. Thus, the courts must carefully scrutinize the states' interest in requiring testimony from a priest who is bound to confidence in the free exercise of his religion. *Id.*

from other sources.

## VI. CONCLUSION

Confidentiality is a necessary element for the proper functioning of the priest-penitent relationship. This element of confidentiality, however, has been challenged by child abuse reporting statutes, which require reporting and testifying in cases of suspected child abuse. Since the reporting statutes have not explicitly excluded priests from the group of those who are expected to report, the priest faces a dilemma when the communication made to him deals with child abuse.

The resolution to the priest's dilemma may be achieved through both statutory and common-law analysis of the conflicting duties and interests. Under the statutory analysis, the dilemma the priest faces is resolved by harmonizing the purposes of the apparently conflicting statutes, or by giving deference to the latest or more specific statute. The purposes are harmonized by interpreting the reporting of suspected child abuse clauses and abrogation of privileged communications clauses of the reporting statutes as dealing with suspicions of abuse that arise from only the priest's observations. If this limitation of the reporting statute is used when the priest is involved, then the confidentiality of the priest-penitent privilege is preserved, and the purposes of the child abuse statute are achieved with a minimal detriment. However, states could best protect the priest-penitent relationship and resolve the priest's dilemma by making the priest a permissive reporter and by not abrogating the privilege. One state chose this means to resolve the problem by amending the child abuse reporting statute to specifically exclude priests from mandatory reporting and testifying.

The dilemma, however, can be resolved by comparing the priest-penitent relationship to other relationships that are given confidentiality privileges. Upon initial comparison, the priest-penitent privilege appears similar to the psychotherapist-patient privilege. If the analysis stops here, the priest-penitent privilege would not be retained in cases of child abuse. However, the priest-penitent privilege is also similar to the attorney-client privilege because it is justified and grounded upon additional constitutional considerations. Hence, the priest-penitent privilege is a hybrid privilege due to its foundation in the constitutional right to free exercise of religion. Because the privilege is based in part on free exercise of religion, added weight should be given when the privilege is balanced against the child abuse reporting statutes. Therefore, under the comparative common-law analysis, unless the state shows there is no less drastic means to achieve a compelling state interest, the priest-penitent privilege should be retained and the purposes of the privilege forwarded.

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