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Criminal and Civil Liability for Failure to Report Suspected Child Abuse in South Carolina

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CRIMINAL AND CIVIL LIABILITY FOR FAILURE TO REPORT SUSPECTED CHILD ABUSE IN SOUTH CAROLINA

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Child abuse did not gain recognition as a significant social issue until the middle of the twentieth century.[1] In the past sixty years, efforts to protect children from abuse have grown exponentially.[2] Because incidents of child abuse do not generally occur in the public eye, many have taken an interest

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1. *See* Basyle J. Tchividjian, *Catching American Sex Offenders Overseas: A Proposal for A Federal International Mandated Reporting Law*, 83 UMKC L. REV. 687, 691–95 (2015).

2. Steven J. Singley, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, 19 J. JUV. L. 236, 238 (1998).

in finding ways to identify victims of abuse.[3] As a result, all fifty states have enacted some type of reporting statute.[4]

Mandatory reporting statutes require certain classes of individuals to report suspected child abuse to a designated state authority.[5] Almost every state, including South Carolina, imposes some kind of criminal penalty for failure to report as required by statute.[6] Although courts in some states also impose civil liability based on violation of reporting statutes under a theory of negligence per se, many do not.[7] In some states, individuals will only be civilly liable for failure to report suspected child abuse under a common law negligence theory for failure to warn a third party.[8]

South Carolina courts have taken a conservative approach punishing individuals for failure to report suspected child abuse.[9] For example, South Carolina has chosen not to impose civil liability for failure to report suspected child abuse in accordance with the reporting statute under a theory of negligence per se.[10] Although South Carolina courts have recognized that certain individuals may be liable for failure to report under a common law negligence theory, all cases that have examined the issue have chosen not to extend liability.[11] In addition, South Carolina's Attorney General's Office has provided guidance that applies theories of statutory construction to limit the scope of its mandatory reporting statute.[12]

Although the majority of South Carolina decisions have indicated the State intends to limit liability for failure to report suspected abuse, there are many issues the courts have yet to decide. The purpose of this Note is to examine the current environment concerning mandatory reporting of child abuse in South Carolina and nationwide, explore areas of ambiguity that currently exist in determining whether to impose civil or criminal liability

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3. V. DEFRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970'S 2 (Children's Division, American Humane Association, Denver, rev. ed. 1974).

4. Singley, *supra* note 2, at 238.

5. Singley, *supra* note 2, at 236.

6. S.C. CODE ANN. § 63-7-310 (2012); Tchividjian, *supra* note 1, at 703.

7. Tchividjian, *supra* note 1, at 704; Singley, *supra* note 2, at 247.

8. Singley, *supra* note 2, at 247.

9. *See* Roe v. Bibby, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014); Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 711 S.E.2d 908 (2011); Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007).

10. *Marion*, 373 S.C. at 399, 645 S.E.2d at 250.

11. *Bibby*, 410 S.C. at 296, 763 S.E.2d at 650; *Wal-Mart Stores, Inc.*, 393 S.C. at 248, 711 S.E.2d at 912; *Marion*, 373 S.C. at 401, 645 S.E.2d at 251.

12. *See* The Honorable Mike Fair, Op. S.C. Att'y Gen., 2014 WL 3552174 (S.C.A.G. June 30, 2014); Michael D. Morin, Op. S.C. Att'y Gen., 2006 WL 269610 (S.C.A.G. Jan. 26, 2006); Dorothy J. Killian, Esq., Op. S.C. Att'y Gen., 2004 WL 113633 (S.C.A.G. Jan. 7, 2004).

for failure to report in South Carolina, and make recommendations. For example, South Carolina should consider expanding civil liability for failure to report for certain categories of individuals.

Part I of this Note will discuss the background of mandatory reporting statutes across the country. In addition, it will provide an overview of the various approaches states have adopted when formulating policies concerning reporting child abuse.

Part II will analyze South Carolina law as it relates to liability for failure to report child abuse. More specifically, it will explore how recent decisions and administrative guidance indicate that South Carolina has adopted a conservative approach to imposing liability for failure to report.

Finally, Part III will explore areas of ambiguity that have been addressed in various ways in other states but have not yet been resolved in South Carolina. For example, South Carolina courts have not provided clear guidance as to whether attorneys, individuals involved with the clergy, and parents should be held liable for failure to report suspected child abuse. It will also provide background on the approaches that have been adopted in other states. In addition, this Part will include several sections that will provide specific recommendations for how South Carolina should handle mandatory reporting issues. Although South Carolina has elected not to impose excessive criminal liability for failure to report suspected abuse in these situations, it may be appropriate to expand civil liability in some circumstances.

I. BACKGROUND

The public has widely adopted the view that children may be unable to protect themselves or they may be too afraid to report their abuse to appropriate authorities.[13] As such, the primary purpose of mandatory reporting statutes is to protect children, not to punish individuals who actually maltreat children.[14] This goal is achieved by imposing liability onto professionals who fail to report suspected abuse.[15] Mandatory reporting statutes in every state create some criminal liability for failure to report.[16] In addition, some states also read the statutes to impose civil liability under a

13. Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 514 (1998).

14. Singley, *supra* note 2, at 236–37.

15. *Id.*

16. *Id.* at 239.

theory of negligence per se.[17] However, there are several states that have elected not to impose civil liability based on the mandatory reporting statutes; instead, certain professionals may only be held civilly liable under common law theories of negligence.[18]

A. Criminal Liability

By 1967, every state had implemented some laws requiring professionals to report suspected child abuse.[19] However, early statutes only focused on a narrow range of professionals: primarily physicians and health care workers.[20] States began to expand coverage under mandatory reporting laws in 1974 when the federal government passed the Child Abuse Prevention and Treatment Act (CAPTA).[21] The act provided states with incentives to develop more comprehensive mandatory reporting laws.[22] Specifically, states became eligible to receive federal funds to support state agencies responsible for providing care for children if the states included certain required elements in their mandatory reporting statutes.[23] These incentives, along with a series of model rules promulgated by outside groups, have contributed to increased consistency among states' mandatory reporting laws.[24] Although states have not achieved complete uniformity, all statutes share particular elements.[25] These elements include: "(1) purpose of the statute; (2) definitions; (3) professionals required to report; (4) standard of certainty reporters must attain; (5) penalties for failure to report; (6) immunity for good faith reports; (7) abrogation of certain communication privileges; and (8) reporting procedures."[26] Further, all states have classified the crime as a misdemeanor.[27]

The most significant differences arise when examining which individuals the statutes include.[28] In every state, any individual who suspects

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17. Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of Legislation*, 67 COLUM. L. REV. 1, 35 (1967).

18. *Id.*

19. Matthew Johnson, *Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia's Children*, 31 GA. ST. U. L. REV. 643, 649–50 (2015).

20. *Id.* at 350, Marrus, *supra* note 13, at 514.

21. Johnson, *supra* note 19, at 650.

22. *Id.*

23. *Id.*

24. *Id.*

25. Singley, *supra* note 2, at 239.

26. *Id.*

27. *Id.* at 246.

28. Johnson, *supra* note 19, at 654.

a child is being abused *may* report his or her suspicion to appropriate authorities as a permissive reporter.[29] However, states have taken different approaches in determining who is *required* to report suspected abuse.[30] Forty-eight states list specific types of professionals, like doctors and teachers, who are required to report suspected abuse.[31] Utah and Wyoming, however, extend mandatory reporting requirements to all adults within the state who reasonably believe a child is being abused.[32]

The expansion of criminal liability to include a broader range of individuals has led to a significant increase in the number of reports.[33] There is considerable debate concerning whether the proportionate number of substantiated reports has also increased.[34] Some critics argue that designating an overly broad range of individuals as mandatory reporters inundates the system with unsubstantiated reports.[35] As a result, legitimate reports of suspected child abuse are lost in a flood of questionable reports because individuals want to avoid liability for failure to report.[36] It is important to note, though, that thousands of children have been saved from abuse as a result of mandated reporting.[37] In 1995, sixty-six percent of substantiated maltreatment investigations were initiated as a result of a mandatory report.[38] These statistics tend to indicate that expansive mandatory reporting requirements are not necessarily the problem; the real issue lies with the underfunding of agencies responsible for investigating abuse.[39]

Critics have also argued that imposition of criminal liability through mandatory reporting statutes is ineffective and insulting to professionals.[40] They argue that "[t]he integrity of professional people . . . ought not to be impugned by the suggestion that criminal measures are required to ensure

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29. *Id.*

30. Megan M. Smith, *Causing Conflict: Indiana's Mandatory Reporting Laws in the Context of Juvenile Defense*, 11 IND. HEALTH L. REV. 439, 444 (2014).

31. *Id.*; Jon M. Hogelin, *To Prevent and to Protect: The Reporting of Child Abuse by Educators*, 2013 B.Y.U. EDUC. & L.J. 225, 233 (2013).

32. Johnson, *supra* note 19, at 654; Smith, *supra* note 30, at 444; Hogelin, *supra* note 31, at 233.

33. Victor I. Vieth, *Passover in Minnesota: Mandated Reporting and the Unequal Protection of Abused Children*, 24 WM. MITCHELL L. REV. 131, 136 (1998).

34. *See id. But see* Singley, *supra* note 2, at 239.

35. *See* Beyea, *infra* note 110, at 294.

36. Singley, *supra* note 2, at 240.

37. Veith, *supra* note 33, at 136–37.

38. *Id.* at 137.

39. *See id.* at 136.

40. Paulsen, *supra* note 17, at 9.

that they do their duty."[41] Furthermore, prosecutors are likely hesitant to pursue mandatory reporting cases because they can be very difficult to prove.[42] However, the presence of the criminal sanction may not necessarily be intended to punish, but to encourage reporting.[43] Whether the threat of criminal liability is actually felt by professionals may be disputed, though. It is unclear whether professionals who fail to report abuse will actually be prosecuted in most cases.[44] Even with the increasing numbers of individuals covered by the mandatory reporting statutes and the subsequent increase in the number of reports, there is still evidence that some mandatory reporters do not report suspected abuse.[45] For example, studies have shown that only forty percent of maltreatment cases known to professionals are reported.[46] Therefore, it is possible that criminal sanctions alone may not be sufficient to encourage professionals to report suspected abuse, especially considering the fact that individuals who violate mandatory reporting statutes are rarely prosecuted.

B. Civil Liability

In addition to criminal liability, individuals may face civil liability for failure to report suspected abuse.[47] Seven states expressly create civil liability for injuries proximately resulting from an individual's failure to report child abuse.[48] In some states, violation of a mandatory reporting statute may constitute negligence per se so long as the plaintiff is a member of the class the statute was intended to protect and the harm suffered was of the type the statute was intended to prevent.[49] In states that decide not to adopt a negligence per se standard, the road to imposing civil liability under common law can be much more difficult to navigate.[50]

At common law, there is no duty to act on behalf of another absent some special relationship.[51] There are several exceptions to this "no duty" rule.[52]

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41. *Id.*
42. *See id.*
43. *Id.*
44. Paulsen, *supra* note 17, at 9; Veith, *supra* note 33, at 144.
45. Veith, *supra* note 33, at 137.
46. *Id.* (citing David Finkelhor, *Is Child Abuse Overreported?*, PUB. WELFARE 22, 25 (1990)).
47. *See* Singley, *supra* note 2; Paulsen, *supra* note 17.
48. Singley, *supra* note 2, at 247. The seven states are Arkansas, Colorado, Iowa, Michigan, Montana, New York, and Rhode Island. *Id.* at 239 n.12.
49. Paulsen, *supra* note 17, at 35.
50. *See* Singley, *supra* note 2, at 241.
51. *Id.*

For example, a court will impose liability on a defendant for failure to act if a special relationship exists between the plaintiff and defendant.[53] In other words, the special relationship imposes an affirmative duty on the defendant to protect the plaintiff, even if the defendant is not responsible for creating the risk to the plaintiff.[54] Under some circumstances, it may be possible to prove that an adult who has failed to protect a child from abuse may have breached a duty to that child by virtue of a special relationship that exists between them.[55] However, it can be difficult to establish the existence of a special relationship especially if the adult never voluntarily assumed custody of the child.[56]

There is a second exception wherein an adult may have an affirmative duty to protect a child from harm by virtue of the adult's special relationship with the person who threatened the child.[57] It is important to note, though, that the adult's duty would be to control the abuser, not necessarily protect the child.[58] While other exceptions to the "no-duty rule" exist, they are less likely to apply to a situation in which an adult has failed to report child abuse.[59]

Criticisms of the expansion of civil and criminal liability are closely related. The primary concern is that expansion of civil liability will lead to a surge in over-reporting that will inundate the system with excessive and often unsubstantiated reports, making it more difficult to identify legitimate cases of abuse.[60]

Conversely, those in favor of expansion of civil liability argue such action will provide greater incentive to professionals who still fail to report despite potential criminal liability.[61] Further, advocates have proposed that imposing a civil duty will "advance the economic well-being of abused children."[62] Finally, expansion of civil liability may be a better alternative than criminal liability because it does not rely on a prosecutor's discretion.[63]

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52. Mary Kate Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 BUFF. L. REV. 405, 411 (1994).
53. *Id.* at 411–12.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 412–13.
58. *Id.*
59. *See id.* at 413–14.
60. Singley, *supra* note 2, at 240.
61. Kearney, *supra* note 52, at 430.
62. *Id.* at 429.
63. *See* Paulsen, *supra* note 17, at 9; Veith, *supra* note 33, at 144.

II. CRIMINAL AND CIVIL LIABILITY IN SOUTH CAROLINA

A. Criminal Liability

South Carolina's mandatory reporting statute is codified in section 63-7-310 of the South Carolina Code.[64] The statute includes an extensive list of professionals who are obligated to report suspected child abuse.[65] If one of the professionals enumerated in the statute received information in his or her professional capacity that gives the professional reason to believe a child's health may be at risk, that professional is obligated to file a report with the appropriate law enforcement agency.[66] These reports may be made orally by telephone or otherwise to the county department of social services or other law enforcement agency in the county where the child resides.[67] An individual who is required to report suspected abuse but fails to do so "is guilty of a misdemeanor, and upon conviction, must be fined not more than five hundred dollars or imprisoned not more than six months, or both."[68]

At this time, it is unclear whether the duty to report suspected child abuse would extend to any professionals not specifically enumerated in section 63-7-310. There do not appear to be any published opinions in which a court has imposed criminal liability for failure to report suspected child abuse; therefore, there is very little binding authority that indicates whether the list provided in the statute is meant to be exhaustive. However, there are several cases in which individuals have been sued by the accused abuser for reporting suspected child abuse.[69] These cases provide some guidance

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64. S.C. CODE ANN. § 63-7-310 (2012).

65. *Id.* ("A physician, nurse, dentist, optometrist, medical examiner, or coroner, or an employee of a county medical examiner's or coroner's office, or any other medical, emergency medical services, mental health, or allied health professional, member of the clergy including a Christian Science Practitioner or religious healer, school teacher, counselor, principal, assistant principal, school attendance officer, social or public assistance worker, substance abuse treatment staff, or childcare worker in a childcare center or foster care facility, foster parent, police or law enforcement officer, juvenile justice worker, undertaker, funeral home director or employee of a funeral home, persons responsible for processing films, computer technician, judge, or a volunteer non-attorney guardian ad litem serving on behalf of the South Carolina Guardian Ad Litem Program or on behalf of Richland County CASA must report in accordance with this section . . . ."). *Id.*

66. *Id.*

67. *Id.*

68. S.C. CODE ANN. § 63-7-410 (2012).

69. *See* Wright v. Sheppard-Oswald, No. 6:14-4646-TMC-JDA, 2015 WL 6725082, at *6 n.5 (D.S.C. Nov. 3, 2015); State v. Cardwell, No. 2012-213334, 2015 WL 5132348, at *2 (S.C. Ct. App. Sept. 2, 2015); Smith v. Beaufort Cnty. Sch. Dist., No. 9:06-0185-CWH, 2008 WL 821809, at *9 (D.S.C. Mar. 25, 2008).

because the courts often acknowledge whether the defendants were acting under a duty to report when assessing their liability. The utility of these cases is limited, though, because they primarily involve professionals that were clearly included within the purview of the statute as opposed to individuals who may or may not fall into one of the categories listed.[70]

The Office of the Attorney General has provided some guidance in interpreting section 63-7-310.[71] Applying standard rules of statutory construction, The Office of the Attorney General determined "the statute as a whole must receive a reasonable, practical and fair interpretation consistent with the purpose, design and policy of the lawmakers,"[72] and the legislators' words must be given their plain and ordinary meaning.[73] Further, penal statutes must be construed strictly against the State and in favor of the defendant.[74]

In ascertaining the purpose of the statute, the Attorney General's office looked to the Children's Code, or title 63 of the South Carolina Code.[75] Based on its reading of relevant portions of title 63, the Attorney General's office found the ultimate purpose of the statute is to protect children from abuse by reporting information about such abuse to law enforcement.[76] The office further asserted that the implication underlying the statute is that children may not know how or be able to report their abuse without assistance.[77]

Despite the weighty purpose underlying the statute, the Office of the Attorney General still applied a narrow interpretation of the statute based on the strict reading it is obligated to provide to penal statutes.[78] Although it never explicitly stated that the statute is exhaustive, the Attorney General's office offered a reading of the statute that limits its application only to those individuals who are specifically listed therein.[79] Therefore, it appears South Carolina courts may be more inclined to limit criminal liability to those

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70. *See supra* note 69.

71. *See* The Honorable Mike Fair, Op. S.C. Att'y Gen., 2014 WL 3352174 (S.C.A.G. June 30, 2014); Michael D. Morin, Op. S.C. Att'y Gen., 2006 WL 269610 (S.C.A.G. Jan. 26, 2006); Dorothy J. Killian, Esq., Op. S.C. Att'y Gen., 2004 WL 113633 (S.C.A.G. Jan. 7, 2004).

72. *E.g.* 2004 WL 113633 at *2.

73. *Id.*

74. *Id.*

75. 2014 WL 3352174 at *2–*3.

76. *Id.*

77. 2014 WL 3352174 at *3.

78. *See* 2014 WL 3352174 (S.C.A.G. June 30, 2014); Michael D. Martin, Op. S.C. Att'y Gen., 2006 WL 269610 (S.C.A.G. Jan. 26, 2006).

79. *See supra* note 78.

professionals that are specifically listed in the statute. Yet, it is still important to note there is no binding authority holding that the list of professionals included in the statute is meant to be exhaustive.

B. Civil Liability

South Carolina courts have consistently held that South Carolina's mandatory reporting statute does not create a private cause of action for negligence per se.[80] The Supreme Court of South Carolina initially made this decision in *Doe v. Marion*.[81] In determining whether the statute created a private cause of action, the Supreme Court examined whether the legislature intended for the statute to be used as such.[82] Although section 63-7-310 was silent as to civil liability, the Court concluded that the legislature did not intend to create a private cause of action for failure to report because the legislature explicitly created civil liability based on other statutes in the same chapter.[83] The Court further explained that the statute did not create a statutory duty in an action for negligence because the statute is concerned with protection of the public as opposed to protection of individual private rights.[84]

Although South Carolina's mandatory reporting statute does not create a private cause of action, parties may still bring claims against others for failure to report suspected child abuse under a theory of common law negligence.[85] In order to succeed on a claim for negligence, a plaintiff must show "(1) [the] defendant owes a duty of care to the plaintiff; (2) [the] defendant breached the duty by a negligent act or omission; (3) [the] defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) [the] plaintiff suffered an injury or damages."[86]

Ordinarily, there is no general duty to control the conduct of another or to warn a third party of danger.[87] However, South Carolina recognizes exceptions to this rule "(1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the

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80. Roe v. Bibby, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014); Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 711 S.E.2d 908 (2011); Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007).

81. *Marion*, 373 S.C. at 390, 645 S.E.2d at 245.

82. *Id.* at 396–97, 645 S.E.2d at 248.

83. *Id.* at 397, 645 S.E.2d at 248–49.

84. *Id.* at 398, 645 S.E.2d at 249.

85. *Id.* at 400, 645 S.E.2d at 250.

86. *Id.*

87. *Id.*

defendant negligently or intentionally creates the risk; and (5) where a statute imposes a duty on the defendant."[88] South Carolina courts have been reluctant to impose a duty to act for failure to report suspected child abuse or to warn potential future victims.[89]

In *Marion*, the court found that the abuser's psychiatrist was not civilly liable for failing to report her patient's activities to authorities or for failing to warn potential future victims of his predilection toward child abuse.[90] The plaintiff brought suit against Dr. Robert Marion for sexual abuse and against Dr. Carol Graf for failing to report to authorities or warn future victims of Dr. Marion.[91] Dr. Marion sexually abused the plaintiff for several years starting in 1999.[92] Prior to the abuse, Dr. Marion received treatment from Dr. Graf for his predilection toward child abuse.[93] Plaintiff alleged Dr. Graf was negligent for breaching her duty to warn reasonably foreseeable future minor patients of Dr. Marion by virtue of the special relationship exception.[94] The court noted that the special relationship exception applies when the defendant "'has the ability to monitor, supervise and control an individual's conduct' and when 'the individual has made a specific threat of harm directed at a specific individual.'"[95] Accordingly, the court rejected the plaintiff's argument, finding the plaintiff failed to allege a specific threat against the plaintiff sufficient to create a duty to warn.[96]

Similarly, in *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, the Supreme Court of South Carolina found Wal-Mart was not civilly liable for failure to report suspected child abuse based on images of such abuse contained in photos developed in its store.[97] The plaintiff in this case brought pictures of evidence of her nephew's physical abuse to be developed to Wal-Mart.[98] Plaintiff intended to show the pictures to the Department of Social Services.[99] Wal-Mart destroyed the pictures based on a policy against

88. *Id.*

89. *See* Roe v. Bibby, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014); Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 711 S.E.2d 908 (2011); *Marion*, 373 S.C. at 390, 645 S.E.2d at 245.

90. *Marion*, 373 S.C. at 401, 645 S.E.2d at 250.

91. *Id.* at 393, 645 S.E.2d at 246.

92. *Id.* at 394, 645 S.E.2d at 247.

93. *Id.*

94. *Id.* at 400, 645 S.E.2d at 250.

95. *Id.*

96. *Id.* at 401, 645 S.E.2d at 251.

97. Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 242, 711 S.E. 2d 908, 909, (2011).

98. *Id.* at 243, 711 S.E.2d at 909–10.

99. *Id.*

developing pictures with nudity.[100] Plaintiff brought this suit on behalf of her nephew against Wal-Mart for failing to report the physical abuse based on the pictures after she discovered her nephew's father also began to sexually abuse her nephew.[101] First, the court recognized that although Wal-Mart's actions violated section 63-7-310 of the South Carolina Code, this statute did not create a private right of action against Wal-Mart for failure to report suspected abuse based on the holding in *Marion*.[102] The Court further held that Wal-Mart did not breach any duty to the victim for failing to report the suspected abuse.[103] The Court found that Wal-Mart did not have a special relationship "with either the victim or his father because it did not have the ability to monitor, supervise, or control either,"[104] and the court did not think any of the other exceptions to the no-duty to act rule applied.[105]

The 2014 decision in *Roe v. Bibby* further demonstrates the trend against finding civil liability for failure to report suspected child abuse.[106] The plaintiff in *Bibby* brought suit on behalf of her children, who were abused by their neighbor, against the wife of said neighbor for failure to warn of her husband's past sexual abuse.[107] Much like the previous cases, the court held that the abuser's wife did not have a duty to warn under the special relationship exception because she did not have the ability to monitor, supervise, or control her husband due to the fact she had a full-time job and was not always home when the children would visit.[108] The court took a step further, though, by emphasizing the fact that this case does not involve commercial childcare.[109] This statement implies that absent some kind of commercial arrangement, the court would be extremely reluctant to impose civil liability for failure to warn.

Taken together, these cases indicate that a South Carolina court is extremely unlikely to impose civil liability for failure to report suspected child abuse to law enforcement authorities. Even if the courts may recognize some exceptions to the general rule that an individual has no duty to warn or control the actions of a third party, such a duty will not be imposed unless there is a very specific threat, to a specific individual, and the individual has sufficient control over the abuser. Even if these requirements were met in a

100. *Id.*
101. *Id.* at 243, 711 S.E.2d at 910.
102. *Id.* at 244–46, 711 S.E.2d at 910–11.
103. *Id.* at 247, 711 S.E.2d at 912.
104. *Id.*
105. *Id.*
106. Roe v. Bibby, 410 S.C. 287, 290, 763 S.E. 2d 645, 647 (Ct. App. 2014).
107. *Id.* at 291, 763 S.E.2d at 647.
108. *Id.* at 295–96, 763 S.E.2d at 649–50.
109. *Id.* at 296, 763 S.E.2d at 650.

given case, the defendant would not have the duty to report the suspected abuse to law enforcement; instead, he or she would have a duty to either control the behavior of the abuser, or warn the guardians of the child directly. This practice raises obvious concerns when parents are the suspected abusers.

III. AREAS OF UNCERTAIN LIABILITY FOR FAILURE TO REPORT

Although recent South Carolina decisions tend to take a conservative approach to imposing criminal and civil liability for failure to report child abuse, there are still several areas of uncertainty South Carolina courts need to address. These areas include individuals involved with the clergy, attorneys, and parents. The law is unclear concerning whether these individuals would be held criminally or civilly liable for failure to report suspected child abuse in South Carolina. Other states have dealt with these determinations in various ways, and each category of reporter provides its own unique issues that deserve individual consideration. In deciding whether to impose liability for failure to report, South Carolina courts must balance the ultimate goal of protecting South Carolina's children from abuse against other interests of maintaining confidentiality, privilege, and familial rights.

A. Attorneys

1. Background

States have adopted various approaches in determining whether an attorney has a duty to report suspected child abuse.[110] Some states have designated attorneys as mandatory reporters or suspended attorney-client privilege in such situations.[111] Others have explicitly stated that attorneys are not required to report suspected abuse,[112] and some who do not reference attorneys at all in their mandatory reporting statutes, or impose a duty onto

110. *See* Alison Beyea, *Competing Liabilities: Responding to Evidence of Child Abuse That Surfaces During the Attorney-Client Relationship*, 51 ME. L. REV. 269, 290–91 (1999); Camile Glasscock Dubose & Cathy O. Morris, *The Attorney As Mandatory Reporter*, 68 TEX. B.J. 208, 210 (2005); Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should Not Be Mandated Reporters of Child Abuse*, 36 N.M. L. REV. 125, 126–28 (2006).

111. *See* Beyea, *supra* note 110, at 290–91; Dubose & Morris, *supra* note 110, at 210; Lockie, *supra* note 110, at 127–28.

112. *See* Beyea, *supra* note 110, at 290–91; Dubose & Morris, *supra* note 110, at 210; Lockie, *supra* note 110, at 127–28.

every individual to report suspected child abuse.[113] In states where obligations are unclear, attorneys are challenged with navigating conflicting legal and ethical obligations in determining whether to report child abuse.

Under Rule 1.6 of the Model Rules of Professional Conduct, attorneys are obligated to keep client communications confidential.[114] As a result, attorneys may face violating Rule 1.6 if they report suspected child abuse based on information they obtained through representation of a client.[115] Although there is an exception to Rule 1.6 in which an attorney may break confidentiality in order to "prevent a client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm," this exception would only apply in situations where the attorney was representing the abuser, not victims or witnesses to abuse.[116]

Attorneys' communications with their clients in the course of representation are also subject to privilege, which means those communications may not be entered as evidence in court.[117] Although this privilege would not necessarily prevent an attorney from reporting suspected abuse, it would prevent the attorney from testifying in removal or criminal proceedings.[118] While this may seem like an unfair rule, there are various important justifications for preserving confidentiality of attorney-client communications.

Confidentiality and privilege rules were developed to encourage full and frank communications between clients so as to assure effective representation and advocacy.[119] In addition, victims and third party witnesses may have particular needs for keeping their disclosures private.[120] Some have argued that attorneys should not be mandatory reporters of child abuse because maintaining confidentiality may empower clients who are involved in the justice system or protect victims of domestic violence from losing parental rights or facing retaliation from abusive spouses.[121] Further,

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113. *See* Beyea, *supra* note 110, at 290–91; Dubose & Morris, *supra* note 110, at 210; Lockie, *supra* note 110, at 127–28.

114. Beyea, *supra* note 110, at 282 (citing MODEL RULES OF PROF'L CONDUCT r. 1.6 (1997)).

115. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (1997); Beyea, *supra* note 110, at 280, 282–83.

116. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (1997); Beyea, *supra* note 110, at 283

117. *See* Dubose & Morris, *supra* note 110, at 211; Lockie, *supra* note 110, at 130.

118. Beyea, *supra* note 110, at 281–82.

119. Lockie, *supra* note 110, at 130 (citing UpJohn Co. v. United States, 449 U.S. 383, 389–91 (1981)).

120. *See id.* at 131.

121. *See id.* at 141, 148–51.

critics have argued that the strong policy interest in maintaining confidentiality significantly outweighs any potential benefits that would result from an increase in reporting.[122] For example, lawyers may not be as qualified to ascertain legitimate signs of abuse as doctors or mental health professionals.[123] As a result, imposing a duty onto attorneys to report suspected abuse would merely lead to an increase in unreliable reports, thereby flooding an already over-exhausted system.[124]

Those who favor assigning attorneys as mandatory reporters argue the privilege that exists between attorneys and clients is not substantially different from the privilege that exists between doctors and patients; as such, attorneys should not be exempted from mandatory reporting statutes.[125] Further, proponents argue the current exception to Rule 1.6 should be expanded to allow attorneys to disclose when they reasonably believe any individual will commit a crime that result in significant bodily harm, not just the client.[126] Supporters of abrogating confidentiality and privilege also point to studies indicating that under-reporting of child abuse is still a major problem under the current mandatory reporting scheme, and as such, criminal and civil liability should be expanded to include a larger array of individuals.[127]

Others have taken a moderate approach, arguing attorneys should be able to disclose client communications related to allegations of child abuse without facing disciplinary measures, but they should not be required to do so.[128] Such an approach would allow attorneys to abrogate their ethical duty to maintain confidentiality when maintaining those confidences would amount to great injustice.[129] As such, attorneys would have the discretion to determine whether the harms of disclosure will substantially outweigh the possibility that a child is being abused.[130]

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122. *See id.* at 131.

123. Beyea, *supra* note 110, at 294.

124. *Id.*

125. Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 538 (1998).

126. *See id.* at 540–41.

127. *See* Kearney, *supra* note 52, at 430; *contra* Beyea, *supra* note 110, at 292–94.

128. *See* Beyea, *supra* note 110, at 295–96.

129. *Id.*

130. *Id.*

2. South Carolina

South Carolina does not explicitly designate attorneys as mandatory reporters of child abuse.[131] Therefore, based on the guidance provided by the Attorney General's Office and the rules of statutory construction, it seems unlikely South Carolina would impose criminal liability on an attorney for failure to report.[132]

Further, South Carolina' legislature has explicitly excluded attorney-client privilege from its abrogation of privileged communications for the purpose of reporting suspected abuse.[133] As such, communications between an attorney and his or her client will not be admissible in court unless the client waives the privilege.[134]

Based on existing South Carolina case law, it also seems unlikely a court in South Carolina would find an attorney civilly liable for failure to report suspected abuse.[135] Courts have been hesitant to find a special relationship sufficient to impose a duty to warn or act to prevent the actions of a third party unless an individual has sufficient ability to control the behavior of the individual or identify a specific threat.[136] Because South Carolina's Supreme Court is reluctant to impose any form of civil liability for failure to report child abuse, and attorneys face additional ethical complications involved with attorney disclosure, it is unlikely a court would find an attorney liable for failing to report suspected abuse.

3. Recommendations

Given the unique ethical obligations of attorneys, it seems inappropriate to impose liability for failing to disclose client communications concerning child abuse. As such, South Carolina courts should not read S.C. Code Ann. § 63-7-310 to apply to attorneys who learn about possible child abuse during the course of representing a client. Nevertheless, that does not mean attorneys should be barred from disclosing such information under the rules of professional conduct. At this point, without guidance, attorneys may be

131. *See* S.C. CODE ANN. § 63-7-310 (2012).

132. *See* The Honorable Mike Fair, Op. S.C. Att'y Gen., 2014 WL 3352174 (S.C.A.G. June 30, 2014); Michael D. Morin, Op. S.C. Att'y Gen., 2006 WL 269610 (S.C.A.G. Jan. 26, 2006); Dorothy J. Killian, Esq., Op. S.C. Att'y Gen., 2004 WL 113633 (S.C.A.G. Jan. 7, 2004).

133. S.C. CODE ANN. § 63-7-420 (2012).

134. *Id.*

135. *See supra* Part II.A.

136. *Id.*

confused about how to comply with the South Carolina Rules of Professional Conduct if they want to report suspected abuse. In order to clarify attorney's responsibilities, South Carolina should adopt the moderate approach outlined above. While the ethical considerations underlying privilege and confidentiality may make it inappropriate to impose civil or criminal liability for failure to report, attorneys should be able to use their discretion in determining whether disclosure is required in order to prevent greater injustice.

B. The Clergy

1. Background

In recent years, many states have addressed whether to include clergy members as mandatory reporters.[137] In doing so, some states have been more conservative in maintaining clergy-penitent privilege than others.[138] Twenty-three states have added clergy members to their list of mandatory reporters, but still protect communication that falls within clergy-penitent privilege.[139] Two states have listed clergy members as mandatory reporters without such protection.[140] Ten states designate specific professionals as mandatory

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137. Julie M. Arnold, *"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, 878 (2008) (citing 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)); Paul Winters, *Whom Must the Clergy Protect? The Interests of at-Risk Children in Conflict with Clergy-Penitent Privilege*, 62 DEPAUL L. REV. 187, 189 (2012) (citing H.R. Transcription Debate, 92nd Gen. Assembly, 135th Legislative Day, at 17 (statement of Rep. Lyons) (Ill. May 23, 2002)).

138. Arnold, *supra* note 137, at 882 (footnote omitted).

139. Winters, *supra* note 137, at 190 (citing ALA. CODE § 26-14-3 (2009); ARIZ. REV. STAT. ANN. § 13-3620 (2010); ARK. CODE ANN. § 12-18-402 (2009); CAL. PENAL CODE §§ 11165.7, 11166 (West 2011); COLO. REV. STAT. §§ 19-3-304, 13-90-107 (2012); CONN. GEN. STAT. § 17a-101 (2011); 325 Ill. COMP. STAT. 5/4 (2010); 735 Ill. COMP. STAT. 5/8-803 (2010); LA. CHILD. CODE ANN. ART. 603 (2004); ME. REV. STAT. tit. 22, § 4011-A (2004 & Supp. 2012); MASS. GEN. LAWS ch. 119, §§ 21, 51A (2008); MICH. COMP. LAWS §§ 722.623, 722.631 (2013); MINN. STAT.§§ 626.556, 595.02 (2009); MISS. CODE ANN. § 43-21-353 (2008); MISS. R. EVID. 505 (2011); MO. REV. STAT. §§ 210.115, 352.400 (2000 & Supp. 2011); MONT. CODE ANN. § 41-3-201 (2011); NEV. REV. STAT. § 432B.220 (2012); N.D. CENT. CODE § 50-25.1-03 (Supp. 2011); OHIO REV. CODE ANN. § 2151.421 (LexisNexis 2011 & Supp. 2012); OR. REV. STAT. § 419B.010 (2011); 23 PA. CONS. STAT. § 6311 (2010); S.C. CODE ANN. §§ 63-7-310, 63-7-420 (2010); VT. STAT. ANN. tit. 33, § 4913 (West 2007); WIS. STAT. § 48.981 (2011)).

140. *Id.* (citing N.H. REV. STAT. ANN. §§ 169-C:29, 169-C:32 (2002); W. VA. CODE §§ 49-6A-2, 49-6A-7 (2002)).

reporters, but do not include clergy members in their lists.[141] Of the states that designate all individuals as mandatory reporters, seven abrogate clergy-penitent privilege within the context of reporting and eight protect the privilege.[142]

States' reluctance to abrogate clergy-penitent privilege is deeply rooted within American custom.[143] All fifty states have codified some form of protection for clergy-penitent communication.[144] There is some disagreement, however, concerning who qualifies as a "clergy member" for purposes of applying the privilege.[145] Almost half of the states agree a clergy member is a "priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious" organization.[146] However, some complications may arise in determining whether an individual is acting within his role as a spiritual counselor, thereby giving rise to the privilege or whether an individual actually qualifies as a "similar functionary of a church" so as to qualify as a clergyman.[147] For example, members of the clergy are often well recognized within the community; what are the rules for establishing whether interactions qualify as social or spiritual?[148] Further, there are many individuals who may serve important roles within a church, like deacons, but it is unclear whether they qualify as a clergy members.[149]

Clergy-penitent privilege may also raise some constitutional concerns within this context. Critics argue that abrogation of the privilege may qualify as a violation of the Free Exercise Clause.[150] However, recent decisions

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141. *Id.* (citing ALASKA STAT. § 47.17.020 (2007); DEL. CODE ANN. tit. 16, § 903 (2006); D.C. CODE § 4-1321.02 (2008); GA. CODE ANN. § 19-7-5 (2010); HAW. REV. STAT. § 350-1.1 (2008 & Supp. 2012); IOWA CODE § 232.69 (2013); KAN. STAT. ANN. § 38-2223 (2011); N.Y. SOCIAL SERVICES LAW § 413 (McKinney 2010); S.D. CODIFIED LAWS § 26-8A-3 (2004); VA. CODE ANN. § 63.2-1509 (2011); WASH. REV. CODE § 26.44.030 (2010)).

142. *Id.* (citing Fla. Stat. §§ 39.201, 39.204 (2010); N.J. STAT. ANN. § 9:6-8.10 (West 2002); N.C. GEN. STAT. §§ 7B-301, 7B-310 (2011); OKLA. STAT. tit. 10A, § 1-2-101 (2011); R.I. GEN. LAWS §§ 40-11-3, 40-11-11 (2006); TENN. CODE ANN. §§ 37-1-605, 37-1-403, 37-1-614 (2010); TEX. FAM. CODE ANN. § 261.101 (West 2008)).

143. *See* Arnold, *supra* note 137, at 898.

144. Winters, *supra* note 137, at 188 (citing W. Cole Durham & Robert Smith, 2 RELIGIOUS ORGANIZATIONS AND THE LAW § 6:21 (2012); Richard Hammar, PASTOR, CHURCH & LAW 1033–53 (3d ed. 2000)).

145. *Id.* (citing Ronald J. Colombo, Note, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 232 (1998); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 697–98 (2012)).

146. *Id.*

147. *See* Winters, *supra* note 137, at 202–04.

148. *Id.* at 203–04.

149. *See e.g.* 2004 WL 113633 (S.C.A.G. Jan. 7, 2004).

150. *See* Winters, *supra* note 137, at 194.

indicate this would not constitute a violation because abrogation would result in a statute of neutral applicability.[151] Conversely, advocates of abrogating the privilege argue that failure to do so could constitute an Establishment Clause violation for giving a religious privilege preferential treatment over other testimonial privileges, such as doctor-patient privilege.[152]

Advocates in favor of abrogating the privilege argue that clergy-members should be required to report and testify about suspected child abuse because they are uniquely positioned to learn about such abuse; some claim clergy members are the only professionals some people will go to for help.[153] In addition, advocates argue the interest in protecting children from abuse outweighs the interest in protecting religious rights.[154] By allowing and urging the clergy to report suspected abuse, the State would gain a powerful ally in identifying and preventing abuse.[155]

Conversely, critics argue abrogation of the privilege will deter individuals from going to members of the clergy for advice, thereby preventing the clergy from urging the penitent to seek assistance.[156] Opponents may also argue against abrogation by emphasizing the importance of protecting individual privacy interests.[157]

2. *South Carolina*

Clergy members, including Christian Science Practitioners or religious healers, are included in South Carolina's mandatory reporting statute.[158] However, in South Carolina a clergy member is not under a duty to report "when information is received from the perpetrator of abuse and neglect during a communication that is protected by the clergy and penitent privilege as provided for in section 19-11-90."[159] Further, South Carolina chose to uphold clergy-penitent privilege in civil protective proceedings.[160] So, clergy members in South Carolina only have a duty to report under some circumstances, and evidence of clergy-penitent communications relating to potential abuse will not be admissible in court.

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151. *Id.* at 194–95.
152. *See* Arnold, *supra* note 137, at 891.
153. *See* Winters, *supra* note 137, at 218–19.
154. *See id.* at 220–23.
155. *Id.* at 223.
156. *See* Arnold, *supra* note 137, at 893.
157. *Id.* at 895.
158. S.C. CODE ANN. § 63-7-310 (2012).
159. S.C. CODE ANN. § 63-7-420 (2012).
160. *Id.*

The Office of the Attorney General has released some guidance concerning who qualifies as a member of the clergy.[161] On behalf of the Department of Social Services, Dorothy J. Killian asked the Attorney General's Office for an opinion on whether the meaning of the term "clergy" included "lay pastors, deacons, elders, and/or others who do pastoral counseling."[162] While the Office did not provide an explicit response, it found that the language of the mandatory reporting statute and the decision to retain clergy-penitent privilege within that context indicates the term is meant to be interpreted consistently with its usage in the context of such privilege.[163] South Carolina courts have recognized "the issue of whether a church official is a 'member of the clergy,' 'clergyman' or 'minister' depends upon the ecclesiastical doctrines and laws of the particular religious denomination involved."[164] Therefore, it stated, "[i]n light of the broad remedial purpose of the child abuse or neglect reporting requirements, a case-by-case analysis to determine the applicability of [§ 63-7-310] in a given instance would likely be warranted."[165]

3. Recommendations

Given the Attorney General's conclusion that determinations of whether an individual qualifies as a clergy member are fact-based South Carolina courts should adopt an expansive definition of who qualifies as a member of the clergy under the statute.[166] Although evidence of communications covered under clergy-penitent privilege will not be admissible in civil protection proceedings, a wider range of individuals will still have the duty to report suspected abuse.[167] Further, the South Carolina legislature should consider eliminating the portion of the rule that discourages clergy members from reporting instances of abuse when information is obtained from the abuser. Although it could be argued that an abuser would be discouraged from seeking assistance from the clergy out of fear of being exposed, he or she would not necessarily be deprived of spiritual counsel; it would be the abuser's choice not to speak with the clergy member. In addition, the abuser may still seek counsel without disclosing specific facts of the abuse.

161. *See* Dorothy J. Killian, Op. S.C. Att'y Gen., 2004 WL 113633 (S.C.A.G. Jan. 7, 2004).

162. *Id.* at *1.

163. *Id.* at *5.

164. *Id.* at *4 (citing Reutkemeier v. Nolte, 161 N.W. 290 (Iowa 1917)).

165. *Id.* at *5.

166. *Id.* at *5.

167. S.C. CODE ANN. § 63-7-420 (2012).

Although this policy would prevent abusers from disclosing to clergy who may convince them to come forward or stop the abuse, it would still encourage the clergy member to come forward when he or she does receive such information.

Further, South Carolina courts should recognize a special-relationship exception to impose civil liability on clergy members who fail to warn victims or prevent abuse. Like a psychiatrist, clergy members may be uniquely positioned to learn details of specific threats to individuals by virtue of the intimacy of their conversations with penitents.[168] Similarly, because of their well-respected position within the community, they may be better situated to control the actions of others.[169] Therefore, South Carolina's court and legislature should take the aforementioned steps to encourage members of the clergy to report suspected abuse.

C. Parents

1. Background

Criminal law widely recognizes that a parent owes a duty to his or her child by virtue of their special relationship.[170] As such, parents are usually obligated to act to protect their children from harm.[171] However, only twenty-two states require parents to be mandatory reporters.[172]

It has been argued that "[t]he very existence of a statute that aims to protect children, but does not consider the parent's role as protector, represents a significant break in traditional legal reasoning about the parent-child relationship."[173] In other words, by electing not to impose a statutory

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168. *See* Winters, *supra* note 137, at 218–19.

169. *See id.*

170. Angelita Martinez, *Parents As Mandatory Reporters of Child Abuse and Neglect: Establishing an Explicit Duty to Protect*, 51 WAYNE L. REV. 467, 468 (2005) (citing WAYNE R. LAFAVE, CRIMINAL LAW § 6.2(a) (4th ed. 2003)).

171. *Id.* (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW §§ 1.2, 1.5 (2d ed. 1986)).

172. *Id.* at 468–69 (citing ARIZ. REV. STAT. § 13-3620; DEL. CODE. ANN. tit. 16, § 903; FLA. STAT. ANN. § 39.201; IDAHO CODE § 16-1619; IND. CODE ANN. §§ 31-33-5-1 to 31-33-5-3 (West 1999); KY. REV. STAT. ANN. § 620.030; ME. REV. STAT. ANN. tit. 22, § 4011-A; MINN. STAT. ANN. § 626.556; MISS. CODE ANN. § 43-21-353; MO. ANN. STAT. § 210.115; NEB. REV. STAT. § 28-711; N.H. REV. STAT. ANN. § 169-C:29; N.J. STAT. ANN. § 9:6-8.10; N.M. STAT. ANN. § 32A-4-3; N.C. GEN. STAT. § 7B-301; OKLA. STAT. ANN. tit. 10, § 7103; R.I. GEN. LAWS § 40-11-3; TENN. CODE ANN. § 37-1-403; TEX. FAM. CODE ANN. § 261.101; UTAH CODE ANN. § 62A-4a-403; WASH. REV. CODE. ANN. § 26.44.030; W. VA. CODE ANN. § 49-6A-2; WYO. STAT. ANN. § 14-3-205).

173. *Id.* at 475–76.

duty on parents, legislatures effectively negate a parent's affirmative duty to act on behalf of his or her child.[174] Advocates of mandatory reporting further assert that parents should be included as mandatory reporters because they are uniquely positioned to shield their children from abuse.[175] First, children often rely on their parents and come to them for help.[176] In addition, parents have a level of intimacy with and exposure to their children that would allow them to recognize signs of abuse.[177] Finally, abuse often times takes place within the context of intimate, familial settings that other members of the public are not familiar with.[178]

Critics argue, however, that physicians and educators may be more effective reporters because their training allows them to identify early signs of abuse.[179] This argument is limited, though, because it ignores the fact that children must be brought to a physician, usually by the parents, before the physician can identify the signs of abuse.[180] Further, children must be old enough to go to school in order for abuse to be identified by educators.[181]

A more significant criticism of parental mandatory reporting involves the likelihood parents will not comply with mandatory reporting requirements.[182] Unfortunately, parents are often the abusers of their children.[183] It is unlikely a parent would report his or her own abuse under these circumstances.[184] Similarly, a parent may be unwilling to report his or her spouse for fear of retaliation or loss of custody.[185] However, just because parents may be unwilling to report suspected abuse under some circumstances does not necessarily mean they should not be required to do so.[186] Further, evidence from the twenty-two states that do include parents as

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174. *Id.* at 476 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 56 (5th ed. 1984); Farwell v. Keaton, 240 N.W.2d 217 (Mich. 1976)).

175. *Id.* at 477 (citing Marcelletti v. Lux, 500 N.W.2d 124, 129 (Mich. App. 1993)).

176. *Id.*

177. *Id.* at 479 (citing Smith v. Organization of Foster Families for Equality & Reform, 432 U.S. 816, 844 (1977)).

178. *Id.* (quoting HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, § 9.4 (2d. ed. 1988)).

179. *Id.* at 477–78.

180. *Id.* at 479.

181. *Id.* at 478.

182. *Id.* at 481.

183. *Id.* (citing U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILD MALTREATMENT 2001, 51 (Washington, DC: U.S. Government Printing Office, 2003)).

184. *Id.*

185. *See id.* at 482.

186. *Id.* at 481.

mandatory reports show that parents make the majority of reports of suspected child abuse.[187]

2. *South Carolina*

South Carolina does not include parents in its mandatory reporting statute.[188] It does, however, include foster parents.[189] The decision to include foster parents and exclude biological parents indicates the legislature did not intend for parents to be held criminally liable for failure to report suspected abuse of their children.[190]

South Carolina courts have not explicitly addressed whether parents would be liable for failure to report suspected abuse, but courts do not appear to be inclined to hold that a parent would have a duty to act on behalf of his or her child by virtue of their relationship alone.[191] In *Doe v. Batson*, the court found that a mother of an abuser did not have a duty to warn children in the neighborhood of her son's abusive tendencies by virtue of her special relationship with her son.[192] Although the court ultimately found that she did not have a duty to warn the neighbors because she was unaware her son's abusive tendencies, the court still examined all of the usual factors that it would consider in determining whether a special relationship existed—it did not merely conclude that such a relationship existed because she is his mother.[193] As such, a court is unlikely to find a special relationship exists warranting a duty to act between a parent and his or her child simply due to the nature of their relationship; further analysis of the facts will be required.

3. *Recommendations*

South Carolina courts should expand civil liability to parents for failure to report suspicion of their children's abuse. Although the pressures involved with reporting as a parent may be significant enough to warrant omitting parents from being criminally liable for inaction, the State's interest in

187. *Id.* at 482 (citing U.S. DEP'T OF HEALTH AND HUMAN SERVS, *supra* note 183, at 12).

188. *See* S.C. CODE ANN. § 63-7-310 (2012).

189. *Id.*

190. *See supra* Part II.A.

191. *See* Doe v. Batson, No. 2004-UP-335, 2004 WL 6331124 (S.C. Ct. App. May 17, 2004).

192. *Id.* at *2.

193. *Id.*

protecting children justifies imposing civil liability in order to encourage unwilling parents to report.

Often, parents may be the only individuals who are aware of a child's abuse by virtue of the fact that abuse commonly takes place in a familial setting. While this can make it more difficult for parents to report out of fear of retaliation from an abusive spouse, or reluctance to subject family members to the criminal justice system, there should be some source of motivation for parents to report suspected abuse.

IV. CONCLUSION

South Carolina's existing attitude toward assigning civil and criminal liability for failure to report is too conservative to accomplish the goal of identifying and preventing child abuse. In order to effectively protect its children in the future, South Carolina needs to engage in careful consideration when clarifying liability for attorneys, individuals involved with the clergy, parents, and other individuals whose liabilities may be uncertain. This consideration should balance the oft-conflicting interests in maintaining confidentiality, familial rights, and protecting children. As such, expansion of civil or criminal liability may not be appropriate under all circumstances. Nevertheless, South Carolina should still consider expanding liability for failure to report suspected abuse when the situation demands it.