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Paul Winters

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WHOM MUST THE CLERGY PROTECT? THE INTERESTS OF AT-RISK CHILDREN IN CONFLICT WITH CLERGY-PENITENT PRIVILEGE

INTRODUCTION: DUTIES IN CONFLICT

Three defendants, all professional spiritual counselors, were convicted of misdemeanors for failure to report incidents of child abuse as required by their state's mandatory reporting laws.¹ The facts were disturbing. In one case, a father had beaten his four- and seven-year-old children.² In the other two cases, fathers had sexually abused their young daughters.³ All three defendants appealed.⁴ Each defendant justified his noncompliance with the reporting statute on religious grounds.⁵ They considered themselves ministers and believed their sincerely held religious convictions bound them to not report the abusive fathers.⁶ Because the three defendants worked in the same church, and because the cases presented similar fact patterns, the state's court of appeals consolidated the cases and affirmed the convictions.⁷ The state's supreme court, however, affirmed only two of the defendants' convictions, but reversed the third.⁸ The sole basis of the supreme court's reversal was the third defendant's status as an *ordained* member of the clergy, and his acting in that capacity.⁹ As a member of the clergy, the court held that there was no mandated duty to report either an abusive father or the victimization of an eight-year-old girl.¹⁰

1. *State v. Motherwell*, 788 P.2d 1066, 1067 (Wash. 1990).

2. *Id.*

3. *Id.*

4. *Id.* at 1068.

5. *Id.*

6. *Id.* at 1070.

7. *Motherwell*, 788 P.2d at 1067-68.

8. *Id.* at 1067.

9. *Id.* at 1069.

10. *Id.* The Washington Supreme Court noted that, prior to 1975, clergymembers were included by statute as mandatory reporters. *Id.* In 1975, however, the legislature removed the reference to clergy. *Id.* The court concluded that this deletion in the statute's legislative history revealed a "clear intent to exempt all [clergymembers] from the statute's mandatory reporting provision." *Id.* The court explained the delineation as follows: "Because defendants *Motherwell* and *Mensonides* were not ordained ministers when they first learned of the suspected child abuse, they do not fall within the exemption. Their convictions are affirmed. Because he was an

The above cases trace several contours in the problem of mandatory reporting laws with respect to members of the clergy. In instances of child abuse and neglect, members of the clergy often face a decision between two competing goods: that of guarding the privacy and the spiritual well-being of the penitent parishioner on one hand, and that of safeguarding the physical and emotional well-being of at-risk children on the other.¹¹

Privilege in the pastor-penitent context has been a staple of American church life and part of the spiritual experience for people of faith for centuries.¹² It is an entrenched practice that has both historic legal and ecclesiastical underpinnings.¹³ All fifty states have codified statutory allowances of one kind or another that make the information disclosed to members of the clergy, in their role as such, privileged in some sense.¹⁴ There is no uniform definition of a clergymember, but twenty-three states agree that, in essence, a clergymember is “a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization.”¹⁵ The existence of the clergy-penitent privilege reflects the value that society places on the safeguarding of personal, religious, and spiritual convictions.¹⁶

ordained minister at all relevant times, Hartley does fall within the exemption. His conviction is reversed.” *Id.*

11. See Ashley Jackson, Comment, *The Collision of Mandatory Reporting Statutes and the Priest-Penitent Privilege*, 74 *UMKC L. REV.* 1057, 1067 (2006) (“[T]he question becomes whether the priest-penitent privilege or the affirmative duty to report should control.”).

12. For a thorough history of the pastor-penitent privilege, see WILLIAM W. RANKIN, *CONFIDENTIALITY AND CLERGY: CHURCHES, ETHICS, AND THE LAW* 15-45 (1990). Although the issue is typically placed in the context of Western religions, it need not be. See Chad Horner, *Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society*, 45 *DRAKE L. REV.* 697, 711 (1997).

13. See Horner, *supra* note 12, at 700 (“[T]he common law was greatly influenced by church law.”).

14. For a summary of each of the fifty states’ statutes regarding the pastor-penitent privilege, see W. COLE DURHAM & ROBERT SMITH, *2 RELIGIOUS ORGANIZATIONS AND THE LAW* § 6:21 (2012). See also RICHARD HAMMAR, *PASTOR, CHURCH & LAW* 1033-53 (3d ed. 2000).

15. Ronald J. Colombo, Note, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 *N.Y.U. L. REV.* 225, 232 (1998). But see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 697-98 (2012). The Court in *Hosanna-Tabor* held that a parochial school teacher who had received a “call to religious service” and been commissioned as a minister was covered by the ministerial exception to the Americans with Disabilities Act, after using the following four criteria to determine whether the exception applied: (1) her formal title; (2) the substance reflected in that title; (3) her own use of that title; and (4) the important religious functions she performed for the Church. *Id.* This recent decision may have future bearing on whether religious professionals, not traditionally construed as members of the clergy, have obligations under mandatory reporting laws.

16. *State v. J.G.*, 990 A.2d 1122, 1127 (N.J. 2010) (“The privilege ‘recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.’ Thus, the

On the other hand, the problem of child abuse and neglect is deeply troubling and epidemic. In 2006, an estimated 905,000 victims of child abuse and neglect were identified from over 3.6 million reports received by various child protective services agencies.¹⁷ In 2009, 702,000 victims were positively identified in the United States and Puerto Rico from 3.3 million reports, which alleged that 6 million children were subject to maltreatment.¹⁸ Maltreatment takes many forms: neglect (78.3%), physical abuse (17.8%), sexual abuse (9.5%), and psychological maltreatment (7.6%).¹⁹ In 2009, an estimated 1,770 children died from abuse and neglect.²⁰

One particular difficulty the data highlight is the relational proximity of victims to those who harm them.²¹ Of the victims identified in 2009, over 80% suffered abuse or neglect at the hands of his or her mother, father, or both.²² The frequent relational proximity between perpetrators and victims accentuates the importance of active compliance by mandated reporters because they are often in the “best position to identify signs of harm to children and to take the steps necessary to help protect them.”²³

Accordingly, in recent years, many states have added members of the clergy to the lists of those who are considered mandatory report-

underlying rationale for the privilege is the public interest in fostering the cleric-penitent relationship.” (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

17. Amy Chihak, *The Nurse's Role in Suspected Child Abuse*, 19 PAEDIATRICS AND CHILD HEALTH S211 (2009).

18. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2009, at viii, ix (2010) [hereinafter CHILD MALTREATMENT], available at <http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf>.

19. *Id.* at ix; for more information on psychological abuse of children, see Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reforming the Legal Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL'Y & L. 247 (2011) (suggesting the European theory of subsidiarity may offer some way forward in addressing the peculiar problems of the psychological abuse of children).

20. CHILD MALTREATMENT, *supra* note 18, at x.

21. *Id.*

22. *See id.*

23. CHILDREN'S JUSTICE TASK FORCE, ILL. DEP'T OF CHILDREN & FAMILY SERVS., MANUAL FOR MANDATED REPORTERS 3 (rev. ed. 2008) [hereinafter MANUAL FOR MANDATED REPORTERS], available at <http://www.state.il.us/dcf/docs/CFS%201050-21%20Mandated%20Reporter%20Manual.pdf>. The problem of abuse presents a special challenge for child protective services agencies, like DCFS, because although the home is where most abuse takes place, it is, in ideal circumstances, the most desirable environment for a child's growth. *See id.* Child protective services agencies, therefore, must walk a tightrope between investigation and enforcement to protect the interests of at-risk children on the one hand, and avoid upsetting the very environment that is most healthy and suitable for children's development on the other. *See id.* This tension thus accentuates the importance of mandatory reporters. *Id.*

ers.²⁴ However, there has not been a uniform approach to resolve the tension between the two competing goods—the privacy of the penitent parishioners and the well-being of the at-risk children—with which the member of the clergy must wrestle.²⁵ Instead, the fifty states have dealt with this tension in a variety of ways.²⁶ Twenty-three states include members of the clergy in their list of mandatory reporters and protect communications received by the clergymembers in the context of clergy–penitent privilege.²⁷ Two states name members of the clergy as mandated reporters, but do not protect privileged clergy–penitent communications.²⁸ Ten states and the District of Columbia designate specific reporters, but do not include clergymembers on their lists.²⁹ Yet, other states have provisions in their reporting statutes making “any person” a mandated reporter. Of these states, seven abrogate the protection ordinarily granted to communications in the context of clergy–penitent privilege.³⁰ Another eight “any person” states protect clergy–penitent communications.³¹ All told, only seven of the fifty sovereign states—New Hampshire, Texas, New Mexico,

24. See, e.g., House of Representatives Transcription Debate, 92nd Gen. Assembly, 135th Legislative Day, at 17 (statement of Rep. Lyons) (Ill. May 23, 2002), <http://www.ilga.gov/house/transcripts/htrans92/t052302.pdf>.

25. Norman Abrams, *Addressing the Tension Between the Clergy–Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C. L. REV. 1127, 1142 (2003).

26. See DURHAM & SMITH, *supra* note 14.

27. See ALA. CODE § 26-14-3 (2009); ARIZ. REV. STAT. ANN. § 13-3620 (2010); ARK. CODE ANN. § 12-18-402 (2009); CAL. PENAL CODE §§ 11165.7, 11166 (West 2011); COLO. REV. STAT. §§ 19-3-304, 13-90-107 (2012); CONN. GEN. STAT. § 17a-101 (2011); 325 ILL. COMP. STAT. 5/4 (2010); 735 ILL. COMP. STAT. 5/8-803 (2010); LA. CHILD. CODE ANN. art. 603 (2004); ME. REV. STAT. tit. 22, § 4011-A (2004 & Supp. 2012); MASS. GEN. LAWS ch. 119, §§ 21, 51A (2008); MICH. COMP. LAWS §§ 722.623, 722.631 (2013); MINN. STAT. §§ 626.556, 595.02 (2009); MISS. CODE ANN. § 43-21-353 (2008); MISS. R. EVID. 505 (2011); MO. REV. STAT. §§ 210.115, 352.400 (2000 & Supp. 2011); MONT. CODE ANN. § 41-3-201 (2011); NEV. REV. STAT. § 432B.220 (2012); N.D. CENT. CODE § 50-25.1-03 (Supp. 2011); OHIO REV. CODE ANN. § 2151.421 (LexisNexis 2011 & Supp. 2012); OR. REV. STAT. § 419B.010 (2011); 23 PA. CONS. STAT. § 6311 (2010); S.C. CODE ANN. §§ 63-7-310, 63-7-420 (2010); VT. STAT. ANN. tit. 33, § 4913 (West 2007); WIS. STAT. § 48.981 (2011).

28. See N.H. REV. STAT. ANN. §§ 169-C:29, 169-C:32 (2002); W. VA. CODE §§ 49-6A-2, 49-6A-7 (2002).

29. See ALASKA STAT. § 47.17.020 (2007); DEL. CODE ANN. tit. 16, § 903 (2006); D.C. CODE § 4-1321.02 (2008); GA. CODE ANN. § 19-7-5 (2010); HAW. REV. STAT. § 350-1.1 (2008 & Supp. 2012); IOWA CODE § 232.69 (2013); KAN. STAT. ANN. § 38-2223 (2011); N.Y. SOCIAL SERVICES LAW § 413 (McKinney 2010); S.D. CODIFIED LAWS § 26-8A-3 (2004); VA. CODE ANN. § 63.2-1509 (2011); WASH. REV. CODE § 26.44.030 (2010).

30. See FLA. STAT. §§ 39.201, 39.204 (2010); N.J. STAT. ANN. § 9:6-8.10 (West 2002); N.C. GEN. STAT. §§ 7B-301, 7B-310 (2011); OKLA. STAT. tit. 10A, § 1-2-101 (2011); R.I. GEN. LAWS §§ 40-11-3, 40-11-11 (2006); TENN. CODE ANN. §§ 37-1-605, 37-1-403, 37-1-614 (2010); TEX. FAM. CODE ANN. § 261.101 (West 2008).

31. See IDAHO CODE ANN. § 16-1605 (2009); IND. CODE §§ 31-33-5-1, 34-46-3-1 (2008); KY. REV. STAT. ANN. § 620.030 (LexisNexis 2008 & Supp. 2012); M.D. CODE ANN., FAM. LAW § 5-705 (West 2006); NEB. REV. STAT. §§ 28-711, 28-714, 27-506 (2008 & Supp. 2012); N.M. STAT.

Rhode Island, Oklahoma, North Carolina, and West Virginia—and the District of Columbia abrogate the pastor-penitent privilege altogether in cases of child abuse.³²

In 1975, the Illinois legislature enacted the Abused and Neglected Child Reporting Act (ANCRA), which listed professions required to report cases of child abuse or neglect.³³ In 2002, the legislature amended ANCRA such that members of the clergy in Illinois were designated “persons required to report.”³⁴ However, of the over forty professions listed as mandated reporters by statute, only members of the clergy are specifically exempted from the reporting requirement when information concerning child abuse is received in a privileged context.³⁵ This is notable because immediately preceding the clergy exemption, the statute abrogates the privileged quality of communications involving abused or neglected children for all other mandatory reporters.³⁶ In other words, although clergy are included under ANCRA, the legislature created a special class of mandated reporter for

ANN. § 32A-4-3 (2003); UTAH CODE ANN. § 62A-4a-403 (West 2004); WYO. STAT. ANN. §§ 14-3-205, 14-3-210, 1-12-101 (2007).

32. *See, e.g.*, TEX. FAM. CODE ANN. § 261.101 (“The requirement to report under this section applies *without exception* to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional, and an employee of a clinic or health care facility that provides reproductive services.” (emphasis added)).

33. *See* Act effective July 1, 1975, No. 79-65, 1975 Ill. Laws 146 (codified as amended at 325 ILL. COMP. STAT. 5/4 (2010)).

34. *See* Act effective Aug. 16, 2002, No. 92-801, sec. 5, § 4, 2002 Ill. Laws 2737, 2939-40. Three aspects of the provision for clergymembers as mandated reporters are notable. First, as a consequence of the amendment effected by P.A. 92-801, members of the clergy were not simply added to the list of mandated reporters, but also set apart in a separate paragraph. *See id.* Moreover, that paragraph specifies that the reporting requirement applies to members of the clergy in “his or her professional capacity.” *Id.* The nuances of that qualification are addressed below in Section III.A.1. Finally, the provision for members of the clergy makes reference to the statutory definition of “abused child” in a manner distinct from all other mandated reporters. *See id.*

35. 325 ILL. COMP. STAT. 5/4 (2010).

36. North Dakota has a more typically structured exemption:

Any physician, nurse, dentist, optometrist, medical examiner or coroner, or any other medical or mental health professional, religious practitioner of the healing arts, school-teacher or administrator, school counselor, addiction counselor, social worker, child care worker, foster parent, police or law enforcement officer, juvenile court personnel, probation officer, division of juvenile services employee, or member of the clergy having knowledge of or reasonable cause to suspect that a child is abused or neglected, or has died as a result of abuse or neglect, shall report the circumstances to the department if the knowledge or suspicion is derived from information received by that person in that person's official or professional capacity. A member of the clergy, however, is not required to report such circumstances if the knowledge or suspicion is derived from information received in the capacity of spiritual adviser.

N.D. CENT. CODE § 50-25.1-03 (2008) (emphasis added).

members of the clergy, with a unique exemption for privileged communications.³⁷

This Comment contends that the carve-out for clergy in ANCRA should be abolished and that other state statutes with similar protections for pastor-penitent communications should be modified such that the privilege is abrogated in situations involving child abuse or neglect.³⁸ Part II of this Comment situates ANCRA in its state and national contexts.³⁹ Part III analyzes ANCRA and discusses its shortcomings in two areas: (1) problems stemming from ambiguity in the statute and (2) problems stemming from violations of the First Amendment Religion Clauses.⁴⁰ Part IV provides an overview of specific ways in which abolition of the clergy exemption strategically enables clergymembers to play an important role in child protection and is justified because the interests of at-risk children trump those of penitent abusers. Part V advances the idea that a neutral “any person” child protection statute, which clearly abrogates all privileges, including the clergy–penitent privilege, should be enacted in Illinois and nationwide.

37. Other amendments added professions to the existing list of mandated reporters. *See infra* note 81. In contrast, the 2002 amendment, which made members of the clergy mandated reporters, did so by the addition of two new paragraphs. *See* Act effective Aug. 16, 2002, No. 92-801, sec. 5, § 4, 2002 Ill. Laws 2737, 2939–40. There are separate paragraphs for other professions, such as school board members, but these separate paragraphs deal with nuanced situations under the law, such as ways in which the reporting of school employees should take place. Members of the clergy are the only profession to which a separate paragraph is devoted.

38. The relevant portion of the statute reads as follows:

The privileged quality of communication between any professional person required to report and his patient or client shall not apply to situations involving abused or neglected children and shall not constitute grounds for failure to report as required by this Act.

A member of the clergy may claim the privilege under Section 8-803 of the Code of Civil Procedure.

325 ILL. COMP. STAT. 5/4.

39. At the federal level, the starting point is the Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 (2006). For a detailed compilation of the fifty states’ treatment of child abuse reporting laws, see NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, MANDATORY REPORTING OF CHILD ABUSE AND NEGLECT: STATE STATUTES AND PROFESSIONAL ETHICS (2010), available at http://cakidscoalition.com/uploads/3/0/0/8/3008529/ndaa_mandatory_child_abuse_reporting.10.14.11.pdf.

40. *Cf.* Abrams, *supra* note 25, at 1156–57 (predicting that constitutional violations involving exemptions for clergy reporting would likely fall under the Establishment Clause of the First Amendment). Abrams was concerned primarily with sexual misconduct towards children by members of the clergy, and the ways in which reporting exemptions hinder the state’s ability to curb sexual misconduct by members of the clergy. This Comment construes the impact of clergy involvement, or the lack thereof, more broadly than the prosecution of offending ministers.

II. BACKGROUND: A RELIGIOUS, CONSTITUTIONAL, AND LEGISLATIVE CANVAS

The Illinois carve-out for clergymembers in its mandatory reporting laws is cast against a complex landscape of religious, constitutional, and state legislative history. Any attempt to abolish the carve-out must consider the ways in which each of these contexts affects the problem.

A. *The Clergy–Penitent Practice and Privilege*

Private confession to, and seeking counsel from, members of the clergy has long been a pillar of American religious practice.⁴¹ Sharon Hymer stated that “[v]irtually every religion stresses our need to make reparation for wrongdoing to our neighbors as a way of showing true remorse.”⁴² The Supreme Court has recognized this need to protect confessional communications.⁴³ Accordingly, there has been at least some measure of formal protection for communications received in the clergy–penitent context for nearly two centuries.⁴⁴ In the last fifty years, the protection of clergy–penitent communications has become more robust.⁴⁵ For example, in 1972, the Supreme Court, by an eight-to-one vote, approved changes to the Federal Rules of Evidence that would have codified the privilege.⁴⁶ Rule 506, as framed by the Court, stated that “[a] person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual

41. For a useful historical survey of the confessional and its legal status, see Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 734–40 (1987). See also Lori Lee Brocker, Note, *Sacred Secrets: A Call for the Expansive Application and Interpretation of the Clergy–Communicant Privilege*, 36 N.Y.L. SCH. L. REV. 455, 455–59 (1991) (noting that over 40% of Americans seek guidance from members of the clergy).

42. Sharon Hymer, *Therapeutic and Redemptive Aspects of Religious Confession*, 34 J. RELIGION & HEALTH 41, 50 (1995).

43. See *Totten v. United States*, 92 U.S. 105, 107 (1875) (“[S]uits cannot be maintained which would require a disclosure of the confidences of the confessional . . .”).

44. The privilege was first recognized in *People v. Phillips* by a New York court in 1813. See 1 W.L.J. 109, 112–13 (1843). In *Phillips*, the defendant, charged with trafficking stolen goods, had confessed his crime to a priest to whom the defendant had also entrusted the stolen property for return. *Id.* at 109. The court in *Phillips* held that the priest could not be compelled to testify because the confession was received during the sacrament of penance. *Id.* at 112–13. To compel the priest to testify would have violated the priest’s freedom of religion. *Id.* at 113.

45. See Walter J. Walsh, *The Priest–Penitent Privilege: An Hibernocentric Essay in Post Colonial Jurisprudence*, 80 IND. L.J. 1037, 1039 (2005) (noting that though religious freedoms had been protected by the courts as early as *Phillips*, it was not until after the second world war that protection under the clergy–penitent privilege resumed its “antebellum dominance”).

46. Mitchell, *supra* note 41, at 739.

adviser."⁴⁷ Although Congress never enacted the changes, the proposals have since shaped the federal common law.⁴⁸

B. *The Religion Clauses*

The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."⁴⁹ Religion Clause jurisprudence considers both the Free Exercise Clause, which protects religious beliefs and practice, and the Establishment Clause, which guards "the rights of religious and non-religious citizens."⁵⁰ Clergy exemptions from mandatory reporting laws, and abrogation of those exemptions, implicate both Clauses.⁵¹

1. *The Free Exercise Clause*

The Free Exercise Clause is generally understood to protect religious belief absolutely, and religious practice or actions provisionally.⁵² However, to the extent that the sincerity of belief informs and motivates practice, belief and practice frequently overlap.⁵³ In *Employment Division v. Smith*, the Supreme Court stated that as long as a law

47. 56 F.R.D. 183, 247 (1972) (proposed Nov. 20, 1972, effective July 1, 1973).

48. See Lennard K. Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 13 REGENT U. L. REV. 145, 148 (2000).

49. U.S. CONST. amend. I.

50. Shannon O'Malley, *At All Costs: Mandatory Child Abuse Reporting Statutes and the Clergy-Communicant Privilege*, 21 REV. LITIG. 701, 714 (2002).

51. See Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 810 (1978) (reasoning that the "single unifying principle underlying the two religion Clauses . . . is that individual choice in matters of religion should remain free," and that, therefore, coercion makes laws unconstitutional with respect to the Free Exercise Clause).

52. For the Supreme Court's interpretation of the Free Exercise Clause as applied to beliefs, see *Davis v. Beason*, 133 U.S. 333, 342 (1890) (stating that the Free Exercise Clause is intended to allow all people "to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper"). See also *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) ("Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."); *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990) (declaring that the freedom to believe and profess whatever doctrine one desires is "first and foremost" what the "free exercise" of religion means). For an example of the Supreme Court's rationale concerning limitations on religious acts, beyond beliefs, see *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (reasoning that when an adherent moves beyond simple belief into a "positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made").

53. See Jane E. Mayes, Note, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern*, 62 IND. L.J. 397, 414 (1987).

was neutral and of general applicability, a burden imposed by the state on religion did not violate the Free Exercise Clause.⁵⁴ For two decades, the standard articulated in *Smith* controlled Free Exercise jurisprudence. In 2012, however, the Court modified its *Smith* Free Exercise doctrine in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.⁵⁵ In *Hosanna-Tabor*, the Court held that enforcement of the Americans with Disabilities Act was unconstitutional because it “interfere[ed] with the internal governance” of a Lutheran church.⁵⁶ *Hosanna-Tabor* muddied the waters concerning governmental burdens because the definition of “internal governance” is not entirely clear from the Court’s opinion.⁵⁷

Consideration of the clergy–penitent privilege under the First Amendment is a novel twist on the typical Free Exercise Clause analysis.⁵⁸ Typically, a statute comes under scrutiny when it burdens the free exercise of religion.⁵⁹ But statutes that protect clergy–penitent privilege actually serve “as an endorsement of the principle of religious freedom because [they promote] the free exercise of religion.”⁶⁰ For this reason, it is the abrogation of the statute that must be considered in terms of its burden on the free exercise of religion.⁶¹

2. *The Establishment Clause*

Similar to the Free Exercise Clause, the Establishment Clause applies to states through the Fourteenth Amendment.⁶² Whereas the Free Exercise Clause prohibits governmental interference in the proper observance of religious belief and worship, the Establishment Clause forbids both governmental advancement and inhibition of religion.⁶³ The Establishment Clause protects both religious and non-

54. *Smith*, 494 U.S. at 879; see also *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993).

55. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012).

56. *Id.* at 706.

57. See Mark Strasser, Making the Anomalous Even More Anomalous: On *Hosanna-Tabor*, the Ministerial Exception, and the Constitution, 52–54 (Feb. 2012) (unpublished manuscript), available at http://works.bepress.com/mark_strasser/26.

58. See Mayes, *supra* note 53, at 413.

59. See *id.* at 412–13.

60. *Id.* at 413.

61. See *id.*

62. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8 n.4 (2004).

63. See *Sch. Dist. of Abington Township, Penn. v. Schempp*, 374 U.S. 203, 222 (1963); see also O’Malley, *supra* note 50, at 714 (“The Free Exercise Clause of the First Amendment protects religious beliefs while the Establishment Clause protects the rights of religious and non-religious citizens.”).

religious people.⁶⁴ In 1971, in *Lemon v. Kurtzman*, the Supreme Court set forth a three-prong test to determine whether a statute is constitutional under the Establishment Clause: first, the statute must have a “secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion”; and third, the “statute must not foster an excessive government entanglement with religion.”⁶⁵ Since 1971, the Court has advanced several iterations of the *Lemon* test in various contexts, yet no clear mandate on its application has emerged.⁶⁶ The Supreme Court itself stated that the *Lemon* factors “are no more than helpful signposts.”⁶⁷

C. *The Backdrop of National Child Protection Legislation*

The modern era of child protective services began in 1962.⁶⁸ Though there had been a growing awareness of the problems of child abuse and neglect prior to 1962, in that year, pediatrician Henry Kempe and his colleagues published the seminal article, *The Battered Child Syndrome*.⁶⁹ On the heels of its publication, Congress, through amendments to the Social Security Act, recognized Child Protective Services as an essential element of child welfare.⁷⁰ In 1974, recognizing the crucial role of mandatory reporters in the prevention of child abuse, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA).⁷¹ Through CAPTA, the federal government, as *parens patriae*, assumed broad powers in “protecting the interests of children

64. See Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 375–76 (2012). Corbin identified three purposes of the Establishment Clause: (1) to protect the stability of society by deterring civil strife resulting from religious preferentialism; (2) to guard established religion from the negative consequences of state intrusion; and (3) to protect those who do not share the beliefs of religious adherents. *Id.*

65. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citations omitted) (internal quotation marks omitted).

66. See Christopher R. Pudelski, Comment, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy–Communicant Privilege in a Post-Smith World*, 98 NW. U. L. REV. 703, 716 (2004). This comment asserted that there are now, in addition to the three-prong test described in *Lemon*, three other approaches. See *id.* at n.101; see also *Lynch v. Donnelly*, 465 U.S. 668, 684–85 (1984); *Lee v. Weisman*, 505 U.S. 577, 586–87 (1992); *Zelman v. Simmons-Harris*, 536 U.S. 639, 651 (2002). Each of these approaches, Pudelski observed, operates in a distinct context. Pudelski, *supra*, at 716–17 n.102.

67. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)) (internal quotation marks omitted) (“Many of our recent cases simply have not applied the *Lemon* test.”).

68. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 455 (2008).

69. *Id.*

70. *Id.*

71. See Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. § 5101 (2006)).

and in intervening when parents fail to provide proper care.”⁷² An important provision of CAPTA made funding available to the states for prevention and treatment programs aimed at child abuse and neglect.⁷³ To be eligible for such a grant, states had to implement programs related to child abuse and neglect that mandate “reporting by individuals required to report such instances.”⁷⁴

As a result of this provision, mandatory reporting laws grew robust and spread among the states.⁷⁵ Today, all fifty states have mandatory reporting laws that specify the professions required to report child abuse and neglect. CAPTA, as it has been amended since 1974, continues to have a significant impact and role in the protection of at-risk children.⁷⁶

D. Child Protection in Illinois

With CAPTA in place, and in the wake of the national movement to expand protective services for children, the Illinois legislature enacted ANCRA. ANCRA identifies professions that are required to report cases of child abuse or neglect.⁷⁷ Failure to report under the Illinois statute constitutes a criminal offense with punishment ranging in severity from a class A misdemeanor to a class 4 felony, and, if applicable, may include a referral to a professional disciplinary board.⁷⁸ In 1975, the list of required reporters under ANCRA consisted of twenty-two designated professions.⁷⁹ Today, that list has expanded to more than forty professions.⁸⁰ Statutory amendments from 1986 to the present have enlisted an ever-wider range of professionals in the effort to protect children from the harms of abuse.⁸¹

72. OFFICE ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE CHILD ABUSE PREVENTION AND TREATMENT ACT INCLUDING ADOPTION OPPORTUNITIES AND THE ABANDONED INFANTS ASSISTANCE ACT AS AMENDED BY THE KEEPING CHILDREN AND FAMILIES SAFE ACT OF 2003, at 4 (2003), available at http://www.acf.hhs.gov/programs/cb/laws_policies/cblaws/capta03/capta_manual.pdf.

73. See 42 U.S.C. § 5106 (2006).

74. *Id.* § 5106a(b)(2)(B)(i) (Supp. IV 2011).

75. See Pudelski, *supra* note 66, at 707 (explaining that child abuse laws have developed over decades and continue to be discussed in Congress).

76. See Myers, *supra* note 68, at 457.

77. 325 ILL. COMP. STAT. 5/4 (2010).

78. *Id.*

79. Act effective July 1, 1975, No. 79-65, 1975 Ill. Laws 146 (codified as amended at 325 ILL. COMP. STAT. 5/4 (2010)).

80. 325 ILL. COMP. STAT. 5/4.

81. See Act effective Jan. 1, 1986, No. 84-611, sec. 1, § 4, 1985 Ill. Laws 3958, 3960-61 (substituting “foster parent, homemaker or child care worker” for “child care or foster care worker”); Act effective July 1, 1986, No. 84-1078, sec. 1, § 4, 1985 Ill. Laws 7127, 7127-28 (adding resident, intern, dentist hygienist, emergency medical technician, assistants working under the direct su-

As a consequence of ANCRA, Illinois, like the rest of the country, has seen a sharp increase in the number of interventions in situations of child abuse and neglect.⁸² Since the enactment of the statute, the number of reports received by the Illinois Department of Child and Family Services (DCFS) rose from about 37,000 in 1980, to over 100,000 in 2001.⁸³ Mandated reporters play a central role in the child protection scheme under ANCRA—approximately 65% of reports of child abuse and neglect in Illinois are brought to light by state-mandated reporters.⁸⁴ DCFS summarized the value of these reporters as follows:

DCFS is often limited in its ability to intervene in family life, both by the law which defines its operations and by the resources available. In making a report, mandated reporters are in the best position to identify signs of harm to children and to take the steps necessary to help protect them.⁸⁵

In 2002, ANCRA was amended to include members of the clergy as “persons required to report.”⁸⁶ However, the 2002 amendment, P.A. 92-801, was different from other amendments that expanded the mandated-reporter section. Although ANCRA had been amended multiple times to expand the list of mandated reporters since its initial enactment, only P.A. 92-801 created new paragraphs dedicated exclusively to one profession: members of the clergy. The first paragraph added by P.A. 92-801 required:

Any member of the clergy having reasonable cause to believe that a child known to that member of the clergy in his or her profes-

pervision of a psychologist, and psychiatrist); Act effective Aug. 21, 1987, No. 85-205, sec. 1, § 4, 1987 Ill. Laws 1283, 1285 (adding crisis line or hotline personnel, educational advocate assigned to a child pursuant to the School Code, domestic violence program personnel, recreational program or facility personnel, and rehabilitation services); Act effective July 1, 1990, No. 86-1004, sec. 3, § 4, 1989 Ill. Laws 6837, 6838 (adding substance abuse treatment personnel); Act effective Jan. 1, 1996, No. 89-363, sec. 15, § 4, 1995 Ill. Laws 3673, 3679 (adding funeral home director or employee); Act effective Jan. 31, 1997, No. 89-706, sec. 275, § 4, 1996 Ill. Laws 3999, 4021–22 (adding acupuncturist); Act effective July 14, 1997, No. 90-116, sec. 20, § 4, 1997 Ill. Laws 2352, 2362–63 (adding physician assistant); Act effective Aug. 13, 1999, No. 91-516, sec. 5, § 4, 1999 Ill. Laws 5821, 5821 (adding advance practice nurse and home health aid); Act effective Jan. 1, 2000, No. 91-259, sec. 15, § 4, 1999 Ill. Laws 3211, 3218 (adding respiratory care practitioner); Act effective Aug. 16, 2002, Pub. Act No. 92-801, sec. 5, § 4, 2002 Ill. Laws 2737, 2939–40 (adding members of the clergy); Act effective July 10, 2003, No. 93-137, sec. 5, § 4, 2003 Ill. Laws 1598, 1599 (adding licensed professional counselor and licensed clinical professional counselor); Act effective Sept. 29, 2004, No. 93-1041, sec. 905, § 4, 2004 Ill. Laws 4381, 4398 (adding genetic counselor); Act effective Aug. 27, 2007, No. 95-461, sec. 5, § 4, 2007 Ill. Laws 6668, 6668–69 (adding certain school board members).

82. See Myers, *supra* note 68, at 459.

83. MANUAL FOR MANDATED REPORTERS, *supra* note 23, at 2.

84. See *id.*

85. *Id.* at 3.

86. See Act effective Aug. 16, 2002, No. 92-801, sec. 5, § 4, 2002 Ill. Laws 2737, 2939–40.

sional capacity may be an abused child as defined in item (c) of the definition of “abused child” in Section 3 of this Act [325 ILCS 5/3] shall immediately report or cause a report to be made to the Department.⁸⁷

Even more significantly, the second paragraph added by P.A. 92-801 granted privileged status to communications made to members of the clergy concerning the abuse and neglect of children: “A member of the clergy may claim the privilege under Section 8-803 of the Code of Civil Procedure.”⁸⁸ This paragraph is especially significant because it immediately follows the section that states the general rule for mandated reporters: “The privileged quality of communication between any professional person required to report and his patient or client *shall not apply* to situations involving abused or neglected children and shall not constitute grounds for failure to report as required by this Act.”⁸⁹ In other words, members of the clergy, unlike other professions on ANCRA’s list of mandated reporters, may claim privilege as a justification for the failure to report.⁹⁰ The juxtaposition of the general rule for all mandated reporters against the exception for clergymembers underscores the legislature’s intent to preserve the clergy–penitent privilege.⁹¹ In its present form, then, ANCRA lists members of the clergy as mandated reporters, but exempts them from the reporting requirements if a confession or admission is received “in his or her professional character or as a spiritual advisor in the course of the discipline enjoined.”⁹²

E. *People v. Campobello: ANCRA Applied*

In *People v. Campobello*, the court considered the interpretation of the phrases “in his or her professional character” and “a spiritual advisor in the course of the discipline enjoined.”⁹³ The case involved a Roman Catholic priest who faced sexual assault charges after it was

87. *Id.* The Illinois construction of an additional paragraph for clergy is also unusual among the states. Cf. ALA. CODE § 26-14-3 (2009).

88. Act effective Aug. 16, 2002, No. 92-801, sec. 5, § 4, 2002 Ill. Laws 2737, 2939–40.

89. 325 ILL. COMP. STAT. 5/4 (2010) (emphasis added).

90. See, e.g., *People v. Morton*, 543 N.E.2d 1366, 1373 (Ill. App. Ct. 1989) (holding that communications to a hospital counselor regarding aggravated sexual abuse of a child were not privileged because ANCRA destroyed any confidentiality).

91. See Transcription Debate, *supra* note 24.

92. See 325 ILL. COMP. STAT. 5/4; 735 ILL. COMP. STAT. 5/8-803. Illinois is one of only three states in which it is the clergymember, not the penitent, who owns the privilege. Illinois is unusual, therefore, in that any decision to disclose information falls upon the member of the clergy and not the person who has shared privileged communications. See generally DURHAM & SMITH, *supra* note 14.

93. See *People v. Campobello*, 810 N.E.2d 307, 320–21 (Ill. App. Ct. 2004).

alleged that he molested a young girl in his trust.⁹⁴ Per Diocese rules, the matter was referred to a Diocesan misconduct officer, whose responsibility was to report findings to an intervention committee.⁹⁵ The State subpoenaed various records generated by the misconduct officer and the intervention committee.⁹⁶ The misconduct officer “averred that the records generated by [him] and the intervention committee contain[ed] the ‘religious thoughts and ideas of members of the Church.’”⁹⁷ Accordingly, the Diocese moved to quash the subpoenas, arguing that the records were protected by the clergy member privilege.⁹⁸ The trial court rejected the Diocese’s argument.⁹⁹ On appeal, the Diocese argued that the trial court read the statute too narrowly.¹⁰⁰ Specifically, the Diocese argued that section 8-803 of the Illinois Code of Civil Procedure should have been construed to protect information shared by the defendant with a board of the Diocese because Diocese members were members of the clergy.¹⁰¹

The Appellate Court affirmed the trial court’s judgment.¹⁰² The court adopted a narrow definition of the phrase “professional character,” in light of what it considered to be the crucial statutory qualification: “in the course of discipline.”¹⁰³ Because the term had not been defined, the court surveyed interpretation of similar phrases in other jurisdictions.¹⁰⁴ From its survey, the court determined that “the ‘discipline’ referred to in section 8-803 is limited to the set of dictates binding a clergy member to receive from an individual an ‘admission’ or ‘confession’ for the purpose of spiritually counseling or consoling the individual.”¹⁰⁵ Accordingly, the court reasoned that the clergy–penitent privilege extends to communications made in confidence, in a one-to-one setting, noting that “an admission or confession is not privileged if made to a clergy member in the presence of a third person unless such person is ‘indispensable’ to the counseling or consoling activity of the [clergy member].”¹⁰⁶ With this definition of the privilege in hand, the court remanded the case and ordered that the record

94. *Id.* at 311.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 312.

99. *Campobello*, 810 N.E.2d at 313.

100. *Id.* at 319.

101. *See id.*

102. *See id.* at 320.

103. *Id.*

104. *See id.*

105. *Campobello*, 810 N.E.2d at 321.

106. *Id.*

of the priest's meetings with the Diocese intervention board and misconduct officer be produced for an *in camera* inspection to determine whether the communications fell within the definition.¹⁰⁷

III. ANALYSIS: DEFECTS OF CLERGY EXEMPTIONS IN MANDATORY REPORTING LAWS

Though the desire to respect the time-honored tradition of pastor-penitent privilege is laudable, clergy exemptions from mandatory reporting laws generally suffer from two serious flaws. First, the exemptions are usually ambiguous. Second, they face problems related to the Religion Clauses of the First Amendment.

A. *Ambiguity of the Statute*

The section of the Code of Civil Procedure that ANCRA refers to in exempting members of the clergy from the requirement to report¹⁰⁸ is conditioned on the existence of confessions or admissions received by "him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body or of the religion which he or she professes."¹⁰⁹ The problem arises from the ambiguity of the phrases "in his or her professional character" and "as a spiritual advisor in the course of the discipline enjoined."¹¹⁰ As notions of confession extend beyond the walls of the Roman Catholic confessional, interpretations of ANCRA and similar statutes create significant challenges of interpretation.¹¹¹

1. *Interpretation Challenges*

Interpretation of reporting statutes varies widely among the states.¹¹² In the Third Circuit, for example, the pastor-penitent privilege exists when the following conditions are satisfied: (1) the clergyman must be acting in his or her spiritual or professional capacity; (2)

107. *Id.* at 321–22.

108. See 325 ILL. COMP. STAT. 5/4 (2010).

109. 735 ILL. COMP. STAT. 5/8-803 (2010).

110. See Colombo, *supra* note 15, at 251 (claiming that misunderstanding regarding the "contours of the clergy-penitent privilege under the Constitution" accounts for several problems with the application of the privilege by (1) improperly extending protection over conversations that should not be privileged; (2) constraining application to only a few specific denominations; and (3) not providing concomitant protective legislation for members of the clergy who invoke the privilege).

111. See Horner, *supra* note 12, at 706–12.

112. See Colombo, *supra* note 15, at 233–34 (observing among the states no less than three distinct ways of defining the scope of covered communication).

the penitent must be seeking spiritual counseling; and (3) the penitent must be reasonably expecting that his or her words will be kept in confidence.¹¹³ In Louisiana, on the other hand, the statute does not observe a distinction between a clergymember per se and a clergymember acting in a professional capacity.¹¹⁴ Thus, regardless of intent or expectations, communications are privileged if they are expressed to a member of the clergy.¹¹⁵ Illinois's statute has requirements similar to those set forth by the Third Circuit, but does not include an expectation of confidence by the penitent.¹¹⁶

Such varied interpretations of clergy-penitent privilege have resulted in diverse outcomes among the states. In *State v. Martin*, for example, a Washington court held that the conversation in question could be privileged, even though the defendant made his admission in his mother's apartment, with his mother present for at least part of the conversation.¹¹⁷ Similarly, in *State v. J.G.*, a New Jersey court ruled that the defendant's conversation with his pastor was protected, even though their conversation took place in a public park.¹¹⁸ On the other hand, in *State v. Mark R.*, a Connecticut court held that the defendant's confession of the sexual abuse of his stepdaughter was not privileged, even though it took place in the pastor's office while the defendant's wife and the victim were the only other people in the building.¹¹⁹ These diverse outcomes, like the holding in *Campobello*, illustrate the challenges courts face in applying clergy-privilege laws.¹²⁰

Additionally, while the decisions seek to clarify ambiguous language in the rules, these explanations often suffer from the same problems of interpretation.¹²¹ In the wake of *Campobello*, for exam-

113. *In re Grand Jury Investigation*, 918 F.2d 374, 377 (3d Cir. 1990). Here, the court did not apply Pennsylvania state law, but instead looked to Federal Rule of Evidence 501 and other federal sources. *Id.*

114. See LA. CHILD. CODE ANN. art. 603 (2004).

115. *Id.* The definitions section of the statute defines a "Member of the Clergy" as one who is "authorized or accustomed to hearing confidential communications, and under the discipline or tenets of the church, denomination, or organization has a duty to keep such communications confidential." *Id.* Under this definition, Louisiana's clergy-penitent privilege focuses on the clergymember's authorization to hear privileged communications, not the manner in which communications are received.

116. 735 ILL. COMP. STAT. 5/8-803 (2010).

117. *State v. Martin*, 959 P.2d 152, 159 (Wash. Ct. App. 1998).

118. *State v. J.G.*, 990 A.2d 1122, 1125, 1134 (N.J. 2010).

119. *State v. Mark R.*, 17 A.3d 1, 8 (Conn. 2011).

120. See *supra* notes 93-107 and accompanying text.

121. Several authors have discussed the challenges of ambiguity in statutory construction of the type present in *Campobello*. See, e.g., Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 59 (2010) ("[P]erceptions of ambiguity

ple, several important questions remain. Specifically, what are the boundaries that comprise “the purpose of spiritually counseling or consoling the individual”?¹²² When is a third person “‘indispensable’ to the counseling or consoling activity of the clergymember”?¹²³ And when is the clergymember functioning in a manner that is distinguishable from situations in which the clergymember is functioning as a mom, husband, or friend?

To illustrate, consider the following tragic example that occurred a few years ago within the presbytery in which this author served as a pastor.¹²⁴ A girl, thirteen or fourteen years of age, was sexually abused by her father over a period of time—at least a year in length. The father, daughter, and the rest of their family were regular attendees of a Presbyterian church, but not formal members.

One evening, the victim contacted the pastor’s teenage son. The two were friends from the church’s youth group. She told the pastor’s son about her abuse, but expressly requested that he not share the information with his father. The son, deeply troubled by what he heard, told his father anyway. The pastor immediately called DCFS. The agency investigated the case, found sufficient evidence of the alleged abuse, and filed a complaint. The girl’s father was arrested, convicted, and served an eighteen-month sentence for aggravated sexual assault.

How, under *Campobello*, are the pastor’s restrictions and responsibilities to be understood in such a situation? Because the girl insisted that the teenage boy not tell his father—the pastor—should the teenage son be considered a third person “indispensable” to the counseling or consoling activity of the clergymember? If so, did the pastor breach his duty of confidentiality by reporting the suspected abuse? Was the pastor, in hearing of the offense from his son, acting “as a spiritual advisor in the course of the discipline enjoined,” or was he simply being a dad?

Additional examples need not be so exotic. A minister bumps into a parishioner at a grocery store. There are several other shoppers nearby, possibly within earshot. The parishioner catches the minis-

are ultimately colored by matters extrinsic to the underlying source material alone”); Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 281 (2010) (“[H]ow a statute gets interpreted in the end, or *who* does the interpreting, will often depend on *whether* it is found ambiguous at the outset.”).

122. *People v. Campobello*, 810 N.E.2d 307, 321 (Ill. App. Ct. 2004).

123. *Id.*

124. In Presbyterian polity, a presbytery is a regional group of local churches of the same denomination. The presbytery provides support and ecclesiastic oversight for its member churches.

ter's arm and whispers, "I've been meaning to talk to you." A synagogue member drives by and sees her Rabbi mowing his lawn. She stops the car, walks over, and over the din of the mower, yells, "I could really use your opinion about something." A church member, between putts on a golf green, says to his priest, "Father, I gotta tell you something." After prayers, a Muslim approaches the presiding Imam as the crowd disperses. Leaning in, he asks, "Could I have about five minutes?" In these hypotheticals, taken out of the pages of ordinary clergy life, are clergymembers acting "in the course of the discipline enjoined"? Arguably, they are.

The problem stems from the inseparability of the *role* of the clergymember and the *identity* of the clergymember.¹²⁵ From the point of view of the typical member of the clergy, nearly every conversation may be perceived as occurring in the context of acting as spiritual advisor in the course of the discipline enjoined.¹²⁶ As some commentators have suggested, the nature of ministry resists any vocational/nonvocational distinctions.¹²⁷ "Their claim to a special call implies . . . that their private lives and career are not separate but bound together in a literal embodiment of some of the culture's highest values."¹²⁸ For this reason, some commentators have concluded that if members of the clergy are "always acting in a professional capacity, the question becomes whether the priest-penitent privilege or the affirmative duty to report should control."¹²⁹

125. See Michael Lane Morris & Priscilla White Blanton, *The Influence of Work-Related Stressors on Clergy Husbands and Their Wives*, 43 FAM. REL. 189, 189 (1994) (noting that professional clergymembers operate "with ambiguous separations between their professional and private lives," as they "attempt to juggle the expectations of self, family, congregation, denomination, and God").

126. See DEREK PRIME & ALISTAIR BEGG, ON BEING A PASTOR: UNDERSTANDING OUR CALLING AND WORK 36 (rev. ed. 2004) ("Whatever else a shepherd and teacher provides for God's people, he is to give them an example to follow. . . . What is more, the example we are to provide is to be maintained all our life."); see also Brent Roam, Comment, *Confessions of Faith: A Reasonable Approach to Arizona's Clergy Privilege*, 40 ARIZ. ST. L.J. 775, 784 (2008) ("[T]he precise legal delineation between a lay leader serving in a nondenominational church and a 'clergyman' for purposes of the privilege remains elusive.").

127. See Richard W. Christopherson, *Calling and Career in Christian Ministry*, 35 REV. RELIGIOUS RES. 219, 232-33 (1994). As an example, Christopherson quoted a senior minister who left a large church after his divorce, specifically regarding his congregation's perceptions of him as pastor: "The spotlight was on me, the shame I knew because I couldn't make this relationship work. . . . My private life made me a worse minister, a flawed minister, and I longed to get away from that." *Id.* at 232 (emphasis added); cf. Jackson, *supra* note 11, at 1067 (analogizing clergy professional character extending beyond occupational duties to that experienced by police officers in their line of work). But see *People v. Campobello*, 810 N.E.2d 307, 320 (Ill. App. Ct. 2004) (rejecting the notion that a member of the clergy's professional character extends beyond his or her capacity as a spiritual advisor).

128. Christopherson, *supra* note 127, at 233.

129. See Jackson, *supra* note 11.

2. *The Problems of Statutory Ambiguity and Child Abuse*

In general, clergy–penitent communications often have value.¹³⁰ After all, as the Supreme Court observed, the clergy–penitent privilege addresses one of humankind’s highest felt needs.¹³¹ Moreover, confidential access to members of the clergy may also promote mores that society deems valuable.¹³² One commentator is especially optimistic in this regard:

When effective, such confession and counseling instills in penitents a sense of responsibility, provides penitents with the encouragement to abandon behavior that is condemned by church and state alike, and in the process, imparts moral understanding that leaves penitents better than they were before committing the acts that caused them to seek clergy assistance in the first place.¹³³

Such benefits make the availability of the clergy–penitent communications desirable in most scenarios. For this reason, although the statutory ambiguities discussed above may be perplexing, they should not always be fatal to the protected status of clergy–penitent privileged communications.¹³⁴

Considered against the glaring problem of child abuse, however, the benefits of the clergy–penitent privilege fade.¹³⁵ The heinous nature of child abuse seriously undermines whatever benefits society receives from protected disclosure.¹³⁶ In these volatile and often dangerous settings, the privilege and its attendant ambiguities are intolerable.¹³⁷ Instead, ambiguities that concern the scope of the clergymember’s

130. For a list of societal benefits resulting from continued application of the clergy–penitent privilege, see Shawn P. Bailey, *How Secrets Are Kept: Viewing the Current Clergy–Penitent Privilege Through a Comparison with the Attorney–Client Privilege*, 2002 B.Y.U. L. REV. 489, 506 (2002).

131. See *Trammel v. United States*, 445 U.S. 40, 51 (1980).

132. See Whittaker, *supra* note 48, at 161 (arguing that the clergy–penitent privilege advances the state’s interests by promoting the penitent’s well-being and encouraging honesty).

133. Bailey, *supra* note 130.

134. Cf. R. Michael Cassidy, *Sharing Sacred Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy–Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1635 (2003) (noting that forcing clergymembers to disclose privileged communications may bring harm by engendering “public backlash and perhaps undermining public faith in government”).

135. See Jackson, *supra* note 11, at 1071 (“With over 2.4 million cases of child abuse and neglect reported in 1989 alone, it is easy to see that child abuse is a major problem in the United States and that affirmative action [with respect to the abrogation of the privilege] needs to be taken.”).

136. Indeed, some commentators have argued that exempting members of the clergy from reporting responsibility in cases of child abuse will actually erode trust in the church’s ability to provide beneficial guidance. See Julie M. Arnold, “Divine” Justice and the Lack of Secular Intervention: Abrogating the Clergy–Communicant Privilege in Mandatory Reporting Statutes to Combat Child Sexual Abuse, 42 VAL. U. L. REV. 849, 896 (2008).

137. For a discussion of the peculiar vulnerability of children in abusive settings, see *infra* notes 243–264 and accompanying text.

duty impede reporting, which is essential to an endangered child's well-being.¹³⁸ ANCRA's statutory defect in this regard is fatal. Because the clergy member's duty under ANCRA is ambiguous, a clergy member is left with uncertain guidelines as to when conversations are privileged, and thus protected. In its consideration of P.A. 92-801, the Illinois legislature wrestled with this difficulty.¹³⁹ One representative framed it well:

Well, how do you separate a congregant that reports abuse in the context of trying to get . . . trying to report it to somebody because a crime has been committed? How do you separate that out from the person that goes to their clergyperson to report that a different person has committed this crime but they don't report it in the context of a crime? They report it in the context of, maybe they think they have sinned. Maybe they think they are going to report it in the context of a confessional or some other meeting with their clergyperson.¹⁴⁰

Abrogating the clergy reporting exemption in cases of child abuse would take the guesswork out of the process and provide agencies with an important tool to secure the well-being of children in harm's way.

Similar to other mandated professionals, the clergy member's duty to report abuse should be absolute. States with similar exemptions for clergy should also recognize the attendant problems of ambiguity.¹⁴¹ When a child's physical and emotional well-being are at stake, mandatory reporters must not be given latitude in determining the scope of their duty. Members of the clergy should always have a duty to report.

Of course, imposing such an affirmative duty upon members of the clergy will raise questions of constitutional import—specifically First Amendment concerns.

B. Religion Clause Concerns

The Supreme Court has not yet ruled whether clergy-penitent privileged communications are protected under the Religion Clauses of the First Amendment.¹⁴² This Comment contends that, if the provisions of ANCRA were challenged on constitutional grounds, the Supreme Court should rule that (1) abrogation of the exemption would not vio-

138. See, e.g., *State v. Martin*, 959 P.2d 152, 154 (Wash. Ct. App. 1998).

139. See Transcription Debate, *supra* note 24, at 18-25.

140. *Id.* at 22 (statement of Rep. Lang).

141. See *supra* note 27 and accompanying text.

142. See Cassidy, *supra* note 134, at 1661 (noting that the Supreme Court has mentioned the privilege three times, but has yet to address it squarely).

late the Free Exercise Clause and (2) a failure to abrogate the exemption would violate the Establishment Clause.

1. *Abrogation of the Exemption Would Not Violate the Free Exercise Clause*

Recall that the exemption from mandatory reporting for members of the clergy under ANCRA is limited to those situations in which a clergymember receives a communication that is a “confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body or of the religion which he or she professes.”¹⁴³ Justification for the exemption, like the justification for all expressions of clergy–penitent privilege, rests on the perception of these communications as sacred and inviolate.¹⁴⁴ Any restriction of the right to such sacred and inviolate communications potentially runs afoul of the Free Exercise Clause because it burdens religious activity.¹⁴⁵

a. *The Smith Standard Applied*

Statutory burdens on the exercise of religion are not unconstitutional per se.¹⁴⁶ Instead, the constitutionality of a statute that burdens religion must undergo the analysis espoused in *Employment Division v. Smith*.¹⁴⁷ According to *Smith*, if a neutral and generally applicable law only *incidentally* burdens religion, that law does not violate the Free Exercise Clause.¹⁴⁸ The proposed abrogation of the clergy exemption would likely be constitutional under this standard.

To begin, the legislative context in which the abrogation would likely occur demonstrates the neutrality of the law. Prior to the passage of P.A. 92-801, ANCRA specified forty-four professions as mandated reporters. These included twenty professions that appeared in the original iteration of ANCRA.¹⁴⁹ The twenty-five additional pro-

143. 735 ILL. COMP. STAT. 5/8-803 (2010).

144. See Michael J. Mazza, *Should Clergy Hold the Priest–Penitent Privilege?*, 82 MARQ. L. REV. 171, 192–93 (1998) (noting that clergymembers regard such communications as “protected under the laws of their church and sacred in the sight of God”).

145. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (holding that the Free Exercise Clause was dispositive when Florida had disfavored petitioners’ religion through restriction of a religious practice).

146. *United States v. Lee*, 455 U.S. 252, 257 (1982) (“Not all burdens on religion are unconstitutional.”).

147. See *Emp’t Div. v. Smith*, 494 U.S. 872, 878 (1990).

148. See *id.* at 879.

149. The original occupations listed in ANCRA included the following: Any physician, hospital, surgeon, dentist, osteopath, chiropractor, podiatrist, Christian Science practitioner, coroner,

fessions added between 1975 and 2002 represented a broad cross-section of occupations in which professionals might become aware of child abuse.¹⁵⁰ The addition of clergymembers to the list of mandated reporters was an effort by the legislature to fortify the protective net through which at-risk children might slip.¹⁵¹ The legislative history of ANCRA shows that the exemption, as originally contemplated, was added, not as an attempt to restrict religion, but instead as an attempt to avoid a constitutional challenge to the statute.¹⁵² Thus, abrogation of the exemption would actually enhance the neutrality and general applicability of ANCRA because it would put clergymembers on equal footing with all other mandated reporters.

The remaining question is whether abrogating the exemption only *incidentally* burdens religion. In *Smith*, respondents were members of the Native American Church.¹⁵³ As part of their religious practice, and for ceremonial purposes, respondents ingested peyote.¹⁵⁴ However, at the time, Oregon Law forbade the use of the substance.¹⁵⁵ Respondents, both employees at a drug rehabilitation center, were fired.¹⁵⁶ When respondents subsequently applied for state unemployment benefits, their claim was denied, “because they had been discharged for work-related ‘misconduct.’”¹⁵⁷ The Oregon Supreme Court held that the purpose of Oregon’s unemployment benefits misconduct provision was “inadequate to justify the burden [that] disqualification imposed on respondent’s religious practice.”¹⁵⁸

school teacher, school administrator, truant officer, social worker, social services administrator, registered nurse, licensed practical nurse, director or staff assistant of a nursery school or a child day care center, law enforcement officer, or field personnel of the Illinois Department of Public Aid. Act effective July 1, 1975, No. 79-65, 1975 Ill. Laws 146 (codified as amended at 325 ILL. COMP. STAT. 5/4 (2010)).

150. For a list of amendments to ANCRA that added occupations required to report, see *supra* note 81.

151. See Transcription Debate, *supra* note 24, at 20 (statement of Rep. Mulligan). Representative Mulligan’s comments on the floor of the House during the debate of P.A. 92-801 are indicative in this regard:

I think [the bill] makes a clear-cut statement that clergy should be mandatory reporters. And I think that that’s been lacking And many other people are mandatory reporters now, teachers, social workers, doctors. I think that this is really an important issue, particularly with the current climate of what’s happening in this country.

Id.

152. *Id.* at 17. “This legislation keeps intact the clergy privilege protecting information received in a spiritual confession which safeguards the legislation from any [c]onstitutional challenge.” *Id.* (statement of the bill’s sponsor, Rep. Lyons).

153. *Smith*, 494 U.S. at 874.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 875.

Accordingly, the court held that respondents were entitled to unemployment benefits.¹⁵⁹

The United States Supreme Court reversed.¹⁶⁰ In holding that Oregon's prohibition of peyote use was constitutional, the Court stated that because respondents' dismissal was based on a violation of the law, denial of unemployment benefits was proper.¹⁶¹ The Court looked to its earlier decisions and concluded that "free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"¹⁶² The Court reasoned that because the law prohibiting peyote was neutral and generally applicable, even if it had the incidental effect of burdening religion, the law did not violate the Free Exercise Clause.¹⁶³ The Court in *Smith* compared the Oregon law that forbade peyote use to such generally applicable laws as the collection of a general tax, by which the burden imposed by a law is incidental to its primary purpose—raising revenue.¹⁶⁴

The clergy-penitent exemption is similar to the tax envisioned by the *Smith* Court. The duty to report is currently shared by other professions in a position to become aware of abuse. To abrogate the exemption would merely impose similar duties on clergymembers as those imposed on over forty other similarly positioned professions. In other words, like the required compliance in *Smith*, abrogation would force clergy compliance with a neutral and generally applicable law. Furthermore, the primary purpose of the duty to report is the safeguarding of children. Thus, the burden to religion would be merely incidental. Proposed abrogation of the exemption would, therefore, not likely suffer from Free Exercise Clause defects.

b. *Hosanna-Tabor*: Outward Physical Acts v. Internal Church Decision

In 2012, as a result of the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court's Free Exercise jurisprudence became more nuanced.¹⁶⁵ The Court explained that a First Amendment ministerial exemption is an affirma-

159. *Smith*, 494 U.S. at 875.

160. *Id.* at 890.

161. *Id.*

162. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

163. *Id.* at 878.

164. *Id.*

165. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012).

tive defense to a claim of discrimination under federal employment law.¹⁶⁶ The Court considered an alleged violation of the Americans with Disabilities Act (ADA).¹⁶⁷ Respondent taught as a “called teacher” in a Lutheran parochial school.¹⁶⁸ She was diagnosed with narcolepsy and began the 2004–2005 school year on disability leave.¹⁶⁹ In February of 2005, the church congregation had voted to offer Respondent the opportunity to resign, but Respondent refused to do so.¹⁷⁰ In April of 2005, the congregation voted to rescind Respondent’s call.¹⁷¹ Respondent sued, alleging that she had been fired in violation of the ADA.¹⁷²

The Court held that there had been no violation of the ADA.¹⁷³ The Court determined that the church was protected by the ministerial exception clause within the ADA.¹⁷⁴ The statute’s exception, as explained by the Court, “precludes application of such legislation to claims concerning the employment relationship between a religious institution *and its ministers*.”¹⁷⁵ Respondent argued that, based on the Court’s decision in *Smith*, the ministerial exception violated the Free Exercise Clause because the exception violated a neutral law of general applicability.¹⁷⁶ The Supreme Court disagreed.¹⁷⁷ The Court distinguished *Smith* on the grounds that the practices considered in *Smith* were “outward physical acts. The present case, in contrast, “concerns government interference with an internal church decision that affects the faith and mission of the church itself.”¹⁷⁸ In doing so, the Court recalled language from its decision in *Smith*, which stated that it would regulate “physical acts,” but not “lend its power to one or the other side in controversies over religious authority or dogma.”¹⁷⁹

166. Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 350 (2012).

167. *Hosanna-Tabor*, 132 S. Ct. at 699–700.

168. *Id.* at 699 (explaining that “called teachers” completed a “colloquy” program at a Lutheran college or university). “‘Called’ teachers are regarded as having been called to their vocation by God through a congregation. To be eligible to receive a call from a congregation, a teacher must satisfy certain academic requirements.” *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 701.

173. *Hosanna-Tabor*, 132 S. Ct. at 710.

174. *Id.*

175. *Id.* at 705 (emphasis added).

176. *Id.* at 706.

177. *Id.* at 707.

178. *Id.*

179. *Hosanna-Tabor*, 132 S. Ct. at 707 (quoting *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990)) (internal quotation marks omitted).

The Court's clarification of *Smith* in *Hosanna-Tabor* does not preclude abrogation of the clergy exemption. Central to the Court's decision in *Hosanna-Tabor* was the degree to which the church's employment decisions pertained to "the *internal governance* of the church."¹⁸⁰ The Court was concerned that the respondent's suit would "depriv[e] the church of control over the selection of those who will personify its beliefs."¹⁸¹ Such matters are primarily ecclesiastical.¹⁸²

On the other hand, penitents' verbal confessions of sin to clergymembers are individual and personal. They are analogous to peyote use in *Smith* and distinct from matters concerning internal governance of the church. In *Smith*, peyote use was an external physical act conforming to the religious tenets of the Native American Church.¹⁸³ Confession of sin to a priest or pastor is similarly an external physical act conforming to the religious tenets of many faiths.¹⁸⁴ It is true that there is an internal component to confession for adherents, but the internal characteristics of confession are unlike the internal elements involved in governing an ecclesiastical body. For confession of sin, the internal characteristics are individual and personal, similar to the way peyote use was sacramental in *Smith*. Both personal confession of sin and peyote use are, to adherents, expressions of religious devotion and, arguably, forms of worship.¹⁸⁵ The confession of sin, therefore, is distinguishable from the internal church governance considered in *Hosanna-Tabor*.¹⁸⁶

The question of the clergy exemption does not pertain to a group's self-governance, or questions of federal employment law. Rather, at issue are personal expressions of devotion and worship. For these reasons, *Hosanna-Tabor* is inapposite. Therefore, abrogation of the exemption, after *Hosanna-Tabor*, would not tread on the Free Exercise Clause.

180. *Id.* at 706 (emphasis added).

181. *Id.*

182. I am using "ecclesiastical" in its narrow, formal sense, which denotes concern with formal church structures, leadership, discipline, and governance.

183. *Emp't Div. v. Smith*, 494 U.S. 872, 874 (1990).

184. *See State v. J.G.*, 990 A.2d 1122, 1127 (N.J. 2010).

185. *See, e.g., Corporate Confession of Sin*, REFORMATION THEOLOGY, http://www.reformationtheology.com/2006/05/corporate_confession_of_sin.php (last visited Jan. 7, 2013).

186. Many religious groups draw the same sharp line proscribing government intervention in ecclesiastical matters. *See, e.g., The Westminster Confession of Faith*, CENTER FOR REFORMED THEOLOGY AND APOLOGETICS, Ch. XXIII, § III, available at http://www.reformed.org/documents/shaw/index.html?mainframe=/documents/shaw/shaw_23.html ("The civil magistrate may not assume to himself the administration of the Word and sacraments, or the power of the keys of the kingdom of heaven . . .").

c. Hybrid and Individualized Governmental Assessment Alternatives

Some authors who support the clergy exemption from mandatory reporting laws contend that two alternative grounds justify the continued protection of the clergy-penitent privilege.¹⁸⁷ The first involves hybrid claims—those alleging a violation of another constitutional right in addition to a violation of the Free Exercise Clause.¹⁸⁸ The second involves what the *Smith* Court called “individualized governmental assessment,” which the Court used to distinguish the respondent’s claims from those in unemployment compensation cases like *Sherbert v. Verner*.¹⁸⁹ Neither of these alternatives, however, is sufficient to establish that an abrogation of the clergy exemption violates the Free Exercise Clause.

In *Smith*, the Court distinguished petitioner’s complaint from earlier hybrid cases in which the Court had held that state statutes violated the Free Exercise Clause in conjunction with another constitutionally protected right.¹⁹⁰ In such hybrid cases, the Court would engage in a form of heightened scrutiny under which the state would be required to show a compelling governmental interest.¹⁹¹

Some commentators contend that requiring clergymembers to report child abuse would create a hybrid claim involving the restriction of religious rights as well as an intrusion upon free speech rights.¹⁹² Such writers argue that, at a minimum, compelled disclosure of privileged conversations violates the clergy member’s “autonomous image.”¹⁹³ In other words, the clergy member who is compelled to disclose confidential communications must publicly disavow his most dearly held religious beliefs.¹⁹⁴ As a result, these authors continue, the clergy member is subjected to public humiliation and disgrace.¹⁹⁵

187. See Pudelski, *supra* note 66, at 720–30 (contending that the clergy exemption should properly be construed as a *Smith* hybrid claim involving free speech concerns); see also Mazza, *supra* note 144, at 196 (contending that a particularized government assessment of individual Free Exercise claims under the privilege is appropriate).

188. See *Smith*, 494 U.S. at 881 (“The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . .”).

189. *Id.* at 884 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

190. See *id.* at 895–96.

191. *Id.* at 902.

192. See Pudelski, *supra* note 66, at 729 (arguing that mandated reporting by clergymembers is compelled speech in violation of the Free Speech Clause, which “is exactly the type of additional right, in addition to free exercise, that the *Smith* Court had in mind”).

193. *Id.* at 728.

194. *Id.* at 728–29.

195. *Id.*

This argument recognizes the previously discussed integration of clergymembers' public and private personae.¹⁹⁶ However, such a hybrid claim is unlikely to prevail. Since the Supreme Court established the hybrid-rights doctrine in 1990, the Court has not used the doctrine to hold that a state law violates the Free Exercise Clause.¹⁹⁷ As one commentator noted, "Academics have also expressed great skepticism of the hybrid rights theory, with most scholars believing that the hybrid rights argument 'was a make-weight . . . that lacks enduring significance.'"¹⁹⁸

Moreover, the federal appellate courts have struggled to consistently apply the *Smith* hybrid-claims doctrine.¹⁹⁹ Some circuits have disregarded it altogether, treating it as dicta.²⁰⁰ It has been called "completely illogical"²⁰¹ and "seemingly impenetrable,"²⁰² and the Supreme Court has asked whether it "has proven to be intolerable simply in defying practical workability."²⁰³ In any event, the foregoing comments raise doubts about whether a hybrid claim can establish a Free Exercise Clause violation when clergymembers are required to report conversations in the clergy-penitent context.

The *Smith* Court distinguished *Sherbert*, which required a statute that substantially burdened religious practice to be justified by a compelling government interest.²⁰⁴ *Sherbert* was an unemployment compensation eligibility case.²⁰⁵ The appellant in *Sherbert* stated a claim for unemployment benefits that the state denied based on the appellant's refusal to work on Saturday for religious reasons.²⁰⁶ The Court held that the state's disqualification of the appellant for unemployment benefits burdened the appellant's free exercise of religion.²⁰⁷ The Court then considered whether a compelling state interest existed for the government's disqualification and held that there was no com-

196. Cf. *supra* Part III.A.

197. See Gage Raley, Note, *Yoder Revisited: Why the Landmark Amish Schooling Case Could—And Should—Be Overturned*, 97 VA. L. REV. 681, 717–19 (2011) (noting that Justice Souter has overtly criticized the doctrine, and suggesting that even Justice Scalia, the author of the hybrid rights distinction, may have begun to disavow it).

198. *Id.* at 715.

199. *See id.* at 717–18.

200. *Brown v. City of Pittsburgh*, 586 F.3d 263, 284 n.24 (3d Cir. 2009).

201. *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993).

202. *Hicks ex rel. Hicks v. Halifax Cnty. Bd. of Educ.*, 93 F. Supp. 2d 649, 661 (E.D.N.C. 1999).

203. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

204. *See Emp't Div. v. Smith*, 494 U.S. 872, 883 (1990).

205. *Sherbert v. Verner*, 374 U.S. 398, 401 (1963).

206. *Id.* at 407.

207. *Id.* at 410.

elling state interest.²⁰⁸ The *Smith* Court observed that the nuances of unemployment compensation law were such that an individual governmental assessment was required to determine whether the case qualified under the *Sherbert* rule.²⁰⁹ Such an assessment was not required outside the employment sphere for neutral laws of general applicability.²¹⁰ Some commentators have argued that requiring clergymembers to report confidential conversations with penitents should similarly require an individual governmental assessment.²¹¹ The theory is that various religious orders display a wide array of doctrines regarding penitence and confession. Just as unemployment compensation eligibility rules require individualized assessments to determine their constitutionality, courts should have to “consider whether a particular cleric of a particular denomination must reveal the contents of an allegedly confidential communication from a particular penitent.”²¹²

However, in the case of typical mandatory reporting laws, the *Smith* decision is fatal to the possibility of individualized governmental assessments. Unlike the unemployment compensation eligibility law in *Sherbert*, mandatory reporting laws carry criminal penalties for failure to comply. For example, in Illinois, AN CRA specifies that failure to comply with the statute is a Class A misdemeanor for a first offense and a Class 4 felony for a second or subsequent violation.²¹³ The *Smith* Court reasoned that individualized governmental assessments are inapplicable to general criminal prohibitions of a particular form of conduct.²¹⁴ Abrogating the clergy exemption creates an across-the-board criminal prohibition against a failure to report known and suspected instances of child abuse. Accordingly, an individualized governmental assessment under *Smith* of the abrogation would be inappropriate.

208. *Id.* at 407.

209. See *Smith*, 494 U.S. at 884 (“[A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant’s unemployment.”).

210. *Id.* at 883.

211. See, e.g., Mazza, *supra* note 144, at 196.

212. *Id.*

213. 325 ILL. COMP. STAT. 5/4 (2010). In Illinois, a Class A misdemeanor is punishable by imprisonment for a period of up to one year, and a fine not to exceed \$2,500. 730 ILL. COMP. STAT. 5/5-4.5-55. A Class 4 felony is punishable by imprisonment from between one and three years, and a fine not to exceed \$25,000. *Id.* §§ -45, -50.

214. See *Smith*, 494 U.S. at 884.

d. Conclusion: No Free Exercise Clause Violation

As discussed above, abrogating the clergy exemption would result in a neutral statute of general applicability. Indeed, because abrogation would result in a statute that obligates members of the clergy similar to other professionals, the resulting law would be more neutral and more generally applicable. Attempts to justify the exemption do not find purchase because hybrid claims are of dubious constitutionality and individualized governmental assessments cannot apply to across-the-board criminal prohibitions. Accordingly, abrogating the clergy exemption to mandatory reporting laws does not raise Free Exercise Clause problems.

2. *Failure to Abrogate the Exemption is a Violation of the Establishment Clause*

American history has been filled with debates regarding religious exemptions since the Colonial days.²¹⁵ Proponents of exemptions view them as an essential part of religious liberty.²¹⁶ The Establishment Clause governs whether such exemptions are permitted.²¹⁷

a. Analysis Under *Lemon*

Evaluating exemptions under the Establishment Clause is not a straightforward process. The line separating church and state, “far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”²¹⁸ Nevertheless, *Lemon v. Kurtzman* does provide some guidance. Under *Lemon*, for a statute to survive scrutiny under the Establishment Clause, it “must have a secular legislative purpose, . . . its principal or primary effect must be one that neither advances nor inhibits religion, [and] the statute must not foster ‘an excessive government entanglement with religion.’”²¹⁹

215. See Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 140 (2009).

216. *Id.* at 176 (“The right to believe a religion is hollow without the right to practice the religion; it leaves committed believers subject to persecution for exercising their religion.”).

217. Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133, 138 (2011).

218. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

219. *Id.* at 612–13 (citation omitted).

i. Abrogation under the purpose prong

With regard to the purpose prong, the Court's discussion in *McCreary County v. ACLU of Kentucky* is instructive.²²⁰ In *McCreary*, the Court held that a display of the Ten Commandments in a Kentucky courthouse violated the Establishment Clause.²²¹ The Court considered the circumstances and context surrounding the display through the eyes of an objective observer.²²² Two prior attempts to display the Ten Commandments in the McCreary County courthouse had been deemed to violate the Establishment Clause.²²³ After reviewing the decisions concerning the first two displays, the Court concluded that McCreary County's justifications were insufficient under the Establishment Clause because they were "presented only as a litigating position."²²⁴ The Court reasoned that an objective observer probably would have concluded that petitioners had included the secular documents merely as a tactic to "keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality."²²⁵

A position taken solely for the purposes of litigation—a "litigating position" like that criticized in *McCreary*—appears to have motivated the passage of clergy exemptions for mandatory reporting. In consideration of P.A. 92-801, the Illinois legislature sought the input of various religious groups.²²⁶ The resulting amendment favored religious professionals—and penitents—unlike any other mandated profession. The legislative history shows that the Illinois House of Representatives was concerned that a bill requiring clergymembers to report

220. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 859 (2005).

221. *Id.* at 850, 858.

222. *Id.* at 862. The Court noted that "reasonable observers have reasonable memories, and our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'" *Id.* at 866 (alterations in original) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)).

223. *Id.* at 854-55.

224. *Id.* at 871. According to the lower court, the government's stated purposes were

(1) [T]o erect a display containing the Ten Commandments that is constitutional; (2) to demonstrate that the Ten Commandments were part of the foundation of American Law and Government; (3) [to include the Ten Commandments] as part of the display for their significance in providing the moral background of the Declaration of Independence and the foundation of our legal tradition.

ACLU of Ky. v. McCreary Cnty., 145 F. Supp. 2d 845, 848 (E.D. Ky. 2001) (alterations in original) (citations omitted) (internal quotation marks omitted).

225. *Id.* at 873.

226. During introductory comments at the outset of the debate of P.A. 92-801, Representative Lyons explained, "This Bill is a result of a myriad of religious organizations at the table . . . The Catholic Conference, the Agudath Israel of America, Episcopal, Presbyterian, African Methodist, American Baptist, and so on." Transcription, *supra* note 24.

would face a constitutional challenge.²²⁷ This makes sense because requiring clergymembers to report against their religious commitments would likely raise eyebrows in a court's Free Exercise Clause analysis.

The exemption, according to the legislative history of P.A. 92-801, was a calculated method to avoid constitutional problems. Yet according to *McCreary*, litigating positions taken to avoid constitutional problems would be insufficient to establish the constitutionality of a statute.²²⁸ Were an objective observer to consider P.A. 92-801 in light of its legislative context—the involvement of religious groups in the legislative process and the unique exemption for religious professionals and penitents—the objective observer would be hard-pressed to find a secular legislative purpose. Rather, religious interests motivated the exemption in P.A. 92-801. Like the attempt in *McCreary*, the exemption for clergy in P.A. 92-801 was merely a litigating position included to avoid constitutional problems. Just as the litigating position in *McCreary* failed to cure a lack of secular purpose for the display, the Illinois legislature's attempts to avoid constitutional problems do not cure P.A. 92-801's lack of secular purpose. The statute is overtly religious in purpose, and thus in violation of the purpose prong of the Establishment Clause.

ii. Abrogation under the effects prong

Even if the exemption for clergymembers satisfies the purpose prong of *Lemon*, the exemption does not survive the effects prong. Under *Lemon*, a statute's principal or primary effect must neither advance nor inhibit religion.²²⁹ In *Agostini v. Felton*, the Supreme Court applied the *Lemon* effects prong and held that New York City's Title I programs did not improperly advance religion.²³⁰ At issue was a program in which federal funds supported the provision of remedial education by public school teachers in parochial school classrooms.²³¹ The Court reasoned that simply because a federally funded teacher entered a parochial school, she would not necessarily jettison her assigned duties and embark on religious indoctrination that would ad-

227. *See id.*

228. *See McCreary Cnty.*, 545 U.S. at 871.

229. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). For a good discussion of why *Lemon*, as modified by *Agostini*, provides reliable guidance through the effects prong, see Marcia S. Alembik, Note, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1203 (2006).

230. *Agostini v. Felton*, 521 U.S. 203, 233–34 (1997).

231. *Id.* at 211.

vance religion.²³² There was no risk of governmental inculcation of religion.²³³ In *Mitchell v. Helms*, the Supreme Court reflected on *Agostini* and noted therein a neutrality principle operating to determine whether government aid improperly advances religion.²³⁴

ANCRA recognizes that a variety of privileged communications may exist, but the statute removes protection of such communications in cases of child abuse. For example, a doctor who ordinarily is bound to keep his patients' confidences is required to report child abuse. But P.A. 92-801 grants clergymembers relief from the burden to report imposed on other professionals. The sole basis of this exemption is religious—the *religious* status of the professional and the *religious* context in which the information was received. In this regard, unlike the federal aid programs in *Agostini*, which gave financial relief indiscriminately, the relief provided to clergymembers in P.A. 92-801 is given exclusively with reference to religion. Under *Lemon* and *Agostini*, a statute's principal or primary effect must be one that neither advances nor inhibits religion.²³⁵ But the primary effect of P.A. 92-801 is to relieve religious leaders of a civil burden broadly imposed on other professions. Religious groups thereby enjoy advantages unavailable to nonreligious professions. In this way, the principal or primary effect P.A. 92-801 advances religion. Accordingly, the exemption violates the Establishment Clause.

In summary, abrogation of the clergy exemption does not raise Free Exercise Clause problems. Instead, the exemption is itself a violation of the Establishment Clause. After discussing the exemption's constitutional defects, the gains a society receives by abrogating the exemption must be considered.

IV. THE BENEFITS OF ABROGATING THE PRIVILEGE IN CASES OF CHILD ABUSE

A. *The Clergy member's Opportunity to Help Those at Risk*

Over 80% of Americans consider themselves religious.²³⁶ Of these, roughly 54% claim to attend religious ceremonies at least once or twice a month.²³⁷ Forty percent of Americans who seek counseling

232. *Id.* at 226.

233. *Id.*

234. See *Mitchell v. Helms*, 530 U.S. 793, 810 (2000).

235. See *Lemon*, 403 U.S. at 612–13; *Agostini*, 521 U.S. at 233.

236. See THE PEW FORUM ON RELIGION & PUBLIC LIFE, PEW RESEARCH CTR., U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

237. *Id.* at 154.

have sought guidance from a member of the clergy.²³⁸ As one commentator explained, people “often trust the very fabric of their lives to the counseling skills of their minister. Frequently the pastor is the only person they allow to enter their private hells. In their desperate need, they open their hearts to the pastor, whether or not he or she deserves that trust.”²³⁹ The expansive religious landscape of America, and the tradition of trust enjoyed by religious professionals, combine to put clergymembers at the vanguard of child protection. Today’s ministers, rabbis, pastors, Imams, and priests are well positioned to receive news of children who are at risk and take steps to begin the process of intervention.

Of course, any contention advocating such disclosures by clergymembers would be sharply criticized. After all, would not a penitent consider public disclosure of “confessed sins” to be the pinnacle of betrayal? If, as some writers claim, clergymembers are the only professionals to whom certain troubled and burdened people will go for help, does not disclosure of the privileged communications harm the very ones who are willing to expose their own weaknesses and vulnerability?²⁴⁰ Is this not why Free Exercise Clause concerns are raised in the first place, out of concern for the rights of the penitent confessor?

To be sure, the rights of the penitent are important. But in the face of child abuse, the rights of the at-risk child outweigh penitent rights. While the notion of disclosing confidences is disturbing, even more disturbing are the devastating effects experienced by victims of child abuse.²⁴¹ Children, because of their peculiar vulnerability, require special protection. Moreover, not only does child abuse most often occur at the hands of parents, but children who have been abused are also likely to be abused again.²⁴² Though clergymembers may loathe the violation of what they consider to be sacred trust, these factors, which are peculiar to children and the injuries they suffer, make non-reporting of known child abuse far more loathsome.

238. Brocker, *supra* note 41, at 455.

239. HOWARD CLINEBELL, *BASIC TYPES OF PASTORAL CARE AND COUNSELING: RESOURCES FOR THE MINISTRY OF HEALING AND GROWTH* 47 (rev. ed. 1984).

240. *Cf. id.* at 47–48.

241. See James C. Backstrom, *Sexual and Physical Abuse of Children*, 45 *PROSECUTOR* 19, 20 (2011) (“Abused and neglected children often suffer physical and emotional damage that result in developmental delays, chronic health problems, learning disorders, depression, conduct disorders, [and] post-traumatic stress disorder . . .”). Backstrom noted that inmates at correctional facilities were almost three times as likely to have suffered abuse as children than those not in incarceration. See *id.* at 22.

242. See *supra* note 23 and accompanying text.

B. *Children's Safety Trumps Religious Rights*

The Supreme Court has held that “[i]t is evident beyond the need for elaboration that a State’s interest in safeguarding the physical and psychological well-being of a minor is compelling.”²⁴³ Specifically, the Court recognized that the “peculiar vulnerability” of children may curtail otherwise protected rights of adults.²⁴⁴ In *Bellotti v. Baird*, the Court held unconstitutional a Massachusetts statute that required minors to receive parental consent before getting an abortion.²⁴⁵ The Court noted that its “concern for the vulnerability of children [had been] demonstrated in its decisions dealing with minors’ claims to constitutional protection against deprivations of liberty or property interests by the State.”²⁴⁶ In particular, the Court identified several challenges related to a minor’s pregnancy that undermined a mandate for parental consent: the narrow window in which abortion is an available option; the minor’s “probable education, employment skills, financial resources, and emotional maturity”; and the legal responsibility of parenthood vis-à-vis the “legal disabilities” of the minor.²⁴⁷ The Court reasoned that, given these factors, “there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.”²⁴⁸ The Court therefore held that if a state required a pregnant minor to receive parental permission before getting an abortion, the state must also provide an alternative authorization procedure.²⁴⁹ Importantly, the Court described the impact of family dynamics with regard to teen pregnancies:

[M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents’ efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.²⁵⁰

While the Court stated that, ideally, parents would be involved in a minor’s decision regarding an abortion,²⁵¹ it argued that the facts of

243. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (quoting *New York v. Ferber*, 458 U.S. 747, 756–58 (1982)) (internal quotation marks omitted).

244. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

245. *See id.* at 651.

246. *Id.* at 634.

247. *Id.* at 642.

248. *Id.*

249. *Id.* at 643.

250. *Bellotti*, 443 U.S. at 643.

251. *See id.* at 640.

Bellotti warranted flexibility with respect to the needs of children.²⁵² A minor's pregnancy creates urgencies that justify a suspension of the "ideal" in the interests of the child.²⁵³

Because of its attention to the peculiar vulnerability of children, *Belotti* provides a template through which society should understand the rights of child abuse victims. Just as time is of the essence for minors considering an abortion, victims of child abuse also have a pressing need for rapid intervention.²⁵⁴ Prompt reporting also initiates medical assistance by both pediatricians and qualified mental health care professionals to assess future needs.²⁵⁵ Intervention must be provided promptly because the level of a victim's stress is directly proportional to the length of time the victim is subjected to the trauma-causing event.²⁵⁶

In addition, because of a child's innate vulnerability, abuse is rarely an isolated event.²⁵⁷ Recidivistic tendencies of perpetrators underscore the dangers to children.²⁵⁸ A study by the United States Department of Health and Human Services reported that children who have been abused are 96% more likely to be abused again.²⁵⁹ An-

There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.

Id. at 640-41 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., concurring)) (internal quotation marks omitted).

252. *See id.* at 634.

253. *Id.* at 642 ("In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.")

254. *See* Albert R. Roberts, *Bridging the Past and Present to the Future of Crisis Intervention and Crisis Management*, in *CRISIS INTERVENTION HANDBOOK: ASSESSMENT, TREATMENT, AND RESEARCH* 3, 13 (Albert R. Roberts ed., 3d ed. 2005) ("Caplan states that 'a relatively minor force, acting for a relatively short time, can switch the balance to one side or another, to the side of mental health or the side of mental ill health.'" (citations omitted)); *see also* Lisa Coles, *Prevention of Physical Child Abuse: Concept, Evidence and Practice*, *COMMUNITY PRACTITIONER*, June 2008, at 18, 20 ("[T]he best protection for a child is achieved by the timely intervention of family support services.")

255. *See* Nancy Kellogg, *The Evaluation of Sexual Abuse in Children*, 116 *PEDIATRICS* 506, 510 (2005).

256. *See* Albert R. Roberts, *Assessment, Crisis Intervention, and Trauma Treatment: The Integrative ACT Intervention Model*, *BRIEF TREATMENT & CRISIS INTERVENTION*, Spring 2002, at 1, 3-4 (relating the need for intervention to a "subjective time clock," in which the greater length of exposure a victim is exposed to a traumatic sensory experience, the greater the stress from that exposure); *see also* Roberts, *supra* note 254, at 26 (calling for intervention to be as close to the precipitating event as possible).

257. Brief for American Psychological Ass'n et al. as Amici Curiae Supporting Respondent at 23 *Stogner v. California*, 539 U.S. 607 (2003) (No. 01-1757).

258. *Id.*

259. *See* Chihak, *supra* note 17, at S211.

other study that tracked recidivism among 197 convicted child molesters found that 42% of offenders were convicted of a subsequent violent or sexual crime.²⁶⁰ Thus, prompt intervention, which removes the child from danger and initiates therapeutic treatment, is required to secure the child's safety.

Furthermore, just as in *Belotti*, in which family dynamics could impede a child's access to abortion services, in cases of child abuse, family dynamics, specifically a parent's self-interest, may impede a child's access to protective and healing services.²⁶¹ The *Belotti* Court recognized that although not every parent would seek his or her interests above the child's, the particular vulnerability of children warranted the Court's action to secure a minor's right to an abortion without having to provide judicial notice to a parent.²⁶² Indeed, because parents are most often the perpetrators of child abuse, the interests of abused children in intervention will most often be diametrically opposed to the interests of parents.²⁶³ In such situations, it is perhaps more likely that a parent will act in his own interests, at the expense of the child. In that scenario, the vulnerable child is generally powerless to secure his own rights.²⁶⁴

For these reasons, just as the *Belotti* Court constrained parents' rights to restrict a minor's access to abortion services, in cases of child abuse, the clergy member's or penitent's right to interpret whether a conversation is privileged, and therefore not subject to reporting, should be similarly constrained. In fact, the case for court intervention in instances of child abuse is perhaps even stronger than the situation contemplated in *Belotti* because child abuse has no viable place in our society.

260. See Brief for American Psychological Ass'n, *supra* note 257, at 24.

261. See Chihak, *supra* note 17, at S211 ("The American Academy of Pediatrics (2007) reports that children are often abused by someone they know."); see also Douglas J. Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARV. J.L. & PUB. POL'Y 539, 555 (1985) (describing cases in which parents decline services or refuse to cooperate such that a social worker must assess whether or not the danger to a child warrants the imposition of treatment).

262. See *Bellotti v. Baird*, 443 U.S. 622, 647 (1979).

263. Cf. William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 475 (1990) (discussing the competing interests of children and parents in the context of the Fifth Amendment in child abuse proceedings).

264. See David Finkelhor & Jennifer Dziuba-Leatherman, *Victimization of Children*, 49 AM. PSYCHOLOGIST 173, 176-77 (1994) (providing several reasons for the particular vulnerability of children: (1) children are weaker and possess small physical stature; (2) children cannot retaliate or deter victimization; (3) children have little choice over with whom they will associate; (4) children cannot leave high-risk relationships at will; and (5) children cannot dissociate from dangerous people or environments).

In sum, there are important advantages to requiring clergymembers to report child abuse as an absolute duty. By eliminating the clergy exemption, agencies like the DCFS of Illinois would garner an important ally in the war against child abuse—the clergy. In addition, the rights of vulnerable children would be better protected. Intervention and treatment of abused children would likely be swifter. Abrogation of the exemption, therefore, is desirable. In Illinois, and states that have enacted laws similar to ANCRA, clergymembers should be included on the list of mandated reporters without caveat.

V. PROPOSAL: “ANY PERSON” MANDATORY REPORTING

Seven states currently mandate the reporting of child abuse by “any person” who becomes aware of it and expressly abrogate privilege in cases of child abuse.²⁶⁵ This Comment proposes that the other forty-three state legislatures adopt similar reporting statutes. Under this proposal, the mandatory reporting requirements of ANCRA, and other similarly constructed statutes, would be amended to abrogate privilege in all cases involving clergymembers and include a similar “any person” provision.

A. Benefits of an “Any Person” Reporting Mandate

Statutes that mandate a general duty for “any person” to report child abuse confer significant societal benefits. Child abuse exacts enormous costs on communities.²⁶⁶ Accordingly, community members have a vested interest in addressing the problem.²⁶⁷ A shared duty to report abuse reflects that interest. As many commentators have pointed out, community norms may either positively or negatively affect the prevalence of child abuse.²⁶⁸ From a practical stand-

265. These states are Florida, New Jersey, North Carolina, Oklahoma, Rhode Island, Tennessee, and Texas. See *supra* note 30 and accompanying text.

266. See Backstrom, *supra* note 241, at 22 (noting that in addition to the emotional damage suffered by victims and families, communities nationwide spend an estimated \$103.8 billion annually as a result of child maltreatment).

267. Community involvement must include supportive elements that contribute to a positive environment for families, as well as corrective involvement that addresses emerging crises. See Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 35 (2005) (explaining that theorists understand communities to be an important part of services to families, but have not yet grappled with the manner in which state agencies impact community involvement).

268. See, e.g., Deborah Daro & Kenneth A. Dodge, *Creating Community Responsibility for Child Protection: Possibilities and Challenges*, FUTURE CHILDREN, Fall 2009, at 67, 69 (explaining at least four reasons why community matters: (1) community norms shape how parents understand appropriate interactions with children; (2) community contexts can either support parents or reinforce feelings of isolation; (3) communities can bring temporary relief to parents; and (4) communities can provide professional services to improve the mental welfare of parents).

point, the “any person” approach puts the problem in the hands of community members and eliminates the “it’s not my problem” justification for passivity. Mandating affirmative duties makes the issue of child abuse everyone’s problem. Furthermore, a change to the law, accompanied by a campaign to raise awareness, would draw the problem out of the shadows and into the light of day. A community with that awareness and shared duty is an important weapon in the fight to protect children.

This is not to say that shared-duty statutes are the magic bullet that will effectively wipe out child abuse and neglect. Compliance with the laws may be inconsistent because the duty to report will inevitably compete with feelings of loyalty to those accused, especially when the accused is a family member.²⁶⁹ Religious conviction may, like family loyalty, hinder a clergy member’s willingness to report. In 2002, for example, one commentator observed that in Texas, which has an “any person” statute, there had not been a single conviction for a refusal to report since the privilege for clergy members was abrogated for cases of child abuse in 1985.²⁷⁰

Commentators have offered various solutions to the problem. Some have suggested that judiciaries adopt affirmative common law duties to protect, which would include more severe criminal penalties for mandated reporters who fail to report when children are injured.²⁷¹ Other commentators have suggested that the possibility of victims’ recovery of tort damages from mandated reporters who fail to report might sufficiently incentivize reporting.²⁷² According to this

269. See Backstrom, *supra* note 241, at 19 (stating that 86% of abuse occurs at the hands of either a parent or family member); *id.* at 20 (noting that the real incidence of abuse may be three times as great as the rate of reporting, and that in one state only an estimated 20% of actual abuse is reported).

270. See O’Malley, *supra* note 50, at 718.

271. See, e.g., Kristen Ditta, Comment, *Who Will Protect Me Now? An In-Depth Look at the Laws Protecting Children in Texas*, 50 S. TEX. L. REV. 285, 312 (2008). But see Jessica R. Givelber, Note, *Imposing Duties on Witnesses to Child Sexual Abuse: A Futile Response to Bystander Indifference*, 67 FORDHAM L. REV. 3169, 3171 (1999) (arguing that the ineffectiveness of “Good Samaritan” laws, which impose affirmative duties of “easy rescue,” is evidence that “any person” reporting mandates, like the Sherrice Iverson Act, would be similarly ineffective).

272. Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children?*, 40 SANTA CLARA L. REV. 991, 1021–22 (2000) (noting a New Jersey Supreme Court decision that held that “when a spouse has actual knowledge or special reason to know of the likelihood of his or her spouse engaging in sexually abusive behavior against a particular person or persons,” that spouse had a duty of care to warn potential victims, and a failure to do so could constitute proximate cause of any resulting injury); see also Jenna Miller, Note, *The Constitutionality of and Need for Retroactive Civil Legislation Relating to Child Sexual Abuse*, 17 CARDOZO J.L. & GENDER 599, 600 (2011) (advocating for the enactment of laws that would allow civil suits against sexual abuse perpetrators even when the statute of limitations has expired on potential criminal charges).

theory, liability for damages due to negligence might actually provide a greater incentive to report than the threat of criminal prosecution.²⁷³ Evaluation of such alternatives is beyond the scope of this Comment. However, each alternative presumes the kind of “any person” mandate envisioned by this proposal. Whatever enforcement challenges reporting statutes may face, enforcement agents must first determine which subjects are bound by statutory duties. The “any person” proposal seeks to impose reporting duties as broadly as possible.

B. The Penn State Scandal: An “Any Person” Reporting Alternative

The recent convictions of a member of the Penn State University football coaching staff for child sexual abuse illustrate the need of “any person” reporting provisions in mandatory reporting statutes. Jerry Sandusky, former defensive coordinator for the Penn State football team, was convicted of over forty counts of “deviate sexual intercourse” and “indecent contact” with victims under the ages of sixteen and thirteen, respectively. Sandusky systematically abused ten different victims over fifteen years.²⁷⁴ According to his testimony given before the grand jury, then-assistant coach Mike McQueary saw Sandusky rape a child in the Penn State locker room showers in 2002, but did not report the incident to the police.²⁷⁵ Instead, McQueary related the incident to then-head coach Joe Paterno.²⁷⁶ Paterno failed to report the incident to police, but instead went to the school’s athletic director.²⁷⁷ The Penn State athletic director also failed to disclose the incident to police.²⁷⁸

Pennsylvania’s mandatory reporting statute provides that “[a] person who, in the course of employment, occupation or practice of a profession, comes into contact with children shall report or cause a report to be made . . . when the person has reasonable cause to suspect . . . a child . . . is a victim of abuse.”²⁷⁹ Employees of institutions are required to report suspected incidents of abuse to the person in

273. See Franklin & Ploeger, *supra* note 272, at 1005 (“[P]otential liability [for tens or hundreds of thousands of dollars] suggests that tort law may be far more threatening and burdensome for many persons than criminal law.”).

274. Kevin Johnson, *Sandusky Faces Life in Prison After Conviction on 45 Charges*, USA TODAY, June 23, 2012, <http://www.usatoday.com/sports/college/football/story/2012-06-22/sandusky-verdict/55768640/1>.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* Athletic director Tim Curley and finance official Gary Schultz will be standing trial on charges of lying to a grand jury concerning their knowledge of Sandusky’s abuse of children. *Id.*

279. 23 PA. CONS. STAT. § 6311(a) (2010).

charge of the institution.²⁸⁰ This scandal, however, illuminates the weakness of a reporting scheme that does not include an “any person” provision. Had the Pennsylvania law contained such a provision, both McQueary and Paterno would have been obligated to report the allegations of abuse to police or a Pennsylvania agency of child protective services, or face the possibility of criminal sanctions.²⁸¹ Child protective services agencies and police departments, unlike a university administrative body, are equipped to investigate the credibility of claims and assess future risk to children. Thus, an “any person” provision in the Pennsylvania statute would have broadened the base of those required to report and further incentivized those with knowledge of the abuse to report it.

VI. CONCLUSION

The problem of child abuse is heinous, affecting victims and society in manifold ways. Abrogation of the clergy exemption from mandatory reporting laws will advance the interests of at-risk children. States that currently provide the exemption should carefully consider the problems of ambiguity as they pertain to the unique nature of the clergy member’s identity and role. States should also carefully weigh the constitutional problems created by clergy exemptions. The interests of at-risk children warrant abrogation of the exemption, even if such abrogation impinges on certain rights of the penitent, because children are particularly vulnerable. Finally, states contemplating abrogation of the exemption would do well to also consider an “any person” reporting provision. Such provisions commit the whole community to the protection of those most in harm’s way.

*Paul Winters**

280. *Id.* § 6311(c).

281. In fact, anyone who witnessed or suspected abuse during the fifteen years in question would have shared the legal obligation.

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