THE PRIEST-PENITENT PRIVILEGE V. CHILD ABUSE REPORTING STATUTES: HOW TO AVOID THE CONFLICT AND SERVE SOCIETY

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I. INTRODUCTION

Due to the recent sex scandals in the Catholic Church, the general public has lost respect for and no longer trusts the Church as it once did.[1] There is a perception that the Church covered up alleged sexual abuse and caused further harm with its efforts to conceal the abuse. There is a clear public demand to do away with what is perceived as "secrecy" within the Church. Because of this eagerness to peel away veils of concealment, the public and, in turn, legislators have become bolder in their lack of deference to the institution of the confessional. Specifically, legislators have been willing to include clergy as individuals who are required to report child abuse under the mandatory child abuse reporting statutes, notwithstanding the traditional secrecy of the confessional. However, this is turning priests[2] into agents of the state and entangling them in a conflict between church and state. This conflict is placing priests between "a centuries-old holy rite to forgive the most unholy wrongs, a sacred trust that is never supposed to be broken,"[3] and mandatory child abuse reporting statutes that are compelling priests to break that sacred trust of confidentiality.

In order to better understand the sanctity of the confessional and the consequences of child abuse reporting statutes on the sanctity of the confessional, this article will provide an overview of the priest-penitent privilege and the child abuse reporting statutes. Additionally, this article will examine the conflict between the privilege and the reporting statutes, as well as provide an overview of the ramifications involved in solving the conflict. Finally, this article offers a simple solution to this issue that should not have the potential to run afoul of the Constitution. The solution will simply urge states to exclude priests as mandatory reporters in child abuse reporting statutes. The states' need for assistance in combating child abuse can be accomplished through other members of society who would not be forced to

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1. *Compare Gallop Poll Nov. 19-21, 2010*, POLLINGREPORT.COM, http://www.pollingreport.com/values.htm (last visited Feb. 7, 2011), *with Gallop Poll Dec.. 8-10, 2006*, POLLINGREPORT.COM, http://www.pollingreport.com/values.htm (last visited Feb. 7, 2011) *and The Harris Poll July 7-10, 2006*, POLLINGREPORT.COM, http://www.pollingreport.com/values.htm (last visited Feb. 7, 2011).

2. The author chose to use the terms priest or clergy to refer to spiritual counselors of all denominations.

3. *Dateline: Sacred Trust*, (NBC television broadcast Aug. 2, 1994).

choose between their religious beliefs or following civil law, thereby alleviating priests of the above conflict.

II. THE PRIEST-PENITENT PRIVILEGE

A. The History of the Priest-Penitent Privilege

The priest-penitent privilege first appeared in the early records of the Christian Church.[4] These records make references to the practice of secrecy based on the Seal of Confession of the Roman Catholic Church.[5] It is this practice of secrecy based on the Seal of Confession that created the priest-penitent privilege.

The Seal of Confession obligates priests to keep secret all matters that have been relayed to them for the purpose of obtaining absolution. The obligation under this Seal is strict, inviolable, and demands confidentiality.[6] In particular, the Seal of Confession declares that "it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion."[7] The Seal is all encompassing and admits no exceptions: "The secrecy concerning the penitent and his or her confession of sins that is to be maintained is properly described as total."[8] Not only is the Seal all encompassing, the inviolability of the Seal of Confession is so serious that it imposes harsh penalties for violating the sanctity of the confessional.[9] In fact, the 1985 revised Code of Canon Law heightened the importance of the confidential nature of the confessional by changing the language to: "[I]t is a crime for a confessor in any way to betray a penitent."[10] The Code goes further to say, "A confessor who directly violates the seal of confession incurs an automatic (*latae sententiae*) excommunication reserved to the Apsotolic [sic] See; if he does so only indirectly, he is to be punished in accord with the seriousness of the offense."[11] Hence, "[a]ll matters that fall within the Seal of

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4. Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 735-36 (1987).

5. *Id.* at 735. (citing SCOTT N. STONE & RONALD S. LIEBMAN, TESTIMONIAL PRIVILEGES § 6.01 (1983)).

6. 1985 CODE c.1388, § 2.

7. 1983 CODE c.983, § 1.

8. Raymond C. O'Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating that Clergy Report Child Abuse*, 25 LOY. L.A. L. REV. 1, 16 n.95 (1991) (quoting 1985 CODE c.983, § 1).

9. O'Brien & Flannery, *supra* note 8, at 16 n.95 (quoting 1985 CODE c.1388 § 1) (stating that violating the Seal is one of only five excommunications reserved to the Holy See).

10. 1985 CODE c.983, § 1.

11. 1985 CODE c.1388, § 1.

> An excommunicated person is forbidden: 1. to have any ministerial participation in celebrating the Eucharistic Sacrifice or in any other ceremonies whatsoever of public worship; 2. to celebrate the sacraments and sacramentals and to receive the sacraments;

Confession are sacrosanct" and "those privy to its sanctity are consummately bound to secrecy."[12]

Not only was the seriousness of the Seal of Confession a principle revered by the Church, but it also became a principle followed by pre-Reformation English common law. Pre-Reformation English common law adopted this concept because its common law was so heavily influenced by the Roman Catholic Church.[13] This influence resulted in the pre-Reformation English common law's respect for the Seal of Confession and recognition of the importance of the secrecy of confession from the time of the Norman Conquest in 1066 until the English Reformation.[14]

Nevertheless, during the English Reformation in the sixteenth century, the priest-penitent privilege began to disappear. This disappearance began because the Roman Catholic Church was replaced by the Anglican Church as the official Church of England.[15] The Anglican Church discarded various 'Romish' practices until it gradually ceased to recognize the priest-penitent privilege.[16] The English courts then refused to recognize the priest-penitent privilege.[17] "Consequently, the [priest-penitent] privilege was not among the common-law principles that English colonists brought to this country."[18]

Because the priest-penitent privilege was not among the common law principles imported to America, American courts required states to impose statutes to protect the priest-penitent privilege of confidential communications.[19] Today, the privilege remains primarily a creature of statute.[20]

Nevertheless, the first American court to recognize the priest-penitent privilege did not rest the privilege on common law or statute. The New York Court of General Session was the first to acknowledge the priest-penitent privilege in the 1813 case of *People v. Phillips*.[21] In *Phillips*, a penitent confessed to the parish priest that he had knowingly received stolen goods.[22] The priest counseled the penitent and convinced the penitent to return the stolen goods

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3. to discharge any ecclesiastical offices, ministries or functions whatsoever, or to place acts of governance.

O'Brien & Flannery, *supra* note 8, at 16 n.94. Additional, penalties, such as dismissal, may be added. *Id.*

12. O'Brien & Flannery, *supra* note 8, at 31.

13. Michael J. Davidson, *The Clergy Privilege*, ARMY LAW., Aug. 1992, at 16, 17.

14. Mitchell, *supra* note 4, at 736.

15. *Id.* (citing W. TIEMANN & J. BUSH, THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATIONS AND THE LAW 49-53 (2d ed. 1983)).

16. *Id.*

17. *Id.*

18. Davidson, *supra* note 13, at 17-18.

19. O'Brien & Flannery, *supra* note 8, at 32.

20. *See* Davidson, *supra* note 13, at 18.

21. People v. Phillips, *Privileged Communications to Clergymen*, 1 CATH. LAW., 199, 199-209 (1955) (N.Y. Ct. Gen. Sess. 1813); *see also The People v. Daniel Phillips and Wife*, 1 W. L. J. 109, 109-14 (Timothy Walker ed., 1843).

22. People v. Phillips, *Privileged Communications to Clergymen*, 1 CATH. LAW., 199, 199 (1955) (N.Y. Ct. Gen. Sess. 1813).

to him.[23] The priest returned the goods to the owner and was later subpoenaed to appear before a grand jury to identify who delivered the goods to him.[24] The priest refused to testify and rested his objection on the Seal of Confession.[25] The court upheld the priest's right not to testify because "compelling a priest to breach the confidentiality of the confessional would violate the constitutional right to the free exercise of religion."[26]

However, four years later, another New York court refused to recognize the priest-penitent privilege.[27] In *People v. Smith*, the court refused to extend the privilege to a Protestant clergyman. The court held that the accused murderer's confession to a Protestant clergyman was not privileged because, "'auricular confessions were not required in the course of discipline prescribed by the canons of [the accused's] church.'"[28] The court drew a distinction between auricular confessions, required by the Church in *Phillips*, and spiritual advice, not required by the religion.

In response to the conflicting decisions, the New York legislature enacted the nation's first statute recognizing the priest-penitent privilege.[29] The statute declared that "[n]o 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 the rules or practice of such denomination."[30] Other states subsequently followed suit by recognizing a priest-penitent privilege in their own statutes or court rules.[31]

The federal government first recognized the priest-penitent privilege in the 1875 case of *Totten v. United States*.[32] In *Totten*, the Supreme Court implicitly acknowledged the priest-penitent privilege through dictum.[33] This dictum remained the authority for the federal priest-penitent privilege until 1958 when the Court of Appeals for the District of Columbia recognized the privilege as a

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23. People v. Phillips, *Privileged Communications to Clergymen*, 1 CATH. LAW., 199, 199 (1955) (N.Y. Ct. Gen. Sess. 1813).

24. *Id.*

25. *Id.* at 200.

26. Scott v. Hammock, 870 P.2d 947, 952-53 (Utah 1994) (citing *Phillips*, *Privileged Communications to Clergymen*, 1 CATH. LAW., 199, 207 (1955) (N.Y. Ct. Gen. Sess. 1813)).

27. People v. Smith, *Privileged Communications to Clergymen*, 1 CATH. LAW., 199, 209-13 (1955) (N.Y. Ct. Oyer & Terminer 1817).

28. Davidson, *supra* note 13, at 18 (quoting *Smith*, *Privileged Communications to Clergymen*, 1 CATH. LAW., 199, 209-13 (1955) (N.Y. Ct. Oyer & Terminer 1817)).

29. Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 106 (1983) (quoting N.Y. REV. STAT., pt. 3, ch. 7, tit. 3, art. 8, § 72 (1828)).

30. N.Y. REV. STAT., pt. 3, ch. 7, tit. 3, art. 8, § 72 (1828).

31. Mitchell, *supra* note 4, at 738.

32. Totten v. United States, 92 U.S. 105 (1875).

33. *Id.* at 107 ("[S]uits cannot be maintained which would require a disclosure of the confidences of the confessional . . . .").

matter of federal common law.[34] Despite this recognition, the Supreme Court has only since mentioned the priest-penitent privilege three times, and only in dicta.[35] It also has held that privileges, in general, should not be "'lightly created nor expansively construed, for they are in derogation of the search for truth.'"[36] Given this opinion about privileges and so few cases discussing the privilege (and then only in dicta), it leaves uncertain whether the Court upholds the privilege.[37]

The federal government's recognition of the priest-penitent privilege was further developed in 1972 when the Supreme Court approved a proposed set of Federal Rules of Evidence. The proposed Federal Rules of Evidence contained evidentiary privileges such as FRE 506,[38] which was a specific rule that provided for a priest-penitent privilege.[39] However, Congress declined to enact the proposed FRE 506 and instead adopted FRE 501—a general and flexible rule that allows the rules of privilege to evolve on a case-by-case basis.[40] Nevertheless, it can be said that a priest-penitent privilege is acknowledged by the federal government.

B. The Definition of the Priest-Penitent Privilege

Against the backdrop of the development of the priest-penitent privilege, it is important to explore the scope and meaning of the privilege to assess the conflict addressed in this article. The priest-penitent privilege is an evidentiary privilege that bars testimony as to the contents of a communication from one

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34. Mullen v. United States, 263 F.2d 275, 276 (D.C. Cir. 1958) (Fahy, J., concurring) (finding inadmissible the testimony of a Lutheran minister that a criminal defendant had confessed to chaining her children). *Cf. id.* at 281 (Edgerton, J., concurring) ("I think [that any] communication made in reasonable confidence . . . and in such circumstances that disclosure is shocking to the moral sense of the community, should not be disclosed in a judicial proceeding . . . .").

35. Rena Durrant, *Where There's Smoke, There's Fire (and Brimstone): Is It Time to Abandon the Clergy-Penitent Privilege?*, 39 LOY. L.A. L. REV. 1339, 1342 & n.16 (2006).

36. Durrant, *supra* note 35, at 1341 (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).

37. *See id.* at 1342.

38. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 247-49 (U.S. 1972).

39. *Id.* at 247. Rule 506 states: "A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser." *Id.*

40. FED. R. EVID. 501 states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State Law.

to his confessor.[41] The privilege is defined by state statute and generally requires certain elements to be fulfilled before the privilege applies.[42] These statutes typically provide that

> [a] clergyman or other minister of any religion shall not, without the consent of the person making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs.[43]

However, the various state statutes are not consistent in their language or scope.

Courts vary in their interpretation of the elements of the priest-penitent privilege. First, statutes vary in their description of who is a "priest."[44] The statutes range from simply mentioning "priest" to lengthy definitional sections prescribing the credentials, responsibilities, and affiliations of eligible priests.[45] However, most statutes imply that the priest must be officially affiliated with some religious organization and generally acknowledge that the privilege applies to ministers, priests, rabbis, and other similar functionaries of a religious group.[46] Most of the statutes agree that the communication must be made to a priest in his professional capacity.[47] This means that the communication must be made while the priest is acting in his capacity as spiritual advisor or consoler.[48] The privilege does not attach if the

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41. BLACK'S LAW DICTIONARY 1236 (8th ed. 2004).

42. *See, e.g.*, FLA. STAT. ANN. § 90.505(1)(b) (West 2011) (stating "A communication between a member of the clergy and a person is 'confidential' if made privately for the purpose of seeking spiritual counsel and advice from the member of the clergy in the usual course of his or her practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication."). For more information regarding the various state statutes governing the priest-penitent privilege, see 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2395 (McNaughton ed., 1961).

43. Claudia G. Catalano, Annotation, *Subject Matter and Waiver of Privilege Covering Communications to Clergy Members or Spiritual Adviser*, 93 A.L.R. 5TH 327 § 9[a] (2001) (quoting *In re* Swenson, 237 N.W. 589, 604 (Minn. 1931)); *see also* MIN. STAT. ANN. § 595.02 (West 2011).

44. For more information regarding who is a "clergyman" or the like and whether they are entitled to assert the privilege attaching to communications to spiritual advisors, *see* Claudia G. Catalano Annotation, *Who Are "Clergy" or Like Within Privilege Attaching to Communications to Clergy Members or Spiritual Advisers*, 101 A.L.R. 5TH 619 (2002).

45. *See* Mitchell, *supra* note 4, at 742-43.

46. *Id.* at 743.

47. *Id.* at 744-45; STONE & LIEBMAN, *supra* note 5, § 6.11, at 372. Furthermore, most statutes agree that just because the communication has been made to a priest does not, in itself, render the communication privileged. Catalano, *supra* note 43, at § 2[a].

48. Mitchell, *supra* note 4, at 745. Generally, it is not difficult to separate a priest's actions into functions that fall within the privilege and functions that do not. However, roles such as marriage counselor and draft counselor are difficult to place either within or without the privilege because it threatens to entangle the state in a properly religious matter by defining priest's roles. *Id.*

communication is made while the priest is acting as a business associate,[49] public official,[50] or friend.[51]

Second, statutes vary in what type of communication is privileged. Some statutes limit the privilege to penitential communications,[52] while other statutes expand the privilege to any communication made for the purpose of seeking spiritual advice or comfort.[53] However, all of the statutes agree that the privilege applies only to communication intended to be confidential.[54]

Third, statutes struggle with requiring communications be made "in the course of discipline enjoined by the rule or practice of such [church or] denomination."[55] The problem arises because it is not clear whether the statute is referring to the priest's or the penitent's church. Additionally, it is not clear "whether the requirement means that the church must require its *members to confess* or simply require its *clergy to hear* confessions when approached for that purpose."[56] This uncertainty invites constitutional attack on the priest-penitent privilege because it seems to prefer churches with a particular discipline.[57]

Moreover, statutes vary on other definitional issues such as who holds the privilege,[58] who is the penitent,[59] and who can waive the privilege.[60] Thus,

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49. *See* United States v. Gordon, 493 F. Supp. 822, 823-24 (N.D.N.Y. 1980) (stating that a business conversation with priest on leave from the church was not privileged).

50. Public official includes priests acting as notaries, city councilmen, volunteer parole supervisors, etc. *See* Partridge v. Partridge, 119 S.W. 415, 416 (Mo. 1909) (notary); Keenan v. Gigante, 390 N.E.2d 1151, 1154-55 (N.Y. 1979) (city councilman); Fahlfeder v. Commonwealth, 470 A.2d 1130, 1133 (Pa. Commw. Ct. 1984) (volunteer parole supervisor).

51. *See* Wainscott v. Commonwealth, 562 S.W.2d 628, 633 (Ky. 1978).

52. VT. STAT. ANN. tit. 12, § 1607 (West 2011) (explaining that the communication must be made "under the sanctity of a religious confessional").

53. ALA. CODE § 12-21-166 (2010) (stating that the communication must be made "to seek spiritual counsel").

54. The communication is considered confidential if the circumstances reasonably indicate the confider's expectation of privacy. *See* Lucy v. State, 443 So. 2d 1335, 1341 (Ala. Crim. App. 1983). The confidentiality of the communication may be destroyed if a third person is present or the statements are made for the express purpose of being transmitted to a third person. 81 AM. JUR. 2D *Witnesses* § 501 (2011).

55. Mitchell, *supra* note 4, at 754 (alterations in original) (quoting MICH. COMP. LAWS ANN. § 600.2156 (West 1986)).

56. *Id.*

57. *Id.* at 755.

58. *Id.* at 755-56 (noting that statutes vary on whether the privilege belongs to the priest, the penitent, or both). "[C]hurches whose 'discipline enjoins' their members to make confessions to a cleric effectively limit the privilege to Roman Catholics." *Id.* at 779.

59. The issue involved in "who is the penitent" is whether the penitent needs to belong to the priest's church, whether the penitent needs to belong to some church, or whether the penitent is any person who makes the prescribed type of disclosure to the prescribed type of priest. *Id*. at 746; Catalano, *supra* note 43, § 8[a].

60. MO. REV. STAT. § 491.060(4) (2010) (no one has the choice to waive the privilege because the statute is worded as a rule of competency rather than a privilege); OKLA. STAT. tit. 12, § 2505 (2010) (the privilege belongs to the penitent but may be claimed by the priest on the penitent's behalf); Siedman v. Fishburne-Hudgins Educ. Found., Inc., 724 F.2d 413, 415 (4th Cir. 1984) (holding that the privilege vested in the cleric). *See also* Mitchell, *supra* note 4, at 755-56. If the penitent holds the privilege, can the courts compel a priest to testify in violation of

given all these variations, the priest-penitent is not a uniformly applied privilege. In fact, commentators have gone as far as to say that not only is it not uniformly applied, but also that "[s]uch sloppy drafting leaves unanswered the question of the privilege's application to most confidential communications to most clergy!"[61]

In addition to state definitions, the federal courts have also defined the priest-penitent privilege. Rule 501 of the Federal Rules of Evidence states that, in federal civil actions, when an element of a claim or defense is determined by state law, the existence and scope of the privilege should be determined by state law.[62] Additionally, Rule 501 states that when a federal law is to be applied, courts should interpret the law "in the light of reason and experience."[63] It is this reason and experience that have led the federal courts to recognize a priest-penitent privilege.[64] Hence, the federal courts perpetuate the inconsistencies in the priest-penitent privilege's definition because it applies either varying state law or ambiguous federal common law.

III. CHILD ABUSE REPORTING STATUTES

Next, an analysis of the history and definitions of various child abuse reporting statutes is appropriate so that the conflict between the reporting statutes and the priest-penitent privilege can be more clearly understood.

A. The History of Child Abuse Reporting Statutes

Child abuse reporting statutes first came about in the 1960s amidst a surge in public attention to the problem of abused children.[65] Improvements in medical diagnostic techniques permitted physicians to more readily detect cases of child abuse; this advance in medicine caused a rise in the public's attention to child abuse. Because of the public's increased awareness surrounding child abuse, the Children's Bureau of the Department of Health, Education, and Welfare held a national conference to discuss child abuse issues.[66]

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his religious duty to maintain confidentiality? *See* STONE & LIEBMAN, *supra* note 5, § 6.08, at 369-70. Alternatively, if the priest holds the privilege, will there be an invasion of privacy issue or will the relationship between the priest and the penitent be harmed to such a degree that the effectiveness of the ministry will be diminished? *See* Mitchell, *supra* note 4, at 759.

61. Mitchell, *supra* note 4, at 754.

62. FED. R. EVID. 501. *See* Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926, 1933-34 (1975) (setting out FED. R. EVID. 501). *See infra* nn.39-40.

63. FED. R. EVID. 501.

64. *See* Totten v. United States, 92 U.S. 105, 107 (1876) (as a general principle, suits that lead to the disclosure of confidential matters are forbidden, which reasonably leads to the preclusion of suits that would require disclosure of the confidences of the confessional).

65. Mitchell, *supra* note 4, at 726.

66. *Id.* at 726 & n.12.

After the conference in 1963, the Children's Bureau of the Department of Health, Education, and Welfare published a report and model statute to address the problem of child abuse.[67] The Department of Health, Education, and Welfare's model statute required physicians to report suspected abuse.[68] Further, it designated a physician's failure to report as a misdemeanor and abrogated both the physician-patient and the husband-wife privileges for all judicial proceedings.[69] States began emulating the Children's Bureau's model statute and the proliferation of reporting statutes commenced.

The proliferation of reporting statutes continued when the federal government encouraged states to enact child protection statutes with reporting requirements.[70] The federal government did so through the Child Abuse Prevention and Treatment Act, which authorized federal funding for state child abuse programs if the state had a statute that required reporting of known and suspected cases of abuse and neglect.[71] By the end of 1967, all states had adopted some form of a child abuse reporting statute, and today the majority of these statutes remain intact.[72] However, the recent sex scandals in

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67. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, THE ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD 1 (1963). Other groups, such as the American Medical Association, proposed model statutes after the Department of Health, Education, and Welfare released their model statute. *See* Steven R. Smith & Robert G. Meyer, *Child Abuse Reporting Law and Psychotherapy: A Time for Reconsideration*, 7 INT'L J.L. & PSYCHIATRY 351, 353 n.13 (1984).

68. CHILDREN'S BUREAU, *supra* note 67, at 6.

69. *Id.* at 12-13.

70. *See* Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5105-5107 (2010)).

71. 42 U.S.C. § 5106a(b)(2)(A). The Act also required funded states to demonstrate prompt and extensive procedures for following up on reports. *Id.* § 5106a(b)(2)(D).

72. Mitchell, *supra* note 4, at 727. For the text of each statute, as it appears today, *see* ALA. CODE § 26-14-3 (2011) (providing for mandatory reporting provision for professionals including the clergy); ALASKA STAT. § 47.17.020 (2011) (providing for mandatory reporting by specified professionals not including the clergy); ARIZ. REV. STAT. ANN. § 13-3620(A) (LexisNexis 2011) (providing for mandatory reporting by specified professionals or any person responsible for care or treatment of children and permitting clergy to withhold reporting if it is reasonable and necessary within the religion to do so); ARK. CODE ANN. § 12-18-402 (2011) (providing for mandatory reporting by specified professionals including clergy); CAL. PENAL CODE §§ 11165.7, .9, 11166 (Deering 2011) (providing for mandatory reporting by specified professionals including clergy); COLO. REV. STAT. § 19-3-304 (2010) (providing for mandatory reporting by specified professionals including Christian Science practitioners); CONN. GEN. STAT. §§ 17a-101 (2011) (providing for mandatory reporting by specified professionals, expressly including clergy); DEL. CODE ANN. tit. 16, § 903 (2011) (providing for mandatory reporting by any person, specifying professionals, but is not limited to that list); D.C. CODE § 4-1321.02 (LexisNexis 2011) (providing for mandatory reporting by specific professionals not including clergy); FLA. STAT. ANN. § 39.201 (LexisNexis 2011) (providing for mandatory reporting by specified professionals and by any person who suspects child abuse or neglect, but specifically upholding priest-penitent privilege in § 39.204); GA. CODE ANN. § 19-7-5 (West 2010) (providing for mandatory reporting by specified professionals not specifically including clergy); HAW. REV. STAT. § 350-1.1 (West 2011) (providing for mandatory reporting by specified professionals not including clergy); IDAHO CODE ANN. § 16-1605 (West 2011) (providing for mandatory reporting of specified professionals, but expressly upholding the clergy-penitent privilege); 325 ILL. COMP. STAT. ANN. 5/4 (West 2011) (providing for mandatory reporting by

specified professionals including clergy); IND. CODE ANN. § 31-33-5-1 (West 2011) (providing for mandatory reporting by any person); IOWA CODE ANN. § 232.69 (West 2011) (providing for mandatory reporting by specified professionals, not including clergy); KAN. STAT. ANN. § 38-2223 (West 2010) (providing for mandatory reporting by specified professionals, not including clergy, and providing for discretionary reporting by any other person who suspects child abuse); KY. REV. STAT. ANN. § 620.030 (West 2010) (providing for mandatory reporting by any person, but priest-penitent privilege provides grounds for refusing to report); LA. REV. STAT. ANN. § 14:403B (2010) (providing for mandatory reporting by specified professionals, but allowing for the exclusion of communications between a priest and his penitent); ME. REV. STAT. ANN. tit. 22, § 4011-A (2011) (providing for mandatory reporting by specified professionals including clergy, except during confidential communications); MD. CODE ANN., FAM. LAW §§ 5-704, -705 (West 2011) (providing for mandatory reporting by specified professionals; requiring reporting by any person but upholding priest-penitent privilege as grounds not to report); MASS. GEN. LAWS ANN. ch. 119, § 51A(j) (West 2011) (providing for mandatory reporting by specified professionals including clergy, except if the information is acquired solely from confidential communications); MICH. COMP. LAWS ANN. § 722.623 (West 2011) (providing for mandatory reporting by specified professionals including clergy); MINN. STAT. ANN. § 626.556 (West 2011) (providing for mandatory reporting for specified professionals including clergy except where reporting violates priest-penitent privilege); MISS. CODE ANN. § 43-21-353 (West 2010) (providing for mandatory reporting by specified professionals including ministers and any person who suspects child abuse); MO. ANN. STAT. §§ 210.115, .140 (West 2011) (providing for mandatory reporting by specified professionals including clergy); MONT. CODE ANN. § 41-3-201 (2009) (providing for mandatory reporting by specified professionals including clergy); NEB. REV. STAT. § 28-711 (2010) (providing for mandatory reporting by specified professionals, not including clergy, and all other persons); NEV. REV. STAT. ANN. § 432B.220 (West 2010) (providing for mandatory reporting by specified professionals including clergy unless knowledge is obtained from offender during confession); N.H. REV. STAT. ANN. § 169-C:29 (2011) (providing for mandatory reporting by specified professionals including clergy); N.J. STAT. ANN. § 9:6-8.10 (West 2011) (providing for mandatory reporting by any person); N.M. STAT. ANN. § 32A-4-3 (West 2010) (providing for mandatory reporting by specified professionals, including clergy, and any person who suspects child abuse); N.Y. SOC. SERV. LAW § 413 (McKinney 2011) (providing for mandatory reporting by specified professionals including Christian Science practitioners); N.C. GEN. STAT. § 7B-301 (2010) (providing for mandatory reporting by any person or institution that suspects child abuse); N.D. CENT. CODE § 50-25.1-03 (2011) (providing for mandatory reporting by specified professionals including clergy unless knowledge is acquired in capacity as spiritual advisor); OHIO REV. CODE ANN. § 2151.421 (West 2011) (providing for mandatory reporting by specified professionals including persons rendering spiritual treatment through prayer in accordance with the tenets of well-recognized religion); OKLA. STAT. ANN. tit. 10A, § 1-2-101 (West 2011) (providing for mandatory reporting by specified professionals and any person who suspects child abuse); OR. REV. STAT. § 419B.010 (2009) (providing for mandatory reporting by any public or private official unless knowledge is obtained by privileged communication with psychiatrist, psychologist, clergy, or attorney); 23 PA. CONS. STAT. ANN. § 6311 (West 2011) (providing for mandatory reporting by specified professionals including Christian Science practitioners, clergy, and any professional who has contact with children, except when acquired through confidential communications); R.I. GEN. LAWS §§ 40-11-3, -11 (West 2010) (providing for mandatory reporting by any person and abrogating all privileges except attorney-client); S.C. CODE ANN. §§ 63-7-310, -420 (2008) (providing for mandatory reporting by specified professionals including Christian Science practitioners, religious healers, and members of clergy; expressly upholding the priest-penitent privilege as grounds for failure to report); S.D. CODIFIED LAWS §§ 26-8A-3, -4 (2011) (providing for mandatory reporting by specified professionals including religious healing practitioners and, in case of death from child abuse, mandatory reporting by all persons); TENN. CODE ANN. § 37-

the Church have caused legislators to revisit their statutes and many have amended the statutes to particularly include priests.[73]

B. The Definition of Child Abuse Reporting Statutes

Next, it is important to consider the scope and meaning of the reporting statutes to be able to assess the conflict addressed in this article. Child abuse reporting statutes are designed to initiate preventative measures for proper authorities to guard against future abuse. The purpose of the statutes is to call official attention to possible abuse and to trigger an investigation. These statutes generally "address who must report, reportable conditions, reporters' immunity, penalties for the failure to report, and the abrogation or application of certain privileges."[74]

1-403 (West 2011) (providing for mandatory reporting by specified professionals, not including clergy, and any person who has reason to know or renders aid to child abuse victims); TEX. FAM. CODE ANN. § 261.101 (West 2009) (providing for mandatory reporting by any person); UTAH CODE ANN. § 62A-4a-403 (West 2011) (providing for mandatory reporting by any person including clergy unless the sole source of information is perpetrator's confession); VT. STAT. ANN. tit. 33, § 4913 (West 2011) (providing for mandatory reporting by certain professionals including clergy, unless the communication meets specific elements); VA. CODE ANN. § 63.2-1509 (West 2011) (providing for mandatory reporting by specified professionals, but expressly excluding clergy); WASH. REV. CODE ANN. § 26.44.030 (West 2011) (providing for mandatory reporting by specified professionals not including clergy); W. VA. CODE ANN. § 49-6A-2 (West 2010) (providing for mandatory reporting by specified professionals including Christian Science practitioners, religious healers, and clergy); WIS. STAT. ANN. § 48.981(2) (West 2011) (providing for mandatory reporting by specified professionals including clergy unless the communication is confidential); WYO. STAT. ANN. § 14-3-205 (West 2010) (providing for mandatory reporting by any person); 19 GUAM CODE ANN. § 13201 (2011) (providing for mandatory reporting by any professional who comes in contact with children as part of their profession, including but not limited to Christian Science practitioners); P.R. LAWS ANN. tit. 8, § 446 (2010) (providing for mandatory reporting by specified professionals not including clergy); V.I. CODE ANN. tit. 5, § 2533 (2010) (providing for mandatory reporting by specified professionals not including clergy).

73. ALA. CODE § 26-14-3 (2011) (amended in 2003 to add members of the clergy as mandated reporters); CAL. PENAL CODE §§ 11165.7, .9, 11166 (Deering 2011) (amended in 2002 to add custodian of records of a clergy member to mandated reporters); COLO. REV. STAT. § 19-3-304 (2010) (amended in 2002 to add clergy members to list of mandated reporters); CONN. GEN. STAT. §§ 17a-101 (2011) (amended in 2002 to specify members of clergy as mandated reporter); 325 ILL. COMP. STAT. ANN. 5/4 (West 2011) (amended in 2002 to add members of clergy to mandated reporters); LA. CHILD. CODE ANN. art. 603 (2010) (amended in 2003 to add members of clergy as mandated reporters); MICH. COMP. LAWS ANN. § 722.623 (West 2011) (amended in 2002 to add members of the clergy as mandated reporters); MO. ANN. STAT. § 210.115 (West 2011) (amended in 2002 to add minister to list of mandated reporters); N.Y. SOC. SERV. LAW § 413 (McKinney 2011) (proposed S.B. 1793, 2009 Leg., 231st Sess. (N.Y. 2009) will add members of clergy as mandated reporters); VT. STAT. ANN. tit. 33, § 4913 (West 2011) (amended in 2003 to add the following language: "It is the intent of the General Assembly by this act to add clergy to the list of mandatory reporters of child abuse and neglect while balancing the state's compelling interest in protecting child safety with the important role of religious and spiritual conscience in our society."); WIS. STAT. ANN. § 48.981(2) (West 2011) (amended in 2004 to add members of clergy as mandated reporters).

74. Mitchell, *supra* note 4, at 728.

The statutes vary on who is required to report.[75] Some statutes explicitly list who is required to report[76] while others simply impose the duty to report on any person who has reason to believe a child is being abused.[77] Some statutes expressly require priests to report child abuse[78] and others explicitly exempt priests from the duty to report.[79]

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75. For a compilation of reporting statutes *See* JOHN C. BUSH & WILLIAM H. TIEMANN, THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW 249-56 (3d ed. 1989).

76. For example, the Colorado statute extensively lists who is responsible for reporting child abuse:

> Persons required to report such abuse or neglect or circumstances or conditions shall include any: (a) Physician or surgeon, including a physician in training; (b) Child health associate; (c) Medical examiner or coroner; (d) Dentist; (e) Osteopath; (f) Optometrist; (g) Chiropractor; (h) Podiatrist; (i) Registered nurse or licensed practical nurse; (j) Hospital personnel engaged in the admission, care, or treatment of patients; (k) Christian Science practitioner; (l) Public or private school official or employee; (m) Social worker or worker in any facility or agency that is licensed or certified pursuant to part 1 and article 6 of title 26, C.R.S.; (n) Mental health professional; (o) Dental hygienist; (p) Psychologist; (q) Physical therapist; (r) Veterinarian; (s) Peace officer as defined in section 16-2.5-101, C.R.S.; (t) Pharmacist; (u) Commercial film and photographic print processor as provided in subsection (2.5) of this section; (v) Firefighter as defined in section 18-3-201(1), C.R.S.; (w) Victim's advocate, as defined in section 13-90-107(1)(k)(II), C.R.S.; (x) Licensed professional counselors; (y) Licensed marriage and family therapists; (z) Unlicensed psychotherapists; (aa)(I) Clergy member . . . ; (bb) Registered dietitian who holds a certificate through the commission on dietetic registration and who is otherwise prohibited by 7 CFR 246.26 from making a report absent a state law requiring the release of this information; (cc) Worker in the state department of human services; (dd) Juvenile parole and probation officers; (ee) Child and family investigators, as described in section 14-10-116.5, C.R.S.; (ff) Officers and agents of the state bureau of animal protection, and animal control officers; (gg) The child protection ombudsman as created in article 3.3 of this title.

COLO. REV. STAT. § 19-3-304 (2010).

77. *See, e.g.*, IND. CODE ANN. § 31-33-5-1 (West 2011) ("[A]n individual who has reason to believe that a child is a victim of child abuse or neglect shall make a report as required by this article.").

78. *See, e.g.*, CONN. GEN. STAT. ANN. § 17a-101(b) (2011) ("The following persons shall be mandated reporters: Any . . . member of the clergy . . . ."); MISS. CODE ANN. § 43-21-353(1) (West 2010) ("Any . . . minister . . . shall cause an oral report to be made immediately by telephone or otherwise and followed as soon thereafter as possible by a report in writing . . . ."); N.H. REV. STAT. ANN. § 169-C:29 (2011) ("Any . . . priest, minister, or rabbi . . . shall report . . . .").

79. *See, e.g.*, MD. CODE ANN., FAM. LAW §§ 5-704, -705 (West 2011) (providing for mandatory reporting by specified professionals but upholding priest-penitent privilege as grounds not to report). Relevant language states:

> A minister of the gospel, clergyman, or priest of an established church of any denomination is not required to provide notice [of child abuse or neglect] if the notice would disclose matter in relation to any communication described in [the priest-penitent privilege statute] and: (i) the communication was made to the minister, clergyman, or

In addition to the duty to report, the statutes define reportable conditions and reporters' immunity. The statutory definitions of reportable conditions and reporters' immunity are more consistent than the definitions of which persons have a duty to report. All the statutes require physical abuse to be reported and most require neglect, mental or emotional abuse, and sexual abuse to be reported.[80] Moreover, most statutes do not require the reporter to have actual knowledge; instead, the statutes require only a reasonable belief or suspicion that child abuse has occurred.[81] The statutes also seem to agree on the reporters' immunity. All of the statutes provide for anonymous reporting[82] and immunity from criminal and civil liability stemming from the report.[83] Hence, the reporting statutes do not tend to vary in their definitions of reportable conditions or reporters' immunity.

The child abuse reporting statutes also address penalties for failure to report. Failure to report suspected cases of child abuse may result in criminal penalties; usually a misdemeanor resulting in a fine or up to one year in jail.[84] Texas and Arizona recently applied the penal portion of their child abuse reporting statutes. In 2006, Pastor Robert Holmes of Houston, Texas, was arrested for failure to report child abuse to the authorities and was charged with injury to a child by omission.[85] In 2010, two Phoenix, Arizona pastors were arrested for not reporting abuse to the authorities.[86]

In addition to criminal penalties, a potential reporter may face civil liability under a negligence or malpractice cause of action for failure to report. For example, the Arkansas statute imposes civil liability for failure to report, stating: "A person required by this chapter to make a report of child maltreatment or suspected child maltreatment to the Child Abuse Hotline who

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> priest in a professional character in the course of discipline enjoined by the church to which the minister, clergyman, or priest belongs; and (ii) the minister, clergyman, or priest is bound to maintain the confidentiality of that communication under canon law, church doctrine, or practice.

Id. § 5-705(a)(3).

80. Mitchell, *supra* note 4, at 729-30.

81. *Id.* at 730.

82. Ralph D. Mawdsley & Steven Permuth, *Child Abuse Reporting: A Search for an Acceptable Balancing of Interest*, 9 NAT'L ORG. LEGAL PROBS. EDUC. SCH. L.J. 115, 118 (1981).

83. Mitchell, *supra* note 4, at 732.

84. *See, e.g.*, FLA. STAT. ANN. § 39.205 (LexisNexis 2011) ("A person who is required to report known or suspected child abuse, abandonment, or neglect and who knowingly and willfully fails to do so . . . is guilty of a misdemeanor of the first degree . . . .").

85. Tom Abrahams, *Pastor Arrested for Not Reporting Alleged Abuse of Child*, KTRK TV (Aug. 23, 2006), http://abclocal.go.com/ktrk/story?section=news/local&id=4490598.

86. Jennifer Thomas, *Phoenix Dad Accused of Molesting Daughters; 2 Pastors Arrested for Not Reporting Abuse*, AZFAMILY.COM (*last updated* Aug. 13, 2010, 2:08 PM), http://www.azfamily.com/news/local/Phoenix-dad-accused-of-molesting-daughters-2-pastors-arrested-for-not-reporting-abuse-99483409.html.

purposely fails to do so is civilly liable for damages proximately caused by that failure."[87]

The statutes also vary on what types of confidential communications are protected. In particular, child abuse reporting statutes either expressly recognize privileged confidential communications or abrogate one or all of the privileges.[88] Most of the statutes abrogate the husband-wife privilege and the physician-patient privilege.[89] Six statutes abolish all privileges[90] and five other statutes nullify all privileges except the attorney-client privilege.[91] Some reporting statutes reaffirm certain confidential communication privileges despite reporting requirements within the statute.[92]

Thus, the child abuse reporting statutes are inconsistent and not uniform throughout the states.

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

After analyzing the priest-penitent privilege and various child abuse reporting statutes, a conflict of laws is evident. This conflict results from the tension between the secular duty to report and the religious duty to maintain confidence. It is a choice between punishing priests or giving up evidence, between protecting confidences or searching for truth, between the free exercise of religion or the welfare of children. Hence, it is a balancing of interests with weighty policies at stake.

Jurisdictions struggle with how the conflict should be resolved because of the uncertainty surrounding the priest-penitent privilege and child abuse reporting statutes. These uncertainties create a tension that catches jurisdictions between favoring priest-penitent privilege or child abuse reporting statutes. Because jurisdictions fear favoring either a state statute enforcing a secular duty or a religious privilege enforcing a religious duty, courts have declined to confront the conflict; they have left the resolution to statutory reconciliation or legislative amendment. Nevertheless, some

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87. ARK. CODE ANN. § 12-18-206 (2011); *see also* Landeros v. Flood, 551 P.2d 389, 394 (Cal. 1976) (allowing a cause of action against a physician for negligent failure to diagnose and report a case of a battered child syndrome).

88. O'Brien & Flannery, *supra* note 8, at 26.

89. Mitchell, *supra* note 4, at 734.

90. GA. CODE ANN. § 19-7-5(g) (West 2010); OKLA. STAT. ANN. tit. 10A, § 1-2-101 (West 2011); S.D. CODIFIED LAWS ANN. § 26-8A-15 (2011); TEX. FAM. CODE ANN. § 261.101 (West 2009); WASH. REV. CODE ANN. § 26.44.060 (West 2011); 19 GUAM CODE ANN. § 13201 (2011).

91. N.H. REV. STAT. ANN. § 169-C:32 (2011); R.I. GEN. LAWS § 40-11-11 (West 2010); TENN. CODE ANN. § 37-1-614 (West 2011); W. VA. CODE § 49-6A-7 (West 2010); V.I. CODE ANN. tit. 5, § 2538 (2011).

92. *See, e.g.*, MD. CODE ANN., FAM. LAW §§ 5-704, -705 (West 2011) (providing for mandatory reporting by specified professionals; requiring reporting by any person but upholding priest-penitent privilege as grounds not to report).

jurisdictions have addressed the conflict, though they are not consistent in the manner they address the conflict or in the outcome they reach.

In *People v. Hodges*,[93] Christine G., the twenty-year-old victim, met with Pastor Hodges in his pastoral office to confide in him as the spiritual leader of the church and as the head of her school.[94] During the meeting, she said that her stepfather had been molesting her for years and that she did not want the police involved.[95] Pastor Hodges responded to the conversation by handling the situation within the church and did not contact the police. [96] He then discussed the situation with Mr. Nobb, the assistant pastor, but only in a limited fashion. Similarly, Mr. Nobb did not report the abuse because he was acting in a pastoral capacity as the assistant pastor.[97]

As a result of Pastor Hodges' and assistant pastor Nobb's failure to report, they were convicted. On appeal, the Superior Court of California held that the trial court properly convicted the pastor and the assistant pastor for violating the Child Abuse and Neglect Reporting Act.[98] The court concluded that the pastors had a duty to report suspected child abuse, that they failed to report, and that there was sufficient evidence to support the convictions.[99] By ruling in favor of the reporting statute, the court concluded that the reporting statute did not violate any of appellants' constitutional freedoms or rights.[100] Thus, California addressed the conflict by focusing on constitutional issues and ultimately valuing the importance of mandatory child abuse reporting statutes over the confidential relationship between priest and penitent.

Connecticut also addressed the conflict between statute and privilege. Pastor Bim Rowley of The Truth Baptist Church was arrested for failure to report abuse.[101] Prior to his arrest, a member of his congregation confessed to sexually abusing his fifteen-year-old stepdaughter. Pastor Rowley counseled the penitent and followed the family's wish to work things out through church counseling and prayer.[102] Despite his efforts to reform the penitent through prayer and counseling, Pastor Rowley became worried and reported the abuse to the police six months later. Nevertheless, the police arrested Pastor Rowley because "he had not done the right thing."[103] He broke the law because he waited to report the abuse for six months when Connecticut's child abuse

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93. People v. Hodges, 13 Cal. Rptr. 2d 412 (Cal. App. Dep't Super. Ct. 1992).

94. *Id.* at 414-15.

95. *Id.* at 416. After the meeting, the pastor prayed and sought advice. *Id.*

96. *Id.* He stated he "had to follow the Scriptures concerning disciplining a Christian." *Id.* He then disciplined the stepfather by having him write a letter of apology to the victim and by sending him on a retreat. *Id.* at 415-16. Additionally, the pastor took away the stepfather's ministerial license. *Id*. at 416.

97. *Id.* at 416.

98. *Id.* at 421. California's Child Abuse and Neglect Reporting Act requires that "any child care custodian . . . must report." *Id.* at 418.

99. *Hodges*, 13 Cal. Rptr. 2d at 421.

100. *Id.*

101. *Dateline*, *supra* note 3.

102. *Id.*

103. *Id.*

reporting statute mandates immediate reports of abuse.[104] Hence, Connecticut addressed the conflict and decided that they valued the importance of mandatory child abuse reporting statutes over the priest-penitent privilege.

The Arkansas Supreme Court also addressed the conflict in *Magar v. State*.[105] In *Magar*, Reverend Rowe confronted Magar after learning of his suspected involvement in the sexual abuse of two boys, and Magar confessed to the allegations.[106] This conversation was used at trial as evidence against Magar.[107] During the trial, Magar claimed that his conversation with Reverend Rowe was made in confidence because he and Reverend Rowe had many prior counseling sessions in which Revered Rowe had assured him that the conversations were private.[108] Moreover, Magar stated he acted "in reliance on a purported established relationship of confidentiality between himself and Revered Rowe when he discussed the issues later involved at his trial."[109] Magar filed a motion to suppress religiously privileged testimony under Arkansas Rule of Evidence 505, but the trial court denied the motion.[110] The court concluded the conversation was not protected by the priest-penitent privilege because it was disciplinary in nature—not spiritual.[111] Magar was convicted of three counts of sexual abuse in the first degree and sentenced to three years for the first count and five years for each of the remaining two counts.[112]

Unlike the cases above, the Court of Appeals in Indiana took a different approach to the conflict between the priest-penitent privilege and child abuse reporting statutes.[113] It did not rely on either a constitutional or evidentiary analysis. Instead, it relied on a negligence analysis. In *J.A.W. v. Roberts*, J.A.W. suffered eleven years of physical and sexual abuse from his foster father and others.[114] J.A.W. filed a complaint seeking recovery for injuries against those who abused him, and a second complaint against those who, J.A.W. claimed, "had knowledge of the molestations, materially assisted in covering them up, and failed to report the abuse to local authorities."[115] In order to determine if those who had knowledge also had a responsibility to report the abuse, the court imposed a common law duty based on a three factor test: (1) the relationship between the victim and the individuals who knew of the abuse, (2) the reasonable foreseeability of harm to the victim, and (3) public policy

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104. *Dateline*, *supra* note 3. Charges against Pastor Rowley were eventually dropped. *Id.*
105. 826 S.W.2d 221 (Ark. 1992).
106. *Id.* at 222.
107. *Id.*
108. *Id.*
109. *Id.* at 222.
110. *Id.* at 221-22.
111. *Magar*, 826 S.W.2d at 223.
112. *Id.* at 221.
113. J.A.W. v. Roberts, 627 N.E.2d 802 (Ind. Ct. App. 1994).
114. *Id.* at 806.
115. *Id.*

concerns.[116] After utilizing this negligence-like standard, the court held one of the defendants could be civilly liable to J.A.W. because he was a member of the clergy with a possible special relationship to J.A.W., knew of the abuse, and failed to report it to authorities; the court therefore remanded for a finding of fact on this issue.[117]

A Washington Court used analysis similar to *Magar* but arrived at a different conclusion. In *Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*,[118] John Roe, a church member, sexually abused his stepdaughter and her younger sister for years.[119] The eldest daughter reported the abuse to the bishop, who handled the matter within the church.[120] A few years later, a friend of the daughter reported the abuse to a new bishop, who followed up by subjecting Roe to disfellowshipment from the church.[121] Neither bishop reported the abuse to secular authorities.[122] When the youngest daughter's mother found out about the abuse, she reported it to the authorities and brought a lawsuit in tort against the church for failure to report.[123] In the suit, the bishops refused to testify about Roe's disciplinary council proceeding, by invoking Washington's clergy-penitent privilege.[124] The Washington Court of Appeals upheld the privilege, stating that the disciplinary proceeding involved a confidential confession to a member of the clergy and was protected under the privilege.[125]

Similarly, in *Scott v. Hammock*,[126] an adopted daughter subpoenaed documents from the LDS Church relating to her father's excommunication proceeding and communications that referred to the abuse of his children.[127] However, Utah's Supreme Court held that the communications between her father and the priest were privileged because during those conversations the bishop was acting in his clerical role, offering spiritual and religious guidance.[128]

Hence, the right to maintain confidence has been confronted with the states' right to receive information. This confrontation has caught courts and legislators between conflicting laws that threaten to entangle church and state. The jurisdictions that have confronted the issue have used varying grounds of liability, none of which are consistent, and have arrived at different

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116. *J.A.W.*, 627 N.E.2d at 809.
117. *Id.* at 811, 813.
118. 90 P.3d 1147, 1149 (Wash. Ct. App. 2004).
119. *Id.* at 1149.
120. *Id.*
121. *Id.* at 1149-50. Potential disciplinary action included probation, disfellowshipment, and excommunication. Disfellowshipment is an intermediate form of punishment between probation and excommunication where the subject remains a Church member but is no longer in good standing. *Id.* at 1149 & n.5.
122. *Id.* at 1149.
123. *Id.* at 1150.
124. *Doe*, 90 P.3d at 1150.
125. *Id.* at 1154.
126. 870 P.2d 947 (Utah 1994).
127. *Id.* at 949.
128. *Id.* at 956.

conclusions, some supporting the privilege and some supporting the reporting statutes. Moreover, most jurisdictions still need to address the conflict between the priest-penitent privilege and the child abuse reporting statutes. Thus, not only is there a conflict between two types of statutes, but there is also a conflict in the way to resolve the two of them.

V. RAMIFICATIONS INVOLVED IN RESOLVING THE CONFLICT BETWEEN THE PRIEST-PENITENT PRIVILEGE AND CHILD ABUSE REPORTING STATUTES

In order to solve this conflict between varying and competing statutes, state jurisdictions have to consider the serious and negative ramifications involved in the resolution. In particular, states have to address possible constitutional challenges involving the Free Exercise Clause, the Establishment Clause, the Due Process Clause, the free speech guarantee of the First Amendment, and the right of privacy. They also have to consider public policy and state interests. The following portion of the article will briefly identify and explain each possible challenge.

A. Free Exercise Rights

The first possible negative ramification involved is free exercise when child abuse reporting statutes compel priests to divulge confidences. The First Amendment to the United States Constitution provides, "Congress shall make no law . . . prohibiting the free exercise" of religion.[129] In essence, the Free Exercise Clause protects individuals from governmental compulsion of conduct offensive to their religious beliefs. It also "cautions government to tread lightly on practices deemed by church members to be central to their religion."[130] Hence, when child abuse reporting statutes require priests to report known child abuse against their religious duty to maintain confidence, the issue becomes whether the failure to report is protected religious activity under the First Amendment.

In order to determine whether a statute violates the Free Exercise Clause, the Supreme Court requires an analysis of three factors.[131] The analyzing court needs to consider (1) if the statute places a burden on the free exercise of religion, (2) if there is a compelling interest that justifies the burden imposed upon the free exercise of religion, and (3) if the state employed the least restrictive means to satisfy its compelling interest.[132]

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129. U.S. CONST. amend I. The Free Exercise Clause applies to the states through the Fourteenth Amendment. Mitchell, *supra* note 4, at 794 & n.387.

130. Mitchell, *supra* note 4, at 794.

131. Callahan v. Woods, 736 F.2d 1269, 1273 (9th Cir. 1984).

132. *See* Lori Lee Brocker, *Sacred Secrets: A Call for the Expansive Application and Interpretation of the Clergy-Communicant Privilege*, 36 N.Y.L. SCH. L. REV. 455, 481 (1991).

A statute places a burden on a priest's free exercise rights when child abuse reporting statutes force a priest to choose between their religious duty to maintain confidence and their secular duty to report. If a religious group has an official rule or policy against its priests' disclosure of confidential communications,[133] the priest-penitent privilege should be justified on the grounds of religious toleration.[134] If the religious belief is not tolerated and the state has a reporting statute backed by criminal or civil sanctions, the priests' free exercise of religion is unquestionably burdened by the necessary choice.[135]

Child abuse reporting statutes can also place a burden on the penitent's free exercise of religion. If confidential communications are not privileged and priests are required to report certain disclosures, further communication will be inhibited.[136] Since communications will be inhibited, penitents will be less likely to seek out priests for absolution, salvation, and welfare of their souls. Hence, the reporting statutes, by inhibiting a penitent's communication with their priest, will interfere and burden a penitent's religious beliefs.[137]

Next, the state must prove that "a compelling governmental interest justifies the regulation in question."[138] The state, no doubt, has an interest in the safety and protection of children.[139] This interest in the safety and protection of children must be weighed against the importance of the right to free exercise of religion. Some states claim the reporting statutes further the state's compelling interest in children, but do not substantially burden a claimant's religious exercise.[140] Other states claim that compelling priests to reveal confidences creates an affirmative duty to report when a general duty to

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133. The Catholic Church has an express doctrine of the Seal of the Confessional which, if broken, results in excommunication; the Episcopal Church has the new Book of Common Prayer's rite which warns that the secrecy of the confessional is absolute and violation of that secrecy results in church discipline; the American Lutheran Church adopted a resolution that holds inviolate the confidentiality of communications made to a pastor; the Presbyterian Church and the American Baptist Convention have "adopted policy statements strongly affirming the inviolability of religious confidentiality." State v. Szemple, 640 A.2d 817, 826 (N.J. 1994).

134. Mitchell, *supra* note 4, at 776.

135. See Keenan v. Gigante, 390 N.E.2d 1151, 1153 (N.Y. 1979), where a Catholic priest made his First Amendment claim, refusing to testify on the grounds that his faith gave him no choice; the priest went to jail for ten days in contempt of court.

136. *See* Mitchell, *supra* note 4, at 794.

137. For example, in the Catholic Church, a penitent cannot go to heaven if they do not confess their sins. Thus, if a penitent is prevented from confiding their sins in their priest, a burden is placed on their religious beliefs. *See* 1985 CODE c.989.

138. Backlund v. Bd. of Comm'rs of King Cnty. Hosp. Dist. 2, 724 P.2d 981, 986 (Wash. 1986).

139. *See* Maryland v. Craig, 497 U.S. 836, 860 (1990) (a state's interest in the well-being of child abuse victims may be sufficiently important to outweigh a defendant's right to face his or her accusers in court); Jehovah's Witnesses v. King Cnty. Hosp. Unit No. 1, 278 F. Supp. 488, 491, 508 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (the state's interest in providing minor children with blood transfusions prevails over parents' free exercise objections).

140. People v. Hodges, 13 Cal. Rptr. 2d 412, 419-20 (Cal. App. Dep't. Super. Ct. 1992).

report a crime does not exist.[141] This creates a burden which probably is not substantially outweighed by the state's interest. Hence, the state must weigh the two interests at stake in the conflict.

The third prong of the free exercise standard requires the state to employ the least restrictive means of achieving its goal.[142] A state must show that its reporting requirement for priests is necessary for the state to locate and protect abused children.[143] The state will argue that priests are in an invaluable position to provide tips on cases of abuse because they observe families and attract troubled persons to share their problems.[144] Furthermore, the state will claim that child abuse has affected an overwhelming portion of society and that "every weapon in the state's arsenal" is necessary to combat the evil.[145]

However, "there are arguably always less restrictive means in this context than compelling disclosure."[146] For example, the statutes can require other persons to report suspected cases of child abuse whose religious beliefs would not be offended by the reporting requirement. Additionally, states will rarely be confronted with a situation in which priests are the only source of the information. Not only are there alternative means for the State to obtain its goal, but the means may also be ineffective. If priests are required to report confidences, penitents will become less likely to confide in priests. If penitents are less likely to confide, then priests will no longer be a source for tips on child abuse. The State's means of protecting children will be ineffective because the reason for requiring priests to report will have dissolved.

Therefore, states will have to deal with possible violations of Free Exercise rights when resolving a conflict between mandatory child abuse reporting statutes and the priest-penitent privilege.

B. The Establishment Clause

The next possible negative ramification involved in the clash between the priest-penitent privilege and the mandatory child abuse reporting statutes is Establishment Clause. The First Amendment provides in part that "Congress

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141. *See* Brocker, *supra* note 132, at 483. The duty to turn another person in or to report a crime "should not be abrogated for clergy, especially because there are valid justifications for doing everything possible to foster the relationship between the clergyperson and the communicant." *Id.*

142. A state must justify its infringement on religious liberty by showing that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." Sherbert v. Verner, 374 U.S. 398, 407 (1963).

143. Mitchell, *supra* note 4, at 810-11.

144. The state will also argue that "[n]ot all burdens on religion are unconstitutional." United States v. Lee, 455 U.S. 252, 257 (1982).

145. Mitchell, *supra* note 4, at 815.

146. *See* Brocker, *supra* note 132, at 483.

shall make no law respecting an establishment of religion."[147] In analyzing the Establishment Clause, the Supreme Court has developed a three part test for determining the constitutionality of a statute under the Establishment Clause: (1) "the statute must have a secular legislative purpose; [(2)] its principal or primary effect must be one that neither advances nor inhibits religion;"[148] and (3) "the statute must not foster 'an excessive government entanglement with religion.'"[149]

When examining the secular purpose and primary effect of the privilege, the court will look at the church's practices and the state's interest it is trying to advance through the privilege.[150] If the state or church believes that the privilege furthers religion, the privilege may violate the Establishment Clause. However, if the privilege furthers a secular purpose such as the welfare of children, the privilege may not violate the Establishment Clause. Although, these two prongs are not likely to cause a problem, the court should consider whether the purpose or effect endorses religion before it determines whether the privilege violates the Establishment Clause.

The court also has to inquire into the potential for excessive entanglement between church and state before it determines the constitutional validity of the privilege under the Establishment Clause.[151] In order to determine whether the government is excessively entangled with religion, a court must look at the "character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority."[152] Hence, the State could argue that if the reporting statutes are compelling priests to testify, an excessive entanglement between church and state will occur. Conversely, the State could argue that the act is limited in its intrusiveness and does not create an entanglement concern.[153] Thus, the State will have to contemplate possible Establishment Clause problems when trying to resolve the conflict between the priest-penitent privilege and the child abuse reporting statutes.

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147. U.S. CONST. amend I. The Establishment Clause, like the Free Exercise Clause, applies equally to the states. Mitchell, *supra* note 4, at 777 & n.284.

148. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

149. *Id.* at 613 (quoting Waltz v. Tax Comm'r of New York, 397 U.S. 664, 674 (1970)).

150. *See* Mitchell, *supra* note 4, at 777-85.

151. 16A AM. JUR. 2D § 441 (2009). The excessive entanglement test is one of degree; it allows some state involvement and entanglement because government and religion interest sometimes incidentally coincide. *Id.*

152. 16A AM. JUR. 2D § 441 (2009).

153. "[T]he most difficult potential conflict with the Establishment Clause would arise if a court construed a privilege statute so narrowly as to favor one religion over another." Brocker, *supra* note 132, at 484.

C. Due Process, Privacy, and Free Speech

Additionally, whether the child abuse reporting statutes offend due process notions by failing to provide adequate notice is another possible negative ramification born from the conflict. In some states, the child abuse reporting statutes declare that "any person . . . shall report . . . ."[154] or that "a mandated reporter shall make a report . . . ."[155] However, the statutory language is vague, and it is unclear which persons fall within the scope of the reporting statutes. Thus, the uncertainty in the statutory language could cause due process violations.

For example, in *People v. Hodges*,[156] the pastor and assistant pastor challenged their conviction on the basis that the California child abuse reporting statute violated due process.[157] The pastor and assistant pastor operated a church school where they performed spiritual and administrative duties.[158] The statute mandated that child care custodians report abuse; however, the pastor and assistant pastor argued they did not realize they were child care custodians within the scope of the statute.[159] Hence, the pastors claimed that the statute violated their due process rights by failing to give adequate notice that they were child care custodians within the scope of the statute.[160]

In addition to free exercise, establishment, and due process considerations, the states will have to contemplate possible privacy or free speech ramifications. The states will have to grapple with whether the reporting statute is a content-based regulation or whether the statute compels speech.[161] If either is true, the reporting statute is an impermissible infringement on First Amendment rights to free speech.[162]

Additionally, the states should think of the possible ramifications on privacy rights. Although the constitutional right of privacy generally has been confined to rights of autonomy or decision-making in fundamentally personal areas, the Supreme Court has acknowledged that there may be a constitutional right of privacy to keep private information secret.[163] Thus, a priest or penitent may have a constitutional right of privacy.[164]

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154. *E.g.*, N.J. STAT. ANN. § 9:6-8.10 (West 2011).

155. *E.g.*, CAL. PENAL CODE § 11166(a) (Deering 2011).

156. People v. Hodges, 13 Cal. Rptr. 2d 412 (Cal. App. Dep't Super. Ct. 1992).

157. *Id.* at 414. They also challenged their convictions on insufficient evidence, Free Exercise, and Establishment Clause grounds. *Id.*

158. *Id.* at 415.

159. *Id.* at 417. In deciding whether the legislative proscription was sufficiently clear to satisfy the requirements of fair notice, the court looked at the language of the statute, its legislative history, and California decisions construing statutory language. *Id.*

160. *Id.* at 418. Despite the pastors' claim, the court concluded that the Reporting Act gave the constitutionally required degree of notice. *Id.*

161. *Id.* at 420.

162. *Hodges*, 13 Cal. Rptr. 2d at 420.

163. *See* Whalen v. Roe, 429 U.S. 589, 599-600 (1977). In *Whalen*, the Court stated that the privacy right has two categories: (1) the "individual interest in avoiding disclosure of

D. Public Policy and State Interest

Public policy is also a necessary consideration when state jurisdictions are designing a resolution to the conflict between the priest-penitent privilege and the child abuse reporting statutes. The public has an interest in encouraging people to confess their wrongdoing and to change their ways.[165] Furthermore, it has an interest in fostering the relationship between a priest and penitent because "society gains more by fostering such relationships than it gains from disclosure of communications within those relationships."[166] On the other hand, the state has an interest in the protection, welfare, and safety of children.[167] The state also has an interest in access to full information in litigation and in the prosecution or rehabilitation of child abusers. Hence, the state needs to weigh state interests and public policy.

E. A Simple Solution Without Ramifications

There is a simple solution to the conflict between mandatory reporting statutes and the priest-penitent privilege that would not involve any of the above possible negative ramifications. State legislators should simply exclude members of the clergy from the statutory list of mandatory reporters. None of the above ramifications would need to be weighed and there would be no risk of running afoul of the Constitution.

At the same time, society's interest in protecting children would still be accomplished because there are plenty of others who are required to report abuse that do not have to choose between adhering to secular law and violating religious beliefs. Other mandated reporters left would include: doctors, social workers, teachers, nurses, day-care workers, foster care providers, and mental health providers, to name only a few.

Not only is there an abundance of other mandated reporters if priests are excluded, statistics also show that reports of child abuse or neglect are being made to the proper authorities. Reporting is no longer the issue it once was. According to the National Child Abuse and Neglect Data Service,[168] during the 2009 Federal fiscal year, an estimated 3.3 million reports of alleged abuse

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personal matters" and (2) the individual "interest in independence in making certain kinds of important decisions." *Id.*

164. *See* Mitchell, *supra* note 4, at 768-76.

165. *See* Brocker, *supra* note 132, at 468.

166. Mitchell, *supra* note 4, at 762. Society benefits if people who are troubled seek counsel, guidance, or forgiveness.

167. The state's duty to protect children arises from the *parens patriae* power. In order to fulfill this duty, the state created child abuse reporting statutes. The primary purpose of the reporting statutes is to bring to light more cases of abuse so that the state can protect children, counsel those who need help, and integrate the family.

168. This organization was established by the Children's Bureau, an agency of the U.S. Department of Health and Human Services. U.S. CHILDREN'S BUREAU, CHILD MALTREATMENT 2009 vii, (2009) *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf.

and neglect were received by a child protective service agency.[169] The organization found that professionals were responsible for submitting three-fifths of the reports.[170] The three largest percentages of report sources were "teachers (16.5%), law enforcement and legal personnel (16.4%) and social services staff (11.4%)."[171] As shown, priests were not among the largest reporters.

It is also more likely that other reporters will discover the abuse before a priest would because they have more direct contact with children. For example, physicians are more likely to discover physical and sexual abuse because of the nature of their relationship with a child. Similarly, teachers and daycare workers are more likely to be among the first to discover abuse due to their day-to-day contact with children.[172]

Finally, child abuse cases are on the decline, indicating that society has developed and enforced other methods to take care of this very serious problem.[173] Several studies, using different methods, show that the number of abused children in the United States has fallen steadily in the last two decades.[174] A report from the Crimes Against Children Research Center at the University of New Hampshire showed that overall per capita physical-abuse cases fell 3% between and 2007 and 2008 (the most recent year for which stats are available) and sexual abuse fell by 6%.[175] The report continues by stating that these figures continue long-term, downward trends in the rate of physical and sexual abuse nationwide—with most states reporting cumulative drops of over 50% since 1992.[176] Experts reviewing these studies have concluded that the decrease can be attributed to a greater public awareness of and intolerance for child abuse, a proliferation of programs designed to help abusers and potential abusers overcome their problems, and more folks deployed in child-

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169. CHILD MALTREATMENT, *supra* note 168, at viii. Of those reports, 61.9% were screened and 22.1% were substantiated. *Id.*

170. *Id.* at ix. Professionals are persons who encountered alleged victims as part of their occupation. *Id.*

171. *Id.*

172. One report to Congress shows that schools (52%), police (12%), and hospitals (11%) recognized 75% of the children who experienced harm. U.S. DEP'T OF HEALTH AND HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4) 16 (2010), *available at* http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl_incid/reports/natl_incid/nis4_report_congress_full_pdf_jan2010.pdf.

173. This author notes that even one incident of child abuse is too many. However, this author uses this statistic simply to show that priests are not needed in this crusade against abuse.

174. Laura Blue, *Is Child Abuse On the Decline?*, TIME (Aug. 24, 2010), http://healthland.time.com/2010/08/24/is-child-abuse-on-the-decline.

175. *Id.*

176. *Id.* The TIME article cites a report from the Crimes Against Children Research Center at the University of New Hampshire. "The numbers are based on 'substantiated' abuse cases only—where substantiated means that the cases were reported to a child-protection agency and investigated, and that the agency then found 'a preponderance of evidence' to suggest maltreatment." *Id.*

protection services and the criminal-justice system.[177] Thus, it is arguable that priests are not needed in this crusade to end child abuse. As such, the simple solution of excluding priests from the list of mandatory reporters avoids the inherent and significant conflict between the mandatory child abuse reporting statutes and the priest-penitent privilege, while at the same time serving society's interest of protecting its children.

VI. CONCLUSION

This article has attempted to provide an overview of the priest-penitent privilege and child abuse reporting statutes. In reviewing the privilege and the reporting statutes, this article has uncovered the inconsistencies and inadequacies in both the applications and definitions of the privilege and reporting statutes. Because of these inconsistencies and inadequacies, a conflict has arisen between the priest-penitent privilege and child abuse reporting statutes.

Not only is there a conflict, but there is also not a uniform solution to guide courts and legislators; the judiciary has avoided the conflict either out of respect for or out of fear of confronting religion. This avoidance has led to the perpetuation of the conflict by lower courts and legislators. Hence, this article explored the various ramifications and issues involved in solving the conflict, as well as stressed the need for legislators and courts to reconsider the potential effect of their statutory constructions and case interpretations on the privilege and reporting statutes.

Therefore, this article urges the state legislators to exclude priests from their mandatory child abuse reporting statutes. By excluding priests from the reporting statutes, states avoid this conflict of laws and resolve the issue in such a way that priests are not caught between choosing religious belief or civil law; states are not caught balancing difficult constitutional issues; and states' interests in protecting children are still advanced through using other members of society to report. Priests would be able to go into a confessional, provide help to those in need, and not be concerned about whether the confession is required to be passed on to law enforcement officials. States will not have to worry about whether the Free Exercise, Establishment, Due Process, and Free Speech Clauses, or privacy guarantee of the Constitution have been violated by eliminating priests as mandated reporters altogether. The State's interest in public safety and welfare of children would still be protected by the long remaining list of mandatory reporters. This elimination of priests from the child abuse reporting statutes would, in turn, provide uniformity and consistency in the application and definition of the priest-penitent privilege and the child abuse reporting statutes.

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177. David Crary, *Child Abuse in U.S. Shows Steep Decline*, THE DENVER POST (Feb. 3, 2010, 1:00 AM), http://www.denverpost.com/frontpage/ ci_14321402#ixzz1HLFwYzdN.