When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect

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WHEN SILENCE RESOUNDS: CLERGY AND
THE REQUIREMENT TO REPORT
ELDER ABUSE AND NEGLECT

Seymour Moskowitz*
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We are indebted to Professors Ivan Bodensteiner and Rory Holscher and to Pastor David H.
Kehret for their insightful comments on this article. Special thanks are due to Tanya Burkhart
who labored so long and so well to complete this project.

1
In contemporary American society, public law touches nearly every aspect of the average citizen's life.¹ When modern regulation and litigation intersect with religious life, both constitutional and common law issues arise.² These issues arise in a broad range of contexts, including the recent civil actions against clergy³ for breach of fiduciary care, clergy "malpractice,"⁴ and the regulation of the employment practices of religious institutions.⁵ A particularly difficult problem is presented when states mandate clergy to report suspected cases of elder abuse and neglect to public authorities for treatment and/or prosecution.⁶ While clergy generally believe that information they re-

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¹. "[I]n the modern regulatory state, most activities and institutions are pervasively regulated." Douglas Laycock, Summary and Synthesis: The Crisis in Religious Liberty, 60 GEO. WASH. L. REV. 841, 848 (1992).

². Justice Kennedy has noted that the "modern regulatory state" imposes a "substantial burden on a large class of individuals," including religious adherents. City of Boerne v. Flores, 521 U.S. 507, 535 (1997). Douglas Laycock has argued that religious conduct, along with most activities and institutions, will be pervasively regulated in the modern regulatory state, unless specific exemptions are provided. "[R]eligious exercise is not free when it is pervasively regulated." Laycock, supra note 1, at 848.

³. In this article, the terms "clergy," "clergyperson," "minister," or similar words are used interchangeably and refer generally to any person who is ordained, serves in, and/or oversees a religious community. These terms are not intended to be technical designations but rather encompass such titles or positions as imam, minister, pastor, priest, rabbi, and other religious officials/leaders. No denominational differentiation is meant by these terms unless specifically stated. The occasional use of the masculine gender (i.e., clergyman) is only for convenience and syntax, as many statutes use that gender. While these terms are initially defined by the religious communities that employ them, secular considerations, including the requirements of the Internal Revenue Service and the Social Security system, also factor into the definition of these terms. See DICTIONARY OF CHRISTIANITY IN AMERICA 293 (Daniel G. Reid et al. eds., 1990).


⁵. In one recent case, the Fifth Circuit Court of Appeals upheld a federal jury award to each plaintiff of $115,000, including $30,000 in compensatory damages and $85,000 in punitive damages, in a suit brought by two women against their pastor for counseling malpractice. See Sanders v. Casa View Baptist Church, 134 F.3d 331 (5th Cir. 1998), aff'd 929 F. Supp. 1028 (N.D. Tex. 1996). See also Nally v. Grace Community Church of the Valley, 763 P.2d 948 (Cal. 1988).

⁶. See, e.g., Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter Day Saints v. Amos, 483 U.S. 327 (1987) (indicating that although the Civil Rights Act prohibiting racial discrimination in employment applies to religious employers, these employers are exempted from discrimination claims when they hire employees to carry out their religious missions).

⁷. See infra Part III.C.
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ceive is confidential and therefore exempt from reporting requirements, this view oversimplifies and overgeneralizes a complex set of intersecting religious, legal, and policy issues.

The importance of these issues is magnified by three interrelated American phenomena. First, elder abuse and neglect is currently an epidemic, affecting every community in the country. Mistreatment of the aged is often associated with physical abuse but may take other, less dramatic forms—psychological or emotional abuse, financial exploitation, and neglect of care-taking obligations. Both congressional committees and academic researchers have estimated that between one and two million cases occur each year in domestic settings alone.

The magnitude of the epidemic becomes even clearer when one considers that these numbers exclude what may be occurring in institutions, such as nursing homes, hospitals, assisted-living facilities, or other group homes.

Second, the most significant demographic trend of this century is the exponential increase in the percentage of elderly persons comprising the total United States population. Between 1900 and 1987, persons aged 65 and older more than doubled as a proportion of the total population and will nearly double again between 1987 and 2030. If these trends continue, by 2000, persons aged 65 and over will comprise 13% of the population, and by 2030, this will rise to 21.8%.

Third, 80% of the aged are members of churches or other religious bodies, and 56% of seniors attend church weekly. The proportion of the aged involved with religious institutions, paired with the statistics of elderly mistreatment in the community, creates disturbing questions because the Judeo-Christian canon and tradition express deep

8. House Select Comm. on Aging, 97th Cong., Elder Abuse: An Examination of a Hidden Problem (Comm. Print 1981) [hereinafter 1981 Elder Abuse House Report] (estimating one million cases of abuse). A decade later, a follow-up congressional panel reported the situation had worsened. House Subcomm. on Health Long-Term Care, 101st Cong., Elder Abuse: A Decade of Shame and Inaction XI (Comm. Print 1990) [hereinafter 1990 Elder Abuse House Report] (estimating more than 1.5 million persons may be victims of such abuse each year, and the number is rising).


11. Id. at 1-4.

12. Id. at 3.

concern for the weak and elderly, particularly parents and family members.\(^\text{14}\)

The public first became aware of the complex issues created by mandatory reporting statutes\(^\text{16}\) following the prosecution of several clergy and religious workers for failure to report child abuse.\(^\text{17}\) Also, many jurisdictions now require clergy to report elder mistreatment. Yet these mandated affirmative duties often conflict with the clergy's sacred obligations. A large body of theological literature and a number of denominations require secrecy and confidentiality for some information revealed to clergy.\(^\text{18}\) Typically, these reporting laws, as neutral laws of general applicability, are not intended to place a burden on religion.\(^\text{19}\) Their disregard for the unique qualities of religious traditions and communities, however, often produces this result.\(^\text{20}\) This fundamental conflict is rarely discussed in the legal literature.\(^\text{21}\)

When the government imposes an obligation on clergy to report information obtained in the course of their religious roles, religious communities and traditions are affected in important ways.

\(^{14}\) See Isaiah 1:16-17; Isaiah 61:1-3; Amos 8:4-10; Leviticus 19:32 (requiring respect for the elderly bordering on reverence); Acts 6:1; James 1:27 (containing clear illustrations of the respect and care Christians are supposed to offer the elderly, especially widows and family members); 1 Timothy 5:3-16 (placing older persons and widows as role models to younger members of the community).

\(^{15}\) See Exodus 20:2 (commanding honor for parents).

\(^{16}\) Mandatory reporting requirements refer to state statutes that require clergy and others to report abuse in certain cases. For a discussion of mandatory reporting requirements, see infra Part III.C.

\(^{17}\) See, e.g., In re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990); State v. Motherwell, 788 P.2d 1066 (Wash. 1990) (en banc); Mellish v. State, No. 84-1930 (Fla. Dist. Ct. App. 1985).

\(^{18}\) See infra Part II.A.

\(^{19}\) Eugene Gressman and Angela Carmella have noted the following regarding the inadvertent, yet real, burdens that the modern regulatory state places on religion.

In the free exercise area, there is no comparable linkage between intentional discrimination and resulting discrimination (as there is in the case of race and voting rights). Typically, a burden on religious conduct that results from a neutral, generally applicable law is attributable merely to the enforcement of that law, and not to efforts to destroy or suppress some religious practice via general legislation. We certainly have historical instances of this, but in the modern regulatory state most burdens are truly "inadvertent."


Mandatory reporting requirements raise a number of issues: the scope and nature of the affirmative duty placed on clergy; the legitimacy of such governmental mandates; appropriate clergy conduct (legally, morally, and professionally) in the face of conflict between sacred and secular duties; and the appropriate protection or punishment for "disobedient" clergy. Reporting requirements do not involve a simple conflict between sacred and secular duties. On the one hand, these issues involve government efforts in an area of legitimate public concern—elder abuse and neglect. On the other, they have deep roots in Western theological and legal traditions. Clergy and their religious communities understand clergy-parishioner communications and confidentiality within the context of their respective sacred traditions and practices. In fact these expectations shape clergy conduct and parishioner expectations.

The minister's silence may allow an offender to evade legal responsibility for abusive conduct. The victim, moreover, needs the protection provided by both religious and legal institutions. Justice may be denied if the situation does not change. When an offender escapes legal responsibility by hiding behind a "cleric's robe," and mistreatment of the aged continues, the surrounding community is affected. Furthermore, reporting requirements raise concerns regarding sound public policy and constitutional rights. Clergy who report elder abuse face risks including disclosure and hostility, the accusation of causing "unfair charges," loss of trust and credibility, and breach of religious discipline. Those who do not report also face risks such as criminal penalties and civil damages; indeed, the religious institution itself could be liable through vicarious liability. Thus, resolving these issues has far-reaching implications.

In the first part of this article, clergy-parishioner communications are examined in the context of religious traditions and ministerial/professional ethics. Second, this article considers the phenomenon of elder abuse and neglect, together with statutory protections for the aged and the almost uniform duty to report suspected elder mistreatment. The third part of this article analyzes potential criminal and civil liabilities of clergy and their institutions when reporting laws are ignored, violated, or disobeyed. Last, legal protections available to clergy are discussed, including the clergy-penitent privilege, federal and state constitutions and statutes, and a proposed affirmative de-

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22. See infra Part II.
23. See infra Part III.
24. See infra Part IV.
defense to negligence liability. Clergy must clearly understand their sacred and secular obligations and the legal issues involved in this increasingly important area, but public officials should also understand the burdens that these statutes place upon clergy and the conflicts that arise.

II. Clergy-Parishioner Communications

In order to evaluate the complex issues posed by applying mandatory reporting requirements to clergy, it is necessary to understand the nature of clergy-parishioner communications. This Part surveys clergy-parishioner communications as viewed by several religious traditions and by common law. Next, ministerial and professional considerations of ethics and professional confidentiality are examined.

A. Clergy-Parishioner Communications in Various Religious Traditions

While clergy-parishioner communications are viewed differently by various religious denominations, nearly all traditions have carefully guarded these communications. However, the extent to which these religious traditions have required confidentiality and secrecy varies. Some forbid disclosure because certain clergy-parishioner communications are regarded as sacred, and in these traditions, violators of confidential communications are punished for abrogation of this sacred trust. Other religious traditions are more flexible—or at least less punitive—regarding violations of confidentiality. Since it is impossible to analyze clergy-parishioner communications in every religious tradition, we survey here only the teachings of a few prominent religious traditions in America.

1. The Roman Catholic Church

The Roman Catholic Church has the most explicit and formal requirements for maintaining the secrecy of clergy-parishioner communications. Papal decrees and official writings have forbidden disclosure since the early history of the Church. In the middle of the

25. See infra Part V.
27. See infra Part II.A.1.
28. See infra Part II.A.2.d. and accompanying text.
29. Perhaps it is because the Roman Catholic Church has been so explicit and formalist in its teachings and requirements regarding clergy-parishioner communications that most American legal analysis focuses extensively on clergy-parishioner communications in the Roman Catholic tradition. See Julie Ann Sippel, Comment, Priest-Penitent Privilege Statutes: Dual Protection in
fifth century, Pope Leo I, the bishop of Rome, discontinued the requirement of public confession.\textsuperscript{30} In its place, he instituted the private confession of sins (the Sacrament of Penance)\textsuperscript{31} and charged priests to keep secret what they heard in private confession.\textsuperscript{32} The Sacrament of Penance is a religious rite whereby a penitent sincerely confesses personal sin to a priest, resolves to reform, obtains God’s forgiveness, and reconciles with the Church.\textsuperscript{33} By the ninth century, the Church had announced that priests who violated the Seal of Confession\textsuperscript{34} would be liable for a double punishment: removal from priestly office and lifelong exile.\textsuperscript{35} The absolute obligation of silence applies not only to the clergy, but also to interpreters, bystanders, eavesdroppers, persons finding and reading lists of sins that are obviously created for the purpose of confession, and everyone else except the penitent.\textsuperscript{36} The obli-


30. In bringing public confessions to an end, Pope Leo I said:

Although one must praise that plenitude of faith which, through fear of God does not shrink from blushing before men, yet since the sins of all those who seek penance are not of such a nature that they do not fear to have them published abroad, it is necessary to desist from [the public reading of confessions], lest many be put off from availing themselves of the remedies of penance.


31. According to St. Augustine, a sacrament is a “visible word” or an “outward and visible sign of an inward and spiritual grace.” \textit{Oxford Dictionary of the Christian Church} 1218 (F. L. Cross & E. A. Livingstone eds., rev. 2d ed. 1983). According to Thomas Aquinas, a sacrament is “the sign of a sacred thing in so far as it sanctifies men.” \textit{Id.} Roman Catholicism teaches that the seven rites of Baptism, the Eucharist, Confirmation, Penance, Extreme Unction, Holy Orders, and Matrimony convey grace in themselves. \textit{Id.}

32. In a letter to the bishops at Campania, Samnium, and Picenum, Pope Leo I wrote:

[Concerning the penitence which is demanded by the faithful, one must not read publicly the notes of a written confession on the nature of each individual sin, since it suffices that the state of conscience be indicated in secret confession to the priests alone . . . . Moreover, that confession is sufficient which is made firstly to God, and then also to the priest, who prays for the sins of the penitents. Only then will they allow themselves to be summoned to penance, if the conscience of him who is confessing is not to be revealed to the ears of the people.

\textit{Max Thurian, Confession} 61-62 (1958) (citing \textit{Migne, Patrologiae Cursus Completus} (1846)). This is the first record of a pope clearly demanding only secret confession and strict silence on the part of the confessor. \textit{Bertrand Kurt scheid, A History of the Seal of Confession} 51-55 (1927).

33. 1985 \textit{Code} c.959.

34. The Seal of Confession refers to “the absolute obligation not to reveal anything said by a penitent using the Sacrament of Penance.” \textit{Oxford Dictionary}, \textit{supra} note 31, at 1254.

35. \textit{Kurt scheid, supra} note 32, at 87. Like the Roman Catholic Church in the West, the Eastern Church has a long tradition of protecting clergy-parishioner communications. \textit{Id.} at 56. The Second Synod of Dvin issued a decree in A.D. 554 that warned that “[a] priest who reveals the confession of the penitents shall be deposed with anathema.” \textit{Noyce, supra} note 30, at 93.

gation is rooted in a tacit contract between the penitent and the priest, and protects the integrity of the use of the sacrament by the faithful.

Canon Law later formalized these requirements.\textsuperscript{37} Canon 983, § 1 provides: "The sacramental seal is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason."\textsuperscript{38} A priest could not reveal to a third party any information gained from the communication, "even if every danger of revelation is excluded."\textsuperscript{39} Under Canon Law, a violation of the Seal of Confession carried the stiffest punishment: the priest was automatically excommunicated from the church, deposed from the priestly office, and sent into the confinement of a monastery to do perpetual penance.\textsuperscript{40} Today, 1,600 years after Pope Leo I's declaration, these doctrines regarding the Sacrament of Penance and the Seal of Confession remain inviolate.\textsuperscript{41}

Thus, the Roman Catholic tradition, including Canon Law, has a clearly established protocol regarding clergy-parishioner communications and the confidentiality of private confession: the priest must maintain absolute secrecy,\textsuperscript{42} without exception, whether the act be sinful, criminal, or otherwise.\textsuperscript{43} The priest must obey the religious law regardless of civil law requirements or the parishioner's desires.\textsuperscript{44} Thus, for Roman Catholic clergy, statutorily mandated reporting requirements create an irreconcilable conflict. In certain instances, following their sacred tradition risks secular legal punishment.\textsuperscript{45}

\textsuperscript{37} See id.  
\textsuperscript{38} 1985 \textsc{code} c.691.  
\textsuperscript{39} "Even if every danger of revelation is excluded, a confessor is absolutely forbidden to use knowledge acquired from confession when it might harm the penitent." 1985 \textsc{code} c.984, § 1. Section 2 of this canon reads: "[O]ne who is placed in authority can in no way use for external governance knowledge about sins which he has received in confession at any time." \textit{id.} at § 2.  
\textsuperscript{40} Canon 1388 § 1 reads: "A confessor who directly violates the seal of confession incurs an automatic excommunication reserved to the Apostolic See; if he does so only indirectly, he is to be punished in accord with the seriousness of the offense." 1985 \textsc{code} c.1388, § 1. Canon 927 notes that the offense is one of only five that are reserved to the Holy See. Canon 21 of the Fourth Lateran Council (1215) provided the following instruction regarding the mandated secrecy: "For whoever shall dare to reveal a sin disclosed to him in the tribunal of penance we decree that he shall be not only deposed from the priestly office but that he shall also be sent into the confinement of a monastery to do perpetual penance." Richard S. Nolan, \textit{The Law of the Seal of Confession}, 13 \textsc{cath. encyclopedia} 649 (1912).  
\textsuperscript{41} \textsc{Bush} & \textsc{Tiemann}, supra note 26, at 46.  
\textsuperscript{42} The Right of Penance states the following about the confessor's religious and moral obligation: "Conscious that he has come to know the secret of another's conscience only because he is God's minister, the confessor is bound by the obligation of preserving the seal of confession absolutely unbroken." Right of Penance 10d.  
\textsuperscript{43} \textsc{Bush} & \textsc{Tiemann}, supra note 26, at 28.  
\textsuperscript{44} \textit{id.}  
\textsuperscript{45} \textit{id.}
2. Various Protestant Denominations

The Protestant traditions interpret clergy-parishioner communications differently than Catholicism, focusing not on the sacrament but on the need for repentance. However, these traditions emphasize the value of discipline within their churches and the need for private counsel for those with troubled consciences. Unlike the Roman Catholic Church and its Canon Law, Protestant traditions do not mandate consistent treatment of clergy-parishioner communications. As a result, the religious value assigned to confidentiality in particular Protestant traditions is not easily summarized. This problem is complicated by the multitude of denominations within Protestantism. Thus, we survey several prominent Protestant traditions in America, illustrating their differences as well as their common concerns regarding confidential communications between clergy and parishioners.

a. Lutheran Churches

Penance is practiced differently in Lutheranism than in traditional Catholicism. In his reforming work, Martin Luther broke with Cath-


49. "Protestant" is used here to signify "mainline" American religious groups such as Baptists, Congregationalists, Disciples, Episcopalians, Lutherans, Methodists, and Presbyterians. See Dictionary of Christianity, supra note 3, at 700-01, 949. However, the title would also apply to scores of other descendants of the Protestant Reformation such as Pentecostals, various Evangelical and Fundamentalist groups in the Free Church tradition, and other independent groups. See id. at 949; see also Evangelical Dictionary, supra note 47, at 888-91. The Baptists clearly illustrate the complexity of the situation. In twentieth century America, Baptists are found in a wide variety of associations, conventions, and fellowships: the American Baptist Association, the American Baptist Convention, the Baptist Bible Fellowship, the Baptist General Conference, the Conservative Baptist Association of America, the General Association of Regular Baptist Churches, the General Association of Separatist Baptists, the General Conference of Seventh Day Baptists, the National Association of Free Will Baptists, the National Baptist Convention of America, the National Baptist Convention of the U.S.A., Inc., the National Baptist Evangelical Life and Soul-Saving Assembly, the North American Baptist Conference, the Primitive Baptists, the Progressive Baptist Convention, the Southern Baptist Convention, and many other organizations and independent Baptist groups and churches. See Dictionary of Christianity, supra note 3, at 110-13; see also H. Leon McBeth, The Baptist Heritage: Four Centuries of Baptist Witness 563-790 (1986).

50. The Lutheran tradition has its roots in the Lutheran part of the Protestant Reformation of the sixteenth century. Oxford Dictionary, supra note 31, at 849. In America, the vast majority of Lutherans are members of three bodies: the Evangelical Lutheran Church in America, the Lutheran Church—Missouri Synod, and the Wisconsin Evangelical Lutheran Synod. Dictionary of Christianity, supra note 3, at 670. For an overview of American Lutheranism, see id. at 670-75.
olic doctrine. For him, confession was not compulsory, but rather a spiritual act in which Christians could participate when moved to do so, not when required by church calendar. While instructing on the doctrine of confession, Luther wrote: "Confession should be brief, and should be a confession chiefly of those things which cause pain at the time of confession, and, as they say, move to confession. For the sacrament of confession was instituted for the quieting, not for the disturbing, of the conscience." Building on one of his central theological themes—the priesthood of all believers—Luther taught that a Christian could confess open and hidden sins to any other Christian, not just to a priest, and thus obtain absolution.

Another important Lutheran theological theme is that of the two kingdoms—the relationship between the church and state. According to Luther, God has established two kingdoms: one under the law, and one under the gospel. The state exists to hold back chaos and destruction, and operates under law, setting limits to human sin and its consequences. Believers, on the other hand, belong to a second kingdom, a kingdom in which civil authorities have no power. Because believers are simultaneously saints and sinners, they are under the authority of the state. Regarding confession, Luther was convinced that Christians should not reveal the contents of a confession in a court of law.

Within the church's sphere of authority we deal in secret with the conscience and do not take its jurisdiction from the civil estate. Therefore people should leave us undisturbed in our sphere of authority and should not drag into their jurisdiction what we do in secret. I, too, have given secret advice, and because the matter was secret, the advice was justly given in this way. If the affair comes under the jurisdiction of civil authority later on, we know nothing of it. Nor shall they drag us into the case.

For Luther, this secrecy was to be maintained even if the confession involved a serious or heinous crime.

[O]ne must distinguish between the authority of the church and the authority of the state. The [sinner] did not confess to me but to Christ. But what Christ keeps secret I, too, must keep secret and

51. See Bush & Tiemann, supra note 26, at 63.
52. Martin Luther, Discussion of Confession, 1 Works of Martin Luther 89 (1943).
54. See Bush & Tiemann, supra note 26, at 64.
55. See George, supra note 53, at 98-102.
56. Id.
57. Id. at 100-01.
58. Id. at 71-72, 100-01.
simply deny that I have heard anything. If Christ has heard anything, He may Himself say so. But during the absolution I should privately say to the [sinner]: You [sinner], never do that again.\footnote{Id.}

According to Luther, the Seal of Confession was inviolate.

Lutheran churches have continued this tradition, affording considerable protection to clergy-parishioner communications. Lutheran churches appear to require confession, although not enumeration of every specific sin.\footnote{The Eleventh article of the Augsburg Confession states: “Of confession, they teach, that Private Absolution ought to be retained in the churches, although in confession an enumeration of all sins is not necessary. For it is impossible according to the Psalm: ‘Who can understand his errors?’ (Psalm 19:12).” Juergen Ludwig Neve, The Augsburg Confession 10 (1914).} In his *American Lutheran Pastoral Theology*, Carl Ferdinand Wilhelm Walther, the principal founder of the Lutheran Church, Missouri Synod, endorsed private confession and absolution, and defended the Seal of Confession.\footnote{See John T. McNeill, A History of the Cure of Souls 188 (1951) (citing Carl F.W. Walther, American Lutheran Pastoral Theology (1872)).} At its twenty-second Biennial Convention, the United Lutheran Church of America declared:

In keeping with the historic discipline and practice of the Lutheran Church and to be true to a sacred trust inherent in the nature of the pastoral office, no minister of The United Lutheran Church in America shall divulge any confidential disclosure given to him in the course of his care of souls or otherwise in his professional capacity, except with the express permission of the person who has confided in him or in order to prevent the commission of a crime.\footnote{The United Lutheran Church, Minutes of the Twenty-Second Biennial Convention of the United Lutheran Church of America 277, 758 (1960).}

In 1960, the Church Council of the American Lutheran Church formally adopted the policy that ministers may not divulge any confidential communication absent consent or the need to prevent the commission of a crime.\footnote{The policy reads:

WHEREAS it has long been recognized that a part of the ministry of pastors of the Lutheran church is to hear confessions, to counsel with persons, and to give advice, comfort, and guidance to those who seek it; and

WHEREAS it is imperative that, in order for such ministry to be effective, all such communications made to the pastor should be kept in the strictest confidence and should be disclosed to no one without the specific consent of the person making the communication; and

WHEREAS it is a part of the traditional discipline and practice of the Lutheran church that a pastor should hold inviolate all communications made to him in his capacity as a pastor; therefore,

BE IT RESOLVED: (1) that the Church Council recognizes and reaffirms that a part of the ministry of a Lutheran pastor is to counsel with persons, to receive their confessions, and to give advice, comfort, and guidance to those who seek it; and

(2) That the Church Council recognizes and reaffirms that it is a part of the traditional discipline and practice of the Lutheran church that the pastor hold inviolate and dis-
The merger agreement between the Lutheran Church in America, the American Lutheran Church, and the Association of Evangelical Lutheran Churches seems to provide that these resolutions, statements, and constitutional provisions still apply with the advent of the new Evangelical Lutheran Church in America. Thus, the privileged nature of clergy-parishioner communications, with the few mentioned exceptions, continues.

b. The Reformed Churches

The Reformed churches likewise understand confession differently from the Roman Catholic Church. Ulrich Zwingli instructed that "[a]uricular confession is nothing but a consultation, in which we receive from him who God has appointed . . . advice as to how we can secure peace of mind," and encouraged parishioners to confess.

The Reformer John Calvin recognized that confession of sin is first made to God. Calvin also distinguished between public and private confession. The truly penitent might publicly confess sin either during an ordinary worship service, following secret confession to God, or during a time of public calamity when there was common guilt. Calvin instructed that public sins (which would include most crimes) should be confessed publicly.

If any man shall offend against the whole Church, Paul enjoins that he be publicly reproved, so that even elders shall not be spared . . . (I Timothy 5:20). The distinction, therefore, which Christ expressly lays down, ought to be kept in mind, that no man may bring dis-
grace upon his brother, by rashly, and without necessity, divulging secret offences.\textsuperscript{72}

According to Calvin, Scripture authorized two kinds of private confession.\textsuperscript{73} The first was the confession of sins to another Christian, including a pastor.\textsuperscript{74} Private confession of sin was neither required nor sacramental.\textsuperscript{75} Rather, it was a voluntary act that a parishioner undertook for the relief of conscience or soul.\textsuperscript{76} The second kind of confession was directed to an injured or offended believer or neighbor, a practice rooted in Matthew 5:23-24.\textsuperscript{77} This was available to restore a state of charity between the two believers.\textsuperscript{78} If a parishoner offended the whole church, confession was to be public, and forgiveness sought.\textsuperscript{79}

While Calvin recognized the importance of both public and private confession, he saw a special value in the private imploring of pastoral assistance and private confession.\textsuperscript{80} The pastor has a special place in the ministry of the Church.

Therefore, let every believer remember that, if he be privately troubled and afflicted with a sense of sins, so that without outside help he is unable to free himself from them, it is a part of his duty not to neglect what the Lord has offered to him by way of remedy. Namely, that, for his relief, he should use private confession to his own pastor; and for his solace, he should beg the private help of him whose duty it is, both publicly and privately, to comfort the people of God by the gospel teaching.\textsuperscript{81}

Calvin also stated:

[I]n the first kind of confession, even though [the Apostle] James, by not expressly determining on whose bosom we should unburden ourselves, leaves us free choice to confess to that one of the flock of the church who seems most suitable. Yet we must also preferably choose pastors inasmuch as they should be judged especially qualified above the rest.\textsuperscript{82}

\textsuperscript{72} 2 John Calvin, Commentary on a Harmony of the Evangelists, Matthew, Mark, and Luke 342-43 (William Pringle trans., 1949) [hereinafter Calvin Commentary].
\textsuperscript{73} See Calvin Institutes, supra note 69, at 636.
\textsuperscript{74} Id.
\textsuperscript{75} See id. at 636-37.
\textsuperscript{76} See id.
\textsuperscript{77} See id. at 636-38. Matthew 5:23-24 reads: “Therefore if thou bring thy gift to the altar, and there rememberest that thy brother hath ought against thee; Leave there thy gift before the altar, and go thy way; first be reconciled to thy brother, and then come and offer thy gift.” Id.
\textsuperscript{78} Id. at 637.
\textsuperscript{79} Calvin Institutes, supra note 69, at 637-38.
\textsuperscript{80} Bush & Tiemann, supra note 26, at 73.
\textsuperscript{81} Calvin Institutes, supra note 69, at 636-37.
\textsuperscript{82} Id. at 636.
Calvin did not explicitly treat the Seal of Confession. However, because he carefully instructed parishioners to seek the assistance of their pastors and to confess their sins in private, some have concluded he would have upheld the Seal. Some have suggested that Calvin would protect the confidence of confessed private offenses but not the public offender. The evidence, however, is inconclusive on the issue of absolute confidentiality.

Other reformed churches have been even less explicit regarding the Seal of Confession, although some references have been made to it. The Reformed Church of France, in a pronouncement by the Synod of 1612, forbade a minister, except in the case of lese majeste, from "disclos[ing] to the magistrates crimes declared by those who come to him for counsel and consolation . . . lest sinners be hindered from coming to repentance, and from making a free confession of their faults." On the European Continent, Reformed pastors at their consecration promise "to keep secret those confessions which may be made for the quieting of conscience."

Although Presbyterians are not required to confess, in 1987 the General Assembly of the Presbyterian Church (U.S.A.) reaffirmed the historic position of the Presbyterian Church that it is a spiritual and professional duty of clergy to hold in confidence matters revealed to them in their counseling, caring and confessional ministries, and that being called to testify in a court of law does not negate this sacred obligation, the law of God being prior to the laws of human courts.

This same resolution also encourages the clergy to become aware of the specific state laws regarding confidentiality and work to develop statutes providing for an effective clergy privilege.

83. See Bush & Tiemann, supra note 26, at 72.
84. Id.
85. Id.
86. McNeill, supra note 62, at 209 (quoting the rule established by the Synod).
87. Thurban, supra note 32, at 22 (quoting Liturgie de Geneve 345 (1945)). Also, in his Yale lectures, The Cure of Souls, Presbyterian scholar John Watson advised pastors to hold all confidences to be inviolably sacred. McNeill, supra note 62, at 259-60.
88. Report of the Advisory Council on Church and Society, A Resolution on Clergy Confidentiality, Minutes of the 199th General Assembly 344 (1987). This resolution was similar to the statement made in 1981 by the General Assembly of the Presbyterian Church in the United States: "The nature of this office is such that a minister is under obligation not to reveal communications given to him in confidence without the authority of the person revealing the confidence." Minutes of the 121st General Assembly, Presbyterian Church in the United States 105 (1981). The statement continued: "[B]eing called to testify in a court of law does not negate this sacred obligation, the law of God being prior to the law of human courts." Id.
Urges presbyteries, sessions, and congregations to become informed about some of the broader concerns relating to the issue of clergy confidentiality.\textsuperscript{89}

Thus, the Reformed churches continue to carefully guard clergy-parishioner communications, although not so rigidly as the Catholic tradition and without its penalties.

c. The Anglican Church and Progeny

After the Reformation in England, the clergy continued to absolve parishioners of sin,\textsuperscript{90} and the privileged nature of confessional communications continued.\textsuperscript{91} As in the Roman Catholic Church, absolution in the Anglican Church was judicial or sacramental.\textsuperscript{92} Early in the Anglican tradition, private confession became voluntary,\textsuperscript{93} but the privacy of confession was protected by clergy and the law. One legal scholar noted the continuation of the privilege in the common law after the Reformation:

\begin{quote}
It follows, then, that not only was there nothing in the change which took place at the Reformation to alter the case as to the privilege attaching to confession, but that there was, on the contrary, an express recognition of it by statute. For of course the recognition of confession implies, in the absence of anything to the contrary, the recognition of its secrecy, because such was the common law rule; and if it were otherwise, no one would be likely to confess, and therefore the directions to the Anglican clergy, to exhort their penitents to confess, would be idle and futile . . . . It is not so clear . . . that ministers of any other religious body, not believing in sacramental confession, would be entitled to it; at all events, according to the strict common law rule upon the subject, which, according to the clearest authority, applied only to sacramental confession with a view to sacramental absolution. But the later cases on the subject
\end{quote}

\begin{footnotes}
\item A Resolution on Clergy Confidentiality, supra note 88, at 344.
\item See Book of Common Prayer 446-52 (1549).
\item For a discussion of privileged clergy-parishioner communications in the common law, see infra Part V.A.
\item See Bush & Tiemann, supra note 26, at 55 (citing 175 Eng. Rep. 935).
\item McNeill, supra note 62, at 220. The Anglican Church said:
\begin{quote}
And because it is requisite that no man should come to Holy Communion but with a full trust of God's mercy, and with a quiet conscience, therefore if there be any of you who by the means aforesaid (self-examination, confession to God, and satisfaction to a wronged neighbor) cannot quiet his own conscience, but requireth further comfort or counsel; then let him come to me, or to some other discreet and learned minister of God's Word, and open his grief, that he may receive such ghostly counsel, advice, and comfort, as his conscience may be relieved; and that by the ministry of God's Word he may receive comfort and the benefit of absolution, to the quieting of his conscience, and avoiding of all scruple or doubtfulness.
\end{quote}
\item Id.
\end{footnotes}
seem to extend the privilege to any communications made to a spiritual advisor as such, whether or not in sacramental confession.\textsuperscript{94}

In 1603, the Anglican Church's ecclesiastical law required those who administered each parish to report evil deeds, crimes, and iniquities committed in the parish.\textsuperscript{95} However, the Church adopted the following exception in Canon 113:

Provided always that if any man confess his secret and hidden sins to the minister for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him; we do not in any way bind the said minister by this our Constitution, but do straitly charge and admonish him, that he do not at any time reveal and make known to any person whatsoever any crime or offense so committed to his trust and secrecy (except they be such crimes as by the laws of the realm his own life may be called in question for concealing the same), under pain of irregularity.\textsuperscript{96}

While the evidence is not clear, it appears that confession lost its privileged nature in the secular, common law at some time during the seventeenth century.\textsuperscript{97} Still, the clergy continued to safeguard confidences, and efforts have been made to restore the evidentiary privilege to confessions made to Anglican clergy.\textsuperscript{98}

In America, the Episcopal Church, which has its roots in the Anglican Church, adopted the \textit{Book of Common Prayer}, which provides: "The content of a confession is not normally a matter of subsequent discussion. The secrecy of a confession is morally absolute for

\textsuperscript{94} W. M. \textit{Best}, \textit{The Principles of the Law of Evidence} 596 (1993).
\textsuperscript{95} \textit{Bush} \& \textit{Tiemann}, \textit{supra} note 26, at 56-57.
\textsuperscript{96} \textit{Nolan}, \textit{supra} note 40, at 655.
\textsuperscript{97} \textit{See Bush} \& \textit{Tiemann}, \textit{supra} note 26, at 58-59.
\textsuperscript{98} One news article says:
The Most Rev. Geoffrey Fisher, Archbishop of Canterbury, said today that the secrecy of confessions made to priests could not be sanctioned in the canon law of the Church of England until Parliament changed the laws of evidence.

Addressing the convocation of Canterbury at Church House ..., he urged reaffirmation of the principle of secrecy of the confessional. But he noted that priests had no statutory right to refuse to answer a judge in a court of law.

The agenda of the present session of the convocation includes a resolution that would reaffirm the principle of secrecy without giving it legal protection and another stating that the church would welcome parliamentary action to exempt priests from the requirements governing court testimony.

The Church of England is the state church and its canon law becomes the law of the land upon the assent of the sovereign, who is the head of the church as well as the chief of state. Royal assent, which is also required for acts of Parliament, would almost certainly be refused for canon laws to which Parliament objected ....

The present canon governing secrecy of the confessional dates from 1603 and is regarded as largely obsolete .... A Church of England spokesman said the seal of confession had not been tested in the courts, at least in modern times, and that, in any case, an Anglican priest would probably go to jail rather than disclose a confession.

\textit{Id.} at 59-60.
the confessor and must under no circumstances be broken." A clergyperson who violates this ecclesiastical rule is liable for presentment to trial within the Church. The General Convention of the Episcopal Church has recognized that "the absolute secrecy of any disclosures in the penitential relationship is ordered by The Episcopal Church" and regards this obligation as superior to the demands of secular law.

The Methodist movement, which in America includes the United Methodist, African Methodist Episcopal, African Methodist Episcopal Zion, Christian Methodist Episcopal, Free Methodist, and Wesleyan denominations, also has its roots in the Anglican Church. The United Methodist Church, which is the largest of these denominations, states in its Book of Discipline: "Ministers of The United Methodist Church are charged to maintain all confidences inviolate, including confessional confidences."

d. Baptist Denominations

Among Baptist congregations, clergy-parishioner communications are understood in a different way. In the Baptist tradition, the faithful are gathered together in independent, autonomous, disci-

100. Bush & Tiemann, supra note 26, at 61 (quoting Memorandum on "Privileged Communications" in the Episcopal Church 3).
101. Id. at 4.
102. The General Convention continued, saying: "Notwithstanding any restraints, demands, or privileges imposed or conferred by civil law, the clergy of The Episcopal Church are bound to the secrecy of the confessional and the inviolate priest-penitent relationship. The obligation rises above the demands of the civil legal system." Id. at 4.
103. See id. at 61.
104. Id at 61-62 (quoting The Book of Discipline of the United Methodist Church § V ¶440.4 (1980)).
105. "Baptist" is a broad term referring to a diverse collection of religious groups. Dictionary of Christianity, supra note 3, at 110. Today, Baptists constitute one of the largest Protestant and Free Church bodies. Oxford Dictionary, supra note 31, at 129. Modern-day Baptists are descendants of the Protestant Reformation, some from the Anabaptist tradition while others trace their roots from the radical spiritual and political movements in the seventeenth century, movements which comprise the Radical Reformation. Dictionary of Christianity, supra note 3, at 110-12. See Evangelical Dictionary, supra note 47, at 903-06; Oxford Dictionary, supra note 31, at 129-30. During the Reformation, the term "Anabaptist" referred to various groups that were distinct from groups in the Lutheran and Reformed traditions. Oxford Dictionary, supra note 31, at 47. The Baptist and Anabaptist traditions are also referred to as the "Free Church" because of their separation from the established church. See Dictionary of Christianity, supra note 3, at 450-52; Evangelical Dictionary, supra note 47, at 903-05; Oxford Dictionary, supra note 31, at 47. The Free Church tradition includes a broad range of groups: the Amish, Baptists, the Brethren, Congregationalists, Mennonites, Moravians, and Quakers. See Dictionary of Christianity, supra note 3, at 450-52; Oxford Dictionary, supra note 31, at 979.
plined fellowships of believers. \textsuperscript{106} Each individual congregation is a local fellowship of believers. \textsuperscript{107} With a congregational, rather than a territorial or hierarchical form of organization, Baptist churches are governed “through the voice of the Holy Spirit in the hearts of the members in each local assembly,” rather than by an order of priests or by higher or central courts. \textsuperscript{108}

One historic function of a Baptist congregation or brotherhood of believers is to hear confessions of sin. \textsuperscript{109} Like some other Protestant traditions, Baptists do not confess their sins to clergy in words. \textsuperscript{110} Rather, parishioners are to confess their sins to God in prayer, and God, in his grace, forgives the penitent of all sin and guilt. \textsuperscript{111} Baptists are also enjoined to confess their sins to those they have offended. \textsuperscript{112} The congregation or the offended person then recognizes the fact that these sins are forgiven. \textsuperscript{113} Thus, in Baptist theology, each congregation is considered an independent, disciplined fellowship of believers. Clergy are fellow believers who are also part of this disciplined brotherhood. \textsuperscript{114} Baptist parishioners may speak, pray, or seek counsel with Baptist clergy, but these communications are understood as taking place between two fellow believers or “brothers.” \textsuperscript{115} Each member of

\begin{itemize}
  \item \textsuperscript{106} \textit{See Evangelical Dictionary, supra note 47, at 122-23.} One early Anabaptist writing, Discipline of the Church at Rattenberg, provides a glimpse at what is meant by a disciplined fellowship.
  \item \textsuperscript{107} \textit{See Evangelical Dictionary, supra note 47, at 122-23.} One Baptist pastor and theologian has defined the Baptist teaching on the church as follows:
  \begin{itemize}
    \item A New Testament church of the Lord Jesus Christ is a local body of baptized believers who are associated by covenant in the faith and fellowship of the gospel, observing the two ordinances of Christ, committed to His teachings, exercising the gifts, rights, and privileges invested in them by His Word, and seeking to extend the gospel to the ends of the earth.
    \item This church is an autonomous body, operating through democratic processes under the Lordship of Jesus Christ. In such a congregation members are equally responsible. Its Scriptural officers are pastors and deacons.
  \end{itemize}
  \item \textit{Herschel H. Hobbs, The Baptist Faith and Message 74, 75-82 (1971).}
  \item \textsuperscript{108} \textit{Id.}
  \item \textsuperscript{109} \textit{Bush & Tiemann, supra note 26, at 79.}
  \item \textsuperscript{111} \textit{Id. at 77-79.}
  \item \textsuperscript{112} \textit{Id. at 78-79.}
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{See Hobbs, supra note 107, at 74, 77, 80-81.}
  \item \textsuperscript{115} \textit{Id.}
\end{itemize}
the congregation, clergy included, is equal, and while each has different gifts, each member has a right and a duty in the government of the local church.\textsuperscript{116} Although clergy are ordained officers of the church who provide oversight and instruction, they are merely first among equals.\textsuperscript{117} In Baptist theology, the clergy have no power or authority over any soul.\textsuperscript{118}

Modern Baptists, in general, do not exercise congregational discipline to the same extent or with the same seriousness as their forebears.\textsuperscript{119} However, many historic beliefs continue, including the rejection of auricular confession to clergy, the recognition of all believing members of the fellowship as ministers, the aversion to recognizing the power of clergy over souls, and the focus on each independent fellowship of believers.\textsuperscript{120} In the American Baptist Convention’s Ministerial Code of Ethics, clergy resolve that they “will hold as sacred all confidences shared with [them].”\textsuperscript{121} The American Baptist Convention has affirmed that its clergy are not morally obligated to disclose confidential information.\textsuperscript{122} However, confidentiality is not absolute because it may be abridged when “conscience so requires.”\textsuperscript{123}

4. Jewish Religious Groups

While no distinct confessional tradition is found within historic Judaism, various Jewish groups have developed practices regarding communication between rabbis and members of the Jewish community.\textsuperscript{124}

\textsuperscript{116} See Evangelical Dictionary, supra note 47, at 123.
\textsuperscript{117} See id. at 123-24.
\textsuperscript{118} See Bush & Tiemann, supra note 26, at 77.
\textsuperscript{119} See id. at 79-80.
\textsuperscript{120} See Hobbs, supra note 107, at 74-82; Evangelical Dictionary, supra note 47, at 122-24.
\textsuperscript{121} Ministers Council of American Baptist Convention, My Code of Ethics 1.
\textsuperscript{122} Bush & Tiemann, supra note 26, at 83-84. The convention stated:

The effective pastoral counseling of the ministry depends upon the assurance of those who seek it that the information they reveal in confidence to their pastoral counselor may be given with full freedom. The American Baptist Church in the U.S.A. expresses its conviction that such confidential, spiritual communications to its ministers should have the status of privileged communications . . . .

The American Baptist Church in the U.S.A. further declares that, whether or not appropriate statutes are enacted, it is a principle with us that any of our number who receive confidential information in the course of responding to a request for spiritual counseling is not morally obligated to disclose it without consent of the other party.


\textsuperscript{124} See Bush & Tiemann, supra note 26, at 85-90.
In America, the rabbi is regarded as a source of personal and spiritual help, filling various roles, including those of theological scholar, religious instructor, and advisor.\textsuperscript{125} Because rabbis commonly fill a counseling and pastoral role, communications between them and members of their community have religious importance. However, the perspectives on those communications vary throughout modern American Jewry.

One approach closely guards confidences, invariably protecting them from disclosure. This approach was articulated by the New York Board of Rabbis, stating:

It is essential for the proper work of the Rabbi in the community that any confidence reposed in him by husband or wife, individually or jointly, or anyone else who has come to him for counseling not be divulged, and we hope that the Court will sustain this action. Otherwise the confidential role of the Rabbi in counselling would be completely vitiated, to the detriment of those who seek his guidance.\textsuperscript{126}

However, this approach is not the only recognized approach among members of the Jewish community. Conservative Jews have a different view. Regarding the reporting of abuse disclosed in the context of a rabbi-counselee relationship, the Committee on Jewish Laws and Standards stated the following:

[The provisions in Jewish law demanding that we save life and limb would require those who know about an abusive situation to report it to the civil authorities so that it might end, and, from the perspective of Jewish law, that would apply to rabbis no less than to any other Jew. Rabbis who become aware of an abusive situation in a counseling setting, however, should consult with an attorney to determine whether civil law grants them the right to report the matter in the specific case before them and, if not, they should seek to end the abusive situation in some other way.\textsuperscript{127}

According to the Conservative movement, rabbis and teachers are understood to have a responsibility to be alert to instances of abuse and to obey any legal requirement to report abuse cases to civil authorities.\textsuperscript{128}

An important theme in Jewish law—incumbent on rabbi and lay people alike—is the obligation to keep information confidential. The source for this is generally believed to be Leviticus 19:16, "Thou shalt

\textsuperscript{125} Id. at 87.
\textsuperscript{127} ELLIOT DORFF, FAMILY VIOLENCE 28 (1995). This paper was adopted as the position of the Jewish Conservative movement by the Committee on Jewish Laws and Standards. Id.
\textsuperscript{128} Id. at 40.
not go up and down as a talebearer among thy people.” The prohibition of talebearing certainly applies to a rabbi’s confidential communications with congregants, but it also applies equally to anyone’s knowledge of his neighbor’s activities, no matter how the knowledge was gained. The prohibition against talebearing is not absolute, but tempered by other ethical and legal considerations, including the other obligation found in the same verse: “Do not stand by idly while your brother’s blood is being shed.” If another human being is in imminent harm, disclosure is mandated even if confidentiality is lost. Jewish law would thus mandate disclosure of known elder abuse, as well as other crimes, particularly if the crimes are avoidable.

In addition, a person who seeks religious counsel and assistance must be bound by the dictates of the faith. It would seem inconsistent for the congregant to be able to prevent the rabbi’s disclosure when Jewish law requires it. By revealing the secret to a rabbi, a Jew implicitly accepts Jewish law.

**B. Clergy Communications from a Ministerial/Professional Ethics Perspective**

Clergy fill a multitude of personal and professional roles. To the religious community, they are administrators and advisers, preachers and public figures, counselors and teachers. To the local community, they are fellow citizens and consumers, friends and neighbors, parents and spouses. Functioning in these widely differing roles, clergy interact with parishioners and non-parishioners alike in a whole host of religious and non-religious communications. Because of the different nature of these relationships and communications, different ethical or moral obligations may arise, and different legal duties and protections may attach.

Various professions have developed comprehensive ethical codes or rules of professional conduct that regulate conduct and guide its members on numerous ethical issues such as confidentiality. Clergy, 129. *Leviticus* 19:16.

130. *Id.*

131. Under Jewish law, the harm is not limited to physical harm. A nonparty is obligated to prevent his fellow from suffering a monetary harm if he is in a position to do so. See Michael J. Broyde, *The Pursuit of Justice and Jewish Law* 25-29 (1996).

132. *Id.*

133. The psychology and legal professions have comprehensive ethical codes or rules that govern the professional conduct of their members. The American Psychological Association adopted the following language regarding confidentiality which appears in its Ethical Principles of Psychologists and Code of Conduct:

5.01 Discussing the Limits of Confidentiality. (a) Psychologists discuss with persons and organizations with whom they establish a scientific or professional relationship . . .
however, have been slow to develop and adopt such comprehensive ethical codes or rules. The professional conduct of clergy has been, and continues to be, regulated by biblical mandate or the dictates of one's denomination or religious tradition. However, the professional conduct of clergy has also been, and continues to be, regulated by a clergyperson's own personal interests or values or certain professional or practical considerations. In fact, many clergy maintain confidentiality for reasons other than doctrine and tradition. Important to personal, ethical considerations are the three virtues of fidelity, jus-

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5.02 Maintaining Confidentiality. Psychologists have a primary obligation and take reasonable precautions to respect the confidentiality rights of those with whom they work or consult, recognizing that confidentiality may be established by law, institutional rules, or professional or scientific relationships.

5.05 Disclosures. (a) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose, such as (1) to provide needed professional services to the patient or the individual or organizational client, (2) to obtain appropriate professional consultations, (3) to protect the patient or client or others from harm, or (4) to obtain payment for services, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose.

AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT (1992). The American Bar Association provides the following instruction regarding confidentiality:

RULE 1.6 Confidentiality of Information
(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; . . .

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

See supra Part I.A.

134. See supra Part I.A.

135. Regarding the absence of rules mandating confidentiality in Protestant denominations, Douglas Jones noted:

Such stringent rules are not written into the discipline of most Protestant denominations and other religious groups. However, the vast majority of ministers labor under at least an implied restriction and feel that the betrayal of a confidence would be tantamount to the destruction of their effectiveness as members of the clergy. Thus, while the religious organizations to which many ministers belong do not have specific canons or rules regarding the safeguarding of confidential information shared with clergy, the question of revealing or not revealing information received in confidence involves the matter of conscience as well as the matter of a relationship with the courts.

Yellin, supra note 123, at 132 (quoting Douglas Jones, Privileged Communications with Clergy in the United States—An Analytical Study of the Laws of Each State, Territory and Protectorate Concerning Such Privileged Communications vi-vii). Seward Reese presented an opposing position, arguing that
Some clergy may maintain secrecy because their consciences compel them to maintain confidentiality. Others adopt confidentiality standards for themselves because they are morally persuaded to behave in a certain way.

Professional or practical considerations provide a great impetus in a clergyperson's decision regarding confidentiality. Clergy, like other professionals, understand the maintenance of confidential communications as essential to their effectiveness with those they serve. In these relationships, trust is essential. And, if confidences are not protected, trust is undermined, and the effectiveness of the relationship is diminished. The law protects the communication between persons in some special relationships, including lawyer-client, husband-wife, physician/therapist-patient, and clergy-penitent. The concept of "privileged communication" is based on a public policy interest in protecting these special relationships and the communications that occur within them. Certainly, for many clergy, legal obligations and liabilities are also integral factors in their determinations regarding confidentiality.

Recently, an increasing number of professional bodies have established comprehensive ethical codes or rules to govern professional conduct, including bodies associated with clergy. One example is provided by the American Association of Pastoral Counselors which has developed a Code of Ethics. This code of conduct provides a more comprehensive treatment of clergy-parishioner relationships and communications and provides the following instruction regarding confidentiality in clergy-parishioner communications:

As members of AAPC we respect the integrity and protect the welfare of all persons with whom we are working and have an obligation to safeguard information about them that has been obtained in the course of the counseling process.

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138. Id. at ch. 9.
139. Id. at ch. 11.
140. See generally Robert E. Regan & John T. Macartney, Professional Secrecy and Privileged Communications, 2 Cath. Law. 3 (1956) (discussing the various professional relationships that have "privileged communications" and related policy considerations).
B. We treat all communications from clients with professional confidence.

D. We do not disclose client confidences to anyone, except: as mandated by law; to prevent a clear and immediate danger to someone; in the course of a civil, criminal or disciplinary action arising from the counseling where the pastoral counselor is a defendant; . . . or by previously obtained written permission. In cases involving more than one persons (as client) written permission must be obtained from all legally accountable persons who have been present during the counseling before any disclosure can be made.

F. We do not use these standards of confidentiality to avoid intervention when it is necessary, e.g., when there is evidence of abuse of minors, the elderly, the disabled, the physically or mentally incompetent.142

142. AMERICAN ASSOCIATION OF PASTORAL COUNSELORS CODE OF ETHICS Principle 4 (1994). The American Association for Marriage and Family Therapy in its Code of Ethics states:

2. Confidentiality

[Marriage and family] [t]herapists respect and guard confidences of each individual client.

2.1 Marriage and family therapists may not disclose client confidences except: (a) as mandated by law; (b) to prevent a clear and immediate danger to a person or persons; (c) where the therapist is a defendant in a civil, criminal, or disciplinary action arising from the therapy (in which case client confidences may be disclosed only in the course of that action); or (d) if there is a waiver previously obtained in writing, and such information may be revealed only in accordance with the terms of the waiver . . . .


The Code of Ethics and Standards of Practice of the American Counseling Association states:

Section B: Confidentiality

B.1. Right to Privacy

a. Respect for Privacy. Counselors respect their clients' right to privacy and avoid illegal and unwarranted disclosures of confidential information.

b. Client Waiver. The right to privacy may be waived by the client or their legally recognized representative.

c. Exceptions. The general requirement that counselors keep information confidential does not apply when disclosure is required to prevent clear and imminent danger to the client or others or when legal requirements demand that confidential information be revealed. Counselors consult with other professionals when in doubt as to the validity of an exception.

. . . .

c. Court Ordered Disclosure. When court ordered to release confidential information without a client’s permission, counselors request to the court that the disclosure not be required due to potential harm to the client or counseling relationship.

f. Minimal Disclosure. When circumstances require the disclosure of confidential information, only essential information is revealed. To the extent possible, clients are informed before confidential information is disclosed.

This trend of developing comprehensive codes of ethics is likely to continue as clergy and their denominations understand the criminal and civil liabilities that may result from their failure to act in mandated ways.

III. Elder Abuse & Neglect

Elder abuse and neglect is a profoundly disturbing subject.\textsuperscript{143} Despite biblical injunction\textsuperscript{144} and modern statutory protections,\textsuperscript{145} elder mistreatment is a pervasive phenomenon, occurring in all segments of our population.\textsuperscript{146} Approximately 1.5 to 2 million cases of moderate to severe mistreatment occur each year,\textsuperscript{147} and its prevalence appears to be increasing.\textsuperscript{148} The National Elder Abuse Incidence Study esti-

\textsuperscript{143} Although physical and sexual abuse are the most dramatic manifestations, far more common are psychological abuse, financial exploitation and neglect of the elderly. The National Aging Resource Center on Elder Abuse estimated that “55% of the reported cases in 22 states during 1988 were determined to be self-neglect or self-abuse cases.” NATIONAL AGING RESOURCE CENTER ON ELDER ABUSE: QUESTIONS AND ANSWERS, AN INFORMATION GUIDE FOR PROFESSIONALS AND CONCERNED CITIZENS 5-6 (1991). Estimates of the percentage of incidence in 24 states in 1988, excluding self-abuse and neglect, include: neglect 37.2%, physical abuse 26.3%, financial exploitation 20%, emotional abuse 11%, all other types 2.8%, sexual abuse 1.6%, and unknown 1.1%. Id. The most recent statistics reporting substantiated new cases in 1996 by state Adult Protective Services agencies generally confirm these figures. National Center on Elder Abuse, The National Elder Abuse Incidence Study, Findings 2 (visited Sept.1998) <http://www.aoa.gov/abuse/report/Cexecsum.htm>. Abuse is illegal in every state. See NEV. REV. STAT. ANN. § 200.5099(1) (Michie Supp. 1997).

\textsuperscript{144} See, e.g., Exodus 20:12 (“Honor thy father and mother”); Leviticus 19:32 (“You shall rise before the aged and show deference to the old”); Ephesians 6:1 (“Children, obey your parents in the Lord, for this is right”).

\textsuperscript{145} See infra notes 191-236 and accompanying text.

\textsuperscript{146} National Elder Abuse Incidence Study, Executive Summary, supra note 143, at 1. Steuer & Austin, Family Abuse of the Elderly, 28 J. AM. GERIATRIC SOC’Y. 372-76 (1980).

\textsuperscript{147} 1990 ELDER ABUSE HOUSE REPORT, supra note 8, at XI (estimating more than 1.5 million persons may be victims of such abuse each year, and the number is rising); Pillemer & Finkelhor, supra note 9, at 51-57 (estimating 700,000-1,100,000 cases of elder mistreatment, excluding financial exploitation, more than a decade ago).

\textsuperscript{148} 1990 ELDER ABUSE HOUSE REPORT, supra note 8, at XI. Ninety percent of states reported to the Committee that the incidence of elder mistreatment was increasing. Id. at XIV. A
mated 450,000 new cases of elder abuse and neglect in 1996 in domestic settings.\textsuperscript{149} In almost 90\% of incidents with a known perpetrator, it is a family member; two-thirds of perpetrators are adult children or spouses.\textsuperscript{150} Although women represent only 58\% of persons over 60 years of age, they comprise more than two-thirds of those subjected to abuse and neglect.\textsuperscript{151} Moreover, the most vulnerable aged, those 80 years and over, are abused and neglected at two to three times their proportion of the elderly population.\textsuperscript{152} The oldest old are also victims of more than one-half of neglect cases.\textsuperscript{153} We are failing badly in our mission to protect senior citizens.

The four main types of elder mistreatment are physical abuse, psychological abuse, financial exploitation, and neglect.\textsuperscript{154} Physical abuse is violent conduct resulting in pain and/or bodily injury. Common examples include hitting, sexual molestation, and physical or chemical restraints.\textsuperscript{155} Psychological abuse is behavior that induces significant mental anguish and may consist of threats to harm, institutionalize, or

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\textsuperscript{149} National Elder Abuse Incidence Study, Executive Summary, supra note 143, at 1.
\textsuperscript{150} Id. at 4.
\textsuperscript{151} Id. at 3.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} The current federal definition includes three major types of elder maltreatment—physical abuse, neglect, and exploitation—and clearly recognizes self-neglect as a form of neglect. 42 U.S.C. § 3002(23-24) (1994). Under the federal statute, “abuse” is defined as the “willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or deprivation by . . . a caregiver, of goods or services . . . necessary to avoid physical harm, mental anguish, or mental illness.” 42 U.S.C. § 3002(13) (1994). “Neglect” is the “failure to provide for oneself goods or services that are necessary to avoid physical harm, mental anguish, or mental illness” or the “failure of a caregiver to provide the goods or services.” 42 U.S.C. § 3002(37) (1994). The term “exploitation” means “the illegal or improper act or process of an individual, including a caregiver, using the resources of an older individual for monetary or personal benefit, profit, or gain.” 42 U.S.C. § 3002(26) (1994). A “caregiver” is an individual “who has the responsibility for the care of an older individual, either voluntarily, by contract, by receipt of payment for care, or as a result of the operation of law.” 42 U.S.C. § 3002(20) (1994). 42 U.S.C. § 3002(24) (1994) notes that “elder abuse” refers to “abuse of an older individual” but does not specify any particular age. Id. However, because other provisions under Title III of the Older Americans Act are applicable to people who are sixty years of age and older, it may be assumed that the Congressional intent is to cover the elderly in the same age group with the new elder abuse prevention program. Id. The language clearly implies that the federal elder abuse definitions cover both domestic and institutional abuse. The 1990 Elder Abuse House Report, supra note 8, at 10-27 sets out numerous documented and graphic case studies that illustrate each type of abuse & neglect.

\textsuperscript{155} See, e.g., N.Y. Soc. Serv. Law § 473(6)(a) (West 1992 & Supp. 1998). “‘Physical abuse’ means the non-accidental use of force that results in bodily injury, pain or impairment, including but not limited to, being slapped, burned, cut, bruised or improperly physically restrained.” Id.
isolate the elder adult.\textsuperscript{156} While the effects of physical abuse are usually visible, the effects of psychological abuse are less obvious; however, psychological abuse can cause a wide range of responses including depression, nervous system disorders, fearfulness, physical illness, and, in extreme cases, suicide.\textsuperscript{157} Financial abuse or exploitation is theft or conversion of property by the elder’s relatives, caregivers, or others, ranging from expropriating small amounts of cash to inducing the elder to sign away bank accounts or other property.\textsuperscript{158}

\textsuperscript{156} "Abuse’ means the nonaccidental infliction of physical pain, injury or mental injury.” \textit{Idaho Code} § 39-5302(a) (1997).

Examples of documented physical abuse cases can be found in many sources. A few illustrative examples from the 1990 \textit{House Elder Abuse Report}, \textit{supra} note 8, at 3 follow.

Nevada authorities report that an 80-year-old woman there was hospitalized with a serious knee injury. Her grandson had knocked her to the ground and stolen her car despite her protests. Reportedly, the grandson had been physically abusive to her on several occasions and had stolen other cars.

In New Jersey, a 70-year-old woman was beaten by her 32-year-old son, who did not contribute to the household expenses and whom she suspected of abusing alcohol and drugs. She said she was terrified of his unprovoked attacks and that he had broken her glasses and once attacked her in bed while she was sleeping. A social worker saw her badly bruised left breast, the result of the son punching her.

\textit{Id.} at 3.


The 1990 \textit{House Elder Abuse Report} illustrates:

An elderly woman in Oregon lived with her son, who was diagnosed as a paranoid schizophrenic and who suffered additional mental impairment from alcohol and drug abuse which began at about age 14. He tormented her in several ways, one day becoming angry, grabbing her mother’s arm, twisting it and spinning her around in her wheelchair. He often threatened her verbally and was physically abusive. Once he crept up behind his mother and yelled, “I could make you have a heart attack!” In Montana, the nephew of an elderly woman threatened repeatedly to kill her and set fire to her ranch. On one occasion, he gave her a black eye and bruises when she refused to give him money.

The 1990 \textit{House Elder Abuse Report}, \textit{supra} note 8, at 17.

\textsuperscript{158} \textit{See Miss. Code Ann.} § 43-47-5(f) (West 1993). “Exploitation” shall mean the illegal or improper use of a vulnerable adult or his resources for another’s profit or advantage.

Illustrative examples of documented financial abuse cited in the 1990 \textit{Elder Abuse House Report}, \textit{supra} note 8, at 12-13 include:

Muriel, an elderly woman in Oklahoma, was being terrorized by her adopted son, who would often display his violent temper to obtain and then squander her money. The son and his wife gained control of Muriel’s money by obtaining power of attorney, which allowed them to cash her Social Security and retirement checks each month and to gain access to her savings account. The pair bought a new boat, new car and other luxury items with his mother’s money. Soon Muriel, now 78, was penniless. In Delaware, an elderly couple, both suffering from Alzheimer’s disease, were the victims of actual and threatened abuse by their granddaughter. She cashed certificates of deposit
Financial exploitation is often accompanied by physical or psychological abuse. Neglect, either passive or active, is the failure to fulfill a care-taking obligation necessary to maintain the elder's physical and mental well-being; examples include abandonment and denial of, or failure to provide, food or health-related services. Neglect may be intentional or negligent resulting from the caretaker's own infirmity or ignorance. Such neglect stems from an overwhelmed and/or dysfunctional care-giving system, the isolation of the elder, refusal of the elder to accept assistance, or other complex and multi-factorial causes. The above categories often overlap, and their use varies in

worth $35,000, although they were in her grandparents' names. The granddaughter has a history of violent behavior and had previously been admitted to Delaware State Hospital for psychiatric care.

Id. 159. 1990 Elder Abuse House Report, supra note 8, at 12-13.

160. See Ark. Code Ann. § 5-28-101(3)(A) (Michie 1997) (“‘Neglect’ means [n]egligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an endangered or impaired adult.”). “‘Abuse of an elder or a dependent adult’ means physical abuse, neglect, . . . or the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.” Cal. Welf. & Inst. Code § 15610.07 (West Supp. 1998).

Illustrative examples of neglect include:

When apartment cleaners and painters entered a Texas apartment vacated by the tenants 3 weeks previously, they discovered an elderly woman in a back room. This stroke victim, in her mid-80's, was bedbound and incontinent, unable to call for help. Her relatives moved out one night, leaving her alone with a glass of water and one plate of food. The woman was found starving, dehydrated and lying in her urine and feces. She had seen no one in the 3 weeks since her family moved. She died in the hospital several days later. Relatives stated that they couldn't afford to take her along.

In Tennessee, an 84-year-old man was found in a urine-soaked, feces-covered bed. He had a staph infection. His care was supposed to be handled by his 50-year-old, low-functioning daughter, who was totally financially dependent on him. She fought the notion of placing him in a nursing home because she would be left without financial support if that happened.

Id. at 7.
More importantly, no standard legal definitions exist. Sexual and emotional abuse, for example, are specifically outlawed in some states but would be subsumed in more general statutes in others. Whether behavior is characterized as abusive or neglectful may depend on the frequency, duration, intensity, or severity of the mistreatment.

A. Etiology

Experts have advanced various explanations for the cause of mistreatment of the elderly, but no consensus has emerged. The diversity of cases reflects their multiple causations: no single theory can reasonably be expected to fully explain this complex phenomenon. The various theories on causes of elder abuse are also applied to other types of domestic violence, and their usefulness has been confirmed by correlating predicted risk factors with actual patterns of elder mistreatment. The literature is too abundant to discuss here in detail. A summary of the main theoretical constructs explaining mistreatment, however, is important to appreciate the significance of later legal arguments. Five main theories have been proposed.


164. Compare Ariz. Rev. Stat. Ann. § 46-451(a-d), (7) (West 1997) (defining abuse as “(a) Intentional infliction of physical harm. (b) Injury caused by negligent acts or omissions. (c) Unreasonable confinement. (d) Sexual abuse or sexual assault.”) with Idaho Code § 39-5302(1), (6) (1997) (defining abuse as the nonaccidental infliction of physical pain, injury or mental injury) and Ala. Code § 38-9-2 (1), (6), (10) (1997) (defining abuse and emotional abuse as the willful or reckless infliction of emotional or mental anguish or the use of a physical or chemical restraint, medication or isolation as punishment or as a substitute for treatment or care of any protected person) with Ind. Code. Ann. § 12-10-3-2(1-3) (West 1995 & Supp. 1997) (failing to mention of emotional abuse, or anguish).


168. Jacquelyn Campbell & Janice Humphreys, Theories of Violence, in Nursing Care of Survivors of Family Violence 6 (2d ed. 1993).

1. Psychopathology and Caretaker Addiction

In some cases, the abuser may be addicted to drugs or alcohol or have psychiatric problems. Such conditions may diminish inhibitions against abusive acts or provide an illusory excuse for violent or neglectful behavior. Psychological issues may include acute or major mental disorders and enduring maladaptive personality or character disorders.

2. Dependency Relationships

a. Care-giver Stress from Elder's Dependency

The emotional and financial strains of caring for a dependent, sometimes impaired, elderly person may produce overwhelming pressures and stresses on the care-giver. As the costs—financial, physical and emotional—grow and the rewards diminish, the relationship is seen as inequitable and stifling. When the care-giver can no longer cope nor escape, abusive behaviors may result.

b. Abuser's Dependence on Elder

While this seems like the reverse of the prior dependency theory, both may help explain a single situation. Where the caretaker is dependent, financially or otherwise, on the elder, the response to such perceived powerlessness may be resentment and mistreatment. The care-giver's dependence may be due to a variety of conditions such as economic impoverishment, mental illness, or substance abuse.

3. Intergenerational Violence

Some theorists propose that domestic violence is learned in the home and passed to subsequent generations. According to these researchers, frequently those who abuse the elderly were raised in homes where domestic violence occurred, and thus a "cycle of vio-

170. Addiction Problems a Factor in Elder Abuse, 5 Alcoholism & Drug Abuse Wkly. 5 (1993); Ansello, supra note 167, at 15.
173. Id. at 630.
174. Our oldest seniors (80 years & over) are abused and neglected two to three times their proportions of elder population. National Elder Abuse Incidence Study, Conclusions, supra note 143, at 3.
175. See Mary Joy Quinn & Susan K. Tomita, Elder Abuse and Neglect: Causes, Diagnosis, and Intervention Strategies 28 (1986).
lence" develops. Where the elder is a parent of the abuser, an additional element of retaliation (consciously or otherwise) toward the perceived prior abuser is possible.

4. Social Isolation

Violent families are more likely than others to be socially isolated and hidden from outside scrutiny. Twenty-five percent of elders live alone, and many interact almost exclusively with family members. Child abuse, in contrast, is far more readily identified because of compulsory attendance of children at school. Isolated elders are more likely to be abused than those with extended social support networks. While such isolation does not necessarily cause mistreatment, it may be a precipitating factor.

5. Societal Attitudes and Conditions

Unquestionably, general societal factors, such as ageism, contribute to elder mistreatment. Our youth-oriented notions of beauty and power tend to degrade those who have lived into their sixth decade and beyond. Older Americans are apt to be viewed as powerless,

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180. Bella English, It's Society’s Secret Crime, BOSTON GLOBE, Aug. 2, 1989, at 17 (reporting that elder abuse thrives on total isolation—it is a “secret crime”).
181. Quinn & Tomita, supra note 175, at 13-14; National Elder Abuse Incidence Study, Conclusions, supra note 143, at 2.
182. The term “ageism,” coined in 1968 by Dr. Robert N. Butler, the first director of the National Institute on Aging, has been defined as:

[A] systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills.... Ageism allows the younger generation to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.

183. A recent bestseller on the theme of intergenerational relations notes how American society associates youth closely with beauty and power.

On my ride from the Boston airport, I had counted the billboards that featured young and beautiful people. There was a handsome young man in a cowboy hat, smoking a cigarette, two beautiful young women smiling over a shampoo bottle, a sultry-looking teenager with her jeans unsnapped, and a sexy woman in a black velvet dress, next to a man in a tuxedo, the two of them snuggling a glass of scotch. Not once did I see anyone who would pass for over thirty-five.
unproductive, and even parasitical. A disproportionate number of abused elderly persons are women, and pervasive sexist attitudes, added to ageist ones, contribute to the climate in which their abuse and neglect occur. Older women are also especially vulnerable economically. Of the elderly population below the poverty line, more than 70% are women. Unsafe and crowded neighborhoods and inadequate living conditions create an environment in which elder abuse is more likely. Seasonal or structural unemployment is also a significant factor, because family violence tends to be more frequent when the major wage-earner is out of work.

B. Failure to Self-Report Abuse & Neglect

Despite the shocking statistics on elder abuse and neglect, elder abuse victims rarely report its occurrence to public authorities. Elder abuse is often hidden and is rarely revealed to those outside the family circle. The aged person may desire to "save face" and thus be unwilling to create or exacerbate intrafamilial conflicts. Embarrassment, shame, lack of third-party support, and/or failure of the criminal justice system to respond to his or her needs also contribute to the lack of reporting. Other contributing factors are dependency

Mitch Albom, Tuesdays With Morrie: An Old Man, A Young Man, And Life's Greatest Lesson 117 (1997).

184. Butler, Dispelling Ageism, supra note 182, at 140-41.
185. National Elder Abuse Incidence Study, Conclusions, supra note 143, at 3. The typical elder abuse victim is a woman of poor to modest means over 75 years of age. She is generally widowed, living with relatives, and frail and vulnerable due to physical and/or mental disabilities. Toshio Tatara, National Aging Resource Center on Elder Abuse, Summaries of National Elder Abuse Data: An Exploratory Study of State Statistics Based on a Survey of State Adult Protective Service and Aging Agencies 18-19 (1990); Quinn & Tomita, supra note 175, at 31; Wolf & Pillemer, supra note 166, at 32.
186. Quinn & Tomita, supra note 175, at 82-85.
187. 1990 Elder Abuse House Report, supra note 8, at 32.
188. Id.
189. See id. at 42 (estimating only one in every eight cases of elder abuse is ever reported); Pillemer & Finkelhor, supra note 9, at 55 (estimating only one in fourteen cases of elder mistreatment is reported to authorities); National Elder Abuse Incidence Study, Executive Summary, supra note 143, at 3 (estimating one in six cases is reported).
191. See National Elder Abuse Incidence Study, Conclusions, supra note 143, at 5 ("Elderly persons who are unable to care for themselves, and/or are mentally confused and depressed are especially vulnerable to abuse and neglect as well as self-neglect."). Police traditionally managed violence in the home very differently from violence on the street. They tried to mediate domestic "disputes." [T]he message was that assaults in the home were permissible. Id. Victims were not afforded adequate protection and assailants were not subject to consequences. Howard Holtz & Kathleen Furniss, The Health Care Provider's Role in Domestic Violence, 8 Trends in
on the abuser, fear of institutionalization, feelings of powerlessness, or lack of self-esteem. In addition, the fact that abused and neglected elderly people tend to be socially isolated is itself a barrier to reporting, because they have fewer contacts and weaker support systems than other aged persons. Thus, victims of elder abuse are unlikely to have the support that would encourage free choice to self-report. Some feel that abusive treatment is normal or that recourse through the law is unavailable or unavailing.

C. Public Policy Response to Elder Abuse & Neglect

The vast majority of states mandate a variety of professionals—e.g., doctors, nurses, social workers—or "any person" to report suspected cases of elder abuse and neglect. Professionals are specifically included as mandatory reporters because of their significant interactions with the elderly and their ability to gather information and alert

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194. See L.W. Griffin, Elder Mistreatment Among Rural African-Americans, 6 J. ELDER ABUSE & NEGLECT 1-29 (1994).

195. See, e.g., Blunt, supra note 192, at 19-32; Holtz & Furniss, supra note 191, at 50.

196. See, e.g., ALA. CODE § 38-9-8(a) (1992 & Supp. 1996) ("All physicians and other practitioners of the healing arts having reasonable cause to believe that any adult protected under the provisions of this chapter has been subjected to physical abuse, neglect or exploitation shall report or cause a report to be made . . . "). "A physician, hospital intern or resident, surgeon, . . . psychologist, or social worker, who has a reasonable basis to believe that abuse or neglect of the adult has occurred . . . shall immediately report or cause reports to be made . . . ."


Whenever any physician, . . . registered nurse, hospital personnel, . . . social worker, . . . mental health professional, . . . has reasonable cause to suspect that an endangered adult has been subjected to . . . abuse, he shall immediately report or cause a report to be made in accordance with the provisions of this section.

Id.

197. See MISS. CODE ANN. § 43-47-7 (1997). "[A]ny person having reasonable cause to believe that a vulnerable adult has been or is being abused, neglected, or exploited shall report such information . . . ." Id.
public authorities. In eight nonmandatory states, reports to protective bodies are voluntary but encouraged.\textsuperscript{198} 

Six states specifically mandate clergy to report suspected maltreatment.\textsuperscript{199} Many others require every person to report, which obviously would include clergy.\textsuperscript{200} Moreover, clergy often function in various


Any person specified in paragraph (b) of this subsection (1) who has observed a disabled adult and because of such observation has reasonable cause to know or suspect that a disabled adult has been subjected to abuse, neglect, or exploitation or is in circumstances or conditions which would reasonably result in such abuse, neglect, or exploitation or that a disabled adult constitutes a danger to himself or is believed to be endangering the health and safety of others in his immediate vicinity, is urged to immediately report or cause a report to be made to the office of the county director. \textit{Id.} “Any person wishing to report a case of alleged or suspected abuse or neglect may make such a report to an agency designated to receive such reports under this Act or to the Department.” \textsuperscript{200}Ill. Comp. Stat. Ann. 20/4(a) (West 1993). “A person who has reasonable cause to believe that a vulnerable adult is the subject of abuse, neglect or exploitation may report the information to the county adult protective services provider.” \textsuperscript{200}N.J. Stat. Ann. § 52:27D-409(a) (West Supp. 1997). See also N.Y. Soc. Serv. Law §§ 473 (West 1992 & Supp. 1998); N.D. Cent. Code §§ 50-25-2-03 (1989); 20 Pa. Cons. Stat. Ann. § 10225-302(a) (West 1997); S.D. Codified Laws §§ 22-46-6 (Michie 1991 & Supp. 1997); Wis. Stat. Ann. § 46.904(a)(2) (West 1997). 

\textsuperscript{199}The following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from abandonment, exploitation, abuse, neglect, or self-neglect, shall, not later than 24 hours after first having cause for the belief, report the belief to the department’s central information and referral service for vulnerable adults: . . . a member of the clergy. \textsuperscript{200}Alaska Stat. § 47.24.010 (Michie 1996). 

Any . . . clergyman, . . . who has reasonable cause to suspect or believe that any elderly person has been abused, neglected, exploited or abandoned, or is in a condition which is the result of such abuse, neglect, exploitation or abandonment, . . . shall within five calendar days report such information or cause a report to be made in any reasonable manner . . . . 

\textsuperscript{200}See Del. Code Ann. § 3910(a) (1997). “Any person having reasonable cause to believe that an adult person is infirm or incapacitated as defined in § 3902 of this title and is in need of protective services as defined in § 3904 of this title shall report such information to the Department of Health and Social Services.” \textit{Id.} “[A] person having cause to believe that an elderly . . . person is in a state of abuse, exploitation or neglect shall report . . . .” \textsuperscript{200}Tex. Hum. Res. Code Ann. § 5W 48.036 (West 1990 & Supp. 1999). “An individual who believes or has reason to believe that another individual is an endangered adult shall make a report under this chapter” \textsuperscript{200}Ind. Code Ann. § 12-10-3-9(a) (West 1994). See also Ky. Rev. Stat. Ann. § 209.030 (Banks-
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roles—as teachers, social workers, counselors, and education directors, for example—where secular professionals are specifically mandated to report.201

Mandated reporting is not conditioned on actual knowledge of maltreatment, nor is clear and convincing evidence or a similarly elevated evidentiary standard needed to trigger the duty.202 The statutory test is objective—whether a prudent professional reasonably believes mistreatment has occurred based on the factual circumstances presented.203 Statutes with slightly different phrasing, e.g., calling for reporting based on “suspicion” or “reasonable suspicion,”204 likewise incorporate objective standards.205 Reasonable belief or suspicion may be derived from the professional’s personal observation, interview, or information, or from other sources, including credible hearsay.

The purpose of mandatory reporting is to bring suspected cases to the attention of state authorities; once alerted, they can filter substantiated cases of mistreatment from the unsubstantiated and trigger ameliorative social and legal services.206 Clergy have a unique opportunity to identify suspected elder abuse and neglect cases, because

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201. See Ariz. Rev. Stat. Ann. § 46-454 (West 1998). “A... psychologist, or social worker, who has a reasonable basis to believe that abuse or neglect of the adult has occurred... shall immediately report or cause reports to be made...” Id. “Whenever any... social worker, mental health professional, has reasonable cause to suspect that an endangered adult has been subjected to... abuse, he shall immediately report or cause a report to be made in accordance with the provisions of this section.” Ark. Code Ann. § 5-28-203(a)(1) (Michie 1993 & Supp. 1995).


203. See statutes collected at supra notes 196-198 and accompanying text. See also Op. Mass. Att’y Gen. 139, 140 (1974-75) (construing identically worded duty to report suspected child abuse as not requiring documentation of abuse or neglect allegations; “reasonable cause” standard was intended to increase, not restrict, reporting).


205. “Suspicion” is defined as having “a slight or even vague idea concerning” or “not necessarily involving knowledge or belief or likelihood...” Black’s Law Dictionary 1447 (6th ed. 1990). See also Op. Mass. Att’y Gen. 157 (1974-75) (equating “reasonable cause” to known and “suspected” instances of child abuse and neglect).

206. APS agencies are “system[s] of preventive, supportive, and surrogate services for the elderly living in the community to enable them to maintain independent living and avoid abuse and exploitation.” Robert E. Regan, Intervention Through Adult Protective Services Programs, 18 Gerontologist 250, 251 (1978).
they administer institutions that tend to the varying needs of large numbers of elderly Americans. Eighty percent of persons 65 and older are members of a religious body and 56% say they attend church weekly. When the religious affiliation percentages are combined with the ever-increasing number of elderly in the United States, a very large group of aged, church-going persons are at risk for mistreatment. Clergy may gain information about suspected elder abuse and neglect through a variety of sources. Personal observation and/or conversation with the victim or the perpetrator may provide direct evidence. Information may also emerge from other parishioners, voluntary social, health, or educational church programs, or allied public social agencies. Unfortunately, the available information suggests that clergy and congregations are not taking advantage of these unique opportunities, nor are they meeting their reporting responsibilities.

The required report typically must be made to a state agency—usually Adult Protective Services ("APS") or law enforcement. States also use central registries, a listing of abuse reports and information to which only certain individuals may gain access. These registries facilitate computerization of data, allowing rapid access to and retrieval of relevant information and are particularly useful in states where more than one agency is involved in the investigation and response to mistreatment.

The content of the report usually includes names and addresses of the allegedly abused citizen, the reporter, and the alleged abuser, as well as information relating to the nature and the extent of the harm, the basis of the reporter’s knowledge. The time frame for making

207. *Gallup*, *supra* note 13, at 40-41.
208. *Id.* at 5.
209. The population segment comprised of persons age 65 and older more than doubled as a proportion of total population between 1900 and 1987, and is expected to nearly double again between 1985 and 2030. *See Aging America: Trends and Projections, supra* note 10. If these trends continue as anticipated, by the turn of the century persons age 65 and over will comprise 13% of the population, and by 2030 the percentage will rise to 21.8%. *Id.* at 3.
210. *See infra* notes 229-232 and accompanying text.
211. *See Ga. Code Ann.* 30-5-4(a)(2) (1997) (requiring that reports of elder abuse be directed toward an “adult protection agency, ... [or] an appropriate law enforcement authority or district attorney”).

Reports . . . shall contain the name, address and approximate age of the elderly person who is the subject of the report, information regarding the nature and extent of the
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such a report is delineated explicitly or through general description.\textsuperscript{214}\n
Thereafter, investigation is commenced, followed by social services and legal proceedings, if needed.\textsuperscript{215}\n
While clergy often fear legal liability (e.g., tort suits for defamation or violation of confidentiality) for reporting information regarding elder abuse or neglect to public authorities, such fear is unfounded. Under state statutes, those who report elder mistreatment receive varying levels of immunity, including absolute immunity.\textsuperscript{216} The majority provide immunity from liability if the report is made in “good faith,”\textsuperscript{217} while others protect the reporter unless he acted “maliciously,” in “bad faith,” or knew the report was false.\textsuperscript{218} Many states

\begin{itemize}
\item [\textsuperscript{214}]See ARK. CODE ANN. § 5-28-206(a) (Michie 1997). “A report of abuse, sexual abuse, or negligence of an abused or neglected adult may, pursuant to this chapter, be made by telephone and shall be followed by a written report within forty-eight (48) hours, if so requested by the receiving agency.” Id. See also GA. CODE. ANN. § 31-8-82(a) (1997). “Such person shall also make a written report to the Department of Human resources within 24 hours after making the initial report.” Id.
\item [\textsuperscript{215}]See TEX. CODE ANN. § 48.061(b) (West Supp. 1998).
\item [\textsuperscript{216}]See ALA. CODE § 38-9-9 (1992). “Any person, firm or corporation making... a report pursuant to this chapter... shall in so doing be immune from any liability, civil or criminal, that might otherwise be incurred or imposed.” Id. See also Jones v. Living Ctrs. Holding Co., 695 So. 2d 1194 (Ala. Civ. App. 1997). The Alabama statute confers absolute immunity for mandatory reporters. Id.
\item [\textsuperscript{217}]See ALASKA STAT. § 47.24.120(a) (1996). “A person who in good faith makes a report under AS 47.24.010, regardless of whether the person is required to do so, is immune from civil or criminal liability that might otherwise be incurred or imposed for making the report.” Id.
\item [\textsuperscript{218}]See GA. CODE ANN. § 30-5-4 (1997). “Anyone who makes a report... shall be immune from any civil or criminal liability... unless such person acted in bad faith or with malicious purpose.” Id. See also IDAHO CODE § 39-5303(2) (Supp. 1997).
\end{itemize}
presume reports are made in good faith unless clear and convincing evidence proves otherwise, an important procedural protection. Immunity is granted even where the report turns out to be incorrect.

In almost all states, anonymity is promised to those who report elder mistreatment, and breach of this guarantee of confidentiality is grounds for liability. In *Texas Department of Human Services v. Benson*, a church leader who had reported suspected child abuse to the state Department of Human Services sued that department after it disclosed his identity to the accused abusers. As a result of the disclosure, the suspected abusing parents filed a libel suit against both Benson and his congregation. Though the libel suit was eventually dismissed, Benson was fired from his clergy position and he then sued the Department of Human Services. The trial jury found that the state agency had negligently injured Benson, and the appellate court affirmed that the department had violated its duty. The confidentiality of the report, established by Texas law, was predicated on the minister's parallel, absolute duty to report instances of child abuse. The court described that duty as "sweeping and mak[ing] no exception for clergy, physicians, mental health professionals or teach-

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Any person who participates in making a report under § 415.1034 or participates in a judicial proceeding resulting therefrom is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from any liability, civil or criminal, that otherwise might be incurred or imposed.

*Id.*

220. See *Zamstein v. Marvasti*, 692 A.2d 781 (Conn. 1997) (holding that there is no duty on the part of mandatory reporters to accused abuser, because potential liability would discourage reporting); *Simonsen v. Swenson*, 177 N.W. 831, 832 (Neb. 1920) (explaining that a physician not liable to a patient for disclosing a contagious disease when the physician acts in good faith, even if mistaken diagnosis made).

221. See *Alaska Stat.* §47.24.050(a) (1996). "Investigation reports and reports of the abandonment, exploitation, abuse, neglect or self-neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying ..." *Id.* "The reports ... shall be confidential and may be disclosed only as provided in subdivision (b). Any breach of the confidentiality required by this chapter is a misdemeanor ... Subdivision (b) permits disclosure to authorized persons and agencies responsible for investigation of the alleged abuse."


223. *Id.* at 238.

224. *Id.*

225. *Id.*

226. *Id.* at 243.

227. *Id.* at 241-42.
ers."

Persons who made such reports in good faith were afforded immunity from civil and criminal liability. In 1997, the Texas legislature amended its elder abuse reporting requirement to mandate reporting "without exception to a person whose communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, and mental health professional."

D. Noncompliance with Mandatory Reporting

Despite the symbolic and practical importance of mandatory reporting statutes, noncompliance appears to be the rule. In 1991, questionnaires returned by all state agencies to Congress demonstrated that a significant number of elder-abuse cases are never reported. The 1981 House of Representatives Report concluded that elder abuse, although at least as prevalent as child abuse, is far less likely to be reported.

Under federal law, local agencies on aging must identify public and private entities in their geographic areas that are engaged in the prevention, identification, and treatment of elder abuse and neglect. Workers in these agencies initiate and maintain face-to-face contacts with seniors to assess cases and to advocate on behalf of the seniors.

A national survey examined these direct practice workers' perceptions of fourteen occupational groups and their role in the discovery and treatment of elder mistreatment. The workers were asked to identify whether they had direct knowledge of cases uncovered by clergy and other professionals and to rate the helpfulness of these groups in identifying cases of elder abuse and neglect. The results reflect a

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228. Benson, 893 S.W.2d at 242.
229. Id. (quoting TEX. FAM. CODE ANN. § 34.03 (West Supp. 1995)).
232. 1981 ELDER ABUSE HOUSE REPORT, supra note 8. The 1981 report issued by the House Select Committee on Aging estimated that 4% of the American elderly population, approximately one million persons, may be victims of moderate to severe abuse, yet few cases are reported. Id.
233. 42 U.S.C § 3018(a) (1994).
234. These groups include: visiting nurses, social service providers, agency homemakers, hospital social workers, health aides, public welfare caseworkers, police, public health department employees, mental health workers, physicians, emergency room staffs, clergy, nursing home personnel, and lawyers. Id.
236. Id.
deeply negative view of the help provided by these groups. In particular, clergy were ranked between "not very helpful" and "no help at all" in the discovery of elder abuse and neglect. As original referral sources, clergy ranked 12th (of 14) regarding elder abuse, and 11th for neglect. Only 9.6% of those who had encountered abuse reported first-hand knowledge of at least one referral by clergy. Clergy were perceived to be even less effective in treating abuse and neglect than in uncovering it. Ten years later, Professors Blakely and Dolon conducted an even more comprehensive survey to determine the ratings of the amount of help provided by various occupational groups in detecting and treating elder abuse and neglect as judged by these front-line workers. This time clergy were ranked last, of seventeen professional and nonprofessional groups, in both detection and treatment.

IV. POTENTIAL CONSEQUENCES TO CLERGY WHO FAIL TO REPORT

While failure to report suspected elder abuse and neglect is often a criminal violation, most statutes require an elevated mental standard—often "willful" or "knowing"—in order to constitute a crime. This mental standard is difficult to prove, and the lack of re-

237. Id.
238. Id.
239. Id.
240. Id. at 189, 193.
porting makes prosecution almost unknown. Moreover, prosecutors are generally loathe to indict the clergy, especially those acting under religious conscience.

A more realistic fear, however, is the specter of civil liability of the clergyperson, the individual church, or its organized body. When clergy learn, or have reason to believe, that a senior citizen is being mistreated but do not report that information to APS and the abuse continues with attendant and increasing injury to the victim, serious monetary risks ensue. The senior, or more likely a subsequently appointed guardian, may bring a negligence action maintaining that the subsequent abuse and injury would not have occurred had the clergyperson complied with the statute and/or his duty of care. The actual abuser is, of course, liable to the victim under numerous tort theories—battery, negligence, etc.—or to criminal prosecution. But

246. A Westlaw search of state cases from 1986 to present did not reveal a single case in which a person was prosecuted for a failure to report elder abuse as required by statute.

247. Abuse, neglect and financial exploitation of older persons have been made specific crimes in almost all states. See, e.g., TENN. CODE ANN. § 71-6-117 (1995). “It is unlawful for any person to willfully abuse, neglect or exploit any adult within the meaning of the provisions of this part. Any person who willfully abuses, neglects or exploits a person in violation of the provisions of this part commits a Class A misdemeanor.” WYO. STAT. ANN. 35-20-109 (Michie 1997) (“A person who abuses, neglects, exploits or abandons a disabled adult is guilty of a misdemeanor and upon conviction shall be fined not more than one thousand dollars [$1000.00]). Statutes often make serious physical abuse or neglect a separate offense. See, e.g., MASS. GEN. LAWS ANN. ch. 265, § 13K(e) (1994 & Supp. 1997).

Whoever, being a caretaker . . . permits serious bodily injury to such elder or person with a disability, or wantonly or recklessly permits another to commit an assault and battery upon such elder . . . shall be punished by imprisonment in the state prison for not more than ten years or . . . in the house of correction for not more than two and one-half years . . . .

Id. See also DEL. CODE ANN. tit. 31, § 3913 (1997) (intentional abuse causing bodily harm, permanent disfigurement is a Class D felony); KY. REV. STAT. ANN. § 209.990 (Banks-Baldwin 1997) (knowing and willful abuse causing serious physical or mental injury is Class C felony).

States which do not specifically criminalize abuse and neglect often have provisions requiring reports go to police for criminal investigation. See, e.g., MASS. GEN. LAWS ANN. ch. 19A, § 18(a) (1994).

If an assessment results in a determination that the elderly person has suffered serious abuse, the department or designated agency shall report such determination to the district attorney of the county where the abuse occurred within forty-eight hours. The district attorney may investigate and decide whether to initiate criminal proceedings. Id. See also CONN. GEN. STAT. ANN. § 17b-460 (West 1997); IDAHO CODE § 39-5310 (Supp. 1997).

Most states allow the advanced age of a victim to be considered as an aggravating factor in sentencing because of the vulnerability to crime of older persons as well as the enhanced effect that crime has on them. See, e.g., Nev. Rev. Stat. Ann. § 193.167 (1-2) (Michie 1997) (“Certain crimes committed against persons 65 years of age or older . . . shall be punished by imprisonment . . . for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime”); ARIZ. REV. STAT. ANN. § 13-702(13) (West 1997) (enhancing culpability “[i]f the victim of the offense is sixty-five or more years of age or is a handicapped person”); DEL. CODE. ANN.
the abuser may, at the time of the civil action, be unavailable, judgment-proof, or for other reasons, an unappealing defendant. In such an instance, clergy or the church may become the target of a negligence suit. Four traditional elements comprise a negligence cause of action: duty, breach of duty, causation, and damages. These will be discussed in order.

A. Negligence Liability

1. Duty & Breach

The duty issue determines whether the clergyperson owes an obligation to the injured, in this case the maltreated aged person. Duty is a legal question which must be decided by the judge, not the jury. In determining whether to impose a duty, courts engage in a complex analysis that weighs and balances several related factors: the foreseeability and severity of the underlying risk of harm, the opportunity and ability to exercise care to prevent that harm, the comparative interest of the relationships between or among the parties, and ultimately considerations of public policy and fairness. Foreseeability includes the defendant's reasonable knowledge of the risk and the specific plaintiff likely to suffer a particular type of injury. When a third person poses the risk of harm, the plaintiff may be required to prove that the clergyperson was in a position to "know or have reason..."
to know that there was likelihood of conduct on the part of the third person that would result in the damage."

The early common law drew a clear distinction between misfeasance (action) and nonfeasance (inaction).

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive in action [sic], a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.

Courts have long recognized an exception to the traditional rule, which imposed no affirmative duty to act, where a special relationship existed between the parties. Illustrative examples include common carriers and their passengers, innkeepers and guests, landholders and invitees. If a special relationship is found to exist between a clergyperson and a victim of elder mistreatment, that victim is owed a duty by the clergyperson to take reasonable steps to report and/or deal with the problem. This principle is illustrated by several child abuse cases. In JAW v. Roberts, an Indiana appellate court recognized that clergyperson may have a special relationship with a parishioner where a "level of interaction or dependency [exists] between the parties that surpasses what is common or usual." No liability was im-

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251. Restatement (Second) of Torts § 449 (1965).

If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

Id.


253. Restatement (Second) of Torts, supra note 251, at § 315.

254. See Werndli v. Grayhound Corp., 365 So. 2d 177, 178 (Fla. Dist. Ct. App. 1978) (holding that a bus driver had a duty to warn a passenger who wished to disembark that the area was known for its frequent criminal activity and its danger). See also Lopez v. Southern California Rapid Transit District, 710 P.2d 907 (Cal. 1985).


257. 627 N.E.2d 802 (Ind. Ct. App. 1994). A child who had been molested sued several defendants, including clergy, who knew about the continuing abuse but did nothing to intervene.

Id.

258. Id. at 809.
posed on the clergyperson in this instance because the court deemed the interaction and dependence insufficient.259

In contrast, a Washington appellate court in Funkhowser v. Wil-son260 imposed liability on a lay church leader who knew of a church official’s proclivity for sexual molestation and did nothing to prevent it. The defendant was responsible for children in various church programs.261 Schulz, a church leader involved in youth activities, was informed that Wilson had molested children in the past and might pose a danger to children at the church. Schulz was also aware that Wilson had access to the pastor’s daughters, but he took no action.262 Wilson subsequently molested all three of the pastor’s daughters. The court stated:

Ultimately, whether a “special” relationship giving rise to a legal duty exists involves the balancing of the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, the relationship between the parties, the temptation presented by the act or failure to act, the gravity of the harm that may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take.263

The court found that a rational trier of fact could find that such a special relationship existed in this instance.264

The mandatory elder abuse reporting statutes, which typically provide criminal sanctions for violation, should establish a legal duty for negligence purposes where the legislature has required “every citizen” or specific groups, e.g., clergy, to notify public authorities of possible mistreatment. The purpose of the reporting statute is usually explicitly stated:

The purpose of this Section is to protect adults who cannot physically or mentally protect themselves and who are harmed or threatened with harm through action or inaction by themselves or by the individuals responsible for their care or by other parties, by requiring mandatory reporting of suspected cases of abuse or neglect by any person having reasonable cause to believe that such a case exists. It is intended that, as a result of such reports, protective services shall be provided by the adult protection agency.265

259. Id. at 813.
261. Id.
262. Id. at 504-05.
263. Id. at 509.
264. Id. at 510.
265. LA. REV. STAT. ANN. § 403.2A(1) (West 1998).
Moreover, a civil cause of action for failing to report suspected elder abuse or neglect as required by law has been created by statute in four states: Arkansas, Iowa, Michigan and Minnesota.\(^{266}\)

Once a legal relationship between the clergyperson and the abused elder has been recognized, the court must evaluate the reasonableness of the defendant's behavior. Under the oft-cited test formulated by Judge Learned Hand in *United States v. Carroll Towing*,\(^ {267}\) the "burden of adequate precautions" is balanced against the probability that the injury will occur multiplied by the severity of the injury if it occurs.\(^ {268}\) Judge Hand explained this as a mathematical formula: "[L]iability depends on whether B [the burden of adequate precautions] is less than L [the potential injury] multiplied by P [the probability of injury]; i.e., whether B<PL."\(^ {269}\) If the minister's knowledge of the risk and the action needed to eliminate the risk are outweighed by the probability and severity of the injury, the action or inaction would be found unreasonable.\(^ {270}\)

Applying this test to the clergy reporting and elder abuse context, the time and other burdens on the minister to evaluate information and report to APS would, in many situations, not outweigh society's interest in protecting the aged from abuse. The particular facts involved would, of course, be critical: would a reasonable person have inquired further into the situation? Initiated a visit to the site? Notified public authorities of the information?

The vast majority of elderly victims fall prey to a close relative or a care-taker, and the mistreatment is committed either in the home of the offender or the victim.\(^ {271}\) The family ties and isolation of many

\(^{266}\) Ark. Code Ann. § 5-28-202(b) (Michie 1997) ("Any person or caregiver required by this chapter to report a case of suspected abuse, neglect, or exploitation who purposely fails to do so shall be civilly liable for damages proximately caused by the failure."). See also Iowa Code § 235B.3(10) (1998) ("A person required by this section to report a suspected case of dependent adult abuse who knowingly fails to do so is civilly liable for the damages proximately caused by the failure."); Mich. Comp. Laws § 16.411e(1) (1997) ("A person required to make a report pursuant to §11a who fails to do so is liable civilly for the damages proximately caused by the failure to report, and a civil fine of not more than $500.00 for each failure to report"); Minn. Stat. § 626.557(7) (1997) ("A mandated reporter who negligently or intentionally fails to report is liable for damages caused by the failure.").

\(^{267}\) 159 F.2d 169, 173 (2nd Cir. 1947).

\(^{268}\) Id.

\(^{269}\) Id.

\(^{270}\) Essentially the same analysis is performed by the *Restatement of Torts*. See *Restatement* (Second) of Torts, *supra* note 251, at §§ 291-93. The *Restatement* test also measures the reasonableness of the defendant's conduct by weighing its risks against its utility. Id.

\(^{271}\) *National Elder Abuse Incidence Study, Conclusions*, *supra* note 143, at 4. Approximately 90% of alleged abusers were related to victims. *Id.*
elders make self-reporting unlikely. Given these factors, clergy are in a unique position to learn of abuse and neglect, and indeed, they may be the only people with the kind of knowledge or opportunity to know that a particular individual is being abused. The duty imposed on them to act is therefore appropriate. Foreseeability is often based upon “particular knowledge” or “special reason to know” that an individual would suffer a “particular type of injury.” The statutes, however, reflect the legislative judgment that while confidentiality serves a public purpose, “the protective privilege ends where the public peril begins.”

If the minister fails to recognize reasonably ascertainable abuse, or learns of it and fails to report, a breach of the duty has occurred. For many years various religious bodies have proclaimed their commitment to oppose domestic violence, published materials and conducted training seminars on the various aspects of this topic. The United States Catholic Conference notes that its commitment to advocacy against domestic violence is “rooted in a concern for human life, human dignity, and family life . . . [and that] historically, in its role as sanctuary, the Church has protected those in danger.” While education and community mobilization are important roles for clergy, one of their most important functions is to respond supportively and appropriately when approached by victims, perpetrators, or third parties. The Center for the Prevention of Sexual and Domestic Violence trains and develops materials for clergy and lay leaders

[t]o increase [their] awareness of the nature and extent of violence in the family . . . [t]o increase participants’ skills in responding to victims and abusers in order to stop the abuse . . . [t]o increase participants’ skills in responding to the religious concerns of victims

272. See supra notes 184-190 and accompanying text.
273. See supra notes 259-260 and accompanying text.
274. See Tarasoff v. Regents of Univ. of Calif., 551 P.2d 334, 340 (Cal. 1976) (imposing duty of reasonable care under circumstances when defendant has basis for determining a readily identifiable victim is likely to be harmed by the actions of a third person).
275. Id. at 347.
276. See U.S. CATHOLIC CONFERENCE OFFICE OF DOMESTIC SOCIAL DEV., VIOLENCE IN THE FAMILY: A NATIONAL CONCERN, A CHURCH CONCERN (1979) (describing the Catholic Church’s response to domestic violence). See also James L. Franklin, Clergy Vows New Support for Victims of Battering, BOSTON GLOBE, Nov. 14, 1993, at 1 (explaining that religious groups are trying to break down any unintended message that religion or the Bible tolerates abuse); Darrell Holland, Diocese Holds Seminars for Church Workers, PLAIN DEALER, Jan. 15, 1994, at 8E (describing church programs designed to assist those working for the church with respect to domestic violence); Linda Midgett, Silent Screams: Are Evangelists Responding Effectively to Abused Women? CHRISTIANITY TODAY, July 19, 1993, at 44-45.
and abusers . . . [and] to increase cooperation between the religious
and secular communities in response to spouse abuse.279

Numerous analogous situations involve the failure of a professional
to reveal to a third party a foreseeable danger to the plaintiff. Often
these cases are based on statutory duties to report to public agen-
cies specific conditions creating risk.280 Other cases involve affir-
mative obligations imposed to reveal even confidential information
in order to protect an identifiable third party from harm.281 The
clergy-elder abuse situation is analogous; the burden on the clergy-
person of triggering the protective instrumentalities is minimal—
they simply must notify the appropriate public authorities.282 Clergy
are likely to have close relationships with the individuals involved
and will often have concrete, or at least credible, evidence of past
and continuing harm.283 If a minister should have identified elder
mistreatment, or learned of the abuse or neglect through counseling
or from other sources, a duty to forestall future harm by triggering
a public agency response is created.284 The minister has no legal
responsibility to control the actions of the abuser or rectify the situa-
tion.285

2. Causation

Once a plaintiff has demonstrated that the clergyperson had a duty
and breached it, she must prove the logical link—both factual and
legal (proximate) cause—between her injuries and the minister's ac-
tions.286 A defendant will typically argue that the harm to the plaintiff
emanated from the perpetrator's tortious and criminal behavior, not

279. Id. at 45.

280. See Gammill v. United States, 727 F.2d 950, 954 (10th Cir. 1984) (physician may be found
liable for failing to warn patient's family and others likely to be exposed to patient of nature and
danger of exposure).

281. Landeros v. Flood, 551 P.2d 389 (Cal. 1976) (imposing liability on doctor for failure to
notify child protective services of battered child as required by state law).

282. See supra notes 191-225 and accompanying text.

283. Franklin, supra note 276, at 1 (noting that "clergy may be the first or only counselors to
whom abused women may turn"); Rebecca Frey, The Powerlessness of God: Sacramental Minis-
try to Survivors of Abuse, 24 LUTHERAN F. 18, 22 (1990) (discussing the emotional and cognitive
dislocation often experienced by victims of domestic abuse).

284. See Timothy E. Gammon & John K. Hulston, The Duty of Mental Health Care Providers
to Restrain Their Patients or Warn Third Parties, 60 Mo. L. REV. 749 (1995); Peter F. Lake,
Revisiting Tarasoff, 58 ALB. L. REV. 97 (1994). See also Bradley v. Ray, 904 S.W.2d 302, 308
(Mo. Ct. App. 1995) (listing cases approving Tarasoff result); Estates of Morgan v. Fairfield
Family Counseling Center, 673 N.E.2d 1311 (Ohio 1997) (finding that psychiatrist-outpatient
relationship justifies duty to protect third parties); Schuster v. Altenberg, 424 N.W.2d 159 (Wis.
1988) (holding that psychiatrist had duty to tell police of patient's dangerousness).

285. Id.

286. KEETON ET AL., supra note 248, at 263.
the cleric's. Once a duty exists and is breached, however, if the clergyperson fails to respond, causation may be found despite the illegal nature of the subsequent abuse or neglect by the perpetrator.\textsuperscript{287} Intervening negligent and/or criminal acts—in this instance by a relative, care-taker or others—that the defendant might reasonably anticipate do not supersede or cut off the defendant's liability for his own act or omission. \textsuperscript{288} It has been noted, “[i]f the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.”\textsuperscript{289} The subsequent damage may be viewed as the exact harm the reporting laws were designed to prevent and thus do not supersede the defendant's liability.\textsuperscript{290}

In weighing that liability, courts are likely to note that considerable empirical evidence supports the conclusion that elder mistreatment is rarely an isolated event.\textsuperscript{291} Elder abuse, like spouse and child abuse, often follows cyclical patterns, with the victim being mistreated repeatedly—and with increasing severity.\textsuperscript{292} “Mistreatment is likely to escalate in frequency and severity over time . . . . The long-term trajectory of abuse is such that if intervention is not initiated after abuse is first observed . . . , the chances are good that it will continue.”\textsuperscript{293} The dynamics are often similar to that found in partner abuse. There, the perpetrator may begin with psychological or financial abuse, progress to property or pet destruction, and finally to physical assault.\textsuperscript{294} Elder mistreatment may follow this “cycle of violence,” or take differ-

\textsuperscript{287} Restatement (Second) of Torts, supra note 251, at § 449.
\textsuperscript{288} Id.
\textsuperscript{289} Id.
\textsuperscript{290} See Stevens v. Des Moines Community Sch. Dist., 528 N.W.2d 117, 119 (Iowa 1995) (finding schools liable for injury to student caused by criminal attack of another student because schools had negligently failed to supervise a student with known violent tendencies).
\textsuperscript{292} H. O'Malley et al., Legal Research and Services for the Elderly, Elder Abuse in Massachusetts: A Survey of Professionals and Paraprofessionals (1979) (estimating 70% of reported cases involved repeated instances of abuse); Elder Abuse & Neglect, supra note 291, at 966-70.
ent paths, resulting in violation of the aged person’s civil rights, physical violence, or other damage.295

The widespread adoption of reporting statutes demonstrates that legislatures presumed and anticipated cyclical behavior. Therefore, once a minister suspects or has reason to believe that an older person has suffered abuse or neglect, he should also reasonably anticipate repetition or escalation. Mandatory reporting states reflect recognition that elders are protected only by identifying those at risk, and instituting protective and therapeutic measures. The ameliorative systems, however, will not work unless they are triggered. In many instances, the consequences of the failure to report are quite foreseeable: public authorities will not act, and the abuse will continue.

If the factfinder concludes that the defendant’s inaction was at least a “substantial factor” that increased the risk of the subsequent harm, “in fact” causation may be established.296 This principle underlies analogous cases charging a caretaker—usually a parent—with criminal liability for failure to report child abuse.297 Again, the actual physical or other harm is inflicted by a third person, typically the husband or boyfriend.298 But the plaintiff must also prove the clergy inaction was the “proximate cause” of the abuse.299 The well-known Landeros v. Flood300 case confronted this issue in a malpractice action against a physician who returned a child to parents who later beat the child repeatedly, causing permanent damage.301 The doctor’s failure to diagnose “battered child syndrome” and to report it was held to be the proximate cause of the injuries.302 Clergy may likewise be held liable for harm that occurs after failure to act to prevent foreseeable risk. Recognizing this cause of action promotes the legislative policy of encouraging compliance with the reporting statutes and preventing elder

295. Id.
296. See Wisconsin v. Williquette, 385 N.W.2d 145, 150 (Wis. 1986).
297. Id.
298. Id. (concluding that mother’s failure to report to state authorities where she knew of abuse and left children alone with father was “substantial factor” which increased the risk of subsequent mistreatment).
299. Judge Andrews defined proximate cause as “[w]hat we mean by the word ‘proximate’ is that, because of convenience, of public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.” Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928).
301. Id.
302. Id. at 395. The court relied on RESTATEMENT OF TORTS § 449 to support its conclusion.
Id.
mistreatment. Damages may, of course, be apportioned between two or more defendants, and the minister may implead the abuser.\textsuperscript{303}

**B. Vicarious and Ascending Liability**

In some cases, a court may impose liability on one party because of the wrongful or harmful activity of another. Vicarious liability may arise when a principal or employer is held liable for the conduct of an agent or employee or when a joint tortfeasor is involved. In such a case, one party is vicariously liable for the actionable conduct of another, based solely on the relationship that exists between the two parties.\textsuperscript{304}

Under the doctrine of *respondeat superior*,\textsuperscript{305} an employer or principal is held liable for the actions of his employee or agent.\textsuperscript{306} The public policy behind the doctrine is that, when a person is conducting business through others, that person is bound to manage them so as to avoid harm to third parties.\textsuperscript{307} Thus, the doctrine allows a court to find some other entity that has benefitted from the harmful action and place responsibility on that entity.\textsuperscript{308} When an agent or employee fails to exercise due care, the principal or employer is responsible to those the agent or employee owed a duty of care, assuming that the servant's failure occurred during the course of his employment.\textsuperscript{309} The employer is responsible for harm that results from the conduct of a servant that was within the scope of the servant's employment\textsuperscript{310} or within the legitimate scope of the agent's authority.\textsuperscript{311} To impose vicarious liability on an organization, the organization must have exer-

\textsuperscript{303} See Ind. Trial 14. "A defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." Nikolous v. Superior Court, 756 P.2d 925 (Ariz. 1988) (holding that the defendant, who was in an auto accident with the plaintiff, could implead the city because it was alleged that a fire truck negligently caused the accident and the city may ultimately be liable to the defendant); Smith Kline & French Laboratories v. Just, 191 S.E.2d 632 (Ga. Ct. App. 1972) (finding that a physician sued for prescribing the wrong drug could implead a drug manufacturer because the physician claimed that the drugs were unsafe and not fit for the intended use).

\textsuperscript{304} Restatement (Second) of Agency §219 (1958).

\textsuperscript{305} The term "respondeat superior" means "let the master answer." Black's Law Dictionary, supra note 205, at 1311.

\textsuperscript{306} Burger Chef Systems, Inc. v. Govro, 407 F.2d 921, 925 (8th Cir. 1969).


\textsuperscript{308} Id.


\textsuperscript{310} Mid-Continent Pipeline Co. v. Crauthers, 267 P.2d 568, 571 (Okla. 1954).

\textsuperscript{311} Rogers v. Town of Black Mountain, 29 S.E.2d 203, 205 (N.C. 1944).
cised control over or benefitted from the wrongful conduct, and the injury must have occurred while the relationship existed between the organization and the servant. Stated differently, the organization must have ordered, participated in, or ratified the misconduct.

Courts frequently use the doctrine of respondeat superior in awarding compensatory damages, thus making the employer or principal financially responsible for the torts of its servants. However, courts have also applied the doctrine when awarding punitive damages. Most courts will hold the master liable for punitive damages when the servant has acted within the scope of employment, the servant has acted maliciously, and the master is vicariously liable for actual damages. With this majority approach, courts hold the master vicariously liable for the malicious conduct of servants in order to deter such wrongful behavior and to encourage masters to exercise greater control over their servants.

The Restatement of Torts and the Restatement of Agency take another approach that limits the vicarious liability for punitive damages to certain situations. First, the plaintiff may not recover punitive damages unless the master, actually or impliedly, authorized the performance and manner of the act. Second, the master had to have been reckless in employing a servant that was unfit. In this situa-

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312. Restatement (Second) of Torts, supra note 251, at § 909.
315. See Keeton et al., supra note 248, at 13.
316. Restatement (Second) of Torts, supra note 251, at § 909.
317. Restatement (Second) of Agency, supra note 304, at § 217C.
tion, the master has actually acted wrongfully. Third, the servant had to have been acting in a managerial capacity and within the scope of employment. Fourth, the master may be vicariously liable for punitive damages when the master or one of the master’s managerial officers participates in, approves of, or ratifies the servant’s acts.

Religious organizations may also be held vicariously liable under a related theory of liability. With the demise of charitable immunity, religious organizations are exposed to liability for the harm that they cause to others. However, religious organizations may also be held responsible for the conduct of members, employees, agents, or even another related religious organization and its members, employees, or agents. This theory of liability is ascending liability. With ascending liability, a party who is injured by an organization’s employees or agents or a related, but separate, organization’s employees or agents seeks to place responsibility for the harm on another organization. With religious organizations that are related to each other ec-

321. See Restatement (Second) of Torts, supra note 251, at § 909 (stating that “[i]t is, however, within the general spirit of the rule to make liable an employer who has recklessly employed or retained a servant or employee who was known to be vicious, if the harm resulted from that characteristic”).


324. This increased exposure to risk from the harm caused by another involves both religious nonprofit corporations and unincorporated religious associations. See Mark E. Chopko, Ascending Liability of Religious Entities for the Actions of Others, 17 A.M. J. TRIAL ADVOC. 289, 294-96 (1993).

325. Id. at 289.


327. Chopko, supra note 324, at 292 (defining “ascending liability” as the effort by injured parties to place responsibility on one organization for the damage or the debt caused by that
clessly or hierarchically, the allocation of civil responsibility may follow the ecclesial or hierarchical lines until the responsibility finally resides in the entity that “has both the juridic power and the civil duty to answer for the actions of individuals or organizations at a lower level.”

Courts employ this doctrine to place the civil responsibility for injury on a financially responsible defendant. However, the doctrine also serves to utilize the liability system to enforce some greater responsibility on related organizations. Most of the reported litigation regarding ascending liability and religious organizations has occurred within the last ten years.

Liability will ascend when responsibility is allocated according to one of the following three principles: (1) statutory or corporate responsibility; (2) denominational responsibility; or (3) situational responsibility. First, liability may ascend to a coordinate or superior body when that body, in the corporation’s civil governing documents, articles of incorporation, bylaws, policy or personnel manuals, or similar documents, reserves authority over the matter in contention. Second, liability may also ascend when a superior or coordinate organization has reserved authority over the matter in dispute in its ecclesial documents or its expressions of authority. Third, the doctrine of ascending liability may apply when the conduct of the organization has so insinuated or involved itself in the matter in contention that the organization can rightly be held as a defendant in the action.

Thus, as a general rule, courts may hold organizations fully liable, including for punitive damages, when their employees or agents cause harm, regardless of the culpability of the organization. Some juris-

organization’s employees or agents, or by a related but separate organization’s employees or agents).

328. Id. at 294-95. Chopko notes that ascending liability is clearly found in litigation that involves hierarchical churches, thus placing responsibility on “superior” religious organizations. Id. at 295. However, courts also use the doctrine to hold “coordinate” religious organizations responsible for the actions of religious organizations that are non-hierarchical, that is, congregational. Id. Such liability allocation in this instance would appear to be more horizontal than vertical or ascending. Id.

329. Id. at 293.

330. Id.

331. Id. at 297. The first case involving ascending liability occurred in 1979. See Barr v. United Methodist Church, 153 Cal. Rptr. 322 (Cal. Ct. App. 1979).

332. For a discussion of these three principles, see id.

333. Chopko, supra note 324, at 300-03.

334. Id. at 303-07.

335. Id. at 308-09.

336. See Standard Oil Co. v. Gunn, 176 So. 332 (Ala. 1937); Western Coach Corp. v. Vaughn, 452 P.2d 117 (Ariz. Ct. App. 1969); Miller v. Blanton, 210 S.W.2d 293 (Ark. 1948); American
dictions have modified this rule so that a court will not hold organizations vicariously liable for punitive damages except when the organization ratified or authorized the tortious act of the employee or agent or when the organization bore some degree of culpability in relation to the tortious act.337

V. LEGAL PROTECTIONS AVAILABLE TO CLERGY

A. The Clergy-Penitent Privilege338

The law generally assumes that parties in litigation have the right to obtain and produce evidence from all sources.339 Privileges bar certain testimony at trial, or protect certain witnesses from compulsory participation in trial.340 The interests protected by a privilege are deemed more important than the trial's search for truth.341 To be privileged, a communication must have been made and maintained in confidence.342 Any voluntary disclosure generally acts as a waiver.343

Fidelity & Casualty Co. v. Farmer, 48 S.E.2d 122 (Ga. Ct. App. 1948); Northrup v. Miles Homes, Inc., 204 N.W.2d 850 (Iowa 1973); D.L. Fair Lumber Co. v. Weems, 16 So. 2d 770 (Miss. 1944); Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. Ct. App. 1978); Schmidt v. Minor, 184 N.W. 964 (Minn. 1921); Clemons v. Life Ins. Co. of Georgia, 163 S.E.2d 761 (N.C. 1968); Stroud v. Denny’s Restaurant, Inc., 532 P.2d 790 (Or. 1975); Odom v. Gray, 508 S.W.2d 526 (Tenn. 1974).

337. See CAL. CIV. CODE § 3294(b) (West Supp. 1984); Roginsky v. Richardson-Merrill, Inc., 378 F.2d 832 (2d Cir. 1967) (applying New York law).

338. The privilege of a clergyperson not to testify about privileged communications has been known by different names throughout its history. The privilege has been called “priest-penitent,” “confessor,” “clergyman’s,” “minister’s,” etc. For the purposes of this article, the terms “clergy-penitent privilege,” “clergy-parishioner privilege,” “minister’s privilege,” “clergy’s privilege,” or simply “the privilege” all refer to the right of a clergyperson of any denomination to remain silent and refuse testimony.

339. Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (courts and the public have a right to “every man’s evidence before a grand jury except for those persons protected by a constitutional, common-law or statutory privilege”).


341. See University of Pennsylvania v. EEOC, 493 U.S. 182, 189 (1990) (“We do not create and apply an evidentiary privilege unless it ‘promotes sufficiently important interests to outweigh the need for probative evidence.’”) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)). See also David W. Louisell, Confidentiality, Conformity and Confusion: Privileges in Federal Court Today, 31 TUL. L. REV. 101, 110 (1956) (it is “historic judgment of the common law” that “whatever handicapping of the adjudicatory process is caused by recognition of the privileges, it is not too great a price to pay for secrecy in certain communicative relations”).

342. See Dean Wigmore’s first two requirements for recognizing a privilege, quoted infra note 345. See also United States v. Wells, 446 F.2d 2 (2d Cir. 1971) (where a letter to a priest contained no hint that its contents were to be kept secret, or that its purpose was to obtain religious counsel or ministration, the admission of the letter into evidence was not error as being in violation of the religious privilege).

343. CHRISTOPHER MUeller & LAIRD KIRKPATRICK, EVIDENCE § 5.6, 353 (1995).
Information gained from a third party or easily accessible to a third
person is normally not privileged. 344

The rationale for privileges has always been disputed. Most profes-
sional privileges have been justified by the need for clients, patients,
or others to communicate freely. 345 Individuals must be able to pro-
vide information and discuss their emotions in this context. Disclo-
sure by the professional of private and even incriminating information
would deter this willingness to confide. Beyond this utilitarian balanc-
ing, other justifications for evidentiary privileges focus on values of
privacy and honor. 346 Revealing confidences creates social embar-
arrassment for the one confiding and a breach of trust for the discloser.
Ethical conflicts emerge for professionals, such as lawyers, doctors, or
clergy who are aware that in seeking information necessary for their
services, they may place clients at risk.

The clergy-penitent testimonial privilege has its roots in ancient
English common law, 347 and its antecedents may be found in Roman
Catholic doctrine that considered the Seal of Confession inviolate. 348
The privilege was first recognized in the United States by a New York
court in 1813, 349 which held that a Catholic priest could not be com-
pelled to reveal what he heard during confession. 350 The court found

344. See United States v. Webb, 615 F.2d 828 (9th Cir. 1980) (confession of a crime, made in
the presence of both a prison chaplain and a security officer, would not offer to the protections
of the privilege).

345. Dean Wigmore’s influential treatise sets out a utilitarian balancing formula for the recog-
nition of a privilege.

(1) The communications must originate in a confidence that they will not be
disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory main-
tenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be
sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communica-
tions must be greater than the benefit thereby gained for the correct disposal of
litigation.

See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (J. Mc-

346. See MCCORMICK, supra note 137, at 268. Professor McCormick’s Evidence treatise loc-
cates the basis for privileges in the need for privacy. Compelled disclosure is considered wrong
because of the personal embarrassment created when secrets are revealed to third parties, and
the breach of the entrusted confidence. Id.

347. See generally Yellin, supra note 123, at 95 (reviewing clergy-communicant privilege
before the Reformation).

348. See supra notes 30-44 and accompanying text.

349. People v. Phillips, N.Y. Ct. Gen. Sess. (1813). This case was not officially reported, but
an editor’s report was abstracted in 1 W.L.J. 109 (1843) and is reprinted in Privileged Communi-
cations to Clergymen, 1 CATH. LAW 198 (1955).

350. See Phillips, 1 W.L.J. at 113.
that forcing a priest to violate the secrecy of the confessional violated the priest's constitutional right to the free exercise of religion.\footnote{351} As early as 1875, in dictum, the Supreme Court stated: "On this principle, suits cannot be maintained which would require a disclosure of the confidence of the confessional ....\"\footnote{352} Today, all American states\footnote{353} and the federal courts\footnote{354} recognize a clergy-penitent privilege, although its scope varies from jurisdiction to jurisdiction. Many clergy instinctively believe all information they receive is confidential, and that a "privilege" immunizes them from revealing this information or participating in any state mandated requirements such as the duty to report elder abuse and neglect. This demonstrates considerable confusion about the law and may subject clergy to a variety of legal sanctions.\footnote{355}

\footnote{351. Id.}

\footnote{352. Totten v. United States, 92 U.S. 105, 107 (1975).}


\footnote{354. See, e.g., Mockaitis v. Harcleroad, 104 F.3d 1522, 1532 (9th Cir. 1997) ("The evidentiary [priest-penitent] privilege as it has existed in the United States has been broadly recognized and affirmed in dicta by the Supreme Court."); In re Grand Jury Investigation, 918 F.2d 374, 384 (3rd Cir. 1990) (privilege applies "to protect communications made (1) to a clergyperson (2) in his or her spiritual and professional capacity (3) with a reasonable expectation of confidentiality").}

\footnote{355. See Part IV.A.}
B. Relationship of Privilege to Reporting Requirements

Privileges generally apply only to questions posed in a court and do not literally relate to the obligation to report information to APS. The evidentiary privilege is thus not necessarily applicable in the most common situation: when a minister has reasonable belief that mistreatment of an elder has occurred and must decide how to respond. Most often, neither the reporting statutes nor the privilege rules and statutes explicitly answer this fundamental question about how evidentiary rules apply. A limited number of administrative and judicial opinions indicate that the clergy privilege is confined to the courtroom. This interpretation is bolstered by the fact that most clergy-communicant privileges are placed in the state’s statutes or rules of evidence and use terms like “witness,” “testimony,” or “litigation.” Some statutes provide that required reports do not have to be disclosed by the mandatory reporter and cannot be revealed by the public agency. Where a state wishes to apply evidentiary privileges

356. Mueller & Kirkpatrick, supra note 343, at 335.
357. See supra Part III.C.
358. Scott v. Hammock, 870 P.2d 947, 956 n.5 (Utah 1994) (noting that the clergy privilege is a rule of evidence that prohibits certain communications from public disclosure in litigation); Walstad v. State, 818 P.2d 695, 697 n.2 (Alaska Ct. App. 1991) (noting that psychotherapist-patient and clergyman-penitent privileges were promulgated by state supreme court pursuant to its authority to make rules governing procedure in civil and criminal cases and do not rest on any independent basis, in contrast to the attorney-client privilege which is “inextricably tied to the constitutional right to counsel”).
359. See supra notes 339-50 and accompanying text.
361. See, e.g., Ind. Code Ann., § 34-46-3-1 (West 1998) (“The following persons shall not be required to testify regarding the following communications:

(3) Clergymen, as to the following confessions, admissions, or confidential communications:

(A) Confessions or admissions made to a clergyman in the course of discipline enjoined by the clergyman’s church.

(B) A confidential communication made to a clergyman in the clergyman’s professional character as a spiritual adviser or counselor.

Id.
362. See, e.g., Ariz. Rev. Stat. Ann., § 46-453(B) (West 1989) (“In any civil or criminal litigation in which incapacitation, abuse, exploitation or neglect of an incapacitated or vulnerable adult is an issue, a clergyman or priest shall not, without his consent, be examined as a witness concerning any confession made to him in his role as a clergyman . . .”).
363. See, e.g., Haw. R. Evid. 502 (1998) (“A person . . . either public or private, making a . . . report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the . . . report, if the law requiring it to be made so provides. A public officer or agency to whom a . . . report is required by law to be made has a privilege to refuse to disclose the . . . report if the law requiring it to be made so provides”).
to non-court situations, it may express that. New Jersey, for example, provides a broad and explicit exemption to any reporting requirement. Moreover, even if applicable beyond the courtroom, the general clergy privilege may be superseded by a subsequently enacted and specific statutory obligation to report. This may be the case in states where clergy are specifically mandated to report, or a duty is imposed on "every person."

Several state statutes are explicit. Two set out a clergy privilege not to report elder abuse. A few grant a privilege not to testify in elder abuse cases. Louisiana provides a clergy privilege not to testify in "any proceeding" involving elder abuse—arguably a broader standard—but makes no explicit mention of the reporting situation. Texas, on the other hand, abrogates all privileges, including clergy,

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The provisions of article II, Privileges, shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed.

Id. The priest-penitent privilege is contained within article II (codified at id. § 2A:84A-23 (West 1994 & Supp. 1998)).


366. See supra note 200 and accompanying text.

367. FLA. STAT. ANN. § 415.109 (West 1999) ("The privileged quality of communication . . . except . . . the privilege provided in s. 90.505 . . . does not apply to any situation involving known or suspected adult abuse, neglect, or exploitation and does not constitute a ground for failure to report . . .") (emphasis added). Section 90.505(b) reads "A communication between a member of the clergy and a person is "confidential" if made privately for the purpose of seeking spiritual counsel and advice from the member of the clergy in the usual course of his or her practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication." Id. See also S.C. CODE ANN. § 43-35-50 (LAW. CO-op 1997) ("The privileged quality of communication . . . between a professional person and the person's patient or client, except that between . . . priest and penitent, are abrogated and do not constitute grounds for failing to report . . . in any civil or criminal proceeding resulting from a report made pursuant to this chapter.") (emphasis added).

368. See, e.g., ARIZ. REV. STAT. ANN. § 46-453(B) (West 1999) ("In any civil or criminal litigation in which incapacitation, abuse, exploitation or neglect of an incapacitated or vulnerable adult is an issue, a clergyman or priest shall not, without his consent, be examined as a witness concerning any confession made to him in his role as a clergyman or a priest in the course of the discipline enjoined by the church to which he belongs"); S.C. CODE ANN. § 43-35-50 (LAW. CO-op. 1997) ("The privileged quality of communication between . . . a professional person and the person's patient or client except that between priest and penitent, are abrogated and do not constitute grounds for . . . the exclusion of evidence in any civil or criminal proceeding resulting from a report made pursuant to this chapter").

369. LA. REV. STAT. ANN. § 14:403.2(M) (West 1986 & Supp. 1999) ("In any proceeding concerning the abuse, neglect, or self-neglect of an adult, evidence may not be excluded on any
with respect to its statutorily-mandated duty on "any person" to report elder abuse.\textsuperscript{370} Four states generally abrogate privileges in their elder abuse laws, but make an exception for clergy.\textsuperscript{371} This fails to define the scope of the privilege. Many states require "any person" to report reasonably suspected elder abuse.\textsuperscript{372}

Evidentiary privileges must be distinguished from the duty of confidentiality imposed by professional codes or religious dictate.\textsuperscript{373} Many professions have a code of ethics which enjoins confidentiality.\textsuperscript{374} Whereas the law of privileges is determined by statute and court decision, ethical principles of confidentiality are constructed by private groups,\textsuperscript{375} and the scope of such an ethical duty may differ from the privilege accorded by state evidence law. The variables may include what information is covered, who may waive confidentiality, and which professional is recognized as having the duty to keep information confidential.

Moreover, any privilege or privacy interest has limits, and this principle applies clearly to information about elder abuse. The attorney-


\textsuperscript{371} Id.

\textsuperscript{372} See, e.g., MISS. CODE ANN. § 43-47-7 (1993) ("[A]ny person having reasonable cause to believe that a vulnerable adult has been or is being abused, neglected or exploited shall report such information . . . ."); UTAH CODE ANN. §§ 62A-3-302(1) (1998); R.I. GEN. LAWS § 42-66-8 (1998).

\textsuperscript{373} See 8 WIGMORE, supra note 345, § 2286 at 528-37 (discussing that communications made in confidence do not necessarily create a legally recognized privilege).

\textsuperscript{374} See, e.g., ABA Model Code of Professional Responsibility, DR 4-101(B)(a); ABA Model Rules of Professional Conduct, Rule 1.6(a); ANA, Code for Nurses 2 ("the nurse safeguards the client's right to privacy by judiciously protecting information of a confidential nature"); APA, ETHICAL PRINCIPLES FOR PSYCHOLOGISTS 5 ("Psychologists have a primary obligation to respect the confidentiality of information obtained from persons in the course of their work as psychologists").

\textsuperscript{375} See Part II.A. for discussion of religious duties of confidentiality. In the attorney-client context, commentators agree that ethics committees tend to accord the rules of confidentiality a broad reading while courts lean toward much narrower construction of similar principles under the attorney-client privilege. CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 24 FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5472, 90 (1986).
client privilege, the oldest and best defined privilege,\textsuperscript{376} may serve as an illustrative example. The Model Rules of Professional Conduct establish that an attorney may not disclose a client’s “confidential information” except in limited circumstances, and that a lawyer violating that prohibition is subject to discipline.\textsuperscript{377} “Confidential information” is broadly defined to include “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client,”\textsuperscript{378} and information gained from others beside the client.\textsuperscript{379} This ethical duty of confidentiality even applies outside formal judicial proceedings.\textsuperscript{380}

The privilege is limited, however, when a client may commit a future crime or fraud.\textsuperscript{381} The ethical confidentiality principle permits, or even requires, attorney disclosure of “the intention of [the attorney’s] client to commit a crime and the information necessary to prevent it.”\textsuperscript{382} Absent statutory exception, a lawyer would thus be obliged to

\textsuperscript{376} See Swidler & Berlin v. United States, 118 S. Ct. 2081, 2084 (1998) (noting “the attorney-client privilege is one of the oldest recognized privileges for confidential communication”).

\textsuperscript{377} MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(B)(1980) [hereinafter MODEL CODE] (“Except when permitted under DR 4-101(C) (a lawyer shall not knowingly . . . reveal a confidence or secret of his client); MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6(a) (1998 ed.) [hereinafter MODEL RULES] (“A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).”).

\textsuperscript{378} MODEL CODE, supra note 377, at DR 4-101(A). The Model Rules provide a similar but somewhat expanded definition of protected information, covering all information “relating to the representation” of the client whether acquired by the attorney before or after the relationship began and providing protection without regard to whether the client indicated the information was to be confidential. \textit{Id.}

\textsuperscript{379} \textit{Id.} (“The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law . . . . A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.”).


\textsuperscript{381} McCormick, supra note 137, § 95 at 350.

\textsuperscript{382} See, e.g., Florida requires disclosure of information believed necessary to prevent a client from committing any crime. RULES REGULATING FLA. BAR 4-1.6(b)(1) (1998) (“A lawyer shall reveal such information to the extent the lawyer believes necessary: . . . [t]o prevent a client from committing a crime . . . .”) (emphasis added). Nevada, New Jersey, and Wisconsin also require disclosure of confidential information limited to more serious crimes making disclosure mandatory when the lawyer “reasonably believes” disclosure is necessary to prevent the client from committing a crime involving death or serious bodily injury. NEV. SUP. CT. R. 156(2) (1997); N.J. RULES OF PROFESSIONAL CONDUCT 1.6(b)(1) (1998); WIS. SUP. CT. R. 20:1.6(b) (1998); Canon 37 of the ABA Canons of Professional Ethics provided that the announced intention of a client to commit a crime is not included in the confidences that the lawyer must respect. ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 69 (1984). Currently, the Model Rules allow a lawyer to disclose information communicated by the client to the extent the lawyer
WHEN SILENCE RESOUNDS

report future elder mistreatment, because such behavior is typically cyclical and past behavior should ordinarily predict future abuse. Religious confidentiality strictures sometimes include a similar duty to report situations involving mistreatment of the aged. Repeated abuse can lead to serious harm or even death to the elderly victim. It may also produce other physical, psychological and economic consequences. Many injuries from which a younger victim recovers quickly may have long-term disabling effects on an elderly victim. The consequences of psychological or emotional abuse have been shown to be more severe for older people than for younger people, causing demoralization and depression. Many elderly persons depend on fixed public or private pensions or benefits, so financial exploitation, even in small amounts, may prevent them from obtaining needed food, medicine, or utility services. Economic losses are difficult for the elderly to recoup and can reduce even financially comfortable elderly people to a state of dire need.

Even where the clergy-penitent privilege is applicable to protect against testimony in court, it is considerably more limited than is commonly realized by clergy. The statutes restrict its scope, limiting its application to certain circumstances in which the privileged information was transmitted and designating the type of clergy covered. Eleven states restrict the privilege to statements made to clergy under the “sanctity of a religious confessional” or “within the course of disci-

reasonably believes disclosure is necessary to prevent the client from committing a criminal act that is likely to result in imminent death or substantial bodily harm. Model Rules, supra note 377, at Rule 1.6(b).

383. See Part III.A.


385. See, e.g., DoFF, supra note 127, at 40.


pline enjoined by [his] church.” Another nine states allow a testimonial privilege only to “confidential communications . . . necessary and proper to enable [the cleric] to discharge the functions of his office according to the usual practice or discipline of his church.”

Often, courts will consider conversations to be within the statutory privilege only if made for the purpose of seeking spiritual or religious comfort. In the remaining states, the privilege protects “any confidential communication made to clergy in his professional capacity,” a broader standard.


392. See, e.g., State v. Van Welch, 448 So. 2d 705, 712 (La. Ct. App. 1984) (holding “priest-penitent” privilege inapplicable because defendant did not approach witness, a “self-ordained” minister, for spiritual counseling); State v. Andrews, 507 S.E.2d 305, 308 (N.C. Ct. App. 1998) (noting that under the ruling of the Supreme Court of North Carolina, when a minister is a friend of the defendant and initiates contact, the clergy-penitent privilege does not apply); People v. McNeal, 677 N.E.2d 841, 852-53 (Ill. 1997) (holding that the murder defendant’s statements were given to his brother outside of his brother’s professional character as a spiritual advisor, and therefore these statements were admissible); State v. Berry, 324 So. 2d 822 (La. 1975) (holding that when a communication was not made within the requisite nature of a confidential disclosure for religious purposes of a penitent or a clergyman seeking religious consolation, the clergy-penitent privilege does not apply); State v. Black, 291 N.W.2d 208, 216 (Minn. 1980) (noting that aid requested of the chaplain must be religious to be privileged).

Where clergy gain information while in a role other than that of religious advisor, it is usually not privileged, even as to testimony in court. Clearly, for instance, informal conversations with a minister, relating to a host of topics, would not be protected. Communications made to a minister as a friend are not privileged, nor are fortuitously overheard conversations. Actions, as opposed to communications, are generally deemed not privileged.

Courts have also restricted the clergy privilege to its specific elements. If information is supplied to religious personnel not named in the statute, often no protection is afforded. If information about

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394. See, e.g., Burger v. State, 231 S.E.2d 769, 771 (Ga. 1977) (holding that statements made to a minister as a friend rather than as a clergyman were not privileged); Commonwealth v. Stewart, 690 A.2d 195, 199 (Pa. 1997) (stating that the clergy-penitent privilege only extends to confidential communications to a "member of the clergy acting in a spiritual capacity"); In re Koellen's Estate, 176 P.2d 544, 550-51 (Kan. 1947) (holding that statement made to a priest about the location of a formerly executed will was not privileged); Scott v. Hammock, 870 P.2d 947, 956 (Utah 1994) (holding that the statutory clergy-penitent privilege will only apply if a communication is made to a cleric in his or her religious role); Simrin v. Simrin, 43 Cal. Rptr. 376, 378-79 (1965) (holding that communications with rabbi during marital counseling were not privileged under statute, but enforcing the parties' agreement to exclude such communications from evidence in light of public policy favoring reconciliation of spouses); State v. Black, 291 N.W.2d 208, 216 (Minn. 1980) (holding that the defendant's request that a prison chaplain telephone friends outside prison was not privileged because aid requested was not religious); Wainscott v. Commonwealth, 562 S.W.2d 628, 632-33 (Ky. 1978) (where defendant spoke to clergyman as "friend rather than as a minister," no privilege was recognized).

395. See, e.g., Burger v. State, 231 S.E.2d 769, 771 (Ga. 1977) (holding no privileged communication to cleric, who was also frequent companion, of intent to kill wife and her lover); Wainscott v. Commonwealth, 562 S.W.2d 628 (Ky. 1978) (communication to cleric as a friend, and not acting in professional capacity, was not privileged); State v. Barber, 346 S.E.2d 441, 445 (N.C. 1986) (holding that statement made by defendant was not privileged because it was not entrusted to a member of the clergy in his professional capacity, but as a friend); Commonwealth v. Stewart, 690 A.2d 195, 199-200 (Pa. 1997) (holding that communications are privileged when made to a member of the clergy in the context of a penitential or spiritual matter).

396. See, e.g., State v. Berry, 324 So. 2d 822, 828-29 (La. 1975) (privilege did not apply to minister who heard communication because defendant did not come for spiritual direction); State v. Martin, 959 P.2d 152, 158-59 (Wash. Ct. App. 1998) (holding that the clergy-penitent privilege only applied to communications meant to be secret and remanding to determine if the presence of the communicant's mother rendered the communication unconditional).


398. See, e.g., State v. Motherwell, 788 P.2d 1066, 1069 (Wash. 1990) (religious "counselors" who were not ordained or licensed ministers could be prosecuted for not reporting suspected child abuse); People v. Thompson, 184 Cal. Rptr. 72, 76 (1982) (privilege was not applicable to conversation of defendant with man who had been trained as an "ethics officer" in the "Church of Scientology" but was not "ordained as an 'auditor' or minister at Church"); In re Cueto, 554 F.2d 14 (2d Cir. 1977) (holding that a lay minister could not claim the privilege); In re Murtha, 279 A.2d 889, 893 (N.J. Super. Ct. App. Div. 1971) (holding that a Catholic nun may not claim the privilege).
suspected elder mistreatment is received, even in “confidence,” from someone other than the penitent, for instance, a parish nurse who visits older church members in their homes, or parishioners or neighbors, it must be reported even if it was received in the course of the clergy performing pastoral functions.

Persons or institutions entitled to assert the privilege are also defined in varying ways by different states. Fourteen states restrict the privilege to a “bona fide established church or religious organization.”399 Others broaden this definition, according a privilege to any “clergyman or priest,”400 but still leave definitional ambiguities for potential dispute.401

C. Affirmative Defense

1. Common Law Protection Afforded Clergy-Penitent Communications

Although an injured aged person may establish liability for the clergyperson, an affirmative defense based on a limited clergy-penitent privilege should be recognized in defined circumstances. The burden of establishing such a defense should be placed upon the defendant-minister. Evidentiary and pleading burdens are typically allocated between the parties in accordance with public policy


401. It is quite uncertain, for example, whether all Jehovah’s Witnesses are ministers, although the denomination claims this to be true. Reese, supra note 135, at 55, 66. See Cimijotti v. Paulsen, 219 F. Supp. 621, 624 (N.D. Iowa 1963) (construing the Iowa clergy-penitent privilege to extend to the disclosure of confidential communications by a member of the clergy for the purpose of seeking advice); Reutkemeier v. Nolte, 161 N.W. 290, 292 (Iowa 1917) (elders of the Presbyterian Church included in statute granting privilege to “minister of the gospel”). But see, Rutledge v. State, 525 N.E.2d 326, 328 (Ind. 1988) (holding that a member of Gideons International, a group of businessmen who also pass out the word of God, was not a clergyman within the meaning of Indiana’s clergy-penitent privilege); Knight v. Lee, 80 Ind. 201, 204 (1881) (holding elder and deacon not covered by minister’s privilege).
considerations. Thus, the clergyperson should have to justify nonreporting when credible evidence of mistreatment is present. As the Supreme Court has noted in another context: "[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof." The defendant clergyperson is best positioned to show why a report was not made, the factors that were taken into account, and the extent to which they influenced his decision-making process. The court must then evaluate the clergyperson's asserted reason for his action/inaction, and balance it against the harm which could be suffered by the elderly citizen under the particular facts. Moreover, such a defense should be a reluctantly granted exception to the strong public policy established by the statutory duty to report. These laws demonstrate that state legislatures clearly appreciated that mistreatment is often clandestine and occurs in isolated, hard to penetrate venues. Allocating the burden of persuasion to the defendant accords with that recognition.

Society's interest in fostering communications between clergy and others as well as cleric's religious rights should outweigh the apparent efficacy of compelled disclosure of elder mistreatment when four tests are met. First, the information must have been obtained under circumstances where a reasonable expectation of privacy existed for both clergy and communicant, and thus the communication was not intended for further disclosure. Information received from public
sources, or in a public context, would not qualify. Second, the clergy must also have been obliged by religious tenet to maintain the secrecy of such communication. 407 Third, the clergyperson must have acted in a reasonable manner. Although no report was made to public authorities, affirmative steps were taken to ascertain whether the information was accurate, and if so, actions were initiated to confront both abuser's and victim's problems. Fourth, in the particular factual situation, the balance between privacy interests and society's need for information must clearly weigh on the confidentiality side. 408

So. 2d 557, 562 (Ala. Crim. App. 1998) (holding that no reasonable expectation of confidentiality attaches to statements made to member of the clergy concerning a threat of violence to a third party).

407. See Part II.A. See also In re Grand Jury Investigation, 918 F.2d 374, 388 n.21 (3d Cir. 1990) (noting that “ascertain[ing] the types of communications that the denomination deems spiritual and confidential is both a necessary and a constitutionally inoffensive threshold step in determining whether a privilege interdenominational in nature applies in light of the facts and circumstances of a particular case.”); People v. Diercks, 411 N.E.2d 97 (Ill. App. Ct. 1980) (privilege not applicable where there was no showing “that the disclosure of [defendant's] confession by [clergyman] would be enjoined by the . . . Baptist Church”; People v. Edwards, 248 Cal. Rptr. 53, 57 (Cal. Ct. App. 1988) (trial court did not err in finding that the communication “was not a penitential communication within legal contemplation” and was therefore not subject to the privilege).

408. The Supreme Court performed this type of balancing between individuals' privacy interests and society's need for information explicitly in Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 458 (1977), and implicitly in Whalen v. Roe, 429 U.S. 589, 600-03 (1977). See Gary R. Clouse, Comment, The Constitutional Right to Withhold Private Information, 77 Nw. U.L. Rev. 536, 558 (1982). In Nixon, the court conceded that Nixon's privacy interests were threatened by the requirement that his presidential materials be screened by government archivists, Nixon, 433 U.S. at 457-58, 465, but stated that “any intrusion must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening.” Id. at 458. In Whalen, the Court upheld the constitutionality of a New York statute requiring physicians to report to the state health department information about any patient to whom they prescribed narcotic drugs. The Court held that although the statute constituted a threat to the legitimate privacy interest of a patient, the threat was not “sufficiently grievous . . . to establish a constitutional violation,” Whalen, 429 U.S. at 600. The Court noted the state's interest in controlling the distribution of narcotic substances, see id. at 598, and the stringent safeguards against public disclosure beyond the health department. See id. at 593-95, 601.

Lower federal courts have also balanced the privacy interests of individuals against state interests. See, e.g., United States v. Westinghouse Electric Corp., 638 F.2d 570, 577-80 (3d Cir. 1980) (holding that employees' medical records fell within a zone of privacy entitled to constitutional protection, but that the National Institute for Occupational Safety and Health was entitled to access to the information because of the public interest in safe working conditions and because adequate provisions were made to prevent further dissemination); Plante v. Gonzalez, 575 F.2d 1119, 1135 (5th Cir. 1978) (holding that although a Florida statute requiring elected officials to make financial disclosures threatened the privacy interests of the officials, that interest was outweighed by the public interest in discouraging official corruption and in strengthening public confidence in state government); Soto v. City of Concord, 162 F.R.D. 603, 618-19 (N.D. Cal. 1995) (balancing the state's interest in discovery against a patient's right to maintain private medical records); Conant v. McCaffrey, 1998 WL 164946, at *4-5 (N.D. Cal.) (holding that the government's interest in enforcing prohibitions on the illegal use of marijuana outweighed the individual's limited privacy interest in medical records that had been redacted to hide the indi-
Recognition of a clergyperson's affirmative defense in appropriate instances promotes public policy. As the Supreme Court noted in *Trammell v. United States*, the [clergy-penitent] privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be the flawed acts or thoughts and to receive priestly consolation and guidance in return. Possible criminal prosecution, potential civil liability, and state-sponsored protective services are not the only, or even the most effective, protections against elder mistreatment. In fact, considerable evidence suggests that this elaborate legal edifice has not succeeded in stemming, or even reducing, elder abuse. Private intervention and the tangible and intangible support of religious organizations may produce better results than those available through the secular state. An abuser may confess and seek spiritual guidance or material support from the pastor and religious community. The "confession" can be the catalyst for new behavior. In fact, repentance and accountability for the evil in which the penitant participated may ameliorate or end past wrongs. The religious concept of repentance is rooted in the Greek word *metanoia* which means "to turn around." True repentance does not deal with feeling, but with action—changing one's behavior, reversing direction. Holding abusers accountable within the context of their faith experience can also be instrumental in changing individual's name); *Veneklase v. City of Fargo*, 904 F. Supp. 1038, 1050 (D. N.D. 1995) (weighing the state's interest in protecting residential privacy against an individual's First Amendment rights). State courts have occasionally accorded greater protection to the right of informational privacy than have federal courts, but their decisions have been based on both state and federal constitutions. See, e.g., *Falcon v. Alaska Pub. Offices Comm'n*, 570 P.2d 469, 476 (Alaska 1977); *Jones v. Superior Court*, 174 Cal. Rptr. 148, 156-57 (Cal. Ct. App. 1981).


110. Id. at 51.

111. 1981 *ELDER ABUSE HOUSE REPORT*, supra note 8. Ten years later, a follow-up congressional report, "Elder Abuse: A Decade of Shame and Inaction," determined the situation had worsened; elder maltreatment was increasing and 5% of the elderly, or more than 1.5 million elderly persons, were estimated abused yearly. 1990 *ELDER ABUSE HOUSE REPORT*, supra note 8 (estimating more than 1.5 million persons may be victims of such abuse each year, and the number is rising). Ninety percent of states reported to the Committee that the incidence of elder mistreatment was increasing. Id. at XIV. In 1998 the California legislature made the following specific findings with regard to the prevalence of elder abuse in the nation's largest state: "California's mandatory reporting laws, first enacted in 1982, have brought the tragedy of elder and dependent adult abuse to public attention. Annually, 225,000 incidents of adult abuse occur in California—an increase of over 1000 percent over the number of incidents in 1986-87." *CAL. WELF. & INST. CODE* § 15610.07 (West Supp. 1999).


114. One ecclesiastical authority has described repentance in a related context as follows:
the community's perception that domination, mistreatment, and violence are socially and religiously acceptable.\textsuperscript{415}

The clergyperson's affirmative defense rests on a qualified privilege not to disclose. Privileges, including the clergy-penitent privilege, are based on (1) "the imperative need for confidence and trust" between the communicants;\textsuperscript{416} and (2) the promotion of "public ends."\textsuperscript{417} Congregants will not confide their behavior and feelings to clergy when damaging information must necessarily be transmitted to APS for civil or possible criminal proceedings.\textsuperscript{418} Acceptance of the principle that clergy need not disclose suspected elder abuse to public authorities in some instances also fosters public ends. Religious congregations are one of the only social institutions that regularly see entire families. But clergy must be trained\textsuperscript{419} and motivated to use this opportunity to apply the theological insights of both Jewish and Christian traditions\textsuperscript{420} that condemn elder mistreatment.

\begin{center}
\textsc{Center for the Prevention of Sexual & Domestic Violence, Clergy Misconduct: Sexual Abuse in the Ministerial Relationship 66 (1992).}
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418. In the child abuse context, commentators have argued that competing interests should be reconciled by permitting disclosures to be used only for the purpose of protecting the child. \textit{See}, e.g., Nancy E. Stuart, \textit{Note, Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality}, 1 Geo. J. Legal Ethics 243, 258 (1987) (arguing that courts should impose mandatory duty on attorneys to report but limit reporting to civil authorities only). For the most part, these recommendations have not been followed. \textit{See}, e.g., People v. Bowman, 812 P.2d 725, 729 (Colo. Ct. App. 1991) (finding purpose of reporting statutes not merely to remove victim from harm but also to aid in prosecution of perpetrator) (citing People v. Battaglia, 203 Cal. Rptr. 370, 373 (Cal. Ct. App. 1984)).
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419. \textit{See} Alberta D. Wood & Maureen C. McHugh, \textit{Women Battering: The Response of the Clergy,} 42 Pastoral Psychol. 192 (1994) (stating that members of the clergy wanted to help in domestic violence situations but were hampered by their lack of counseling training, and by their limited knowledge of treatment programs, legal options, and programs for abusers).
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420. \textit{See, e.g., Isaiah 1:16-17, 61:1-3; Amos, 8:4-10 (expressing a deep concern for the weak, disadvantaged, defenseless, and elderly); Leviticus 19:32 (requiring a respect for the elderly bordering on reverence); Exodus 20:12 (commanding a person to honor parents). \textit{See, e.g., I Timothy} 5:3-16 (placing older people and widows at the status of role models to younger members of the community); Matthew 22:33-40 (containing Jesus' basic command of love for others,
\end{center}
In the legal context, Jeremy Bentham, generally an opponent of privileges, notes “[r]epentance and consequent abstinence from further misdeeds of the like nature—repentance, followed even by satisfaction in some shape or other, satisfaction more or less adequate for the past: such are other well-known consequences of [clergy-penitent communication].”

In the first judicial recognition of the clergy privilege, a New York court declared:

[When a man under the agonies of an afflicted conscience and the disquietudes of a perturbed mind, applies to a minister of the Almighty, lays bare his bosom filled with guilt, and opens his heart black with crime, and solicits from him advice and consolation, in this hour of penitence and remorse, and when this confession and disclosure may be followed by the most salutary effects upon the religious principles and future conduct of the penitent, and may open to him prospects which may bless the remnant of his life, with the soul's calm sunshine and the heart-felt joy, without interfering with the interests of society, surely the establishment of a rule throwing all these pleasure prospects into shade, and prostrating the relation between the penitent and the comforter, between the votary and the minister of religion, must be pronounced a heresy in our legal code.]

Although the status of communications and confession to clergy varies among different religious denominations, the effectiveness of the clergy-parishioner relationship is compromised by an absolute disclosure requirement. Trust is essential to open communications. If all the information clergy learned had to be disclosed, they might be reticent to elicit information, inhibiting the flow of communication. Moreover, mandatory disclosure might well undermine the basis of the testimonial exemption because clergy-penitent communication is privileged only if intended to be confidential. A reporting statute could imply that confidentiality is not intended.
A privacy rationale justifying the recognition of a clergy privilege provides a different and independent basis for exemption from mandatory reporting requirements. The common law has long recognized an individual’s interest in the nondisclosure of embarrassing or private facts. Moreover, the federal Constitution and most state constitutions have been interpreted to provide a legally protected interest in the privacy of confidential communications, at least against governmental intrusion. The Fourth Amendment, which protects an individual’s right of privacy against “unreasonable” search and seizure, has been interpreted to bar unauthorized government eavesdropping or recording. “What an individual seeks to preserve as private may be constitutionally protected.” The test is whether a “reasonable expectation of privacy” exists. The Supreme Court has also recognized that an individual’s interest in privacy includes an interest in controlling the dissemination of private information about himself. This interest may include the minister’s nondisclosure of particular facts.

Other recognized constitutional interests are likewise implicated by a uniform rule that that clergy must report information about suspected or known elder mistreatment, no matter how obtained, to pub-

which he could reasonably assume under the circumstances would be understood by the attorney as so intended.”

428. U.S. CONST., amend. IV.
lic authorities. Observers have long recognized that religious, and indeed other, organizations are meaningful protectors of individual liberties against overbearing governmental authority and coercion.\(^4\) The unenumerated right to associate has a distinguished pedigree.\(^3\) Association in the religious context has additional attributes. As Justice Brennan has written, "for many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."\(^4\)

2. \textit{Federal Constitutional and Statutory Protection Afforded Free Exercise of Religion}

a. First Amendment Issues

Clergy may argue that even if no "privilege" exists, the First Amendment provides an exemption for their nondisclosure of elder abuse information to authorities because the reporting requirements substantially burden or prohibit free exercise of religion. Throughout our history, government actors have treated religious people variously, sometimes with favored status, sometimes with disfavored status, and sometimes with indifference.\(^3\) While these varying forms of treatment by the government occurred, the Supreme Court has interpreted the First Amendment to the Constitution\(^4\) to provide various levels of protection to the free exercise of religion.\(^4\)

\(^4\) The principle of association" is "a principle in which political parties, professional associations, social clubs, families, labor unions, religious organizations, and other private collectivities are thought entitled" "to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it . . . sovereign." Alexis de Tocqueville, Democracy in America 242 (2d ed. 1863) (quoted in Lawrence H. Tribe, American Constitutional Law § 14-16, at 1297 (2d ed. 1988)).


\(^4\) Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment).


\(^4\) The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. Const. amend. I.

\(^4\) For discussion of these levels of protection, see Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).
(i) The Protection of Religious Freedom in Historical Perspective

The Bill of Rights initially did not apply to the states, governing instead only the national government. In 1878, the Supreme Court, in Reynolds v. United States, upheld federal legislation that imposed criminal sanctions on Mormons for practicing plural marriage (polygamy). The Court determined that Congress could prohibit any conduct regardless of the religious implications but it could not formally prohibit any religious beliefs. The Court, in Davis v. Beason and Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, subsequently upheld other laws that, through penalties, burdened the practice of the Mormon religion. The Supreme Court also upheld other burdens imposed by law on the free exercise of religion.

However, these cases represent a time in American history during which religious minority groups were subject to considerable hostility and mistreatment. They also demonstrate that a standard was needed which would provide a greater measure of protection for the free exercise of religion under the First Amendment. A new era was signaled in 1940 when the Supreme Court made the Free Exercise Clause applicable to the states through the Due Process Clause of the Fourteenth Amendment.

(ii) The “Strict Scrutiny” Standard under Sherbert

In a series of cases over two and a half decades, the Supreme Court extended the highest level of protection afforded under the Constitution to the free exercise of religion. In 1963, the Court held, in Sherbert v. Verner, that state unemployment benefits could not be

440. 98 U.S. (8 Otto) 145 (1878).
441. Id.
442. Id. at 164 ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").
443. 133 U.S. 333 (1890).
444. 136 U.S. 1 (1890).
447. In addition to the three case discussed in this section, see Frazee v. Dep’t of Employment Security, 489 U.S. 829, 834 (1989) (holding that the denial of unemployment compensation to worker who refused job because it would have required him to work on his sabbath violated the Free Exercise Clause); Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136, 146 (1987) (holding that the denial of unemployment compensation benefits to claimant, who was discharged for refusing to work on her sabbath, violated the Free Exercise Clause).
denied to a Seventh-Day Adventist employee because she refused to work on Saturdays due to her religious beliefs.\(^{449}\) In a 1972 case, *Wisconsin v. Yoder*,\(^ {450}\) the Court held that Wisconsin could not require members of the Amish Church to send their children to public schools after the eighth grade.\(^ {451}\) In the 1981 case, *Thomas v. Review Board*,\(^ {452}\) the Court held that Indiana violated the plaintiff's right to free exercise when the review board denied him unemployment compensation benefits after he had terminated his job because his religious beliefs forbade participation in the production of armaments.\(^ {453}\) In each of these cases, the Court protected religious freedom by applying the strict scrutiny standard which requires that, before the government may place a substantial burden on the freedom, it must show a compelling interest with narrowly tailored means to achieve that end.\(^ {454}\) This strict scrutiny standard was formally proclaimed between 1963 and 1990 but so often determined to be satisfied that it is debatable whether it indeed controlled free exercise jurisprudence even during this period.\(^ {455}\)

(iii) The “Lesser Scrutiny” Standard Under *Smith*

In 1990, the Supreme Court lowered the standard of scrutiny that it would apply to government action in free exercise cases. In *Employment Division v. Smith*,\(^ {456}\) the Court held that the government may apply neutral, generally applicable laws that suppress religious practices.\(^ {457}\) It also held that the state does not need to have any reason for refusing exemptions for the free exercise of religion.\(^ {458}\) Today, if

\(^{449}\) Id. at 409.

\(^{450}\) 406 U.S. 205 (1972).

\(^{451}\) Id. at 236.


\(^{453}\) Id. at 720.

\(^{454}\) Id. at 719 (stating that “[n]either of the interests advanced [by the state] is sufficiently compelling to justify the burden upon Thomas' religious liberty.”); Yoder, 406 U.S. at 214 (stating that for the state’s requirement to be upheld “there . . . [must be] a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”); Sherbert, 374 U.S. at 406 (stating that the Court would “consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right”).


\(^{457}\) Id.

\(^{458}\) Id.
"generally applicable, religion-neutral laws [e.g., the elder abuse disclosure obligation] . . . have the effect of burdening a particular religious practice," the Court holds that the Free Exercise Clause does not mandate an exemption for noncompliance. 459 “[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” 460 The majority opinion in Smith did allow such exemptions as a matter of legislative decision-making. 461 The Court’s interpretation of the First Amendment in Smith has remained intact. 462

Members of Congress have attempted to “overrule” the Smith opinion through proposed amendments to the Constitution 463 and through legislative enactment. 464 These proposals seek to restore heightened protection to free exercise. 465 However, any constitutional amendment would take considerable time and would face the serious obstacle posed by the ratification process.

(iv) Establishment Clause

Would a judicially-created defense for a clergyperson in a civil damage action violate the federal constitution? The First Amendment was intended to safeguard religious liberty. 466 Professor McConnell has discussed at length the framer’s sensitivity to religious diversity in the United States. 467 Justice Scalia’s opinion in Smith, infra, would seem to bar an affirmative defense exempting clergy from generally applicable laws unless it were created by the legislature. 468 Smith does, however, provide an argument for religiously based exemptions where a Free Exercise right is implicated “in conjunction with other constitu-

459. Id. at 886 n.3.
460. Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).
461. Id. at 890 (interpreting the First Amendment to permit a legislature to create an exemption, but not requiring one).
464. See infra Part V.C.2.b.
465. See infra Part V.C.2.b.
466. City of Boerne v. Flores, 521 U.S. at 564 (O’Connor, J., dissenting) (religion clauses represent “profound commitment to religious liberty”).
Although the Supreme Court has not revisited this issue since Smith, a number of federal circuit courts have subsequently recognized the viability of exemptions based on Free Exercise claims when they are linked to another constitutional right.470

A clergyperson's interest in not reporting instances of elder abuse, in the narrow factual circumstances outlined above, should qualify as such a “hybrid claim.” First, in order to meet Free Exercise jurisprudential tests, the claim must be religious in nature,471 sincerely made,472 and the burden on religious practice substantial—“directly or indirectly mak[ing] the believer's religious duty more difficult or more costly.”473 The burden placed on religious practice of clergy and parishioner by the reporting requirement is demonstrable. Second, a number of independent constitutional rights—privacy and association—are implicated by government's blanket demand that a minister report suspected elder mistreatment.474 But would an exemption violate the other prong of religious liberty—the ban on establishing religion?

In other situations, the Supreme Court has indicated “ample room” exists between the Free Exercise Clause and the Establishment Clause for government action providing “benevolent neutrality which will permit religious exercise to exist without sponsorship and without in-

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469. Id. at 881 (citing Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940) (“invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious”)); Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); Follett v. Town of McCormick, 321 U.S. 573, 577 (1944) (same). The rights of parents, acknowledged in Pierce v. Society of Sisters, 268 U.S. 510 (1925), to direct the education of their children has also been used in conjunction with a Free Exercise claim. See Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). The majority in Smith found only a Free Exercise claim present. Employment Division, 494 U.S. at 882.

470. See Thomas & Baker v. Anchorage Equal Rights Comm., 165 F.3d 692, 704 n.7 (9th Cir. 1999) (noting that a valid hybrid claim is composed of both a free exercise challenge and some other constitutional claim); Equal Employment Opp. Comm’n v. The Catholic Univ. of America, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that free exercise claim exists when enforcement of Title VII infringes on both the free exercise of religion and the right to be free from excessive government entanglement with religion); see also American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1407-08 (9th Cir. 1992) (noting that a hybrid claim arises if a law implicates another constitutional right in addition to the right to free exercise); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472-73 (8th Cir. 1991) (stating that a free exercise claim may be sustained, because the city's ordinance impinged upon both the right to free exercise and the right to free speech).


474. See supra notes 426-434 and accompanying text.
"[W]e in no way suggest that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."

The standard for evaluating an Establishment Clause violation is still the three-prong test of Lemon v. Kurtzman. Government action violates the Establishment Clause only if (1) it does not have a "secular legislative purpose;" (2) its "principal or primary effect" is to advance or inhibit religion; or (3) it fosters an "excessive government entanglement" with religion. Similarly, under the "endorsement" test, an alternative to Lemon, courts look to "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion."

Certainly, maintaining clergy-parishioner confidentiality in these limited circumstances does not risk "endorsing" religion or unnecessarily "entangling" the government in religious affairs. An exemption for clergy from the duty to report elder abuse, which has a disparate impact on particular religious groups and individuals, confers no special benefit. Under Lemon, a "secular legislative purpose" is present in the protection of privacy and association in this intimate relationship.

The existence of such an affirmative defense does not have the effect of advancing religion, the second prong of the Lemon test, for it only promotes equal treatment of religion. The information protected may have been derived from any communicant, and not even one of the clergyperson's denomination; nor would it necessarily have

478. 483 U.S. 327, 335 (1987) (noting that alleviating governmental interference with ability of religious organizations to carry out their religious mission is a permissible legislative purpose).
481. 403 U.S. 602, 612 (1971).
482. 483 U.S. 327, 335 (1987) (noting that alleviating governmental interference with ability of religious organizations to carry out their religious mission is a permissible legislative purpose).
483. Lemon, 403 U.S. at 613 (1971).
484. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989) (noting than an accommodation is constitutional if "designed to alleviate government intrusions that might significantly deter adherents of a particular faith" from engaging in religious conduct pursuant to their faith).
been obtained through religiously commanded confession or observance. The final Lemon criterion, forbidding excessive church-state "entanglement," is not violated because courts routinely inquire into the "sincerity" of religious belief in First Amendment contexts.\footnote{See, e.g., Hernandez v. Commissioner, 490 U.S. 680, 693 (1989) (noting that an otherwise valid claim of religious benefit may be rejected if an individual's beliefs are not sincerely held).}


In response to the Smith decision, Congress enacted and President Clinton signed into law the RFRA,\footnote{42 U.S.C. § 2000bb (1994). In the Act itself, Congress stated that the state was enacted to restore the compelling interest test that Employment Division v. Smith had eliminated. Id.} which reestablished the greatest level of protection to religious exercise. The purposes of the statute were to restore the compelling interest test as the standard that courts are to apply in free exercise cases and to provide a claim or defense to persons whose religious exercise was substantially burdened.\footnote{Id. The Act outlines the purposes as follows:}

The RFRA provided that a party will have a claim or defense under the Act when the party shows that the government has "substantially burdened" that party's free exercise rights.\footnote{487. Id. The Act outlines the purposes as follows:}

Thus, the RFRA prohibits the government from placing a substantial burden on the free exercise of religion except in the most narrow of instances.\footnote{488. Id. (providing "a claim or defense to person whose religious exercise is substantially burdened by government"). In an earlier case, the Supreme Court had noted that the state is not "unduly to infringe the protected freedom [of the exercise of religion]." Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).}

For the government's burden on free exercise to be upheld by a court, the government's action must undergo the strictest of scrutiny. First, the government must demonstrate that the burden on religion furthers a
compelling governmental interest. Second, the government must show that the means employed were the least restrictive means available to further its compelling interest.

In 1997, in *City of Boerne v. Flores*, the Supreme Court invalidated the RFRA as applied to the states. However, the RFRA is still valid with regard to federal actors. Congress is presently considering alternative legislation that would provide heightened protection to religious liberty.

3. **State Constitutional and Statutory Protection Afforded Free Exercise of Religion**

State law may provide greater protections than are available under the federal constitution or laws. State constitutions, as "documents whose vitality and force are independent of [their] federal counterpart," are increasingly being interpreted by state courts to provide significant protections to civil rights and liberties. Some commentators have suggested that these constitutions provide some of the surest bases for securing the blessing of religious liberty.

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490. *Id.* at 1(b) (stating that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is [inter alia] in furtherance of a compelling governmental interest").

491. *Id.* (stating that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is the least restrictive means of furthering that compelling governmental interest").


WHEN SILENCE RESOUNDS

of state protection for religious freedom.\textsuperscript{498} And now, in the wake of the \textit{Smith} and \textit{City of Boerne} decisions, the guarantees afforded to the free exercise of religion under state constitutions and statutes are becoming increasingly important to religious individuals.\textsuperscript{499}

\section*{a. Heightened Protection for Religious Freedom}

In some jurisdictions, state constitutions or statutory law affords the free exercise of religion the highest level of protection, requiring any state-imposed burden on religious freedom to undergo strict scrutiny analysis. A number of state appellate courts have interpreted their constitutions to require strict scrutiny analysis.\textsuperscript{500} In some cases,
courts have explicitly refused to follow the Supreme Court’s opinion in Smith, basing their decisions on independent grounds provided under their state constitutions.501 Thus, in applying the “strict scrutiny” standard, some state courts have interpreted their constitutional provisions to provide greater protection to religious exercise than the federal constitution.502 Other constitutions may be amended to provide this heightened level of protection.503

In still other states, legislation provides a heightened level of protection to religious liberty. Two states passed religious freedom legislation after the Supreme Court’s decision in Smith.504 Some legislatures, in the wake of the Supreme Court’s decision in City of Boerne have considered and enacted statutes that would provide greater protections to religious freedom than is afforded under the federal constitution and laws.505

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501. See Minnesota v. Hershberger, 462 N.W.2d 393, 396-97 (Minn. 1990) (declining to rest its opinion on the Smith opinion because the Minnesota Constitution provided an adequate, independent state constitutional basis upon which to decide); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 185 (1992) (en banc) (stating that it would “eschew the ‘uncertainty’ of Smith II”); Wisconsin v. Miller, 549 N.W.2d 235, 240 (Wis. 1996) (emphasizing that its holding was “firmly grounded on the Wisconsin Constitution alone”).

502. See, e.g., Minnesota v. French, 460 N.W.2d 2, 9 (Minn. 1990) (stating that the Minnesota Constitution “grants far more protection of religious freedom than the broad language of the United States Constitution”); First Covenant Church of Seattle v. City of Seattle, 120 Wash. 2d 203, 224, 840 P.2d 174, 186 (Wash. 1992) (en banc) (stating that “[t]he language of our state constitution is significantly different and stronger than the federal constitution”). “The First Amendment limits government action that ‘prohibits’ free exercise. Our state provision ‘absolutely’ protects freedom of worship and bars conduct that merely ‘disturbs’ another on the basis of religion.” Id.


504. See Conn. Gen. Stat. § 52-571b (1997) (prohibiting the state and any of its political subdivisions from placing a burden on the free exercise of religion unless the application of the burden (1) promotes a compelling governmental interest, and (2) is the least restrictive means of promoting that interest); R.I. Gen. Laws § 42-80.1-1 et seq. (1997) (requiring that any restriction governmental authority places upon the free exercise of religion be a rule of general applicability, not intentionally discriminate against religion or among religions, promote a compelling governmental interest, and be the least restrictive means of promoting that interest).

505. See, e.g., H.B. 2370, 90th Gen. Assem., 1997-1998 Reg. Sess. (Ill. 1998) (prohibiting the government from substantially burden the free exercise of religion, even if the burden results from a law of general applicability, unless the government demonstrates that the burden promotes a compelling governmental interest and is the least restrictive means of promoting that interest); Fla. Stat. ch. 761.01-03 (1997) (applying strict scrutiny when state government substantially burdens the free exercise of religion, even if the burden results from a rule of general applicability).
b. Limited Protection for Religious Freedom

In some states, the protection of religious freedom afforded by strict scrutiny analysis has been rejected, and instead only a reduced level of protection is available. For instance, New Jersey state courts have repeatedly held that the state constitution's religion clauses provide the same level of protection as those afforded by the First Amendment to the Constitution. In Oregon, the state supreme court has interpreted the free exercise provisions of its constitution and determined, independent of the federal First Amendment jurisprudence, that a heightened level of protection for religious freedom is not required. Thus, in these states, neutral laws of general applicability that have an incidental burden on religion would not violate the free exercise provisions of their state constitutions.

c. Undefined Protection for Religious Freedom

In most states, the level of protection afforded under state constitutional law has not been clearly defined. This uncertainty stems, at least in part, from the fact that state courts relied on the pre-Smith First Amendment jurisprudence when interpreting state constitutional provisions regarding free exercise, often intertwining the state and federal analyses. While in some states the courts have not specifically articulated the standard required by the state constitution, the courts will likely apply a heightened standard such as the strict

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506. See, e.g., South Jersey Catholic Sch. Teachers Org. v. St. Theresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709 (N.J. 1997); Schaad v. Ocean Grove Camp Meeting Ass'n of United Methodist Church, 370 A.2d 449 (N.J. 1977) (holding that the letter and spirit of the state's constitutional provisions have substantially the same purpose, intent, and effect as the provisions under the First Amendment); Bethany Baptist Church v. Deptford Township, 542 A.2d 505 (N.J. Ct. App. 1988) (applying strict scrutiny analysis to state free exercise claim in a pre-Smith case).

507. See, e.g., Meltebeke v. Bureau of Labor & Indus., 903 P.2d 351, 361 (Or. 1995) ("A law that is neutral toward religion or nonreligion as such, that is neutral among religions, and that is part of a general regulatory scheme having no purpose to control or interfere with rights of conscience or with religious opinions does not violate the guarantees of religious freedom in Article I, sections 2 and 3."); Smith v. Employment Div., 721 P.2d 445, 448-49 (Or. 1986) (upholding a general regulatory scheme that was "completely neutral toward religious motivations for misconduct" even though it incidentally burdened the free exercise of religion), vacated and remanded on other grounds, 485 U.S. 660 (1988).

508. See, e.g., Bureau of Motor Vehicles v. Pentecostal House of Prayer, 380 N.E.2d 1225 (Ind. 1978) (citing both state and federal constitutions but relying solely on the U.S. Supreme Court's First Amendment jurisprudence); North Dakota v. Rivinius, 328 N.W.2d 220, 228-29 (N.D. 1982) (stating that "when [the] constitutional provision was adopted by the state of North Dakota upon being granted statehood, it was tacitly approved and is in harmony with the First Amendment to the United States Constitution"), cert. denied, 460 U.S. 1070 (1983).
In other states, the courts will likely apply a lower standard. In many states, it is difficult to anticipate the level of protection likely to be afforded under the state constitution. For instance, in California, legal precedents support the application of both the heightened standard and the reduced standard, and thus, the standard remains to be determined.

509. See, e.g., Osteraas v. Osteraas, 859 P.2d 948, 953 (Idaho 1993) (stating that “[A]rt. 1, § 4 of the Idaho Constitution is an even greater guardian of religious liberty” than the First Amendment); Rupert v. City of Portland, 605 A.2d 63, 66 (Me. 1992) (applying the strict scrutiny test but stating that “[w]e have no reason in this case to decide whether in applying the Maine Free Exercise Clause will change course to follow the Supreme Court’s lead in Smith”); Blount v. Dept. of Educ. & Cultural Servs., 551 A.2d 1377, 1385 (Me. 1988) (stating that “the full range of protection afforded . . . by the Maine Constitution is also available under the United States Constitution”); Miller v. Catholic Diocese of Falls, Billings, 728 P.2d 794, 797 (Mont. 1986) (relying on Wisconsin v. Yoder, 406 U.S. 205 (1972), and stating that “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion” and that “[w]e use that standard as our guide”).

510. See, e.g., Delcarpi v. St. Tammany Parish Sch. Bd., 865 F. Supp. 350, 362 (E.D. La. 1994) (stating that “under Louisiana jurisprudence, judicial determination of a claim brought pursuant to the parallel sections of the federal constitution is applicable to Article I, sections 7 and 8 of the state constitution”), rev’d on other grounds, 64 F.3d 184 (5th Cir. 1995); Louisiana v. Franzzone, 384 So. 2d 409, 411 (La. 1980) (“we are satisfied that our state constitution’s guarantee of freedom of expression and freedom of the press was designed to serve the same purpose and provides at least coextensive protection afforded under the First Amendment”); Petition of Roland Spencer Smith, 652 A.2d 154 (N.J. 1994) (holding that a doctor could not avoid, on free exercise grounds, compliance with neutrally applied state licensing requirements, but not stating a standard of review); Hunt v. McNair, 187 S.E.2d 645, 648 (S.C. 1972) (stating that language of First Amendment and language of Article I, section 2 of the state constitution are, “for all intents and purposes, the same”), aff’d, 413 U.S. 734 (1973); Rock Hill v. Henry, 135 S.E.2d 718 (S.C. 1963) (stating that the same rights protected by the First Amendment are fully protected by the state constitution), rev’d on other grounds, 376 U.S. 776 (1964); South Carolina Dept. of Social Servs. v. Father & Mother, 366 S.E.2d 40, 42 (S.C. Ct. App. 1988) (stating that guarantees of free exercise of religion in federal constitution and state constitution “have been treated as coextensive”).

511. Compare South Dakota v. Cosgrove, 439 N.W.2d 119, 121 (S.D.), cert. denied, 493 U.S. 846 (1989) (stating, in a case raising federal and state constitutional claims, that “[t]he important constitution underpinnings of this issue require that we apply the strict scrutiny standard to our review”) with South Dakota v. Arnold, 379 N.W.2d 322 (S.D.) (stating, in a case only federal free exercise claim, that “[l]aws advancing legitimate and significant governmental interests are not invalid for interfering with the free exercise of religion merely because they have some incidental detrimental effect on the adherents of one or more religious views”) (citing Braunfeld v. Brown, 366 U.S. 599 (1961)), and In re Northwestern Lutheran Academy, 290 N.W.2d 845, 850 (S.D.) (noting that the U.S. Supreme Court has repeatedly upheld governmental regulations concerning important governmental interests, even though such programs may have an incidental effect upon the free exercise of religion) (citing Braunfeld).

512. See, e.g., Walker v. Superior Court, 763 P.2d 852 (Cal. 1988) (applying strict scrutiny analysis to claim federal and state free exercise claim); Donahue v. Fair Employment & Housing Comm'n, 2 Cal. Rptr. 2d 32, 40 (Cal. Ct. App. 1991) (stating that “the California Supreme Court has indeed specifically adopted and employed the pre-Smith federal balancing test and compelling state interest analysis as a matter of state constitutional law”).

513. See, e.g., Rescue Army v. Municipal Court, 171 P.2d 8, 15 (Cal. 1946) (“There can be no question, therefore, that a person is free to hold whatever belief his conscience dictates, but
d. State Standards Applied to Mandatory Reporting Requirements

The level of protection that a particular jurisdiction affords to the free exercise of religion can make a significant difference in mandatory reporting cases. If strict scrutiny analysis applies, any significant burden on free exercise must promote a compelling government interest and the means chosen must be the least restrictive alternative. However, if a reduced level of analysis applies, then incidental burdens on the free exercise of religion are permissible as long as the law is a neutral law of general applicability.

VI. CONCLUSION

In the modern regulatory state, the law intersects with religious life in significant ways, including the statutory provisions requiring clergy to report certain instances of abuse. These reporting requirements grow out of important public policy concerns regarding valuable, yet vulnerable, segments of the United States population. In the case of elder abuse, these public policy concerns involve a large and growing segment of the population, with members who are subject to various forms of mistreatment that often evade detection.

Failure to report elder abuse risks continued injury to aged persons and legal liabilities for clergy. Imposing such a duty, however, creates complex constitutional and legal issues. Clergy must understand the nature and scope of the obligations placed on them and those working under their supervision. In carefully considering the manner in which to fulfill these obligations, clergy will need to assess a multitude of interconnected issues, such as religious tradition, the instruction of professional/ministerial ethics, the impact of reporting or failing to report upon the victim, the religious community, and the local community, the potential of criminal and/or civil liability, and the available protections under the law. Having carefully balanced these competing interests, the clergyperson will be in a position to determine whether it is in fact a time to keep silent or a time to speak.

when he translates his belief into action he may be required to conform to reasonable regulations which are applicable to all persons and are designed to accomplish a permissible objective.
