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THE CLERGY-PENITENT PRIVILEGE: THE ROLE OF CLERGY IN PERPETUATING AND PREVENTING DOMESTIC VIOLENCE

*By: Kami Orton**

INTRODUCTION

“Forgive me, Father, for I have sinned. I have been hitting my wife and children when they don’t listen to me or make a mess of the house. I try telling them, but they just don’t listen. Hitting them is the only thing that works. I don’t hit hard.”

“Bishop? Can I talk to you for a minute? My husband and I were married about a year ago. He has become very controlling. He gets angry if I spend too much time with my friends. He wants to see a receipt for anything I buy and only gives me a certain amount of money for groceries. He is very different from the man I married, but I still want to honor my wedding vows.”

“Reverend, there’s something I need to tell you. Lately my younger sister has been acting strangely. She isn’t interested in any of her old hobbies. She is always in her room instead of interacting with the family. She seems afraid of my dad. I think he may be doing something to her.”

“I just don’t know what to do Rabbi. Sometimes my husband hits me, but usually only when he’s been drinking. Lately it’s just gotten so much worse.”¹

Domestic violence is a systematic pattern of power and control, using fear and intimidation between intimate partners.² Clergy are often the “first re-

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¹ Fictional examples of conversations between clergy and congregants indicate male perpetrators. Though less frequently, women can be and are perpetrators of domestic violence. Statistics between heterosexual couples indicate that 95% of intimate partner violence is male against female. U.S. DEP’T OF JUSTICE, NCJ-87068, BUREAU OF JUSTICE STATISTICS: REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 1, 21 (1983).

² The Honorable, Wise, and Humble Frank P. Sullivan, many occasions. The Department of Justice defines domestic violence as any violent crime against a current or former spouse, intimate partner, cohabitating person, or other people similarly situated. *See Domestic Violence*, DEP’T OF JUST. [HTTPS://WWW.JUSTICE.GOV/OVW/DOMESTIC-VIOLENCE](https://www.justice.gov/ovw/domestic-violence). (last visited April 10, 2020).

sponders” to domestic violence.³ This paper attempts to examine the role of the clergy in perpetuating and preventing domestic violence. Part II addresses the prevalence of domestic violence overall in society. It then covers the pervasiveness of domestic violence in organized religion. Finally, Part II discusses theology and pastoral practices that may encourage abusive relationships and prevent survivors from seeking help.

Part III deals with the clergy-penitent privilege, in part by describing the necessary history and background that led to the modern clergy privilege.⁴ Then it discusses clergy views on the privilege, based on case law and practice. Part III also analyzes the general problems with an absolute privilege and argues that a qualified privilege may be more appropriate. Finally, Part III considers the interaction between domestic violence and the clergy privilege and issues that arise.

Part IV goes into detail regarding a specific form of domestic violence—child abuse. This section addresses the prevalence of child abuse in religious communities. Additionally, Part IV analyzes the clergy-penitent privilege statutes and mandatory reporting laws, which occasionally conflict. Part IV also proposes an abrogation of the clergy-communicant privilege which would require clergy to report suspected or known child abuse, in accordance with current mandatory reporting statutes.

I. “BUT I BELIEVE IN GOD”: THE PREVALENCE OF DOMESTIC VIOLENCE IN RELIGIOUS COMMUNITIES

A. DOMESTIC VIOLENCE IN RELIGIOUS ORGANIZATIONS

Every minute there are twenty people who become victims of physical violence from an intimate partner in the United States.⁵ Intimate partner violence affects women and men, regardless of social or economic status, race, profession, or geographical location.⁶ While it may be surprising to some, religion is not a protective factor against domestic violence.⁷

³ *When I Call for Help: A Pastoral Response to Domestic Violence Against Women*, U.S. CONF. OF CATHOLIC BISHOPS (2002), <http://www.usccb.org/issues-and-action/marriage-and-family/marriage/domestic-violence/when-i-call-for-help.cfm>.

⁴ Clergy-penitent privilege, also known as clergy-communicant privilege or simply clergy privilege. All three names are used interchangeably herein.

⁵ See Joel D. Young, *5 Facts Everyone Must Know About Domestic Violence*, PSYCHOLOGY TODAY (OCT. 29, 2015), <https://www.psychologytoday.com/us/blog/when-your-adult-child-breaks-your-heart/201510/5-facts-everyone-must-know-about-domestic>.

⁶ Aimee Lee Ball, *The Faces of Abuse*, HARPER’S BAZAAR, Nov. 1994, at 190; *5 Facts Everyone Should Know*, supra note 5.

⁷ Katherine Hancock Ragsdale, *The Role of Religious Institutions in Responding to the Domestic Violence Crisis*, 58 ALB. L. REV. 1149, 1156 (1995).

Forty-five percent of Americans depend on prayer, personal reflection, or advice from spiritual leaders to make major life decisions.⁸ Additionally, 89 percent of Americans self-identify as maintaining a belief in God.⁹ The United States is home to between 300,000 and 400,000 congregations of various religious denominations.¹⁰ Given the high numbers of religious individuals and the alarming rates of domestic violence, it is unsurprising that domestic violence occurs in our religious communities.¹¹ Furthermore, some religious sects may face additional challenges regarding domestic violence.

1. Catholicism

One Catholic woman was in prison for killing her husband in self-defense after years of abuse.¹² When she was asked why she had not simply left her husband, she responded that she was “a good Catholic girl[,] and the church frowned on divorce.”¹³ Catholics place strong value on marriage and families.¹⁴ This emphasis can occasionally directly encourage survivors to remain with abusers or can more subtly affect a survivor’s decision to remain with an abuser.¹⁵

Researchers have not focused studies on the pervasiveness of domestic violence within the Catholic Church.¹⁶ However, the Church formally condemns domestic violence.¹⁷ In fact, in 1992, the American Catholic bishops issued a

⁸ Michael Lipka, *5 Facts About Prayer*, PEW RESEARCH CENTER (May 4, 2016), <https://www.pewresearch.org/fact-tank/2016/05/04/5-facts-about-prayer/>.

⁹ *U.S. Public Becoming Less Religious*, PEW RESEARCH CENTER (Nov. 3, 2015), <https://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/>.

¹⁰ Nancy T. Ammerman, *Introduction: Observing Religious Modern Lives*, in *EVERYDAY RELIGION: OBSERVING MODERN RELIGIOUS LIVES* 3, 7 (Nancy T. Ammerman ed., 2007).

¹¹ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis for State Statutes and Case Law*, 21 *HOFSTRA L. REV.* 801, 891 (1993).

¹² Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor’s Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 *J. L. & Pol’y* 1, 71 n.247 (1994). The woman was later granted clemency, along with twenty-seven other battered women. *Id.* at 2–3.

¹³ *Id.* at 71 n.247.

¹⁴ U.S. CONF. OF CATHOLIC BISHOPS, *Marriage: Love, and Life in the Divine Plan* 58 (2009),

<http://www.usccb.org/upload/marriage-love-life-divine-plan-2009.pdf>.

¹⁵ See, e.g., Ammons, *supra* note 12, at 71 n.247.

¹⁶ See Joseph Isanga, *Muliers Dignitatem, Ephesians 5, And Domestic Violence: Grounding International Women’s Human Rights*, 8 *AVE MARIA L. REV.* 405, 418–19 (2010) (discussing the teachings of the Catholic Church regarding domestic violence).

¹⁷ Message of His Holiness Pope Francis for the Celebration of the Fiftieth World Day of Peace, *Nonviolence: A Style of Politics for Peace* (2017), http://www.vatican.va/content/francesco/en/messages/peace/documents/papa-francesco_20161208_messaggio-l-giornata-mondiale-pace-2017.html.

statement instructing members that women “no longer needed to endure brutality in marriage.”¹⁸

2. Islam

Many Muslim scholars indicate that Islam, and the Quran, do not permit domestic violence.¹⁹ However, Islam has been used to justify domestic violence.²⁰ Nevertheless, Muslim American women tend to experience domestic violence at the same rate as women in the general population.²¹ Similarly, Muslims are not more likely to engage in domestic violence than individuals in other religions.²²

However, one crucial challenge in Muslim communities is the cultural and community pressure regarding domestic violence.²³ In many instances seeking help from the police, courts, or other outside sources could be viewed as disloyalty to the community.²⁴ Survivors may feel pressure to prevent negative attention towards the community due to inaccurate stereotypes.²⁵

3. Judaism

Scholars have done significantly more research regarding domestic violence in Jewish communities when compared to other religions.²⁶ Nearly six million Jews live in the United States.²⁷ Researchers have found that between

¹⁸ Linda L. Ammons, *What's God Got to Do with It? Church and State Collaboration in the Subordination of Women and Domestic Violence*, 51 RUTGERS L. REV. 1207, 1271 (1999).

¹⁹ See Nooria Faizi, Comment, *Domestic Violence in the Muslim Community*, 10 TEX. J. WOMEN & L. 209, 213 (2001).

²⁰ *Id.* at 211–12.

²¹ See Julia Macfarlane, *Understanding Trends in American Muslim Divorce and Marriage: A Discussion Guide for Families and Communities*, INST. FOR SOC. POL'Y & UNDERSTANDING 1, 26 (2012).

²² Andrew L. Milne, *Sharia and Anti-Sharia: Ethical Challenges for the Cross-Cultural Lawyer Representing Muslim Women*, 57 S. TEX. L. REV. 449, 464–65 (2016).

²³ See Macfarlane, *supra* note 21 at 26.

²⁴ *Id.*

²⁵ See Milne, *supra* note 22, at 465.

²⁶ See, e.g., Lydia M. Belzer, *Toward True Shalom Bayit: Acknowledging Domestic Abuse in the Jewish Community and What to Do About it*, 11 CARDOZO WOMEN'S L.J. 241, 241 (2005); Michal Gilad, *In God's Shadow: Unveiling the Hidden World of Victims of Domestic Violence in Observant Religious Communities*, 11 RUTGERS J. L. & PUB. POL'Y 471, 493 (2014); Stacey A. Guthartz, *Domestic Violence and the Jewish Community*, 11 MICH. J. GENDER & L. 27, 28 (2004); Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171, 171 (1995); Adam H. Kolblenz, *Jewish Women Under Siege: The Fight For Survival on the Front Lines of Love and the Law*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 259, 259 (2009).

²⁷ Jeremy Glicksman, Note, *Almost, But Not Quite: The Failure of New York's Get Statute*, 44 FAM. CT. REV. 300, 302 (2006) (citing Jewish Virtual Library, *The Jewish Population of the World* (2006), available at <https://www.jewishvirtuallibrary.org/jewish-population-of-the-world>).

15 and 25 percent of Jewish women have experienced abuse at least once in their life.²⁸ These statistics are proportional to data found in other ethnic and religious groups.²⁹ While the pervasiveness of domestic violence is similar, Jewish survivors of domestic violence face unique challenges.³⁰

One study found that Jewish women who experience domestic violence are the least likely of any ethnic or religious group to use available resources or initiate self-help remedies, like support groups, social services, or women's shelters.³¹ Furthermore, Jewish women tend to stay in violent relationships longer than non-Jewish women.³² One reason for that may be rooted in the principle of "Shalom Bayit," which is a fundamental Jewish value, meaning peace in the home.³³ Under this principle it is the woman's responsibility to keep this peace as well as maintain family integrity.³⁴ Violence and abuse clearly disrupts peace in the home. Some Jewish women who experience domestic violence feel responsible for the abuse and consider it their failure to maintain Shalom Bayit.³⁵ Survivors may feel shame or guilt.³⁶ Furthermore, divorce could be viewed as a woman's failure to maintain the family's dignity.³⁷ These factors are likely a substantial cause explaining why Jewish women remain in violent relationships longer than non-Jewish women.³⁸

4. Domestic Violence and Other Religions

Relatively little research has been done examining domestic violence in other religions, such as Hinduism, Baptists, Mormons, Buddhism, or Jehovah's

²⁸ See Guidelines on Domestic Violence, Jewish Community Relations Council of San Francisco, the Peninsula, Marin, Sonoma, Alameda and Contra Costa Counties, (Mar. 12, 1997), https://jcrc.org/uploads/3.12.97_JCRC_CS_Violence.pdf [hereinafter Jewish Community Relations Council]; see also JEWISH WOMEN INTERNATIONAL, *JWI'S NEEDS ASSESSMENT: A PORTRAIT OF DOMESTIC ABUSE IN THE JEWISH COMMUNITY* (2004); NAT'L RESOURCE CTR. ON DOMESTIC VIOLENCE, RELIGION AND DOMESTIC VIOLENCE: INFORMATION AND RESOURCES: STATISTICS 5 (2007), https://vawnet.org/sites/default/files/materials/files/2016-09/NRC_ReligionStatistics.pdf.

²⁹ Guidelines on Domestic Violence, *supra* note 28.

³⁰ See Koblenz, *supra* note 26, at 259–60.

³¹ *Do Jewish Men Really Do That?: Domestic Violence in the Jewish Community*, <https://vawnet.org/sites/default/files/materials/files/2016-09/DoJewishMenDoThat.pdf>.

³² Guidelines on Domestic Violence, *supra* note 28 (citing Liane Clorfene-Casten, *A Chicago Haven for Jewish Battered Women*, LILITH (Winter 1993)).

³³ Marie M. Fortune et al., *A Commentary on Religion and Domestic Violence*, FAITH TRUST INST. 1, 9 (2010), <http://www.faithtrustinstitute.org/resources/articles/Commentary.pdf>.

³⁴ Gilad, *supra* note 26, at 503 (citing Hemi Ramiel, *The Religious Community is Coping with Domestic Violence*, NE'EMANEI TORAH VA'AVODAH, <http://toravoda.org.il/node/3285> (Published in Hebrew)).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 493–94.

Witnesses.³⁹ Researchers believe that domestic violence occurs in religious and non-religious populations at similar rates.⁴⁰ However, women who belong to any highly religious community are more vulnerable when abused.⁴¹

B. UNDERREPORTING OF DOMESTIC VIOLENCE

Rates of domestic violence are alarmingly high in the United States; however, experts agree that domestic violence is chronically underreported.⁴² In religious communities, underreporting may be even more severe due to additional pressures, such as reputation, cultural expectations, or a desire to be a good member of the faith.⁴³ This is particularly likely in highly observant communities and individuals.⁴⁴

C. HOW CLERGY ENCOURAGE PARISHIONERS TO REMAIN IN ABUSIVE RELATIONSHIPS: THEOLOGY AND PASTORAL PRACTICES

Men and women may be less likely to report domestic violence or leave an abusive relationship due to advice or counsel from clergy.⁴⁵ Religious leaders may unconsciously or explicitly encourage survivors to remain in dangerous situations.⁴⁶ For example, rabbis have advised battered women to submit to their husbands, saying things like “What are you doing to provoke your husband?” “Go home and be a good wife . . . things will get better.” or “Once a month? . . . How bad can that be?”⁴⁷ Christian clergy are also guilty of encouraging domestic violence survivors to remain with abusers, saying things such as “God never gives us more than we can endure” or “Pray for your husband; God will protect you.”⁴⁸

Clergy may intentionally or unintentionally persuade survivors to remain in unhealthy relationships through theology or pastoral practice.⁴⁹ Theology

³⁹ See *id.* at 473–75 (discussing domestic violence in religious communities).

⁴⁰ *Id.* at 478.

⁴¹ *Id.*

⁴² See, e.g., Enrique Gracia, *Unreported Cases of Domestic Violence Against Women: Towards an Epidemiology of Social Silence, Tolerance, and Inhibition*, 58 J. EPIDEMIOLOGY COMMUNITY HEALTH 536, 536 (2004) (“[R]eported cases of domestic violence against women (usually the most severe end of violence) and homicide of women by their intimate partners represents only the tip of the iceberg. According to this metaphor, most of the cases are submerged, allegedly invisible to society.”).

⁴³ Gilad, *supra* note 26, at 500, 518, 532.

⁴⁴ *Id.* at 483–84.

⁴⁵ *Id.* at 527–28.

⁴⁶ Ragsdale, *supra* note 7, at 1152–53.

⁴⁷ *Id.* at 1156 (quoting Rabbi Julie Spitzer, Sermon, “*Shalom Bayit*” and *Kabbalat Shabbat Service*, in DOMESTIC/FAMILY VIOLENCE AWARENESS: RABBI KIT 1, 8 (B’nai B’rith Women ed., 1994)).

⁴⁸ *Id.* at 1153.

⁴⁹ *Id.*

meaning religious views and beliefs, and pastoral practice meaning the way a pastor relates to church members through advice, counseling, or guidance.⁵⁰

There are several theologies that can influence individuals experiencing domestic violence. It is important to note that sometimes abusers can twist positive religious beliefs to manipulate another to stay with them.⁵¹ For example, the belief that God is omnipotent could imply that God wills the victim's abuse and they should not attempt to resist or stop it.⁵² Victims could believe that if God wanted their abuse to stop, He would end it- unless they deserve it.⁵³ Another theology emphasizes the suffering of Jesus Christ and His submission to God as a key to salvation.⁵⁴ This suggests to individuals that they also must submit to their suffering.⁵⁵ A theological belief in a hierarchy with God as supreme, followed by angels, men, and women can contribute to acceptance of family violence.⁵⁶ It can indicate that women are responsible to submit to the will of, and domination by, their husbands.⁵⁷

In pastoral practice clergy may misunderstand or misapply these religious doctrines to a person who is experiencing domestic violence.⁵⁸ This could be due to lack of education regarding domestic violence or simply an insufficient understanding of the congregant's dangerous situation.⁵⁹ It is critical for clergy to educate themselves regarding domestic violence as well as resources available to help church members who experience it.⁶⁰ Similarly, it is important for secular advocates to be aware of religious pressures and beliefs a survivor may experience and be sensitive to those needs.⁶¹

II. AN EXPLANATION OF THE CLERGY-PENITENT PRIVILEGE, THE ASSOCIATED HARMS, AND THE RELATION TO DOMESTIC VIOLENCE

Legislatures created privileges to protect certain relationships, such as attorney-client, therapist-patient, and clergy-penitent.⁶² Protecting these relation-

⁵⁰ *Id.* at 1152.

⁵¹ Gilad, *supra* note 26, at 510–11, 525.

⁵² DOROTHEE SOELLE, *SUFFERING* 11 (Everett Kalin trans., 1975).

⁵³ *See* Ragsdale, *supra* note 7, at 1154.

⁵⁴ *An Outline of the Faith: Commonly Called the Catechism*, in *THE BOOK OF COMMON PRAYER* 845, 849 (1979).

⁵⁵ ARUNA GNANADASON, *NO LONGER A SECRET: THE CHURCH AND VIOLENCE AGAINST WOMEN* 42–43 (1993).

⁵⁶ *See* Ragsdale, *supra* note 7, at 1154.

⁵⁷ *Id.*

⁵⁸ Gilad, *supra* note 26, at 527.

⁵⁹ *Id.* at 528.

⁶⁰ *Id.* at 536.

⁶¹ *Id.*

⁶² Christine P. Bartholomew, *Exorcising the Clergy Privilege*, 103 VA. L. REV. 1015, 1020 (2017).

ships is public policy for society's benefit.⁶³ A client should be able to be upfront with their attorney without fear that the attorney will be compelled to testify against them. A patient cannot receive help if they are not honest with their therapist. Similarly, society protects the relationship between cleric and congregant to allow individuals to fully engage in and participate in their chosen religion.⁶⁴ These relationships are considered worthy of protection at a cost to justice, allegedly a small cost.⁶⁵

However, the clergy-penitent privilege makes an assumption that is empirically untested: "only a broad absolute privilege can promote spiritual relationships, encourage individual autonomy, and mediate legal and canonical obligations."⁶⁶ Purported justifications for the privilege suggests there is a need to encourage religious relationships by stimulating the growth of communications and but for the privilege, individuals would be unwilling to confide in clergy.⁶⁷ This reasoning indicates the privilege creates little to no cost to justice.⁶⁸ The premise Part III challenges is "the injury that would inure to the relation by the disclosure of the communications is greater than the benefit thereby gained."⁶⁹

A. THE HISTORY AND DEVELOPMENT OF THE CLERGY PRIVILEGE

In 1813, in *People v. Phillips*, a Catholic priest refused to reveal information provided to him during sacramental confession by the defendant.⁷⁰ The New York Court of General Sessions was one of the first courts to recognize any type of clergy privilege.⁷¹ Just four years later, in *People v. Smith*, a New York trial court compelled a Protestant minister to testify about the defendant's confession.⁷² Following public outcry regarding the forced testimony, the New York legislature passed a statutory privilege protecting confidential exchanges

⁶³ Raymond F. Miller, Comment, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771 (1999).

⁶⁴ Bartholomew, *supra* note 62, at 1016.

⁶⁵ *Id.* at 1023.

⁶⁶ *Id.* at 1016.

⁶⁷ See 26 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5612 (2d ed. 1992).

⁶⁸ Bartholomew, *supra* note 62 at 1023–24.

⁶⁹ See 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2285, 2396 (1905).

⁷⁰ *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813) (excluding clergy-communicant exchanges on free exercise grounds), *reprinted in* 1 CATH. LAW 199, (1955).

⁷¹ *Exorcising the Clergy Privilege*, *supra* note 62, at 1020.

⁷² N.Y. CITY HALL REC. 77 (1817), *reprinted in* William F. Cahill, *Mutations of the Rule of Fraud in Marriage*, 1 CATH. LAW. 185, 198 (1955); *see also* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 106 (1983) (briefly discussing the case).

between all clergy in their professional capacity.⁷³ Other states followed and now every state in America, including the District of Columbia, has clergy privilege statutes.⁷⁴ All fifty states define clergy to include rabbis, priests, ordained or licensed ministers, and accredited Christian Science practitioners.⁷⁵ Furthermore, almost every state has since expanded statutory protection of clergy-penitent communications.⁷⁶ For example, six states have expanded the protection to include any person authorized to perform similar functions of any religion.⁷⁷ In addition, every state statute includes protection beyond sacramental confessions, containing safeguards for spiritual advice and communications of comfort.⁷⁸

The majority of federal and state clergy privileges include three requirements: (1) confidential, (2) spiritual communication, (3) made to a cleric in her

⁷³ 2 N.Y. REV. STAT., pt. III, tit. 3, art. 8, § 72 (1829) (current version at N.Y. C.P.L.R. § 4505).

⁷⁴ ALA. CODE § 12-21-166 (2012); ALASKA R. EVID. 506; ARIZ. REV. STAT. ANN. §§ 12-2233 (2016), 13-4062(3) (2010); ARK. R. EVID. 505; CAL. EVID. CODE §§ 1030–34 (Deering 2004); COLO. REV. STAT. § 13-90-107(1)(c) (2017); CONN. GEN. STAT. § 52-146b (2015); DEL. R. EVID. 505; D.C. CODE § 14-309 (2001); FLA. STAT. § 90.505 (2016); GA. CODE ANN. § 24-5-502 (2013); HAW. R. EVID. 506; IDAHO CODE § 9-203(3) (2010); 735 ILL. COMP. STAT. 5/8-803 (2016); IND. CODE ANN. § 34-46-3-1(3) (LexisNexis 2008); IOWA CODE § 622.10 (2017); KAN. STAT. ANN. § 60-429 (2005); KY. R. EVID. ANN. 505; LA. STAT. ANN. § 13:3734.2 (2006); LA. CODE EVID. ANN. art. 511 (2019); ME. R. EVID. 505; MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (LexisNexis 2013); MASS. GEN. LAWS ch. 233, § 20A (2016); MASS. R. EVID. 510; MICH. COMP. LAWS SERV. §§ 600.2156 (LexisNexis 2004), 767.5a(2) (LexisNexis 2002); MINN. STAT. § 595.02(1)(c) (2016); MISS. CODE ANN. § 13-1-22 (2012); MO. REV. STAT. § 491.060(4) (2016); MONT. CODE ANN. § 26-1-804 (2015); NEB. REV. STAT. § 27-506 (2016); NEV. REV. STAT. ANN. § 49.255 (LexisNexis 2012); N.H. REV. STAT. ANN. § 516:35 (2007); N.J. STAT. ANN. § 2A:84A-23 (West 2011); N.M. R. EVID. § 11-506; N.Y. C.P.L.R. § 4505 (CONSOL. 2003); N.C. GEN. STAT. § 8-53.2 (2015); N.D. R. EVID. 505; OHIO REV. CODE ANN. § 2317.02(c) (LexisNexis 2017); OKLA. STAT. tit. 12, § 2505 (2011); OR. REV. STAT. § 40.260 (2015); 42 PA. STAT. AND CONS. STAT. ANN. § 5943 (West 2017); 9 R.I. GEN. LAWS § 9-17-23 (2012); S.C. CODE ANN. § 19-11-90 (2014); S.D. CODIFIED LAWS § 19-19-505 (2016); TENN. CODE ANN. § 24-1-206 (2000); Tex. R. Evid. 505; UTAH CODE ANN. § 78B-1-137(3) (LexisNexis 2012); VT. STAT. ANN. tit. 12, § 1607 (2002); VA. CODE ANN. §§ 8.01-400, 19.2-271.3 (2015); WASH. REV. CODE § 5.60.060(3) (2016); W. VA. CODE ANN. § 57-3-9 (LexisNexis 2012); WIS. STAT. § 905.06 (2015–16); WYO. STAT. ANN. § 1-12-101(a)(ii) (2017).

⁷⁵ See, e.g., ALA. CODE § 12-21-166(a)(1) (2012); ALASKA R. EVID. 506; ARIZ. REV. STAT. §§ 12-2233 (2016), 13-4062(3) (2012); ARK. R. EVID. 505(a)(1); CAL. EVID. CODE §§ 1030–34 (Deering 2004); COLO. REV. STAT. § 13-90-107(1)(c) (2017); CONN. GEN. STAT. § 52-146b (2015); DEL. R. EVID. 505(a)(1).

⁷⁶ See, e.g., Anthony Merlino, *Tightening the Seal: Protecting the Catholic Confessional from Unprotective Priest-Penitent Privileges*, 32 SETON HALL L. REV. 655, 699 (2002) (discussing clergy privilege statutes enacted by 2002).

⁷⁷ See, e.g., N.J. STAT. ANN. § 2A:84A-23 (2011); UTAH R. EVID. 503(a)(1) (2011); GA. CODE ANN. § 24-5-502 (2013); MISS. R. EVID. 505(a)(1) (2016); LA. CODE EVID. ANN. art. 511(A)(1) (2017); KY. R. EVID. ANN. 505(a)(1) (2019).

⁷⁸ The expansion of the types of protected communications varies from state to state, but frequently includes spiritual advice, solace, or comfort. See, e.g., MASS. GEN. LAWS ch. 233 § 20A (2016).

professional capacity.⁷⁹ In criminal cases, courts deny the clergy privilege seventy-five percent of the time.⁸⁰ In contrast, courts deny the privilege in civil cases only fifty-five percent of the time.⁸¹ Courts deny the privilege most often because the proponent is unable to establish one of the requirements.⁸² Law professor Christine P. Bartholomew collected data from over 700 clergy privilege decisions and found that courts rely heavily on clergy testimony to determine if the clergy-penitent communication satisfies the necessary requirements.⁸³

B. HOW CLERGY TREAT THE PRIVILEGE IN PRACTICE

If courts rely on clergy testimony to determine if a particular communication can be excluded through the clergy-penitent privilege, it is important to explore how the clergy treat the privilege. Clergy tend to narrowly define their ministerial role.⁸⁴

Clergy often draw distinctions between their ministerial capacity and their actions as a friend.⁸⁵ For example, in *State v. McCurdy*, the defendant was convicted of sexual abuse partly due to the testimony of his pastor and longtime friend.⁸⁶ When Pastor Acker spoke with McCurdy over the phone, McCurdy said he was being investigated and gave Acker details of his actions.⁸⁷ McCurdy and Acker prayed together, and Acker advised McCurdy to seek God and ask for His help in the matter.⁸⁸ Still, Acker told the court that in the conversation he acted as a friend, not a pastor.⁸⁹ He claimed that he was spiritual in nature and often gave spiritual advice to others outside of his capacity as a pastor.⁹⁰ The court relied on this testimony and denied the clergy privilege.⁹¹

Clergy also distinguish between their ministerial role and their role as disciplinarians⁹² and employers,⁹³ and narrowly define what constitutes a protect-

⁷⁹ There is frequent variation in the words and phrasing of state statutes. Compare GA. CODE ANN. § 24-5-502 (2013) (communications “made by any person professing religious faith, seeking spiritual comfort, or seeking counseling” are privileged), with FLA. STAT. § 90.505 (2017) (privileging communications made “for the purpose of seeking spiritual counsel and advice”).

⁸⁰ Bartholomew, *supra* note 62, at 1029.

⁸¹ *Id.*

⁸² *Id.* at 1031.

⁸³ *Id.*

⁸⁴ *Id.* at 1032.

⁸⁵ *Id.*

⁸⁶ *State v. McCurdy*, 2012 WL 4901158, *1 (Iowa Ct. App. 2012).

⁸⁷ *Id.* at *3.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See, e.g., *Kos v. State*, 15 S.W.3d 633, 639–40 (Tex. App. 2000).

⁹³ See, e.g., *Bonds v. State*, 837 S.W.2d 881, 884 (Ark. 1992).

ed communication.⁹⁴ Historically, the privilege was a protection for Catholic sacramental confessions.⁹⁵ Other religions do not recognize confession as a sacrament and legislatures expanded the privilege to non-Catholics.⁹⁶ That type of legislation created an extremely broad protection of religion communications, especially when compared to other evidentiary rules.⁹⁷

However, an examination of clergy testimony indicates that an absolute privilege is not necessary to protect the freedom of religion protected by the First Amendment.⁹⁸ Most clergy privilege decisions involve Protestants, however even in cases involving Judaism, Santeria, Islam, and even Catholicism courts have found the privilege does not apply based on clergy testimony.⁹⁹ Clergy action before trials and testimony during litigation continue to demonstrate there is no need for an absolute privilege.¹⁰⁰

C. ISSUES ARISING DUE TO AN ABSOLUTE CLERGY-COMMUNICANT PRIVILEGE

An absolute clergy privilege is problematic because: (1) it prevents clergy who wish to testify from doing so; (2) it interferes with justice; and (3) ultimately, the harm outweighs the benefit. It is important to note that because the clergy-penitent privilege is an absolute privilege, it means that a case-specific showing of a critical need for the testimony cannot override the privilege.¹⁰¹

1. An Absolute Privilege Prevents Clergy Who Want to Testify

Clergy have many responsibilities which may even include a duty to testify.¹⁰² One cleric explained the competing duties:

[Clergy] are citizens under the laws of their own society; they also have responsibilities to individual members of their families and to their neighbors. As people of broad moral outlook, many clergy feel an accountability to the wider hu-

⁹⁴ Bartholomew, *supra* note 62, at 1035.

⁹⁵ The Catholic seven sacraments include confession. General Council of Trent, Seventh Session, Decree of the Sacraments, Canon I. No. 1311 (1547), reprinted in J. NEUNER & J. DUPOIS, *THE CHRISTIAN FAITH: IN THE DOCTRINAL DOCUMENTS OF THE CATHOLIC CHURCH* 522 (Jacques Dupois ed., 6th ed. 1998).

⁹⁶ Bartholomew, *supra* note 62, at 1035.

⁹⁷ *See id.* at 1021.

⁹⁸ *Id.* at 1035.

⁹⁹ *People v. Johnson*, 497 N.Y.S.2d 539, 539 (App. Div. 1985) (Islam); *People v. Drelich*, 506 N.Y.S.2d 746, 748 (App. Div. 1986) (Judaism); *Morales v. Portuondo*, 154 F. Supp. 2d 706, 729 (S.D.N.Y. 2001) (Catholicism); *State v. Gil*, No. 2 CA-CR 2013-0508, 2014 WL 4725805, at *4 (Ariz. Ct. App. Sept. 23, 2014) (Santeria).

¹⁰⁰ Bartholomew, *supra* note 62, at 1031–37.

¹⁰¹ EDWARD J. IMWINKERIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 1.2.1 (Richard D. Friedman ed., 1st ed. 2002) (discussing absolute and qualified privileges).

¹⁰² *See, e.g.*, Mark Herman, *The Liability of Clergy for the Acts of Their Congregants*, 98 GEO. L.J. 153, 167 (2009).

man community. They are accountable to their denominational leadership and denominational policy. They also have an answerability to God as they understand God. Within their congregations, clergy must assume the difficult and sometimes contradictory roles of administrator, preacher, counselor, teacher, worship leader, officiant at specialized ritual functions, friend, and professional colleague, among others.¹⁰³

Clergy may have a duty to keep communications confidential, but that is often outweighed by a duty to aid justice or to assist victims and survivors.¹⁰⁴ Oftentimes clergy may feel they have a responsibility to God to testify about a crime. In *State v. Hancock*, a murder case, the defendant told the pastor details regarding his role in his wife's recent disappearance during counseling.¹⁰⁵ The pastor chose to testify regarding this communication because he felt he had a "paramount duty" as a citizen and pastor to help find the victim.¹⁰⁶

When determining whether to grant the clergy privilege, judges rely heavily on clergy testimony.¹⁰⁷ Data shows that the clergy-penitent privilege is declining, because clergy members themselves have not embraced an absolute privilege, showing that they tend to want to testify.¹⁰⁸ In a state with a broad statute that merely requires a confidential communication with a clergy to claim an absolute privilege, an abuser would be able to prevent the clergy member from testifying even if they desired to.¹⁰⁹

2. *It Interferes with Justice*

Our society values the freedom to engage in religious practices and beliefs.¹¹⁰ The First Amendment protects two separate concepts—the freedom to believe and the freedom to act.¹¹¹ The freedom to believe is absolute, but the freedom to act is not.¹¹² Both Congress and the states are unable to enact legislation regarding an individual's beliefs, but they are able to prohibit religious acts if they are detrimental to the best interests of society.¹¹³ "Crime is not the

¹⁰³ See WILLIAM W. RANKIN, CONFIDENTIALITY AND CLERGY: CHURCHES, ETHICS, AND THE LAW 8–9 (1990).

¹⁰⁴ See, e.g., Azizah al-Hibri, *The Muslim Perspective on the Clergy-Penitent Privilege*, 29 LOY. L.A. L. REV. 1723, 1730 (1995); Marie M. Fortune, *Confidentiality and Mandatory Reporting: A Clergy Dilemma?*, FAITH TR. INST. 1, 3–4 (2014).

¹⁰⁵ *Tennessee v. Hancock*, No. M2012-02307-CCA-R3-CD, 2014 WL 7006969, *5 (Tenn. Crim. App. Dec. 12, 2014), *appeal denied* (May 14, 2015).

¹⁰⁶ *Id.*

¹⁰⁷ Bartholomew, *supra* note 62, at 1031.

¹⁰⁸ *Id.* at 1017.

¹⁰⁹ *Id.* at 1068–69.

¹¹⁰ U.S. CONST. amend. I.

¹¹¹ *United States v. Ballard*, 322 U.S. 78, 86 (1944).

¹¹² *Id.*

¹¹³ See *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (stating, "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 good order.").

less odious because sanctioned by what any particular sect may designate as religion.”¹¹⁴

For example, the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS) is a break off sect from the LDS (Mormon) church.¹¹⁵ The FLDS believe in polygamy and engage in a practice called placing, where the prophet of the congregation assigns each marriage in the congregation.¹¹⁶ The polygamous practice creates more available men than women in the church community.¹¹⁷ The Church remedies this problem by assigning older men to marry child brides.¹¹⁸ The Church’s actions lead to incest, abuse, and domestic violence, including sexual violence, fear, intimidation, and battering.¹¹⁹

Despite these behaviors allegedly being associated with their religious beliefs, it does not excuse the illegality of these actions. In 2007, Warren Jeffs, the president of the FLDS Church, was convicted of two counts of first degree felony rape as an accomplice when he forced a 14-year-old girl to marry her 19-year-old cousin.¹²⁰

Most religions do not embrace such outrageous and horrific crimes, but this example demonstrates the limits on freedom of religion. An absolute privilege interferes with justice because disallowing clergy to testify can lead to harmful individuals escaping convictions. Instead of an automatic and absolute privilege, there should be a case by case evaluation to ensure justice is being served by balancing religious freedom and societal interests.

3. *It Protects Clergy Who are Perpetrators*

This paper is unable to adequately cover the scope of clergy perpetrators, but it is important to mention that an absolute privilege is a protection for clergy who are offenders in their families, personal lives, or congregations. While

¹¹⁴ Philip B. Kurland, *Religion and the Law of Church and State and the Supreme Court* 21, 24 (1962).

¹¹⁵ See, e.g., RAY B. WEST, JR., *KINGDOM OF THE SAINTS: THE STORY OF BRIGHAM YOUNG AND THE MORMONS* 342 (1957); B.A. Robinson, *Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS)*, ONTARIO CONSULTANTS ON RELIGIOUS TOLERANCE (July 25, 2004), <http://www.religioustolerance.org/fls.htm>.

¹¹⁶ John Dougherty, *Derail Polygamy’s Money Train*, PHOENIX NEW TIMES (April 7, 2005), <http://www.phoenixnewtimes.com/2005-04-07/news/derail-polygamy-s-money-train/1>.

¹¹⁷ Robinson, *supra* note 115.

¹¹⁸ *Id.* (There are some cases “in which girls from the ages of 13 to 16 have been married to older men.”) Additionally, adult women have reported battering, intimidation, and sexual abuse in polygamous families. *USA: Polygamy related abuses in Utah*, WOMEN LIVING UNDER MUSLIM LAWS (Feb. 15, 2002), <http://www.wluml.org/action/usa-polygamy-related-abuses-utah>.

¹¹⁹ *Id.*

¹²⁰ *Warren Jeffs May Retain His Grip Even From Jail*, RELIGION NEWS BLOG, <https://www.religionnewsblog.com/15767/warren-jeffs-may-retain-his-grip-even-from-jail> (last updated Sep. 27, 2007). Felony sex crimes were due to Jeffs’ role in orchestrating marriages between underage girls and older men. Nancy Perkins, *Resignation: Jeffs has dropped FLDS position*, DESERET NEWS (Dec. 6, 2007).

there are certainly thousands of clergy members who behave properly,¹²¹ there are far too many clergy members who take advantage of their position of authority to abuse and harm others.¹²²

Regarding clergy sex abuse scandals in the last two decades, clergy have attempted to create a blanket protection.¹²³ The clergy privilege can be used to promote self-interest, shown as clergy have raised the privilege in an attempt to protect communications between alleged perpetrators and superiors as well as fellow clergy members.¹²⁴ It is shameful to allow clergy members to avoid consequences for abhorrent crimes by permitting them to abuse the very privilege intended to foster and protect spiritual relationships.

4. *The Harm from an Absolute Privilege Outweighs the Possible Benefit*

Overall there is more harm that results from a broad and absolute clergy-penitent privilege. The suggested benefit of the absolute privilege includes fostering the relationship between clergy and communicant.¹²⁵ This rationale implies that individuals would not confide in their religious leader if they knew it was not protected.

However, evidence demonstrates that such communications and confessions occur “irrespective of the presence of absence of evidentiary privilege.”¹²⁶ In fact, evidence scholar Professor Edward Imwinkelried declared, “It is an insult to the sincerity of a fideist’s belief to argue that he or she will make a doctrinally required confession only if the legal system confers an evidentiary privilege on the confession.”¹²⁷

The only benefit that occurs from a clergy privilege, is the protection of religious freedom. However, an absolute privilege is not required to maintain protection of religious rights. The resulting harms from an absolute privilege

¹²¹ Shawn P. Bailey, *How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege*, B.Y.U. L. REV. 489, 491, n.12 (2002).

¹²² See, e.g., Fox Butterfield, *Two Priests Who Abused Boys in Maine Are Removed*, N.Y. TIMES, (Mar. 10, 2002).

¹²³ See, e.g., *People v. Campobello*, 810 N.E.2d 307, 311–12 (Ill. App. Ct. 2004) (discussing monsignor who refused to turn over any requested documents in a church abuse case); *Roman Catholic Archbishop v. Superior Court*, 32 Cal. Rptr. 3d 209, 216, 231 (Ct. App. 2005) *as modified on denial of reh’g* (Aug. 16, 2005) (addressing the Archbishop’s improper assertion of the privilege for twenty-two document requests).

¹²⁴ See, e.g., *Hutchison v. Luddy*, 606 A.2d 905, 908 (Pa. Super. Ct. 1992); *Kos v. State*, 15 S.W.3d 633, 638–40 (Tex. App. 2000); *Campobello*, 810 N.E.2d at 311; *Ex parte Zoghby*, 958 So. 2d 314, 325 (Ala. 2006).

¹²⁵ 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2285, 2396 (J. McNaughton rev. ed. 1961) (1904).

¹²⁶ 1 GEORGE E. DIX ET. AL., MCCORMICK ON EVIDENCE § 76.2, at 139 (Kenneth S. Broun ed., 6th ed. 2006).

¹²⁷ EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 6.2.3, at 467–68 (Richard D. Friedman ed., 1st ed. 2002).

would certainly lessen with a case by case qualified clergy-communicant privilege.

D. A PROPOSED QUALIFIED CLERGY PRIVILEGE

A qualified clergy-penitent privilege would be more beneficial to society than the current absolute privilege. Religious freedom is critical in our nation and protecting religious relationships is an important part of that. However, that protection should be balanced with the epidemic of domestic violence in America and particularly in religious communities. A case-specific approach is essentially what currently occurs, when clergy decide if a communication fits statutory requirements and is thus protected.¹²⁸ A statutorily adopted qualified privilege would return that decision making responsibility to the courts.¹²⁹ Instead of simply accepting clergy's definitions, the judiciary can make case-specific weighing.¹³⁰ As Professor Bartholomew proposes, "Courts and legislators can integrate the lessons learned from existing jurisprudence. Clergy's testimony and conduct have generated multi-factor tests to balance the privilege against the need for evidence in a given case."¹³¹

When the Federal Rules of Evidence were adopted, they liberalized the admissibility of evidence.¹³² The rules instruct courts that evidence is admissible unless there is a special reason to exclude it.¹³³ Federal and state evidentiary rules have become less restrictive, but have not similarly updated the clergy-communicant privilege.¹³⁴ The Supreme Court has emphasized the need for "evolutionary development" of privileges, particularly when "experience suggests the need for change."¹³⁵ Qualifying the clergy privilege assimilates judicial experience with the existing privilege and more closely aligns with other existing evidentiary rules.¹³⁶

As discussed above, it is critical to find an appropriate balance between seeking justice and protecting religious rights. A qualified clergy privilege would enable courts to evaluate, in each specific case, if the privilege "promotes or compromises the 'prestigious place in society' that religion holds."¹³⁷ A case-by-case assessment would retain protection of spiritual relationships

¹²⁸ Bartholomew, *supra* note 62, at 1066.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See, e.g., Jeffrey Cole, *The Federal Hearsay Rule: You Can't Believe Everything You Hear*, 34 LITIG. 51, 56 (2008).

¹³³ *Id.* at 54.

¹³⁴ See, e.g., Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J. L. & POL'Y 553, 553-54 (2007).

¹³⁵ *Trammel v. United States*, 445 U.S. 40, 47-48 (1980).

¹³⁶ Bartholomew, *supra* note 62, at 1068.

¹³⁷ *Id.*

while tempering the harm caused by a broad and absolute privilege.¹³⁸ Furthermore, an examination of the clergy's competing duties also protects the spiritual relationship between clergy and other communicants.¹³⁹

Qualifying the clergy-penitent privilege is unlikely to harm spiritual relationships by preventing potential defendants from confiding in clergy.¹⁴⁰ For example, about seventy-five percent of detained individuals still talk to law enforcement after hearing Miranda warnings.¹⁴¹ Moreover, communicants already continue to confide in clergy, even when clergy directly state intention to report the information.¹⁴²

Perhaps even better than a qualified privilege, is a series of codified exceptions and presumptions, which would offer additional predictability.¹⁴³ Exceptions could remove certain types of communications, such as violence, from protected status. Legislatures could even create different standards for various causes of action, like spousal privileges.¹⁴⁴

Regardless of proffered solutions, clearly a broad and absolute clergy-penitent privilege is not in the best interest of society. Congress and state legislatures should amend currently clergy-communicant privilege statutes to create a qualified privilege. Such a law would protect clergy and spiritual relationships while striking a balance with the fundamental laws of fairness and justice.

E. THE CLERGY PRIVILEGE AND DOMESTIC VIOLENCE

The clergy-penitent privilege is directly related to epidemic of domestic violence. As indicated in the chart below, the clergy privilege is asserted most often in murder cases. The Centers for Disease Control and Prevention ("CDC") released a report in 2017 analyzing the murders of women.¹⁴⁵ The CDC found that fifty-five percent of female murders were domestic violence related.¹⁴⁶ Domestic violence related crimes are likely to fall in each type of case involving clergy privilege assertions. Murder, sex crimes, and family cases are most likely to relate to domestic violence.¹⁴⁷ However, property crimes and personal crimes can also be linked to domestic violence.¹⁴⁸

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1069.

¹⁴¹ See Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653 (1996).

¹⁴² Bartholomew, *supra* note 62, at 1069.

¹⁴³ *Id.* at 1072.

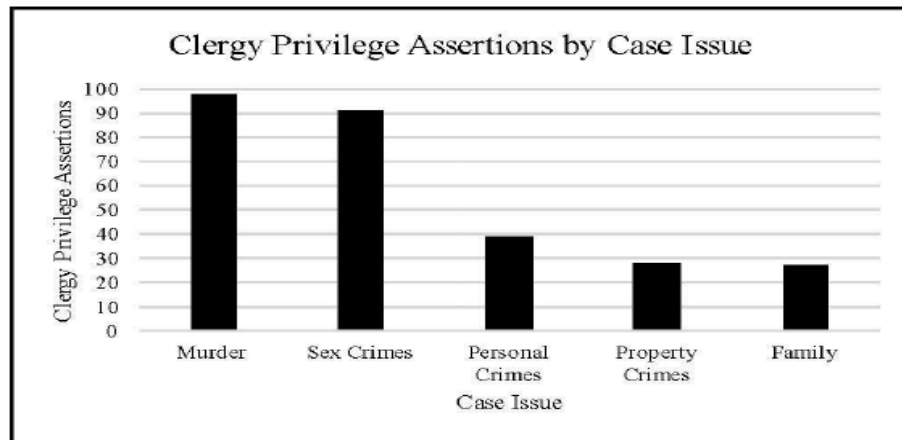
¹⁴⁴ *Id.*

¹⁴⁵ Olga Khazan, *Nearly Half of All Murdered Women Are Killed by Romantic Partners*, ATLANTIC (Jul. 20, 2017), <https://www.theatlantic.com/health/archive/2017/07/homicides-women/534306/>.

¹⁴⁶ *Id.*

¹⁴⁷ Bartholomew, *supra* note 62, at 1028.

¹⁴⁸ *Id.*



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An absolute clergy privilege encourages domestic violence by disallowing proper intervention. When law enforcement and prosecution have become properly involved, it is often an abuser's word against the survivor's.¹⁵⁰ In criminal cases, this can lead to credibility issues and create difficulty obtaining convictions.¹⁵¹ Corroborating a survivor's testimony or testifying regarding a confession would substantially assist in the prosecution of abusers and the protection of survivors.

Clergy are often the first to learn about domestic violence, from the survivor, the perpetrator, other congregants, or by observation.¹⁵² Additionally, they are often privy to specific details regarding the violent situation.¹⁵³ Furthermore, clergy have responsibilities to help survivors both in and out of their congregation.¹⁵⁴ Allowing clergy to testify, when appropriate, through a qualified clergy privilege would enable clergy to protect survivors and help them receive justice.

¹⁴⁹ *Id.*

¹⁵⁰ Tiffany Sala, *What Do You Get When You Abuse Your Spouse? Spousal Support*, 50 U. PAC. L. REV. 735, 757 (2019).

¹⁵¹ David K. Warren, *A Man's Home Is His Castle, but it Has a Secret Dungeon: Domestic Violence Victims Need an Amendment to Florida's All-Party Consent Law*, 69 FLA. L. REV. 223, 234–36 (2017).

¹⁵² *When I Call for Help*, *supra* note 3.

¹⁵³ *See, e.g.*, *State v. McCurdy*, 823 N.W.2d 418, 2012 WL 4901158, *1–4, *3 (8th Cir. Oct. 17, 2012).

¹⁵⁴ *See, e.g.*, *Fortune*, *supra* note 104, at 4.

III. A FORM OF DOMESTIC VIOLENCE—CHILD ABUSE

Domestic violence is often considered violence between intimate partners, spouses, or significant others.¹⁵⁵ However, it can also include harm to a family or household member.¹⁵⁶ This can include violence between siblings or parents and children.¹⁵⁷ A particularly abhorrent form of domestic violence occurs when parents are violent to their children instead of providing the love and safety they are entrusted with.

A child experiences abuse or neglect every thirty-six seconds in the United States.¹⁵⁸ There were 702,000 substantiated cases of child abuse or neglect in 2014.¹⁵⁹ As discussed above, religious beliefs or participation does not act as a protection for intimate partner violence. One study suggests that religious beliefs that hold noninterference in families in high regard may be a risk factor for child maltreatment.¹⁶⁰ This Part does not address instances of child abuse from a clergy, but rather focuses on child abuse from a parent or caretaker as a form of domestic violence, as well as the relation to the clergy privilege.

A. THE INTERACTION BETWEEN MANDATORY CHILD ABUSE REPORTING LAWS AND THE CLERGY PRIVILEGE

Society condemns child abuse. States have created reporting statutes to assist with the prosecution of child abuse.¹⁶¹ Additionally, this type of legislation was intended to protect children.¹⁶² Reporting statutes requires certain individuals to report known or suspected child abuse.¹⁶³ Initially, reporting statutes compelled only doctors and other medical professionals.¹⁶⁴ Every state in

¹⁵⁵ Gilad, *supra* note 26, at 477.

¹⁵⁶ *Domestic Violence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁵⁷ NAT'L CONF. OF ST. LEGIS., *Domestic Violence/Domestic Abuse Definitions and Relationships*, (June 16, 2019), <http://www.ncsl.org/research/human-services/domestic-violence-domestic-abuse-definitions-and-relationships.aspx>.

¹⁵⁸ Kimberly Day, *What Will it Take to End Child Abuse Fatalities in the United States?*, https://www.socialworktoday.com/archive/exc_042911.shtml (last visited Feb. 15, 2020).

¹⁵⁹ Every Child Matters, *Prevent Child Abuse & End Death From Abuse and Neglect*, (2016), <http://everychildmatters.org/our-issues/safe-kids/> (last visited on Feb. 15, 2020).

¹⁶⁰ OLIVER C. S. TZENG ET AL., *THEORIES OF CHILD ABUSE AND NEGLECT: DIFFERENTIAL PERSPECTIVES, SUMMARIES, AND EVALUATIONS* (1991).

¹⁶¹ See John E.B. Myers et al., *Prosecution of Child Sexual Abuse in the United States*, in *CRITICAL ISSUES IN CHILD SEXUAL ABUSE: HISTORICAL, LEGAL, AND PSYCHOLOGICAL PERSPECTIVE* 27, 57 (Jon R. Conte ed., 2002).

¹⁶² Andrew A. Beerworth, *Treating Spiritual and Legal Counselors Differently: Mandatory Reporting Laws and the Limitations of Current Free Exercise Doctrine*, 10 ROGER WMS. U.L. REV. 73, 103–04 (2004).

¹⁶³ *Id.* at 76.

¹⁶⁴ See, e.g., Ashley Jackson, *The Collision of Mandatory Reporting Statutes and the Priest-Penitent Privilege*, 74 UMKC L. REV. 1057, 1065.

America adopted some type of mandatory reporting statute by 1967.¹⁶⁵ Over time, states have included others as mandated reporters, typically those likely to encounter child abuse.¹⁶⁶ Some professionals included in mandating statutes are teachers and educators, therapists or mental health professionals, law enforcement, doctors, and social workers.¹⁶⁷

Most reporting statutes have two types of provisions, “provisions that apply to certain individuals and permissive reporting provisions that apply to everyone.”¹⁶⁸ Statutes frequently include immunity from suit for those who report.¹⁶⁹ Furthermore, reporting statutes typically include civil and criminal liability for statutorily required individuals who fail to report.¹⁷⁰

Some states have included clergy as professionals required to report suspected child abuse.¹⁷¹ The clergy addition has been somewhat controversial and met with resistance.¹⁷² Notably, a statute naming clergy as mandated reporters of child abuse appears to be conflicting with a clergy-penitent privilege statute.¹⁷³ States have generally taken three different approaches to handling this contradiction: 1) some states explicitly abrogate the clergy-penitent privilege in cases relating to suspected child abuse; 2) some states include an inclusive catch-all provision requiring “any person” to report suspected child abuse; and 3) other states specifically exempt clergy from reporting because of the clergy-communicant privilege.¹⁷⁴

At least twenty states preserve an absolute and full clergy-penitent privilege, which allows clergy to refrain from reporting known or suspected child

¹⁶⁵ Lawrence R. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69, 75 (1982); Jackson, *supra* note 164, at 1065–66; *see, e.g.*, ALA. CODE § 26-14-3 (2019); ALASKA STAT. ANN. § 47.17.020 (West 2019); ARIZ. REV. STAT. ANN. § 13-3620 (2019); CAL. PENAL CODE § 11166 (West 2019); COLO. REV. STAT. § 19-3-304 (West 2019); CONN. GEN. STAT. ANN. § 17a-101(b) (West 2019); DEL. CODE ANN. tit. 16, § 903 (West 2017); FLA. STAT. ANN. § 39.201 (West 2019).

¹⁶⁶ *See* Jackson, *supra* note 164, at 1066.

¹⁶⁷ *Id.*

¹⁶⁸ Heather Rushing Potter, Comment, *Confidentiality in Mediation and the Duty to Report Child Abuse*, 29 J. LEGAL PROF. 269, 270 (2005).

¹⁶⁹ *Id.* at 270.

¹⁷⁰ Christopher R. Pudelski, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-Smith World*, 98 NW. U.L. REV. 703, 713 (2004); *see also* Landeros v. Flood, 551 P.2d 389, 395–96 (Cal. 1976). In *Flood*, the court held that doctors can be liable for negligence if they do not report suspected child abuse. *Id.*

¹⁷¹ Pudelski, *supra* note 170, at 713.

¹⁷² *See* Chad Horner, *Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society*, 45 DRAKE L. REV. 697, 730–31 (1997); Jackson, *supra* note 164, at 1062; J. Michael Keel, *Law and Religion Collide Again: The Priest-Penitent Privilege in Child Abuse Reporting Cases*, 28 CUMB. L. REV. 681, 682 (1998).

¹⁷³ Jackson, *supra* note 164, at 1067.

¹⁷⁴ *Id.* at 1066; Beerworth, *supra* note 162, at 103.

abuse.¹⁷⁵ Only thirteen states explicitly require clergy to report abuse.¹⁷⁶ Finally, ten states require “any person” to report known or suspected abuse, but do not address how this law interacts with conflicting clergy-communicant privileges.¹⁷⁷

Clergy are in a unique position to receive information regarding child abuse.¹⁷⁸ It is critical for states to use such a powerful resource to help combat child abuse. Clergy have moral and often religious responsibilities to protect congregants and children in particular.¹⁷⁹ Furthermore, the State has an obligation to regulate the health, safety, and welfare of its citizens.¹⁸⁰

States should abrogate the clergy-communicant privilege as it conflicts with mandatory child abuse reporting statutes. Children are vulnerable and often unable to protect or advocate for themselves. In instances of domestic violence where children are harmed by a parent or other guardian, another adult must take steps to ensure children are protected. Often the adult who is aware of the abusive situation is the family’s spiritual or religious leader. Shame on any secular or political leader who allows someone to stand idly by while a child is harmed, in the name of religion.

Some claim that an abrogated clergy-penitent privilege would violate the Free Exercise Clause, would discourage parishioners from pursuing religious guidance or religiously mandated confession, would intrude upon individual privacy rights, and would lead to a slippery slope of governmental intrusion.¹⁸¹

Abrogating the clergy privilege would not violate the Free Exercise Clause.¹⁸² In *Employment Division, Department of Human Resources of Ore-*

¹⁷⁵ Beerworth, *supra* note 162, at 99 n.171–72. (States protecting the full clergy-communicant privilege include Alaska, Arkansas, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Minnesota, Montana, New Mexico, New York, Ohio, Oregon, South Dakota, Utah, Virginia, and Vermont).

¹⁷⁶ *Id.* at 99 n.173. (These states are Arizona, California, Colorado, Connecticut, Illinois, Massachusetts, Michigan, Mississippi, Montana, North Dakota, Pennsylvania, South Carolina, and Texas).

¹⁷⁷ *Id.* at 99–100 n.174. (States using a catch-all phrase like “any person” are Delaware, Indiana, Kentucky, Nebraska, Nevada, New Jersey, Oklahoma, Tennessee, Wisconsin, and Wyoming).

¹⁷⁸ Pudelski, *supra* note 170, at 736 (“[O]ne large obstacle to preventing child abuse is the limited ability of the state to discover abuse in the first place. Consequently, because clergy members are in unique positions to receive such information, they appear to be one of the state’s most important resources to combat abuse.”).

¹⁷⁹ EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 1.2.1 (Richard D. Friedman ed., 2d. 2009).

¹⁸⁰ See Jackson, *supra* note 164, at 1073 (“The protection of children is a very legitimate and important state interest that must be carefully weighed against society’s interest in protecting and preserving the relationship between a clergy member and a parishioner.”).

¹⁸¹ See Beerworth, *supra* note 162, at 106; Horner *supra* note 172, at 730; Jackson, *supra* note 164, at 1070; Keel, *supra* note 172, at 682–83.

¹⁸² See Julie M. Arnold, Note, “Divine” Justice and the Lack of Secular Intervention: Abrogating the Clergy-Communicant Privilege in Mandatory Reporting Statutes to Combat Child Sexual Abuse, 42 VAL. U.L. REV. 849, 898 (2008).

gon v. Smith, the Supreme Court held that religiously neutral laws can be generally applied.¹⁸³ Abrogating the clergy-communicant privilege as to child abuse would be a general law which would not target any church, religion, or sects and would apply equally to all.¹⁸⁴ Furthermore, a mandated reporter who fails to report known or suspected child abuse can be criminally prosecuted.¹⁸⁵ In a state with a reporting statute requiring “any person” to report, but provides an exception for clergy, an injustice occurs.¹⁸⁶ An agnostic person is held to a higher standard of the criminal law than a well-respected clergy member.¹⁸⁷

Some claim abrogating the clergy-communicant privilege will interfere with the practice of religion, such as seeking spiritual counsel or participating in confession.¹⁸⁸ However, in researching the clergy privilege, experts found individuals continue to confess and seek guidance regarding crimes to clergy, even if the clergy explicitly states their intention to report the crime.¹⁸⁹ It is unlikely that result would be different with child abuse.

Those who oppose an abrogation of the clergy privilege may argue that it interferes with an individual’s privacy rights and limiting the privilege will lead to less individual privacy in the context of religion.¹⁹⁰ While individual privacy is crucial, requiring clergy to follow mandated reporting laws is not a significant interference with privacy.¹⁹¹ Additionally, abrogating the privilege just as it pertains to mandated reporting of child abuse would still protect the majority of clergy-communicant communications.¹⁹²

Finally, a slippery slope argument against abrogating the privilege is not convincing. It is possible the State could continue to restrict the privilege in other contexts. However, other evidentiary privileges have had exceptions carved out without a deterioration of the original privilege.¹⁹³

¹⁸³ *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 881 (1990).

¹⁸⁴ See Arnold, *supra* note 182, at 890.

¹⁸⁵ Seletha R. Butler & Valerie Nijiiri, *Higher Education Governance: Proposals for Model Child Protection Governance Policy*, 2015 BYU EDUC. & L. J. 367, 373–74 (2015).

¹⁸⁶ Arnold, *supra* note 182, at 891.

¹⁸⁷ *Id.*

¹⁸⁸ See Bartholomew, *supra* note 62, at 1035.

¹⁸⁹ *Id.* at 1069.

¹⁹⁰ David M. Greenwald et al., *The Clergy Communications Privilege*, 1 TESTIMONIAL PRIVILEGES § 6:1, § 6:1 n.1 (2006).

¹⁹¹ See Arnold, *supra* note 182, at 895.

¹⁹² *Id.* at 895–96.

¹⁹³ *Id.* at 899–901. (While not officially enacted by Congress, federal common law privileges, recognized by the Supreme Court, carve out exceptions for reporting, such as in the husband-wife privilege. See FED R. EVID. 505 (not enacted). According to proposed Rule 505, there is no husband-wife privilege “(1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage” *Id.* at (c)(1)-(2). Similarly, proposed rule 504 carves out exceptions to the psychotherapist-patient privilege for communications relevant to proceedings for hospitalizing a patient for mental illnesses, communications made in the course of a judge-ordered mental examination, or

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CONCLUSION

In conclusion, state legislatures and Congress should act to qualify the clergy-communicant privilege to allow a case by case showing as well as abrogate the clergy-penitent privilege regarding mandated child abuse reporting laws. Domestic violence, including child abuse, is an epidemic in the United States. Religious communities experience domestic violence at similar rates as non-religious individuals. However, due to underreporting, the prevalence of domestic violence is likely higher than currently known. Qualifying the clergy-communicant privilege will allow for a case by case analysis, which will assist with the prosecution of abusers as well as the protection of survivors. Abrogating the privilege to require clergy to comply with mandated child abuse reporting statutes will help keep children safe. Our federal and state governments have a responsibility to act for the well-being of society and modernizing the clergy-penitent privilege is in society's best interest.

communications made during the course of a mental examination conducted as a condition to a claim of self-defense. FED R. EVID. 504 (not enacted)).