1987

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Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion

Mary Harter Mitchell*

The choice between jailing clergy and giving up evidence of child abuse must be a dire one. This Article asks whether that choice faces the law. Pastor John Mellish, a Nazarene minister in Florida, recently went to jail for refusing to divulge information confided to him by an ex-policeman later accused of child abuse.¹ The minister claimed that the clergy privilege provided him with a legal excuse for not divulging communications confided to him in his professional capacity.² This dramatic incident uncovers a tension in the law between the old clergy privilege³ and new requirements of disclosure of child abuse.⁴

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2. The bylaws of the Church of the Nazarene forbid a minister to divulge anything disclosed to him in confidence. Duin, A Pastor Faces Legal Action for Refusing to Break a Confidence, 28 CHRISTIANITY TODAY, Oct. 5, 1984, at 80, 85. The minister stated: “[T]he question would always be on the mind of parishioners as to whether I would tell on them in something else.” Id. at 80.

3. This privilege has several names: the priest-penitent privilege, the clergyman-penitent privilege, the confessor-confessant privilege, the ministerial privilege, etc. This Article uses the term clergy privilege to avoid a narrow gender or denominational reference. To avoid similar chauvinisms, this Article also uses the term cleric to denote a single member of any denomination’s clergy. To avoid begging a key question, see infra text accompanying notes 141-52, this Article refers to the person who consults a cleric as the confider rather than the penitent.

4. A similar tension exists between the clergy privilege and other abuse reporting requirements. Although reporting requirements are not usually included in spouse abuse statutes, such requirements are common, and controversial, in statutes addressed to abuse of the elderly and other dependent
Such a tension in so important a juncture of law demands attention and invites reconsideration of the scope and derivation of the clergy privilege because many clergy, caught between seemingly conflicting laws, are anxious for guidance as to their legal rights.

This Article exposes the superficiality of characterizing the conflict between the clergy privilege and child abuse reporting requirements as a choice between protecting secrets and protecting children. Instead, the Article recasts the conflict in terms that are more evincive of the true interests at stake. Part I reviews states' child abuse reporting requirements, and Part II surveys the development and present status of the clergy privilege. Part III then focuses on the troubling intersection of these two lines of law. Finally, Part IV considers the argument that the clergy privilege is grounded in a cleric's constitutional right freely to practice his religion. Although this Article focuses on the clergy's duty to report child abuse, much of its discussion, especially of the free exercise issue, would also apply to clergy's participation at later proceedings.


7. This Article addresses the dilemma confronting a cleric who does not want to report suspected abuse because reporting would violate a professional confidence. Thus, the Article does not consider the law's application to clergy who are willing to report but who confront either an objection by the confider or a rule of law declaring clergy incompetent to disclose confidential communications. This Article focuses on the issue of when the cleric, rather than the confider, may claim the privilege.
I. CHILD ABUSE REPORTING REQUIREMENTS

Child abuse in this country is staggeringly rife and tragically important.8 Every state9 has a statute aimed at discovering and stopping child abuse and every statute includes a reporting requirement.10 These reporting requirements differ as to matters such as who must report and what must be reported, but they are similar in many ways, and in all jurisdictions the reporting requirement is a key part of the statutory...


9. Although the text refers to states, this survey also includes the statutes of the District of Columbia, American Samoa, Guam, Puerto Rico, and the Virgin Islands.

A. EVOLUTION OF REPORTING REQUIREMENTS

The history of special child abuse legislation begins in the early 1960s, and from the beginning reporting requirements have been central. In 1962, the Children’s Bureau of the Department of Health, Education and Welfare (HEW) held a national conference to discuss child abuse and, in 1963, HEW published a landmark report and model statute to address the problem of child abuse. The model statute required physicians to report suspected cases of abuse and designated as a misdemeanor a physician’s knowing and willful failure to report.


12. These legal developments followed in the wake of much public attention to the problem of abused children. This attention, in turn, resulted partly from improvements in medical diagnostic techniques that permitted doctors to detect cases of pattern abuse. I. Sloan, supra note 11, at 15. In 1962, the influential Journal of the American Medical Association published a landmark article on diagnosing the “battered child syndrome.” See Kempe, Silverman, Steele, Droegemueller & Silver, The Battered-Child Syndrome, 181 J. A.M.A. 17 (1962); see also Landeros v. Flood, 17 Cal. 3d 399, 408-10, 551 P.2d 399, 393, 131 Cal. Rptr. 69, 73 (1976) (discussing growing awareness by medical profession of battered child syndrome).


14. CHILDREN’S BUREAU, supra note 13, at 11, 13. The report explained why the statute singled out physicians:

Children who have suffered physical abuse at the hands of parents or other persons responsible for their care and protection are most frequently brought or come to the attention of physicians, either in pri-
The model statute also expressly abrogated both the physician-patient and the husband-wife privileges for all judicial proceedings resulting from a report of abuse.\textsuperscript{15}

This federal prodding came at a time of heightened public concern about child abuse.\textsuperscript{16} With remarkable swiftness, all states adopted some form of child protection statute with a reporting requirement by the end of 1967.\textsuperscript{17} These early statutes generally limited the reporting requirements to physicians and required reports of only physical abuse.\textsuperscript{18} Since the 1960s, however, most states have amended their statutes at least once.\textsuperscript{19} The trend of these amendments has been to expand both the reportable circumstances and the classes of persons who must report.\textsuperscript{20}

B. PURPOSE OF REPORTING REQUIREMENTS

The obvious purpose of child protection statutes is, as most
statutes expressly state, to protect children. Within the statutory scheme, reporting requirements are meant to be finders. Their role is to call official attention to possible cases of child abuse and thus trigger a state investigation. If the investigation substantiates the suspicion of abuse, the state stands equipped to follow up with a variety of statutory interventions, including removing the child from the home, administering social services, terminating parental rights in the child, and bringing criminal action against the abuser.

C. ELEMENTS OF CURRENT REPORTING STATUTES

Statutory child abuse reporting requirements tend to share common characteristics. The statutes typically address who must report, reportable conditions, reporters' immunity, penalties for the failure to report, and the abrogation or application of certain privileges.

1. Who Must Report

The statutes vary considerably in their designations of persons required to report. Aiming at persons likely to encounter abused children, most statutes require reporting by various professionals in the fields of health, education, law enforcement, and social work. All statutes, for example, require phy-

22. See id. at 50-66, 75-88; Weisberg & Wald, Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform, 18 Fam. L.Q. 143, 149-51 (1984). Reporting requirements therefore presuppose adequate follow-up measures. "[The proposed model statute] presupposes the existence in the States of adequate, applicable legal and social machinery—laws, enforcement, and social welfare agencies and courts—and that these will be put in motion by the making of the required reports." Children's Bureau, supra note 13, at 9. See infra notes 456, 473 and accompanying text.
23. Many statutes have separate lists for persons who must report and those who may report cases of suspected abuse. Another common approach is to require certain listed professionals to report but to add that "any other person" may also report. See I. Sloan, supra note 11, at 24-27 (table showing, by jurisdiction, who must report and who may report); Mawdsley & Permuth, supra note 11, at 116-18. Where clergy may but are not required to report the law creates no tension between the reporting statute and the clergy's right to claim a privilege.
24. See I. Sloan, supra note 11, at 24-27 (chart for all states). Many statutes address institutional "chain of command" problems with a provision allowing a staff person merely to report to his supervisor rather than directly to the government. Indiana's statute is typical:
   If an individual is required to make a report under this chapter in his capacity as a member of the staff of a medical or other public or pri-
sicians to report, many statutes list particular medical practitioners, and about half of the statutes require reporting by coroners or medical examiners. Similarly, almost all child abuse reporting statutes include a provision requiring reports from law enforcement officials and school personnel. Several statutes require reporting by attorneys, day-care staff, and foster care providers. Many statutes list Christian Science practitioners specifically or religious healers generally among those required to report, and a few jurisdictions expressly require clergy to report. Finally, many statutes, in addition to or instead of listing those persons required to report, simply impose the duty to report on "any person" who suspects child abuse.

2. Reportable Conditions

Statutory definitions of reportable abuse vary. All definitions include physical abuse and most include neglect, mental
or emotional abuse, and sexual abuse or exploitation. The reporter is not required to know that abuse has occurred; all that is required is a belief or a reasonable suspicion that a child has been abused.

**seriously threatens the child's life or health, a state may have authority to intervene and provide needed medical care. See id. at 43.**


36. Id. at 18. At one time, two states, Maine and Maryland, provided express exceptions to their duty to report. These exceptions, although now deleted in both states, are nevertheless instructive. Maryland's statute stated that a report would not be required if

[e]fforts are being made or will be made to alleviate the conditions or circumstances which may cause the child to be considered a neglected child . . . [or where] . . . reporting would inhibit the child, parent, guardian, or custodian from seeking assistance in the future and thereby be detrimental to the child's welfare.

MD. ANN. CODE art. 72A, § 6(c) (1978) (deleted in 1983) (emphasis added). Similarly, Maine's statute once stated:

A person shall not be required to report when the factual basis for knowing or suspecting abuse or neglect comes from treatment of a person responsible for the child, the treatment was sought by that person for a problem of abuse or neglect and there is little threat of serious harm to the child.


Both states' exceptions seemed to acknowledge that, at least when the child was not threatened with immediate serious harm, the child's long-range best interests might be served better by continued help for the caretaker than by reporting the abuse to a state agency. The suggestion was that "blowing the whistle" might have ended a therapy that promised to alleviate the problem, or to do at least as much good as would follow from a state investigation.

Significantly, both statutes limited their exceptions to situations where the person seeking treatment or help was the child's caretaker. See ME. REV. STAT. ANN. tit. 22, § 4011(1)(c) (1980) (deleted in 1985); MD. ANN. CODE art. 72A, § 6(c) (1978) (deleted in 1983). In other words, treatment for a non-caretaker abuser was not accorded the same deference as treatment for a caretaker abuser. If this distinction was deliberate, it would seem to indicate that these exceptions to the reporting requirement did not rest primarily on a desire to help the abuser, but instead rested on the benefit to the child that might result from help for the caretaker. The child's welfare was not being subordinated to the welfare of the abuser; rather, the child's welfare itself was thought, at least in some cases, to be served better by private therapies than by state intervention. Such exceptions seem to have rested, at least partly, on a desire to preserve the family.

Maryland has deleted its statutory exception, see MD. FAM. LAW CODE ANN. §§ 5-903, 5-904 (1984 & Supp. 1986), and Maine has replaced its exception with a longer provision that addresses similar concerns in a very different manner, see ME. REV. STAT. ANN. tit. 22, § 4011(1)(A) (Supp. 1986). Maine's new provision, unlike its former one, is limited to "licensed mental health professionals," a term defined to include psychiatrists, licensed psychologists, licensed clinical social workers, and certified social workers. ME. REV. STAT. ANN. tit. 22, § 4002(6)(A) (Supp. 1986). The provision concerns mental health professionals who have reason to suspect that their patient either has abused or is likely to abuse a child. Id. § 4011(1)(A). This new provision does not, as
Similarly, the specific information required of the reporter varies from state to state.\textsuperscript{37} Typically, the statutes require information sufficient to identify the child, the child's parent or guardian and the suspected abuser as well as information concerning the nature and extent of the harm suffered by the child.\textsuperscript{38} The reporter is usually required to describe and make available evidence such as photographs and x-rays and to report any other action the reporter has taken in the matter. For example, the reporter may be required to divulge whether the

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\textsuperscript{37} I. SLOAN, supra note 11, at 48. Statutes also vary as to whether the report must be oral, written, or both and as to the public agencies or officials to whom the report should be made. Typical provisions call for reports to local law enforcement officials, to local welfare units, or, in the case of a child's death, to the coroner or district attorney. \textit{See id.} at 45-50.

\textsuperscript{38} \textit{Id.} at 48.
child has been removed from the home or whether anyone else has been notified.\textsuperscript{39}

3. Reporter's Immunity

To protect reporters, all states allow for anonymous reporting.\textsuperscript{40} In addition, every state specifically provides immunity for the reporter from criminal and civil liability resulting from the report.\textsuperscript{41} Most states also extend the reporter's immunity to liability for participation in later judicial proceedings on the same matter.\textsuperscript{42} Although the reporter's good faith is a prerequisite to immunity in most jurisdictions,\textsuperscript{43} good faith is difficult to disprove and therefore is presumed in many states.\textsuperscript{44}

4. Penalties for Failure to Report

The duty to report is indeed a duty,\textsuperscript{45} backed by criminal penalties in most jurisdictions and additional civil liability in some.\textsuperscript{46} Failure to report is usually a misdemeanor requiring a willful or knowing failure to report\textsuperscript{47} and is usually accompanied by the criminal penalties of a fine or a few days to a year in jail.\textsuperscript{48} Furthermore, a few states expressly provide a civil cause of action for a child who is injured by abuse against the person who failed to make a required report that might have

\begin{itemize}
\item \textsuperscript{39} See id. at 35-38 (includes tables indicating which statutes authorize the taking of x-rays and photographs and which authorize those things to be done at public expense). Some persons may be \textit{required} to take photographs or x-rays or to detain the child in temporary custody. See id. at 38; N.Y. Soc. Serv. Law § 416 (McKinney 1983) (institutional employees shall cause photos to be taken).
\item \textsuperscript{40} Mawdsley & Permuth, supra note 11, at 118.
\item \textsuperscript{41} See I. Sloan, supra note 11, at 31-35.
\item \textsuperscript{42} See id. In addition, many statutes provide immunity for temporary removal of a child from unsafe circumstances, see id. at 35, and some statutes provide immunity for the taking of photographs or x-rays. See id. at 32-33, 35-38.
\item \textsuperscript{43} See id. at 32-35.
\item \textsuperscript{44} See id.; Fraser, supra note 11, at 664.
\item \textsuperscript{45} The language of almost all statutes is “shall report.”
\item \textsuperscript{46} See I. Sloan, supra note 11, at 43-45; cf. 60 Op. Md. Att'y Gen. 51 (1975) (statute stating “shall make a report” is mandatory despite absence of penalties for failure to report).
\item \textsuperscript{47} I. Sloan, supra note 11, at 44. “The requirement of proving a willful failure to report beyond a reasonable doubt makes the likelihood of a successful prosecution very unlikely. Despite the widespread provision for penalties, there are no reported cases of a criminal prosecution for failure to report an abused or neglected child.” Id.
\item \textsuperscript{48} Id.
\end{itemize}
led to prevention of that abuse.\textsuperscript{49}

5. Statutory Abrogation of Privileges

Finally, all but six reporting statutes contain a provision


Even without an express provision for civil liability, a person who fails to report might be liable in a civil action on behalf of persons injured as a result of the failure to report. See Landeros v. Flood, 17 Cal. 3d 399, 400, 551 P.2d 389, 394, 131 Cal. Rptr. 69, 74 (1976) (allowing a cause of action against a physician for negligent failure to diagnose and report a case of battered child syndrome). Another case against a doctor for failure to report child abuse was settled before trial. See John, \textsuperscript{supra} note 11, § 24. In the absence of an express statutory cause of action, the action might be brought for malpractice or negligence, and the reporter's duty might be established by reference to the statutory mandate, to the "reasonable person," or to both. See Isaacson, Child Abuse Reporting Statutes: The Case for Holding Physicians Civilly Liable for Failing to Report, 12 SAN DIEGO L. REV. 743, 747-50 (1975) (discussing California tort law approach to establishing standard of conduct); Note, Civil Liability for Teacher's Negligent Failure to Report Suspected Child Abuse, 28 WAYNE L. REV. 183, 191-207 (1981) (discussing theories of civil liability); Note, Physician's Liability for Failure to Diagnose and Report Child Abuse, 23 WAYNE L. REV. 1187 (1977) (analyzing Landeros v. Flood); Comment, Civil Liability for Failing to Report Child Abuse, 1977 DET. C.L. REV. 135, 147-50 (discussing common law and statutory duties to report); Comment, Torts: The Battered Child—A Doctor's Civil Liability For Failure to Diagnose and Report, 16 WASHBURN L.J. 543, 546-48 (1977) (analyzing the claims of negligence and failure to comply with statutory reporting requirements in Landeros v. Flood).

A successful negligence or malpractice action against a cleric, however, is unlikely. Despite much ballyhoo over the prospect of clergy malpractice litigation, clergy have not been held liable except in cases of flagrant misconduct. One reason is the difficulty of determining an appropriate standard of care without unconstitutional entanglement with religion. See generally Nally v. Grace Community Church of the Valley, 157 Cal. App. 3d 912 (reversed and deleted by order of California Supreme Court), 204 Cal. Rptr. 503, 507-08 (1984) (recognizing action for intentional infliction of emotional distress for counseling by clergyman and reasoning that freedom of clergy to act is not absolute); Bergman, Is the Cloth Unraveling? A First Look at Clergy Malpractice, 9 SAN FERN. V.L. REV. 47, 62-64 (1981) (setting a standard duty of competence for the clergy); Ericson, Clergyman Malpractice: Ramifications of a New Theory, 16 VAL. U.L. REV. 163, 176-84 (1981) ("Judicial review of counseling by clergymen will inevitably draw the courts into the dangerous ground of evaluating the truth or error of the counseling given."); Comment, Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept, 19 CAL. W.L. REV. 507, 530-42 (1983) (judicial application of standard of care for clergy would not survive establishment clause and free exercise clause tests); Comment, Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?, 17 U. TOL. L. REV. 209, 223-35 (1985) (discussing constitutional impediments to clergy malpractice actions) [hereinafter Comment, Clergy Malpractice: Bad News].
abrogating some privileges in the context of child abuse. Most statutes specifically abrogate the physician-patient and the husband-wife privileges. A few states specifically abrogate privileges for psychotherapists, psychiatrists, psychologists, nurses, social workers, or counselors. Many statutes abrogate certain of these privileges by name and include all other "similar" privileges or "all professional privileges" except, interestingly, the attorney-client privilege. Finally, four statutes expressly abrogate the clergy privilege in the context of child abuse.

On the other hand, some statutes expressly reaffirm particular privileges in the face of reporting requirements. Almost always, it is the attorney-client privilege that is preserved, although three statutes do specifically reaffirm the clergy privilege.

II. THE CLERGY PRIVILEGE

Almost every jurisdiction recognizes some form of clergy evidentiary privilege, usually by statute. This section surveys

50. See I. SLOAN, supra note 11, at 40-41 (table for all jurisdictions).
51. See id. at 40-41, 92-93.
52. See id. at 38-41.
53. See id. The express retention of the attorney-client privilege is noteworthy in light of the frequently conceded weakness of its rationale. See S. STONE & R. LIEBMAN, TESTIMONIAL PRIVILEGES § 1.01 (1983) (although references to this book are referred to throughout this Article as S. STONE & R. LIEBMAN, the authors of TESTIMONIAL PRIVILEGES wish to acknowledge that chapter 6, on clergy privilege, was authored by Michael G. Plantamura); S. J. WIGMORE, WIGMORE ON EVIDENCE § 2291 (McNaughton rev. ed. 1961). See infra text accompanying note 472.
54. ARK. REV. STAT. ANN. § 42-815 (Supp. 1985); IDAHO CODE § 16-1620 (Supp. 1986); LA. REV. STAT. ANN. § 14:403(F) (West 1986); WASH. REV. CODE § 26.44.060(3) (1985).
these laws generally to provide background on the nature of the clergy privilege and specifically to surface those features likely to bring the privilege into collision with child abuse reporting requirements.\(^5\)

A. History of the Clergy Privilege\(^5\)

The clergy privilege originated in the seal of confession of the Roman Catholic church.\(^6\) For centuries, the Catholic seal of confession has protected as inviolably secret the contents of a penitent's auricular confession to a priest.\(^6\) Although historians have not located a precise origin for the seal, they have


\(^{58}\) For a more detailed history of the clergy privilege, see W. Tiemann & J. Bush, supra note 5, at 33-98; J. Wigmore, supra note 53, § 2394; Callahan, Historical Inquiry into the Priest-Penitent Privilege, 36 JURIST 328 (1976); Yellin, supra note 57, at 90-108. See also Q. Donoghue & L. Shapiro, supra note 57.

\(^{59}\) S. Stone & R. Liebman, supra note 53, § 6.01.

\(^{60}\) "The sacramental seal is inviolable. Accordingly, 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." THE CODE OF CANON LAW IN ENGLISH TRANSLATION Canon 983 (Collins, London 1983). "The confessor is wholly forbidden to use knowledge acquired in confession to the detriment of the penitent, even when all danger of disclosure is excluded." Id. Canon 984.
found references to the practice of secrecy from early records of the Christian church. In the fifth century, Pope Leo I acknowledged an already longstanding practice of secret confession, and in the ninth century, church law imposed punishment on any priest who violated the seal. Historians have also found frequent and specific references to the seal from the twelfth century onward.

It is fairly certain that pre-Reformation English law recognized the secrecy of confession and did not require a priest to violate the seal. Many judges were clergymen, and the common law of England was strongly influenced by the law of the church. There is strong evidence that, after the Norman Conquest in 1066, English courts recognized a clergy privilege based on the seal. With the English Reformation in the sixteenth century, however, the basis for the clergy privilege began to founder. For a time, the Anglican church, which had replaced the Roman Catholic church as the established church of England, continued the practice of confession and the requirement of secrecy. As the new church discarded various "Romish" practices, however, emphasis on the confessional dwindled and confession to a cleric became optional in the Anglican church. The law then ceased to recognize the clergy privilege. Some historians place the termination of the privilege at the time of

See Regan & Macartney, Professional Secrecy and Privileged Communications, 2 Cath. Law. 3, 4-12 (1956) (elaborating on Roman Catholic position).

61. See Yellin, supra note 57, at 97-98.
63. Id. at 36.
64. Id. at 36-47.
67. W. Tiemann & J. Bush, supra note 5, at 39-47. Apparently, the law after the Norman Invasion recognized an exception to the privilege for cases of treason. Id. at 47. But see Garnet's Case, 2 Howell's State Trials 218, 242 (1606). In Garnet's Case, Father Garnet was found guilty, probably of misprision or treason, for refusing to divulge anything concerning his knowledge of the failed Gunpowder Plot, a plot to assassinate King James I. Yellin, supra note 57, at 99-101. The case can be read either as denying the existence of the privilege or as applying an exception for treason. Id.
69. See W. Tiemann & J. Bush, supra note 5, at 49-53; Yellin, supra note 57, at 102.
70. See S. Stone & R. Liebman, supra note 53, § 6.01; W. Tiemann & J. Bush, supra note 5, at 53-54; Yellin, supra note 57, at 103.
the English Reformation.\textsuperscript{71} Wigmore thought, however, that the privilege survived until the Restoration.\textsuperscript{72} In either case, a line of English cases since the seventeenth century clearly refuses to recognize a clergy privilege.\textsuperscript{73} Blackstone's \textit{Commentaries}, written just before the American Revolution,\textsuperscript{74} mention no such privilege. Thus, a clergy privilege was not part of the common law imported into this country, and most American courts and commentators have announced that the privilege, if it exists, must rest on statute.\textsuperscript{75}

Interestingly, however, the first recorded case in this country addressing the issue of clergy privilege recognized such a privilege based on neither common law nor statute, but on constitutional principles of freedom of religion. \textit{People v. Phillips}, decided by the New York Court of General Session in 1813, involved a Roman Catholic priest who had returned stolen goods to their owner but then refused to testify to a grand jury as to who had delivered those goods to him.\textsuperscript{76} The priest maintained his refusal to testify at the criminal trial of the persons suspected of trafficking in the stolen goods. The priest rested his objection on his church's seal of confession and the court in \textit{Phillips} upheld his right not to testify.\textsuperscript{77} The court found a privilege rooted in the priest's constitutional right, under New York's constitution, to exercise freely his religion.\textsuperscript{78}

\footnotesize
\textsuperscript{71} See W. TIEMANN & J. BUSH, supra note 5, at 53-54; Yellin, supra note 57, at 102.
\textsuperscript{72} J. WIGMORE, supra note 53, § 2394.
\textsuperscript{73} See W. TIEMANN & J. BUSH, supra note 5, at 120-22; J. WIGMORE, supra note 53, § 2394; Yellin, supra note 57, at 103.
\textsuperscript{74} W. BLACKSTONE, \textit{Commentaries} (first edition published in 1765-1769).
\textsuperscript{76} People v. Phillips (N.Y. Ct. Gen. Sess. 1813) was never officially published. The records of a participating attorney are, however, reprinted in \textit{Note, Privileged Communications to Clergymen}, 1 CATH. LAW. 199 (1955), and abstracted in 1 \textit{WESTERN L.J.} 109 (1843). The abstract contains some material not found in the reprint. The original records are available at the Court of General Sessions of the County of New York.
\textsuperscript{77} See Note, supra note 76, at 201.
\textsuperscript{78} \textit{Id.} at 209. New York's constitution provided that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state, to all mankind." \textit{Id.} at 207 (quoting N.Y. CONST. of 1777, art. XXXVIII).
Phillips involved a Roman Catholic priest, and whether the Phillips court would have extended the same privilege to non-Catholic clerics was unclear.\textsuperscript{79} Four years after Phillips, in People v. Smith, another New York court found that no privilege existed for a Protestant minister.\textsuperscript{80} The court in Smith failed to clarify, however, whether its distinction was based on the Catholic church's requirement of confession or its requirement of secrecy.\textsuperscript{81} In any event, in 1828 the New York legislature, cutting off this promising judicial evolution of a constitutional doctrine of privilege, passed the nation's first statute recognizing the clergy privilege.\textsuperscript{82} The statute extended the privilege to a "minister of the gospel, or priest of any denomination whatsoever" as to confessions "enjoined by the rules [or] practice of such denomination."\textsuperscript{83} Following New York's lead, other states passed similar statutes or court rules recognizing some version of a clergy privilege.\textsuperscript{84}

In 1942, the American Law Institute adopted its Model Code of Evidence. Rule 219 provided for a narrow "priest-penitent" privilege.\textsuperscript{85} The Uniform Rules of Evidence, adopted in

\begin{thebibliography}{99}
\item \textsuperscript{79} Although the case's editor volunteered his opinion that the privilege recognized in Phillips was confined to Catholic priests, see 1 WESTERN L.J. supra note 76, at 113 (case abstract), the court did not expressly so limit its holding. The court did, however, emphasize that for Roman Catholics, unlike Protestants, penance is a sacrament and that failure to recognize the seal of confession would "annihilate" an important branch of the Catholic religion. See Note, supra note 76, at 207.
\item \textsuperscript{80} People v. Smith, 2 City Hall Rec. (Rogers) 77 (N.Y. 1817), unofficially reported in Note, supra note 76, at 209.
\item \textsuperscript{81} Perhaps another material factual distinction, although one not noted in Smith, is that the priest in Phillips had steadfastly refused to testify, see Note, supra note 76, at 199-200; 1 WESTERN L.J., supra note 76, at 109-10, whereas the minister in Smith expressed willingness to disclose if the court allowed him. See Note, supra note 76, at 210-11.
\item \textsuperscript{82} "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 the rules or practice of such denomination." Note, supra note 76, at 218 (quoting N.Y. REV. STAT. Pt. 3, ch. 7, tit. 3, § 72 (1828)).
\item \textsuperscript{83} Id.
\item \textsuperscript{84} Reese, supra note 57, at 57.
\item \textsuperscript{85} Priest-Penitent Privilege; Definitions; Penitential Communications:
(1) As used in this Rule,
(a) "priest" means a priest, clergyman, minister of the gospel or other officer of a church or of a religious denomination or organization, who in the course of its discipline or practice is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his church, denomination or organization;
(b) "penitent" means a member of a church or religious denomi-
1953, incorporated the same provision. In 1974, however, the National Commissioners of Uniform State Laws promulgated new Uniform Rules of Evidence, including Rule 505, which contains a broader statement of privilege for confidential communications to clergy.

The federal government's recognition of a clergy privilege has evolved slowly. As early as 1875, the Supreme Court acknowledged the privilege in dictum. Much later, in a concurring opinion from the District of Columbia Circuit in 1958, Judge Fahy recognized a privilege as a matter of federal common law. In 1972, the Supreme Court approved, by an eight-to-one vote, a version of the Federal Rules of Evidence that included thirteen specific rules regarding evidentiary privileges. Among them was proposed Rule 506, a specific version of the clergy privilege almost identical to Rule 505 of the Uniform Rules of Evidence. Congress, however, failed to enact the

nation or organization who has made a penitential communication to a priest thereof;

(c) "penitential communication" means a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of the discipline or practice of the church or religious denomination or organization of which the penitent is a member.

(2) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing, a communication if he claims the privilege and the judge finds that

(a) the communication was a penitential communication, and
(b) the witness is the penitent or the priest, and
(c) the claimant is the penitent, or the priest is making the claim on behalf of an absent penitent.

MODEL CODE OF EVIDENCE Rule 219 (1942).

86. UNIF. R. EVID. 29 (1953) (now superseded). See W. TIEMANN & J. BUSH, supra note 5, at 152; Reese, supra note 57, at 63.
87. UNIF. R. EVID. 505 (1974). Several states have adopted this version of the clergy privilege. See infra note 101 and accompanying text.
89. See Totten v. United States, 92 U.S. 105, 107 (1875) (dictum).
90. See Mullen v. United States, 263 F.2d 275, 276-81 (D.C. Cir. 1958) (Fahy, J., concurring) (admissibility of minister's testimony as to criminal defendant's confession of abusing her children). Judge Fahy based this recognition on Rule 26 of the Federal Rules of Criminal Procedure which allowed federal courts to find privileges based on "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." FED. R. CRIM. P. 26 (amended Nov. 20, 1972, effective 180 days after Jan. 2, 1975).
92. Compare Fed. R. Evid. 506, 56 F.R.D. 183, 247-49 (1972) (proposed Nov. 20, 1972, effective July 1, 1973) with infra text accompanying note 101. The proposed federal rule replaced the last sentence of UNIF. R. EVID. 505 with the following: "The clergyman may claim the privilege on behalf of the
specific rules of privilege, opting instead for the general and flexible Rule 501. Congress preferred Rule 501 expressly because it enabled the rules of privilege to evolve case by case. Nevertheless, proposed Rule 506, although never adopted, has been considered a guiding formulation of the privilege and a source of federal common law.

B. CURRENT DEFINITION OF THE CLERGY PRIVILEGE

Today almost every jurisdiction recognizes some form of clergy privilege. The existence and scope of the privilege are usually determined by statutes and by the few cases interpreting those statutes. The statutes, however, differ markedly from state to state, so that there is no typical clergy privilege statute. Colorado's, for example, is brief and narrow and limits the privilege to a clergyman or priest and to confessions. Conversely, Maryland's statute is brief but broad, providing that a cleric in an established church cannot be compelled to disclose any information told to him in confidence by a person seeking spiritual advice. His authority so to do is presumed in the absence of evidence to the contrary.

The Federal Rules of Evidence state:

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.


95. See supra note 56.

96. "A clergyman or priest shall not be examined without the consent of the person making the confession as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs." Colo. Rev. Stat. § 13-90-107(c) (1973).
tual solace. Indiana's brief statute bluntly declares clergy incompetent as witnesses "as to confessions or admissions made to them in [the] course of discipline enjoined by their respective churches." By contrast, the Kansas statute expends over 360 words detailing who counts as clergy, who counts as a penitent, and what communications are privileged. There also are several states that base their statutes largely on Rule 505 of the Uniform Rules of Evidence.

Federal courts also recognize a clergy privilege, but by common law rather than by specific statute. Rule 501 of the Federal Rules of Evidence provides that in federal civil actions, when an element of a claim or defense is determined by state law, the existence and scope of a privilege shall be determined by applicable state law. Rule 501 further provides that when federal law is to be applied, courts should interpret that law "in light of reason and experience."

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101. Rule 505 of the Uniform Rules of Evidence addresses religious privilege and reads:

(a) Definitions. As used in this rule:

(1) A “clergyman” is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. 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 advisor.

(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.


103. Id.
pear to have led federal courts to recognize a clergy privilege. Thus, a federal civil court will look either to state law that almost always has a clergy privilege statute, or to federal common law that also recognizes the privilege.

These various versions of the clergy privilege make generalizations about the privilege difficult. Nevertheless, a brief survey of the law of clergy privilege is necessary to show how the privilege might conflict with child abuse reporting requirements.

1. **Who is a Cleric**

The statutes vary widely in their designations of those clergy eligible to claim the privilege. By label or by description, the statutes prescribe or imply the type of organization with which the cleric must be affiliated, the cleric’s office within the qualifying organization, and the cleric’s role at the time entrusted with the confidential communication. The statutes range from the simple and narrow mention of a “priest” or “priest or minister of the gospel” to lengthy definitional sections prescribing the credentials, duties, and affiliation of eli-


105. See also MILITARY R. EVID. 503 (recognizing a version of clergy privilege for courts-martial); W. TIEMANN & J. BUSH, supra note 5, at 161-65 (discussing military version).

106. See S. STONE & R. LIEBMANN, supra note 53, §§ 6.05-.06; Reese, supra note 57, at 64-66; Yellin, supra note 57, at 114-21. One court interpreting a privilege statute has stated:

> What is a “minister of the Gospel” within the meaning of this [Iowa’s] statute? The law as such sets up no standard or criterion. That question is left wholly to the recognition of the “denomination.” The word “minister,” which in its original sense meant a mere servant, has grown in many directions and into much dignity. Few English words have a more varied meaning. In the religious world, it is often, if not generally, used as referring to a pastor of the church and a preacher of the Gospel. This meaning, however, is not applicable to all Christian denominations. Some of them have no pastors and recognize no one as a minister in that sense, and yet all denominations recognize the spiritual authority of the church, and provide a source of spiritual advice and discipline.


108. E.g., VT. STAT. ANN. tit. 12, § 1607 (1973) (“priest or minister of the gospel”). See also GA. CODE ANN. § 24-9-22 (Supp. 1986) (privilege extended to Protestant ministers, Roman Catholic or Greek Orthodox priests, Jewish rabbis, and Christian or Jewish ministers “by whatever name called”).
CLERGY PRIVILEGE

Many statutes refer simply to "a clergyman or priest," while other statutes include, rather vaguely, "religious practitioners." Another typical provision defines "clergyman" as "a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him." Finally, a few statutes, following Rule 505 of the Uniform Rules of Evidence, include a person reasonably believed to be a cleric by the person confiding in him.

Most statutes at least imply that the cleric must be officially affiliated with some religious organization. The very terms "priest," "minister," and "cleric" arguably imply such an affiliation. A few statutes seek to assure the cleric's affiliation with a religious organization by requiring that the cleric


111. E.g., CAL. EVID. CODE § 1030 (West 1966); see also N.J. STAT. ANN. § 2A:84A-23 (West Supp. 1986) ("clergyman . . . or practitioner authorized to perform similar functions").

112. NEB. REV. STAT. § 27-506 (1985); OKLA. STAT. tit. 12, § 2505(A)(1) (1981); S.D. CODIFIED LAWS ANN. § 19-13-16(1) (1979); WIS. STAT. § 905.06 (1979-1980); ARK. R. EVID. 505(a)(1) (1979); ME. R. EVID. 505(a)(1). This provision is based on UNIF. R. EVID. 505(a)(1) (1974). In addition, approximately half the statutes specifically include rabbis. W. TIEMANN & J. BUSH, supra note 5, at 85-86. Approximately one-fourth of the statutes mention Christian Science practitioners. S. STONE & R. LIEBMAN, supra note 53, § 6.05, at 364. Several statutes exclude part-time, lay, or self-appointed ministers. See, e.g., FLA. STAT. § 90.505 (1985) (1976 law revision council note subsection 1 stating clergy do not include "self-denominated" ministers); KAN. STAT. ANN. § 60-429 (1983) ("does not include a person who irregularly or incidentally preaches [or] who does not regularly, as a vocation, teach and preach"); see also ALA. CODE § 12-21-166 (1986) ("limited to any person who regularly, as a vocation, devotes a substantial portion of his time and abilities to the service of his respective church or religious organization"); CONN. GEN. STAT. § 52-146b (1985) ("who is settled in the work of the ministry"); see infra notes 114-20 and accompanying text. The application of such statutes to Jehovah's Witnesses, who consider each member a minister, is unclear. For criticism of these limitations, see Yellin, supra note 57, at 152-54 (arguing that narrow definitions exclude worthy spiritual counselors). As a further limitation, two statutes impose a minimum age requirement. See TENN. CODE ANN. § 24-1-206(a)(1) (1980) (over 18); VA. CODE ANN. § 8.01-400 (1984) (over 18).

be "duly ordained, licensed or commissioned,"114 or "accredited by,"115 or "accountable to the authority of"116 a church body. Several statutes seem to restrict the type of religious organization, albeit vaguely, by attaching such adjectives as "bona fide,"117 "established,"118 "organized,"119 or "legally cognizable."120

Almost all statutes expressly require the communication to

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115. E.g., CONN. GEN. STAT. § 52-146b (1985).
116. E.g., OHIO REV. CODE ANN. § 2317.02(c) (Anderson Supp. 1985).
119. E.g., MO. REV. STAT. § 491.060(4) (1986).

be confided to the cleric in his professional capacity.\textsuperscript{121} A few statutes further specify the nature of a cleric's professional capacity, usually in terms of his capacity as spiritual advisor or consoler.\textsuperscript{122} Thus, communications are not privileged if made to a cleric who, at the time, is acting only as friend,\textsuperscript{123} business associate,\textsuperscript{124} public official,\textsuperscript{125} or fortuitous bystander.\textsuperscript{126} In most of these cases, the line is easily drawn between the troubled soul and the manipulator of the privilege, and in most cases several factors combine to place the communication outside the ambit of the privilege. In other cases, however, drawing the line threatens to entangle the state in the properly religious matter of defining a cleric's professional role or delimiting the cleric's ministry. These cases raise the questions whether it is a cleric's function to provide marriage counseling,\textsuperscript{127} draft counseling,\textsuperscript{128} or moral support for a political pro-

\begin{itemize}
  \item \textsuperscript{121} S. STONE \& R. LIEBMAN, supra note 53, § 6.11, at 372; Yellin, supra note 57, at 121.
  \item \textsuperscript{122} E.g., ALA. CODE § 12-21-166(b) (1986) (“(1) to make a confession, (2) to seek spiritual counsel or comfort, or (3) to enlist help or advice in connection with a marital problem”); LA. REV. STAT. ANN. § 15-477 (West 1981) (“seeking his spiritual advice or consolation”); MO. REV. STAT. § 491.080(4)(a) (1986) (“professional capacity as a spiritual advisor, confessor, counselor or comforter”); ME. R. EVID. 505(b) (“professional character as spiritual advisor”).
  \item \textsuperscript{123} See Burger v. State, 238 Ga. 171, 172, 231 S.E.2d 769, 771 (1977) (statement to cleric, a “friend and frequent companion,” of intent to kill wife and her lover not privileged); Wainscott v. Commonwealth, 562 S.W.2d 628, 633 (Ky.) (no privilege for comments to a minister as a friend), cert. denied, 439 U.S. 868 (1978); Blossi v. Chicago & N.W. Ry., 144 Iowa 697, 713, 123 N.W. 360, 367 (1909) (minister acting “as a friend and interpreter”).
  \item \textsuperscript{126} See State v. Berry, 324 So. 2d 822, 829-29 (La. 1975) (no privilege for admissions made to minister present when defendant came to pawn a watch because primary purpose of visit not to seek spiritual advice), cert. denied, 425 U.S. 954 (1976).
  \item \textsuperscript{127} See Simrin v. Simrin, 233 Cal. App. 2d 90, 94, 43 Cal. Rptr. 376, 378-79
\end{itemize}
test. In such sensitive and controversial contexts, the religious community, sensing encroachment on its free exercise of religion, bristles at the state’s attempts to define ministerial roles.

2. Who is a “Confider”

Most statutes do not specify the person whose confidential communications are protected. A few refer to the “penitent” or “confessant” but most refer simply to “any person” or use the passive voice to avoid defining the confider. Thus, in most states, any person who makes the prescribed type of disclosure to the prescribed type of cleric may claim the privilege. Although a few statutes seem to require that the confider be a member of the cleric’s church, few policy reasons support such a strict requirement and most states probably would reject it.

(1965) (dicta that no privilege exists for rabbi marriage counseling under statute).


130. See id. at 111-16 (state definition of “church” or “minister” would constitute establishment of the groups meeting the definition); Note, supra note 120, at 525 (positing that “to deny the privilege is to prohibit the free exercise of religion”). Cf. In re Murtha, 115 N.J. Super. 380, 386, 279 A.2d 889, 892 (finding teaching nun’s ministry did not include religious functions of a priest), cert. denied, 59 N.J. 239, 281 A.2d 278 (1971).

131. Kansas, however, is uniquely specific: “[P]enitent” means a person who recognizes the existence and the authority of God and who seeks or receives . . . advice or assistance in determining or discharging his or her moral obligations, or in obtaining God’s mercy or forgiveness for past culpable conduct.

KAN. STAT. ANN. § 60-429(a) (1983).

132. E.g., CAL. EVID. CODE § 1031 (West 1966); UTAH CODE ANN. § 78-24-8(3) (Supp. 1986). See also MODEL CODE OF EVIDENCE Rule 219 (1942) (set out supra note 85).

133. E.g., NEV. REV. STAT. § 49.255 (1985).

134. E.g., COLO. REV. STAT. § 13-90-107(c) (1973); FLA. STAT. ANN. § 90.505 (1985).

135. E.g., IND. CODE ANN. § 34-1-14-5 (Burns 1986); MICH. COMP. LAWS ANN. § 600.2156 (West 1986).


137. “The clergyman’s door should always be open; he should hear all who come, regardless of their church affiliation.” In re Swenson, 183 Minn. 602, 604, 237 N.W. 589, 590 (1931). Accord Kohloff v. Bronx Sav. Bank, 37 Misc. 2d
3. Nature of the Consultation

The clergy privilege originated to shield a specific and easily identifiable type of communication: auricular confession of sin to a priest pursuant to the Roman Catholic sacrament of penance. Such limited scope is unthinkable in a religiously pluralistic nation that is constitutionally forbidden to prefer one religion over another. Consequently, regardless of the privilege’s origin, no modern statute limits the clergy privilege to Roman Catholics. Whether the privilege is nevertheless restricted to penitential communications, however, is less clear. By extending the privilege beyond its origins, the law assumes the difficult task of distinguishing among types of consultations with clergy.

The statutes run the gamut on the issue of whether the clergy privilege is restricted to penitential communications. Some statutes apparently do limit the privilege to penitential communications by, for example, mentioning only “confessions” or “admissions.” One statute expressly restricts the privilege to “a confession of culpable conduct.” The very terms “penitent” and “priest-penitent privilege,” used in many statutes, imply a similar restriction. Other statutes go further and sweep in any communications made for the purpose of seeking spiritual advice or comfort. Several other statutes use the term “penitential communication” but proceed to de-
fine that term without restrictions as to content.145 Many statutes simply cover any confidential communication to a cleric in his professional capacity146 or "necessary and proper to enable [the cleric] to discharge" his assigned functions.147

The precise statutory language becomes crucial in deciding whether the privilege takes in communications confided during a counseling session.148 Because most churches do not set aside formal occasions for special private encounters labelled "confession,"149 less formal consultation must be privileged if the privilege is not in effect to be limited to Roman Catholics.150 Obviously, the term "counseling" is much broader than "confession." Likewise, the content of counseling sessions often includes many theoretically distinguishable types of confidential disclosure, including, for example, statements of the confider's past conduct, confessions, expressions of penitence, expressions of anger and other deeply felt emotions, solicitations of advice, personal background information, and statements about the wrongdoing of others.

Furthermore, most churches do not prescribe a ceremonial

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145. E.g., CAL. EVID. CODE § 1032 (West 1966) ("'penitential communication' means a communication made in confidence, in the presence of no third person . . . to a clergyman who . . . is authorized or accustomed to hear such communications and . . . has a duty to keep such communications secret"); MODEL CODE OF EVIDENCE Rule 219 (1942) ("'penitential communication' means a confession of culpable conduct made secretly and in confidence").

146. E.g., CONN. GEN. STAT. § 52-146b (1985) ("confidential communications made to him in his professional capacity"); KY. REV. STAT. ANN. § 421.210(4) (Michie/Bobbs-Merrill Supp. 1986) ("any confession made to him, in his professional character, in the course of discipline enjoined by the church to which he belongs"); OR. REV. STAT. § 40.260 (1985) ("A member of the clergy shall not . . . be examined as to any confidential communication made to the member of the clergy in the member's professional character.").


148. See generally S. STONE & R. LIEBMAN, supra note 53, § 6.12, at 373-74 (contrasting restrictive statutes that protect only penitential communications with expansive statutes that protect all conversations by persons seeking spiritual advice); W. TIEMANN & J. BUSH, supra note 5, at 155-59, 191 (outlining the confidant's role in marital and pastoral counseling); Reese, supra note 57, at 71-72 (distinguishing Catholic confession from marriage counseling); Yellin, supra note 57, at 123-26 (arguing that marriage counseling falls within the clergyman's professional character).


order for the confidential encounter between a person and his client. A typical counseling session will be an unpredictable, often emotional, welter of several types of communication. It is practically impossible to untangle the various strands of communication and make only some privileged. Even if some distinctions could be drawn, there are at least two reasons for the law not to draw its distinctions too finely. First, the same information may be included in several intermingled types of communication. It makes little sense, for example, to shield a person’s confession of a sinful act but to unveil the subsequent discussion of how the penitent might redress his wrongs. Second, even if a counseling session could be severalized by type of communication, no good reason supports holding some types privileged and others not. No rationale for the clergy privilege is limited to penitential statements only.\textsuperscript{151} Therefore, as long as the confider consults the cleric in the cleric’s professional capacity and in confidence, the law should not put its ear to the keyhole.\textsuperscript{152}

A few states expressly extend the privilege to counseling generally\textsuperscript{153} or to marriage or family counseling specifically;\textsuperscript{154}

\begin{enumerate}
\item[151.] See infra notes 210-82 and accompanying text (discussing rationales for the privilege). \textit{But see} Knapp & VandeCreek, supra note 149, at 293-96 (arguing that clergy’s lack of training and experience in counseling is reason not to extend privilege beyond confessions).
\item[152.] For similar reasons, the clergy privilege should shield the minister’s advice as well as the penitent’s comments. A few statutes do indicate that the privilege covers the discussion flowing in both directions. \textit{E.g.}, \textsc{Ala. Code} \textsection 12-21-166(b) (1986) (privilege extends to “anything said by either party”); \textsc{Md. Cts. & Jud. Proc. Code Ann.} \textsection 9-111 (1984) (privilege extends to “any matter in relation to any confession or communication” made to cleric); \textsc{Mass. Ann. Laws} ch. 233, \textsection 20A (Law. Co-op. 1986) (privilege extends to the cleric’s advice); \textsc{N.J. Stat. Ann.} \textsection 2A:84A-23 (West Supp. 1986) (privilege extends to “relations and communications between and among” the cleric and confider). Most statutes, however, by their terms seem to protect only communications to the cleric. \textit{See, e.g.}, \textsc{Ariz. Rev. Stat. Ann.} \textsection 13-4062(3) (Supp. 1986) (“confession made to” cleric); \textsc{Ark. R. Evid.} 505(b) (“communication by the person to a clergymen”).
\item[153.] \textit{E.g.}, \textsc{Fla. Stat.} \textsection 90.505(1)(b) (1985) (“for the purpose of seeking spiritual counsel”); \textsc{Mo. Rev. Stat.} \textsection 491.060(4) (1986) (“communications made to him . . . as a counselor”).
\item[154.] Alabama’s statute, for example, extends to confidential communications “to seek spiritual counsel or comfort” or “to enlist help or advice in connection with a marital problem.” \textsc{Ala. Code} \textsection 12-21-166(b) (1986). In 1981, the New Jersey legislature added the following to its otherwise typical statute: “nor shall [a cleric] be compelled to disclose the confidential relations and communications between and among him and individuals, couples, families or groups with respect to the exercise of his professional counselling role.” \textsc{N.J. Stat. Ann.} \textsection 2A:84A-23 (West Supp. 1986). The District of Columbia statute protects communications to a cleric “by either spouse, in connection with [any]
others imply such an extension. In addition, statutes with broad definitions of privileged communications, such as those that cover any confidential communication to a cleric in his professional capacity, should cover counseling sessions. Although such statutes' failure specifically to mention counseling may leave room for an argument that particular types of counseling are not part of a cleric's professional capacity, the better view is that most counseling, especially marriage counseling, is a part of most clergy's ministry. In any event, a court should resist defining a cleric's ministry more narrowly than it is defined by the cleric's church or by the cleric.

Although the statutes differ as to the types of consultations that are protected, all versions of the clergy privilege require effort to reconcile estranged spouses." D.C. CODE ANN. § 14-309(3) (1981). Delaware's statute contained substantially the same provision before 1981. DEL. CODE ANN. tit. 10, § 4316(3) (1975), repealed by 63 Del. Laws ch. 62, § 1 (effective June 30, 1981).

155. See supra note 146 and accompanying text.

156. "Marriage counselling seeking to preserve the sanctity of marriage is most important and is definitely within the functions and duties of a minister. It is to be encouraged rather than discouraged." Le Gore v. Le Gore, 31 Pa. D. & C. 2d 107, 108 (1963).

Although there is much authority for extending the privilege to counseling generally, the limited case authority is split on the question of extending the privilege to marriage counseling involving both spouses. Compare Simrin v. Simrin, 233 Cal. App. 2d 90, 94-95, 43 Cal. Rptr. 376, 378-79 (1965) (no privilege under California's now superseded statute, but rabbi not compelled to disclose because of agreement of confidentiality among all parties) with Kruglikov v. Kruglikov, 29 Misc. 2d 17, 18, 217 N.Y.S.2d 845, 847 (1961) (privilege applies), appeal dismissed, 16 A.D.2d 735, 226 N.Y.S.2d 931 (1962). Such joint marital counseling seems to run afoul of several requirements in the narrower privilege statutes. First, it is not necessarily penitential. Second, it is not "confidential" if the presence of a third party destroys confidentiality, see infra text accompanying notes 160-67. Third, it is seldom enjoined by the discipline of a church. But see Reese, supra note 57, at 72 (Episcopal church requires marital counseling if "marital unity is imperilled"). Yet a distinction between counseling and confession seems unwisely artificial.

New Hampshire has defined a class of clergy that it designates "pastoral counselors." See N.H. REV. STAT. ANN. § 330-A:16-c (1984). To be state certified, a cleric must meet statutory education and training requirements. See id. A client's communications to a pastoral counselor are privileged under the special privilege statute for certified psychologists. N.H. REV. STAT. ANN. § 330-A:19 (Supp. 1986). The state code also includes a typical privilege statute for uncertified clergy. See id. § 518.35 (privilege for clergy generally). The constitutionality of regulation of pastoral counseling is questionable. See Comment, Clergy Malpractice: Bad News, supra note 49, at 242-44 ("Pastoral counseling although religiously motivated, is not absolutely protected [by] the first amendment. The clergyman's first amendment protection is subject to be outweighed by the state's duty to protect its citizens." Id. at 253.).
that the privileged communication be confidential. If the communication is considered confidential if the circumstances reasonably indicate the confider's expectation of secrecy. If, however, the confider did not expect or intend secrecy, the privilege does not apply.

This requirement of an expectation of confidentiality leads to a corollary rule: the presence of third persons during the communication destroys the privilege. Although this "third person rule" is generally sound, it sometimes does, and arguably should, yield to exceptions for some types of third persons, such as eavesdroppers, custodians of persons in legal custody.
persons necessarily assisting the cleric and cocounselees. When one of these types of persons hears the communication, the confider's expectation of secrecy usually remains undiminished.

The presence of a cocounselee raises issues especially likely to arise in child abuse cases, where two or more family members might seek ministration together. If the third person rule applies, communications to a cleric are not privileged if the confider of no third person so far as the penitent is aware. CAL. EVID. CODE § 1032 (West 1966) (emphasis added).

A person who is incarcerated, under arrest, or civilly confined may be too closely supervised to communicate with his cleric out of earshot of his custodian. Although precedent on this matter is slight, the two reported cases disagree about the legal effect of the custodian's presence. The Ninth Circuit held that the presence of a security guard destroyed the confidentiality of a communication by a prisoner to the prison chaplain and, therefore, that the clergy privilege did not apply. United States v. Webb, 615 F.2d 828, 828 (9th Cir. 1980). A New York county court, however, held on similar facts that the privilege applied. The court suggested that either arrangements should be made to allow an arrested suspect to communicate privately with a cleric or the custodial officer should "retreat to a safe distance" so as not to overhear. People v. Brown, 82 Misc. 2d 115, 120, 368 N.Y.S.2d 645, 650-51 (1974). In Brown, the arrested murder suspect had repeatedly refused during interrogation to confess the murder. He then telephoned his minister and immediately blurted out, in the presence of a police officer, "Bishop Hicks, praise the Lord, I need your prayers, I have killed a man." Id. at 650. The court held that statement privileged. Id. at 651.

Arguably, there should also be an exception to the third person rule for persons needed to assist the cleric in receiving the confider's words. See In re Verplank, 329 F. Supp. 433, 436 (C.D. Cal. 1971) (lay draft counselors needed to assist minister); Reutkemeier v. Nolte, 179 Iowa 342, 350, 161 N.W. 290, 293 (1917) (elders and deacons present); Yellin, supra note 57, at 150 (explicit provision preserving privilege for communications resolves ambiguity). Many statutes do make exceptions for "persons present in furtherance of the communication." E.g., FLA. STAT. § 90.505(1)(b) (1985) (communication "not intended for further disclosure except to other persons present in furtherance of the communication"); OR. REV. STAT. § 40.260 (1985) ("'Confidential communication' means a communication made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication."); Wis. STAT. ANN. § 905.06 (West 1979-1980) ("A communication is 'confidential' if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication."). Mississippi's statute excepts the clergyman's secretary, stenographer, and clerk. MISS. CODE ANN. § 13-1-22(4) (Supp. 1986). These exceptions, too, seem consistent with the purpose of the confidentiality requirement.

Roman Catholic law, for example, extends the duty of secrecy to interpreters and all persons who may have acquired knowledge of confession in any way. See 2 J. ABBO & J. HANNAH, THE SACRED CANONS 17 (1960) (translation of The CODE OF CANON LAW Canon 889 (1918)). See also id. at 18 (Canon 890 forbidding a confessor to use to the detriment of the penitent any knowledge acquired from confession even though there is no danger that the penitent or his sin will be known).
fider seeks counsel jointly with someone else, for example, a spouse. The reasons for the clergy privilege do not abate, however, when a cleric undertakes joint counseling. On the contrary, family counseling is often equally private but more effective when the cleric can work with family members together. Thus, in this specialized context, the presence of a third party should not vitiate the privilege. Accordingly, by expressly extending the privilege to marriage or family counseling, a few statutes do seem to reach this result.

Another important issue in child abuse cases is whether the clergy privilege extends to personal observations by the cleric. An abused child might confide something to a minister without mentioning abuse, yet the minister might observe suspicious symptoms of abuse. Similarly, a minister might notice in an abuser some telltale demeanor that corroborates a suspicion. Although the statutes do not directly address the question whether such observations are privileged, most of them specifically protect confessions, communications, or admissions and thereby suggest by omission that there is no protection for noncommunicative information acquired in the course of discussion. Case law, although sparse and vague on this point, suggests a distinction between a cleric's observation of communicative conduct, which is privileged, and his observation of noncommunicative conduct, which is not. Furthermore, a

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167. See supra note 154.


169. See, e.g., Snyder v. Poplett, 98 Ill. App. 3d 359, 363-64, 424 N.E.2d 396, 400 (1981) (not "all communications made to clergymen are necessarily protected from disclosure . . ."); State v. Kurtz, 564 S.W.2d 856, 860-61 (Mo. 1978) (personal observations may be admissible as distinguished from direct communications); In re Williams, 269 N.C. 68, 76-77, 152 S.E.2d 317, 324 (North Carolina statute providing that no minister be required to testify in suit concerning any information communicated to him does not justify refusal to be sworn and testify in a criminal suit when no objection to proposed testimony is advanced), cert. denied, 388 U.S. 918 (1967). Contra Commonwealth v. Zezima, 365 Mass. 238, 341-42, 310 N.E.2d 590, 592 (1974) (scope of privilege extends beyond simple conversation). See also S. Stone & R. Liebman, supra note 53, § 6.09; Yellin, supra note 57, at 151.
cleric's observation of a person's condition or state of mind is not privileged. Apparently, then, the privilege does not extend to a cleric's seeing the bruises or the flinching of an abused child unless a person confiding in the cleric showed the cleric these things to communicate a point.

Finally, many statutes require that the privileged communication be made "in the course of discipline enjoined by the rule or practice of such [church or] denomination." Such a requirement has proven troublesome for several reasons. First, many statutes fail to clarify whether the requirement refers to the discipline of the confider's or the cleric's church. Second, and related, many statutes fail to clarify 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. Such sloppy drafting leaves unanswered the question of the privilege's application to most confidential communications to most clergy! Few churches require their members to make private confessions to clergy; probably none require their members to seek counseling. Many, however, require, at least implicitly, that their clergy be available to receive voluntary confessions or to counsel trou-

170. For examples of cases finding a cleric's observations not privileged, see Estate of Toomes, 54 Cal. 509, 516 (1880); Buuck v. Kruckeberg, 121 Ind. App. 262, 268-69, 95 N.E.2d 304, 306-07 (1950); Kurtz, 564 S.W.2d at 860-61.

171. MICH. COMP. LAWS ANN. § 600.2156 (West 1986). See also CAL. EVID. CODE §§ 1032-1034 (West 1979); FLA. STAT. ANN. § 90.505 (West 1979); ILL. ANN. STAT. ch. 110, § 8-803 (Smith-Hurd 1982).

172. See S. STONE & R. LIEBMAN, supra note 53, § 6.10; Reese, supra note 57, at 67-73; Yellin, supra note 57, at 126-37.

173. See, e.g., IND. CODE ANN. § 34-1-14-5 (Burns 1986) ("The following persons shall not be competent witnesses: ... Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches."); see also Ball v. State, 419 N.E.2d 137, 139-40 (Ind. 1981) (suggesting confession must be pursuant to discipline of cleric's church).

174. Compare Sherman v. State, 170 Ark. 148, 151, 279 S.W. 353, 354 (1926) (privilege not applicable unless church discipline requires members to confess sins) with In re Swenson, 183 Minn. 602, 605-06, 237 N.W. 589, 591 (1931) (privilege applies if church discipline either requires member to disclose or requires the cleric to receive the communication).

175. A privilege limited to churches that require private confession to a cleric would be limited primarily to the Roman and Eastern Orthodox churches and possibly some Lutheran churches. For discussion of this issue and "mainline" denominations' requirements, see In re Estate of Soeder, 7 Ohio App. 2d 271, 300, 220 N.E.2d 547, 567-68 (1966); Reese, supra note 57, at 68; Smith, supra note 57, at 14; Yellin, supra note 57, at 128-30. Even the Roman Catholic church requires only one confession a year. Would subsequent confessions therefore be not privileged? See Reese, supra note 57, at 68.
bled people. Many requirements are implicit. It is a matter of common knowledge, and we take judicial notice of the fact, that such "discipline" is traditionally enjoined upon all clergymen by the practice of their respective churches. Under such "discipline" enjoined by such practice all faithful clergymen render such help to the spiritually sick and cheerfully offer consolation to suppliants who come in response to the call of conscience.

In re Swenson, 183 Minn. 602, 605-06, 237 N.W. 589, 591 (1931). The Episcopal church officially requires its clergy to provide marriage counseling to troubled couples. See Reese, supra note 57, at 72.

177. The requirement seems of questionable constitutionality, not only because of its discrimination among religious groups, see infra notes 295-305 and accompanying text, but also because it requires a court to interpret church rules to determine what church discipline requires. Stoyles, supra note 150, at 55; Yellin, supra note 57, at 150. See also Jones v. Wolf, 443 U.S. 595, 602-05 (1979) (disadvantages of analyzing and examining church doctrine in property disputes); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445 (1969) ("special problems arise . . . when [property] disputes implicate controversies over church doctrine and practice"); Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-29 (1872) (discussing favoritism of one religion over another and concluding that "the law knows no heresy, and is committed to the support of no dogma, the establishment of no sect").

178. See CAL. EVID. CODE § 1032 (West 1966); FLA. STAT. § 90.505 (1985).

179. See In re Swenson, 183 Minn. 602, 605-06, 237 N.W. 589, 591 (1931).


The various versions of the clergy privilege produce four distinct schemes of waiver. First, if the statute declares that clergy may not testify as to confidential communications, apparently no one may waive the privilege and the rule is more a rule of competence than of privilege. See, e.g., IND. CODE ANN. § 34-1-14-5 (Burns Supp. 1986); MICH. COMP. LAWS ANN. § 600.2156 (West
gest in various ways, that the clergy privilege "belongs" to the confider because it is waivable only by her. Some statutes simply frame the privilege in terms of a prohibition on examining clergy without the consent of the person making the confession or unless that person waives the privilege. Many other statutes include provisions which allow the privilege to be claimed by the confider, by the confider's guardian or conservator, or if the confider is deceased, by her personal representative. According to those same provisions the clergyman to whom the communication was made is presumed to have authority to claim the privilege, but only on behalf of the communicant.

Supp. 1986). But see infra note 197. Second, if the statute says that a cleric may not disclose without the confider's consent, apparently the confider has the discretion to waive or insist on the privilege. See, e.g., COLO. REV. STAT. § 13-90-107 (1978); MINN. STAT. § 595.02(1)(c) (1986). Third, if the statute states only that clergy shall not be compelled to disclose, the cleric has the discretion to waive or insist on the privilege. See, e.g., MD. CTs. & JUD. PROC. CODE ANN. § 9-111 (1984); VA. CODE ANN. § 8.01-400 (1984). Finally, if a statute says that a cleric shall not be compelled without the confider's consent, then the confider and the cleric both must object to disclosure in order for the privilege to apply. See, e.g., KY. REV. STAT. ANN. § 421.210(4) (Michie/Bobbs-Merrill Supp. 1986). That there are significantly distinct positions may be illustrated with the following chart showing how the four versions would operate in the four possible factual situations that might arise. The chart assumes that, absent a claim of privilege, the cleric must disclose the information.

<table>
<thead>
<tr>
<th>Cleric Willing To Tell; Confider Willing, Too</th>
<th>Cleric Willing To Tell; Confider</th>
<th>Cleric Objects To Telling; Confider</th>
<th>Cleric Objects To Telling; Confider, Objects, Too</th>
</tr>
</thead>
<tbody>
<tr>
<td>clergy may not disclose</td>
<td>no disclosure</td>
<td>no disclosure</td>
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<tr>
<td>clergy may not disclose without confider's consent</td>
<td>disclosure</td>
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<td>disclosure</td>
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<td>clergy may not be compelled to disclose</td>
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<td>clergy may not be compelled to disclose</td>
<td>disclosure</td>
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The implication in these statutes is that the privilege belongs entirely to the confider.\textsuperscript{184} Other persons, including the cleric, may claim the privilege, but only on the confider’s behalf. If, under this view, the confider waives the privilege, the cleric has no remaining right to keep silent. This interpretation accords with the law for other privileges that protect professional relationships: the physician-patient privilege, for example, belongs to the patient\textsuperscript{185} and the attorney-client privilege to the client.\textsuperscript{186}

In contrast, some statutes seem to afford the cleric a privilege in his own right. Only California, however, does so explicitly by providing two statutory privileges: one for the “penitent” and one for the “clergyman.”\textsuperscript{187} Additionally, some other statutes point, albeit less clearly, to a cleric’s independent right to claim the privilege by, for example, framing the privilege in terms of a simple prohibition on compelling clergy to disclose.\textsuperscript{188}

Virginia has enacted such a prohibition against compelling clergy to disclose confidential communications,\textsuperscript{189} and the Fourth Circuit, in the recent case of \textit{Seidman v. Fishburne-Hudgins Educational Foundation, Inc.},\textsuperscript{190} interpreted that statute as vesting the privilege in the cleric instead of in the confider. The court cited three reasons for its interpretation. First, Virginia framed its statute as a prohibition on compelling clergy to disclose.\textsuperscript{191} Second, Virginia’s statute omitted a term, common in other privilege statutes, prohibiting disclosure with-

\textsuperscript{184} The issue of waiver is particularly problematic if the privilege covers counseling sessions involving more than one counselee. After marital counseling, for example, does the power to claim or waive the privilege belong to one or both spouses? The few statutes innovative in extending the privilege to such situations do not agree. The District of Columbia statute, for example, forbids examination of the cleric “without the consent of the spouse making the communication.” D.C. CODE ANN. § 14-309(3) (1981). Alabama’s statute, however, might be read as permitting \textit{either} spouse to prevent the cleric’s disclosing anything said during the counseling session. Yellin, \textit{supra} note 57, at 138. \textit{See} ALA. CODE § 12-21-166(b) (1986). \textit{Cf.} Simrin v. Simrin, 233 Cal. App. 2d 90, 94, 43 Cal. Rptr. 376, 378-79 (1965) (ex-wife wanted rabbi to testify, ex-husband objected, court noted but failed to reach waiver issue).

\textsuperscript{185} \textit{See} S. STONE & R. LIEBMAN, \textit{supra} note 53, § 7.20.

\textsuperscript{186} \textit{Id.} § 1.60.

\textsuperscript{187} CAL. EVID. CODE §§ 1030-1034 (West 1966). \textit{See also} ALA. CODE § 12-21-166(b) (1986) (“\textit{either such person or the clergyman shall have the privilege}”).

\textsuperscript{188} \textit{See}, e.g., Md. CTS. & JUD. PROC. CODE ANN. § 9-111 (1984).

\textsuperscript{189} VA. CODE ANN. § 8.01-400 (1984).

\textsuperscript{190} 724 F.2d 413 (4th Cir. 1984).

\textsuperscript{191} \textit{Id.} at 415.
out the consent of the confider.\textsuperscript{192} Third, Virginia's privilege statutes for physicians and psychologists \textit{did} contain such a consent provision.\textsuperscript{193} Taken together, these facts led the court to conclude that Virginia's statute "invests the priest with the privilege and leaves it to his conscience to decide when disclosure is appropriate."\textsuperscript{194} According to this interpretation, the confider lacks standing to object to the cleric's decision either way.\textsuperscript{195}

Other statutes simply declare that clergy are not competent to testify as to certain communications.\textsuperscript{196} Statutes worded as a rule of competency, rather than as a rule of privilege, suggest that no one has the choice to waive the privilege.\textsuperscript{197} Missouri's statute takes this approach,\textsuperscript{198} and a federal district court recently interpreted such a statute to allow a cleric to claim the privilege in his own right.\textsuperscript{199}

Still other statutes offer little guidance on the issue of who

\begin{itemize}
\item \textsuperscript{192} _Id._ at 415-16.
\item \textsuperscript{193} _Id._ at 416 n.2.
\item \textsuperscript{194} _Id._ at 416.
\item \textsuperscript{195} _Id._ ("[Plaintiff] has no standing to object to the introduction of the priest's deposition into evidence or its use during cross-examination.").
\item \textsuperscript{196} \textit{See, e.g.}, GA. CODE ANN. § 24-9-22 (Supp. 1986) ("[N]o such minister, priest, or rabbi shall disclose . . . nor shall such minister, priest, or rabbi be competent or compellable to testify."); IND. CODE ANN. § 34-1-14-5 (Burns 1986) (clergy not "competent witnesses" as to confessions); MICH. COMP. LAWS ANN. § 600.2155 (West 1986) ("[no cleric] shall be allowed to disclose"); MO. REV. STAT. § 491.060(4) (1986) (cleric "incompetent to testify"). \textit{But see} People v. Lipsczinska, 212 Mich. 484, 493, 180 N.W. 617, 620-21 (1920) (suggesting waivable by confider).
\item An interesting question is whether a cleric who discloses despite the confider's objection, or despite a statute framed as a prohibition on disclosure of certain communications, may be penalized for "violating" the privilege statute. \textit{See} Reese, \textit{supra} note 57, at 79-80. Only Tennessee's statute provides a statutory penalty in such a case. Any cleric "violating the provisions of this section, shall be guilty of a misdemeanor and fined not less than fifty dollars ($50.00) and imprisoned in the county jail or workhouse not exceeding six (6) months." TENN. CODE ANN. § 24-1-206(d) (1980). \textit{Cf.} WASH. REV. CODE § 26.44.060(3) (1985) (reporting child abuse not deemed "violation" of privilege statutes). In the absence of such a provision, criminal penalties surely could not be imposed. Reese, \textit{supra} note 57, at 80. Success in a civil action by the confider against the disclosing cleric also seems remote, especially in light of the difficulties of establishing a contract or a tort duty in the cleric-confider relationship. \textit{Id.} See also \textit{supra} note 49 for literature on clergy malpractice.
\item On the other hand, even rules of incompetency may be waivable in the sense that they are not recognized unless asserted. \textit{See} MCCORMICK, \textit{supra} note 94, §§ 73, 74.1.
\item \textsuperscript{196} \textit{Id.} at 416.
\item \textsuperscript{197} Mo. REV. STAT. § 491.060(4) (1986).
\item \textsuperscript{198} \textit{Eckmann v. Board of Educ. of Hawthorn School Dist. No. 17, 106 F.R.D. 70, 73 (E.D. Mo. 1985).}
\end{itemize}
may claim or waive the clergy privilege and so leave room to argue that a cleric's claim of privilege survives the confider's waiver. As two commentators recently said: "It is questionable whether a court would compel the clergyman to testify in violation of a religious duty to maintain confidentiality." 200 Several good reasons support recognition of an independent claim of privilege for the cleric not waivable by the confider. 201 If the privilege rests on a desire to foster the clergy-penitent relationship because of the relationship's value to society, 202 arguably, the prospect of the government unveiling confidential discussions would deter a cleric from giving her most effective counsel. 203 Alternatively, if the privilege rests on a respect for privacy, 204 one could argue that the cleric is a partner to the intimate relationship and shares an interest in privacy, an interest undiminished by being a function of the cleric's profession. 205 Even apart from the psychological offense that accompanies an invasion of privacy, the cleric may suffer harm from the diminished effectiveness of his ministry. In addition, if the confider alone may choose to claim or waive the privilege, the confider can manipulate that power to unfair advantage in litigation. 206 Finally, if the privilege is grounded in the free ex-

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201. See Yellin, supra note 57, at 137.
202. See infra text accompanying notes 219-37.
203. As just one example: pastoral counselors are sometimes encouraged to share personal matters about themselves.

There are times when it is important for you to share things about yourself . . . . The sharing of your own internal process is an important part of building a relationship. For therapists this process of self-disclosure must be used judiciously, but it can contribute in important ways to trust.

204. See infra text accompanying notes 238-75.
205. See supra note 203.
206. Reese, supra note 57, discusses the potential for manipulation:

Statements in confessions could be inaccurate, and could be intended to mislead, if an unscrupulous confessant thought the statements could be used later in a trial. Due to the belief in the usual truthfulness of facts told during the confession, the testimony of a clergyman concerning the confession might be given too much weight in reaching a finding. Suppose that in a state where there is no privilege, two men, Mr. Badd and Mr. Worse, plan to hold up a small store in a residential neighborhood. Badd pleads with Worse not to take a pistol along, but to no avail. In the hold-up, Worse shoots the old storekeeper. Thereafter, Worse goes to confession and, instead of submitting to the priest his murder of the old man, confesses that he drove the car to the holdup scene and, although he pleaded with Badd not to
exercise of religion, some privilege belongs to the cleric by constitutional right.

A recent opinion, Eckmann v. Board of Education of Hawthorn School District No. 17, interpreted Missouri's clergy privilege statute to give clergy the right to claim or waive the privilege and also decided that, under federal common law, the privilege belongs to the cleric. Acknowledging that federal courts had not previously reached that conclusion, the court nevertheless stated that federal courts look to state law for "guidance and tradition" in developing the law of privilege, and that most state statutes vest the privilege in the cleric. Thus, with little policy discussion, the court concluded that the privilege belongs to the cleric and cannot be waived by the confider. Although the Eckmann court would have trouble substantiating its assertion that most state statutes vest the privilege in the cleric, still, the opinion points the federal law of privilege in an important new direction.

D. RATIONALES FOR THE CLERGY PRIVILEGE

The clergy privilege is primarily a rule of evidence. Society, working through its courts, has a right to every person's evidence. More than three centuries of law resoundingly confirm this claim, and against that background any privilege, as Wigmore explained, is "distinctly exceptional." Furthermore, most rules concerning admissibility of evidence serve to

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kill the man, Badd nevertheless did it, and then Worse drove him away from the scene. This confession and admission of guilt to being an accessory before and after the fact, made as a means of shifting the blame for the actual murder from himself to Badd, might be rather potent evidence.

Id. at 82-83. In a later passage, Reese writes:

The waiver privilege could also be the instrument of abuse by a scheming, wilful, and debased person. He could confess a number of different versions to a number of different priests and then waive the privilege for the one who best suited his purpose but not waive it for the priests who would not serve his purpose.

Id. at 85.

207. See infra text accompanying notes 276-82, 385-496.
209. Id.
210. But see infra text accompanying notes 338-380.
211. 12 COBBETT'S PARLIAMENTARY HISTORY 693 (1812) (quoted in J. WIGMORE, supra note 53, § 2192); see also Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961) ("Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law.").
212. J. WIGMORE, supra note 53, § 2192, at 64.
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exclude irrelevant or unreliable evidence; they aim at educing

truth.213 Rules of privilege are, however, what Wigmore called

rules of "extrinsic policy [because] some consideration extrinsic
to the investigation of truth is regarded as more important and

overpowering."214 Because in principle these rules of privilege
work at cross-purposes with the quest for truth in the individual
case,215 the rules are and ought to be strictly construed and

a privilege recognized only where the extrinsic policy is both
important and necessarily implicated.216

A survey of possible extrinsic policy rationales for the
clergy privilege should show the shape and strength of the priv-
ilege, as well as its weak spots where an exception might or
should break through.217 The following discussion considers
three rationales for the privilege: society's interest in fostering
the clergy-confider relationship, privacy rights in that relation-
ship, and free exercise of religion.218

213. See McCormick, supra note 94, § 72.
214. J. Wigmore, supra note 53, § 2176, at 3; see also McCormick, supra
note 94, § 72.
215. An exception is the attorney-client privilege, one purpose of which is
to encourage full disclosure to one's attorney so that the attorney can most ef-
fectively represent the client, so that, in turn, the adversarial system will work
best and truth will out. See J. Wigmore, supra note 53, § 2291.
216. See id. §§ 2175, 2192. See also Trammel v. United States, 445 U.S. 40,
50 (1980) (stating that exclusionary rules and privileges are contrary to the es-

dablished principle that the public is entitled to every man's evidence); United
States v. Nixon, 418 U.S. 683, 709-10 (1974) ("Whatever their origins, these ex-
ceptions to the demand for every man's evidence are not lightly created nor
expansively construed, for they are in derogation of the search for truth." Id.
from attending or, having attended, giving testimony are recognized by all
courts. But every such exemption is grounded in a substantial individual in-
terest which has been found, through centuries of experience, to outweigh the
public interest in the search for truth."). These commonly encountered asser-
tions rest on the state's long-established interest in securing all available evi-
dence for trials. The state does not have a similarly long-established interest
in its citizens submitting reports of suspected abuse.
217. See generally Reese, supra note 57, at 60-61 and Yellin, supra note 57,
at 108-14 (discussing rationales for clergy privilege).
218. Another very practical reason for the clergy privilege may be the sim-
ple recognition that many clergy would refuse to divulge confidential commu-
nications regardless of the existence of a privilege. See Cimijotti v. Paulsen,
219 F. Supp. 621, 626 (N.D. Iowa 1963) ("priests would be subjected to infamy
and disgrace if they disclosed communications which they have sworn to keep
secret"); Reese, supra note 57, at 60, 68-69, 81 ("Not only is church policy and
doctrine clear, but the statements of individual clergy are uniform, adamant
and audacious—the same throughout the western world. They will not tes-
stify!" Id. at 69.); Regan, supra note 60, at 3 (elaboration on Roman Catholic
position); Southard, A Response, 39 J. Pastoral Care 101, 106 (1985) (re-

dressing to Knapp & VandeCreek, supra note 149, and discussing Biblical au-
1. Fostering the Clergy-Confider Relationship

The most commonly offered rationale for the clergy privilege is society's desire to foster the clergy-confider relationship. Several evidentiary privileges, including the physician-patient privilege, the attorney-client privilege, and the marital communication privilege, are thought to foster special relationships between persons by shielding communications within those relationships.\textsuperscript{219} The law has determined that, in the long run, society gains more by fostering such relationships than it gains from disclosure of communications within those relationships.\textsuperscript{220} Those who rely on this utilitarian or instrumental rationale frequently have recourse to Wigmore's famous four prerequisites for recognizing an evidentiary privilege:

\begin{enumerate}
  \item The communications must originate in a \textit{confidence} that they will not be disclosed.
  \item This element of \textit{confidentiality must be essential} to the full and satisfactory maintenance of the relation between the parties.
  \item The \textit{relation} must be one which in the opinion of the community ought to be sedulously \textit{fostered}.
  \item The \textit{injury} that would inure to the relation by the disclosure of the communications must be \textit{greater than the benefit} thereby gained for the correct disposal of litigation.\textsuperscript{221}
\end{enumerate}

The first requirement is met by the very definition of the clergy privilege. Communications not intended to be confidentiality for confession and various denominations' historical positions on secrecy); Yellin, supra note 57, at 110-11 ("Another reason for according ministers the privilege is that we are, in fact, recognizing the inevitable, that ministers will refuse to testify, despite the potential punitive sanctions the court may impose." Id. at 110.). Although not all clergy are bound to secrecy by church discipline or personal conscience, and although disclosure requirements might serve a teaching function even if all clergy refused to comply, still, solicitude for those clergy who would refuse to disclose is surely part of the reason for the privilege. This explanation should not, however, be elevated to a justification, because it rests at bottom on the awkward assertion that the law should not impose a requirement on persons who will not comply. What is important is why some clergy would not comply and the strength of their reasons.

\textsuperscript{219} See MCCORMICK, supra note 94, § 72.

\textsuperscript{220} It has been said that the benefit from the privilege "overbalances the possible benefit of permitting litigation to prosper." Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir. 1958) (Fahy, J., concurring).

tial simply do not fall within the privilege.\textsuperscript{222}

Wigmore's second requirement, that confidentiality be crucial to the "full and satisfactory maintenance of the relation" between cleric and confider, is seldom questioned. The common assumption is that a threat of disclosure would seriously impair the quality, if not also the quantity, of troubled persons' communications with clergy.\textsuperscript{223} Even when church rules require confession or other consultation with clergy, one would expect a lack of confidentiality to inhibit seriously such consultation.

Some critics might see a weakness in the lack of empirical data to verify the assumption that the absence of confidentiality would inhibit consultation. Robert Weisberg and Michael Wald, for example, have criticized the string of unsubstantiated assumptions underlying Wigmore's "instrumental" rationale for privileges:

Measuring the instrumental argument for privileges ... would seem to call for empirical research, but such research has rarely been attempted. Rather, the [law of privilege has] evolved, or stumbled along, as legislatures and courts have made fairly crude general guesses about social behavior, and have responded to an uncertain mixture of unsupported instrumental assertions and the politics of professionalism.\textsuperscript{224}

\textsuperscript{222} See supra notes 157-67 and accompanying text.

\textsuperscript{223} The conclusion that confidentiality is essential to the clergy-confider relation is frequently assumed and widely promoted.

And it is the common judgment of moralists and ethicists that individuals in [distress of soul or mind or body] would be restrained from seeking ... assistance—with incalculable harm to society—if they had no assurance that their confidences would not be betrayed by those persons to whom they might appeal for help.

Regan, supra note 60, at 4. See also People v. Phillips (N.Y. Ct. Gen. Sess. 1813), reprinted in 1 CATH. LAW. 199, 207 (1955), abstracted in 1 WESTERN L.J. 109, 112 (1843) (secrecy is "of the essence of penance"); Reese, supra note 57, at 81 ("If the privilege were taken away . . . the work of the church would be greatly hampered and a purely secular society would be well on its way."); Smith, supra note 57, at 1-2 (need for privilege "self-evident"); Comment, Clergy Malpractice: Bad News supra note 49, at 229-30 ("a vital prerequisite for successful counseling"). The Code of Professional Ethics of the American Association of Pastoral Counselors states: "One has an obligation to safeguard information about an individual that has been obtained in the course of the counseling process." Augspurger, Legal Concerns of the Pastoral Counselor, 29 PASTORAL PSYCHOLOGY 109, 110 (1980). Cf. Smith & Meyer, supra note 13, at 358 ("Protecting the communications of therapy [is the] sine qua non for successful therapy.").

\textsuperscript{224} Wiesberg & Wald, supra note 221, at 185. See also McCormick, supra note 94, § 76.2 (questioning whether secrecy encourages disclosure at least when disclosures are required by church); Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 HARV. L. REV. 464,
Weisberg and Wald cited an empirical study that raised doubt about whether the existence of a psychotherapist privilege actually encouraged more persons to engage in psychotherapy or enhanced that therapy’s effectiveness. From this study, Weisberg and Wald concluded that “patients do not directly rely on privilege laws in deciding whether to seek psychotherapy or to be candid with their therapists.” Because in these authors’ view the Wigmore rationale for the psychotherapist privilege rests on mere speculation, they concluded that the psychotherapist privilege ought to yield more readily to courts’ and administrative agencies’ superior need for psychotherapists’ information regarding child abuse. Weisberg and Wald were addressing the psychotherapist privilege rather than the clergy privilege in the context of a concrete state investigation of abuse rather than in the reporting context. Nevertheless, their discussion raises a question whether Wigmore’s second prerequisite for a privilege might be a weak link in the chain of assumptions justifying a privilege on the Wigmore rationale.

On the other hand, this criticism assumes a burden on advocates of a privilege to supply empirical data to support their assumptions. For the clergy privilege, the burden would seem more appropriately placed on those who argue counterintuitively that secrecy is not essential to clergy-confider relationships. Such an argument is difficult to support, especially because the clergy-leading participants in these relationships—have repeatedly insisted on the necessity of confidential-


226. Weisberg & Wald, supra note 221, at 187.
It would be difficult to test how many people fail to come forward for help because they fear disclosure. Furthermore, at issue is not just the number of persons who consult clergy or the number of consultations, but the healing quality of those consultations. Such judgments are especially difficult and inappropriate for religious relationships, which may aim at religious as well as secular values. Perhaps the most salient conclusion from the surge of recent literature on clergy malpractice is that courts are in fact unqualified and in principle disqualified from establishing criteria to assess the quality of clergy-confider consultations. Thus, even in the absence of supporting empirical data, Wigmore’s second requirement appears to be satisfied.

Perhaps a more troublesome question, posed by Wigmore’s third prerequisite for recognizing an evidentiary privilege, is whether the community believes that the clergy-confider relation deserves special solicitude. Wigmore hinted that a lack of this requirement partly explains English law’s long failure to recognize a clergy privilege. In the United States today, however, this requirement seems to be met. It is arguable that the requisite “opinion of the community” is furnished by the free exercise clause, which applies to the states as well as the federal government, and by state constitutional guarantees of religious liberty. Such provisions bespeak the community’s desire to protect clergy-confider relationships as an aspect of many persons’ religious practice. One could also note, without begging the question, that almost every state and the federal government now recognize a clergy privilege on policy grounds, even while apparently believing that it is not constitutionally required. These recognitions impliedly manifest community desire to protect relationships with clergy. However one gauges community opinion, the conclusion seems secure for now that the clergy-confider relation is indeed one which “in the opinion of the community ought to be sedulously fostered.”

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227. See supra note 223.
229. See malpractice literature cited supra note 49.
230. J. WIGMORE, supra note 53, § 2396. This would be especially true in England, he noted, when confession was primarily associated with the disfavored Roman Catholic church. Id.
231. But see Knapp & VandeCreek, supra note 149, at 297-98 (arguing that
The Wigmore rationale does not dictate any particular reasons for a community's desire to foster clergy-confider relationships. One of the community's reasons might be the desire to accommodate religious practices, which accommodation inures many clergy's lack of counseling training and experience suggest community should not sedulously foster counseling relationships with unqualified clergy.

232. Although the reasons for the community's desire to foster relationships with clergy are immaterial under Wigmore's test, those reasons do become relevant under constitutional scrutiny. If the law of clergy privilege rests simply on popular desire to promote a religious relationship, the privilege might violate the establishment clause. See infra notes 283-328 and accompanying text. If, on the other hand, the privilege is an accommodation of religious practice, arguably it is compelled by the free exercise clause. See infra notes 385-496 and accompanying text.

It is possible also that the clergy privilege falls between the two religion clauses. In the space between, where the privilege is commonly thought to reside (neither constitutionally forbidden nor constitutionally compelled), a state may decide on policy grounds whether and how far to accommodate a religious relationship. Such a location for the privilege, in the zone of "permissible accommodation," is, however, somewhat insecure for two reasons. First, the Supreme Court's free exercise and establishment cases have continually shifted the boundaries of that zone. See Estate of Thornton v. Calder, 472 U.S. 703 (1985) (absolute statutory right not to work on one's Sabbath violates establishment clause); Marsh v. Chambers, 463 U.S. 783 (1983) (state-paid chaplain opening legislative sessions not violative of establishment clause); Gillette v. United States, 401 U.S. 437 (1971) (conscientious objection statute constitutional); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding constitutionality of property tax exemptions for church property); Zorach v. Clauson, 343 U.S. 306 (1952) (release of students during school hours for religious instruction neither establishes nor infringes on free exercise of religion). Compare, e.g., Mueller v. Allen, 463 U.S. 388 (1983) (upholding, in effect, Minnesota's income tax deduction for parents incurring expenses of private schools) with Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (invalidating New York's income tax deduction for parents of students in nonpublic schools).

Second, in that space between the religion clauses, the privilege is vulnerable to cultural winds. Much has been written concerning the secularization of American culture. See, e.g., H. Cox, RELIGION IN THE SECULAR CITY (1984) (examining recent resurgence of traditional religion); H. Cox, THE SECULAR CITY DEBATE (D. Callahan ed. 1986) (collection of opinions and criticisms of The Secular City); H. Cox, The Secular City (1965) (influential examination of secularization); A. Greeley, Unsecular Man—The Persistence of Religion (1972) (religious questions becoming "more critical" in modern society); Lyon, Rethinking Secularization: Retrospect and Prospect, 26 REV. OF RELIGIOUS RES. 228 (1985) (appraising meaning of secularization of society). Whether secularization is an inexorable and already mature process in this country, as some have thought, or simply one direction that the wind has blown, it is a process that could threaten the clergy privilege, as indeed it could threaten any "merely permissible" accommodation of religious practice. This is simply to say that the Wigmore rationale for the clergy privilege, unaccompanied by a constitutional right, yokes the privilege to popular opinion and subjects it to the vicissitudes of popular confidence in the benefits of religion and clergy.
in the long run to the community's welfare. A more commonly mentioned reason is the benefit the community derives from the mental, emotional, and spiritual health of its members. One author has written that the privilege is important to the health and stability of the whole society and that it enables people to deal with their problems with positive results. The individual penitent or counselee may receive forgiveness, absolution, advice, and comfort; from these may flow spiritual, emotional, mental, and even physical health. The community benefits from the health of its citizens, and for many persons religion, including confidential consultations with clergy, contributes significantly to that health.

Wigmore's fourth prerequisite for a privilege is that the injury caused to the relationship by disclosure of communications must be greater than the benefit of evidence gained by disclosure. Although Wigmore expressly contemplated a balancing of interests, he did not contemplate weighing clerics' and confidants' interests in confidentiality against specific litigants' interests in the outcome of their litigation. Rather, he contemplated weighing society's interest in clergy-confidant relationships generally against society's interest in access to full information in every litigation. Apparently, Wigmore also had in mind a single conclusive balancing that would determine whether, in the long run, society benefits more from nondisclosure than from disclosure. If so, the privilege should be recognized; if not, the privilege should fail. Wigmore was not advocating ad hoc judicial determinations following every individual claim of privilege. This all-or-nothing approach has been criticized by some who prefer more ad hoc balancing. Such criticism may seem to carry special weight when the claim of privilege would shield evidence of child abuse. A privilege that

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233. See infra text accompanying notes 276-82.
234. See, for example, the preface to Mississippi's clergy privilege statute: "Whereas, the emotional, mental and spiritual health of many of our citizens depends upon the free and confidential access to their clergymen or spiritual advisers..." MISS. CODE ANN. § 13-1-22 note (Supp. 1986). See also Reese, supra note 57, at 81-82 (therapeutic value of consulting clergy).
235. For a discussion of Dean Kelley's Views, see W. TIEMANN & J. BUSH, supra note 5, at 180-81.
236. See MCCORMICK, supra note 94, § 77.
237. See id.; S. STONE & R. LIEBMAN, supra note 53, § 1.01 (attorney-client privilege); Note, The Attorney-Client Privilege, supra note 224, at 464. Such an ad hoc balancing approach is often used to determine whether to sustain a claim of journalist's privilege. See S. STONE & R. LIEBMAN, supra note 53, §§ 8.09-16.
seems to be acceptable in general may appear less so when it withholds crucial evidence of serious abuse of a helpless child. One danger of the ad hoc approach to privileges, however, is its tendency to focus on the palpable need for evidence in the individual case and to neglect more intangible and long-term interests. Even in ad hoc weighing, the balancer must take into account the long-term effects of disclosure on the practice of religion and the benefits the community derives from clergy's contributions to the health of many citizens.

2. Privacy

A few commentators have sought to justify evidentiary privileges in terms of privacy interests. The privacy rationale rests the clergy privilege on each person's interest in the dignity of privacy for his most intimate relationships. A confider who seeks out a member of the clergy for confession and counsel draws on or establishes a soul-baring relationship as deeply intimate as any among family members. There is general repugnance at the law's intrusion into such a relationship.

Weisberg and Wald are among the critics who have objected to resting the traditional evidentiary privileges solely on Wigmore's utilitarian rationale: "Wigmore's instrumental concern has attracted some academic criticism, precisely because he ascribes no independent legal significance to privacy. . . . Many commentators have argued that privacy, as an end and not as a means to instrumental goals, is itself a ground of privilege." Charles Black, for example, positing a privacy rationale instead of a utilitarian rationale for the marital communications privilege, asked:

Is it so obvious that the effect of prior knowledge on conduct is the one and only reason for respecting the privacies of human life? Is it not the intrinsically private character of the relation, and the reciprocal indecency of invading that privacy, rather than the parties' knowledge of the law of evidence, that chiefly justifies confidentiality?


239. Weisberg & Wald, supra note 221, at 191.

240. Black, supra note 238, at 49 (emphasis in original).
Similarly, Black found the physician privilege grounded in "intrinsic decency," which ought not to give way "as soon as somebody files any kind of a non-demurrable complaint." 241

Unlike Wigmore's utilitarian rationale, the privacy rationale justifies the clergy privilege primarily in terms of the participants' interests and not society's benefit—except to the extent that everyone benefits from living in a society in which law does not intrude unnecessarily into people's private lives. 242 Whereas the Wigmore rationale seems to imply that society favors persons confiding in their clergy, the privacy rationale is consistent with society's neutrality or even antipathy toward such confidences. The privacy rationale protects the clergy-confider relationship because the confider, and not society generally, values that relationship. One advantage, then, of the privacy rationale over the Wigmore rationale is that a privacy rationale maintains the privilege even in the face of popular loss of confidence in the clergy. A related advantage of the privacy rationale is that it does not depend on any showing that disclosure of confidences would in fact deter or inhibit relationships with clergy. In other words, the privacy rationale eliminates the need to meet Wigmore's second and third prerequisites for a privilege. 243

One disadvantage of the privacy rationale for the clergy privilege is that it might be cast in terms less sacrosanct than "privacy." 244 For example, one author, writing of the marital

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241. *Id.* at 50.

242. Reporting statutes can also infringe privacy rights of the reported family. Vagueness of statutory criteria for reporting leads to overreporting, and state investigations that do not substantiate the suspicion of abuse have often seriously disrupted the family under investigation. See infra note 475 and accompanying text; Smith & Meyer, *supra* note 13, at 354-55 (60% of child abuse reports are unsubstantiated); *Id.* at 362 (proposal to narrow and clarify statutory definitions of child abuse); Note, *Constitutional Limitations on the Scope of State Child Neglect Statutes*, 79 COLUM. L. REV. 719, 721 (1979) (overbreadth of child neglect statutes).

243. But see Shuman & Weiner, *supra* note 225, at 899, 906-07 (arguing that even privacy rationale for psychotherapy privilege has empirical components because privilege is not absolute and may have to be balanced against other interests).

244. Another disadvantage of the privacy rationale is that, whereas Wigmore's utilitarian rationale points to an absolute privilege, a privacy rationale might be vulnerable to exceptions in cases where the need for the confidential information is strong.

Traditional evidentiary privilege necessarily paints with a broad brush since the achievement of utilitarian objectives requires privileges which are essentially absolute in character. But . . . [if] the object aimed at is not the inducement of conduct in certain relationships but
communications privilege, characterized popular repugnance at revealing confidences between spouses as “mere sentiment,” “courtesy,” and “feelings of delicacy.” Such terminology paved the way for that author to discredit the privilege with the mere quotation of Wigmore’s declaration that the “high and solemn duty of doing justice and of establishing the truth is not to be obstructed by considerations of sentiment.” It was only because the author could see a constitutional basis for the marital communications privilege that she thought the privilege worth keeping at all.

The clergy privilege similarly might be elevated to constitutional status. In 1965, the United States Supreme Court first officially recognized a constitutional right of privacy. The use of the word “privacy” to identify this new doctrine suggests the doctrine’s possible application to confidences reposed in clergy. Such confidences seem eminently “private” in the popular sense of that term. So far, however, the constitutional right of privacy has mostly been confined to rights of autonomy or decision making in such fundamentally personal areas as marriage, procreation, abortion, sexual relations, child-rearing, and medical treatment. The cases provide little authority,

the protection of individual privacy from unnecessary or trivial intrusions, the implementation of the privilege is amenable to the finer touch of the specific solution. Thus, a decision in the particular case that sufficiently grave considerations demand disclosure will, to be sure, impact adversely on the privilege holder, but no more extended societal interest will be impaired.


245. See Note, Pillow Talk, supra note 224, at 138.

246. Id. (quoting J. WIGMORE, supra note 53, § 2228 at 228).

247. The author proceeded to argue that a limited marital communications privilege is compelled by the constitutional right of privacy. See id. at 139-47.


however, for relying on the constitutional right of privacy to keep private information secret.

In 1976, the Supreme Court, in Paul v. Davis,\textsuperscript{250} expressly rejected the argument that the constitutional right of privacy encompasses a right to the confidentiality of private information.\textsuperscript{251} The following year, however, two Supreme Court opinions seemed to say expressly the opposite. In Whalen v. Roe,\textsuperscript{252} the Court acknowledged that the privacy right has two facets: the "individual interest in avoiding disclosure of personal matters," and the individual "interest in independence in making certain kinds of important decisions."\textsuperscript{253} Then, in Nixon v. Administrator of General Services,\textsuperscript{254} the Court quoted from

\begin{itemize}
  \item Stanley v. Illinois, 405 U.S. 645 (1972) (child custody);
  \item Stanley v. Georgia, 394 U.S. 557 (1969) (obscene materials in home);
  \item Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception).
\end{itemize}

\textsuperscript{250} 424 U.S. 693 (1976).

\textsuperscript{251} \textit{Id.} In \textit{Davis}, police had distributed to merchants in the Louisville area flyers showing the pictures and names of persons recently arrested for shoplifting in the area. Edward Davis appeared in the flyers, although he had pleaded not guilty to a charge of shoplifting, the charge was not pursued, and his guilt or innocence was never determined. Davis sued the police for redress of constitutionally secured rights under 42 U.S.C. § 1983. The Supreme Court rejected the argument that his interests fell within constitutionally protected zones of privacy:

His claim is based, not upon any challenge to the State’s ability to restrict his \textit{freedom of action} in a sphere contended to be “private,” but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

\textsuperscript{424} U.S. at 713 (emphasis added).

In Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973), the court rejected an unwed mother’s argument that she had a constitutional right not to divulge to welfare authorities the name of her child’s father. The court held that, given the state’s right to “every man’s evidence,” “no man has any knowlege that is rightly private.” \textit{Id.} at 75 (quoting J. \textsc{Wigmore}, \textit{supra} note 53, § 2192). According to the court, the only constitutional limit on the state’s power to gather evidence is the fifth amendment privilege against self-incrimination. \textit{Id.} at 76. The court also distinguished the unwed mother’s family relationships from the more “durable” ones honored in the Supreme Court’s privacy decisions. \textit{Id.} at 77.

\textsuperscript{252} 429 U.S. 589 (1977). At issue in \textit{Whalen} was the constitutionality of New York’s centralized computer file containing names and addresses of persons who had obtained a physician’s prescription for certain lawful drugs for which an unlawful market also existed. The Court held that New York’s computer file did not pose a sufficient threat to the constitutionally protected privacy interests of either patients or physicians. \textit{Id.} at 603-04.

\textsuperscript{253} \textit{Id.} at 599-600.

\textsuperscript{254} 433 U.S. 425 (1977). In \textit{Nixon}, the Court held that former President Nixon’s “legitimate expectation of privacy in his personal communications” did not suffice to prevent public archivists from hearing and editing tape re-
Whalen to establish that "one element of privacy" is the interest in secrecy for personal matters. The Court even found this right to belong to a figure as public as the President of the United States. Thus, both Whalen and Nixon extended the privacy right beyond autonomy to secrecy. On the other hand, neither case elaborated on the right to secrecy, and neither acknowledged any conflict with Paul v. Davis. Furthermore, the privacy right did not prevail in either case. Rather, in both cases the Court found that under the specific circumstances involved, adequate safeguards were in place to prevent serious threats to privacy interests. Thus, there is room to speculate about the constitutional status of an argument for keeping private information private.

cordings of his telephone conversations. Id. at 465. A federal statute authorized the archivists to examine millions of pages of presidential papers and hear 880 taped recordings made during Nixon's presidency. Nixon pointed out that the tapes included some extremely private conversations with his family, attorney, and clergyman. Nevertheless, the Court found his privacy interest to be even weaker than that involved in Whalen v. Roe. Id. at 458.

255. Id. at 457. The Court spoke partly in terms of privacy as an aspect of the fourth amendment right to freedom from unreasonable searches and seizures. Cf. Note, Protecting Privacy Under the Fourth Amendment, 91 YALE L.J. 313 (1981) (private interest in secrecy and solitude should determine scope of fourth amendment).

256. The concurrences in Whalen v. Roe justify hesitation in proclaiming a new secrecy aspect of the constitutional privacy doctrine. Justice Brennan understood the Court to be recognizing a person's constitutional right to avoid government's disclosure of personal matters, while finding that the right was not "seriously invaded" in Whalen. 429 U.S. at 606-07 (Brennan, J., concurring). On the other hand, Justice Stewart stated that he did not share Justice Brennan's understanding of the holding and opined that a right of secrecy did not follow from the Court's privacy precedents. 429 U.S. at 607-09 (Stewart, J., concurring).

257. In Whalen, the Court found sufficient security against unwarranted disclosure of the collected data. See 429 U.S. at 600-02, 605-06. Similarly, in Nixon, the Court found no significant threat of exposure of personal communications. See 433 U.S. at 465. The Court in Nixon emphasized that the archivists had a record for discretion, and that public access regulations would be sensitive to the exposure of private materials. Id. at 458-59, 465.

258. For example, an open question is whether the right to secrecy is infringed upon by government's obtaining the private information, or government's publicizing the information, or both. If the concern is with government's acquisition of the information, there may be overlap with fourth amendment law on search and seizure. See supra note 255. Another issue open to speculation is whether the zones of secrecy are coextensive with the zones of autonomy, or whether one has a right to keep certain intimate information confidential even if it does not pertain to marriage, procreation, sexual conduct, or family. For a discussion of this issue, see Bazelon, supra note 248, at 611-14; Kurkland, The Private I, U. CHI. MAG. 7, 8 (1976) (quoted in Whalen v. Roe, 429 U.S. at 599); Project, Government Information and the Rights of
Undaunted by the sparsity of precedent, a few commentators and courts recently have suggested that the doctrine of privacy may afford a constitutional basis for a marital communications privilege,\textsuperscript{259} a psychotherapist privilege,\textsuperscript{260} a physician-patient privilege,\textsuperscript{261} and even a parent-child privilege.\textsuperscript{262}


\textsuperscript{260} E.g., Black, supra note 238, at 48-49; Note, Pillow Talk, supra note 224, at 139-47.


The arguments for the marital communications and parent-child privileges point out that the Supreme Court's leading precedents on the right of privacy involved family-related matters. Those precedents, however, involved autonomy and not secrecy in family matters. To bridge the gap between the Supreme Court's decisions and the conclusion that the constitution requires evidentiary privileges for intrafamily communications, one must either argue that disclosure of intrafamily confidences would somehow chill exercise of the right to make fundamental family decisions or, alternatively, argue frankly for a new direction for the right of privacy.263 Similarly, the argument for a constitutional basis for the physician-patient privilege might point to precedent that already extends the right of privacy to medical decision making.264 Again, however, the argument must either show how secrecy protects autonomy or call outright for extending the right of privacy to include some aspects of secrecy.

Extending the privacy doctrine to psychotherapists and clergy requires an even greater leap from precedents involving autonomy. Nevertheless, several commentators and lower courts have suggested that the intimacy of disclosures to psychotherapists justifies constitutional protection for the psychotherapist privilege.265

In fact, the privacy concerns inherent in such professional relationships as the psychotherapist-patient relationship are in some ways even stronger than those accorded constitutional weight, since in the professional relationship the client discloses thoughts and feelings she might well be unwilling or afraid to disclose to her most intimate friends and family members.266

The argument that constitutional protection is warranted in the psychotherapist-patient relationship because of the na-
ture of the disclosures applies as well to confidential communications to clergy. If the privacy doctrine encompasses any rights to secrecy, communications to clergy ought to be at the head of the line of privileges accorded constitutional status. Such communications are characteristically intimate, made with the expectation of secrecy, important to health and well-being, closely tied to the making of fundamental personal decisions, and time-honored.\(^{267}\) Furthermore—and this point is more than a makeweight—it is difficult to talk for long about privacy as a noninstrumental value without using religious terms like "sacred," "sanctity," and "sanctuary."\(^{268}\)

A cleric may encounter difficulty, however, arguing that he personally has a constitutional privacy right, apart from the confider's right, to refrain from disclosing confidences. In *In re Lifschutz*,\(^{269}\) for example, the California Supreme Court stated its belief that a psychotherapist's patients possess a privacy interest which "draws sustenance from our constitutional heritage."\(^{270}\) The court had trouble, however, seeing any independent privacy right of the psychotherapist:

> It is the depth and intimacy of the patients' revelations that give rise to the concern over compelled disclosure; the psychotherapist, though undoubtedly deeply involved in the communicative treatment, does not exert a significant privacy interest separate from his patient. We cannot accept petitioner's reliance on the *Griswold* decision as establishing broad constitutional privacy rights of psychotherapists.\(^{271}\)

The *Lifschutz* court reached this conclusion despite its acknowledgment of a growing consensus that "an environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy."\(^{272}\) Similarly, in *Whalen v. Roe*,\(^{273}\) the United States Supreme Court rejected an argument by physicians that their privacy rights were infringed upon by

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\(^{267}\) In one respect, however, communications to psychotherapists may have a stronger claim to privilege: a greater stigma now probably is associated with consulting a psychotherapist than with consulting a cleric.

\(^{268}\) See, e.g., Weisberg & Wald, *supra* note 221, at 192.

\(^{269}\) 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970). *Lifschutz* held that California's litigant-patient exception to its psychotherapist privilege did not violate the constitutional privacy rights of either psychotherapists or patients.

\(^{270}\) *Id.* at 431, 467 P.2d at 567, 85 Cal. Rptr. at 839. The court held, however, that the litigant-patient exception to the psychotherapist privilege was carefully tailored to serve the state's compelling interest in ascertaining the truth in litigation and thus was constitutional. *Id.* at 432-33, 467 P.2d at 568, 85 Cal. Rptr. at 840.

\(^{271}\) *Id.* at 424, 467 P.2d at 562, 85 Cal. Rptr. at 834 (emphasis in original) (citations omitted).

\(^{272}\) *Id.* at 422, 467 P.2d at 560-61, 85 Cal. Rptr. at 832-33.

New York's practice of maintaining a computer file on persons with prescriptions for certain drugs. The Court reasoned that "[t]o the extent that their claim has reference to the possibility that the patients' concern about disclosure may induce them to refuse needed medication, the doctors' claim is derivative from, and therefore no stronger than, the patients'." Thus, a cleric's privacy claim unallied with the confider's claim might not be accorded constitutional weight.

3. Free Exercise of Religion

A third rationale for the clergy privilege is accommodation of religious practice. Although this rationale is little discussed, it almost certainly underlies the privilege. Bentham, who Wigmore called "the greatest opponent of privileges," justified the clergy privilege on grounds of religious toleration. Wigmore himself wrote that the penitential relation deserves recognition "[i]n a State where toleration of religions exists by law, and where a substantial part of the community professes a religion practicing a confessional system." Furthermore, the first case in the United States to recognize the clergy privilege grounded that privilege in religious liberty. Although the accommodation of religion reflected in the clergy privilege may be partly an accommodation of the religious practices of confid- ers, surely it is also an accommodation of clergy's religious objections to disclosure. Many clergy feel bound by church rule or personal conscience not to betray professional confidences.

274. Id. at 604 (footnote omitted).
275. If the Court held that the constitutional right of privacy included the clergy privilege, a state could not require disclosure of confidential communications to clergy unless it could demonstrate a compelling state interest and the necessity of disclosure to sustain that interest. Caesar v. Mountanos, 542 F.2d 1064, 1067-68 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977); In re Lifschutz, 2 Cal. 3d at 432-33, 467 P.2d at 568, 85 Cal. Rptr. at 840. See Smith, supra note 165, at 9-11, 32-41 (discussing test in detail as applied to psychotherapist privilege). See also infra text accompanying notes 442-483 (discussing whether a state statute meets this test, which also applies to the cleric's free exercise claim).
277. J. Wigmore, supra note 53, § 2396.
278. See 4 J. Bentham, Rationale of Judicial Evidence 588 (Hunt & Clark ed. 1827).
279. J. Wigmore, supra note 53, § 2396.
280. See supra notes 76-83 and accompanying text.
Clergy are taught deep respect for the information they receive from their parishioners. Catholic priests are under threat of excommunication if they reveal information obtained from the confessional. Although Jewish and Protestant clergy do not perform the sacramental equivalent of a confession, they hold the religious communications of their parishioners in high confidence.281

Although this third rationale for the privilege can be framed simply as a policy rationale, it also can be framed in terms of a constitutional right. This Article later takes up the argument that the clergy privilege is not simply a statutory law with various policy rationales, but is also a constitutional right of clergy.282

E. CONSTITUTIONALITY OF THE PRIVILEGE UNDER THE ESTABLISHMENT CLAUSE

The establishment clause of the first amendment states: "Congress shall make no law respecting an establishment of religion . . . ."283 Despite its reference to Congress, the establishment clause prohibition constrains the states as well as the federal government,284 and all branches of government. The Supreme Court has interpreted the establishment clause to prohibit much more than an official national church.285 The Court has broadly applied the clause in two ways that unsettle the current law of clergy privilege. First, the Supreme Court has consistently read the clause as prohibiting governmental favoritism for or discrimination against particular religions.286 Second, less consistently and more controversially, the Court has stated that the establishment clause outlaws state aid or benefit

281. Knapp & VandeCreek, supra note 149, at 293.
282. See infra text accompanying notes 385-496.
283. U.S. CONST. amend. I.
284. Wallace v. Jaffree, 472 U.S. 38, 49-50 (1985) (fourteenth amendment imposes same substantive limits, including limit on establishing religion, on the state's legislative powers as the first amendment imposes on Congress); Everson v. Board of Educ. of Ewing, 330 U.S. 1, 8, 15 (1947) (first case to hold that the fourteenth amendment embraces the establishment clause); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (dictum suggesting fourteenth amendment extends to establishment clause); Stoyles, supra note 150, at 28 ("Doubt no longer exists that fourteenth amendment requires states to afford the protections of the fundamental principles of the religion clauses.").
286. See, e.g., Larson v. Valente, 456 U.S. 228, 244-46 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); Everson, 330 U.S. at 15 ("Neither a state nor the Federal Government can pass laws which . . . prefer one religion over another.").
to religion even in general. Although the Supreme Court has never ruled directly on the constitutionality of the clergy privilege, in light of the Court's establishment cases, the constitutionality of the privilege seems open to question.

The Supreme Court has recently expressed its "unwillingness to be confined to any single test or criterion in this sensitive area," and there is fresh disagreement among the Justices as to the merit of the Court's traditional lines of inquiry in establishment cases. Nevertheless, the Court has prescribed two tests for applying the establishment clause. The Larson strict-scrutiny test applies to laws that discriminate on their face among religious denominations. The Lemon tripartite test applies in other establishment cases. Either test

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287. See, e.g., School Dist. of Abington v. Schempp, 374 U.S. 203, 216-17 (1963) (the Supreme Court "has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); Everson, 330 U.S. at 15 (federal and state governments may not pass laws that aid one religion or all religions).


289. See McCORMICK, supra note 94, § 76.2, at 184 (constitutionality of clergy privilege is an "open question"); Reese, supra note 57, at 87-88 (questioning whether priest-penitent statutes violate the establishment clause). See also In re Lifschutz, 2 Cal. 3d 415, 429, 467 P.2d 557, 566, 85 Cal. Rptr. 829, 838 (1970) (declining to comment on the "potentially difficult constitutional question" of constitutionality of clergy privilege). See generally Stoyles, supra note 150 (arguing the priest-penitent privilege as typically applied is unconstitutional).


293. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). In a footnote to Larson v. Valente, the Supreme Court distinguished between (1) a state law that is facially neutral but has a disparate impact on different religious organizations and (2) a state law that "makes explicit and deliberate distinctions between different religious organizations." 456 U.S. 228, 246 n.23 (1982). The latter law is unconstitutional unless, under the Larson test, its distinctions are necessary to achieve a compelling state interest. Id. at 247. The former is unconstitutional unless the State can demonstrate its secular purpose and effect. Id. at 246 n.23. In other words, apparently the former type of statute must meet the Lemon tripartite test, 403 U.S. at 612-13, while the latter must meet the Larson strict-scrutiny test. It is not at all clear which category encompasses a clergy privilege statute that seems to grant the privilege, in effect, only to one or a few religious sects. In Larson the Court struck down Minnesota's charitable solicitations act because it exempted from registration and reporting requirements only those religious organizations that received more than half their contributions from members. 456 U.S. at 251, 255. Such a statutory distinction, according to Larson, effectively discriminated against new
might be brought to bear on the law of clergy privilege.

1. Discrimination Among Religions

Government may not favor one or some religions over others. The Supreme Court recently reaffirmed this “principle of denominational neutrality” in *Larson v. Valente* and articulated the test for determining whether a discriminatory law violates the establishment clause. The Court will consider such a law suspect and apply strict scrutiny. Strict scrutiny requires the state to justify its discrimination with a “compelling governmental interest” and to show that its law is “closely fitted to further that interest.”

Many versions of the clergy privilege are not denominationally neutral. For example, statutes limiting the privilege to a “priest” or “priest or minister of the gospel” exhibit obvious favoritism. Less obviously, but more typically, statutes limiting the privilege to churches whose “discipline enjoins” their members to make confessions to a cleric effectively limit the privilege to Roman Catholics. Similarly, many statutes seem to limit the privilege to well-established churches. Less narrow, but also discriminatory, are versions of the clergy privilege in which the “discipline enjoined” requirement refers to church discipline enjoining its clergy to hear, rather than its

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295. 456 U.S. 228, 246 (1982).
296. *Id.*
297. *Id.* at 247.
300. Reese, *supra* note 57, at 61 n.22, 62 (citing statutes from 22 states that include some form of the wording “in the course of discipline enjoined by the Church”) (citations omitted). See Stoyles, *supra* note 150, at 59 (arguing that effectively limiting the privilege to Roman Catholics makes the privilege unconstitutional); *supra* text accompanying notes 172-77. Forcing revelation of intimate confidences that a person’s religion specifically required him to make might be particularly offensive. States, however, do not seem to have a compelling interest in distinguishing between that offense and the offense in forcing revelation of other intimate information confided in a cleric for purposes of obtaining forgiveness, consolation, or religious counsel.
301. See *Smith*, *supra* note 57, at 9 (“Some [states] have placed restrictive definitions of clergy and legitimate denominations in their privilege rules in apparent attempts to keep frauds and fly-by-nights from claiming privilege under the acts.”); *supra* text accompanying notes 117-20.
members to make, confession. Such statutory line-drawing among religious groups seems to call for application of Larson strict scrutiny.

Under the Larson analysis the state must demonstrate a compelling reason not only for recognizing clergy privilege, but specifically for extending the privilege to some but not all religions. It is difficult to imagine a compelling reason necessitating most statutory discrimination. The state could hardly judge constitutionally, for example, that some denominations' clergy are better counselors than others'. Some courts, sensitive to potential constitutional problems, have interpreted facially discriminatory statutes more broadly than the statutory language seems to warrant. Arguably, the clergy privilege should extend to clergy of all religions.

2. Favoring Religion In General

Even if the clergy privilege were expanded to include the clergy of all religious groups, the question remains whether a state may favor religion in general by granting special benefits, even to all religions. Laws that seem to favor religion over nonreligion are subject to the Lemon test, an inquiry first expressly articulated in the Supreme Court's 1971 decision in

302. Reese, supra note 57, at 67-73 (comparing "discipline enjoined" statutes) (quoting ARK. STAT. ANN. § 28-606 (1947)).

303. A state might constitutionally distinguish between clergy who believe disclosure violates a sacred trust and clergy not encumbered by such a belief. California's statute, for example, limits the privilege to communications to a cleric who "under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret." CAL. EVID. CODE § 1032 (West 1966). The rationale for such a distinction would be the accommodation of free exercise of religion, unquestionably a compelling state interest. See Sherbert v. Verner, 374 U.S. 398, 409 (1963).

State privilege statutes draw many other distinctions that do not on their face discriminate among religious groups and therefore do not call for strict scrutiny under Larson. For example, the distinction between confessions and nonpenitential communications, although it may be unwisely artificial, would not compel Larson scrutiny. Similarly, applying the privilege to communications by members of the cleric's church, but not to communications by nonmembers, seems unduly restrictive yet is not discrimination against some religious groups.

304. See Larson, 456 U.S. at 244-46 (stating a "principle of denominational neutrality"); Gillette v. United States, 401 U.S. 437, 450-51 (1971) (conscientious objector provision of Selective Service Act does not violate establishment clause because it does not discriminate on the basis of religious affiliation.).

305. See, e.g., In re Swenson, 183 Minn. 602, 603-04, 237 N.W. 598, 599 (1931) (rejecting narrow meaning of "confession" that would apply only to Roman Catholic Church in favor of broader meaning that would apply to any religion).
CLERGY PRIVILEGE

Lemon v. Kurtzman. Despite some Justices' recent murmurs of dissatisfaction with the Lemon test, the Supreme Court has invoked that test in almost every establishment case since 1971. To be constitutional under the Lemon test, the clergy privilege must (1) have a "secular legislative purpose," (2) have a primary effect that "neither advances nor inhibits religion," and (3) not foster excessive entanglement between government and religion. Thus, to be constitutional under the Lemon test, the clergy privilege must first have a secular purpose. The state's purpose need not be exclusively secular.

At this point, the rationale for the clergy privilege becomes constitutionally significant. If the Constitution compels a religious exemption, such as the clergy's exemption from the general duty to report certain information, the exemption cannot violate the establishment clause. If, however, the Constitu-

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308. Except for Larson v. Valente, 456 U.S. 228, 246 (1982), Marsh v. Chambers, 463 U.S. 783 (1983), stands alone among the Supreme Court's establishment clause cases as a post-Lemon case not applying the Lemon test. Marsh, 463 U.S. at 796 (1983) (Brennan, J., dissenting) ("The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause."). In Marsh, the Court upheld the Nebraska legislature's practice of hiring and paying a chaplain to begin each legislative session with prayer. Id. at 785. Although the Eighth Circuit had held that Nebraska's practice failed all three parts of the Lemon test, id. at 786, the Supreme Court, surprisingly, did not even acknowledge the test. Id. at 796 (Brennan, J., dissenting). Instead, the Court considered the practice of opening legislative sessions with prayer as "deeply embedded in the history and tradition of this country" and followed by federal and state legislatures since colonial times. Id. at 786. Thus, the Court concluded, legislative prayer presents "no real threat to the Establishment Clause ...." Id. at 791.
309. Lemon, 403 U.S. at 612-13 (citations omitted).
310. Wallace, 472 U.S. at 56 ("For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." (citation omitted)).
312. Thomas v. Review Bd. of Ind. Empl. Sec. Div., 450 U.S. 707, 719-20 (1981) (allowing Jehovah's Witness to receive unemployment compensation when he refused to work in production of weapons was not violation of establishment clause); Sherbert v. Verner, 374 U.S. 398, 409 (1963) (allowing Seventh-Day Adventist to exercise her religion was not a violation of the establishment clause). So if, as this Article argues, the free exercise clause
tion does not require an exemption, the state must be careful how it frames its purpose for the privilege. If the state's purpose is to "sedulously foster" relationships with clergy,\textsuperscript{313} arguably its purpose is the unconstitutionally religious one of endorsing religion. If, however, the state only seeks to accommodate some persons' religious practices, its purpose should be upheld as constitutional.\textsuperscript{314} The Supreme Court has not clarified whether and when the accommodation of religious practice is a legitimate secular interest.\textsuperscript{315}

To avoid this thicket, a state might seek to justify its clergy privilege by other legitimate secular interests, such as its interest in the health of its citizens or in protecting the privacy of intimate relationships.\textsuperscript{316} The Lemon test does not expressly incorporate an inquiry into the overinclusiveness or underinclusiveness of a state's law. Thus, these state interests in the clergy privilege would probably be acceptable despite the state's failure to extend a similar privilege to other counselors, such as psychotherapists or school counselors, or to other intimate relationships.\textsuperscript{317}

\begin{footnotesize}
\begin{enumerate}
\item[313.] See supra text accompanying notes 230-35.
\item[314.] The California Supreme Court has held that no violation of equal protection exists when the psychotherapist privilege statute has a litigant-patient exception not contained in the clergy privilege statute. The permissible reason for the distinction, according to that court, is the accommodation of religious practice. \textit{In re Lifschutz}, 2 Cal. 3d 415, 429, 467 P.2d 557, 565, 85 Cal. Rptr. 829, 837 (1970). See also Katcoff v. Marsh, 755 F.2d 223, 237 (2d Cir. 1985) (purpose of the constitutionally valid army chaplaincy program is to make religious activities available to military personnel where they would otherwise be unavailable). See infra text accompanying notes 326-28.
\item[315.] See supra note 232.
\item[316.] See supra text accompanying notes 234-35. If a state's primary rationale for the clergy privilege is the mental and emotional health of its citizens, the state might wish to extend the privilege only to clergy with certain credentials for counseling. Such a distinction would, however, raise serious questions of state entanglement with organized religion and of infringement of free exercise of religion. But cf. Comment, \textit{Clergy Malpractice: Bad News}, supra note 49, at 224-26 (arguing that although some have contended that a judicially-enforced pastoral counseling standard would constitute excessive entanglement because it would require secular authorities to monitor religious activity, the government's interest in redressing mental and physical injury may be overriding).
\item[317.] A striking overinclusiveness or underinclusiveness might raise a suspicion that the asserted state interest is pretextual. Most states, however, do afford a privilege for communications to physicians and psychotherapists. See Shuman & Weiner, \textit{supra} note 225, at 907-11 n.100 (table of physician, psychiatrist, psychologist, and psychotherapist privileges by state). Some also recognize privileges for other mental health workers, for social workers, or for
\end{enumerate}
\end{footnotesize}
The second part of the *Lemon* test for constitutionality requires a primary effect that neither advances nor inhibits religion. "[N]ot every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." In pursuing this inquiry, the Supreme Court has been primarily concerned about direct financial subsidies to religious organizations, or about direct governmental messages of endorsement of religion. A state's provision of a special privilege for religious leaders might seem to communicate endorsement of religion. On the other hand, the Court has tended not to find a primary religious effect when the benefit to religious persons or groups is shared with other similarly situated persons or groups, if they are similarly situated with regard to legitimate secular criteria. Thus, a state's mental health information generally. See S. Stone & R. Liebman, *supra* note 53, §§ 7.03-7.06.


319. Witters v. Washington Dep't of Servs for the Blind, 106 S. Ct. 748, 752-53 (1986) (financial aid to blind person who chose to use aid to support his religious education was not a direct subsidy and was constitutional); Mueller v. Allen, 463 U.S. 388, 396-402 (1982) (primary effect of statute making school expenses deductible was not to advance religion).

320. Witters, 106 S. Ct. at 753 (no “message of state endorsement of religion” is conveyed merely because petitioner chose “to use neutrally available state aid to help pay for his religious education”); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125-28 (1982) ("[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion."). Delegation of legislative powers to religious groups can also run afoul of the second part of the *Lemon* test. *Larkin*, 459 U.S. at 122-23 (zoning law delegating to churches power to prevent issuance of liquor licenses within specified radius of churches violates the establishment clause).

Although the Supreme Court has maintained a strict separationist position in its cases involving religion in public schools, see, e.g., *Wallace*, 472 U.S. at 42-61 (holding Alabama statute authorizing a daily period of silence for meditation or voluntary prayer unconstitutional), it has recently taken a more accommodationist position in other establishment cases. *Lynch*, 465 U.S. at 687 (declaring that a “crabbed” reading of the establishment clause); Mueller v. Allen, 463 U.S. 388, 399 (1982) (quoting Hunt v. McNair, 413 U.S. 734, 742 (1973) and announcing its “consistent rejection of the argument that ‘any program which in some manner aids an institution with a religious affiliation’ violates the Establishment Clause”).

321. “The Court might be persuaded that a state, in granting the priest-penitent privilege, unconstitutionally furnishes use of a court room, funds, judges and other court personnel, prestige, and power to religion or a sect or sects through the intermediaries of clergy and church members.” Stoyles, *supra* note 150, at 46 (citations deleted). See also id. at 47 (asking whether privilege helps churches acquire or retain members).

322. See, e.g., *Witters*, 106 S. Ct. at 753 (financial aid to blind students for education or training in various trades and professions including ministry);
concurrent recognition of privileges for other healing or intimate relationships probably negates any message of special endorsement of religion in particular.

The third Lemon inquiry looks for excessive entanglement between government and religion. The Court has found excessive entanglement, for example, when government must monitor public funds to religious institutions to ensure that the funds serve primarily secular purposes or when religious organizations become involved in the exercise of governmental authority. The clergy privilege does not seem to present any impermissible entanglement.

The Second Circuit recently affirmed the constitutionality of the Army's chaplaincy program. The court held that the program passed all three parts of the Lemon test, which, the court cautioned, must be applied flexibly and in context rather than woodenly. According to the Second Circuit, making clergy available to persons who choose to consult them is a legitimate secular purpose and does not have the primary effect of advancing religion. If government's paying for, approving,

Mueller, 463 U.S. at 397 (income tax deduction for parents with certain school-related expenses including expenses for parochial schools). But cf., Larkin, 459 U.S. at 117, 125-26 (primary effect of zoning laws to protect churches and schools was advancement of religion).

323. See, e.g., Wolman v. Walter, 433 U.S. 229, 254 (1977) (funding of field trips for nonpublic schools impermissibly entangled state with religion because state supervision of nonpublic teachers would be required); Lemon, 403 U.S. at 611-25 (salary supplement to teachers of secular subjects in nonpublic elementary schools impermissibly entangled state with religion because extensive state surveillance would be required).

324. See Larkin, 459 U.S. at 126-27 (zoning law vesting governmental authority in churches impermissibly entangles church and state).

325. A court, however, may still have to determine who is clergy and what is a church. See supra notes 106-30 and accompanying text; see also Note, Catholic Sisters, Irregularly Ordained Women and the Clergy-Penitent Privilege, 9 U.C. Davis L. Rev. 523, 538-47 (1976) (arguing “clergy” should be redefined to include “sisters and irregularly ordained women”). Although some might find an excessive entanglement in such inquiries, see, e.g., Stoyles, supra note 150, at 34, 55, there seems to be no more entanglement here than in many of the cases in which a state must define clergy, church, or religion for purposes of accommodating religion. If, however, the court must delve into church discipline to determine what it requires, arguably such interpretation amounts to excessive entanglement beyond judicial competence. See supra note 177.

326. Katcoff v. Marsh, 755 F.2d 223, 238 (2d Cir. 1985). The court remanded the case, however, for a determination whether chaplains were necessary in large urban areas where civilian clergy were readily available. Id.

327. Id. at 232-34.

328. Id. at 234, 237. The court suggested the free exercise and establish-
and supervising clergy, so that some persons may consult them, is constitutional, government's merely respecting the confidentiality of communications to clergy, for similar reasons, should be constitutional as well.

III. THE INTERSECTION OF REPORTING REQUIREMENTS AND THE CLERGY PRIVILEGE

Statutes impose child abuse reporting requirements; the clergy privilege is thought to rest on statute. Thus, resolving any tension between the two is, at first instance, a process of statutory construction. This process involves three inquiries, the answers to which will vary from state to state. First, do child abuse reporting requirements apply to clergy? If not, there is, of course, no tension between reporting requirements and the clergy privilege. If, however, clergy are subject to reporting requirements, the second question arises: does the clergy privilege extend to the context of a reporting requirement? If it does, the conflict between the two is palpable, and the third question is then imperative: how should the conflict between the two statutes be resolved? The remainder of this Article examines these three questions.

A. WHETHER REPORTING REQUIREMENTS APPLY TO CLERGY

Four types of provisions in state reporting statutes arguably apply to clergy. First, a few statutes specifically require clergy to report. Second, many statutes require Christian Science practitioners or "religious healers" to report. Because such healers might also be considered clergy for purposes of the clergy privilege, information confided to them in their dual role as healer-clergy would seem to raise the conflict between privilege and duty to report. Third, a cleric can also function as a teacher, school administrator, social worker, or other professional required to report. Tension with the clergy privilege is, however, less likely in these contexts. The clergy privilege applies only to communications confided to a cleric in...
her professional capacity as cleric. Thus, the conflict between the reporting requirement and the clergy privilege arises only if a communication is confided to the cleric as cleric and the reporting requirement applies regardless of the source of the cleric's information.

Finally, approximately half of the statutes contain general "catch-all" provisions that would, in the absence of an express exclusion, seem to include clergy. Where "any person" who suspects abuse must report, clergy are obviously included. Clergy also might be included under a duty imposed on "any public or private official," "any persons who, in the course of their employment, occupation, or practice of their profession come into contact with children," or "any other person having responsibility for the care or treatment of children."

Thus, even setting aside the more specialized second and third types of provisions, it appears that more than half the reporting statutes apply, at least at first blush, to clergy. If, in jurisdictions with such statutes, the clergy privilege extends to reporting requirements, the cleric's dilemma is complete.

B. WHETHER THE CLERGY PRIVILEGE APPLIES IN THE CONTEXT OF REPORTING REQUIREMENTS

There has been surprisingly little discussion of the range of the so-called evidentiary privileges. The paradigmatic claim of privilege is that of a witness in court invoking the privilege as he declines to testify. The privilege protects against his being held in contempt of court. Most discussion concerning privileges in general, and the clergy privilege in particular, assumes the context of a criminal or civil trial in a court. If the clergy

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332. See supra notes 121-30 and accompanying text (discussing limitation of privileged communication to cleric's professional role).
333. See supra note 32.
339. See, e.g., S. STONE & R. LIEBMAN, supra note 53, § 7.01, at 378-79 (stating that privileges are usually limited to judicial or quasi-judicial proceedings,
privilege is limited to a trial context, it obviously does not conflict with reporting requirements.

Recognition of evidentiary privileges has not, however, been confined to trials. Privileges are generally also recognized in grand jury proceedings, for example, and before administrative tribunals. It is not clear, however, whether privileges extend far enough from trial-like settings to serve as an excuse for failure to comply with a statutorily mandated duty to report. This issue would arise in a criminal or civil action against the cleric for failure to report. To resolve this question, this section examines the language of the clergy privilege statutes, the rationales for the privilege and their application to reporting, and specific references to privileges in the abuse-reporting statutes.

1. The Language of the Privilege Statutes

To discover whether the clergy privilege would apply to a reporting requirement, the starting place should be the language of the privilege statutes themselves. Unfortunately, most clergy privilege statutes do not state the range of their application, and those that do fail to address the specific context of reporting requirements. Apparently, the drafters of the privilege statutes did not have in mind any potential for tension between the privilege and reporting requirements. Given the relative newness of reporting requirements and the paucity of case law addressing the tension, this oversight is not surprising.

Some clergy privilege statutes do straightforwardly set out

but that statutes broaden the application of privileges to other types of disclosure.

In re Wood, 430 F. Supp. 41, 45 (S.D.N.Y. 1977). But see W. Tiemann & J. Bush, supra note 5, at 183-87 (“Case law is currently averse to the claim of privilege in grand jury inquiries.” Id. at 185.).


Weisberg & Wald, supra note 221, at 156-82 (discussing law's confusion concerning scope of privilege and other nondisclosure statutes); cf. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (discussing psychotherapist privilege as potential bar to psychotherapist's duty to warn foreseeable victims of patient's violence); Commonwealth v. Jones, 501 Pa. 162, 460 A.2d 739, 742 (1983) (spousal testimonial privilege limited to adjudicative proceedings and does not extend to wife's giving police information that leads to husband's arrest).

See supra notes 45-49 and accompanying text (addressing criminal and civil liability for failure to report).
the contexts in which claiming the privilege is proper. A few of these statutes are worded so narrowly as to suggest that the privilege would not shield the cleric from reporting requirements. For example, Rhode Island’s statute limits the privilege to “the trial of every cause, both civil and criminal,”344 and Tennessee’s statute covers “testimony as a witness in any litigation.”345 Only a Pickwickian reading of such language could apply these statutes to mandated reports that may or may not result in a trial. West Virginia’s statute is most severely limited: to testimony in divorce actions.346

Other privilege statutes state their applications more broadly, yet still do not clearly include the reporting context. Such statutes provide, for example, that the privilege applies in any “civil or criminal proceedings,”347 or “any legal proceeding”348 or even “any civil or criminal case or proceedings preliminary thereto.”349 The reach of these statutes depends on the reach of the word “proceeding.” One could argue that a report of child abuse initiates, and thus is part of, a “proceeding” for the investigation of the abuse.350 By comparison, Pennsylvania’s statute strains a little less to cover the reporting context. It extends its privilege to disclosures “in any legal proceeding, trial or investigation before any government unit.”351 Only Illinois, however, words its statute to fit easily the reporting context; its statute applies to state compulsion “to disclose in any court, or to any administrative board or agency, or to any public officer.”352 Thus, even among the minority of privilege statutes purporting to state their scope, only a few seem to extend the clergy privilege to state-mandated reports.

Most clergy privilege statutes do not even attempt to state the range of their application. One might, however, draw modest inferences from the statutes’ language. Laws that state, for

347. See, e.g., D.C. CODE ANN. § 14-309 (1981) (broad statute with no clear application to reporting); see also ALA. CODE § 12-21-166 (Supp. 1986) (“[a]ny proceeding, civil or criminal, in any court”).
348. 42 PA. CONS. STAT. ANN. § 5943 (Purdon 1982).
351. 42 PA. CONS. STAT. ANN. § 5943 (Purdon 1982) (emphasis added).
example, that a cleric shall not be examined\textsuperscript{353} or examined as a witness,\textsuperscript{354} or that otherwise speak in terms of testimony\textsuperscript{355} or competence to testify,\textsuperscript{356} arguably limit the privilege to contexts in which there are witnesses, examination, and testimony, for example, to trials and trial-related or trial-like proceedings. Although the breadth of words like "examine" and "testify" is certainly debatable, such terminology seems to be at least inappropriate as applied to a person's tip to the authorities, especially because the tip may never result in a trial.

The location of many clergy privilege statutes in a code of evidence might imply a range for the privilege coextensive with that of rules of evidence generally.\textsuperscript{357} Unfortunately, that range is often also unclear.\textsuperscript{358} Furthermore, many clergy privilege statutes appear not in a code of evidence but among provisions regarding professionals' conduct and licensure.

One must conclude that the clergy privilege statutes mostly fail to state or even imply whether the privilege could be properly invoked to excuse a failure to report abuse.

2. The Rationales for the Clergy Privilege

Every major rationale for the clergy privilege applies to the context of mandatory reports to the state.\textsuperscript{359} If the rationale for the privilege is a concern that disclosure of confidential

\textsuperscript{353} \textit{E.g.}, \textsc{Wash. Rev. Code} § 5.60.060(3) (1985 & Supp. 1986).


\textsuperscript{355} \textsc{Iowa Code} § 622.10 (1984).

\textsuperscript{356} \textit{E.g.}, \textsc{Mo. Rev. Stat.} § 491.060 (1986); \textsc{N.C. Gen. Stat.} § 8-53.2 (1986).

\textsuperscript{357} \textit{See} Reese, \textit{supra} note 57, at 74 (arguing that failure of state evidence code to mention administrative hearings limits applicability of clergy privilege in those proceedings); Weisberg & Wald, \textit{supra} note 221, at 159 n.54 (arguing that privileges found in evidence codes might apply only to court proceedings); Yellin, \textit{supra} note 57, at 139 n.191 ("Since the privilege statutes are invariably in the parts of the code dealing with evidence, presumptively the privilege would have as broad or narrow an application as the evidence code does.").

\textsuperscript{358} For example, the Federal Rules of Evidence are not limited to proceedings before United States courts. 21 \textsc{C. Wright & K. Graham, Federal Practice and Procedure} § 5013, at 120 (1977). Application to federal agencies or other tribunals, however, is dependent on statutory requirements often qualified by phrases capable of broad interpretation, such as "so far as practicable." \textit{Id.} Operating under this standard, federal agencies may be subject to less restrictive evidence standards than the rules themselves suggest. \textit{See} \textsc{McCormick, supra} note 94, § 351 (discussing relaxation of evidence rules for federal agencies). In addition, most states have freed their administrative agencies from rules of evidence. \textit{Id.} § 351, at 1008.

\textsuperscript{359} \textit{See} Smith, \textit{supra} note 57, at 14, 17-18 (arguing that it is senseless not to extend clergy privilege to informal state investigations).
communications will defeat the cleric-confider relationship,\textsuperscript{360} it matters little whether disclosure is to a court during trial or to a public official to trigger an investigation. That states may take some steps to prevent public access to reported information\textsuperscript{361} will do little to reassure hesitant confiders because the information may ultimately become available for a civil or criminal trial and, meanwhile, many state officials may have shared the contents of the report. Similarly, a cleric's ability to report anonymously\textsuperscript{362} might protect the clergy-confider counseling relationship in the short run because the confider, and potential confiders, would not know that the cleric might be reporting confided information. If the law requires clerics to report, however, in the long run people will know, and the cleric's ability to minister might be impaired. If the rationale for the privilege is the concern with privacy for intimate relationships,\textsuperscript{363} that privacy is shattered by compelled disclosures in the form of a report as much as by compelled disclosures in a courtroom. Finally, to the extent that the privilege is grounded in free exercise of religion,\textsuperscript{364} the privilege should extend to any state requirement of disclosure that offends religious principles.

3. References to Privileges in Abuse Reporting Statutes

Despite a lack of precedent for extending privileges as far outside the courtroom as to reports, the abuse-reporting statutes themselves manifest widespread concern that such an extension is expectable. All but six reporting statutes contain some provision to abrogate or reaffirm some privileges.\textsuperscript{365} Many of these provisions abrogate privileges only for "proceedings" or "judicial proceedings" resulting from or related to a re-

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\item \textsuperscript{360} See supra notes 219-37 and accompanying text (discussing ramifications of protecting clergy-confider relationships).
\item \textsuperscript{361} See I. Sloan, supra note 11, at 62-63 (listing confidentiality status of state laws).
\item \textsuperscript{362} See supra note 40 (statutory allowance for anonymous reporting).
\item \textsuperscript{363} See supra notes 238-75 and accompanying text (discussing privacy rationale).
\item \textsuperscript{364} See supra text accompanying notes 276-82 (discussing religion rationale); infra notes 385-496 and accompanying text (analyzing clergy's free exercise rights).
\item \textsuperscript{365} See supra note 50 (chart and discussion of state abrogation provisions). Many of these abrogation provisions are unclear and illogical. See also Weisberg & Wald, supra note 221, at 162-65 (identifying flaws in abrogation statutes and their exceptions).
\end{itemize}
Such statutes do not directly address whether a person may claim a privilege to avoid reporting in the first place. Many other statutes, however, explicitly state that certain privileges shall not excuse mandatory reporting. Typical of these statutes is Florida's, which states that various professional privileges "shall not apply to any situation involving known or suspected child abuse or neglect and shall not constitute grounds for failure to report as required . . . ."

Six reporting statutes expressly abrogate the clergy privilege. Most of these statutes abrogate the privilege for any "proceeding" regarding child abuse, failing to indicate whether the privilege is still available to justify a cleric's failure to report abuse in the first place. A seventh statute, Washington's, is oddly worded. It states that neither mandatory nor permissive reporting of child abuse will violate the clergy privilege, so that a cleric who reports is not liable to any confider for violation of the privilege statute. The statute, however, only implies the correlative point that the clergy privilege statute affords no refuge from the duty to report.

In addition to the statutes expressly abrogating the clergy privilege, about half of the reporting statutes seem to include the clergy privilege in their general abrogation of all professional privileges, or all except the attorney-client privilege. North Dakota's statute is typical:

Any privilege of communication between husband and wife or between any professional person and his patient or client, except between attorney and client, is abrogated and does not constitute grounds for preventing a report to be made or for excluding evidence

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370. See supra note 54 (listing statutes that abrogate the clergy privilege).
in any proceeding regarding child abuse or neglect resulting from a report made under this chapter.\footnote{374} Whereas North Dakota abrogates privileges as grounds for refusing to report, the Texas statute is typical of the general abrogations of privileges that do not mention the reporting context: “In any proceeding regarding the abuse or neglect of a child or the cause of any abuse or neglect, evidence may not be excluded on the ground of privileged communication except in the case of communications between attorney and client.”\footnote{375} A 1985 Texas attorney general’s opinion interpreted this language as abrogating the clergy privilege.\footnote{376} Furthermore, the opinion assumed that the statute applied to reporting,\footnote{377} although by its terms the statute applies only to “proceedings.”

In contrast, reporting statutes in Kentucky, Oregon, and South Carolina expressly reaffirm the clergy privilege in the face of the reporting requirement.\footnote{378} These states have confronted head-on the conflict between reporting requirements and the clergy privilege and have expressly resolved the tension in favor of the privilege.

In addition, many reporting statutes do not state but imply that the clergy privilege is not abrogated for reports of abuse. These are the statutes that expressly abrogate some named privileges and fail to mention the clergy privilege.\footnote{379} Such statutes suggest the familiar principle of statutory construction that the mention of one or more members of a class implies exclusion of unmentioned members of the same class.\footnote{380} By specifically abrogating some evidentiary privileges but not the clergy privilege, these statutes imply that the clergy privilege remains in effect.

Thus, many reporting statutes imply that evidentiary privileges are in principle applicable in the reporting context. Many of those statutes proceed to abrogate or affirm certain privileges in the reporting context. Seven laws expressly abrogate

\footnote{374} N.D. CENT. CODE § 50-25.1-10 (1982).
\footnote{375} TEX. FAM. CODE ANN. § 34.04 (Vernon 1986) (emphasis added).
\footnote{377} Id. at 1559-61.
\footnote{379} E.g., MICH. COMP. LAWS ANN. § 722.631 (West Supp. 1986) (abrogating all privileges except the attorney-client privilege); N.D. CENT. CODE § 50-25.1-10 (1982) (husband-wife and professional-client privileges exempted, with attorney-client privilege excepted from exemption).
the clergy privilege, and three expressly reaffirm it. The remaining statutes leave the resolution of the tension between the reporting requirement and clergy privilege to inference or amendment.

C. RESOLVING THE CONFLICT

Assessing the legality of a cleric's refusal to report child abuse involves difficult statutory questions. Only a few jurisdictions have confronted and resolved the conflict between statutory reporting requirements and the clergy privilege, and they reach different results. Most jurisdictions, however, apparently have not confronted the conflict. Those jurisdictions with no ready answer when a cleric invokes the clergy privilege to excuse a failure to report must resort to principles of statutory reconciliation or seek a legislative amendment to resolve the conflict. In doing so, they somehow balance the weighty policies at stake.

Unless a state has determined that clergy need not report abuses, it must address an overriding concern: whether a cleric has a constitutional right to maintain confidentiality in the face of a statutory reporting requirement. If such a right exists, the inquiry alters dramatically. Legislatures contemplating statutory amendments and courts construing statutes must still balance the reasons for reports against the cleric's reasons for refusing to report. That balancing, however, must comport with first amendment principles.

IV. FREE EXERCISE OF RELIGION

It is amazing that there has been so little discussion on the possible constitutional basis for the clergy privilege. The free

382. Two authors recently concluded that "it would seem to be a fairly uncontroversial matter of statutory interpretation that an unequivocal reporting law preempts an evidence privilege." Weisberg & Wald, supra note 221, at 160.
383. See supra text accompanying note 21 (discussing reasons for reporting).
384. See supra text accompanying notes 210-75 (discussing rationale supporting clergy privilege); infra text accompanying notes 427-31 (addressing possible objections by clerics to disclosure).
exercise clause of the first amendment, which applies to the states as well as to the federal government, protects individuals from governmental compulsion of conduct offensive to their religious beliefs. The free exercise clause also cautions government to tread lightly on practices deemed by church members to be central to their religion. Thus, the clause seems to be directly applicable when a state compels disclosure of confidences over the clergy's religious objections.

Many clergy object to compelled disclosure of communications confided in them. Some clergy's church rules forbid disclosure. Other clergy conscientiously oppose betraying confidences because they believe that disclosure is a breach of the sacred trust of their office, will destroy existing counseling relationships, and will deter people from seeking religious counsel or from trusting clergy sufficiently for effective ministration. Many clergy are concerned about the long-term

at 79, 116, 179, 186; Alexander, supra note 149, at 304-06; Reese, supra note 57, at 60; Smith, supra note 57, at 18; Yellin, supra note 57, at 112-13. For cases involving free exercise claims, see authorities cited infra notes 396, 409-11.

386. "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.


388. See United States v. Lee, 455 U.S. 252 (1982) (holding that when religious beliefs unduly interfere with an overriding governmental interest, the government's interest prevails); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that if a state's interests would not be adversely affected, a state must grant an exception to a compulsory school-attendance law that endangers free exercise of religion).

To be distinguished from the free exercise argument against reporting child abuse is the free exercise argument against the state's requiring speech that indicates the speaker's particular belief. See West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (a state may not compel school children to recite pledge of allegiance); Wooley v. Maynard, 430 U.S. 705 (1977) (a state may not compel objecting Jehovah's Witnesses to display motto "Live Free or Die" on license plates). Because the latter argument against compelled expression objects to an association of a speaker with a particular belief, it involves free speech values (the right not to express a belief) and establishment clause values (no state promotion of particular religious beliefs). See generally Gaebler, First Amendment Protection Against Government Compelled Expression and Association, 23 B.C.L. REV. 995 (1982) (arguing that the first amendment protects the right not to speak or associate).

389. See Yoder, 406 U.S. 205 (1972) (finding that compulsory school-attendance "contravenes the basic religious tenets" of the Amish); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (holding that the distribution of religious material by Jehovah's Witnesses is a form of evangelism entitled to the same protection afforded to "more conventional exercises of religion").

390. See supra note 218 (explaining the rationale behind the clergy privilege).
effects of disclosure on the continued practical availability of religious ministries to the distressed.

The free exercise issue is unlikely to arise until the law forces disclosure, and attorneys and courts have been reluctant to compel disclosure. Few cases involve the clergy privilege itself, and only a handful of them discuss free exercise issues. The recently publicized conflict between the clergy privilege and child abuse reporting requirements, however, calls for careful attention to the free exercise argument. Clergy who appear to be shielding child abusers seem to need more than a statutory privilege to protect their silence. If the privilege rests solely on statute, a state is free to alter or revoke the privilege and state that the privilege yields to reporting requirements. If, however, the free exercise clause backstops a claim of privilege, the state must weigh the privilege against the state’s interests in mandatory reporting of child abuse, and do so, as free exercise analysis requires, with its thumb on the scale on the side of the privilege.

One does encounter formidable obstacles to arguing that the free exercise clause provides the basis for the clergy privilege. Precedent for such a proposition is slender and commentators who address the question usually conclude that no such constitutional basis exists. In addition, even if the free exercise clause supports some degree of privilege, the privilege it supports is probably not coextensive with the privileges defined in most state statutes. Thus, the free exercise clause adds an overlay to privilege issues. For example, the question “whose free exercise right?” is not the same question as “whose privilege?” Courts might naturally balk at the complexities of recognizing a constitutional privilege distinct from a statutory privilege. Nevertheless, the constitutional argument grows

391. See infra notes 395-410 and accompanying text.
392. See, e.g., Stoyles, supra note 150, at 51-52; cf. Branzburg v. Hayes, 408 U.S. 665, 689-90 (1972) (suggesting that the only testimonial privilege rooted in the federal constitution is the fifth amendment privilege against self-incrimination) (dictum); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 644 (1943) (Murphy, J., concurring) (suggesting that freedoms of speech and religion are subject to compulsion to give evidence in court).
393. The jurisdictions do not agree concerning who may claim the statutory privilege. See supra text accompanying notes 181-209. The distinguishable question of who may claim a free exercise right not to disclose confidential information depends upon whose religion is offended by a disclosure requirement. This Article addresses only the cleric’s free exercise right to refuse to break confidences. It does not consider whether mandatory reports by clergy might also infringe the free exercise rights of a confider, for example, by chilling the right to confess to or seek counsel from clergy.
naturally from the Supreme Court's free exercise decisions and accords with the momentous shared value of religious liberty. As one author has well stated, "[T]he priest-penitent privilege should not be viewed as the circumference but as the visible and recognized center of a broader First Amendment shield for church workers." This Part explores the argument that despite some nettlesome problems the free exercise clause does afford constitutional status to some clergy privilege.

A. PRECEDENT

Case law provides little support for a free exercise grounding for the clergy privilege. The case most cited for such a grounding is People v. Phillips, the nation’s first reported case to recognize a clergy privilege. The question in Phillips was whether a Catholic priest must reveal information received in confession, thereby violating conscience, clerical duty, and church canons, and consequently suffer the church's sanctions. After a lengthy discussion of several common law objections to compelling disclosure, the court upped the stakes:

But this is a great constitutional question, which must not be solely decided by the maxims of the common law but by the principles of our government: We have considered it in restricted shape, let us now look at it upon more elevated ground; upon the ground of the constitution, of the social compact, and of civil and religious liberty.

In 1813 the common law of England did not recognize a clergy privilege and no American state had recognized the privilege by statute or case law. Furthermore, the free exercise clause of the United States Constitution had not yet been applied to the

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395. See Note, supra note 76, at 200 (reprinting People v. Phillips (N.Y. Ct. Gen. Sess. 1813) from the records of a participating attorney); cf. 1 WESTERN L.J. 109 (1843) (abstracting Phillips from the attorney’s records and containing material not found in the Note reprint); see also supra text accompanying notes 76-79.

396. The court in Phillips asked

[w]hether a Roman Catholic priest shall be compelled to disclose what he has received in confession—in violation of his conscience, of his clerical engagements, and of the canons of his church, and with a certainty of being stripped of his sacred functions, and cut off from religious communion and social intercourse with the denomination to which he belongs.

Note, supra note 76, at 200.

397. Id. at 206.

398. See supra notes 69-75 and accompanying text.
So the court's options were to deny the privilege, recognize the privilege by an original bend in the common law of New York, or recognize the privilege as grounded in New York's constitution. The court took the third course, relying on the state's constitutional protection of “the free exercise and enjoyment of religious profession and worship, without discrimination, or preference.”

Phillips directly supports an argument for basing a clergy privilege on state constitutional protections of religious freedom. Indirectly, Phillips also bolsters the argument for grounding the privilege in the federal Constitution's free exercise clause. New York's constitutional language relied on in Phillips resembles the free exercise clause. Furthermore, the court's arguments in Phillips for recognizing a clergy privilege would be at home in a modern free exercise opinion. For example, the court noted the centrality of the sacrament of penance to the Roman Catholic religion. Additionally, the court emphasized the “troubling predicament” imposed on the priest:

"If he prevaricates he violates his judicial oath,—if he tells the truth, he violates his ecclesiastical oath. Whether he lies, or whether he tells the truth, he is wicked; and it is impossible for him to act without acting against the laws of rectitude and conscience. The only course is, for the court to declare that he shall not act at all."

Finally, the court applied a balancing test and required a clear showing of threat to the public peace or safety as a prerequisite to violation of the priest's right to keep silent. These features of the Phillips opinion accord with modern free exercise analysis.

Since 1940, the Supreme Court has applied the free exercise clause of the federal Constitution to the states and has developed an expansive jurisprudence of free exercise prote-
Courts have not, however, developed the free exercise argument incipient in Phillips. Although occasionally claimants have asserted free exercise arguments for refusal to testify at a trial or grand jury proceeding, courts have usually brushed off the argument, either because the court did not believe the argument to be grounded in religion or because the court thought that the statutory clergy privilege amply protected religious rights. A few courts have pursued the free exercise arguments far enough to assert that the government has a strong interest in hearing every person's evidence and that this inter-

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407. See, e.g., Thomas v. Review Bd. of Ind. Empl. Sec. Div., 450 U.S. 707 (1981) (holding that state unemployment compensation regulations that pressure adherents to compromise religious beliefs violate free exercise clause); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that a state may not compel school attendance when so doing endangers the free exercise of religion); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that a state may not condition unemployment benefits on acceptance of employment that is contrary to the applicant's religious beliefs).

408. The court in In re Murtha held that a Roman Catholic nun in a teaching order could claim neither the clergy privilege nor free exercise of religion to excuse her from testifying to a grand jury concerning communications confided to her by a former student. 115 N.J. Super. 380, 279 A.2d 889 (1971), cert. denied, 59 N.J. 239, 281 A.2d 278 (1971). In rejecting Sister Margaret's free exercise argument, the court sharply distinguished between the exercise of religion and the exercise of conscience. Id. at 389-90, 279 A.2d at 893-94. Because Sister Margaret's teaching order did not require her to keep confidences, the court concluded that her claim was one of individual conscience. Id. Moreover, because Sister Margaret had previously signed a police statement disclosing the matters she later claimed were confidential, the court found that she failed to demonstrate the "compelling voice of conscience" necessary to invoke free exercise protection. Id. at 389-90, 279 A.2d at 894.

A federal district court also rejected a free exercise claim of confidentiality in In re Wood, 430 F. Supp. 41 (S.D.N.Y. 1977). In that case, church personnel claimed that grand jury subpoenas chilled their free exercise right. The court, however, found that the claimants were not priests and that the work they performed, "while perhaps performed under spiritual auspices, [was] primarily in the nature of social work." Id. at 46. Thus, the court recognized no burden on free exercise of religion.

409. See Keenan v. Gigante, 47 N.Y.2d 160, 390 N.E.2d 1151 (1979). In Keenan, the court rejected a Catholic priest's free exercise objection to testifying before a grand jury investigating improprieties in New York City government. Id. at 167-68, 390 N.E.2d at 1154-55. Although the priest had served as a city councilman during the period under investigation, id. at 163, 390 N.E.2d at 1153, the court rejected his claim of privilege because the inquiry did not concern confidential priestly communications. Id. at 166-67, 390 N.E.2d at 1154. The court also rejected the priest's free exercise argument, stating that his right to minister bestowed no protection beyond that already afforded by New York's privilege statute. Id. at 168, 390 N.E.2d at 1155. See also In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967) (holding that no free exercise privilege exists apart from statute), cert. denied, 388 U.S. 918 (1967).
Clergy privilege est outweighs even a free exercise objection to testifying.\textsuperscript{410} These latter precedents are few, however, and most are dated or equivocal. They apparently have not dislodged the prevailing opinion that the clergy privilege rests only on statute.

B. THE CLERIC’S FREE EXERCISE RIGHT

A cleric facing punishment for failure to disclose a confidential communication involving child abuse might argue for a free exercise right to maintain confidentiality. Relying on the Supreme Court’s free exercise precedents, a court would test the cleric’s argument by inquiring into the following issues.

1. Religious Belief

The cleric must show that the government is infringing on the exercise of religion.\textsuperscript{411} Secular beliefs and practices do not qualify for free exercise protection.\textsuperscript{412} Whether a belief or practice is religious or secular in some cases may be a troubling threshold inquiry. As the Supreme Court said in Wisconsin v. Yoder:

\begin{quote}
Although a determination of what is a “religious” belief or practice entitled to a constitutional protection may present a most delicate
\end{quote}

\textsuperscript{410} The closest precedent is People v. Woodruff, 26 A.D. 236, 272 N.Y.S.2d 786 (1966), aff’d, 21 N.Y.2d 848, 236 N.E.2d 159, 288 N.Y.S.2d 1004 (1968). In Woodruff, a grand jury investigating adultery, disorder, and use of narcotics at a particular house subpoenaed a resident of that house. The resident claimed that testifying would harm others and thus offend her religion, an unnamed religion she described as akin to Hinduism. The court acknowledged that her belief was both sincere and religious, but concluded that the grand jury’s paramount need for all pertinent evidence outweighed her free exercise objection to testimony. \textit{Id.} at 238-39, 272 N.Y.S.2d at 789-90.

In Smilow v. United States, the Second Circuit rejected a seventeen-year-old student’s free exercise objection to answering a grand jury’s questions. 465 F.2d 802 (2d Cir.), judgment vacated, 409 U.S. 944 (1972). The youth claimed that “as an ‘observant and committed Jew’ he must refuse to answer the grand jury questions or else suffer ‘[d]ivine punishment and ostracism from the Jewish community.’” \textit{Id.} at 804. The court found his claim to be novel although “its precise religious basis [was] . . . not clear from the record.” \textit{Id.} Even assuming \textsl{arguendo}, however, that Jewish law contained such a tenet, and that the claimant sincerely believed it, the court held that the youth’s free exercise right was outweighed by the state’s compelling interest in obtaining every person’s testimony. \textit{Id.} at 805. The court also found that the grand jury’s questioning was narrowly drawn to elicit only relevant testimony. \textit{Id.}


question, the very concept of ordered liberty precludes allowing every
person to make his own standards on matters of conduct in which so-
ciety as a whole has important interests.\footnote{413}

This initial requirement may present a snag for clergy of novel
religious groups or even secular humanist counselors who wish
to claim a privilege. Such claimants must contend with the pre-
vailing confusion about the definition of religion for free exer-
cise purposes.\footnote{414}

Even clergy of "mainline" denominations may have trouble
characterizing as religious their objections to disclosure. This
conclusion draws support from several other cases in which the
Supreme Court extended free exercise protection to individuals
whose religious beliefs were personal. If a concededly religious
group has an official rule or policy against its clergy's disclosure
of confidential communications, adherence to that rule or pol-
icy should count as free exercise of religion. Most denomina-
tions, however, have no official rule or policy concerning
confidentiality.\footnote{415} Other denominations require confidentiality
but allow exceptions for situations involving harm to third per-
sons generally or child abuse specifically. If a cleric of such a
church nevertheless claims a religious objection to disclosure,
the cleric may have difficulty characterizing the objection as
religious.

Some free exercise precedent seems to suggest the impor-
tance of group backing in determining whether a belief is reli-
gious. In \textit{Wisconsin v. Yoder},\footnote{416} for prominent example, the
Supreme Court took pains to distinguish religious beliefs from
beliefs merely "philosophical and personal."\footnote{417} The free exer-
cise clause protects the former but not the latter.\footnote{418} \textit{Yoder}
involved three Amish parents' free exercise objections to sending

\begin{itemize}
\item \footnote{413} 406 U.S. 205, 215-16 (1972) (footnote omitted).
\item \footnote{415} See W. TIEMANN & J. BUSH, supra note 5, at 20-24; see also Reese, \textit{supra} note 57, at 68-70 (noting that many denominations have no precise rules regarding confidential communications); Yellin, \textit{supra} note 57, at 146-48 (discussing differences among denominations respecting confidential communications); Comment, \textit{Clergy Malpractice: Bad News}, \textit{supra} note 49, at 232-33 (noting that many denominations lack expressly defined rules regarding confidential communications).
\item \footnote{416} 406 U.S. 205 (1972).
\item \footnote{417} Id. at 216.
\item \footnote{418} Id.
their children to school beyond eighth grade.\textsuperscript{419} In support of its characterization of the Amish parents' claim as religious, the Court repeatedly noted that the parents' claim was firmly grounded in three centuries of group practice and belief.\textsuperscript{420} Indeed, the Court was conspicuously unconcerned with the specific beliefs of the individual parents who were parties to the lawsuit. Instead, the Court skipped immediately to an exploration of the nature of beliefs and practices of the Amish community generally.

Yet it would be a mistake to read \textit{Yoder} as saying that the free exercise clause protects only shared or institutionalized beliefs. Rather, the determinative distinction seems to have been between religious and philosophical beliefs and not a distinction between shared and personal beliefs.\textsuperscript{421} Indeed, the Court has since declared that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."\textsuperscript{422} Thus, a cleric of a concededly religious organization who cannot fall back on denominational rules of confidentiality is not precluded from arguing that her maintenance of secrecy is grounded in religious belief.

A cleric lacking church backing may, however, have more difficulty convincing a court that the asserted belief in secrecy is religious.\textsuperscript{423} The cleric's difficulty will derive partly from the

\begin{itemize}
  \item \textsuperscript{419} \textit{Id.} at 207.
  \item \textsuperscript{420} \textit{Id.} at 219, 235.
  \item \textsuperscript{421} This conclusion draws support from several other cases in which the Supreme Court extended free exercise protection to individuals whose religious beliefs were personal. \textit{See} \textit{Thomas v. Review Bd. of Ind. Empl. Sec. Div.}, 450 U.S. 707, 715-16 (1981) (holding that the free exercise clause protects religious beliefs even if they are not shared by all members of the sect); \textit{United States v. Ballard}, 322 U.S. 78, 87 (1944) (holding that the free exercise clause prohibits courts from questioning the truth of religious views); \textit{cf.} \textit{Gillette v. United States}, 401 U.S. 437 (1971) (holding that those who object to participation in a "particular" war are not exempt, even if the objection is religious in character). In \textit{Gillette}, the Court noted that:
  \begin{itemize}
    \item In the draft area for 30 years the exempting provision has focused on individual conscientious belief, not on sectarian affiliation. . . . And while the objection [to war] must have roots in conscience and personality that are "religious" in nature, this requirement has never been construed to elevate conventional piety or religiosity of any kind above the imperatives of a personal faith.
  \end{itemize}

  \item \textsuperscript{422} \textit{Thomas}, 450 U.S. at 715-16.
  \item \textsuperscript{423} \textit{See}, \textit{e.g.}, \textit{In re Murtha}, 115 N.J. Super. 380, 279 A.2d 889 (holding that the privilege asserted by a nun is based on individual conscience because the
Court's failure to define religion. Except for the group-focused inquiry in *Yoder*, the Court's only modern consideration of what counts as religion came in the conscientious objection cases of the Viet Nam draft era.\(^4\) Although those cases involved statutory rather than direct constitutional interpretation, they are commonly read as suggesting the Court's willingness to interpret religion broadly to include practices rooted in a "sincere and meaningful [belief that] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."\(^5\)

Without knowing the nature of a particular cleric's objections to disclosure, one cannot decide whether these personal objections are religious. The cleric may believe it is sinful for any person to violate a confidence.\(^6\) The cleric may also believe that anything confessed to her in her professional capacity is, metaphysically, confessed only to God and that the cleric is merely a nonhearing conduit.\(^7\) If, however, the cleric's claim rests on a concern that disclosure will diminish the effectiveness of her ministry, her claim is peculiar. It then rests on a Catholic denomination does not require nuns to keep confidences), *cert. denied*, 59 N.J. 239, 281 A.2d 278 (1981); see also *supra* note 408 (additional discussion of *In re Murtha*). For this reason, church groups may be wise to adopt some official policy regarding the secrecy of confidential communications to their clergy. Augspurger, *supra* note 223, at 114-15. On the other hand, adopting such a policy might make a cleric who discloses in violation of that policy more vulnerable to a malpractice suit. Smith, *supra* note 57, at 18.

424. See *Welsh v. United States*, 398 U.S. 333 (1970) (holding that conscientious objector status applies to seriously held religious beliefs even if beliefs are nontraditional); *United States v. Seeger*, 380 U.S. 163 (1965) (holding that the test for exemption is whether beliefs are religious within the objector's "own scheme of things").


427. "A man should by no means give evidence on matters secretly committed to him in confession, because he knows such things, not as man but as God's minister . . . ." THOMAS AQUINAS, SUMMA THEOLOGICA II-II, q.70, art. 1, at 266 (Fathers of the English Dominican Province trans. 1918). This belief is expressed similarly in other religious writings:

[T]he priest in the confessional takes the place of Christ. The revelations made by the penitent are not made to the confessor as man but in his vicarious capacity as the representative of Christ. Therefore the confessor has no dominion over, no really human knowledge of, what has been confessed in the Sacrament . . . . And if the confessor does wrongfully reveal the knowledge acquired in the Sacrament he adds to his crime of sacrilege the guilt of falsehood by asserting something of which he is not, humanly speaking, aware.

*Confession, Seal of*, 4 NEW CATH. ENCYCLOPEDIA 134 (1967).
professional and not merely personal belief that she should not disclose. The cleric's argument is that her official role in her religious group imposes on her special obligations of secrecy. In other words, she argues that her religion includes her special ministry and that maintaining certain confidences enhances the effectiveness of that ministry.

The Supreme Court has stated that "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister . . . ."428 Courts have not, however, developed a specialized jurisprudence of free exercise for professional clergy.429 A court might look somewhat askance at a cleric's claim that a belief about ministerial effectiveness is a religious belief when the church in which the cleric is an officer does not share that belief.430 A court should,
however, be reluctant to be drawn into the question whether it is the church group or the individual cleric who defines the cleric's ministry. Courts should recognize as religious a claim to secrecy asserted by those who believe that they are called to minister and that confidentiality is essential to the effectiveness of that ministry.

2. Sincerity

In addition to showing that his belief is religious, the cleric must also demonstrate the sincerity of his belief. A cleric's refusal to disclose confidential information must be rooted in religious beliefs held honestly and in good faith. Although inquiring into sincerity of a belief carries some danger of spilling into impermissible judgments about the truth or falsity of that belief, the elimination of a sincerity requirement might encourage spurious claims contrived to avoid a general legal obligation such as the obligation to report child abuse. In any event, although courts do not require the religious belief to be true, well-articulated, or even consistent, they do require that the belief be sincerely held.

3. Burden on Religious Belief or Practice

The cleric must show a burden imposed by the government on free exercise of religion. Reporting requirements backed by criminal or civil sanctions unquestionably directly burden the clergy, who may indeed have independent constitutional rights (not derivative from other persons' rights to seek their counsel) to practice an effective ministry.

432. Id. at 92-93 (Jackson, J., dissenting) (arguing that issues of truth and sincerity are inseparable). Here again, the distinction between individual belief and institutional rule complicates the issue. Consider a cleric who personally believes he should report confided information concerning abuse of a child, but who also, as a minister of a religious organization, professes loyalty to that organization's rules forbidding disclosure. Where precisely should the sincerity inquiry be brought to bear? On the belief of those who adopted the organization's rule? On the cleric's belief that he should be obedient to that rule? The problem stems from the tendency of free exercise jurisprudence to focus on the characteristics of beliefs (true or false, sincere or spurious, theistic or atheistic) rather than on practices or office. There is little guidance for determining whether and when a religious practice receives free exercise protection based on its grounding in official church rule or policy. Apparently, such grounding makes it easier to prove that a belief is religious, see supra text accompanying notes 415-30, and that the belief is sincere. Beyond that, much is unclear.
religious liberty of a cleric whose religion forbids disclosure.\textsuperscript{434} Although the Supreme Court has never made this an official part of the free exercise test, the seriousness of the burden on religious liberty might also enter into the analysis.\textsuperscript{435} In \textit{Gillette v. United States},\textsuperscript{436} for example, the Court stated that denying certain conscientious objectors an exemption from the draft imposed only “incidental burdens” on their religion.\textsuperscript{437} The Court also has permitted some burdening of religious liberty in the form of reasonable time, place, and manner restrictions on religious speech.\textsuperscript{438} In \textit{Yoder}, however, the Court concluded that requiring Amish parents to send their children to school for two years beyond eighth grade was overly burdensome and carried “a very real threat of undermining the Amish community.”\textsuperscript{439} The Court in \textit{Yoder} noted this threat as part of its finding that the parents had a free exercise claim in the first place, before it balanced that claim against the state’s interests.\textsuperscript{440}

Because courts have not focused much attention on the degree of burden on free exercise, there is room to speculate about the weight to be accorded this factor. The question is raised whether a court is free to evaluate the importance or centrality of a religious practice either to the individual claimant, as in \textit{Gillette}, or to the claimant’s religious community, as in \textit{Yoder}. Such a judicial inquiry threatens to entangle courts in religious questions that they are practically and constitutionally incompetent to address. Yet a court is surely entitled to determine whether the claimed infringement on religion is more than de minimis before requiring a compelling state inter-

\textsuperscript{434} Before \textit{Sherbert} v. \textit{Verner}, 374 U.S. 398 (1963), the Court was reluctant to invalidate, on free exercise grounds, indirect burdens such as the economic pressures exerted by “blue laws” on business persons with Saturday sabbaths. \textit{See} \textit{Braunfeld v. Brown}, 336 U.S. 599 (1961). Since 1963, however, the Court has clearly held that even indirect burdens on religious practice can justify a free exercise argument. \textit{Sherbert}, 374 U.S. at 403-04. \textit{See also Thomas}, 450 U.S. at 717-18 (noting that an indirect burden may be substantial); \textit{McDaniel}, 435 U.S. at 626-29 (holding that disqualifying clergy from the right to seek office violates the free exercise clause).

\textsuperscript{435} \textit{Cf. supra} note 388.

\textsuperscript{436} 401 U.S. 437 (1971).

\textsuperscript{437} \textit{Id.} at 462.


\textsuperscript{439} 406 U.S. 205, 218 (1972).

\textsuperscript{440} \textit{Id.} at 213-19.
est to justify the infringement. In most cases, the cleric who objects to disclosing confidential communications can meet such a threshold test by stressing the importance of confidentiality to confessions and counseling, and the deep importance of confessions and counseling to religious beliefs. A court probing the religious importance of these practices should be prepared for answers framed in such religious terms as absolution, salvation, and the welfare of souls.

C. BALANCING AGAINST STATE INTERESTS

Once a cleric has shown that a child abuse reporting requirement burdens his sincere religious belief in, or his denomination's requirement of, confidentiality, the state must justify its reporting requirement with a compelling state interest. Despite the absolute language of the first amendment, the Supreme Court has recognized the necessity for some government interference with religious practices. When challenged, however, the government's burden is substantial: “Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” Accordingly, the state has the dual burden of justifying both its end and its means.

441. “If, for a moment, the idea could be entertained that the confessor might make use of any information he received in confession, or mention even the smallest sin confessed to him, the usefulness, sanctity, and benefits of the sacrament would be rendered absolutely null and void.” F., Belton, A Manual for Confessors 89 (rev. ed. 1931). “If the privilege were taken away and the confidential nature of the penitential communications violated and disregarded, the work of the church would be greatly hampered and a purely secular society would be well on its way.” Reese, supra note 57, at 81.

442. Free exercise cases have long distinguished between freedom to believe and freedom to act. See, e.g., McDaniel v. Paty, 435 U.S. 618, 626-27 (1978) (holding that Tennessee's disqualification statute is aimed at conduct, not belief); Sherbert v. Verner, 374 U.S. 398, 402-03 (1963) (noting that the free exercise clause does not protect overt religious acts that threaten public safety); Reynolds v. United States, 98 U.S. 145, 166 (1878) (holding that the first amendment allows regulation of religious practices). Freedom to believe is absolute. It is not subject to balancing with state interests. See, e.g., Torcaso v. Watkins, 367 U.S. 488 (1961) (holding that a state may not for any reason require its public officials to profess belief in God). If, however, a law burdens religious conduct, the state can defend its law by showing that it is necessary to some compelling state interest. Sherbert, 374 U.S. at 406. Reporting requirements fall into this second category: they punish a cleric for the “act” of refusing to speak.


444. See Thomas v. Review Bd. of Ind. Empl. Sec. Div., 450 U.S. 707, 718 (1981) (a “state may justify an inroad on religious liberty by showing that it is
1. Formulating and Weighing the State Interest

To meet this high burden, a state will assert its obvious and unquestionably important interest in the safety of children. The aim of reporting requirements in every state is to bring to light more cases of abuse so that the state can protect children. As parens patriae, the state has the high duty to safeguard its children. Its interest in doing so is surely compelling. Here, however, one must avoid the temptation to slide into a facile balancing of clergy's religious rights with children's safety. The appropriate balancing test is and should be more complicated than that. First, much depends on how one formulates the interests to be balanced. Second, the free exercise test looks beyond the legitimacy and weight of the state interest and inquires also into the necessity of the means chosen to pursue that interest. Popular oversimplification of the clergy

the least restrictive means of achieving some compelling state interest”); see also United States v. Lee, 455 U.S. 252, 257-58 (1982) (a “state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest”).

445. Some courts have characterized as compelling a state's interest in the availability of all relevant evidence for a trial or grand jury investigation. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 685-88 (1972) (grand jury may require testimony by news reporter even when such testimony threatens confidentiality of sources); Kastigar v. United States, 406 U.S. 441, 444 (1972) (ability to compel testimony is an essential power of government); Smilow v. United States, 465 F.2d 802 (2d Cir.) (state interest overrides free exercise argument for nondisclosure), vacated, 409 U.S. 944 (1972); People v. Woodruff, 26 A.D.2d 236, 272 N.Y.S.2d 786 (1966) (same), aff'd, 21 N.Y.2d 848, 236 N.E.2d 159, 288 N.Y.S.2d 1004 (1968). As Smith, supra note 165 at 8 n.48, 32, notes, however, the need for all relevant evidence is not, of itself, compelling in every case. If it were, no claim of privilege would ever prevail. In any event, these precedents deal with the state's need for evidence in a trial or grand jury proceeding, and not with the state's need for an initial report. The weight of the state's interest in reports of child abuse should depend on the necessity of those reports to some other compelling state interest, for example, the state's interest in protecting children.

446. See supra notes 8-11 and accompanying text.

447. The doctrine of parens patriae (parent of the country) holds that the state is “parent” to its dependent citizens. This doctrine is the basis for state intervention to protect children. See generally Areen, Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases, 63 GEO. L.J. 887, 894-99 (1975) (discussing the history of the parens patriae doctrine). See also Prince v. Massachusetts, 321 U.S. 158 (1944) (the right of free exercise of religion does not include freedom to threaten the health or safety of children).

The state may also have other goals, such as rehabilitating or punishing the abuser, or keeping the family together. These interests, however, are all part of the state's interest in protecting children. A state seldom articulates an independent interest in helping a child abuser for the abuser's own sake.
privilege issue often results from failure to acknowledge these complications.

The free exercise test is a balancing test in the sense that it calls for a state interest sufficiently important to override a free exercise claim. Balancing tests are inherently slippery. One reason is the unavoidable subjectivity of any judgment that one interest "outweighs" another. In addition, much depends on how one characterizes the interests to be balanced. The balancer must be careful, for example, to formulate the opposing interests at the appropriate "level of generality." One can load the issue by tinkering with the formulation of the interests. For example, one could characterize the interest on the cleric's side as a cleric's right to keep secrets, a cleric's right to an effective ministry, a cleric's right to save souls, a cleric's right to the free exercise of religion, or society's interest in the free exercise of religion. Similarly, one could characterize the state's interest as an interest in clergy reports for additional sources of information on child abuse, an interest in locating cases of child abuse, an interest in intervening on behalf of abused children, or an interest in protecting abused children. To formulate the issue as a balancing of the cleric's right to keep secrets against the state's interest in protecting children is misleading and inflammatory.


449. See id.; Weisberg & Wald, supra note 221, at 208-09.

450. See Pepper, supra note 448, at 928.

451. See Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). Tarasoff held that psychotherapists may have a duty to warn, or take reasonable steps to protect, foreseeable victims of their patients' violence. The court characterized the issue as one of weighing the public interest in treatment for the mentally ill against public "safety from violent assault." Id. at 440, 551 P.2d at 346, 131 Cal. Rptr. at 26. The dissent, on the other hand, stated the issue as "whether effective treatment for the mentally ill should be sacrificed to a system of warnings." Id. at 452, 551 P.2d at 355, 131 Cal. Rptr. at 35 (Clark, J., dissenting) (emphasis added).

452. In each of these lists the move from the first option to the second is a step that assumes the effectiveness of means to ends. The free exercise test requires the state to demonstrate that its means (compelled clergy reports) is necessary to its end (locating and protecting abused children). "[T]he mere reporting of child abuse offers no protection to children." Comment, Civil Liability, supra note 49, at 151. Indeed, for the state this list represents not just a list of alternative characterizations of its interests, but a list of necessary links in its chain of argument. The free exercise test, however, does not require the cleric to show even a rational connection between means (keeping secrets) and any end. The cleric simply must show that the burdened means (keeping secrets) is a sincere exercise of religion.
A related trouble here is with the image of the free exercise test as a weighing of competing interests on scales, with the "heavier" interest prevailing. That image is misleadingly simplistic in that it fails to explain what "items" are being weighed. A claimant who shows a more-than-minimal state-imposed burden on her exercise of religion should be entitled to place upon the scales the full weight of the free exercise of religion. That interest is heavy and can be outbalanced only by a compelling state interest. The state, on the other hand, can place on the scales only those interests that it first shows are necessarily served by its burden on the claimant's religion.453

453. This Article does not consider whether, if a child's safety is clearly at stake, free exercise interests might nevertheless outweigh the state's interest in protecting the child. Some persons might argue that even when a child's safety is threatened free exercise interests ought to prevail, particularly when the free exercise claimant perceives those interests in terms of ultimates such as salvation or damnation. Apparently, however, the law has already decided that issue. In situations involving a parent's religious objections to medical treatment for a child, for example, courts have always authorized state intervention to provide necessary medical treatment to save the child's life or to protect the child from imminent and extremely serious physical harm. Note, In re Hofbauer: May Parents Choose Unorthodox Medical Care for Their Child?, 44 ALB. L. REV. 818, 822 n.15 (1980). Courts have authorized intervention despite a parent's claim that the treatment would jeopardize the parent's or child's eternal salvation and despite the combination of the parent's free exercise right with a constitutional right to make child-rearing decisions. See, e.g., Jehovah's Witnesses in State of Wash. v. King County Hosp., 278 F. Supp. 488, 504 (W.D. Wash. 1967) (holding that state intervention is appropriate for health and welfare purposes despite child's participation in objecting religion), aff'd, 390 U.S. 598 (1968) (per curiam), reh'g denied, 391 U.S. 961 (1968); People ex rel. Wallace v. Labrenz, 411 Ill. 618, 625-26, 104 N.E.2d 769, 773-74 (temporarily depriving parents of custody of minor child to administer transfusion did not violate parental or religious rights), cert. denied, 344 U.S. 824 (1952); Muhlenberg Hosp. v. Patterson, 128 N.J. Super. 498, 500-02, 320 A.2d 518, 520-21 (1974) (government action may transgress religious beliefs where goal is general health of community); Mitchell v. Davis, 205 S.W.2d 812, 815 (Tex. Civ. App. 1947). Unlike most reporting statutes, however, these cases have generally drawn a line between serious threats to a child's life or health and less serious threats. See Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 YALE L.J. 645, 651-61 (1977); Note, In re Hofbauer, supra note 454 at 822 n.15, 823 n.16; Note, Judicial Limitations on Parental Autonomy in the Medical Treatment of Minors, 59 NEB. L. REV. 1093, 1113-14 (1980); Note, Choosing For Children: Adjudicating Medical Care Disputes Between Parents and the State, 58 N.Y.U. L. REV. 157, 163-66 (1983). To be sure, some cases suggest that concern for even lesser threats to a child's well-being might outweigh free exercise interests. See, e.g., Prince v. Massachusetts, 321 U.S. 158, 168-69 (1944) (state's power to regulate child labor overrides free exercise claim); In re Sampson, 65 Misc. 2d 658, 665-69, 317 N.Y.S.2d 641, 649-52 (Fam. Ct. 1970) (child's need for cosmetic surgery to reduce severity of facial deformity overrides parents' religious opposition to blood transfusions), aff'd, 37 A.D.2d 668, 323 N.Y.S.2d 253 (1971), aff'd, 29 N.Y.2d 900, 278
In other words, the free exercise inquiry into the weight of the state's interest presupposes the inquiry into the necessity of the means chosen to pursue that interest.

2. Necessary Means

A state therefore cannot rest upon a showing that its reporting requirement aims at the paramount state interest of protecting children from abuse, but must also show that its means are necessary to its end. Thus, a state must show that its reporting requirement is a necessary means to protecting children from abuse. In fact, although this point is less clear, a state must show the necessity not just of some reporting requirement, but specifically of applying that requirement to clergy who have free exercise objections. To place on the scales the full weight of its interest in protecting children, the state must first prove that clergy reports are necessary for locating more abused children, that locating the children is neces-

N.E.2d 918, 328 N.Y.S.2d 686 (1972). Arguably, these cases gave insufficient weight to the parents' free exercise rights. In any event, all of these cases clearly implicated the child's welfare. They presented little question concerning the means by which the state sought to protect the child. It is, however, the long-term effectiveness of clergy reports as a means of protecting children that this Article questions.


455. In Yoder, for example, the state of Wisconsin needed more than a general argument that its compulsory education statute was necessary to achieve its paramount goal of securing an education for its children. Wisconsin needed to argue more specifically that denying an exemption to the Amish was necessary to its goal. Wisconsin v. Yoder, 406 U.S. 205, 205 (1972). The Court found that Wisconsin could make no such specific showing, because the Amish provided its young people with an alternative educational experience that, for the Amish youth, met the state's goals. Id.

Contrast the holding in Yoder with the Court's holding in United States v. Lee, 455 U.S. 252, 260-61 (1982), denying to Amish employers an exemption from paying Social Security tax for their employees. In Lee, the Court found that for the Social Security system to be effective it must be compulsory. Id. at 258-59. Exceptions for persons who could provide alternative income security for retirement would defeat the program. Id. Thus, the Court in Lee distinguished Yoder: universal education is less threatened than is a universal retirement insurance program by exceptions for people able to provide their own alternative programs. Id. at 259-60. Although one might quarrel with the results in Yoder and Lee, the Court in those cases does seem to draw a useful distinction between justifying a state's general requirement and justifying the specific application of that requirement to a free exercise objection. Accordingly, a state must show specifically that requiring objecting clergy to report child abuse is necessary to protect children from abuse.
sary for the state's intervening, and that state intervention is necessary for protecting children. None of the links in this argument should be weak if the state is to prevail.

The state can argue that clergy are often in a position to observe families, that abusers, victims, and other persons affected by child abuse are likely to confide in clergy, and that the cleric's unique role—as confidant, spiritual adviser, and perhaps bespeaker of God's forgiveness—attracts troubled persons and will make clergy especially rich sources of tips on cases of abuse. The state must argue further that it investigates reported cases and, when necessary, intervenes with appropriate and effective procedures to protect the abused child.

A cleric has three directions of response. He might first argue that requiring clergy to report does not in fact significantly further the state's goal of protecting children. Second, he might argue that, even if requiring clergy to report results in some additional reports of abuse, the state has alternative ways of securing that information. Third, he might argue that undermining the confidential relationship between confiders and clergy will defeat one valuable, nongovernmental means of achieving the state's own goals of preventing and treating child abuse. Stated differently, the cleric has three attacks on the claim that requiring clergy reports is a necessary means of preventing and treating abuse: (1) such reports are not in fact a means to that end at all; (2) alternative means exist; and, (3) such reports actually work against the desired end in many cases.

a. No Means At All

To argue that clergy reports are not an effective means to the state's end of protecting children, the cleric might criticize the state's follow-up to a report, as many commentators have done.456 If follow-up measures are ineffective in protecting

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children, the state should not be entitled to claim as its compelling interest the protection of children. Furthermore, the state should bear the burden of proving the effectiveness of its means to its end.\textsuperscript{457}

Even if a state's post-report procedures are effective, however, a cleric has a good argument that the state stands to gain no additional information from requiring objecting clergy to report. Thus, requiring clergy to report is not only not a necessary means of preventing child abuse, it is no means at all. A person who seeks out a cleric for consultation or confession usually does so with the expectation that the cleric will hold his communications confidential. Often that expectation is reinforced by church rules, the cleric's practice, and the cleric's express assurance. If, to comply with statutory reporting requirements, clergy begin to disclose otherwise confidential information, the expectation of secrecy will be destroyed. In the short run, confiders will feel betrayed; in the long run, they are likely to stop confiding in the clergy. As a result, the clergy will no longer be a source of tips on child abuse, and the reason for requiring them to disclose in the first place will dissolve. In the final analysis, by requiring clergy to report, a state will succeed only in deterring abusers and others troubled by abuse from seeking private help from clergy.\textsuperscript{458}

It may be difficult to prove that such a chain of events would follow clergy disclosures, but clergy and psychotherapists have repeatedly voiced this claim.\textsuperscript{459} Indeed, the likeli-

\textsuperscript{457} One author has described the similar constitutional privacy test as requiring the state to prove that its law "actually and significantly" advances its asserted state interest. See Smith, supra note 165, at 36. "Without this limitation on the compelling state interest doctrine, governments might claim that every state regulation furthered a compelling interest, even though it promoted that interest in only the most trivial or tenuous manner." Id.


\textsuperscript{459} See, e.g., supra note 223; Stoyles, supra note 150, at 49. Cf. Contemporary Studies Project, supra note 11, at 1337-38 (finding that medical reporters are reluctant to report instances of child abuse for fear of deterring parents from bringing the child for treatment); Smith, supra note 165, at 36-37 ("As patients recognize that their confidences may be revealed, they can be expected to minimize the confidential information revealed in therapy, especially if they have reason to believe that their therapy or confidences may become the subjects of litigation.").

Smith and Meyer present a similar argument for psychotherapy:
hood of such a scenario is a key premise of the Wigmore rationale, the most commonly cited rationale for the clergy privilege.\textsuperscript{460} Personal and perhaps incriminating disclosures are not likely to be disclosed to someone not trusted to keep them confidential.

Despite some language in the Supreme Court's 1972 opinion in \textit{Branzburg v. Hayes},\textsuperscript{461} clergy should not need empirical data to prove that their disclosures of confidential communications will deter further confiding. In \textit{Branzburg}, the Supreme Court held that a news reporter has no constitutional privilege against testifying to a grand jury concerning confidential news sources.\textsuperscript{462} In response to the reporter's argument that forcing disclosure would cause valuable sources of information to dry up, the Court stated:

\begin{quote}
[W]e remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. \ldots \text{[T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common law and constitutional rule regarding the testimonial obligation of newsmen.}\textsuperscript{463}
\end{quote}

Such language might appear to suggest that a court should require some empirical evidence to support a cleric's argument that compelling him to disclose confidential communications would deter persons from confiding in him. The issue in \textit{Branzburg}, however, is distinguishable from the clergy privilege issue. In \textit{Branzburg}, the issue was whether to recognize a first amendment privilege in the first place. The reporter's proof that disclosure would deter his sources was necessary to

\begin{quote}
Abusers seeking (psychotherapeutic) treatment do not just run the risk of having the fact of abuse disclosed to authorities in many states, they can be certain of the release of that information if their therapists abide by the law. \ldots \text{Therefore, abusers knowing of the reporting requirements may be discouraged from seeking treatment or from describing their problems with child abuse if they enter treatment.}\textsuperscript{460} See supra text accompanying notes 223-29.  

Furthermore, “[a] professional who fears that she might have to disclose confidential information in court might be inhibited from eliciting it from the client.” Weisberg & Wald, supra note 221, at 184.\textsuperscript{461}  

Furthermore, it would be anomalous for a state to argue that a cleric's disclosure of a confider's communications would not significantly inhibit such communications to the cleric, when the state itself allows the cleric to anonymously report abuse, ostensibly to encourage more reports.\textsuperscript{462}  

\begin{flushright}
\textsuperscript{460} 408 U.S. 665 (1972).  
\textsuperscript{461} Id.  
\textsuperscript{462} Id. at 693.
\end{flushright}
link his claim of privilege with an already recognized first amendment right, such as the right of the public to receive information.464 Without that link, the reporter's claim lacked constitutional dimension: news reporters otherwise have no special first amendment right to be enabled to gather news.465 The cleric, on the other hand, at this stage in her argument, has already established a first amendment right to a privilege. She has done so directly by showing governmental compulsion of conduct her religion forbids. She now is attacking the state's argument that forcing clergy to report will give the state any new information concerning child abuse.466 At this stage, the burden should be on the state to supply evidence for its counterintuitive proposition that a cleric's report would not dry up the sources of her information.

As the dissenters in Branzburg stated:

[The Supreme Court has] never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.

Rather, on the basis of common sense, we have asked, often implicitly, (1) whether there was a rational connection between the cause (governmental action) and the effect (deterrence or impairment of First Amendment activity) and (2) whether the effect would occur with some regularity, i.e., would not be de minimis.467

The dissenters added that, although denying a news reporter's privilege would not deter informants in every case, it would likely deter informants in the most sensitive and controversial relationships.468 The dissent continued: "To require any

464. Id. at 680.
465. Id. at 681-82, 684-85.
466. The cleric's argument would be analogous to the news reporter's in Branzburg if the only exercise of religion involved were the confider's act of consulting clergy. In that event, Branzburg would point more clearly to the need for the cleric to demonstrate that reporting requirements in fact deter persons from exercising their first amendment right to consult clergy. In that case, too, both Branzburg and Whalen, see supra notes 252-53 and accompanying text, would be discouraging precedent for the cleric's deterrence argument. If, however, the cleric's right to silence is itself a first amendment right, as this Article argues, these precedents are distinguishable.
467. 408 U.S. at 725, 733-34 (Stewart, J., dissenting). The dissent continued: "And, in making this determination, we have shown a special solicitude towards the 'indispensable liberties' protected by the First Amendment ... for 'freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" Id. at 734 (quoting NAACP v. Alabama, 357 U.S. 449, 461 (1958); Bantam Books Inc. v. Sullivan, 372 U.S. 58, 66 (1963); Bates v. Little Rock, 361 U.S. 516, 523 (1960)) (citations omitted).
468. Id. at 735-36. As Justice Stewart noted in his Branzburg dissent, id. at
greater burden of proof is to shirk our duty to protect values securely embedded in the Constitution. We cannot await an unequivocal—and therefore unattainable—imprimatur from empirical studies."\textsuperscript{469} Although the dissenters in \textit{Branzburg}, like the majority, were addressing the distinguishable issue of whether the state's disclosure requirements infringed anyone's first amendment rights, their caution concerning empirical proof should apply a fortiori when the state \textit{has} infringed a first amendment right and is attempting to justify the infringement.

\textbf{b. Alternative Means Available}

The cleric's second argument might be that the state can pursue other means of discovering child abuse. Other persons, for example, are required to report suspected cases of child abuse and can do so without offense to their religious beliefs.\textsuperscript{470} Many such persons are likely to obtain such information from encounters unencumbered by an expectation of confidentiality. The Supreme Court has stated that 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."\textsuperscript{471}

The appealing counterargument here is that child abuse is a huge and terrible problem calling for every weapon in the state's arsenal. One major obstacle to stopping abuse has been the difficulty of discovering the abuse. If a cleric fails to report a suspected case of abuse, someone else may or may not report the same case. The state will argue that no alternate means exist to discover every case. This state's argument is stronger in states whose statutes compel reports from \textit{any person} who suspects abuse. Most states, however, limit the categories of persons required to report, and in those states the state's argument is correspondingly weaker. By indicating that not every person's suspicion is worth pursuing, those states have already forfeited the argument that reports are required from every

\textsuperscript{735}, the Court had previously found that forcing disclosure of the names of NAACP members was likely to adversely affect the ability of NAACP members to advocate their beliefs or attract new members. \textit{See also} NAACP v. Alabama, 357 U.S. 449, 462-63 (1958) (compelled disclosure of organization's membership held unconstitutional restraint on freedom of association). \textsuperscript{469} \textit{Branzburg}, 408 U.S. at 736 (Stewart, J., dissenting).

\textsuperscript{470} Most reports come from nonprofessionals. \textit{See} Fraser, \textit{supra} note 11, at 646 (stating that although reporting statutes have focused on professionals, most reports come from nonprofessionals).

possible source.\textsuperscript{472} 

c. Counterproductive Means

The cleric might also argue that compelling clergy to report works counter to the state’s own goal of protecting children. This argument might take three forms. First, the cleric’s sharpest argument is that the state’s procedures following a report are not only ineffective but actually harmful to the child.\textsuperscript{473} Critics who have voiced this concern focus especially on the vagueness of reporting standards which results in much overreporting and in turn means that the state has unnecessarily invaded the privacy of many families to the detriment of all family members, including the child.\textsuperscript{474} Even if a state’s investigation substantiates the suspicion of abuse, the state’s consequent intervention may do more harm than good.\textsuperscript{475} Although such criticisms of state intervention may or may not be warranted in a particular state, their assertion by many commentators indicates the feasibility of such an argument to defend a cleric’s free exercise claim.

Second, a cleric can concede the effectiveness of a state’s interventions and still argue that religious ministration is more effective, at least in many cases. The strength of this argument depends on the effectiveness of clergy counseling because the argument is that what clergy can do to alleviate the situation

\textsuperscript{472} Most states’ reporting statutes are not so broad as to require anyone who suspects abuse to report. See I. Sloan, \textit{supra} note 11, at 24-25. Furthermore, almost half the statutes expressly preserve the attorney-client privilege despite expanding reporting requirements. See id. at 40-41. The rationale for the attorney-client privilege is generally thought to be weak, however, and is certainly no stronger than a free exercise right to claim a clergy privilege. See S. Stone & R. Liebman, \textit{supra} note 53, \S 1.01.

\textsuperscript{473} In some cases the reporter fears that a report would provoke further abuse of the child. See \textit{Contemporary Studies Project, supra} note 11, at 1337-38.

\textsuperscript{474} See Bourne & Newberger, ”Family Autonomy” or ”Coercive Intervention”? Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect, 87 B.U.L. Rev. 670, 696 (1977); Clements, Child Abuse: The Problem of Definition, 8 CREIGHTON L. Rev. 729, 733-37 (1975); Smith & Meyer, \textit{supra} note 13, at 357. Arguably, when the state unnecessarily intrudes on family, it infringes upon the family’s constitutional privacy rights. \textit{Id.} at 355 n.31. \textit{See also} Note, \textit{supra} note 242, at 731-33 (cautioning that statutes protecting children from abuse must be carefully drafted to minimize government intrusion into family life).

may be better than what the state with its arsenal of interventions can accomplish.\textsuperscript{476} A similar argument has often been made on behalf of psychotherapists.\textsuperscript{477} The argument on behalf of clergy, however, may strain the confidence people have in clergy's counseling skills, especially in light of this nation's wildly various religious groups and the wide divergence of their clergy's training and religious objectives.\textsuperscript{478} Thus, a state might justify a distinction between clergy and licensed psychotherapists. Maine, for example, permits state-licensed mental health professionals, but not clergy, to participate in the state's decision how to proceed following a report of abuse.\textsuperscript{479} Alternatively, a state might recognize a category of clergy who meet certain standards of counseling, training, or skill and who therefore perhaps have a stronger reason to refuse to report abuse.\textsuperscript{480} On the other hand, the effectiveness of even licensed psychotherapists is often uneven, while many clergy are well-trained and competent counselors. Furthermore, for many persons, a religious response to their problems, framed in the religious categories that are most deeply meaningful to them, may be more effective than secular interventions.\textsuperscript{481}

\textsuperscript{476} This argument is limited to counseling as treatment of abusiveness. It is true, of course, that states have more weapons in their arsenal to combat the problems of abuse. For example, if danger threatens, a state can physically remove a child from the abusive situation. Only some states authorize individuals to do likewise. See I. Sloan, supra note 11, at 35. Moreover, a state may prosecute the abuser. To the extent that these are effective helps to the child and available only to the state, a cleric's claim to more effective counseling is weakened. On the other hand, the cleric can still argue that, regardless of the impressiveness of a state's arsenal against child abuse, in the long run, compelling clergy reports will not help the state to discover abuse and use that arsenal. See infra text accompanying note 482.

\textsuperscript{477} See, e.g., Smith & Meyer, supra note 13, at 357-60; Smith, supra note 165, at 54.

\textsuperscript{478} See Knapp & VandeCreek, supra note 149.

\textsuperscript{479} See supra note 36.

\textsuperscript{480} See supra note 156 (discussing state designated "pastoral counselors" in New Hampshire); see also Augspurger, supra note 223, at 115-18 (noting impact of state licensing on pastoral counseling).


The pastoral counselor has unique resources available for dealing with human brokenness and guilt. . . . The authority inherent in the symbolic role of the pastoral counselor makes him or her uniquely fitted for helping the counselee find forgiveness for true guilt and release from false guilt. Similarly the pastoral counselor has a unique perspective to bring to the tragedies and sufferings of mankind. Id. at 805. See also Lecomte, Relations Between the Subject and the "Minister" in Confession and Psychoanalysis, 40 Lumen VITAE 91 (1985) (comparing Catholic penance with psychoanalysis).
Even if the point concerning some clergy's lack of counseling skills is well taken, a cleric still has a third argument that mandating clergy reports is counterproductive to the state's goal of protecting children. If the prospect of disclosure will deter people from approaching clergy for help, the choice is not between help from the state and help from clergy, it is between help from clergy and no help at all. By discouraging persons from seeking private help, reporting requirements may preclude some troubled people from seeking any help at all.

D. IMPORTANCE OF THE FREE EXERCISE ARGUMENT

Without the free exercise claim, a cleric can make many of the same arguments. He can urge society's interests in accommodating religious practice, in promoting the health that flows from confessions to and counseling by clergy, and in respecting the privacy of clergy-confider relationships. He can question whether mandating clergy reports in fact contributes to the state's protection of children. He can propose that under some circumstances reports are counterproductive. These are all sound arguments, even if not of constitutional status. Without free exercise backing, however, more of a burden will rest on the cleric to substantiate his arguments. In addition, the cleric must contend with three lines of precedent that seem to cut against his insistence on privilege in the face of a statutory mandate to report, and that suggest the law's general antipathy toward claims of the kind the cleric might make without the backing of the free exercise clause.

The first harmful line of cases is that in which courts have subordinated the psychotherapist's privilege to the psychotherapist's privilege by parents. See supra note 453. It should not be an adequate response to the counterproductivity argument for the state to indicate that some people still confide in clergy despite some clergy's failure to keep confidences. Cf. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 439-40, 551 P.2d 334, 346, 131 Cal. Rptr. 14, 26 (1976) (rejecting claim that requiring therapists to warn their patients' potential victims would adversely affect the practice of psychotherapy); In re Lifschutz, 2 Cal. 3d 415, 426-27, 467 P.2d 557, 564, 85 Cal. Rptr. 829, 836 (1970) (practice of psychotherapy flourishing even though psychotherapist privilege not absolute). That some people still confide does not mean that others have not been deterred from confiding or from confiding fully.
apist’s duty to warn of or help prevent harm to third persons threatened by the therapist’s patient.\textsuperscript{484} The California Supreme Court, in \textit{Tarasoff v. Regents of the University of California},\textsuperscript{485} rocked the mental health community with its holding that a psychologist could be held liable for failing to warn the foreseeable victim of his patient’s violence. The American Psychiatric Association requested a rehearing, and in \textit{Tarasoff II} the California Supreme Court reaffirmed its holding: “When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.”\textsuperscript{486} The court acknowledged the “public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy, and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication.”\textsuperscript{487} Nevertheless, it held that these interests were outweighed by the “public interest in safety

\textsuperscript{484} See Jablonski v. United States, 712 F.2d 391, 397-98 (9th Cir. 1983) (psychiatrists had duty to warn patient’s girlfriend who was foreseeable victim of patient’s violent tendencies); Hasenei v. United States, 541 F. Supp. 999, 1011-14 (D. Md. 1982) (psychiatrist should take reasonable action to warn specific or readily identifiable persons endangered by client); Leedy v. Hartnett, 510 F. Supp. 1125, 1130 (M.D. Pa. 1981) (in the absence of specific threats, hospital had no duty to warn anyone of patient’s propensity toward violence when intoxicated), \textit{aff’d}, 676 F.2d 686 (3d Cir. 1982); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 192-93 (D. Neb. 1980) (psychiatric hospital has duty to protect a class of persons if unreasonable risk to them is foreseeable); Hedlund v. Superior Ct., 34 Cal. 3d 695, 700-04, 669 P.2d 41, 43-46, 194 Cal. Rptr. 805, 807-10 (1983) (psychotherapists have duty to recognize when patients present serious danger to others and warn identifiable potential victims); Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 438-39, 551 P.2d 334, 345-46, 131 Cal. Rptr. 14, 25-26 (1976) (psychotherapist has duty to exercise reasonable care both in predicting whether a patient poses a serious danger to others and in protecting any foreseeable victims); Cairl v. State, 323 N.W.2d 20, 26 (Minn. 1982) (duty of state to warn of patient’s violent tendencies exists only when specific threat made); McIntosh v. Milano, 168 N.J. Super. 466, 489-90, 403 A.2d 500, 511-12 (1979) (psychotherapist has duty to take reasonable steps to protect potential victims of patient). \textit{Cf.} Thompson v. County of Alameda, 27 Cal. 3d 741, 753-54, 614 P.2d 728, 734-35, 167 Cal. Rptr. 70, 76-77 (1980) (county’s liability). But see Brady v. Hooper, 570 F. Supp. 1333, 1338 (D. Colo. 1983) (duty to warn arises only when threats directed to identifiable victims), \textit{aff’d}, 751 F.2d 329 (10th Cir. 1984); Petersen v. State, 100 Wash. 2d 421, 429 671 P.2d 230, 237-38 (1983) (benefits of privileged communication between psychiatrist and patient must be balanced against public interest in full revelation of facts).


\textsuperscript{487} \textit{Id.} at 440, 551 P.2d at 945, 131 Cal. Rptr. at 26.
from violent assault." 488 Despite the considerable controversy surrounding the psychotherapist's duty to warn, 489 Tarasoff and its progeny stand as precedent that the state's interest in encouraging therapy, even allied with privacy interests of the participants in therapy, should yield to the state interest in protecting persons from violent attacks. 490

Further related but also distinguishable precedent involves the tension between a state's reporting requirements and federal confidentiality statutes. For example, a federal statute prohibits disclosure of information concerning patients at alcohol or drug abuse treatment programs funded, assisted, or authorized by the federal government. 491 In 1984, the Minnesota Supreme Court held that federal confidentiality statutes do not preempt that state's abuse reporting statute, reasoning that Congress could not have intended to render child abuse reporting requirements ineffective. 492

Finally, a line of precedent holds that rules of evidence generally are relaxed for proceedings in which the welfare of a child is at stake, including custody determinations as well as child abuse or neglect proceedings. 493 In such proceedings, the

488. Id.
490. The issue in these cases was whether psychotherapists had a common law duty to warn. That no privilege applies means only that a therapist may, not that he must, warn. See Tarasoff, 17 Cal. 3d at 540 n.12, 551 P.2d at 347 n.12, 131 Cal. Rptr. at 28 n.12.
law commonly hews out exceptions to both the marital communications and the physician-patient privileges. In fact, one court has held that recognition of the marital communications privilege in a custody proceeding violates the child’s due process right to have all material evidence before the court.

These precedents lean against the cleric’s claim of privilege not to report suspected child abuse. Because the cases are variously distinguishable, however, especially on the ground that they do not involve clergy and do not address free exercise issues, the cleric’s special arguments deserve direct attention.

islative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition, 34 CATH. U.L. REV. 1021, 1041-43 (1985) (discussing state statutes that allow admission of videotaped depositions of alleged child abuse victims); John, supra note 11, § 33.

494. See S. STONE & R. LIEBMAN, supra note 53, §§ 5.15, 7.27, 7.28. Cf. Weisberg & Wald, supra note 221, at 210-11 n.215 (arguing that the need for psychotherapist privilege is greater in child custody cases than in abuse or neglect cases).


496. In Op. Tex. Att'y Gen. JM-342 (Aug. 5, 1985), the attorney general of Texas gave direct attention to the relationship between the Texas reporting statute, the clergy privilege, and the free exercise clause, but failed to address the necessity of the means chosen by the Texas legislature to protect child abuse victims. The question addressed was whether a minister is required to report child abuse under the Texas reporting statute. The Texas statute mandates reports from “[a]ny person having cause to believe” that a child is abused. TEX. FAM. CODE ANN. § 34.01 (Vernon 1986) (emphasis added). Texas, however, also recognizes the following version of the clergy privilege:

Communications to Clergymen
(a) Definitions. As used in this rule:
(1) A “clergyman” is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed to be by the person consulting him.
(2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
(b) General rule of privilege. 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.
(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

TEX. R. CRIM. EVID. 505. The attorney general acknowledged the apparent tension between the two statutes, but found a resolution in chronology. Texas
Resolution of the tension between abuse reporting requirements and the clergy privilege will vary from state to state with variations in state policies and the effectiveness of the state procedures that follow reports. More empirical data might be helpful. This Article has attempted to clarify the true interests at stake, offer a structure for analyzing those interests, and, most important, assert that constitutional considerations of free exercise of religion must be prominent in the debate.

It may sound harsh to argue that clergy have the right to withhold their suspicion or knowledge of child abuse. Certainly, many clergy would not claim such a right. Those clergy who do, however, and advocates of their right to do so, are neither condoning child abuse nor slighting its horrors.

adopted its privilege statute in 1967. Subsequently, however, Texas added the following provision to its reporting statute: "In any proceeding regarding the abuse or neglect of a child or the cause of any abuse or neglect, evidence may not be excluded on the ground of privileged communication except in the case of communications between attorney and client." TEX. FAM. CODE ANN. § 34.04 (Vernon 1986). The attorney general invoked the principle that "[i]f there is an irreconcilable conflict between statutes dealing with the same subject, the most recent controls as the latest expression of legislative intent." Op. Tex. Att'y Gen. No. JM-342 at 1559 (Aug. 5, 1985). Accordingly, without any policy discussion, the attorney general concluded that the reporting statute prevails. Id. at 1560.

The opinion's discussion of the free exercise issue is astonishingly brief. Having determined that mandatory reporting interferes with religious conduct rather than with religious belief, the opinion simply concluded:

Government regulation of religious conduct is valid if it does not unduly burden the practice of religion, if the state's interest in enacting the regulation is compelling, and if there are no alternative means available which are less intrusive upon the practice. See Wisconsin v. Yoder; see also Sherbert v. Verner. Each of these requirements is satisfied here. In Price v. Massachusetts, the United States Supreme Court said "[t]he right to practice religion freely does not include liberty to expose the...child...to ill health or death...." See also Jehovah's Witnesses v. King County Hospital Unit No. 1. To conclude that the application of [the Texas reporting statute] to clergymen would violate the Free Exercise Clause would be to ignore this admonition. We therefore conclude that to require a clergyman to report evidence of child abuse or neglect when confidentially disclosed to him by a parishioner does not violate the Free Exercise Clause. Id. at 1561 (citations omitted). That is the extent of the opinion's free exercise analysis. The attorney general stated the correct free exercise test, but then applied only part of that test. He omitted the crucial inquiry into the necessity of clergy reports as the means to achieving the state's interest in protecting children. Consequently, the opinion's incomplete and unsophisticated analysis of both the statutory and the constitutional issues diminishes the persuasiveness of its authority on the issue of mandatory clergy reports.

497. Tiemann and Bush note that:
When the harm that the report might have averted is tangible and terrible, it is tempting to let go of the less tangible, more long-term, but vital values served by respecting the privacy of the confessional and the place of religious counsel. The common law has long declined to impose on persons a duty to rescue or warn those with whom they have no special relationship. As this archaism rightly succumbs to the legal doctrinization of the interdependence of persons, the duty to protect children should be at the vanguard. Compelling reports from clergy, however, is a feeble and objectionable beginning.

Instead of imposing on objecting clergy an absolute duty to report, a state could make reporting permissive rather than mandatory for clergy with free exercise objections. Alternatively, a state could at least narrow the scope of the duty to report generally, or clergy’s duty specifically, to situations involving serious threats to the child’s life or health, or to known, rather than suspected, cases of abuse.

Unfortunately, [the clergy’s defense of the privilege against child abuse reporting requirements] may seem at first to put the clergy in a position of seeking ways to protect child abusers. Upon reflection it is clear that this is no more the case than the existence of the privilege generally makes the clergy defenders of any other sinner. Case law is filled with instances where clergy have been involved confidentially with those who have or may have murdered, maimed, raped, and robbed. . . . Existence of the privilege does not condone any criminal act. The emotionally charged cause of child abuse is not different in this regard.

W. Tiemann & J. Bush, supra note 5, at 178.

498. See Tarasoff, 17 Cal. 3d 425, 435, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976); Restatement (Second) of Torts §§ 314, 315 (1965); Note, Tort Law, supra note 489, at 517-20. For cases discussing the duty to rescue or warn, see authorities cited supra note 484.

499. Yellin, supra note 57, at 156, recommends that clergy privilege statutes include the following exception: “If the communication threatens harm to any person, the Clergyman may, but is not required to disclose the communication to avoid occurrence of that harm.” Accord, Comment, Reporting Child Abuse and Neglect: Oregon’s Legislation, 51 OR. L. REV. 444, 454 n.72 (1978).

Instead of a duty to report, a state could impose a duty to warn. See supra text accompanying notes 484-90. For many clergy, however, even this duty is a burden on the right to maintain confidentiality. Furthermore, a duty to warn may help the victim little when the victim is a child and the parent or guardian, normally the person warned, is also the abuser.

500. Some current definitions of abuse are too vague for prospective reporters to know when a report is required. This is a fatal defect if the duty to report is backed by criminal sanctions. Clements, supra note 474; Smith & Meyer, supra note 13, at 356. See also State v. Ballard, 341 So. 2d 957, 960-62 (Ala. App.) (child abuse statute held unconstitutional because vagueness made it impossible for accused to prepare adequate defense), cert. dismissed, 341 So. 2d 962 (Ala. 1976); State v. Meinert, 225 Kan. 816, 820, 594 P.2d 232, 234 (1979)
Another appropriate compromise might be a carefully limited exception to reporting requirements, patterned on Maine’s or Maryland’s former statutory exceptions. The exception to the reporting requirement could be limited, as was Maine’s, to situations in which there is “little threat of serious harm to the child.” Alternatively, the exception could be limited, as was Maryland’s, to situations in which

\[\text{efforts are being made or will be made to alleviate the conditions or circumstances which may cause the child to be considered a neglected child [or where] reporting would inhibit the child, parent, guardian or custodian from seeking assistance in the future and thereby be detrimental to the child’s welfare.}\]

Finally, the exception could be limited to persons who have acquired their reportable information from professional counseling relationships, or limited even further to clergy who have so acquired the information and have religious objections to reporting.

The thesis of this Article is that resolving the tension between abuse reporting requirements and the clergy privilege should not be simple. Given the momentous interests potentially at stake, the issue should be carefully analyzed. Currently, most states have not taken a clear position on the issue. Clergy feel caught in a legal dilemma that only exacerbates any moral or religious dilemma they face concerning disclosure of suspected abuse. The resolvers of the legal dilemma must pro-

(statute defining crime of endangering child was unconstitutional due to vagueness of phrase “unjustifiable physical pain”); State v. Gallegos, 384 P.2d 967, 968 (Wyo. 1963) (statute making it illegal to endanger the health or welfare of minor child held unconstitutionally vague). But see People v. Jennings, 641 P.2d 276, 278 (Colo. 1982) (prohibition in child abuse statute against cruel punishment held sufficiently precise to satisfy due process requirements); Campbell v. State, 240 So. 2d 298, 299-300 (Fla.) (words “unnecessarily or excessively chastised” in statute prohibiting torture or unlawful punishment of children not too indefinite to meet constitutional standards of due process), appeal dismissed, 402 U.S. 936 (1970); Hunter v. States, 360 N.E.2d 588, 594-96 (Ind. App.) (statute prohibiting cruelty to children contains sufficient specificity for people of ordinary intelligence to determine proscribed conduct and is not, therefore, unconstitutionally vague), cert. denied, 434 U.S. 906 (1977).

Smith and Meyer have argued for narrowing the definitions of reportable abuse and neglect to meet three goals: limiting reports to serious injuries, limiting reports to injuries that state follow-up services can handle, and giving prospective reporters guidance concerning when they must report. See Smith & Meyer, supra note 13, at 362.

501. See supra note 36.
503. MD. ANN. CODE art. 72A, § 6(c) (1976) (deleted in 1983). Maryland’s deleted statute is discussed more fully supra note 36.
ceed with informed concern for the children, with sensitivity to the less perceptible values of free religious practice and the beneficence of effective ministries, and with appropriate humility concerning anyone's abilities either to judge or to effect a child's best interests.