Boston College Law Review

Volume 44
Issue 4 *The Impact Of Clergy Sexual Misconduct Litigation On Religious Liberty*

Article 8

7-1-2003

Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes

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ADDRESSING THE TENSION BETWEEN THE CLERGY-COMMUNICANT PRIVILEGE AND THE DUTY TO REPORT CHILD ABUSE IN STATE STATUTES

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Abstract: Every state provides some statutory form of an evidentiary clergy-communicant privilege to protect certain types of conversations between clergy members and individuals. Likewise, every state imposes a statutory obligation on certain individuals to report suspected child abuse. The relationship between clergy privilege statutes and child abuse reporting requirements has received much attention recently due to the numerous allegations of child sexual misconduct by clergy members. This Article surveys the variations on clergy privileges and child abuse reporting statutes in the fifty states. The Article then discusses the varying approaches the states take in addressing the relationship between the obligation to report and the clergy privilege. A majority of states expressly exempt clergy-privileged information from reporting requirements; some states expressly abrogate the clergy privilege in the child abuse reporting context; and a third group of states do not confront the issue at all. This Article argues that there is a need for uniformity and proposes a partial-abrogation solution that will help alleviate the tension between the clergy privilege and mandatory reporting requirements.

INTRODUCTION

A once obscure evidentiary privilege—the priest-penitent privilege, or as it should be more generally termed today, the clergy-communicant privilege—has become the subject of increased interest in recent years, mainly as a result of the numerous instances of

 Interim Dean and Professor of Law, UCLA School of Law. I am indebted to a number of people in connection with the preparation of this Article: Professor Robert Goldstein, UCLA, who commented on an earlier version of the Article; Professor Brenda D. Smith, SUNY, Albany, for ideas suggested in conversation that are reflected in the Article; participants in the Boston College Law School Symposium (where this Article was first presented), whose comments led to a different focus for the second half of the Article; and Matthew Schwoeffer Reynolds, UCLA Law, 2004, for careful research on the complex web of relevant state laws.

charges of child molestation that have surfaced involving church personnel. Much attention has focused on the relationship between this privilege and state statutory obligations to report child abuse.

In fact, the duty to report child abuse often arises in settings that have nothing to do with the clergy-communicant privilege. For example, information regarding child abuse by church personnel may be transmitted to church officials from clergy or non-clergy persons such as the victims, family members or friends of the victim in circumstances not covered by the clergy privilege. Similarly, church officials may conduct investigations and otherwise obtain information from sources in unprivileged contexts.

Still, the attention that has focused on the clergy privilege and its relation to the statutory obligation to report child abuse is warranted. There is an obvious tension between such an evidentiary privilege and the imposition of a statutory reporting obligation. How the legal system resolves or should resolve this tension is a subject worthy of examination. Furthermore, communications to members of the clergy by the perpetrator of child abuse can be an invaluable source of information. Such communications will often pose clergy privilege issues, and the question is whether the clergy privilege-child abuse reporting requirement relationship, as it presently exists in the states, adequately addresses the tension inherent in such situations.

Beginning about thirty years ago, individual states began to change the scope of their clergy privilege statutes.[1] During this same period, every state enacted a statutory duty to report child abuse.[2] Although there are some differences in the scope of the clergy privilege described in the various state statutes, there is even greater variability among the state child abuse reporting statutes regarding whether clergy are obligated to report, and if so, whether clergy must report communications covered by the clergy privilege.[3]

The variations in the state laws relating to this subject cover the gamut of possibilities. Some states do not appear to impose any duty on clergy to report.[4] A majority of states, however, do impose such a duty.[5] Among the states that do impose a duty to report, some expressly abrogate the application of the clergy privilege in the reporting context, that is, they require reporting despite the otherwise-

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[1] *See infra* notes 22–28 and accompanying text.
[2] *See infra* notes 51–55 and accompanying text.
[3] *See infra* notes 30–34, 51–55 and accompanying text.
[4] *See infra* notes 55–56 and accompanying text.
[5] *See infra* notes 52–54 and accompanying text.

privileged nature of the communication.[6] At the same time, a significant number of states take the opposite tack and exempt from the reporting requirement communications that fall within the clergy privilege.[7]

Although some differences among the states in attitudes and values regarding the proper scope of a requirement to report child abuse or differences in the value and importance of the clergy privilege are to be expected, the degree of divergence is unacceptable. There are reasons why a modicum of consistency and uniformity among the states in this area of law is desirable. The challenge is to identify a position that best accommodates the different concerns and is one that all of the states might be persuaded to adopt.

Part I.A summarizes the history of the clergy privilege in the United States.[8] Part I.B surveys the various ways individual states have described the clergy privilege.[9] Part I.C provides a general overview of the various state child abuse reporting statutes.[10] Part I.D discusses how varied are the approaches that the states take in addressing the relationship between the obligation to report child abuse and the clergy privilege.[11] Part II presents a hypothesis regarding what might explain the existing variation in approaches.[12] Next, Part III suggests a way to resolve the quandary presented by the divergent approaches in existing law by making a proposal for the reform of state statutes on this subject.[13] Finally, Part IV explores the issues and concerns raised by this proposal.[14]

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[6] *See infra* note 59.
[7] *See infra* note 58.
[8] *See infra* notes 15–28 and accompanying text.
[9] *See infra* notes 29–50 and accompanying text.
[10] *See infra* notes 51–57 and accompanying text.
[11] *See infra* notes 58–67 and accompanying text.
[12] *See infra* notes 68–86 and accompanying text.
[13] *See infra* notes 87–112 and accompanying text.
[14] *See infra* notes 113–136 and accompanying text.

I. A Survey of the State Statutory Schemes

A. *The Historical Transition to the Modern Statutes*

1. The Early Days of the Privilege: From First Recognition to the Mid-1950s

The first acknowledgement of the clergy privilege in this country was in *People v. Phillips*, where the Court of General Sessions for the City of New York in 1813 recognized a privilege not to give testimony for a Roman Catholic priest who relied on the seal of the confessional.[15] New York subsequently by statute recognized the result in *Phillips*: "No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by rules or practice of such denomination."[16]

To the extent that a clergy privilege was recognized, from the early nineteenth century through at least the 1950s, this privilege followed the pattern of the New York statute, that is, the states recognized a confessional or priest-penitent privilege. This privilege protected against judicial compulsion of testimony regarding confessions that the applicable religious doctrine required the penitent to make and where secrecy was enjoined on the clergy involved in hearing the confession. This restricted form of the privilege did not apply to the clergy of all religious denominations: it only applied to Roman Catholic priests, probably to Episcopal priests, and possibly Lutheran ministers.[17] Thus, for example, in 1923 in the second edition of his treatise, John Wigmore spoke of "a privilege for the confessions to a priest" and stated:

> [I]n more than one half of the jurisdictions of the United States the privilege has been sanctioned by statute. In the

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[15] This case was not officially reported, but the record and opinion were later reprinted in 1 W. L.J. 109 (1843).

[16] Note, *Privileged Communications to Clergymen*, 1 Cath. Law. 199, 213 (1955) (quoting N.Y. Rev. Stat. tit. 3, § 72 (1828)). Four years after the decision in *Phillips*, a New York court in *People v. Smith* permitted a Protestant minister to testify to statements made to him by the defendant confessing the crime, where the minister had been visiting him in his capacity as a minister of the gospel. The minister when asked by the judge indicated that he did not object to testifying regarding the defendant's statements. 2 N.Y. City-Hall Recorder 77 (1817).

[17] John C. Bush & William Harold Tiemann, The Right to Silence 25–26, 60–61, 66–68 (3d ed. 1989).

> application of these statutes, . . . the privilege applies only to communications made in . . . pursuance of that church discipline which gives rise to the confessional relation, and, therefore, in particular to confessions of sin only, not to communications of other tenor . . . .[18]

Furthermore, when the American Law Institute's Model Code of Evidence was drafted in the early 1940s, it included this confessional or priest-penitent privilege.[19] Similarly, when the National Conference of Commissioners on Uniform State Laws ("NCCUSL") originally published the Uniform Rules of Evidence in 1953, they included a similar priest-penitent privilege.[20] Significantly, the comment to that rule stated: "The privilege is intentionally limited to communications by communicants within the sanctity and under the necessity of their own disciplinary requirements. Any broader treatment would open the door to abuse and would clearly not be in the public interest."[21] Thus, until the 1950s, the dominant version of the clergy privilege in the United States provided an evidentiary privilege only for confessional communications that were part of the religious observance of the communicant and the clergy member.

2. The Modern Form of the Privilege: From the 1950s to the Present

While a broader and different clergy privilege may have surfaced earlier in individual states, it was only in the 1960s and 1970s that a legislative formulation of a broader privilege emerged nationally, spurred by the promulgation of several influential evidence codes.[22]

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[18] Wigmore here cited and quoted thirty U.S. jurisdictions that provided for a confessional privilege. 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2395 (2d ed. 1923); *see* JOHN H. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE 411–12 (1935); 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2395 (4th ed. 1961).

[19] *See* MODEL CODE OF EVID. R. 219 (1942).

[20] *See* UNIF. R. EVID. 29.

[21] *Id.* cmt.

[22] See S.C. CODE ANN. § 19-11-90 (Law. Co-op. 2002) for an example of a statute enacted before 1960. When the California Evidence Code was enacted in 1967, it, too, included a clergyman-penitent privilege. However, it slightly broadened the privilege—not specifying as a requirement that the penitential communication be a "confession." While the significance of that change is debatable, it can be seen as not changing the confessional privilege in any basic way. The privilege in California was still restricted to such penitential communications as the clergyman is "in the course of the discipline or practice of the church . . . authorized or accustomed to hear." CAL. EVID. CODE § 1032 (West 2003). In his study on behalf of the California Law Revision Commission that led to the final version of the Evidence Code, Professor James H. Chadbourn explained, "The definition of 'penitential communication' has been revised so that it is no longer necessary to determine the

This broader clergy privilege did not explicitly require a confession or penitential communication. Rather, it provided privilege protection to a broader category of communications usually related to spiritual advice.

The most influential of the code models which propagated the new privilege was the Federal Rules of Evidence, which set forth the new privilege in proposed Rule 506.[23] Although Congress did not approve the privilege provisions of the Federal Rules, including that contained in Rule 506, many of these privilege provisions were influential in both the federal and state courts and in the state legislatures.[24]

Proposed Federal Rule 506, which has been the model for the type of clergy privilege adopted in a large number of states, provided: "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 a spiritual adviser."[25]

The Advisory Committee's note to Rule 506 highlights the difference between a confessional privilege and the spiritual-advice privilege provided in Proposed Rule 506:

> The definition of "confidential" communication is consistent with the use of the term . . . for lawyer-client [privilege] and . . . for psychotherapist-patient, suitably adapted to communications to clergymen.
>
> The choice between a privilege narrowly restricted to doctrinally required confessions and a privilege broadly applicable to all confidential communications with a clergyman in his professional character as spiritual adviser has been exercised in favor of the latter. Many clergymen now receive training in marriage counseling and the handling of personality problems. Matters of this kind fall readily into the realm of the spirit. The same considerations which underlie the

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content of the statement; a court need determine only that the communication was made in the presence of the priest only and that the priest has a duty to keep the communication secret." CAL. LAW REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 249 (1964).

[23] FED. R. EVID. 506, 56 F.R.D. 183, 247 (1972) (unenacted). Also, in 1974, the NCCUSL published a revised version of the Uniform Rules of Evidence that generally tracked the Federal Rules and, with slight word changes, adopted as Rule 505 the same privilege as proposed Federal Rule 506. UNIF. R. EVID. 505, *available at* http://www.law.upenn.edu/bll/ulc/fnact99/ure88.htm.

[24] *See* FED. R. EVID. 506, 56 F.R.D. 183, 247 (1972) (unenacted).

[25] *Id.* (unenacted).

> psychotherapist-patient privilege . . . suggest a broad application of the privilege for communications to clergymen.[26]

The notion of a spiritual advice counseling privilege opens the door to a wide range of communications relating to all types of personal problems. Even though the advice may have spiritual content, the advice may also include psychological and common sense elements, similar to the advice provided by other kinds of counseling functionaries. In the absence of a religious requirement to seek such advice, the spiritual advice counseling privilege, separately viewed, is quite different in form, content and rationale from the confessional-penitential privilege.[27] The dramatic switch in approach to this area of law seems to have occurred within the twenty-odd year period between the promulgation of the original Uniform Rules of Evidence in 1953, and the revision of those Rules in 1974 and promulgation of the Federal Rules in 1975.[28]

B. *The Modern Clergy Privilege Statutes*

1. A Survey of Modern Clergy Privilege Statutes

The clergy privilege statutes that succeeded the earlier confessional privilege statutes have taken several forms. A survey of current state statutes establishing the clergy privilege reveals the following breakdown.[29] Thirty-three of the fifty states have adopted privilege provisions that include "spiritual advice."[30] Twenty of these states, many following very closely the pattern of the Federal Rules, provide only for a privilege covering spiritual advice (referred to herein as

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[26] *Id.* at 248 (advisory committee's note) (unenacted).

[27] *See infra* notes 29–36 and accompanying text.

[28] We can only guess at the causes of this dramatic change. It may have reflected the coming of age in the country of a host of religious denominations, with different practices and doctrines. Or it may be that the argument that providing only a confessional privilege favored some religions over others and raised constitutional questions had begun to gain adherents. Possibly, judicial decisions relating to freedom of religion and establishment issues may have influenced the drafters. There is the related concern that providing a privilege that was available only to some religious denominations was not politically wise or acceptable. Finally, the switch in approaches may have reflected the particular views of the drafters of these codes. Whatever the explanation, the strong influence of the Federal Rules as a model, backed up by the similar approach in the new Uniform Rules, clearly helped to spread the new approach through much of the country.

[29] In classifying the statutes according to these categories, I have ignored specific word differences among the statutes and focused only on the essential nature of the privilege described in the statutory language.

[30] *See infra* notes 31–32.

spiritual-advice jurisdictions).[31] Thirteen of the thirty-three jurisdictions expressly provide in a single statutory section for a privilege for both "confessions" and communications relating to "spiritual advice" (referred to herein as side-by-side jurisdictions).[32] Another seven states may be treated separately or may be included in the spiritual-advice category.[33] They do not actually use the words "spiritual advice" or the equivalent, but rather generally cover confidential communications to a clergy person in his or her professional capacity, which suggests the possibility of an even more broadly applicable privilege. Finally, ten states, adhering to the original, pre-Federal Rules approach, provide statutory clergy privilege protection only for a "confession . . . in the course of discipline enjoined by the church" or equivalent language.[34]

Even in states that still follow the pre-Federal Rules approach, some of their state courts have interpreted their respective privilege statutes to include spiritual advice. For example, in an influential decision, the Supreme Court of Utah held in 1994 in *Scott v. Hammock* that to fall within the statute which restricts the privilege to "any confession" communications to clergy only requires that "they be made in

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[31] *See* ALASKA R. EVID. 506; ARK. R. EVID. 505; DEL. R. EVID. 505; FLA. STAT. ch. 90.505 (2003); GA. CODE ANN. § 24-9-22 (2003); HAW. R. EVID. 506; KY. R. EVID. 505; LA. CODE EVID. ANN. art. 511; ME. R. EVID. 505; MISS. CODE ANN. § 13-1-22 (2003); NEB. REV. STAT. § 27-506 (2002); N.M. R. EVID. 11-506; N.C. GEN. STAT. § 8-53.2 (2003); N.D. R. EVID. 505; S.D. CODIFIED LAWS § 19-13-17 (Michie 2003); TENN. CODE ANN. § 24-1-206 (2003); TEX. R. EVID. 505; VA. CODE ANN. § 8.01-400 (Michie 2003); W. VA. CODE § 48-1-301 (2003); WIS. STAT. § 905.06 (2003).

[32] *See* ALA. CODE § 12-21-166 (2003); 735 ILL. COMP. STAT. 5/8-803 (2003); IND. CODE § 34-46-3-1 (2002); KAN. STAT. ANN. § 60-429 (2002); MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2003); MASS. GEN. LAWS ch. 233, § 20A (2003); MINN. STAT. § 595.02(c) (2002); MO. REV. STAT. § 491.060(4) (2003); N.H. R. EVID. 505; N.J. STAT. ANN. § 2A:84A-23 (West 2003); N.Y. C.P.L.R. 4505 (Consol. 2003); OHIO REV. CODE. ANN. § 2317.02(C) (Anderson 2003); R.I. GEN. LAWS § 9-17-23 (2002). Those statutes that have enacted a rule modeled after Federal Rule 506 do not, arguably, really differ in legal effect from those that adopt a side-by-side approach. A formulation cast in terms of confidential communications relating to spiritual advice is broad enough also to encompass the confessional, as a requirement of confessional observance necessarily also involves the seeking of spiritual advice and counsel.

[33] *See* COLO. REV. STAT. § 13-90-107 (2003); CONN. GEN. STAT. § 52-146b (2003); IOWA CODE § 622.10 (2002); OKLA. STAT. tit. 12, § 2505 (2002); OR. REV. STAT. § 40.260 (2001); 42 PA. CONS. STAT. § 5943 (2003); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 2002).

[34] *See* ARIZ. REV. STAT. §§ 12-2233, 13-4062 (2003); CAL. EVID. CODE §§ 1032, 1033; IDAHO CODE § 9-203 (Michie 2003); MICH. COMP. LAWS § 600.2156 (2003); MONT. CODE ANN. § 26-1-804 (2003); NEV. REV. STAT. 49.255 (2002); UTAH CODE ANN. § 78-24-8 (2002); VT. STAT. ANN. tit. 12, § 1607 (2002); WASH. REV. CODE § 5.60.060 (2003); WYO. STAT. ANN. § 1-12-101 (Michie 2002). California is classified here as a confessional state, but that characterization is debatable. *See supra* note 22.

confidence and for the purpose of seeking or receiving religious guidance, admonishment, or advice and that the cleric be acting in his or her religious role pursuant to the practice and discipline of the church."[35] The court further stated, "[T]he term 'confession' as used in the statute does not take its meaning from the course of discipline of any one church, but rather depends for its meaning on the course of discipline of the church of the cleric."[36]

This brief survey documents the strong trend away from the narrowly applicable statutes that limit the privilege to confessional communications and toward a broader privilege that includes spiritual advice. Even in those jurisdictions that still only refer to confessional communications, judicial decisions may be swinging in favor of broadened interpretations of the statutory language.

2. Retention of the Confessional Privilege in the Modern Privilege Statutes

What is striking about the results of this survey is that almost one-third of the states retain a reference to the confessional privilege

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[35] 870 P.2d 947, 956 (Utah 1994). *Scott* has been cited and followed in a number of the confession states. *See* People v. Mackinnon, 957 P.2d 23, 27–28 (Mont. 1998) (concluding that "Utah's broader interpretation of the clergy-penitent privilege as set forth in *Scott* . . . is the better view, and we adopt that approach"); State v. Martin, 975 P.2d 1020, 1026 & nn.65, 66, 69, 73 (Wash. 1999) ("determination of the definition of 'confession' referred to . . . is to be made by the church of the clergy member"). For an early broad reading of "confession" (but not as broad as *Scott*), see *In re Swenson*, 237 N.W. 589, 590 (Minn. 1931).

[36] *Scott*, 870 P.2d at 951. The church involved in the *Scott* case was the Church of Jesus Christ of Latter-day Saints, and as an intervenor in the litigation, the Church argued

> that whether or not formal penitential confessions are required by a denomination, the role of a cleric in providing spiritual guidance and counseling cannot properly be limited to formal confessions and the law ought to recognize that fact. . . . Indeed . . . according to its course of discipline, it is impossible to separate a specific "penitential confession" from the process of providing religious and spiritual counseling, guidance, and admonishment intended to persuade a church member to forsake and make amends for wrongful conduct.

Id.

The court invoked free exercise of religion concerns in support of its interpretation, and, most significantly, noted that "[a] broad construction of the clergy-penitent privilege is also consistent with the purpose of its secular analogue, the psychotherapist-patient privilege." *Id.* at 954. The court also called attention to the fact that it had promulgated rules of evidence in 1992 under its rulemaking power which were not applicable to the *Scott* case but which were much broader than the clergy privilege provided by the statute. *Id.* at 950 n.2.

along with the spiritual-advice privilege.[37] This may reflect a tipping of the legislative hat to the prior history, or may be recognition that the confessional context is very important in this area of the law. Perhaps, too, it indicates a desire to preserve a separate identity for the confessional privilege, or acknowledges that many religions have a confessional dimension to their religious practice. As discussed below, this retention of the confessional language makes it easier to draw a distinction between confessional and spiritual-advice communications for some purposes.[38]

3. Retention of the Religious Compulsion Requirement in Modern Statutes

It may be useful here to make another type of comparison among the various state privilege statutes. Most of the confessional privilege statutes refer to "confessions made . . . in the course of discipline enjoined by the church to which he belongs . . . ," or some equivalent phrasing.[39] This phrasing goes back to the *Phillips* case and the New York statute enacted in its wake.[40] Such phrasing suggests that the communicator and the communicatee are functioning in accordance with religious compulsion. Many states, however, do not use a "discipline" phrase in their privilege statutes.[41]

Of the spiritual-advice and side-by-side jurisdictions that do use a discipline phrase, some use it in an ambiguous manner. One extreme example is Iowa, which adds a discipline qualifier to a list of covered professionals. The Iowa statute bars members of the clergy along with other professionals such as attorneys, counselors, and physicians from disclosing "any confidential communication . . . necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline."[42]

In some side-by-side jurisdictions, the discipline language only modifies the confessional, and not the spiritual-advice, component of the statute.[43] Used in this manner, the phrase probably has the same significance that it has when attached to the confession component in

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[37] *See supra* note 32 and accompanying text.

[38] *See, e.g.*, MASS. GEN. LAWS ch. 119, § 51A (2003) (limiting clergy members' duty to report to confessions only).

[39] *See, e.g.*, ARIZ. REV. STAT. § 12-2233 (2003); MONT. CODE ANN. § 26-1-804 (2003).

[40] *See supra* notes 15–17 and accompanying text.

[41] *See, e.g.*, ALASKA R. EVID. 506; CONN. GEN. STAT. § 52-146b (2003).

[42] IOWA CODE § 622.10 (2002).

[43] *See, e.g.*, D.C. CODE ANN. § 14-309 (2003); IND. CODE § 34-46-3-1 (2002).

a confession-only state—that is, it merely reinforces the need for the communication to be made under religious compulsion. Other side-by-side jurisdictions use the discipline language in a way that makes it unclear what exactly it modifies.[44]

The privilege statutes in spiritual-advice jurisdictions typically refer to communications made to a clergy person in his professional character as spiritual adviser.[45] A few of these spiritual-advice jurisdictions use the discipline language, but not in a manner that suggests a requirement of religiously compelled confidentiality.[46]

In addition, variations in judicial interpretation of the discipline phrase compound this confusion. One possible interpretation is that both the communicator and communicatee must be operating under religiously imposed discipline for the privilege to be applicable. Another interpretation, as announced in 1999 by the Supreme Court of Washington in *State v. Martin*, is that only the clergy member, not the penitent, need be acting under religious compulsion.[47]

Some states, however, use language that successfully eliminates this kind of ambiguity. For example, California refers to "a communication made in confidence . . . to a member of the clergy who, . . . under the discipline or tenets of his or her church, . . . has a duty to keep those communications secret."[48]

There are other ambiguities and uncertainties regarding the religious compulsion feature of the privilege. When tied to confessional communications, given the history, the discipline language calls to mind the Roman Catholic approach that makes confession a matter of religious obligation and that treats as sinful any disclosure of confessional communications. Such language, when tied to a spiritual-advice clause, does not, however, carry with it a similarly specific connotation, and so its meaning is more uncertain. To qualify for privilege coverage under such language, must disclosure be prohibited by religious doctrine and be deemed a "religious transgression," or is it sufficient that the ethics or professional rules of the particular ministry prohibit disclosure (which, of course, would make it much more akin to the professional ethics rules of the legal and medical professions)?

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[44] *See, e.g.*, 735 ILL. COMP. STAT. 5/8-803 (2003).

[45] *See, e.g.*, S.D. CODIFIED LAWS 19-13-17 (Michie 2003).

[46] *See, e.g.*, TENN CODE ANN. § 24-1-206 (2003); VA. CODE ANN. § 8.01-400 (Michie 2003).

[47] 975 P.2d at 1025–26; *accord Scott*, 870 P.2d at 955.

[48] CAL. EVID. CODE § 1032 (West 2003).

Generally, concern about the uncertainty of statutory meaning does not cause any difficulty under spiritual-advice or side-by-side statutes since such statutes cover both spiritual-advice and confessional communications, and there is usually no need to distinguish between the coverage of each.[49] Only where the privilege protection is limited to confessional communications is there often a need to determine more precisely the meaning of the discipline language.[50]

C. *A Survey of the Applicability of State Child Abuse Statutory Reporting Requirements to the Clergy*

Every state imposes some obligation to report suspected child abuse.[51] The state statutes fall into four categories. Nineteen states list the categories of professionals who have a mandatory obligation to report suspected child abuse and include clergy in the listing.[52] Six states list the categories of individuals required to report child abuse, and although they do not include clergy in the list, they include a catchall clause such as "any person" or "any other person" at either the beginning or the end of the list, thus imposing a reporting obligation on everyone else in the community, including clergy.[53] Ten other jurisdictions reach the same result without providing a list of covered individuals by imposing a reporting requirement on "any person" or

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[49] *See supra* notes 31–32 and accompanying text.

[50] Thus in states that have confessional privilege statutes that have not been interpreted broadly, it may be necessary to determine the meaning of the "discipline" language. Similarly, under one feature of my proposal, it will be necessary to put content into this concept. *See infra* note 110 and accompanying text. Similarly, Professor Michael Cassidy found it necessary to put specific content into his proposed gloss on the clergy-communicant privilege. *See* 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, 1697 (2003).

[51] *See infra* notes 52–55.

[52] *See* ARIZ. REV. STAT. § 13-3620 (2003); CAL. PENAL CODE § 11165.7 (West 2003); COLO. REV. STAT. § 19-3-304 (2003); CONN. GEN. STAT. § 17a-101 (2003); 325 ILL. COMP. STAT. 5/4 (2003); LA. CHILD. CODE ANN. art. 603 (West 2002); ME. REV. STAT. ANN. tit. 22, § 4011-A (West 2003); MASS. GEN. LAWS ch. 119, § 51A (2003); MICH. COMP. LAWS § 722.623 (2003); MINN. STAT. § 626.556 (2002); MISS. CODE ANN. § 43-21-353 (2003); MO. REV. STAT. § 210.115 (2003); MONT. CODE ANN. § 41-3-201 (2003); N.H. REV. STAT. ANN. § 169-C:29 (2002); N.M. STAT. ANN. § 32A-4-3 (Michie 2003); N.D. CENT. CODE § 50-25.1-03 (2003); 23 PA. CONS. STAT. § 6311 (2002); TEX. FAM. CODE ANN. § 261.101 (Vernon 2003); W. VA. CODE § 49-6A-2 (2003).

[53] *See* DEL. CODE ANN. tit. 16, § 903 (2003); FLA. STAT. ch. 39.201 (2003); IDAHO CODE § 16-1619 (Michie 2003); KY. REV. STAT. ANN. § 620.030 (Michie 2002); NEB. REV. STAT. § 28-711 (2002); OKLA. STAT. tit. 10, § 7103 (2002).

an equivalent phrase.[54] Finally, fifteen states list those required to report but do not include the clergy in the listing and do not have a catchall clause in their reporting statute.[55] Thus, in almost one-third of the states, there is no mandatory reporting obligation imposed on the clergy, and no issue as to whether the reporting requirement applies to information obtained as a result of clergy-privileged communications.[56]

There are various possible explanations for the failure to include clergy in those required to report. For example, one speculation is that these states were unable to resolve the conflict between the reporting requirement and the privilege, and this concern dominated their thinking. Another possible explanation is that these states did not perceive clergy as fitting into the same categories as those who are required to report. Lastly, the legislature may simply have been inattentive to the possibility of including the clergy in the listing. Whatever the explanation, the focus of this Article is on the thirty-five states that do impose a reporting requirement on clergy.[57] The proposal presented here, however, may also be of interest to the fifteen states that presently do not impose a reporting duty on the clergy.

D. *A Survey of Statutory Provisions Governing the Relationship Between the Clergy Privilege and the Obligation to Report Child Abuse*

The thirty-five states that impose a reporting requirement on clergy either through a specific listing or by using a catchall "any person" approach can be further grouped into three categories. The largest number of states—twenty-two—provide an express exception from their reporting requirement for clergy-privileged information.[58]

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[54] *See* IND. CODE § 31-33-5-1 (2002); MD. CODE ANN., FAM. LAW § 5-705 (2003); NEV. REV. STAT. 202.882 (2002); N.J. STAT. ANN. § 9:6-8.10 (West 2003); N.C. GEN. STAT. § 7B-301 (2003); OR. REV. STAT. § 419B.010 (2001); R.I. GEN. LAWS § 40-11-3 (2002); TENN. CODE ANN. § 37-1-403 (2003); UTAH CODE ANN. § 62A-4a-403 (2002); WYO. STAT. ANN. § 14-3-205 (Michie 2002).

[55] *See* ALA. CODE § 26-14-3 (2003); ALASKA STAT. § 47.17.020 (Michie 2003); ARK. CODE ANN. § 12-12-507 (Michie 2003); GA. CODE ANN. § 19-7-5 (2003); HAW. REV. STAT. § 350-1.1 (2002); IOWA CODE § 232.69 (2002); KAN. STAT. ANN. § 38-1522 (2002); N.Y. SOC. SERV. LAW § 413 (Consol. 2003); OHIO REV. CODE ANN. § 2151.421 (Anderson 2003); S.C. CODE ANN. § 20-7-510 (Law. Co-op. 2002); S.D. CODIFIED LAWS § 26-8A-3 (Michie 2003); VT. STAT. ANN. tit. 33, § 4913 (2002); VA. CODE ANN. § 63.2-1509 (Michie 2003); WASH. REV. CODE § 26-44.030 (2003); WIS. STAT. § 48.981 (2003).

[56] *See supra* note 55.

[57] *See supra* notes 52–54.

[58] *See* ARIZ. REV. STAT. § 13-3620 (2003); CAL. PENAL CODE § 11166(c)(1) (West 2003); COLO. REV. STAT. § 19-3-304(2)(aa)(II) (2003); DEL. CODE ANN. tit. 16, § 909 (2003); FLA.

Only six states abrogate the application of the clergy privilege to the abuse reporting requirement (that is, the privilege does not operate to protect the confidentiality of the relevant communications).[59] In the remaining seven states, the issue of exception for, or abrogation of, the clergy privilege is not dealt with by statute.[60]

Where a statute imposes a reporting requirement on clergy with no express exception for communications covered by the clergy privilege or express abrogation of the same, whether clergy are required to report otherwise-privileged information is left to the courts to decide. Where there is an express exception for clergy-privileged information, this exception takes various forms. In some statutes, the exception is framed in broad terms, such as in the Maine statute, which states: "except for information received in confidential communications [under the cleric privilege]."[61] In some instances, the exemption is formulated in the same terms as the terms of the privilege, such as "information received in the capacity of a spiritual adviser."[62]

Spiritual-advice and side-by-side jurisdictions are among those states that abrogate the privilege and require the clergy to report child abuse. No confession-only state, however, has abrogated the privilege in favor of the reporting requirement.[63] Rather, and not surprisingly, most of the confession-only states provide an exception to the reporting requirement for confessional communications.[64] This

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STAT. ch. 39.204 (2003); IDAHO CODE § 16-1619(c) (Michie 2003); 325 ILL. COMP. STAT. 5/4 (2003); KY. REV. STAT. ANN. § 620.050(3) (Michie 2002); LA. CHILD. CODE ANN. art. 603(13)(b) (West 2003); MD. CODE ANN., FAM. LAW § 5-705; ME. REV. STAT. ANN. tit. 22, § 4011-A(1)(A)(27) (West 2003); MASS. GEN. LAWS ch. 119, § 51A (2003); MICH. COMP. LAWS § 722.631 (2003); MINN. STAT. § 626.556 subd. 3(a)(2) (2002); MO. REV. STAT. § 352.400 (2003); MONT. CODE ANN. § 41-3-201(4)(b) (2003); NEV. REV. STAT. 202.888 (2002); N.M. STAT. ANN. § 32A-4-3 (Michie 2003); N.D. CENT. CODE § 50-25.1-03(1) (2003); OR. REV. STAT. § 419B.010(1) (2001); 23 PA. CONS. STAT. § 6311(a) (2002); UTAH CODE ANN. § 62A-4a-403(2).

[59] N.H. REV. STAT. ANN. § 169-C:32 (2002); N.C. GEN. STAT. § 7B-301 (2003); OKLA. STAT. tit. 10, § 7103(A)(3) (2002); R.I. GEN. LAWS § 40-11-11 (2002); TEX. FAM. CODE ANN. § 261.101(c) (Vernon 2003); W. VA. CODE § 49-6A-7 (2003).

[60] CONN. GEN. STAT. § 17a-101 (2003); IND. CODE § 31-33-5-1 (2002); MISS. CODE ANN. § 43-21-353 (2003); NEB. REV. STAT. § 28-707(2) (2002); N.J. STAT. ANN. § 9:6-8.10 (West 2003); TENN. CODE ANN. § 37-1-411 (2003); WYO. STAT. ANN. § 14-3-205 (Michie 2002).

[61] ME. REV. STAT. ANN. tit. 22, § 4011-A(1)(A)(27).

[62] *See, e.g.*, N.D. CENT. CODE § 50-25.1-03(1). North Dakota has another provision that abrogates privileges in regard to the reporting requirement for privileges between any professional person and the person's patient or client, with the exception of the attorney-client privilege.

[63] It is true, of course, that there are not very many abrogation states. *See supra* note 59.

[64] Wyoming, a confession jurisdiction, does not provide an exception for confessional communications. WYO. STAT. ANN. § 14-3-205. Vermont and Washington, also confession

seems to be the only correlation between the form of the clergy privilege and the nature of the relationship between the obligation to report and the privilege. Thus, no legislature has expressly provided that its child abuse reporting requirement trumps the confessional version of the clergy privilege.[65] Only in jurisdictions that include spiritual advice within their privilege, or have an even broader clergy privilege, has the application of the clergy privilege to child abuse reporting been abrogated.[66]

Most of the states that exclude clergy-privileged information from the reporting requirement make the exception co-extensive with the scope of the clergy privilege. Three states, however, do not fit this pattern because their clergy privilege exception to the reporting requirement applies only to confessional communications, whereas their definition of the privilege itself is more broadly cast to include spiritual advice.[67]

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states, do not provide an exception to the reporting requirement for confessional communications because the clergy are not covered by the obligation to report. VT. STAT. ANN. tit. 33, § 4913 (2002); WASH. REV. CODE § 26-44.030 (2003).

[65] *But see infra* note 98 and accompanying text.

[66] *Compare supra* note 59, *with supra* notes 31–32. Of course, spiritual-advice and broader privileges also include by implication confessional communications within the coverage of the privilege. The result is that the abrogation statutes in the child abuse reporting context do have the legal effect of abrogating the application of the privilege to confessional communications as well as to spiritual-advice communications not involving the confessional, even though that effect is not highlighted in the statutory language.

[67] *See* DEL. CODE ANN. tit. 16, § 909 (2003); LA. CHILD. CODE ANN. art. 603(13)(b) (West 2003); MASS. GEN. LAWS ch. 119, § 51A (2003). The Massachusetts statutory scheme requires further description. The clergy privilege provision has two parts: any disclosure of confessional communications, without the consent of the communicant, is prohibited; there is a separate prohibition against testifying as to spiritual-advice communications. MASS. GEN. LAWS ch. 233, § 20A. The reporting statute exempts confessional material or "similarly confidential communication in other religious faiths." *Id.* ch. 119, § 51A. If the spiritual-advice provision, though framed in terms of testifying, applies to the reporting context, then it is abrogated while confessional communications are exempted. If the spiritual-advice privilege is not applicable in the reporting context, then there is anyway an obligation to report information communicated in the spiritual-advice context. As to the question of whether a privilege that is framed in terms of "testifying" or is applicable to "proceedings" or has some similar frame of reference applies at all in the reporting context, compare Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 786–89 (1987), with Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 224–26 (1992) (examining whether the attorney-client privilege applies to out-of-court disclosures).

II. A Hypothesis to Explain the Variation in State Approaches to the Relationship Between the Obligation to Report and the Clergy Privilege

The variation in approaches to the relationship between the obligation to report child abuse and the confidentiality afforded by the clergy privilege is remarkable. It is striking that in many states the clergy privilege trumps the obligation to report; in others, a fewer number to be sure, the obligation to report trumps the privilege; and in a third group, the question of the relationship is not answered in the statute.[68]

What might account for such diametrically opposed approaches to this important public policy issue? The most obvious explanation is that different states place different values on the matters at issue. In those states where the reporting requirement trumps the privilege, one might assume those states place a higher value on preventing child abuse.[69] In states where the opposite occurs, one might infer that a relatively lower value is placed on the need to report child abuse than on the protection of clergy-privileged communications.

Initially, it appears that the number of states that place a higher value on the clergy privilege outnumber those that place the higher value on the need for reporting child abuse by a factor of three to one.[70] This seems odd given the great public concern about child abuse, the prevailing and clearly sound notion that children need protection against this scourge, the incidence of child abuse in clergy-related situations, and the fact that a need for a strong child abuse reporting obligation has been uniformly recognized in this country.

This paradox suggests that one cannot explain the variation in approaches through general comparisons between the relative values placed on the matters at issue. Indeed, it seems reasonable to assume that the value placed on preventing child abuse probably does not vary significantly in different parts of the country. Accordingly, my hypothesis is that the variation in approaches relates to the privilege side of the relationship and that the subject is more complicated than it initially appears.

Thus, my speculation has two parts. The first is: a) that the diametrically opposed positions among the states result in part from the breadth of the clergy privilege in most of the states—the fact that it

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[68] *See supra* notes 58–60 and accompanying text.

[69] *See* Cassidy, *supra* note 50, at 1672.

[70] *Compare supra* note 58, *with supra* note 59.

covers both confessional communications and spiritual-advice counseling, the latter not covered by the requirements of religious doctrine; and b) that if the privilege were limited to confessional communications protected by religious law, there would be much less variation in the state responses to the clergy privilege-child abuse reporting tension. Second, even if only spiritual-advice communications were required to be reported, there would still be a problem because abuser-perpetrators would be reluctant to communicate in confidence in spiritual-advice settings because of a concern that their communications might subsequently be used against them in a criminal prosecution.

Inclusion of coverage of both confessional and spiritual-advice communications in most state versions of the clergy privilege creates a dilemma for those states that wish to subordinate only spiritual-advice communications, and not confessional communications, to their child abuse reporting requirements.[71] What is a state to do if its clergy privilege covers both forms of communications? One should not be surprised in that circumstance that the unsatisfactory choice between abrogation or creating an exception to the reporting requirement has produced an odd result. Some states have abrogated the privilege, some states have carved out an exception to their reporting requirements, and some states have punted and failed to resolve the issue.[72]

Are there grounds for concluding that the confessional communication form of the clergy privilege is viewed differently from the spiritual-advice counseling form in the child abuse reporting context? I believe there are some grounds for such a conclusion although admittedly one is forced to rely on reasonable speculation and circumstantial evidence.

It is easier to justify a clergy privilege exception to child abuse reporting requirements for confessional communications than for spiritual-advice communications. This is because absent such an exclusion for confessional communications, a state, through its courts, could order a clergy person or parishioner to testify to such communications—that is, to engage in conduct that violates his religious beliefs.[73] Although impositions on religious practice are permissible in some contexts, a direct imposition of this sort smacks of religious per-

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[71] *See supra* note 32 and accompanying text.

[72] *See supra* notes 58–60 and accompanying text.

[73] See *supra* notes 15–16 and accompanying text for a description of *People v. Phillips.*

secution.[74] One can construct a First Amendment argument against imposing such an obligation, although the existing United States Supreme Court precedents make the success of this argument uncertain.[75]

The argument in support of protecting spiritual advice counseling communications by a privilege may take a slightly different form. Although a First Amendment argument can also be constructed in support of non-restriction of a spiritual-advice privilege, it would be a weaker argument than in the confessional communication context. Imposing an obligation on the clergy to report child abuse information that is gained through spiritual-advice sessions usually does not, by hypothesis, involve trying to force individuals to engage in conduct that violates *religiously* imposed obligations.

Another line of argument focuses on the similarity of the spiritual-advice version of the clergy privilege and other professional relationship privileges.[76] As suggested by the drafters of the Federal Rules of Evidence, the spiritual-advice version particularly resembles the privilege applicable to the psychotherapist-patient or psychologist (or

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[74] This form of argument touches, of course, on First Amendment free exercise issues, but it can also be made independent of any constitutional claim. The California Supreme Court captured this justification for the religious doctrine-bound privilege in *In re Lifschutz*:

> Realistically, the statutory privilege must be recognized as basically an explicit accommodation by the secular state to strongly held religious tenets of a large segment of its citizenry. . . . Wigmore, in his treatise, similarly relates the purpose of the privilege in a question and answer format: "Does the penitential relation deserve recognition and countenance? In a state where toleration of religion exists by law, and where a substantial part of the community professes a religion practising a confessional system, this question must be answered in the affirmative."

85 Cal. Rptr. 829, 837 (1970).

[75] For an elaboration of the First Amendment free exercise argument, see *infra* notes 102–110 and accompanying text. The First Amendment argument would apply equally where criminal sanctions are invoked against the clergy person who fails to fulfill the obligation to report.

[76] Those privileges are commonly argued to be based on an instrumental justification. The application of an instrumental notion—that the privilege is needed to encourage individuals to be willing to communicate—makes little sense in a context where a parishioner is required by his or her religious beliefs to communicate about his or her sins. Where the communication is religiously compelled, we assume that religiously observant persons will communicate to the priest or minister whether or not an evidentiary privilege is applicable. In another article, I have criticized the instrumental justification as it works in practice and proposed a new approach to professional relationship evidentiary privileges, but still in reliance on the same general type of instrumental justification. Norman Abrams, *Unpacking the Power of an Ante-Litigation Limitation on Advice/Treatment-client/Patient Evidentiary Privileges*, 21 QUINNIPIAC L. REV. 1089 (2003).

other mental health professional)-patient relationships.[77] It is noteworthy that most states impose an obligation to report child abuse on mental health professionals including physicians, who, as a general group are required to report under the state statutes, and the reporting statute does not exempt communications that fall under the physician-patient privilege and the psychotherapist privilege.[78] Thus, if a state creates an exception to its child abuse reporting obligation for spiritual advice counseling communications, this opens the door to an argument in favor of providing a similar exemption for psychological counseling communications.[79] To avoid such argument, it would be better to treat spiritual-advice communications similarly to other counseling relationships.

Finally, there is circumstantial corroboration of the higher value given to the protection of privileged confessional communications. First, the fact that ten states still limit the clergy privilege to confessional communications and do not abrogate the privilege in the child abuse reporting context,[80] and the fact that three states restrict their exception to the mandatory child abuse reporting to privileged confessional communications *despite the fact that their clergy privilege includes coverage of spiritual-advice communications*[81] confirms that, at least in those states, privileged confessional information is viewed as meriting higher protection. Second, although initially it appears that exemption of spiritual-advice counseling from the child abuse reporting statutes is a very strong majority position among the states, on closer examination, the numbers appear quite different. Thus, of the twenty-two states that expressly exempt information covered by the clergy privilege from the child abuse reporting requirement, seven of those twenty-two are states whose clergy privilege only covers confessional communications.[82] Further, of the fifteen states remaining from the twenty-two whose privilege statutes cover spiritual advice counseling

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[77] *See supra* notes 24–27 and accompanying text.

[78] *See, e.g.*, MASS. GEN. LAWS ch. 119, § 51A (2003); TEX. FAM. CODE ANN. § 261.101 (Vernon 2003).

[79] See generally J. Michael Keel, *Law and Religion Collide Again: The Priest-Penitent Privilege in Child Abuse Reporting Cases*, 28 CUMB. L. REV. 681 (1997), which addresses the constitutional issues raised by a state statutory scheme requiring child abuse to be reported by a psychotherapist but not by a member of the clergy engaged in a spiritual-advice counseling role.

[80] *See supra* note 34.

[81] *See supra* note 67.

[82] The clergy privilege and child abuse reporting statutes in Arizona, California, Idaho, Michigan, Montana, Nevada and Utah have this relationship. *Compare supra* note 34, *with supra* note 58.

information, three of these narrow the exception to confessional communications.[83] Thus, if one puts the aforementioned seven states whose clergy privilege only covers confessional communications together with the three states, which although they are spiritual-advice jurisdictions, provide only for an exception to the reporting requirement for confessional communications, ten states of the original twenty-two exempt only confessional communications from the obligation to report.[84] Twelve states do exempt spiritual advice or confidential communication information, rubrics that are broad enough also to include confessional communications.[85]

Although these elaborated numbers show that carving out an exception to the obligation to report child abuse for spiritual-advice information is not an especially widespread position, they do not reduce the impression that the states are in a quandary about how to resolve the child abuse reporting-clergy privileged communications relationship.[86]

III. Attempting to Resolve the Quandary

A. *The Argument for Some Uniformity and Consistency Among the States*

The variation in approaches among the jurisdictions is remarkable for another reason: this is a specific area of the law where there are strong arguments in favor of having a reasonable amount of consistency and uniformity among the states. Clergy are members of one of the most mobile professions in the United States.[87] Many clergy are employed by, or are the agents of, large religious organizations that have the authority to, and do, transfer clergy from pulpit to pulpit around the country. Even clergy not employed by a large organization often move from city to city, usually to larger and larger churches or synagogues.

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[83] *See supra* note 67.

[84] *See supra* notes 80–83 and accompanying text.

[85] These states are Colorado, Florida, Illinois, Kentucky, Maryland, Maine, Minnesota, Missouri, New Mexico, North Dakota, Oregon and Pennsylvania. *See supra* note 58 and accompanying text.

[86] The concerns reflected in the foregoing analysis may be the kind of concerns that the drafters of the original Uniform Rules of Evidence had in mind when they commented that a rule broader than the confessional privilege would "open the door to abuse and would clearly not be in the public interest." *See supra* note 21 and accompanying text.

[87] Among the many occupations that are required to report, there may be some others that have a similar peripatetic feature, but I have not identified any place where that feature is combined with privilege-reporting rules that vary so markedly.

Given an obligation to report that varies markedly from state to state, this kind of mobility puts special burdens on the clergy member to learn new law every time he or she moves. Further, it is likely to be disconcerting for a clergy member to learn that in one jurisdiction there may be an obligation to report child abuse communications even though communicated within the traditional privilege, while in the next, there may be no such obligation, and still in a third, the question of whether there is such an obligation is unclear. Running into such diametrically opposed rules is likely to breed a sense that the law is indeed a fickle mistress.

The mobility of clergy poses additional problems when the perpetrator is a member of the clergy. For the confidee clergy member, the issue after a move to another jurisdiction is whether he is required to report, and for the confiding clergy person, the question is: Dare I confide? As suggested below, the willingness to confide may be affected by the availability of the privilege and whether the disclosure could trigger a duty to report.

The mobility of clergy also can add another dimension where the state laws on the subject differ dramatically. Suppose the perpetrator in state *A*, where no report is required, makes the confessing communication, but shortly thereafter, the clergy member to whom the incriminating communication was made in confidence is transferred to state *B*, where there is an obligation to report?[88] Cases involving more than one state where there is different coverage of the privilege and different reporting obligations applicable to the clergy can present conflict of laws issues. Of course, there are always likely to be some differences between state laws on such a subject. What is disturbing is that the differences are not matters of detail but differences in the basic rules. Thus, it would be desirable to have some general consistency among the states in dealing with these issues.

Choosing an approach that is acceptable to all states, given the complexity of the matter, is a difficult task. The burden of the remainder of this Article is to identify such an approach.

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[88] For opinions in a case where a conflict of laws issue arose in a clergy-privilege setting, but not involving child abuse reporting differences between the states, see *Gonzalez v. State*, 45 S.W. 3d 101, 102–03 (Tex. Ct. App. 2001) and *Gonzalez v. State*, 21 S.W. 3d 595, 596–97 (Tex. Ct. App. 2000).

B. *Examination of Alternative Approaches*

One way to identify a preferred position among the various state approaches is to examine the approaches from the perspective of the principal players, namely the abused child, the perpetrator of the abuse, and the clergy person who receives the potentially privileged communication.

1. Exemption of Clergy-privileged Communications from the Reporting Requirement

The approach that provides an exception to the reporting requirement for privileged communications certainly serves the interest of the perpetrator: he or she can freely communicate without having to worry that the communications may lead to criminal prosecution. This approach is also attractive to the clergy member because the clergy member does not have an obligation to report traditionally privileged matters. Of course, this approach does not serve the interest of the abused child. A potential source of information that might lead to disclosure of the abuse is protected. Even though the authorities may learn of the abuse from other sources, in many cases the perpetrator will possibly be the only source from which disclosure and the resulting official reporting and follow-up might initially come.

2. Full Abrogation of the Clergy Privilege

What about the opposite approach—one that abrogates the privilege in the reporting context? This is neither the preferred approach for the clergy person, who would be required by law to breach his or her religiously compelled rules of confidentiality, nor the preferred approach for the perpetrator, who could face disclosure of otherwise confidential communications, resulting in possible criminal prosecution. Initially, however, this position does appear to serve the interest of the abused child because the clergy member is required to report otherwise-privileged communications made by the perpetrator.

Closer examination, however, raises some questions about whether abrogation as such will in fact benefit the abused child. If the perpetrator knows that the clergy person will be obligated to make a report based on his or her communication, which in turn is likely to lead to criminal prosecution, he or she would probably be unwilling to make disclosures even in the context of the otherwise-privileged relationship.

If this prediction is correct, then the full abrogation rule is not likely to serve the interest of the abused child. Perhaps in some contexts, the perpetrator may be overwhelmed by guilt or compelled by the confessional obligations of his or her religion, and choose to disclose the abuse without regard to the consequences. Of course, in the last-mentioned context, even though the statute abrogates the privilege, where the religious order deems revealing privileged confessional information to be sinful, the clergy person is unlikely to report even if there is a legal obligation to do so. Therefore, under the full abrogation approach, in many situations, either the perpetrator will not disclose, or the clergy person will not report, despite the rule of abrogation. The result is that a rule of full abrogation may not actually serve the interest of the child victim.

3. Partial Abrogation of the Privilege

There are two ways a state can partially abrogate the clergy privilege in the child abuse reporting context. First, the partial abrogation of the privilege can be applied only to the reporting requirement but not to criminal proceedings. This is in contrast to "full abrogation," where the privilege is abrogated both with respect to the reporting requirement and with respect to other proceedings involving allegations of child abuse. A second type of partial abrogation refers to how extensively the statute abrogates the substantive coverage of the privilege—whether, for example, the abrogation extends to both spiritual advice and confessional communications.

a. *Partial Abrogation: Abrogation in the Reporting Context Only*

A state might choose to abrogate the clergy privilege in the child abuse reporting context only, and not abrogate the privilege for other types of proceedings, such as criminal proceedings. Under such an approach, the clergy member or the perpetrator could use the clergy privilege to bar testimony in subsequent criminal proceedings, despite the abrogation of the privilege as to the reporting requirement.

Six states have full abrogation provisions requiring the reporting of child abuse information even where the information is derived from communications that fall within the clergy privilege—New Hampshire, North Carolina, Oklahoma, Rhode Island, Texas and

West Virginia.[89] In these states, the abrogation extends to all proceedings involving child abuse as well as to the reporting requirement. Courts typically interpret statutes that abrogate the privilege in judicial proceedings when child abuse is involved to include criminal trials.[90]

Partial abrogation, however, would be a better approach than full abrogation in these six states because the clergy privilege could be invoked to bar testimony in subsequent criminal proceedings, despite the abrogation of the privilege as to the reporting requirement and as to other kinds of proceedings.[91] Thus, if a child abuse perpetrator were to communicate in confidence to his priest or minister in a manner that would normally be covered by the privilege, the priest or minister would be obligated to report the information regarding child abuse but that information could not subsequently be introduced at the perpetrator's criminal trial. In effect, the privilege would be revived, "brought back from abrogation," in a criminal proceeding involving prosecution of the abuser despite the previous disclosure of the information.[92]

What is the justification for this type of partial abrogation? Recall that the weakness of the full abrogation approach is that the perpetrator, knowing that the reporting statute abrogates the privilege, is unlikely to make the disclosures to a clergy member, so that in practice, a full abrogation rule would not really serve the interest of the abused child. By reinstating the privilege for the criminal proceeding, the perpetrator receives some privilege protection, not so much as he would receive if the privilege was fully applicable, but more than he

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[89] *See supra* note 59. Idaho, in what surely must be a result of legislative inattention, does not abrogate the clergy privilege in regard to reporting suspected child abuse but does abrogate with respect to judicial proceedings involving child abuse. IDAHO CODE § 16-1619 (Michie 2003).

[90] *See, e.g.*, Bordman v. State, 56 S.W. 3d 63, 67–68 (Tex. Ct. App. 2001) (applying TEX. FAM. CODE ANN. § 261.202).

[91] Wyoming is an interesting state in this respect. The Wyoming child abuse reporting statute does not address the clergy privilege issue, so it is unclear whether it is an abrogation or exemption state as to the reporting requirement. WYO. STAT. ANN. § 14-3-205 (Michie 2002). Another provision, however, makes evidence "regarding a child in any judicial proceeding" subject to exclusion if it concerns "a confession made to [the clergy person] in his professional character if enjoined by the church to which he belongs." *Id.* §§ 1-12-101, 14-3-210. The Wyoming statute thus comes closest to being a statutory model for the form of partial abrogation being proposed here, but it is distinguishable because the statute does not provide that the clergy privilege is abrogated as to the child abuse reporting obligation.

[92] Issues can be raised as to how far the privilege door would be closed in the criminal proceedings. These questions are addressed in Part IV.

would receive under the full abrogation approach. Is that likely to diminish the reluctance of the perpetrator otherwise to communicate? I believe so.

Of course, some perpetrators may still be deterred from communicating to their clergy person and triggering a child abuse report because they are unwilling to face any kind of public exposure or because they fear the non-criminal, administrative consequences that may flow from their disclosures. Still, by reinstating the privilege with respect to criminal proceedings, more perpetrators will be encouraged to communicate than would otherwise be the case.[93] This then is a middle ground designed to encourage communications regarding child abuse and gaining many of the benefits that flow from official reporting of this information.

Will this approach adequately protect the interest of the abused child? It will not provide maximum protection for the child, but at a minimum, the child is identified, the authorities can treat the child, remove the child from risk and ensure that the perpetrator is removed from any situation that puts children at risk. The only omission is that the communication cannot be used at a subsequent criminal trial. Remember, though, it may be possible to convict the perpetrator based on evidence other than that derived from the privileged communications.

This proposed resolution of the tension between the confidentiality of the privilege and the desire to protect abused children is a compromise, not a perfect accommodation of the two sets of values. It is, however, likely to provide more protection to the interest of the abused child than the full abrogation or the exemption approach.

b. *Partial Abrogation: Abrogation for Spiritual-advice Communications Only*

As previously described, partial abrogation may refer to abrogation of the clergy privilege only for spiritual-advice communications in the reporting context, whereas the privilege is preserved for confessional communications.

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[93] It should be emphasized that what is being proposed is the recognition of the clergy privilege that would otherwise have been applicable in the criminal proceeding, if there had not been an abrogation of the privilege under the child abuse reporting statute. The proposal does not extend the clergy privilege so much as it prevents the child abuse reporting obligation from having the consequence of making the privilege inapplicable in the criminal proceeding.

In three states, as described above, the statutory clergy privilege covers both spiritual advice and confessional communications, yet the exemption from the reporting requirement covers only the latter.[94] In other words, clergy must only report communications that involve spiritual advice and need not report communications from religious confessions.

As suggested earlier, concern about treating spiritual advice and confessional communications similarly has been one of the reasons why the states have found themselves in a quandary and have ended up with different statutory approaches. Further, in contexts where the clergy person who hears the confession is enjoined from disclosure by religious doctrine, it makes little sense to abrogate the privilege and require that child abuse information be reported. The compulsion of religious law is likely to overcome the compulsion of civil or criminal laws. In such a circumstance, government officials are placed in a dilemma: either they attempt to enforce the law and end up trying to put a priest or minister in jail, or they leave the law unenforced. Typically, in this type of situation, they leave the law unenforced. The Texas experience is illustrative.

Texas abrogates the privilege in the reporting context.[95] The Texas clergy privilege statute, modeled after the proposed Federal Rule of Evidence 506, applies to spiritual-advice communications.[96] The Texas child abuse reporting statute sweeps broadly and provides: "The requirement to report . . . applies without exception to an individual whose personal communications may otherwise be privileged, including . . . a member of the clergy."[97] In a 1985 opinion, the Texas Attorney General interpreted a statute of similar import, concluding that a minister of an established church is required to report evidence of child abuse when confidentially disclosed to him by a parishioner,

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[94] *See supra* note 67. The result is that these states can be put in the exemption category (partial exemption), or in the abrogation category (partial abrogation), because the fact that only some otherwise-privileged communications are exempted by the privilege from having to be reported leaves other otherwise-privileged communications which must be reported.

[95] TEX. FAM. CODE ANN. § 261.101(c) (Vernon 2003); *see supra* notes 25–26. Also worthy of note is Washington, which provides that conduct involved in reporting is not to be deemed in violation of any privilege. WASH. REV. CODE § 26.44.060(3) (2003). The Washington clergy privilege applies only to confessional communications.

[96] TEX. R. EVID. 505.

[97] TEX. FAM. CODE ANN. § 261.101(c).

even when the knowledge comes from information communicated in the confessional.[98]

Not surprisingly, there have been no reported prosecutions in Texas of clergy for failing to report child abuse. It seems unlikely that police will attempt to enforce the provision against clergy who have received the information in the confessional where religious doctrine prohibits the clergy person from disclosing the communication.[99]

There is another reason for not abrogating the privilege with respect to confessions, disclosure of which would violate the clergy person's religious obligations. Were a reporting requirement like the Texas statute enforced against clergy, particularly concerning information received in a religious confessional context, it would raise a question whether it was violative of the First Amendment.

Until recently, the U.S. Supreme Court's multi-pronged free exercise test, as articulated in *Sherbert v. Verner* and *Thomas v. Review Board*, would be the applicable precedent for this First Amendment challenge.[100] Today, however, this same case would be analyzed under the Court's more recent decisions in *Employment Division v. Smith* and *City of Boerne v. Flores*.[101]

The Court held in *Smith* in 1990 that the Free Exercise Clause does not protect religiously motivated behavior that conflicts with a valid and neutral law of general applicability.[102] Under this reasoning, the government does not have to demonstrate a compelling interest nor that it has adopted the least restrictive means.[103] Similarly, in *Boerne*, the Court in 1997 held unconstitutional the Federal Religious Freedom Restoration Act, which was a legislative attempt to overrule *Smith* by statute and reinstate the compelling interest standard.[104]

Thus, if a child abuse reporting statute applies to all, including clergy members, and applies to all clergy communications, including

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[98] Op. Tex. Att'y Gen. No. JM-342 (1985). *See* Shannon O'Malley, *At All Costs: Mandatory Child Abuse Reporting Statutes and the Clergy-Communicant Privilege*, 21 REV. LITIG. 701, 706–07 (2002).

[99] Prosecutions are more likely to occur in nonconfessional and, of course, in unprivileged contexts. *See, e.g.*, People v. Hodges, 13 Cal. Rptr. 2d 412, 414–16 (1992) (prosecution of protestant ministers for failing to report child abuse where information received from victim appeared not to have been received in a privileged context).

[100] Thomas v. Review Board, 450 U.S. 707, 718 (1981); Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[101] City of Boerne v. Flores, 521 U.S. 507, 512–14, 536 (1997); Employment Division v. Smith, 494 U.S. 872, 884–90 (1990).

[102] 494 U.S. at 872–73.

[103] *Id.* at 873.

[104] *Boerne*, 521 U.S. at 507–08, 536.

traditionally privileged communications, even those involving well-recognized, religiously required functions, it would seem to qualify as neutral and generally applicable, and therefore would be constitutional, under the *Smith-Boerne* reasoning.[105] The matter, however, is not free from doubt.[106] The proposal presented here, to maintain the privilege and exempt confessional communications from the obligation to report, would serve to avoid a difficult constitutional question and the controversy that would ensue, whichever way the decision went.[107]

One final issue to resolve in connection with this proposal is what are the characteristics of a confessional communication? Generally, a confessional communication has three principal attributes: it involves confessional or penitential communications; it is required by religious obligation; and the clergy member is barred by religious obligation from disclosing the communication to anyone in any setting. Should the exemption from the reporting requirement under the proposal include all three of these attributes?

Under some statutes, communications that are privileged as religiously obligated extend beyond confessional material.[108] Given a pur-

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[105] *See supra* notes 102–104 and accompanying text.

[106] There may be a question, however, whether the "neutral and generally applicable" standard is met where the reporting obligation is imposed on a list of named professions that includes the clergy profession. There may be a further question about the applicability of *Smith* and *Boerne* if another constitutional claim is raised. *See Smith*, 494 U.S. at 872–73 ("The only decisions in which this Court has held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action are distinguished on the ground that they involved not the Free Exercise Clause alone, but that Clause in conjunction with other constitutional protections."). Compelled speech is involved here because legislation that abrogates the privilege for child abuse reporting purposes requires that reports be made in specified circumstances with criminal sanctions imposed for failing to report. Hence, there is at least some basis for raising a freedom of speech concern.

[107] Of course, exempting religiously protected confessional communications or the like may pose an establishment issue. *See infra* notes 113–127 and accompanying text.

[108] See, for example, MASS. GEN. LAWS ch. 119, § 51A (2003), which provides for an exemption to the reporting requirement for "information gained solely in a confession or similarly confidential communication in other religious faiths"; see also the Maryland statutes which contain an additional ambiguity: through a combination of two provisions, the exemption applies to "any confession or communication made . . . in confidence by a person seeking . . . spiritual advice or consolation" where the "clergyman . . . is bound to maintain the confidentiality of that communication under canon law, church doctrine, or practice." MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2003); MD. CODE ANN., FAM. LAW § 5-705 (2003). This provision would seem to exempt from the reporting requirement confessional communications whose confidentiality is protected by religious obligation. Is the exemption similarly limited as to spiritual-advice communications? The answer would seem to be yes, unless the term "practice" is given a broad construction, which is a possibility.

pose of avoiding the creation of an obligation to report child abuse that is essentially unenforceable because religious doctrine prohibits reporting, the main test for this category of exemption should be whether religious doctrine requires the clergy person to maintain the confidentiality of the communication.[109] There are various statutory approaches to draw upon in trying to ensure that there is a religious basis for the confidentiality. For example, the Massachusetts approach that restricts the exemption to "a confession or similarly confidential communication in other religious faiths" not only ensures that the criterion is not limited to one or two denominations but also, through the use of the phrase, "similarly confidential," would seem to tie the exemption to a type of communication whose confidentiality is mandated by religious doctrine.[110]

There is, of course, an irony in proposing retention of the privilege for religiously protected communications in connection with the obligation to report child abuse. The operation of this aspect of the proposal is likely to have its greatest impact on the obligation of Roman Catholic clergy to report, and it is that denomination which seems in recent days to be having the greatest problem with child abuse and the sharing of information. The response to any expression

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[109] The California approach may accomplish this result, but the language is not absolutely clear. *See* CAL. EVID. CODE § 1032 (West 2003) (defining penitential communication as "a communication made in confidence . . . to a member of the clergy who . . . under the discipline or tenets of his or her church, denomination, or organization has a duty to keep those communications secret"). The problem is highlighted by the reference to the "discipline or tenets of his or her . . . organization." *Id.* Might rules of the church group that do not have the force of religious doctrine be included in this category? If so, the obligation of confidentiality begins to look more like rules of professional ethics than religiously based rules. Perhaps the inclusion of the phrase "penitential communication" serves to restrict the category to religiously protected communications. Recall Professor Chadbourn's explanation of the reason for the change from confession to penitential communication. *See supra* note 22.

[110] *See* MASS. GEN. LAWS ch. 119, § 51A. Still another approach is proposed by Professor Cassidy. He advocates abrogation of the clergy privilege where the clergy member has "reasonable cause to believe that the individual . . . intends to commit a future criminal act causing death or serious bodily injury," but he would exempt from the abrogation a "penitential communication," which he defines as a communication "made pursuant to the recognized sacraments of the church for the purposes of spiritual absolution or forgiveness, provided that the clergy member is authorized under Canon law or church doctrine to hear such communication and has a sacred duty under Canon law or church doctrine to keep it secret." *See* Cassidy, *supra* note 50, at 1697–98. Although he is dealing with a different problem and set of issues, his purpose is clearly to provide an exemption tied to an obligation to maintain confidentiality based in religious doctrine, and for essentially the same reasons as under this proposal. Still, because he has tied it so explicitly to the religious requirements of one or two religious denominations, it would seem more likely to be vulnerable to constitutional challenge.

of concern about carving out such an exception to the reporting obligation should be: a) as previously mentioned, the privilege has not played a central role in the child abuse scandals that have surfaced; and b) if we fail to recognize this exception, it will not lead to an increase in the reporting of child abuse because clergy who receive information through religiously protected communications will not report anyway.

4. Combining the Two Forms of Partial Abrogation

In trying to resolve the quandary faced by the states on this issue, one thing is clear: an approach that imposes only one of the two forms of partial abrogation will not solve the problem. If the states were only to carve out an exception to the reporting requirement for confessional communications, they would be left with only a partial solution. Adopting that position implies that the privilege is abrogated as to spiritual advice counseling communications.[111] If that abrogation extends, however, to any subsequent criminal proceedings, the erstwhile spiritual advice counseling communicant will be reluctant to communicate.[112]

Only by holding out the carrot of reinstating the privilege in subsequent criminal proceedings is the reluctance of the perpetrator to disclose the child abuse likely to be assuaged. Hence, the proposal to address this quandary requires both: 1) excepting from the reporting requirement privileged religiously protected communications; and 2) despite the abrogation of the privilege at the child abuse reporting stage as to other kinds of clergy-communicant communications (relating to spiritual advice), recognizing the privilege as to all types of clergy-communicant communications by the perpetrator at his or her subsequent criminal prosecution.

IV. Implementing the Proposal—Issues and Concerns

A. *Establishment Issues*

Serious constitutional issues can be raised in connection with the proposal, mainly questions about whether recognition of an exception to the abrogation of the privilege only for religiously protected communications would violate the Establishment Clause of the First

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[111] *See supra* notes 94–110 and accompanying text.

[112] *See supra* notes 89–93 and accompanying text.

Amendment. Although religiously based conduct may not be protected against a statutory prohibition cast in neutral and generally applicable terms, the U.S. Supreme Court also indicated in *Employment Division v. Smith* that a state might provide a nondiscriminatory religious-practice exemption from a prohibitory law, presumably without violating the Establishment Clause.[113] The type of exception to the general abrogation of the privilege being proposed here might well fall within such a religious-practice exemption. Of course, under the Court's decisions, not all religious-practice exemptions constitute permissible accommodations under the Establishment Clause.[114]

The question is: When does an unlawful fostering of religion occur? An establishment concern raised by this proposal is whether it involves governmental action that favors some religious denominations over others. Thus, religious denominations—such as Roman Catholics, Greek Orthodox, probably Episcopalians and perhaps others that provide for *religiously based* protection of the confidentiality of confessional communications—would qualify for exemption from the duty to report under the proposal. On the other hand, spiritual-advice communications in religious denominations where the basis for confidentiality is not religious doctrine may be generally privileged but would not be exempted from the reporting requirement. Is this an impermissible discrimination among religious denominations?

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[113] The Court stated:

> [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.

494 U.S. 872, 890 (1990). Of course, this was dictum and the Court was not necessarily opining generally on all such statutory exemptions.

[114] In *Corporation of Presiding Bishop v. Amos*, the U.S. Supreme Court stated: "It is well-established . . . that '[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.' . . . There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.' . . . At some point, accommodation may devolve into 'an unlawful fostering of religion'" 483 U.S. 327, 334–35 (1987) (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 145 (1987); Walz v. Tax Comm'n, 397 U.S. 664, 669, 673 (1970)).

A 1971 U.S. Supreme Court case, *Gillette v. United States*, presented somewhat similar issues in a different context.[115] Petitioners in that case were religious objectors who claimed the benefit of a statutory provision exempting from military service those who object to "participation in war in any form."[116] Petitioners did not object to all participation in war but only particular wars, for example, participation in a war not deemed to be a "just war."[117] The District Court construed the statutory exemption clause to require objection to all wars.[118] In response, petitioners argued that this was an impermissible discrimination among religious beliefs: interpreting the statute in this way barred their claim to relief from military service.[119]

Gillette involved a situation where the law imposed an affirmative across-the-board duty—in that case, to report for military service; under this proposal, to report child abuse despite the existence of a clergy-communicant confidentiality privilege. In both situations, a religiously connected exemption from the affirmative duty is provided by statute—in *Gillette*, for those who religiously object to all wars; under the proposal, for those whose communications are compelled and held confidential under religious doctrine.[120] In both situations, an argument could be made that, as framed, the exemption works an establishment of religion by discriminating between different relig-

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[115] 401 U.S. 437 (1971). Close in time to the *Gillette* decision, the U.S. Supreme Court decided *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), in which it articulated a three-part test for assessing constitutionality under the Establishment Clause. The Court has sometimes, but not always, used the *Lemon* test in subsequent Establishment Clause cases. The *Lemon* test involves a determination of whether the legislation has a secular purpose, has a primary effect that neither advances nor inhibits religion, and does not promote excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 612–13. The entanglement issue in this context primarily involves the question whether, in being required to distinguish between clergy privileges that are religiously based and those which are not, the courts will be drawn into resolving religious questions in an impermissible way. The issues thus raised are discussed in section B of this Part. *See infra* notes 129–133 and accompanying text.

[116] *Gillette*, 401 U.S. at 437.

[117] *Id.* at 440–41.

[118] *Id.* at 440.

[119] *Id.* at 441.

[120] It can be argued that the cases are distinguishable: Although the statutory exemption in *Gillette* was broader than the exemption the petitioners claimed—all wars versus particular wars—the exemption under this proposal arguably is the narrower one—exemption is provided for religious denominations that religiously require and protect confessional or similar communications, not for those which privilege all confidential spiritual-advice communications. This distinction, however, is not significant if there is a valid neutral nonreligious reason for providing the narrower exemption under the proposal.

ious denominations through the grant of an exemption that has the effect of benefiting only certain denominations.

Although there have been other important establishment decisions since,[121] *Gillette* provides useful and instructive signposts for dealing with the establishment issues raised by the proposal. Thus, the Court in *Gillette* stated:

> [T]he Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact. . . .
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> The critical weakness of petitioners' establishment claim arises from the fact that § 6(j), on its face, simply does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war. . . . The specified objection must have a grounding in "religious training and belief," but no particular sectarian affiliation or theological position is required. . . .
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> Section 6(j) serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions. There are considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man . . . but no doubt the section reflects as well the view that "in the forum of conscience, duty to a moral power higher than the State has always been maintained." . . . We have noted that the legislative materials show congressional concern for the hard choice that conscription would impose on conscientious objectors to war . . . .
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> Naturally the considerations just mentioned are affirmative in character, going to support the existence of an exemption rather than its restriction specifically to persons who object to all war. The point is that these affirmative purposes are neutral in the sense of the Establishment Clause. Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values . . . . "Neutrality" in matters of religion is not inconsistent with "benevolence" by way of exemptions from

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[121] *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989); Larson v. Valente, 456 U.S. 228, 255 (1982); *Lemon*, 403 U.S. at 624–25.

> onerous duties . . . so long as an exemption is tailored broadly enough that it reflects valid secular purposes. In the draft area, for 30 years the exempting provision has focused on individual conscientious objection, not on sectarian affiliation.[122]

Using the criteria reflected in the foregoing passage, one can construct arguments in response to the establishment objections to the exemption proposal. Thus, it can be argued that no particular sectarian affiliation or theological position is required by the exemption—only that the clergy privilege be based in a religiously protected communication. Some denominations contain such requirements; many do not.

The proposed exemption arguably would have valid secular purposes "having nothing to do with a design to foster or favor any sect, religion, or cluster of religions."[123] It does not favor the adherents of any one sect or religious organization any more than did the exemption in *Gillette* that applied only to those who objected to all wars. The exemption "does not single out any religious organization or religious creed for special treatment."[124]

The secular purposes of the proposed exemption involve considerations of a pragmatic nature, having to do with the prevailing pattern not to enforce a reporting requirement against those whose religious commitments prevent them from reporting the information.[125] It is not desirable to have a criminal law on the books that remains unenforced even when violations have occurred.[126] A related pragmatic consideration is to resolve the quandary created by the need to reconcile the obligation to report child abuse with clergy-communicant privileges that are religiously based and those that are more broadly grounded. Carving out an exemption for religiously based privileged communications despite the broader coverage of the clergy privilege is a reasonable way to resolve this quandary.

As in the *Gillette* context, respect for the value of conscientious action and for the principle of the supremacy of conscience would also apply under the proposal. One can also say here that it is hardly impermissible for the State to try to accommodate free exercise val-

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[122] 401 U.S. at 450–54.

[123] *Id.* at 452.

[124] *Id.* at 457.

[125] *See supra* notes 95–99 and accompanying text.

[126] Generally, a failure to report is a misdemeanor under the state child abuse reporting statutes. *See, e.g.*, CAL. PENAL CODE § 11166(b) (West 2003).

ues.[127] It is also important that a number of states still provide a clergy privilege similar in scope to the proposed exemption and that historically, the clergy privilege was cast in terms similar to those provided in the exemption under the proposal.[128]

Overall, one can make a persuasive case against the establishment objection to the exemption feature of the proposal, although like the First Amendment issues previously discussed, the matter is not entirely free from doubt.

B. *The Constitutionality of Judicial Consideration of Religious Questions*

If a statute exempts the privilege for confessional communications from the reporting requirement, is there any constitutional objection to subjecting to judicial examination whether the clergy person is religiously prohibited from disclosing the communication regarding child abuse and therefore, under the proposal, not required to file a report? The answer is likely no, but one must consider the constitutional issues.

Although there are First Amendment restrictions on certain kinds of judicial forays into the religious garden, the U.S. Supreme Court has not declared that all inquiry into religious questions is barred. Thus, for example, even though courts are barred from determining the truth or falsity of religious beliefs, in the context of a fraud prosecution they are permitted to determine whether the religious beliefs are honestly held.[129] Similarly, courts are generally prohibited from resolving ecclesiastical disputes among church members, for example, where those disputes affect property or trust matters.[130]

Whereas in the exemption-from-reporting context, the judicial determination may relate to the extent or application of religious doctrine, the purpose and context of the inquiry is to resolve a secular, not a religious, question. Courts can obtain expert advice in resolving such questions.[131] The nature and difficulty of the inquiry may

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[127] *See, e.g.*, *Walz*, 397 U.S. at 678 ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the [tax] exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside.").

[128] *See supra* note 34 and accompanying text.

[129] United States v. Ballard, 322 U.S. 78, 85 (1944).

[130] Presbyterian Church v. Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 440 (1969).

[131] *See, e.g.*, People v. Edwards, 248 Cal. Rptr. 53, 56–57 (Ct. App. 1988). In that case, extensive testimony was given by church officials as to the discipline and tenets of the Epis-

have a bearing on the question of whether the judicial inquiry involves an impermissible entanglement.[132] The courts would not be involved in resolving religious disputes. It is hard to see how such judicial evaluation would violate First Amendment interests.[133]

C. *Special Problems Arising Out of an Abrogation of the Privilege in One Context and Its Subsequent Recognition in a Related Context*

Does the fact that the clergy person is required to report an otherwise-privileged spiritual-advice communication regarding child abuse, but at the same time cannot be compelled to testify as to that same communication in a subsequent criminal trial, create any special problems?

At the outset, it should be noted that there is an oddity in adopting this approach. Our assumptions regarding the prototype situation are as follows. The perpetrator communicates confidentially to his or her clergy person who is then required to make an official report of

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copal Church as bearing on the question whether the communications in question were penitential communications within the meaning of the California clergy privilege statute. *Id.* Often, too, the priest or minister's own view of the nature of the communication will play a large role in the judicial determination of whether the privilege is applicable. *See, e.g.*, Kos v. State, 15 S.W. 3d 633, 638–40 (Tex. Ct. App. 2000).

[132] Thus in *Amos*, by statute, religious organizations were exempted from the provision of Title VII of the Civil Rights Act of 1964 prohibiting discrimination in employment based on religion. 483 U.S. at 329. The question was whether applying the exemption to the secular nonprofit activities of religious organizations violated the Establishment Clause. *Id.* at 329–30. In support of the Court's conclusion that there was no constitutional violation, Justice William Brennan, concurring in the judgment, addressed the question whether a categorical exemption for nonprofit activities was justified and in that connection considered the appropriateness of a case by case determination of the character—religious or not—of a nonprofit organization, stating: "What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs." *Id.* at 342 (Brennan, J., concurring).

By way of contrast, determining whether the tenets of a particular religious denomination *religiously* obligate the clergy to maintain secrecy is not the same kind of fact-intensive determination that was under consideration in the *Amos* case. Although determining whether a particular communication is covered by a religious obligation to maintain its confidentiality, or falls under the heading of spiritual advice, may turn on the facts and circumstances of the particular case, it would seem to be a rather straightforward inquiry and not run the same type of risks of entanglement referred to by Justice Brennan in *Amos*. *See id.* (Brennan, J., concurring).

[133] Professor John Mansfield, also writing in this Symposium, may disagree with the conclusion reached here. *See* John H. Mansfield, *Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty*, 44 B.C. L. Rev. 1167, 1179 (2003).

the information. Various official steps are taken in the wake of this report. If, however, the perpetrator is subsequently prosecuted, at the criminal trial, the clergy member is barred by the privilege from testifying about the original communication or the official report that was made. Once the clergy member reveals confidential information and the information is officially disclosed, it seems strange to permit a privilege that protects confidentiality to be invoked at a later stage. It would seem to be a classic case of "the cat out of the bag."[134]

As previously discussed, adopting such a set of rules can be justified on policy grounds. The goal is to strike a balance between incentives to disclose and protection of the abused child. Specific operational aspects of this approach remain to be considered. One can identify four principal categories of evidence whose status might be privileged in the subsequent criminal proceeding. These categories are:

> 1. Testimony relating to the statements regarding child abuse made in the course of the parishioner's original communications to the clergy person that led to the reporting of the child abuse.
> 2. Testimony regarding, or documentary evidence of, the official report of child abuse that was filed.
> 3. Testimony regarding physical evidence or the introduction of the physical evidence that was discovered by the police as a result of the report of child abuse.
> 4. The identity of the victim discovered as a result of the child abuse report. This is a special instance of cases that fall under No. 3 above.

Given the goal of encouraging full disclosure by the perpetrator in the context of clergy-parishioner confidential communications, there are reasons to limit the incriminatory use of the otherwise-privileged communications. Accordingly, in connection with the proposal, it would be desirable to establish the following subsidiary rule: at a criminal proceeding involving child abuse charges against the original communicating perpetrator of child abuse, testimony or evidence regarding the first three items listed above would be foreclosed by the clergy-communicant privilege itself or by application of the privilege supplemented by a notion of derivative use. Consistent with the foregoing, however, evidence could be used to prosecute an al-

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[134] Oregon v. Elstad, 470 U.S. 298, 325 (1985) (Brennan, J., dissenting).

leged perpetrator of child abuse if the police derive it from an independent source, that is, a source independent of the communicating perpetrator's otherwise-privileged communications to the clergy person.

The idea of abrogating the privilege at one stage and then reinstating it at another stage and supplementing this rule with derivative use and independent source doctrine has some loose parallel in rules relating to the privilege against self-incrimination, where in some contexts testimony may be compelled under a grant of use immunity, and neither the testimony nor evidence derived from it may be introduced into evidence against the individual, but evidence gained from an independent source can be used.[135] The analogy is, of course, imperfect. The privileges are quite different, and the communications from the abuser-perpetrator to the clergyman, unlike communications in the Fifth Amendment context, are not compelled. Still, in both instances, that is, under immunity-derivative use doctrine and under the proposal, evidence and its derivatives may be used for some purposes but may not be used to contribute to the criminal conviction of the communicator. Both cases permit a selective use of the disclosed information.

The most troubling application of the proposed approach to the child abuse report-clergy privilege intersection involves the situation where the police learn the identity of the victim of the abuse from the report. It is very difficult to say to the police—when they learn about a victim of whom they previously knew nothing—that they cannot use that information to begin an investigation, including talking to the victim.

Of course, if the police were able to use the identity of the victim, although derived from the original disclosure by the perpetrator, this would discourage many perpetrators from disclosing such informa-

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[135] *See* Kastigar v. United States, 406 U.S. 441, 442, 462 (1972) (examining the constitutionality of compelling testimony by offering immunity in subsequent criminal proceedings); Murphy v. Waterfront Comm'n, 378 U.S. 52, 103 (1964) (White, J., concurring) (asserting that "[o]nce a defendant demonstrates that he has testified in a state proceeding in exchange for immunity to matters related to the federal prosecution, the government can be put to show that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence").

We refer to the use immunity-derivative use doctrine only by way of analogy to suggest the kind of derivative evidence doctrine that might be applied. Another arena that has some relevance by way of analogy is the poisonous fruit doctrine applied in connection with illegal searches or tainted confessions. *See generally* Wong Sun v. United States, 371 U.S. 471 (1963).

tion in an otherwise-privileged setting to their priest, minister or rabbi. Permitting the use in the criminal prosecution of information derived from the victim whose identity was revealed through the official report of child abuse would create a very large loophole in the derivative-use protection afforded to the perpetrator.

Whether to adopt a live-witness exception to the no derivative-use rule is thus a close and hard question that may have a significant impact on the operation of the rule. *United States v. Ceccolini* recognized such a special live-witness exception to the poisonous fruit doctrine in the search and seizure arena: "Witnesses are not like guns or documents."[136]

The victim-witness issue in the child abuse report-privileged communication context is arguably different, however, from the discovery of a live witness as the fruit of an illegal search and seizure. Whether identifying a live witness results from an illegal search and seizure is a matter of chance, probably not occurring with great frequency. Carving out an exception to the derivative-evidence exclusionary rule thus does not make much of an inroad on the application of the rule applied to search and seizures. In the child abuse reporting context, however, the identity of the victim will always be disclosed in the report. Allowing a live-witness exception to a rule barring the use in the criminal prosecution of the report or evidence derived from it would essentially undermine the purpose of the rule: to encourage disclosure of information regarding child abuse.

Conclusion

The most striking aspect of the conflict between the confidentiality afforded by the clergy privilege statutes and the disclosure obligations mandated by the child abuse reporting statutes is the number of different ways in which that conflict has been resolved by the states. Because of the frequency with which clergy move from pulpit to pulpit and for other reasons, this is an area of law where some consistency and uniformity among the states is needed.

In aid of a search for uniformity, an approach that on its face is rather unusual has been proposed: in cases where the communication falls under the heading of spiritual advice, abrogate the clergy-communicant privilege in regard to the obligation to report child abuse; the clergy person must report the child abuse. In a criminal

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[136] 435 U.S. 268, 276 (1978).

proceeding against the same perpetrator, however, revive the privilege as to the original communications and evidence derived therefrom. The aim is to encourage communication about the child abuse by assuring the communicating offender that his or her incriminating statements will not be used in a criminal prosecution.

Further, do not abrogate the privilege and require the clergy person to report where the communication was protected against disclosure as a matter of religious doctrine. Specially protecting communications that are protected against disclosure by the requirements of religious doctrine may be seen as a limited return to the historical roots of the clergy-communicant privilege.

In the realm of child abuse reporting, the question of whether a member of the clergy should be required to report child abuse when the information is obtained through otherwise-privileged communication poses a difficult social policy conflict. Where the clergy privilege protects communications that resemble those in other professional-client counseling relationships, the legal claim for protection against the obligation to report is not very strong. The claim for protection is stronger if mandatory reporting would require violation of a clergy member's religious convictions. The best way to deal with the difference between these two kinds of claims is to treat them separately and differently.

Of course, issues relating to application of the clergy privilege, while very important, may be viewed as but a sideshow in the current efforts to bring to light information relating to child sexual abuse perpetrated by members of the clergy. In the end, efforts in an institution to keep unprivileged information about such matters secret or confidential almost always fail. It is always better to produce the information early and completely.