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# Comments: Holding Clergy Accountable: Maryland Should Require Clergy to Report Suspected Child Abuse

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# HOLDING CLERGY ACCOUNTABLE: MARYLAND SHOULD REQUIRE CLERGY TO REPORT SUSPECTED CHILD ABUSE

## I. INTRODUCTION

In the Catholic Church alone, 700 clergy have been removed from ministry since June 2002 due to the surfacing of child sexual abuse claims.<sup>1</sup> Cardinal William Keeler disclosed in 2002 that allegedly more than eighty priests in the Baltimore Archdiocese have sexually abused minors in the past.<sup>2</sup> Reports of sexual abuse have been uncovered outside the Catholic Church as well. A Presbyterian missionary is suspected of abusing twenty-two women and girls,<sup>3</sup> while an Orthodox Jewish youth leader is accused of dozens of cases of molestation of teenage girls and boys.<sup>4</sup>

In many instances, colleagues of abusive clergy fail to report suspected abuse to the appropriate authorities.<sup>5</sup> Some claim that religious organizations conspire to keep the abuse secret. In Boston, Catholic priest John J. Geoghan allegedly sexually abused 130 children.<sup>6</sup> The Boston Archdiocese, aware of the abuse, chose to keep the matter within the Church.<sup>7</sup> Cardinals and bishops merely moved Geoghan from parish to parish for thirty-four years, while he continued to molest children.<sup>8</sup> These same leaders also discouraged victims of the abuse from reporting it to authorities.<sup>9</sup>

Similar collusion has occurred elsewhere. In Jehovah's Witness churches, leaders handle complaints of sexual abuse solely within the church.<sup>10</sup> An all-male group of elders meets to decide how to proceed with each complaint, and refuses to pursue the matter unless a witness

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1. Press Release, U.S. Conference of Catholic Bishops, 700 Priests Removed Since January 2002 (Feb. 27, 2004), available at <http://www.usccb.org/comm/archives/2004/04-040.htm>.
  2. John Rivera, *Keeler Letter Reveals Abuse*, BALT. SUN, Sept. 25, 2002, at 1A.
  3. Kevin Eckstrom, *Presbyterian Church Mulls New Rules in Sex Abuse Cases*, WASH. POST, Oct. 5, 2002, at B9.
  4. Alan Cooperman, *Sexual Abuse Scandal Hits Orthodox Jews*, WASH. POST, June 29, 2002, at A2.
  5. Mark Henry, *Confession of Crime Leads to a Dilemma for the Clergy*, L.A. TIMES, June 1, 1986, pt. 2, at 4.
  6. Michael Rezendez, *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE, Jan. 6, 2002, at A1.
  7. *See id.*
  8. *Id.*
  9. *Id.*
  10. *See* Laurie Goodstein, *Ousted Members Say Jehovah's Witnesses' Policy on Abuse Hides Offenses*, N.Y. TIMES, Aug. 11, 2002, § 1, at 26; *see also* Dennis O'Brien, *Another Church Facing Charges of Sexual Abuse*, BALT. SUN, May 21, 2002, at 1B.

can corroborate the victim's story.<sup>11</sup> Victims are threatened with "disfellowshipping," or expulsion from the church, if they consider reporting the abuse themselves.<sup>12</sup> Because neither the church nor the victims report the abuse outside the church, it is usually allowed to continue.<sup>13</sup>

Although abusive clergy have received much of the public attention, members of religious congregations have also sexually abused children.<sup>14</sup> Some cases demonstrate that clergy have been reluctant to report suspected abuse in those circumstances as well.<sup>15</sup> Furthermore, while the media has focused on the failure of clergy to report *sexual* child abuse, evidence exists that suggests physical and emotional child abuse in religious institutions has also gone unreported.<sup>16</sup>

While some churches are adopting new policies outlining how they will deal with abusive clergy within the church,<sup>17</sup> the states must pass laws holding abusive and secretive clergy accountable to society. Allowing churches to form their own policies and handle allegations of sexual abuse solely within their organizations is inadequate. A recent study showed that, of nearly 11,000 allegations of child sexual abuse in the Catholic Church, 149 priests accounted for twenty-six percent of the allegations.<sup>18</sup> That statistic means that a group of 149 priests was responsible for 2,860 allegations, or that each priest in the group was to blame for an average of approximately nineteen allegations. If other church leaders were aware of those priests' actions, and those leaders were required to make a report at first suspicion, much of the subsequent abuse could have been avoided.

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11. See Goodstein, *supra* note 10, at 26.

12. See *id.*

13. See *id.*

14. See, e.g., *Church of Jesus Christ of Latter-Day Saints v. Superior Court*, 764 P.2d 759, 760-61 (Ariz. Ct. App. 1988); see also Henry, *supra* note 5, pt. 2, at 4.

15. See *Church of Jesus Christ of Latter-Day Saints*, 764 P.2d at 762. In that case, a member of the church's congregation molested children for twenty years while church leaders, fully aware of the abuse, did nothing to stop it. *Id.* at 761-62.

16. See, e.g., Martin Finucane, *Former Students Allege Rape, Abuse at School for Deaf*, BOSTON GLOBE, May 11, 2004, available at [http://www.smccarthy.com/archives/0504/now\\_the\\_nuns\\_are\\_involved.php](http://www.smccarthy.com/archives/0504/now_the_nuns_are_involved.php) (reporting that, in a recent suit brought against nuns, priests, and other leaders at a religious school, former students claimed they were beaten, sexually molested, and emotionally traumatized by nuns).

17. See, e.g., Press Release, U.S. Conference of Catholic Bishops, Charter for the Protection of Children and Young People, Revised Edition (Nov. 2002), available at <http://www.usccb.org/bishops/charter.htm>.

18. THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES: A RESEARCH STUDY CONDUCTED BY THE JOHN JAY COLLEGE OF CRIMINAL JUSTICE ix-x (Feb. 27, 2004), available at <http://www.jjay.cuny.edu/churchstudy/main.asp> [hereinafter JOHN JAY STUDY].

Child molesters should not be able to hide behind the veil of secrecy created by their religious institutions, allowing them to repeatedly abuse their victims. Nationally, sexual child abuse is one of the most underreported crimes.<sup>19</sup> Moreover, according to a representative of Maryland's Child Protective Services, Maryland underreports as compared to the rest of the country.<sup>20</sup> By mandating that clergy report, Maryland could increase its reporting rate.<sup>21</sup> For this reason, clergy must be held to the same standard as every other individual in Maryland; they must be required to report suspected child abuse to the authorities.<sup>22</sup>

As a general matter, Maryland law requires all persons to report suspected sexual, physical, and emotional child abuse.<sup>23</sup> The law, however, provides two exceptions: (1) attorneys who learn of the abuse from their clients during confidential, privileged communications; and (2) clergy who learn of the abuse during certain confidential communications.<sup>24</sup> In 2003, some Maryland legislators introduced Senate Bill 412, a bill that would have narrowed the clergy exception by requiring clergy to report abuse disclosed to them by victims or their family members, even if the disclosure was made during a confession or similar practice.<sup>25</sup> Although the bill provided an exemption for confessions made by the perpetrator of the crime,<sup>26</sup> some members of the religious community were outraged.<sup>27</sup> Many believed the bill would violate the "Seal of the Confessional"<sup>28</sup> and offend the traditional privilege that allows clergy to keep certain communications

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19. See OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 163390, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES I (1997), available at <http://www.ncjrs.org/pdffiles/163390.pdf>.

20. See Testimony of Dale Balfour before the House Judiciary Committee on HB 1490 (bill creating the clergy exemption to the child abuse reporting statute) (on file with author). In 2003, only 1,279 "indicated" instances of child abuse, or those where credible evidence was not refuted, were reported in Maryland. MD. DEP'T OF HUMAN RES., CHILD PROTECTIVE SERVS., FACTS AND STATISTICS (2004), available at <http://www.dhr.state.md.us/cps/statdata.htm>.

21. See Karen L. Ross, *Revealing Confidential Secrets: Will it Save Our Children?*, 28 SETON HALL L. REV. 963, 967 (1998) (discussing the correlation between requiring professionals to report abuse and increasing numbers of reports).

22. MD. CODE ANN., FAM. LAW § 5-705(a)(1)(i) (2004). See discussion *infra* Part III.B.

23. MD. CODE ANN., FAM. LAW § 5-705(a)(1)(i).

24. *Id.* at § 5-705(a)(2)-(3).

25. See S. 412, 2003 Leg., 417th Sess. (Md. 2003); H.D. 823, 2003 Leg., 417th Sess. (Md. 2003). The two versions of the bill are identical. For the text of the bill, see *infra* Part IV.A.

26. See S. 412, 2003 Leg., 417th Sess. (Md. 2003).

27. Jo Becker, *McCarrick Decries Maryland Child Abuse Bill*, WASH. POST, Feb. 22, 2003, at B1. Cardinal Theodore McCarrick is the leader of the Archdiocese of Washington. *Id.*

28. See discussion *infra* Part II.A.

confidential.<sup>29</sup> The Senate Committee on Judicial Proceedings ultimately gave the bill an unfavorable report.<sup>30</sup>

In 2004, a revised version of the bill was introduced in both the Senate and House of Delegates.<sup>31</sup> The new bill would have required clergy to report child abuse only if they were acting outside their clerical role when they learned of the abuse, if they learned of it through non-confidential communications or observations, or if they disclosed the abuse to a third party.<sup>32</sup> Confessions and similar practices would still have been exempted from the reporting requirement.<sup>33</sup> This bill also failed in committee in the Maryland Senate.<sup>34</sup>

This comment discusses the history of clergy-communicant privileges and child abuse reporting statutes, and their treatment in jurisdictions outside Maryland.<sup>35</sup> The comment then discusses Maryland law in those areas.<sup>36</sup> Next, it recommends passage of a law similar to Senate Bill 412,<sup>37</sup> and evaluates possible constitutional challenges to such a law.<sup>38</sup> Finally, this comment recommends the adoption of other laws that are needed in Maryland to hold clergy fully accountable to children and society.<sup>39</sup>

## II. BACKGROUND AND TREATMENT BY OTHER JURISDICTIONS

### A. *The Clergy-Communicant Privilege*

Most religious organizations require that clergy keep certain communications with members confidential.<sup>40</sup> Many of the states protect this confidentiality by recognition of the "priest-penitent" or "clergy-communicant" privilege, which generally allows clergy to refuse to tes-

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29. See MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2003); discussion *infra* Part II.A.

30. Jo Becker, *Maryland Panel Rejects Child Abuse Bill After Uproar*, WASH. POST, March 1, 2003, at B3.

31. See S. 237, 2004 Leg., 418th Sess. (Md. 2004); H.D. 1098, 2004 Leg., 418th Sess. (Md. 2004). The two versions of the bill are identical. For the text of the bill, see *infra* Part IV.A.

32. See S. 237, 2004 Leg., 418th Sess. (Md. 2004); H.D. 1098, 2004 Leg., 418th Sess. (Md. 2004).

33. See S. 237, 2004 Leg., 418th Sess. (Md. 2004); H.D. 1098, 2004 Leg., 418th Sess. (Md. 2004).

34. See Joe Feuerherd, *Maryland Committees Reject Clergy Reporting Bill*, NAT'L CATH. REP., Washington Notebook, Mar. 24, 2004, available at <http://www.nationalcatholicreporter.org/washington/wnb032404.htm>.

35. See *infra* Part II.

36. See *infra* Part III.

37. See *infra* Part IV.

38. See *infra* Part V.

39. See *infra* Part VI.

40. For a discussion of the confidentiality of the Catholic confessional, see Anthony Merlino, Comment, *Tightening the Seal: Protecting the Catholic Confessional from Unprotective Priest-Penitent Privileges*, 32 SETON HALL L. REV. 655 (2002).

tify at trial as to certain communications with those confiding in them.<sup>41</sup> In many jurisdictions, however, the privilege is a broader rule, extending to all in-court testimony, including grand jury proceedings and administrative hearings.<sup>42</sup>

The privilege first arose in English courts to protect communications made during confession,<sup>43</sup> also known as the Roman Catholic Sacrament of Penance or Sacrament of Reconciliation.<sup>44</sup> The Roman Catholic Church mandates confession so that priests may absolve confessors of their sins.<sup>45</sup> The first American case on this subject, based on the constitutional grounds of free exercise of religion, allowed a Roman Catholic priest to refuse to testify regarding confessional communications.<sup>46</sup> All fifty states later created court rules or statutes expanding the privilege to include communications made to clergy of all religions.<sup>47</sup> Policy reasons supporting these laws included society's in-

41. See Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 740-42 (1987).

42. *Id.* at 787; see, e.g., CONN. GEN. STAT. ANN. § 52-146b (West 2004) (extending privilege to "any civil or criminal case or proceedings preliminary thereto, or in any legislative or administrative proceeding"); *In re Grand Jury Investigation*, 918 F.2d 374, 378-79, 384 (3d Cir. 1990) (holding that the Federal Rules of Evidence contemplate the application of clergymen's privilege to grand jury proceedings).

43. Mitchell, *supra* note 41, at 736.

44. Merlino, *supra* note 40, at 658. The seal of the confessional is considered "inviolable" and priests face severe punishment by the church if broken. *Id.* at 663-64. This tenet is found in the Canon Law of the Catholic Church. 1983 CODE c.983-84.

45. Merlino, *supra* note 40, at 658-59.

46. *People v. Phillips*, N.Y. Ct. of Gen. Sess. (1813). In this case, a Roman Catholic priest refused to testify regarding who had given him stolen goods to return to their owner. *Id.* The case was never officially published, but is reprinted in *Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955).

47. See ALA. R. EVID. 505(b); ALASKA R. EVID. 506(b); ARIZ. REV. STAT. ANN. §§ 12-2233, 13-4062(3) (West 2003); ARK. R. EVID. 505(b); CAL. EVID. CODE §§ 1032-1033 (West 2005); COLO. REV. STAT. ANN. § 13-90-107(1)(c) (West 2004); CONN. GEN. STAT. ANN. § 52-146b (West 2004); DEL. R. EVID. 505(b); FLA. STAT. ANN. § 90.505(2) (West 2004); GA. CODE ANN. § 24-9-22 (2004); HAW. R. EVID. 506(b); IDAHO CODE § 9-203(3) (Michie 2004); 735 ILL. COMP. STAT. ANN. 5/8-803 (West 2003); IND. CODE ANN. § 34-46-3-1(3) (West 2005); IOWA CODE ANN. § 622.10(1) (West 1999); KAN. STAT. ANN. § 60-429(b) (2005); KY. R. EVID. 505(b); LA. CODE EVID. ANN. art. 511(B) (West 2005); ME. R. EVID. 505(b); MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2003); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 2000); MICH. COMP. LAWS ANN. § 600.2156 (WEST 2000); MINN. STAT. ANN. § 595.02(c) (West 2000); MISS. CODE ANN. § 13-1-22(2) (2004); MO. ANN. STAT. § 491.060(4) (West 2004); MONT. CODE ANN. § 26-1-804 (2003); NEB. REV. STAT. § 27-506(2) (2004); NEV. REV. STAT. 49.255 (2002); N.H. R. EVID. 505; N.J. R. EVID. 511; N.M. R. EVID. 11-506(B); N.Y. C.P.L.R. LAW § 4505 (Consol. 2004); N.C. GEN. STAT. § 8-53.2 (2003); N.D. R. EVID. 505(b); OHIO REV. CODE ANN. § 2317.02(C) (West 2004); OKLA. STAT. ANN. tit. 12, § 2505(B) (West 2004); OR. REV. STAT. § 40.260(2) (2003); 42 PA. CONS.

terest in fostering confidential relationships, the individual's right to privacy, and the free exercise of religion.<sup>48</sup> Most religious groups believe that confidential counseling encourages people to openly repent, receive forgiveness and guidance, and presumably lead a more blameless life.<sup>49</sup> The scope of protected communications, however, varies by jurisdiction.

Ten states recognize a privilege only for "confessions,"<sup>50</sup> while the others recognize a broader privilege for all "spiritual advice" or other confidential communications.<sup>51</sup> Many of these rules and statutes are ambiguous, however, leaving courts to determine whether they require the clergy or the confider to be acting under religious compulsion when the communication occurs.<sup>52</sup> For instance, several laws describe protected communications with the following antiquated language originally found in *People v. Phillips* and the subsequently enacted New York statute:<sup>53</sup> "confessions made . . . in the course of discipline enjoined by the church to which he belongs."<sup>54</sup> The term "confessions" literally means the acknowledgement of one's miscon-

STAT. ANN. § 5943 (West 2000); R.I. GEN. LAWS § 9-17-23 (2004); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 2004); S.D. CODIFIED LAWS § 19-13-17 (Michie 2004); TENN. CODE ANN. § 24-1-206(a)(1) (2000); TEX. R. EVID. 505(b); UTAH CODE ANN. § 78-24-8(3) (2002); VT. STAT. ANN. tit. 12, § 1607 (2002); VA. CODE ANN. § 8.01-400 (Michie 2000); WASH. REV. CODE ANN. § 5.60.060(3) (West 2004); W. VA. CODE ANN. § 48-1-301(a) (Michie 2004); WIS. STAT. ANN. § 905.06(2) (West 2004); WYO. STAT. ANN. § 1-12-101(a)(ii) (Michie 2003). Federal courts will follow the state law of privileges in *Erie* cases, FED. R. EVID. 501, but they also recognize the common law privilege for matters of federal law. *Trammel v. United States*, 445 U.S. 40, 51 (1980) (dictum) (noting that "[t]he priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return").

48. Mitchell, *supra* note 41, at 761.

49. See, e.g., Merlino, *supra* note 40, at 658-59. This reasoning may be somewhat flawed in the case of child abusers because many of them suffer from a chronic disorder and cannot be cured. See Christine H. Kim, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 ILL. L. REV. 287, 294 n.59 (1999).

50. See Norman Abrams, *Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C. L. REV. 1127, 1134 (2003). These states are Arizona, California, Idaho, Michigan, Montana, Nevada, Utah, Vermont, Washington, and Wyoming. *Id.* at n.34.

51. *Id.* at 1133-34. These states are Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. *Id.* at nn.31-33.

52. See *id.* at 1136-38.

53. See N.Y. C.P.L.R. 4505 (Consol. 2004); *Privileged Communications to Clergymen*, *supra* note 46, at 213.

54. See, e.g., MONT. CODE ANN. § 26-1-804 (2003).

duct,<sup>55</sup> but also refers to the disclosure of sins to a priest or minister in order to receive absolution.<sup>56</sup> The phrase “in the course of discipline enjoined by the church” suggests the confession must be a ritual that the church *requires* its members practice, such as the Roman Catholic Sacrament of Penance.<sup>57</sup> Because these laws extend to clergy of all religions,<sup>58</sup> however, and most churches do not require confession, the privilege must necessarily include even those confessions that the church does not require.<sup>59</sup>

### B. *The Clergy Abuse Reporting Statutes*

While the clergy-communicant privilege protects clergy against compelled testimony, all fifty states have some form of child abuse reporting statute.<sup>60</sup> These laws generally require certain or all citizens

55. See Webster's Third New Int'l Dictionary (Merriam-Webster, Inc. 1993). Webster's defines "confession" as "the act of confessing: admission: a statement of guilt or obligation in a matter pertaining to one's self." *Id.*
56. See *id.* (alternatively defining "confession" as "acknowledgement of sins or sinfulness; specific[ally]: the act of disclosing sins or faults to a priest to obtain sacramental absolution or to a minister to obtain pastoral counseling").
57. Webster's defines "enjoin" as "[t]o direct, prescribe, or impose by order typically authoritatively and compellingly and with urgent admonition." *Id.* at 754. See also *supra* notes 44-45 and accompanying text.
58. See *supra* note 47 and accompanying text.
59. See Mitchell, *supra* note 41, at 748 (observing that "[b]ecause most churches do not set aside formal occasions for special private encounters labeled 'confession,' less formal consultation must be privileged if the privilege is not in effect to be limited to Roman Catholics"). Also of concern is that, in the Roman Catholic Church itself, it can sometimes be difficult to distinguish confessional or penitential communications from other types of communication. Mitchell notes that "[a] typical counseling session will be an unpredictable, often emotional, welter of several types of communication and make only some privileged." Mitchell, *supra* note 41, at 749.
60. See ALA. CODE § 26-14-3 (Supp. 2004); ALASKA STAT. § 47.17.020 (Michie 2004); ARIZ. REV. STAT. ANN. § 13-3620 (Supp. 2004); ARK. CODE ANN. § 12-12-507 (Michie 2003); CAL. PENAL CODE §§ 11165.7, 11165.9 (West Supp. 2005); COLO. REV. STAT. ANN. § 19-3-304 (West Supp. 2004); CONN. GEN. STAT. ANN. § 17a-101 (West 2004); DEL. CODE ANN. tit. 16, § 903 (2003); FLA. STAT. ANN. § 39.201 (West Supp. 2005); GA. CODE ANN. § 19-7-5 (2004); HAW. REV. STAT. § 350-1.1 (1993); IDAHO CODE § 16-1619 (Michie 2001); 325 ILL. COMP. STAT. ANN. 5/4 (West 2001); IND. CODE ANN. § 31-33-5-1 (1997); IOWA CODE ANN. § 232.69 (2000); KAN. STAT. ANN. § 38-1522 (Supp. 2003); KY. REV. STAT. ANN. § 620.030 (Banks-Baldwin 2003); LA. REV. STAT. ANN. § 603 (West Supp. 2005); ME. REV. STAT. ANN. tit. 22, § 4011-A (West Supp. 2004); MD. CODE ANN., FAM. LAW § 5-705 (Supp. 2004); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2003); MICH. COMP. LAWS ANN. § 722.623 (West 2002 & Supp. 2004); MINN. STAT. ANN. § 626.556 (West 2003); MISS. CODE ANN. § 43-21-353 (1999); MO. ANN. STAT. § 210.115 (West 2004); MONT. CODE ANN. § 41-3-201 (2003); NEB. REV. STAT. § 28-711 (1995); NEV. REV. STAT. ANN. 202.882 (Michie 2001); N.H. REV. STAT. ANN. § 169-C:29 (2001); N.J. STAT. ANN. § 9:6-8.10 (WEST 2002); N.M. STAT. ANN. § 32A-4-3 (Michie 2004); N.Y. SOC. SERV. LAW § 413



of the state to report suspected child abuse to the appropriate authorities.<sup>61</sup> The problem with such a requirement is that the language of some clergy-communicant privileges is broad enough to preclude clergy from being required to report child abuse.<sup>62</sup>

For example, Pennsylvania's statute states that a clergyman shall not be compelled to disclose confidential information "in any legal proceeding, trial or investigation before any government unit."<sup>63</sup> Illinois' statute protects certain information from disclosure "in any court, or to any administrative board or agency, or to any public officer."<sup>64</sup> Both of these privileges seem to extend beyond testimony given at trial to any statement provided to law enforcement authorities.

Furthermore, some of the rationale supporting the clergy-communicant privilege seems to apply in the context of child abuse reporting.<sup>65</sup> Those communicating with the clergy may fear disclosure to law enforcement authorities, just as they would disclosure in a formal court proceeding.<sup>66</sup> One might argue that requiring clergy to report suspected child abuse would discourage open communication or impede the free exercise of religion.<sup>67</sup> Clergy may, therefore, interpret the clergy-communicant privilege to exempt them from the requirement to report child abuse.<sup>68</sup>

Because the clergy-communicant privilege may extend to the reporting of child abuse, these statutes create a tension between the clergy's need to keep certain communications confidential and their

(McKinney 2005); N.C. GEN. STAT. § 7B-301 (2003); N.D. CENT. CODE § 50-25.1-03 (1999); OHIO REV. CODE ANN. § 2151.421 (West 2004); OKLA. STAT. ANN. tit. 10, § 7103 (West Supp. 2005); OR. REV. STAT. § 419B.010 (2003); PA. STAT. ANN. § 6311 (West 2001); R.I. GEN. LAWS § 40-11-3 (1997); S.C. CODE ANN. § 20-7-510 (Law. Co-op. Supp. 2004); S.D. CODIFIED LAWS § 26-8A-3 (Michie Supp. 2003); TENN. CODE ANN. § 37-1-403 (2001); TEX. FAM. CODE ANN. § 261.101 (Vernon 2002); UTAH CODE ANN. § 62A-4a-403 (2000); VT. STAT. ANN. tit. 33, § 4913 (Supp. 2004); VA. CODE ANN. § 63.2-1509 (Michie 2002); WASH. REV. CODE ANN. § 26.44.030 (West 1997); W. VA. CODE ANN. § 49-6A-2 (Michie Supp. 2004); WIS. STAT. ANN. § 48.981 (West 2003); WYO. STAT. ANN. § 14-3-205 (Michie 2003).

61. See Abrams, *supra* note 50, at 1138-39. These statutes usually cover all forms of child abuse, including physical, mental, and sexual abuse; a report should generally be made to the Department of Social Services or its equivalent, or the local law enforcement agency. See, e.g., ALA. CODE § 26-14-3(b) (2003); CONN. GEN. STAT. ANN. § 17a-101(d) (West 2004); GA. CODE ANN. § 19-7-5(b)(3) (2004); S.C. CODE ANN. § 20-7-510(d) (Law. Co-op. 2004).

62. See Abrams, *supra* note 50, at 1139-41. See also *supra* note 42 and accompanying text.

63. 42 PA. CONS. STAT. ANN. § 5943 (West 2004).

64. 735 ILL. COMP. STAT. 5/8-803 (2003).

65. See *supra* text accompanying notes 48-49.

66. See Abrams, *supra* note 50, at 1156.

67. See Mitchell, *supra* note 41, at 789-90.

68. See Mitchell, *supra* note 41, at 793-94.

duty to help prevent child abuse.<sup>69</sup> Many states have addressed this tension by requiring clergy to report suspected child abuse, unless the communication meets certain criteria.<sup>70</sup> Some of these state laws specifically exempt privileged information from the reporting requirement.<sup>71</sup> Others make no mention of the privilege whatsoever.<sup>72</sup> If, in those state laws that do not mention the clergy-communicant privilege, the privilege is interpreted to extend beyond in-court testimony, the clergy's duty to report may be limited by that state's privilege.<sup>73</sup>

Six states—New Hampshire, North Carolina, Oklahoma, Rhode Island, Texas, and West Virginia—specifically abrogate any clergy-communicant privilege in the context of child abuse reporting.<sup>74</sup> These states use differing language to accomplish this result. For example, New Hampshire's statute specifically lists priests, ministers, and rabbis as mandatory reporters, and an annotation to the statute states, "this obligation is not limited by religious exemption."<sup>75</sup> North Carolina takes a different approach by stating in one section of its code that "any person" must report suspected abuse,<sup>76</sup> and stating in another section that privileges are not grounds for failing to report.<sup>77</sup> Importantly, in all but two of these states, the reporting requirement does not affect the clergy privilege against in-court testimony.<sup>78</sup>

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69. See Mitchell, *supra* note 41, at 723.

70. See Mitchell, *supra* note 41, at 728-29. Some states require clergy to report by specifically listing clergy as mandatory reporters, while other states include "any person" in their list. See Abrams, *supra* note 50, at 1138. Fifteen states do not require clergy to report under any circumstances. See Abrams, *supra* note 49, at 1139. These states are Alabama, Alaska, Arkansas, Georgia, Hawaii, Iowa, Kansas, New York, Ohio, South Carolina, South Dakota, Vermont, Virginia, Washington, and Wisconsin. See Abrams, *supra* note 50, at 1139 n.55.

71. See Abrams, *supra* note 50, at 1139. These states are Arizona, California, Colorado, Delaware, Florida, Idaho, Illinois, Kentucky, Louisiana, Maryland, Maine, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, and Utah. See Abrams, *supra* note 49, at 1139 n.58.

72. See Abrams, *supra* note 50, at 1140. These states are Connecticut, Indiana, Mississippi, Nebraska, New Jersey, Tennessee, and Wyoming. See Abrams, *supra* note 50, at 1140 n.60.

73. See *supra* note 62 and accompanying text.

74. N.H. REV. STAT. ANN. § 169-C:29 (2004); N.C. GEN. STAT. § 7B-301, 7B-310 (2003); OKLA. STAT. ANN. tit. 10, § 7103 (West Supp. 2004); R.I. GEN. LAWS § 40-11-3, 40-11-11 (Supp. 2004); TEX. FAM. CODE ANN. § 261.101 (Vernon 2004); W. VA. CODE ANN. § 49-6A-2 (Michie 2004).

75. N.H. REV. STAT. ANN. § 169-C:29.

76. N.C. GEN. STAT. § 7B-301.

77. *Id.* at § 7B-310.

78. North Carolina and Texas are the two states that allow a defendant's confession of child abuse to his clergyman to be used during a criminal trial. *Id.*; TEX. FAM. CODE ANN. § 261.202 (Vernon 2004). The Court of Appeals of Texas, without addressing constitutionality, has upheld convictions where this evidence was admitted. See *Bordman v. State*, 56 S.W.3d 63, 68 (Tex. App. 2001); *Martinez v. State*, 2002 Tex. App. LEXIS 5975, at \*3 (Aug. 15, 2002).

These six state legislatures passed laws requiring clergy to report in recognition of the need to protect the safety and welfare of children.<sup>79</sup> This is not to say that mandatory reporting laws do not have disadvantages. Some argue that requiring clergy to break confidences when they learn of child abuse will discourage congregation members or colleagues from confiding in them at all.<sup>80</sup> Also, clergy may be forced to choose between violating the law of the state and violating the law of their religious institutions, placing them in a difficult situation.<sup>81</sup> Nevertheless, six states have weighed these competing interests and determined that a child's safety should take priority.<sup>82</sup>

### III. MARYLAND LAW

#### A. *The Clergy-Communicant Privilege*

Maryland recognizes a very broad clergy-communicant privilege.<sup>83</sup> It protects any communication made in confidence to a clergyman by a person seeking "spiritual advice or consolation."<sup>84</sup> This broad privilege is intended to encourage people to seek assistance when they are experiencing problems, so that they can discuss them openly and potentially resolve them.<sup>85</sup> By allowing clergy to refuse to testify in court as to confidential communications, the privilege permits church members to speak with their clergy without fear of subsequent disclosure.<sup>86</sup> There is no Maryland law, however, that extends the privilege beyond testimony in court and administrative proceedings.<sup>87</sup>

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79. Shannon O'Malley, *At All Costs: Mandatory Child Abuse Reporting Statutes and the Clergy-Communicant Privilege*, 21 REV. LITIG. 701, 713 (2002).

80. *Id.* at 711. *But see supra* notes 18 and 49.

81. *See* O'Malley, *supra* note 79, at 711.

82. *But see id.* at 718. The author recognizes that there apparently have been no reported convictions of clergymembers in Texas for refusing to report or testify. This observation leads to the conclusion that law enforcers and prosecutors are ignoring . . . the Texas Family Code by allowing the clergymembers to keep silent about any knowledge of child abuse learned in the confessional.

*Id.*

83. MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2003).

84. *Id.* The statute reads: "A minister of the gospel, clergyman, or priest of an established church of any denomination may not be compelled to testify on any matter in relation to any confession or communication made to him in confidence by a person seeking his spiritual advice or consolation." *Id.* There have been no reported cases in Maryland interpreting the scope of this privilege. *See id.* (there are no annotations interpreting the scope of the statute).

85. *See* Mitchell, *supra* note 41, at 762, 768.

86. *See* Mitchell, *supra* note 41, at 762.

87. The privilege applies to all in-court testimony, whether at trial or some other proceeding; however, because the statute uses the term "testify," the privilege does not cover a clergyman's confidential disclosure of information outside of court. MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2003). BLACK'S LAW DICTIONARY 1514 (8th ed. 2004) (defining "testify" as "to give

*B. The Child Abuse Reporting Statutes*

Since 1987, the Family Law Article of the Maryland Code has specifically required all health practitioners, police officers, educators, and human service workers to report all suspected instances of child sexual abuse to the local department or law enforcement agency.<sup>88</sup> The section further mandates that any other “person” in the state report such suspicions.<sup>89</sup> In 1988, this section of the statute was amended to provide an exemption for certain communications.<sup>90</sup> Subsection (a)(2) excludes attorneys from the reporting requirement if such a report would violate the attorney-client privilege.<sup>91</sup> Subsection (a)(3) provides that clergy will not be required to disclose information protected by the clergy-communicant privilege, if that information was communicated to the clergyman “in a professional character in the course of discipline enjoined by the church,” and the clergyman is “bound to maintain the confidentiality of that communication under canon law, church doctrine, or practice.”<sup>92</sup>

The language of subsection (a)(3) is vague regarding what information clergy are not obligated to divulge to the authorities. Clearly, Maryland’s clergy-communicant privilege protects any communication made in confidence to a clergyman by a person seeking “spiritual advice or consolation.”<sup>93</sup> On the other hand, the clergy reporting exemption should not be as broad as the testimonial privilege because reporting involves the health and welfare of children that will continue to be jeopardized if a report is not made.<sup>94</sup> The language of the

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evidence as a witness”). Black’s definition does not include confidential reports of child abuse to a department of social services. *See also infra* note 116.

88. 1987 Md. Laws 635 (codified at MD. CODE ANN., FAM. LAW § 5-704(a)(1)(i) (2004)). Abuse is defined in the subtitle as “the physical or mental injury of a child . . . or the sexual abuse of a child, whether physical injuries are sustained or not.” MD. CODE ANN., FAM. LAW § 5-701(b)(1)-(2). The local department to which the report should be made is the department of social services that has jurisdiction in the county where the child lives or the abuse occurred. *Id.* § 5-701(o)(1)-(2).
89. MD. CODE ANN., FAM. LAW § 5-705(a)(1)(i).
90. 1988 Md. Laws 769, 770.
91. MD. CODE ANN., FAM. LAW § 5-705(a)(2) (2004). The attorney-client privilege is found in section 9-108 of the Courts & Judicial Proceedings Article. MD. CODE ANN., CTS. & JUD. PROC. § 9-108 (2003).
92. MD. CODE ANN., FAM. LAW § 5-705(a)(3) (2004). Interestingly, the 1988 bill, as introduced, included only an exemption for the attorney-client privilege. *See* 1988 Md. Laws at 770. The exemption for the clergy-communicant privilege was added to the bill as an amendment, without a committee hearing at which the public could testify. *See id.*
93. MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2003).
94. The “legislative policy” of the subtitle specifically notes that the reporting requirements are intended “to protect children who have been the subject of abuse or neglect.” MD. CODE ANN., FAM. LAW § 5-702 (1999). In a recent letter to Senator Delores G. Kelley, the chief sponsor of Senate Bill 412, Kathryn Rowe, an Assistant Attorney General of Maryland, pointed out that

reporting statute, however, seems to exempt a very broad category of communications. The phrase "in the course of discipline enjoined by the church" could simply refer to a counseling session that the church encourages, or the confidentiality of which the church generally guarantees.<sup>95</sup> Furthermore, the clergyman need only be "bound to maintain the confidentiality of [the] communication under canon law, church doctrine, or practice."<sup>96</sup> Some churches, or even individual clergymen, might customarily keep certain communications confidential, and interpret this "practice" as one that exempts clergy from the duty to report child abuse.

Indeed, in a letter written to a Maryland legislator in support of the current clergy exemption, the Executive Director of the Maryland Catholic Conference pointed out that the exemption "relates only to knowledge obtained during a conversation in which the clergyman serves as spiritual advisor to a person who specifically manifests the need for spiritual advice and guidance and which, but for the curtain of assured confidentiality, would not likely occur."<sup>97</sup> In other words, that Catholic leader interpreted the exemption to include all communication protected by the clergy-communicant privilege. His interpretation is understandable given the confusing language of the statute.<sup>98</sup>

An advisory opinion of the Attorney General of Maryland provides no clarification. In response to an inquiry from the Governor's Council on Child Abuse and Neglect, the Attorney General simply stated that the statute "excuses reporting of certain confidential communica-

the current statute was probably intended to cover a very narrow class of penitential communications - those where a religious requirement to communicate is placed on the confider. See Letter from Kathryn M. Rowe, Maryland Assistant Attorney General, to Maryland Senator Delores G. Kelley (Jan. 20, 2004) (on file with author).

95. See *supra* notes 57-59 and accompanying text (observing that the phrase "in the course of discipline enjoined by the church" may refer to more than only those confessions required by the church); see also Mitchell, *supra* note 41, at 754-55.
96. MD. CODE ANN., FAM. LAW § 5-705(a)(3)(ii) (2004) (emphasis added).
97. Letter from Richard J. Dowling, Executive Director, Maryland Catholic Conference, to Senator Walter M. Baker, Chairman of the Senate Judicial Proceedings Committee (Apr. 5, 1988), *microformed on* 276/C-305 (Md. Dep't of Legis. Reference). In another letter, he referred to the amendment as one "designed to reinstate the priest-penitent privilege" in the child abuse reporting context. Letter from Richard J. Dowling, Executive Director, Maryland Catholic Conference, to Senator Nathan C. Irby (Mar. 7, 1988), *microformed on* 276/C-312 (Md. Dep't of Legis. Reference). Scholars have also commented that Maryland's current statute is broad enough to exempt spiritual advice or counseling from the reporting requirement. See, e.g., Abrams, *supra* note 50, at 1146 n.85.
98. Even in a House Floor Report, delegates acknowledged that the original law "unwittingly did away with the attorney-client privilege and the priest-penitent privilege. This bill is intended to correct that oversight." See H.D. 1490, 1998 Leg., 398th Sess. (Md. 1988), *microformed on* 276/C-312 (Md. Dep't of Legis. Reference).

tions to a minister, clergyman, or priest.”<sup>99</sup> Religious organizations might read “certain communications” to include almost any communication between a clergyman and a member.

The Catholic Church has taken its own steps towards clarifying which communications should be reported. For instance, the United States Conference of Bishops released a new policy in 2002 that mandated all church officials “comply with all applicable civil laws.”<sup>100</sup> This clarification does not provide much guidance, however, if the state laws are ambiguous. The Washington Archdiocese in the District of Columbia outlined in its Child Protection Policy that personnel shall report suspected abuse to appropriate authorities unless that information is “subject to the priest-penitent privilege.”<sup>101</sup> Unfortunately, the Policy fails to define the priest-penitent privilege, leaving room for a broad interpretation of the exception. The bill proposed in Maryland in 2003 would have solved these problems.

#### IV. THE PROPOSED AMENDMENT

Although Maryland’s proposed amendments to the child abuse reporting statute failed in the Senate Judicial Proceedings Committee in 2003 and 2004, likely because of intense pressure from several religious groups,<sup>102</sup> the legislature should not back down. As Senator Delores G. Kelley pointed out, an amendment like that in 2003 “would serve the interests of Maryland’s children, providing increased protection when it is most needed.”<sup>103</sup> The bill was designed to limit the current exemption and eliminate confusion as to which communications will remain exempted.<sup>104</sup> In particular, it was aimed at “clergy who confer between and among themselves and/or others regarding how to protect the public, legal, or fiscal position of their religious

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99. 80 Op. Att’y Gen. Md. 130 (1995).

100. Press Release, U.S. Conference of Catholic Bishops, Charter for the Protection of Children and Young People, Revised Edition (Nov. 2002), available at <http://www.usccb.org/bishops/charter.htm>. See *Child Safety Vs. Clergy Rights*, BALT. SUN, Nov. 13, 2002, at 14A; see also *The Bishops and the Law*, WASH. POST, Nov. 10, 2002, at B6.

101. Press Release, Archdiocese of Washington, Child Protection Policy (Mar. 2003), available at [http://www.adw.org/commun/cpp\\_english.pdf](http://www.adw.org/commun/cpp_english.pdf).

102. See Becker, *supra* note 30, at B3. Members of the Senate Committee on Judicial Proceedings received emotional letters and testimony from constituents opposing the bill. See *id.*; see also Letter from Elizabeth A. Konig to Senator Brian E. Frosh, Chairman of the Senate Judicial Proceedings Committee (Feb. 21, 2003) (on file with author) (stating that “[i]f the ‘seal of confession’ is broken, as in [Senate Bill] 412 and [House Bill] 823 now before the Maryland legislature, this ancient comity between the Catholic Church and the State of Maryland will be violated”).

103. *Family Law—Child Abuse and Neglect—Reporting by Members of Clergy: Hearing on S.B. 412 Before the Senate Judicial Proceedings Comm.*, 2003 Leg., 417th Sess. (Md. Feb. 25, 2003) (testimony of Sen. Delores G. Kelley) (on file with author).

104. *Id.*

institution, in light of a suspected or acknowledged case of child abuse."<sup>105</sup> These are all compelling reasons for the Maryland legislature to pass a bill similar to Senate Bill 412.

A. *Language of the 2003 Proposed Bill*

Senate Bill 412 elucidated exactly which types of communications must be reported to authorities, creating a bright-line rule for religious leaders.<sup>106</sup> It would have required all communications other

105. *Id.*

106. *See* S. 412, 2003 Leg., 417th Sess. (Md. 2003). As introduced, Senate Bill 412 read as follows:

(a)(1) Except as provided in paragraphs (2) and (3) of this subsection, notwithstanding any other provision of law, including a law on privileged communications, a person in this state other than a health practitioner, police officer, or educator or human service worker who has reason to believe that a child has been subjected to abuse or neglect shall:

(i) if the person has reason to believe the child has been subjected to neglect, notify the local department or the appropriate law enforcement agency; or

(ii) if the person has reason to believe the child has been subjected to neglect, notify the local department.

(2) A person is not required to provide notice under paragraph (1) of this subsection:

(i) in violation of the privilege described under § 9-108 of the Courts Article;

(ii) if the notice would disclose matter communicated in confidence by a client to the client's attorney or other information relating to the representation of the client; or

(iii) in violation of any constitutional right to assistance of counsel.

(3)(I) A minister of the gospel, clergyman, or priest of an established church of any denomination is not required to provide notice under paragraph (1) of this subsection if the notice would disclose matter in relation to any communication described in § 9-111 of the Courts Article and:

~~(i) the communication was made to the minister, clergyman, or priest in a professional character in the course of discipline enjoined by the church to which the minister, clergyman, or priest belongs; and~~

~~(ii) COMMUNICATED BY THE PERPETRATOR IN THE COURSE OF A CONFESSION, AND the minister, clergyman, or priest is SPECIFICALLY bound to maintain the confidentiality of that communication under canon law, OR church doctrine, or practice.~~

~~(II) SUBPARAGRAPH (I) OF THIS PARAGRAPH MAY NOT BE CONSTRUED TO MODIFY OR LIMIT THE DUTY TO REPORT SUSPECTED CHILD ABUSE OR NEGLECT:~~

~~1. WHENEVER A MINISTER, CLERGYMAN, OR PRIEST DESCRIBED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH ACTS IN A CAPACITY THAT WOULD OTHERWISE REQUIRE THE MINISTER, CLERGYMAN, OR PRIEST TO REPORT SUSPECTED ABUSE OR NEGLECT UNDER THIS SUBTITLE; OR~~

~~2. IF INFORMATION REGARDING THE SUSPECTED ABUSE OR NEGLECT:~~

than confessions or similar communications of the perpetrator to be reported.<sup>107</sup>

The bill deleted the confusing language found in current subsection (a)(3)(i)—“communication . . . in the course of discipline enjoined by the church”—and instead added language that limits the exception to confessions of the perpetrator.<sup>108</sup> By using the word “confession,” the bill probably would have limited the exemption to communications made during the Roman Catholic Sacrament of Penance or similar practices.<sup>109</sup> While the bill retained the requirement that the clergyman be bound to maintain the confidentiality of the communication under canon law or church doctrine, the bill clarified that such confidentiality must be specifically required.<sup>110</sup> The bill also deleted the word “practice” from current subsection (a)(3)(I)(ii).<sup>111</sup> Both of these changes would have made the exemption narrower and less ambiguous than the current law by ensuring that clergy act under specific church doctrine, rather than habit or custom, when deciding to keep communication confidential.<sup>112</sup> Finally, the bill included a subsection that listed circumstances in which the exception would not apply and the clergyman would be required to report.<sup>113</sup>

#### B. Public Policy Reasons Supporting the 2003 Proposed Bill

Passage of a bill like Senate Bill 412 would promote sound public policy. While some may incorrectly argue that this bill offends the

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A. WAS OBTAINED FROM ANY SOURCE OTHER THAN BY THE PERPETRATOR IN THE COURSE OF A CONFESSION, INCLUDING PERSONAL OBSERVATION OF A VICTIM, EVEN THOUGH INFORMATION ALSO MAY HAVE BEEN OBTAINED FROM THE PERPETRATOR IN THE COURSE OF A CONFESSION;

B. WAS COMMUNICATED BY THE PERPETRATOR IN THE COURSE OF A CONFESSION IN THE PRESENCE OF A THIRD PARTY; OR

C. WAS COMMUNICATED BY THE PERPETRATOR IN THE COURSE OF A CONFESSION AND DISCLOSED BY A MINISTER, PRIEST, OR CLERGYMAN DESCRIBED IN SUBPARAGRAPH TO A THIRD PARTY.

*Id.* The struck-through text would be deleted from MD. CODE ANN., FAM. LAW § 5-705 (2002). The text in all capital letters would be added.

107. *See id.*

108. *See supra* note 106.

109. *See supra* note 56 and accompanying text. While this language probably encompassed certain communications with clergy from churches outside the Catholic faith, the bill might have benefited from changing the word “confession” to “confidential penitential communication” to more clearly indicate this point. Such language was used in the 2004 version of the bill. *See infra* note 141 and accompanying text.

110. *See supra* note 106.

111. *See supra* note 106.

112. *See supra* note 106.

113. *See supra* note 106.



clergy-communicant privilege,<sup>114</sup> Maryland law has traditionally only recognized the privilege in the context of court proceedings.<sup>115</sup> The privilege does not extend to other situations outside of court, including the reporting of suspected child abuse.<sup>116</sup> By removing a cross-reference to the clergy-communicant privilege, confusion regarding the scope of the exemption would be eliminated. Furthermore, a clergyman making a child abuse report would be guaranteed confidentiality,<sup>117</sup> and could still invoke the clergy-communicant privilege during subsequent court proceedings.<sup>118</sup>

Additionally, the spirit of the confessional would not be dishonored, because the bill would still exempt true "confessions" of sin.<sup>119</sup> Perpetrators would be encouraged to speak with their priests, ministers, or rabbis, because they would not fear being reported to authorities.<sup>120</sup> Therefore, open communications and the potential resolution of problems would still be fostered.<sup>121</sup>

On the other hand, communications made by victims of abuse or third parties are not "confessions" at all, because those children did not commit a sin. Children may be simply reaching out to someone they trust for help and guidance, most likely because they feel uncomfortable reporting the abuse themselves.<sup>122</sup> Clergy should be responsible for taking that step for them, instead of perpetuating feelings of

114. See *supra* notes 27-30 and accompanying text.

115. See MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2003).

116. *Id.* The statute states only that a minister, priest, or rabbi "may not be compelled to testify" regarding confidential communications. See *supra* note 87. See also Letter from Lynn McLain, Professor of Law, University of Baltimore School of Law, to Senator Brian Frosh, Chairman of the Senate Judicial Proceedings Committee (Feb. 20, 2003) (on file with author). In this letter, McLain points out that "[Senate Bill] 412 does not address in-court testimony. Rather, it imposes a legal obligation to make an out-of-court report. The exception it carves out from that duty must be as narrowly defined as possible, or the reporting requirement will be totally gutted." *Id.*

117. MD. CODE ANN., FAM. LAW § 5-707 (2004).

118. MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2002).

119. See *supra* notes 21-23 and accompanying text.

120. See *supra* note 80 and accompanying text. Studies show that victims of child sexual abuse very rarely report it themselves.

121. One supporter of Senate Bill 412 has pointed out that, even if the bill required clergy to report perpetrators' confessions, perpetrators would not necessarily be discouraged from communicating with clergy. See *Family Law - Child Abuse and Neglect - Reporting by Members of Clergy: Hearing on S.B. 412 Before the Senate Judicial Proceedings Comm.*, 2003 Leg., 417th Sess. (Md. Feb. 25, 2003) (testimony of Ellen Mugmon) (on file with author). She suggested that research shows *trust*, and not necessarily confidentiality, is what fosters a therapeutic relationship. *Id.* Therefore, if a clergyman informs a confessor up front that a report could potentially be made, the confessor may still disclose the abuse. See *id.*

122. See *supra* note 103 and accompanying text. This would provide "increased protection when it is most needed" by the state's children. See *supra* note 103 and accompanying text. See also JOHN JAY STUDY, *supra* note 18, at 13-14.

guilt and suggesting that it is acceptable to keep abuse secret. While some may argue that if a child does not wish to report the abuse, the clergyman should honor that desire, the State's interest in prosecuting child abusers should outweigh the victim's interest in privacy.<sup>123</sup>

The bill also clarifies situations in which clergy are specifically bound to report.<sup>124</sup> First, they must report abuse if it was disclosed to them by a third person as well as by the perpetrator.<sup>125</sup> In this way, the clergyman would not be reporting the perpetrator's confession, but rather the third party's disclosure of abuse, of which the clergyman was already aware.<sup>126</sup> As Assistant Attorney General of Maryland, Kathryn M. Rowe, stated, "[i]t should not be open to a defendant to remove possible sources of information about his or her crimes simply by confessing to them."<sup>127</sup>

Second, a third party's presence during the perpetrator's confession would break the duty of confidentiality and require a report to be made, as would the clergyman's disclosure of the confession to any other third person.<sup>128</sup> This parallels the evidentiary privilege, which both federal and state courts have found to be inapplicable when information is disclosed in the presence of a third party.<sup>129</sup> Therefore, a clergyman would not be able to discuss a perpetrator's confession of child sexual abuse with his colleagues without invoking the duty to report.<sup>130</sup>

Third, the exemption would not apply any time the clergyman was acting outside the capacity of priest, minister, or rabbi when hearing

123. See *infra* note 177 (discussing a California case that found a state's interest in the apprehension of felons and prevention of child abuse are "compelling" for purposes of constitutional analysis).

124. See *supra* note 106.

125. See *supra* note 106.

126. See Letter from Kathryn M. Rowe, Maryland Assistant Attorney General, to Maryland Senator Delores G. Kelley (Jan. 20, 2004) (on file with author).

127. *Id.*

128. See *supra* note 106.

129. See, e.g., *United States v. Webb*, 615 F.2d 828, 828 (9th Cir. 1980) (prisoner confessed to chaplain in front of officer); *State v. Berry*, 324 So. 2d 822, 829 (La. 1975) (defendant told minister of crimes while two other people were present). While Maryland courts have never decided if a clergyman may waive the privilege by making a disclosure to a third party, such a principle is in line with other states' interpretation of the privilege. See, e.g., *State v. Szemple*, 640 A.2d 817, 836 (N.J. 1994) (holding that the privilege could be waived by a clergyman without the consent of the communicant). Also, as Professor McLain points out, the language of the statute itself—" [a] minister, [priest, or rabbi] . . . may not be compelled"—implies that the clergyman holds the privilege and his disclosure to a third party will waive it. See Letter from Professor McLain, *supra* note 116.

130. This section of the bill ensures clergy do not secretly "confer between and among themselves and/or others regarding how to protect the public, legal, or fiscal position of their religious institution." See *supra* text accompanying note 105.

of the abuse.<sup>131</sup> For example, if the clergyman learned of abuse while coaching the church basketball team or attending a neighborhood picnic, the duty to report would attach. In those instances, the church member probably does not have an expectation that the communication will be kept secret and the communication does not rise to the level of a religiously compelled "confession."

Not only does the bill clarify exactly which information is not exempted, it also provides an avenue for clergy that would like to report sexual abuse, but fear violating church law.<sup>132</sup> The few churches that punish clergy for revealing confidential information would have to tolerate adherence to a generally applicable law of the government.<sup>133</sup> In fact, many churches may approve of the requirement because, by making child abuse reporting mandatory, the statute prevents the report from constituting a waiver of the privilege at a subsequent trial.<sup>134</sup> Waiver of an evidentiary privilege occurs only when the holder of the privilege *voluntarily* discloses information to a third person.<sup>135</sup>

This bill would also correct a bizarre incongruity in the law that requires psychotherapists to report child abuse, but exempts clergy from the same duty.<sup>136</sup> Maryland law recognizes both a clergy-communicant and psychotherapist-patient privilege for in-court testi-

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131. See *supra* note 106.

132. See *supra* note 81 and accompanying text.

133. A California appellate court has found that, where a priest was dismissed from service in retaliation for reporting another priest's sexual abuse of a child, judicial review of the priest's claims of intentional infliction of emotional distress and defamation was appropriate. *Conley v. Roman Catholic Archbishop of S.F.*, 102 Cal. Rptr. 2d 679, 683 (2000). Clergy would also be immune from civil liability for making the report, so long as it was done in good faith. MD. CODE ANN., FAM. LAW § 5-708 (2004).

134. See Letter from Lynn McLain, Professor of Law, University of Baltimore School of Law, to Senator Brian E. Frosh, Chairman, Judicial Proceedings Committee (Mar. 4, 2004) (on file with author).

135. See Letter from Professor McLain, *supra* note 116.

136. The statute exempts only communications protected by the attorney-client and clergy-communicant privileges. MD. CODE ANN., FAM. LAW § 5-705 (2004). It previously contained an exemption for certain communications between a psychotherapist and patient (known as the "Berlin exemption"), but that exemption was repealed in 1989. See 1989 Md. Laws 730. Interestingly, one of the reasons for repealing the exemption was that therapy does not cure pedophilia, so encouraging child molesters to seek treatment would not actually solve their problem. See H.D. 1210, 1989 Leg., 384 Sess. (Md. 1989), *microformed on 276/C-328* (Md. Dept. of Legis. Reference). One could argue that the clergy-communicant privilege should also be repealed in its entirety because encouraging molesters to confide in clergy will not stop them from abusing children. The other reason for repealing the psychotherapist-patient exemption was that abusers do not seek treatment voluntarily, but only when there is a threat of disclosure if they do not. Therefore, removing the exemption would not decrease the number of abusers seeking voluntary treatment. See H.D. 1210, 1989 Leg., 384 Sess. (Md. 1989), *microformed on 276/C-328* (Md. Dept. of Legis. Reference).

mony.<sup>137</sup> While many of the reasons supporting the extension of these privileges to child abuse reporting are the same for both groups, the law reaches different results. In both cases, a privilege was created to encourage open communications and the resolution of problems.<sup>138</sup> If the legislature has determined that requiring psychotherapists to report is so important to the public safety as to warrant severing a confidential relationship, why has it not done the same for clergy?<sup>139</sup> Critics of the bill may argue that it would violate the clergy's constitutional right to the free exercise of religion. As discussed below, however, this argument lacks support in the law.<sup>140</sup>

### C. *The 2004 Version of the Bill*

The version of the bill introduced in the Senate in 2004 was modified to allow clergy to keep many communications confidential.<sup>141</sup>

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137. The psychotherapist-patient privilege is found in MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (2002).

138. See, e.g., McCormack v. Bd. of Educ. of Balt. County, 158 Md. App. 292, 305-06, 857 A.2d 159, 167 (2004) (discussing the psychotherapist-patient privilege, the court stated that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment"). See also J. Michael Keel, *Law and Religion Collide Again: The Priest-Penitent Privilege in Child Abuse Reporting Cases*, 28 CUMB. L. REV. 681, 689 (1997-98).

139. Other scholars have recognized the need for uniformity in this area. O'Malley, *supra* note 79, at 713 (stating that "[m]andatory child abuse reporting statutes guarantee that there is equal treatment across the board for professionals who generally assert a privilege"). For a thorough discussion of the disparity between the treatment of the psychotherapist-patient privilege and the clergy-communicant privilege in child abuse reporting statutes, see Keel, *supra* note 138.

140. See *infra* Part IV.

141. S. 237, 2004 Leg., 418th Sess. (Md. 2004); H.D. 1098, 2004 Leg., 418th Sess. (Md. 2004). In pertinent part, the modified bill read as follows:

(3)(I) A minister of the gospel, clergyman, or priest of an established church of any denomination is not required to provide notice under paragraph (1) of this subsection if the notice would disclose matter in relation to any communication described in § 9-111 of the Courts Article and COMMUNICATED TO THE MINISTER, CLERGYMAN, OR PRIEST IN THE COURSE OF A CONFIDENTIAL PENITENTIAL COMMUNICATION AND:

1. THE MINISTER, CLERGYMAN, OR PRIEST IS SPECIFICALLY BOUND TO MAINTAIN THE CONFIDENTIALITY OF THAT COMMUNICATION UNDER CANON LAW OR CHURCH DOCTRINE; AND

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

While not as effective as the 2003 version of the bill,<sup>142</sup> it still would have been a huge victory in the protection of children.

This bill differed from Senate Bill 412 of 2003 because it would have exempted clergy from reporting information learned from anyone during confidential penitential communications,<sup>143</sup> rather than confessions of the perpetrator only.<sup>144</sup> The phrase "confidential penitential communications" is somewhat unclear, but probably includes Roman Catholic confessions and similar practices in other churches. The bill also differed from Senate Bill 412 of 2003 by retaining the confusing phrase "in the course of discipline enjoined by the church" found in the current statute.<sup>145</sup>

The bill was similar to Senate Bill 412 of 2003, in that it also included language that clarified when clergy must report. Clergy would still have been required to report if they learned of the abuse when acting in a capacity other than that of a clergyman, thereby rendering the clergy-communicant relationship inapplicable.<sup>146</sup> Clergy would have been required to report abuse they learned about from any source other than a confidential penitential communication.<sup>147</sup> The bill specifically provided that personal observations must be reported.<sup>148</sup> Finally, any time a confession was made in the presence of

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(II) SUBPARAGRAPH (I) OF THIS PARAGRAPH MAY NOT BE CONSTRUED TO MODIFY OR LIMIT THE DUTY TO REPORT SUSPECTED CHILD ABUSE OR NEGLECT:

1. WHENEVER A MINISTER, CLERGYMAN, OR PRIEST OF AN ESTABLISHED CHURCH OF ANY DENOMINATION FUNCTIONS IN A ROLE THAT WOULD OTHERWISE REQUIRE THE MINISTER, CLERGYMAN, OR PRIEST TO REPORT SUSPECTED ABUSE OR NEGLECT UNDER THIS SUBTITLE; OR

2. IF INFORMATION REGARDING THE SUSPECTED ABUSE OR NEGLECT:

A. WAS OBTAINED IN ANY MANNER OTHER THAN AS DESCRIBED IN SUBPARAGRAPH (1) OF THIS PARAGRAPH, INCLUDING PERSONAL OBSERVATION OF A VICTIM, EVEN THOUGH INFORMATION ALSO MAY HAVE BEEN OBTAINED AS DESCRIBED IN SUBPARAGRAPH (1) OF THIS PARAGRAPH;

B. WAS COMMUNICATED TO THE MINISTER, CLERGYMAN, OR PRIEST IN THE PRESENCE OF A THIRD PERSON; OR

C. WAS DISCLOSED BY THE MINISTER, CLERGYMAN, OR PRIEST TO A THIRD PERSON.

*Id.*

142. In fact, Kathryn Rowe pointed out that the bill may not substantively change the current law at all, but may simply provide clearer language. See Letter from Kathryn M. Rowe, *supra* note 126.

143. See *supra* note 141.

144. See *supra* note 141.

145. See *supra* note 141.

146. See *supra* note 141.

147. See *supra* note 141.

148. See *supra* note 141.

a third party or the clergyman revealed abuse to a third person, the broken confidentiality would have required a report to be made.<sup>149</sup>

The bill, while lacking the bright-line rule that all information other than a perpetrator's confession must be reported, still aimed to discourage clergy from conferring among themselves and choosing to deal with allegations of abuse within the church.<sup>150</sup> It also clarified the instances in which clergy must report.<sup>151</sup> However, the bill would not have adequately protected victims and family members who tell clergy about the abuse during a "confession."<sup>152</sup> In these situations, the clergyman would have no duty to report.<sup>153</sup>

Like critics of Senate Bill 412 of 2003, critics of the 2004 bill may argue that requiring clergy to report child abuse in some circumstances violates the clergy's constitutional right to the free exercise of religion. As the following section explains, such a law would be well within the boundaries of the United States Constitution.

## V. CONSTITUTIONALITY OF A MANDATORY REPORTING LAW

A child abuse reporting statute that includes clergy as mandated reporters would not violate the Free Exercise Clause of the First Amendment.<sup>154</sup> The United States Supreme Court will uphold generally applicable state laws that infringe only incidentally upon a person's religious beliefs.<sup>155</sup> In fact, a reporting law that creates a broad exemption for clergy may conflict with the Establishment Clause of the First Amendment.<sup>156</sup> A court might find that such an exemption improperly promotes religion.<sup>157</sup>

### A. *The Free Exercise Clause*

State laws applicable to the public in general, and not aimed specifically at religious groups, will not violate the Free Exercise Clause. In 1940, the Supreme Court noted that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the pro-

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149. *See supra* note 141.

150. *See supra* note 141.

151. *See supra* note 141.

152. *See supra* note 141.

153. *See supra* note 141.

154. U.S. CONST. amend. I. The First Amendment states, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.* The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend XIV; *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

155. *See infra* notes 158-162 and accompanying text.

156. U.S. CONST. amend I.

157. *See infra* notes 193-196 and accompanying text.

motion or restriction of religious beliefs.”<sup>158</sup> The Court reiterated this principle in its 1990 decision in *Employment Division v. Smith*,<sup>159</sup> when it found that a neutral law of general applicability—one that criminalized the use of narcotics, including the sacramental use of peyote—was valid.<sup>160</sup>

The Court in *Smith* went on to hold that the government does not need to show a compelling interest in order for the Court to uphold a generally applicable law affecting an individual’s religious beliefs.<sup>161</sup> The Court noted that such a rule “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”<sup>162</sup>

Congress attempted to abrogate this holding in *Smith* when it passed the Religious Freedom Restoration Act of 1993 (RFRA).<sup>163</sup> The statute’s stated purpose was “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened.”<sup>164</sup> However, the Supreme Court responded to RFRA in *City of Boerne v. Flores*,<sup>165</sup> when it held the statute was unconstitutional as applied to state government action.<sup>166</sup> The Court pointed out that Congress had overstepped its bounds and violated the separation of powers by enacting RFRA.<sup>167</sup> Therefore, the *Smith* test still applies to most Free Exercise challenges.<sup>168</sup>

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158. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594 (1940).

159. 494 U.S. 872 (1990).

160. *Id.* at 878-82.

161. *Id.*

162. *Id.* at 888.

163. 42 U.S.C. § 2000bb (2003).

164. *Id.* The balancing test in *Sherbert* set forth that governmental actions substantially burdening religious practices must be justified by a compelling governmental interest. *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). This test was applied where unemployment benefits were denied based on an *individualized consideration* of whether an employee had either quit work, or not accepted work, for “good cause.” See *id.* at 400-01. *Smith* held that such a test applied only to a very narrow field of factual situations like the one in *Sherbert*. *Smith*, 494 U.S. at 883-85.

165. 521 U.S. 507 (1997).

166. *Id.*

167. *Id.* at 536.

168. There are still two instances when a compelling interest test will apply to challenges of statutes affecting religious beliefs. One occurs in situations where free exercise is affected by individualized considerations, as in *Sherbert*. See *supra* note 164. The second, known as a “hybrid-rights” violation, occurs when a statute infringes upon not only freedom of religion, but also upon some other constitutionally protected interest. See *Smith*, 494 U.S. at 881. One author has attempted to argue that mandating clergy to report child abuse violates both the free exercise rights of the confessor as well as the free exercise rights of the church. See Merlino, *supra* note 40, at 697. However, the *Smith* court points out that it has only found a generally applicable law to violate the Free Exercise Clause when it also violated freedom

Senate Bill 412 would certainly pass muster under the principles set forth in *Smith*. Like the statute in *Smith*, which prohibited the knowing or intentional possession of a controlled substance,<sup>169</sup> a mandatory child abuse reporting statute is a law of general applicability. It is a law requiring every citizen in the State of Maryland to protect children by reporting suspected child abuse to the authorities.<sup>170</sup> It is not aimed at restricting religious beliefs, but instead at ensuring the health and welfare of children.<sup>171</sup>

Even if a court were to apply the compelling interest test to Senate Bill 412, the law would be upheld. As the Supreme Court set forth in 1944 in *Prince v. Massachusetts*,<sup>172</sup> the government has an interest in the protection of children sufficient to outweigh sacred religious interests.<sup>173</sup> In 1982, the Court noted in *New York v. Ferber* that “[i]t is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’”<sup>174</sup> Therefore, Maryland’s proposed bill, which aims to protect the welfare of children,<sup>175</sup> would be beyond the reach of any First Amendment argument.<sup>176</sup> It serves the compelling government interest of protecting children.

There have been no reported constitutional challenges to state statutes requiring clergy to report confessional communications. A California state court, however, has already decided the constitutionality of a mandatory reporting statute that specifically exempts confessional communications.<sup>177</sup> The court decided that California’s law, which mandates reports of information learned from any communication other than a confession, is constitutional.<sup>178</sup> The court stated that

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of speech or the press, or the right of parents to direct the education of their children. *Smith*, 494 U.S. at 881.

169. *Id.* at 874. The individuals challenging the statute claimed that denial of unemployment benefits based on their sacramental use of peyote violated the Free Exercise Clause. *Id.*

170. Senate Bill 412 requires, with limited exceptions, “any person” to report suspected abuse. See *supra* note 89 and accompanying text.

171. See *supra* note 94 and accompanying text.

172. 321 U.S. 158 (1944). In *Prince*, the Court upheld a parent’s conviction for permitting an infant to work in violation of state law, and rejected the parent’s claim that the law violated the Free Exercise Clause. *Id.* at 168-69.

173. *Id.* at 165-66.

174. 458 U.S. 747, 756-57 (1982) (citing *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982)).

175. See *supra* note 94 and accompanying text.

176. One scholar has even hypothesized that abolition of the privilege for all purposes would be constitutional under a *Smith* analysis. John J. Montone, III, *In Search of Forgiveness: State v. Szemple and the Priest-Penitent Privilege in New Jersey*, 48 RUTGERS L. REV. 263, 281-82 (1995).

177. See *People v. Hodges*, 13 Cal. Rptr. 2d 412 (Cal. App. Dep’t Super. Ct. 1992). This case was followed in *Conley v. Roman Catholic Archbishop of S.F.*, 102 Cal. Rptr. 2d 679 (2000), discussed *supra* at note 133.

178. CAL. PENAL CODE §§ 11165.7, 11166 (West Supp. 2005); *Hodges*, 13 Cal. Rptr. 2d at 420.



“the mere fact that a petitioner’s religious practice is burdened by a governmental program does not mean an exception . . . must be granted,” and that if the petitioners were exempt from reporting, “the [reporting requirement]’s purpose would be severely undermined.”<sup>179</sup> The court also believed the state’s interests in the apprehension of felons and prevention of child abuse were compelling.<sup>180</sup>

Therefore, Maryland’s child abuse reporting statute might also be deemed constitutionally valid. Simply because Senate Bill 412 incidentally burdens the religious practices of some clergy does not mean it is unconstitutional. Also, it would serve the same compelling state interests that the California law now serves. In fact, without removing the clergy exemption from the current Maryland law, the law may violate another constitutional provision found in the First Amendment—the Establishment Clause.

### B. *The Establishment Clause*

The United States Supreme Court has stated that the Establishment Clause requires that

[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.<sup>181</sup>

This interpretation is vital to the continued separation of church and state. A child abuse reporting statute, with a religious exemption affecting the health and welfare of children, can be viewed as an impermissible attempt to aid religion. It is not a neutral statute, but one expressly providing that some citizens are not required to comply because of their religious practices.<sup>182</sup>

In *Lemon v. Kurtzman*,<sup>183</sup> the Supreme Court established a three-part test for use in determining whether a statute violates the Establishment Clause.<sup>184</sup> The Court held that the statute first must have a “secular legislative purpose.”<sup>185</sup> Second, its “principal or primary effect must be one that neither advances nor inhibits religion.”<sup>186</sup> Finally, “the statute must not foster ‘an excessive government entanglement

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

180. *Id.* at 419.

181. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

182. MD. CODE ANN., FAM. LAW § 5-705 (2004).

183. 403 U.S. 602 (1971).

184. *Id.* at 612-13.

185. *Id.* at 612.

186. *Id.*

with religion.’”<sup>187</sup> Maryland courts have followed this approach quite strictly, particularly in cases involving children.

In *Davis v. State*,<sup>188</sup> the Court of Appeals of Maryland cautioned that any religious exemption potentially affecting the health and welfare of children should be carefully scrutinized under Establishment Clause principles.<sup>189</sup> In that case, a parent challenged a religious exemption from a law requiring school children to be immunized.<sup>190</sup> He argued that the exemption, which applied only to conflicts with the tenets of recognized churches or religious denominations, should apply to conflicts with personal beliefs.<sup>191</sup> The court, in ruling that the exemption did not include personal beliefs, also found the exemption unconstitutional under the Establishment Clause.<sup>192</sup>

Applying the principles of *Lemon* and *Davis* to Maryland’s current reporting law confirms that it may be invalid. While it is true that the exemption may have the secular legislative purpose of encouraging open communications and the resolution of the abuser’s problems,<sup>193</sup> its principal effect is to advance religion.<sup>194</sup> Permitting clergy to keep confessions of abuse secret usually does not resolve the problem, but instead allows the abuser to continue molesting children.<sup>195</sup> Therefore, the statute’s principal effect is not to resolve problems, but to allow religious institutions to exacerbate them. This type of exemption probably constitutes “excessive entanglement,” which the Supreme Court has proscribed.<sup>196</sup> A Maryland court might, therefore, find the current reporting law as an unconstitutional attempt to advance religion, especially given that it involves the health and welfare of children.

As well as advancing religion in general, the statute appears to favor one religion over another. If the statute were read to protect only confessional communications, it would apply only to those religions that practice confession.<sup>197</sup> The Supreme Court has held that such laws are subject to strict scrutiny.<sup>198</sup> Therefore, the state must have a compelling interest for the discrimination, and the law must be

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187. *Id.* at 613 (quoting *Walz v. Tax Comm’r*, 397 U.S. 664, 674 (1970)).

188. 294 Md. 370, 451 A.2d 107 (1982).

189. *Id.* at 378-79, 451 A.2d at 111-12.

190. *Id.* at 374, 451 A.2d at 109.

191. *Id.*

192. *Id.* at 382, 451 A.2d at 114.

193. *See supra* note 185 and accompanying text.

194. *See supra* note 186 and accompanying text.

195. *See supra* note 18.

196. *See supra* note 187 and accompanying text.

197. *See supra* notes 56-59. *See also supra* note 109 and accompanying text (commenting that Senate Bill 412 might benefit from an amendment that changes the word “confession” to “confidential penitential communications”).

198. *Larson v. Valente*, 456 U.S. 228, 246 (1982).

“closely fitted” to that interest.<sup>199</sup> In the case of a child abuse reporting statute, there can be no conceivable state interest in preferring one religion over another. There is no legitimate reason to allow some religions to keep abuse secret, while others must report it to authorities.

Because of these constitutional concerns, it is imperative that the Maryland legislature pass a child abuse reporting statute that does not include an impermissible exemption for clergy. Maryland must pass a bill like Senate Bill 412. In addition to a law that strengthens Maryland’s child abuse reporting statute, there are other laws that could be created to better protect the state’s children.

## VI. OTHER LAWS

Maryland has done much in the way of protecting children from sexual abuse. The Maryland legislature recently adopted a new sentencing guideline for the sexual abuse of children.<sup>200</sup> Any person convicted of sexual abuse of a minor may receive up to the maximum sentence of twenty-five years imprisonment.<sup>201</sup> Another bill recently passed by the Maryland legislature affects the statute of limitations for victims wishing to bring civil suits against their abusers.<sup>202</sup> Victims may now bring suit until seven years after they reach the age of majority.<sup>203</sup> These laws are proper steps towards holding child abusers responsible for their actions. Maryland is one of few states, however, with no criminal penalty for failing to report suspected child abuse.<sup>204</sup>

Some legislators are attempting to pass a bill that would make failing to report sexual abuse a misdemeanor for health practitioners, police officers, educators, and human service workers.<sup>205</sup> The penalty would be a \$1,000 fine.<sup>206</sup> In 2004, a similar bill was successful in the Maryland Senate, but did not pass in the House.<sup>207</sup> The bill needs to

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199. *Id.* at 246-47.

200. MD. CODE ANN., CRIM. LAW § 3-602 (2002).

201. *Id.* at § 3-602(c). This law should be strictly enforced. Only two percent of priests and deacons accused of child sexual abuse have served prison sentences. JOHN JAY STUDY, *supra* note 18, at xii.

202. MD. CODE ANN., CTS. & JUD. PROC. § 5-117 (Supp. 2004). This law is necessary because victims of child abuse often are reluctant to come forward with information of abuse until many years after it has occurred. *See supra* notes 19-20.

203. MD. CODE ANN., CTS. & JUD. PROC. § 5-117. Legislators are now attempting to increase the limitations period to twenty-eight years after the age of majority. *See* H.D. 1376, 2005 Leg., 420th Sess. (Md. 2005).

204. MD. CODE ANN., FAM. LAW § 5-705 (Supp. 2004). An advisory opinion of the Maryland Attorney General points out that the duty to report is mandatory, despite the lack of a penalty for failure to report. 60 Op. Md. Att’y Gen. 51 (1975).

205. *See* S. 106, 2005 Leg., 420th Sess. (Md. 2005); H.D. 845, 2005 Leg., 420th Sess. (Md. 2005).

206. *Id.*

207. *See* S. 195, 2003 Leg., 417th Sess. (Md. 2003).

be passed, and extended to include penalties for all persons failing to report. Simply requiring people to report, without providing a penalty for failure to do so, is ineffective.

Recently in Ohio, the Roman Catholic Archdiocese of Cincinnati became the first diocese in the United States to be penalized for failing to report sexual abuse of children.<sup>208</sup> The judge, imposing the maximum fine of \$2,000 on each of the five counts, commented that he believed “everybody has the duty to follow the law.”<sup>209</sup> He further expressed disappointment that the religious leaders had failed their moral duty to report serious crimes against children, placing “self-preservation” as their highest priority.<sup>210</sup>

Many other states have criminal penalties for failure to report child abuse or neglect. The extent of the penalty varies by state. Tennessee, for example, treats failure to report as a misdemeanor, and provides a maximum fine of fifty dollars if the defendant pleads guilty.<sup>211</sup> In contrast, Mississippi punishes those who violate its reporting law by a fine up to \$5,000 or imprisonment up to one year, or both.<sup>212</sup> Other states take more creative approaches. For instance, Illinois treats the first violation of its reporting statute as a misdemeanor, and the second as a felony.<sup>213</sup> Additionally, physicians or dentists that violate the law will be referred to their disciplinary boards.<sup>214</sup>

Maryland should also create, as other states have done, an express provision for civil liability when clergy fail to report suspected child abuse. The law currently does not provide for a civil cause of action, but creating one would further encourage clergymen to report suspected abuse.<sup>215</sup> Such a cause of action would also provide relief to those injured by the clergy’s failure to report.

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208. Alan Cooperman, *Archdiocese Fined in Abuse Coverup*, WASH. POST, Nov. 21, 2003, at A3. Surprisingly, no other religious leaders have been convicted. This is true even in Texas, a state with very strict child abuse reporting requirements. See *supra* note 82.

209. Cooperman, *supra* note 208, at A3.

210. *Id.*

211. TENN. CODE ANN. § 37-1-412 (Supp. 2001).

212. MISS. CODE ANN. § 43-21-353(7) (Supp. 2004).

213. 325 ILL. COMP. STAT. ANN. 5/4.02 (West Supp. 2004).

214. *Id.*

215. Although Maryland does not expressly allow a civil cause of action for failure to report child abuse, a private plaintiff may still make out a claim for negligence. See *Bentley v. Carroll*, 355 Md. 312, 325-26, 734 A.2d 697, 705 (1999) (holding that, although Maryland’s (now superceded) Child Abuse Act did not impose criminal or civil liability for failure to report child abuse, violation of the statute “may furnish evidence of negligence . . . ‘if the person alleging negligence is within the class of persons sought to be protected, and the harm suffered is of the kind which the statute was intended, in general, to prevent’”) (citing *Atlantic Mutual v. Kenney*, 323 Md. 116, 124, 591 A.2d 507, 510-11 (1991)). Even though private plaintiffs may have a claim in negligence, a statutory cause of action would put citizens on notice that the duty to report is serious and could result in personal liability. Such a statute might read: “Any person who knowingly violates the

## VII. CONCLUSION

The Maryland legislature must take action to protect the children of the state. Sexual abuse by clergy has run rampant, and secrecy within religious institutions has exacerbated the harm done.<sup>216</sup> As Maryland's current child abuse reporting statute exempts clergy from reporting anything that would fall within the clergy-communicant privilege,<sup>217</sup> it should be amended to require clergy to report all suspected instances of child abuse. Such a law would be constitutional under the Free Exercise Clause, and would put to rest any Establishment Clause concerns the current law creates.<sup>218</sup> Finally, in order for the law to be fully effective, Maryland must create penalties for failure to report under the new law.<sup>219</sup>

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provisions of § 5-705 shall be liable for civil damages proximately caused thereby." Cf. COLO. REV. STAT. ANN. § 19-3-304 (West Supp. 2004).

216. See discussion *supra* Part I.

217. See discussion *supra* Part III.

218. See discussion *supra* Part IV.

219. See discussion *supra* Part V.