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Kathryn Keegan

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## THE CLERGY-PENITENT PRIVILEGE AND THE CHILD ABUSE REPORTING STATUTE: IS THE SECRET SACRED?

The concept of a clergyman having to choose between disclosing a confidential communication and the possible threat of criminal sanctions seems far-fetched to most people. Yet, that is precisely what is happening today. Recent authority interpreting<sup>1</sup> the Texas child abuse reporting statute<sup>2</sup> held that members of the clergy would be required to report known and suspected cases of child abuse which were confidentially disclosed to them. This interpretation forces clergymen to choose between obeying the dictates of their religion and complying with the law. This ruling represents serious intrusions into the confidential relationship between the penitent and the clergy. Furthermore, the Attorney General's Opinion has the practical effect of discouraging penitents from seeking spiritual guidance and counseling.

This comment traces the development of the clergy-penitent privilege. The traditional policies for the privilege and the inherent conflict with the statutory requirement of reporting child abuse are discussed. The clergy-penitent privilege is analogized to the psycho-therapist-patient privilege because privacy is an essential element in both relationships. The constitutionality of child abuse reporting statutes is also discussed, particularly as they infringe upon the right of a person to freely exercise his religion. Finally, this comment proposes that although a clergyman should be allowed and even encouraged to report known and suspected cases of child abuse, he should not be compelled to do so.

### *Development of the Clergy-Penitent Privilege*

The clergy-penitent privilege is one of the oldest testimonial

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1. See OP. TEX. ATT'Y GEN. No. JM-342 (Aug. 5, 1985). The Texas Attorney General's Opinion construed the Texas child abuse reporting statute, requiring anyone with knowledge of child abuse to report it to the authorities, to include clergymen. Furthermore, the Attorney General ruled that clergymen would also be required to testify at child abuse proceedings. *Id.*

2. See TEX. FAM. CODE ANN. § 34.07 (Vernon 1975). This section provides:  
(a) A person commits an offense if the person has cause to believe that a child's physical or mental welfare has been or may be further adversely affected by abuse or neglect and knowingly fails to report in accordance with § 34.02 of this code. (emphasis added).  
(b) An offense under this section is a Class B misdemeanor.

privileges. English courts, prior to the Reformation, however, recognized the clergy-penitent privilege.<sup>3</sup> After the Reformation, the common law of England no longer reflected the laws of the Roman Catholic Church, and the confidentiality of confession was no longer absolute.<sup>4</sup> A clergyman did not have a right to withhold any information from a court of law even if that information was obtained during confession.<sup>5</sup> Although the clergy-penitent privilege was abandoned in England after the Reformation, English judges occasionally, as a matter of judicial discretion, excused members of the clergy from testifying about information revealed during confession.<sup>6</sup>

The first recorded case in the United States on the clergy-penitent privilege recognized the privilege without the support of a statute or the English common law.<sup>7</sup> In *People v. Phillips*,<sup>8</sup> the court held that a priest could not be compelled to testify as to what he heard during confession.<sup>9</sup> The court reasoned that compelling a priest to violate the secrecy of the confessional would be an unconstitutional burden on the free exercise of religion, contrary to the first amendment.<sup>10</sup>

3. See Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 96-101 (1983). The author suggests that while there was no law in England prior to the Reformation dictating that confession and its secrecy be honored by the courts, it is logical to conclude that the privilege existed because of the close relationship between the common law and religious laws. Canon law greatly influenced the common law because the courts of England were staffed with many bishops and clerics. *Id.*

4. See *id.* at 98-104. Confession in the Anglican church was voluntary after the Reformation and no longer compulsory. Although confession was still considered inviolable, there was an exception which required ministers to reveal confidential communications that involved serious crimes. This is considered to be the reason for the loss of the minister's privilege in England.

5. *Id.* at 1-3 (quoting 11 HALSBURY'S LAW OF ENGLAND ¶ 464 (4th ed. 1973) ("confessions made to a minister of religion under the seal of secrecy are not privileged from disclosure.")).

6. See, e.g., *Broad v. Pitt*, 172 Eng. Rep. 518 (1828) (the comment by English jurist, Chief Justice Best, represents the English court's approach to the clergy-penitent privilege: "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner, but if he chooses to disclose them, I shall receive them in evidence.").

7. *People v. Phillips*, N.Y.Ct.Gen. Sess. (1813) (this case was not officially reported, but was abstracted in 1 W.J.L. 109 (1843), quoted in *Privileged Communications to Clergymen*, 1 CATH. LAW. 198 (1955)). In *Phillips*, the court held that a priest did not have to reveal who had given him stolen goods which he returned to the rightful owner. The court stated that the Constitution was enacted to protect against all types of religious oppression and tyranny. Furthermore, the court held that a priest did not have to violate his conscience and his church's law by testifying in court because of first amendment. *Privileged Communications to Clergymen*, 1 CATH. LAW. 198, 207 (1955).

8. *Privileged Communications to Clergymen*, 1 CATH. LAW. 198, 207 (1955).

9. *Id.*

10. *Id.* The *Phillips* court declared itself "shocked" that the privilege did not exist in England. The court, however, held that the denial of the privilege to priests in England could be of no influence on American law because the Constitution guaranteed the right of individuals to freely exercise their religion. The court stated:

Four years later, after a New York court restricted the clergy-penitent privilege to Catholic priests only,<sup>11</sup> the New York state legislature passed the first clergy-penitent statute.<sup>12</sup> The statute was purposely non-denominational so that confession made to any priest or minister would be privileged.<sup>13</sup> Currently, forty-nine states and the District of Columbia have statutes granting a privilege to clergy-penitent communications.<sup>14</sup> Although these statutes vary greatly in their treatment of the privilege, neither scholars nor the judiciary question the validity of the privilege.<sup>15</sup> Consequently, the issue is

It is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected. The sacraments of a religion are its most important elements . . . Secrecy is of the essence of penance . . . To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman Catholic religion would be thus annihilated.

*Id.* at 207.

11. See *People v. Smith*, 2 N.Y. City Hall Rec. 77 (Rogers 1817) (case was not officially reported, but was abstracted in *Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 209-13 (1955)).

12. N.Y. REV. STAT. pt. 3, ch. 7, § 72, at 406 (1828) (since amended). This statute provided that "[n]o minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." *Id.*

13. See *id.*

14. ALA. CODE § 12-21-166 (1982); ALASKA CIV. R. 43-h(3) (1984); ARIZ. REV. STAT. ANN. § 12-2233 (1982); ARK. STAT. ANN. § 28-1001, R.505 (1973); CAL. EVID. CODE §§ 1030-1034 (West 1966); COLO. REV. STAT. § 13-90-107 (1973); CONN. GEN. STAT. ANN. § 52-146(b) (West 1981); DEL. CODE ANN. tit. 10, § 4316 (1975); D.C. CODE ANN. § 14-309 (1981); FLA. STAT. ANN. § 90.505 (West 1979); GA. CODE ANN. § 38-419.1 (Harrison 1981); HAWAII REV. STAT. § 621-20.5 (1981); IDAHO CODE § 9-203 (1982); ILL. REV. STAT. ch. 51, § 48.1 (1983); IND. CODE ANN. § 34-1-14-5 (West 1982); IOWA CODE ANN. § 622.10 (West 1982); KAN. STAT. ANN. § 60-429 (1976); KY. REV. STAT. § 421.210 (1982); LA. REV. STAT. ANN. § 15:477 (West 1981); ME. R. OF CT., R. OF EVID. 505 (1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-111 (1980); MASS. GEN. LAWS ANN. ch. 233, 20A (West 1982); MICH. COMP. LAWS § 600.2156 (1986); MINN. STAT. ANN. 595.02 (West 1982); MISS. CODE ANN. § 13-1-22 (1982); MO. ANN. STAT. § 491.060 (Vernon 1952); MONT. CODE ANN. § 26-1-801 (1984); NEB. REV. STAT. § 27-506 (1979); NEV. REV. STAT. § 49-255 (1979); N.H. REV. STAT. ANN. § 516:35 (1981); N.J. STAT. ANN. § 2A: 84A-23 (West 1982); N.M.R. OF CT., R. OF EVID. 506 (1983); N.Y. CIV. PRAC. LAW § 4505 (McKinney 1982); N.C. GEN. STAT. 8-53.2 (1981); N.D. R. OF EVID. 505 (1981); OHIO REV. CODE ANN. § 2317.02 (Page 1981); OKLA. STAT. ANN. tit 12, § 2505 (West 1980); OR. REV. STAT. § 44.040 (1979); PA. CONS. STAT. ANN. § 5943 (Purdon 1971); R.I. GEN. LAWS § 9-17-23 (1970); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1978); S.D. CODIFIED LAWS ANN. § 19-13-16 (1979); TENN. CODE ANN. § 24-1-206 (1980); TEX. REV. CIV. STAT. ANN. § 3715(A) (Vernon 1982); UTAH CODE ANN. § 78-24-8 (1977); VT. STAT. ANN. tit 12, § 1606 (1973); VA. CODE § 8.01-400 (1983); WASH. REV. CODE ANN. § 5.60.060 (1982); WIS. STAT. ANN. § 905.06 (West 1975); WYO. STAT. § 1-12-101 (1977). For a more complete discussion of these statutes, see W. TIEMANN & J. BUSH, *infra* note 51, at 207-32. See also Smith, *The Pastor on the Witness Stand: Toward a Religious Privilege in the Courts*, 29 CATH. LAW. 1 (1984).

15. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1556 (1985). *But see* Stoyles, *The Dilemma of The Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27 (1967) (author suggests that the typical clergy-penitent statute violates the establishment clause of the first amendment because the privilege can only be

rarely litigated.<sup>16</sup>

The lack of reported cases may stem in part from the judicial system's respect for the clergy,<sup>17</sup> or from the fact that relatively few cases have reached the appellate courts.<sup>18</sup> Appellate courts that have analyzed the privilege have had to deal almost exclusively with the interpretation of a state's statute because it is considered a statutorily created privilege that was not recognized at common law. These statutes are not identical and often vary in their treatment of the privilege.

The statutes are divided on the question of who may claim the privilege; therefore, no general statement can be made as to who controls the privilege.<sup>19</sup> In the clergy-penitent relationship, some states' statutes grant the privilege to both the clergyman and the penitent.<sup>20</sup> Other statutes prohibit both clergymen and penitents from disclosing confidential communication; under these, neither may waive the privilege.<sup>21</sup> In a few jurisdictions, the state grants the privilege to the clergyman rather than the penitent.<sup>22</sup>

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claimed by one or a few religions).

16. See Yellin, *supra* note 3, at 96. Yellin's research on the number of reported cases in the United States dealing with the clergy-penitent privilege from 1658 to 1980 revealed approximately 70 cases; compared to 122 cases in California in 1963 alone, dealing with the attorney-client privilege. *Id.*

17. *Id.* at 110. Judicial respect for the clergy may be judges recognizing the inevitable, that clergymen will refuse to testify, despite possible civil and criminal sanctions the court may impose. Furthermore, judges may be reluctant to impose civil or criminal sanctions against clergymen who refuse to testify because public opinion would oppose such punitive measures. *Id.* at 111.

18. See Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 58 (1963).

19. See Yellin, *supra* note 3, at 187.

20. See, e.g., ALA. CODE 21-21-166(b) (Supp. 1984) (the privilege may be claimed by either the clergy or the communicant); CAL. EVID. CODE §§ 1030-1034 (West 1966) ("a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege [and a] clergyman, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege."); OHIO REV. CODE ANN. § 2317.02 (Page 1981) ("the clergyman, rabbi, priest, or minister may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of his sacred trust.").

21. See, e.g., MICH. COMP. LAWS § 600.2156 (1968) ("No minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confession made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination."); VT. STAT. ANN. tit. 12, § 1607 (1973) ("A priest or minister of the gospel shall not be permitted to testify in court to statements made to him by a person under the sanctity of a religious confessional.").

22. See, e.g., OHIO REV. CODE ANN. § 2317.02 (Page 1981) ("the clergyman, rabbi, priest, or minister may testify by express consent of the person making the communication, *except when the disclosure of the information is in violation of his sacred trust.*") (emphasis added). See also *Seidman v. Fishburne-Hudgins Educational Foundation, Inc.*, 724 F.2d 413, 415-16 (4th Cir. 1984) (federal court looked to state law for guidance regarding the development of clergy-penitent privilege and noted that under most state statutes the clergyman is the owner of the privilege);

The statutes also vary in their definition of the clergy. Some statutes have either vague<sup>23</sup> or very broad<sup>24</sup> definitions of who are clergymen. Some states have restricted the definition of clergy in an attempt to keep frauds from claiming the privilege.<sup>25</sup> Such attempts at limiting the privilege to only a few "legitimate" religions could violate the free exercise and equal protection clauses of the Constitution.<sup>26</sup> Even though the statutes differ in their definition of the clergy, no court has denied the privilege to a person who claimed to be a clergyman on the ground that the statutory definition did not include him.<sup>27</sup>

Legislatures have typically required that church doctrine mandate the confidential communication in order for it to be protected.<sup>28</sup> A minority of jurisdictions still follow this traditional approach, often labeled the "discipline enjoined requirement."<sup>29</sup>

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Eckmann v. Board of Educ. of Hawthorn School Dist., 106 F.R.D. 70, 73 (E.D. Mo. 1985) (the court concluded that under federal law the clergy-penitent privilege belongs to the clergyman and cannot be waived by the plaintiff).

23. Louisiana's clergy-penitent statute is one of the few statutes that does not define clergymen, and therefore, is necessarily vague. LA. REV. STAT. ANN. § 15:477-478 (West 1981).

24. See, e.g., N.M. STAT. ANN. § 20-4-506 (1975) ("a clergyman is a minister, priest, rabbi or similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him."); N.Y. CIV. PRAC. LAW § 4505 (McKinney 1982) ("a clergyman, or other minister of any religion or duly accredited Christian Science practitioner . . .").

25. See, e.g., GA. CODE ANN. § 38-419.1 (1981). The Georgia statute seems to apply only to religions that are of Judaeo-Christian origin and presumably would exclude a minister of the Moslem faith, or the Unification Church. The Georgia statute applies "[t]o any Protestant minister of the Gospel, or to any priest of the Roman Catholic Faith, or to any priest of the Greek Orthodox Catholic Faith, or to any Jewish Rabbi, or to any Christian or Jewish minister, by whatever name called, shall be deemed privileged." *Id.*

26. See Stoyles, *supra* note 15, at 32. The author suggests that since only a few religions can claim the privilege, it violates the establishment and equal protection clauses. The state is unconstitutionally favoring certain religions and that when a state recognizes the clergy-penitent privilege, it violates the establishment clause because it furnishes a courtroom, funds, judges and other court personnel, prestige and power to only certain religions. *Id.* at 46. *But see* Sherbert v. Verner, 374 U.S. 398, 409 (1963) (Court held that treating various religions differently does not necessarily violate the establishment clause).

27. See Yellin, *supra* note 3, at 117. *Cf. In re Martha*, 115 N.J. Super. 380, 387, 279 A.2d 889, 893 (1971) (court held a Catholic nun could not claim the clergy-penitent privilege not because she did not meet the statutory definition of clergy but rather because her own religion did not recognize her as a member of the clergy). *But see* Eckmann v. Board of Educ. of Hawthorn School Dist., 106 F.R.D. 70, 72 (E.D. Mo. 1985) (court held that a nun acting as a spiritual advisor for the plaintiff was sufficient to invoke the clergy-penitent privilege under both Missouri and federal law); Comment, *Catholic Sisters, Irregularly Ordained Women and the Clergy-Penitent Privilege*, 9 U.C.D. L. Rev. 523 (1976) (author suggests that nuns should be able to claim the clergy-penitent privilege because they engage in spiritual counseling and because people reveal communications to them based on the expectation of confidentiality).

28. See Stoyles, *supra* note 15, at 35.

29. See ARIZ. REV. STAT. ANN. § 12-2233 (1982); CALIF. EVID. CODE §§ 1032-1034

Confession in the Catholic Church is a classic example of a communication meeting the discipline enjoined requirement because it is mandatory.<sup>30</sup> The majority of religions, however, do not mandate confession.<sup>31</sup> Therefore, a restrictive interpretation of the discipline enjoined requirement would remove the protection of the privilege from most communications made to clergymen. While confession is

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(West 1966); COLO. REV. STAT. § 13-90-107 (1973); IDAHO CODE § 9-203 (Supp. 1984); IND. CODE ANN. § 34-1-14-5 (West 1982); MONT. CODE ANN. § 26-1-804 (1983); UTAH CODE ANN. § 78-24-8 (3) (1977); WASH. REV. CODE § 5.60.060 (1983); WYO. STAT. § 1-12-101 (1983). Courts have typically interpreted the "discipline enjoined" requirement to mean that the communications must have been made by the communicant because he was required under the rules of his church to so communicate and the clergyman must have had a duty to receive the communication. *See, e.g.,* *Sherman v. State*, 170 Ark. 148, 279 S.W. 353 (1926) (the mere fact that a confession is made is not enough, the confession must be made pursuant to a duty of that particular church); *Alford v. Johnson*, 103 Ark. 236, 146 S.W. 516 (1912) (penitent's confessions to minister were not privileged because penitent was not a member of the church, and therefore, did not have a duty to confess).

30. *See* J. ABBO & J. HANNAN, *THE SACRED CANONS*, (2d Rev. ed. 1960). Canon 9066 of the Catholic Church provides: "Each and every member of the faithful . . . , on reaching the age of discretion, that is, the use of reason, is obliged to make an exact confession of all his sins at least once a year." *Id.* at 33. *See also* *In re Estate of Soeder*, 7 Ohio App. 2d 271, 300-02, 220 N.E.2d 547, 567-69 (1966) (court narrowly interpreted the statute and held the privilege applied only to communications made in pursuance of church duty, and therefore, in particular to confessions of sin only, not communications of other tenor). The statutes are divided on whether the penitent must be of the same denomination as the clergyman. *Compare* *Kohloff v. Bronx Sav. Bank*, 37 Misc. 2d 27, 28, 233 N.Y.S.2d 849, 850 (N.Y.C. Civ. Ct. N.Y. County 1962) (the clergy-penitent privilege applies even though the penitent and clergyman are not of the same religion) *with* *Angleton v. Angleton*, 84 Idaho 184, 199-200, 370 P.2d 788, 797 (1962) (statements made to a Roman Catholic priest by a non-Catholic are not privileged and held priest was not incompetent to testify).

31. *See* Yellin, *supra* note 3, at 128. Communications made to Protestant and Jewish clergy would not be privileged, if the court strictly interpreted the "discipline enjoined" requirement because these religions do not have mandatory confession. *Id.* at 130. One court, however, interpreted the "discipline enjoined" requirement liberally. *In re Swenson*, 183 Minn. 602, 237 N.W. 589 (1931). In *Swenson*, the clergyman claiming the privilege was a Lutheran minister who was called by the plaintiff as a witness in a divorce proceeding to prove that the defendant-penitent admitted to having an adulterous relationship. The court held the communications were privileged despite the fact that the minister's religion had no formal secrecy requirement. *Id.* at 603, 237 N.W. at 591-92.

The court in *Swenson* reasoned that it is desirable to encourage confidential communications and held the legislative intent of the statute was to give broad interpretation to the clergy-penitent privilege:

If we are to construe this statute as meaning that only "confession" that is privileged is the compulsory one under the rules of the particular church, it would be applicable only, if our information is correct, to the priest of the Roman Catholic Church. Certainly the Legislature never intended the absurdity of having the protection extend to the clergy of but one church. Had the legislature intended to so limit the privilege, the word "priest" would probably have been used instead of "clergyman."

We are of the opinion that the "confession" contemplated by the statute has reference to a penitential acknowledgement to a clergyman . . . . The clergyman's door should always be open, he should hear all who come regardless of their church affiliation.

*Id.* at 603-05, 237 N.W. at 590-91.

not required in most religions, the notion of confidentiality when such communications occur is universally accepted.<sup>32</sup> Because most religions assume religious communications are confidential, it is anomalous to privilege communications to clergymen only when their religions mandate them. The modern trend, therefore, is to broadly interpret the discipline enjoined requirement to protect confidential communications from judicial inquiry regardless of whether the religion mandates confession.<sup>33</sup>

Some recently enacted statutes apply the privilege to communications made to members of the clergy in their professional capacity as religious or spiritual advisors.<sup>34</sup> While these statutes protect communications of a religious nature, not all statements made to clergymen are privileged. For instance, where a minister acted as an interpreter,<sup>35</sup> or a priest as a notary public,<sup>36</sup> courts have held the communications were not privileged since they were not made to the clergyman in his professional capacity.<sup>37</sup>

A closely related development in the clergy-penitent privilege is the extension of the privilege to cover secular counseling.<sup>38</sup> Courts that have ruled on the issue of whether secular counseling is privileged have reached different results under substantially similar fact

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32. See Reese, *supra* note 18, at 69. Reese believes that the Protestant clergy have an implied duty to keep confessions confidential:

The ministers of most Protestant churches likewise are obligated to keep confidential the communications revealed to them in their ministerial capacity. Although many denominations have not spelled out the precise description or definition of their discipline, their uncodified discipline or practice is as binding on them as though it were written.

*Id.* See also Goldman, *Three Cases Challenged Privacy of Talks with Clergy*, Chicago Daily L. Bull., Aug. 28, 1985, at 3, col. 2 (clergymen of all faiths noted that "anything a parishoner tells [a clergyman] is 100 percent confident[ial].").

33. See, e.g., *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958) (court held that confession is a privileged communication even though the minister attempted to testify because his religion did not mandate secrecy); *In re Fuhrer*, 100 Misc. 2d 315, 419 N.Y.S.2d 426 (1979) (court stated that voluntary confessions are included under the minister's privilege in addition to confessions which are enjoined by religious doctrine).

34. See, e.g., N.H. REV. STAT. ANN. § 516:35 (1981); N.Y. CIV. PRAC. LAW § 4505 (McKinney 1982); WIS. STAT. ANN. § 905.06 (West 1975).

35. *Blossi v. Chicago & N.W. Ry. Co.*, 144 Iowa 697, 123 N.W. 360 (1909) (the court held that a minister summoned by a doctor to act as an interpreter could testify about the conversation, since the minister was not acting in his professional character).

36. *Partridge v. Partridge*, 220 Mo. 3221, 119 S.W. 415 (1909) (the court held a priest's testimony was not privileged since he was not acting as a spiritual advisor).

37. See *supra* notes 35-36. But see *Commonwealth v. Zezima*, 365 Mass. 238, 241, 310 N.E.2d 590, 592 (1974) (defendant showing a gun to a minister might constitute a privileged communication if the displaying of the gun had been made in the course of his seeking religious or spiritual advice or comfort).

38. See, e.g., ALA. CODE § 12-21-166 (Supp. 1982) (communications to clergymen to "enlist help or advise in connection with a marital problem" are privileged); DEL. CODE ANN. tit. 10, § 4316 (1975) (statute privileges marital counseling).



situations and statutes.<sup>39</sup> Where clergymen perform counseling functions similar to psychologists and psychiatrists, courts have held that the communications are privileged.<sup>40</sup> Therefore, it is inconsistent for courts to hold that people who reveal their most intimate personal and family problems to psychologists or psychiatrists are privileged,<sup>41</sup> while similar communications to clergymen are subject to judicial inquiry. Because of this anomaly, courts have recently held that counseling should be privileged regardless of whether it is for secular or religious reasons since the parties intended the communications to be confidential.<sup>42</sup>

### THE POLICY OF THE PRIVILEGE

A competent person can testify in all matters in any legal proceeding.<sup>43</sup> Two classes of witnesses, however, are excluded from the obligation to testify:<sup>44</sup> those that are considered incompetent to testify because of their young age or mental incapacity,<sup>45</sup> and those who, because of a privilege, are not permitted or required to testify.<sup>46</sup> The recognition of a privileged relationship, exempting an otherwise competent witness, is the result of a balancing process in which granting a testimonial privilege is considered more important than the court's need to hear all relevant evidence.<sup>47</sup> Professor Wigmore defined four necessary conditions to establish a privilege:

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39. See, e.g., *Simrin v. Simrin*, 233 Cal. App. 2d 90, 94, 43 Cal. Rptr. 376, 378-79 (1965) (communications made to a rabbi during marital counseling are not privileged; however, parties' agreement to exclude such communications is enforced); *People v. Pecora*, 107 Ill. App. 2d 283, 299, 246 N.E.2d 865, 872-73, cert. denied, 397 U.S. 1028 (1969) (communications made to clergymen during marital counseling held privileged); *Pardie v. Pardie*, 158 N.W.2d 641 (Iowa 1968) (marital counseling with a minister involves privileged communications).

40. See *Pardie*, 158 N.W.2d 641; *LeGore v. LeGore*, 31 Pa. D. & C.2d 107, 5 Adams Co. Leg. J. 51 (1963) (communications to clergyman during marriage counseling are privileged).

41. See, e.g., *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955) (the court stated that the psychotherapist-patient privilege is necessary to prevent full and intimate details of the patient's life being revealed in a courtroom).

42. See, e.g., *Kruglikov v. Kruglikov*, 29 Misc. 2d 17, 717 N.Y.S.2d 845 (Sup. Ct. 1961), appeal dismissed, 16 A.D.2d 735, 226 N.Y.S.2d 931 (1962) (the court held secular counseling performed by a rabbi was privileged, since the parties would not have revealed intimate details of their marriage unless they believed the communications were immune from judicial inquiry); *LeGore*, 31 Pa.D. & C.2d 107, 5 Adams Co. Leg. J. 51 (marital counseling is privileged because the minister needs to know intimate facts in order to give effective guidance and counseling). See also, *Developments in the Law: Privileged Communications*, supra note 15, at 1531.

43. FED. R. EVID. 601 provides, in part: "Every person is competent to be a witness except as otherwise provided in these rules." *Id.*

44. Reese, supra note 21, at 56.

45. *Id.*

46. *Id.*

47. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2285, at 877 (McNaughton rev. 1961).

- (1) The communications must originate in a confidence that they will not be disclosed;
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered, and
- (4) The injury that would result to the relation by disclosure of the confidences must be greater than the benefit, thereby gained from revealing the confidence.<sup>48</sup>

Wigmore concluded that based on these four factors the clergy-penitent privilege should be recognized.<sup>49</sup> The justification for the clergy-penitent privilege is that confession involves disclosure of full and intimate details of the penitent's life and such disclosure would be inhibited if clergymen were required to reveal confessions in the courtroom.<sup>50</sup> Because of the potential for revelation of incriminating evidence, the penitent must be assured that confidentiality of religious communications is protected under the law.<sup>51</sup>

One possible exception to the clergy-penitent privilege is in the area of child abuse.<sup>52</sup> Concern over child abuse in America is reflected in the nationwide expansion of child abuse reporting laws.<sup>53</sup>

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48. *Id.*

49. *Id.* at 878.

50. Courts have recognized that "[s]ecrecy is of the essence of penance. The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed . . ." *People v. Phillips*, unreported, quoted in *Privileged Communications*, *supra* note 7, at 199.

51. See Smith, *The Pastor on the Witness Stand: Toward a Religious Privilege in the Courts*, 29 CATH. LAW. 1, 2 (1984) (author suggests that since a person in the course of spiritual counseling may reveal criminal guilt, secrecy should be assured under the law; alternatively, "if a cleric is unable to guarantee confidentiality, he or she may have a duty to advise against revealing confidences, lest the cleric becomes the instrument through which the matter is exposed to others.").

52. See W. TIEMANN & J. BUSH, *THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATIONS AND THE LAW* 175-78 (2d ed. 1983). The authors contend that the clergy-penitent privilege should not be abrogated when the clergyman hears confidences that involve child abuse. Additionally, the authors argue that recognition of the privilege does not mean that clergymen condone what is told to them in confidence. Furthermore, they warned that "[a]brogation under child protection legislation represents the most assertive and widespread attack on the privilege in recent years. It could contain the seeds of a very dangerous precedent when other kinds of criminal acts gain the level of populist attention that child abuse has gotten recently." *Id.* at 178.

53. See Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARV. J. L. & PUB. POL'Y 539 (1985). Currently, all fifty states have child abuse reporting laws. *Id.* at 545. Almost all states now have statutes that require medical, education, social work, child care and law enforcement professionals to report neglect and exploitation of the child; failure under these statutes to report may subject the person to civil or criminal penalties. *Id.*

Child abuse has been classified into eleven different categories. Physical Battering-physical assaults that cause serious injury to the child; Physical Endangerment-reckless behavior toward a child such as placing a child in a dangerous environ-

The purpose of child abuse reporting laws is not to punish those who maltreat children but rather to provide protection to children.<sup>54</sup> In the rush to protect children, legislatures quickly, and sometimes haphazardly, passed child abuse reporting statutes.<sup>55</sup>

Mandatory reporting laws were first directed at doctors.<sup>56</sup> They are considered the professionals most likely to see injured children, and are presumed to know the symptoms of child abuse and neglect.<sup>57</sup> Most states now mandate that other professionals having regular contact with children and in a position to detect child abuse are required to report.<sup>58</sup> Common among professionals required to report are teachers,<sup>59</sup> social workers,<sup>60</sup> police officers,<sup>61</sup> child care workers,<sup>62</sup> as well as others.<sup>63</sup>

A growing number of states, however, now require anyone that has knowledge of known or suspected cases of child abuse to report it to the authorities.<sup>64</sup> Such overly broad statutes may diminish the impact and enforceability of reporting laws.<sup>65</sup> Furthermore, child abuse reporting statutes that require anyone to report, produce an

ment; Physical Neglect-failure to provide the child with adequate food, clothing or hygiene to a degree which causes injury to the child; Medical Neglect-failure to provide adequate medical, or dental care for the child; Sexual Abuse-vaginal, anal or oral intercourse that causes serious mental injury; Sexual Exploitation-use of a child for pornography, prostitution or other sexually exploitative activities; Emotional Neglect-abuse such as torture and close confinement; Developmental Neglect-failure to provide the child with emotional support; Improper Ethical Supervision-parental behavior that advocates child delinquency; Educational Neglect-failure to send the child to school; Abandonment-intentionally leaving a child alone or in the care of another for an indefinite period of time.

*Id.* at 589.

54. See Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 464 (1977).

55. See Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 711 (1966) ("In the history of the United States, few legislative proposals have been so widely adopted in so little time.").

56. See, e.g., ALA. CODE tit. 27 § 21 (Supp. 1975); OHIO REV. CODE ANN. § 2151.421 (Page 1976); WIS. STAT. ANN. § 48.981 (1) (West 1977).

57. See Besharov, *supra* note 54, at 466-67.

58. See *id.* at 464 n.36 for a compilation of the forty-five states that require professionals to report known and suspected cases of child abuse.

59. See, e.g., CAL. PENAL CODE § 11161.5(a) (West 1977); LA. REV. STAT. ANN. § 14.403(c) (1) (West 1974).

60. See, e.g., ILL. ANN. STAT. ch. 23, § 2054 (Smith-Hurd 1977); N.Y. SOC. SERV. LAW 413 (McKinney 1976).

61. See, e.g., IOWA CODE ANN. § 235A.3(1) (b) (West 1977); MO. REV. STAT. 210.115(1) (1976).

62. See, e.g., N.H. REV. STAT. ANN. 169.40 (1975); N.D. CENT. CODE 50-25.1-03(1) (1977).

63. See, e.g., CAL. PENAL CODE § 11161.5(a) (West 1977) (day camp workers); MISS. CODE ANN. 43-23-9 (1977) (clergymen); OHIO REV. CODE ANN. 2151.421 (Page 1976) (psychologists).

64. See, e.g., OKLA. STAT. ANN. tit. 21, § 846 (West 1977); TEX. FAM. CODE ANN. § 34.01 (Vernon 1975).

65. See Besharov, *supra* note 54, at 469.

inherent tension between granting a testimonial privilege to the clergy-penitent relationship and providing assistance to the minor.

A recent Texas Attorney General's Opinion<sup>66</sup> interpreted the state's child abuse reporting statute. The statute requires anyone with knowledge of known or suspected cases of child abuse and neglect to report it to the authorities.<sup>67</sup> The Attorney General, although reluctant to require clergymen to disclose confidential communications,<sup>68</sup> concluded that members of the clergy were not exempt from the duty to report known and suspected cases of child abuse.<sup>69</sup> This interpretation should be resisted because it directly conflicts with the policy reasons for creating the clergy-penitent privilege.

One court resisted this exception to the clergy-penitent privilege. In an opinion by Justice Fahy, evidently adopted as the decision of the court, it was held in *Mullen v. United States*,<sup>70</sup> that a penitent's communications are privileged in a child abuse case. The court concluded that sound policy reasons justify excluding clergymen from disclosing confidential communications.<sup>71</sup> The court

66. See *supra* note 1.

67. See *supra* note 2.

68. See Goldman, *supra* note 32, at 3. The Texas Attorney General, Jim Mattox, ruled that members of the clergy were not exempt from the duty to report known and suspected cases of child abuse. Furthermore, clergymen would be required to testify in court cases involving child abuse, although no clergyman has been forced to yet. Mattox said he was only interpreting the intent of the state legislature when he ruled that clergymen have a duty to disclose confidential communications and that *he did not agree with the substance of the ruling. Id.* (emphasis added).

69. OP. TEX. ATT'Y GEN. No. JM-342 (Aug. 5, 1985).

70. 263 F.2d 275 (D.C. Cir. 1958). *Mullen* involved a prosecution for child abuse based on the conduct of a mother in chaining her young child in their house while she was gone. The trial court allowed the minister to testify that the mother had come to his office and asked whether she could receive communion. *Id.* at 276. The minister told her that as long as there was any suspicion about her abusing her children he could not let her receive communion and urged her to confess her sins. *Id.* at 277. Justice Fahy concluded that despite the lack of recognition of the privilege at common law the minister could not testify without the consent of the penitent. *Id.*

Justice Fahy found authority for recognizing the privilege in Rule 26 of the Federal Rules of Criminal Procedure. *Id.* at 278. The court noted the rules of evidence were "concerned not only with the truth but the manner of its ascertainment." *Id.* at 280. The court recognized that a minister's testimony about a confidential communication was not a proper method of ascertaining information because it is "shocking to the conscience" and should be excluded from evidence under the clergy-penitent privilege as "interpreted by the courts of the United States in the light of reason and experience." *Id.* at 279. (quoting FED. R. CRIM. P. 26). For other federal decisions recognizing the clergy-penitent privilege, see *United States v. Luther*, 481 F.2d 429, 432 (9th Cir. 1973); *United States v. Wills*, 446 F.2d 2, 4 (2d Cir. 1971); *Eckmann v. Board of Educ. of Hawthorn School Dist.*, 106 F.R.D. 70, 72 (E.D. Mo. 1985).

71. *Mullen*, 263 F.2d at 275. The court in *Mullen* concluded that Rule 26 of the Federal Rules of Criminal Procedure warranted recognition of the clergy-penitent privilege, despite the fact that no federal privilege statute existed. In *Mullen*, the court relied upon dictum in a Supreme Court case that found a suit could not be maintained which "would require a disclosure of the confidences of the confessional. . . ." *Id.* at 278 (quoting *ToHen v. United States*, 92 U.S. 105, 107 (1875)). Similar reasoning was used by another court in determining whether the clergy-penitent priv-

stated that preserving these confidences inviolate outweighed the possible benefit of the evidence at the expense of the integrity of the religious relationship, and the spiritual rehabilitation of the penitent.<sup>72</sup>

Society has recognized that certain relationships should remain immune from judicial inquiry. The clergy-penitent privilege and the psychotherapist-patient privilege are at once similar and distinct. Common to both relationships is the necessity that communications remain confidential. The clergy-penitent privilege, however, also involves the right to practice one's religion free from governmental interference. This distinction between the two privileges may be critical in determining whether clergymen have a duty to report known and suspected cases of child abuse.

### *Similarities Between The Clergy-Penitent Privilege and The Psychotherapist-Patient Privilege*

Requiring clergymen to reveal confidential communications  
which involve known and suspected cases of child abuse is analogous

ilege should be recognized in federal court. See *In re Verplank*, 329 F. Supp. 433 (C.D. Cal. 1971). The *Verplank* court also relied upon Rule 26 of the Federal Rules of Criminal Procedure and concluded that the privilege existed in federal courts. Moreover, the court in *Verplank* placed significance on the fact that the Proposed Federal Rules of Evidence Rule 506, contained a provision acknowledging the clergy-penitent privilege. *Id.* at 435. Rule 506 provided in part:

(1) A "clergyman" is a minister, priest, rabbi, or individual reasonably believed so to be by the person consulting him . . . .

(b) . . . A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as a spiritual advisor.

PROP. FED. R. EVID. 506.

The decision in *Verplank* was handed down before the adoption of the Federal Rules of Evidence, which did not include Proposed Rule 506. Rule 501 was adopted which replaced proposed Rule 506. Rule 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in Rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rules of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501 (emphasis added). Despite the fact that Rule 501 refers to the common law which did not recognize the privilege, the phrase "in light of reason and experience" is the very language used in *Mullen* to justify the conclusion that the privilege exists in federal courts. Thus the incorporation of the language used in *Mullen* into federal Rule 501 indicates that the drafters of the rule intended that the clergy-penitent privilege exists in federal courts. *Accord, Eckmann*, 105 F.R.D. at 72 (the court unequivocally stated that the clergy-penitent privilege exists in the federal courts).

72. *Mullen*, 263 F.2d at 279.

to the duty imposed on psychotherapists or psychiatrists.<sup>73</sup> In both relationships the penitent/patient seeks guidance and counseling. The justification for the psychotherapist-patient privilege is that full disclosure of intimate details of the patient's life is essential for effective treatment.<sup>74</sup> Courts, as a consequence, have acknowledged the need for psychotherapy sessions to remain immune from judicial inquiry because of the very nature of the communications.<sup>75</sup> The clergy-penitent relationship involves similar disclosures that the patient makes in psychotherapy. In fact, psychology recognizes that confession can be a therapeutic process whereby the penitent obtains psychological and physical relief from fear, tension and anxiety.<sup>76</sup>

Protecting the privacy of communications in both relationships is in the best interest of society. Encouraging people to reveal feelings of guilt or remorse to clergymen or psychotherapists facilitates desirable confidential communications.<sup>77</sup> If psychotherapists or clergymen are required to reveal confidential communications in a courtroom, the patient/penitent would refrain from revealing their

73. See, e.g., N.H. REV. STAT. ANN. § 169.40 (1970) (psychologists have a duty to report known and suspected cases of child abuse); OHIO REV. CODE ANN. § 2151.421 (Page 1976) (psychologists included in group of professionals required to report). See also *People v. Stritzinger*, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983) (the court held psychotherapists have an affirmative duty to report to a child protection agency all known and suspected cases of child abuse).

74. See *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955). The court stated the purpose of the psychotherapist-patient privilege:

The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition . . . . It would be too much to expect them to do so if they know that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.

*Id.* at 401 n.2 (quoting GUTTMACHER & WEILOFEN, *PSYCHIATRY AND THE LAW* 272 (1952)).

75. *Taylor*, 222 F.2d 398.

76. See S. FREUD, *AN OUTLINE OF PSYCHO-ANALYSIS*, quoted in 23 *STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 144 (1964). Freud described the importance of full patient disclosure in psychoanalysis, as analogous to confession, in the following manner:

We pledge him to obey the fundamental rule of analysis, which is henceforward to govern his behavior towards us. He is to tell us not only what he can say intentionally and willing [sic], *what will give him relief like a confession*, but everything else as well that his self-observation yields him, everything that comes into his head, even if it is disagreeable for him to say, even if it seems to him unimportant or actually nonsensical.

*Id.* at 174 (emphasis added).

77. See *Reutkemeier v. Nolte*, 179 Iowa 342, 161 N.W. 290 (1917). The court stated that the purpose of the clergy-penitent statute was based upon the idea that the human being sometimes has need of a place of penitence and confession. *Id.* at 344, 161 N.W. at 293. "When any person enters that secret chamber, this statute closes the door upon him, and civil authority turns away its ear."

most intimate feelings and thoughts.<sup>78</sup> Consequently, society as a whole would lose the benefit of being able to seek psychological or spiritual help.

### *The Privacy Rationale*

An alternative justification for prohibiting compelled disclosure of confidential communications for the clergy-penitent and the psychotherapist-patient is that the privileges are necessary to protect the privacy of the communicant.<sup>79</sup> A person's right to privacy is currently interpreted as a fundamental tenet of the American legal tradition.<sup>80</sup> The Constitution recognizes the general interest of a person's right to privacy in confidential communications. The fourth amendment protects a person's right of privacy against unreasonable search and seizures,<sup>81</sup> and has been used to condemn unauthorized government recording of private conversations.<sup>82</sup> Under the fourth amendment, what an individual attempts to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>83</sup> The test is whether the person's "expectation of privacy" is justified.<sup>84</sup>

A penitent's communications to a clergyman involves an expectation of privacy. Penitents expect communications made to clergymen to be confidential, and recognition of the clergy-penitent privilege illustrates society's respect for the penitent's privacy interest.<sup>85</sup> The clergy itself, in its canons, recognizes the privacy interest of the penitent in the clergy-penitent relationship.<sup>86</sup> The clergy-penitent relationships involves the same reasonable expectation of privacy as

78. See Louisell and Sinclair, *Forward: Reflections on the Law of Privileged Communications—The Psychotherapist-Patient Privilege in Perspective*, 59 CALIF. L. REV. 30, 51-53 (1971).

79. See Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 618-19 (1980) (for a general discussion of the privacy rationale for testimonial privileges). See also Yellin, *supra* note 3, at 109. Yellin contends one of the policy reasons for the clergy-penitent privilege is protecting the privacy of conversations between clergymen and penitents. "By encouraging people who are burdened with feelings of guilt or remorse to reveal their inner thoughts to a person of God we facilitate 'socially desirable confidential relationships.'" *Id.* (quoting Ponder, *Will our Pastor Tell?*, LIBERTY 2-3 (May-June 1978)).

80. See A. WESTIN, *PRIVACY AND FREEDOM* 330-38 (1967).

81. U.S. CONST. amend. IV.

82. See *Katz v. United States*, 389 U.S. 347, 359 (1967). See also *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (where Justice Holmes said of wire-tapping: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.").

83. See *Katz*, 389 U.S. at 351-52.

84. *United States v. White*, 401 U.S. 745, 752 (1961).

85. See *supra* note 14 (West Virginia is the only state that does not have a statute recognizing the clergy-penitent privilege).

86. See *supra* notes 30 and 32 (discussing the confidentiality of confession and spiritual counseling).

communications patients make to psychotherapists. Compelling a clergyman or a psychotherapist to disclose information obtained from either the penitent or patient threatens the privacy of the person's most intimate thoughts. Some courts have recognized that this type of communication falls within the constitutional zone of privacy.<sup>87</sup>

The Constitution also recognizes a person's right to privacy in another way. The Supreme Court held a person's right to privacy includes an interest in controlling the publication of private information about one's self.<sup>88</sup> A penitent's communications to a clergyman and a patient's disclosures to a psychotherapist both involve this privacy concern.

A person's right to privacy, however, is not absolute, and a compelling state interest may outweigh that right.<sup>89</sup> The Supreme Court has performed a balancing test between a person's right to privacy and society's need for information.<sup>90</sup> Child abuse reporting statutes represent society's need to detect child abuse versus the communicant's right to privacy. In *California v. Stritzinger*,<sup>91</sup> the California Supreme Court was confronted with the conflict between the psychotherapist-patient privilege and the child abuse reporting statute. The court noted that the patient has a right to privacy, but held that right could be limited when the state has a compelling inter-

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87. See *In re Lifschutz*, 2 Cal. 3d 415, 431-32, 467 P.2d 557, 567, 85 Cal. Rptr. 829, 839 (1970) (court stated that a patient's right to preserve the confidentiality of communications made to a psychotherapist is based on the constitutional right to a "zone of privacy" besides the state's evidence code); see also *In re "B,"* 482 Pa. 471, 484, 394 A.2d 419, 425 (1978) (court held that the psychotherapist-patient privilege is based on the privacy interest of the patient and is protected by the federal and Pennsylvania Constitutions).

88. See *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 457-60 (1977); *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

89. See *Nixon*, 433 U.S. at 465. In *Nixon*, the Supreme Court balanced a person's privacy right with society's need for information. The Court conceded that the President's privacy right was threatened by the requirement that his materials would be screened by government archivists but stated that "any intrusion must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening." *Id.* at 458. See also *Whalen v. Roe*, 429 U.S. 589, 600-03 (1977). In *Whalen*, the Court upheld the constitutionality of a statute requiring physicians to report to the government any patient who was prescribed narcotic drugs. The Court acknowledged the patient's privacy interest, but held that the threat was not "sufficiently grievous . . . to establish a constitutional violation." *Id.*

90. *Katz*, 389 U.S. at 351-52. Federal courts have also performed a balancing test of the individual's privacy interest against the state's interest. See, e.g., *United States v. Westinghouse*, 638 F.2d 570, 577-80 (3d Cir. 1980) (the court recognized that employees' medical records fell within a zone of privacy guaranteed by the Constitution but held that the government was entitled to the information because of the public's interest in safe working conditions); *Planter v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978) (the court held that elected officials had a privacy interest in preventing disclosure of financial records but that the state's interest in discouraging official corruption outweighed the privacy interest).

91. 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983).



est.<sup>92</sup> The court concluded that the state's interest outweighed the patient's privacy interest, and therefore, the psychotherapist had a duty to report known and suspected cases of child abuse.<sup>93</sup>

The Texas child abuse reporting statute represents the same compelling state interest involved in the *Stritzinger* case.<sup>94</sup> The Texas Attorney General's opinion interpreted the state statute to require clergymen to report known and suspected cases of child abuse even if that information was gained during a confidential communication.<sup>95</sup> The analogy to the psychotherapist privilege implies that clergymen would also have a duty to report cases of child abuse because they both protect similar privacy interests. The clergy-penitent privilege, however, differs from the psychotherapist-patient privilege in two important respects. First, courts have held that psychotherapists have a special duty to disclose a patient's statement which threatens a third person.<sup>96</sup> Additionally, the clergy-penitent privilege also involves another important right, the right of a person to freely exercise his religion.<sup>97</sup>

In *Tarasoff v. Board of Regents of the University of California*,<sup>98</sup> the California Supreme Court held the psychotherapist-patient privilege was abrogated to the extent necessary to avert danger to others. Although the court recognized the patient's privacy interest, it held the privilege "ends where the public peril begins."<sup>99</sup> In reaching its conclusion, the court relied heavily on the California evidence code which specifically abrogates the privilege when there is possible threat of harm to others.<sup>100</sup> Significantly, there is no equivalent provision in the California code abrogating the clergy-

92. *Id.* at 511, 668 P.2d at 742, 194 Cal. Rptr. at 435 (citing *Britt v. Superior Court*, 20 Cal. 3d 844, 855, 574 P.2d 766, 773, 143 Cal. Rptr. 695, 702 (1978) (a compelling state interest can outweigh a right to privacy); *Board of Medical Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 680, 156 Cal. Rptr. 55, 61 (1979) (a compelling state interest may warrant intrusions into zones of privacy).

93. *Stritzinger*, 34 Cal. 3d at 512, 668 P.2d at 743, 194 Cal. Rptr. at 436.

94. See TEX. FAM. CODE ANN. § 34.07 (Vernon 1975).

95. See *supra* notes 1 and 2.

96. See, e.g., *Tarasoff v. Board of Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (the landmark case imposing a legal duty on psychotherapists to warn third parties who are in danger from a patient); *McIntosh v. Milano*, 168 N.J. Super. 466, 403 A.2d 500 (1979) (the court considered the obligation of a psychotherapist to reveal confidential communications to the potential victim, and concluded that there is a duty of disclosure if there is an imminent danger to society or the patient). *But see Stone, The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976) (the author contends that the duty imposed on psychotherapists to reveal confidential communications will reduce public safety since it will interfere with the ability of the therapist to effectively treat potentially dangerous patients).

97. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

98. 17 Cal. 3d 425, 551 P. 2d 334, 131 Cal. Rptr. 14 (1976).

99. *Id.* at 442, 551 P.2d at 349, 131 Cal. Rptr. at 27.

100. CAL. EVID. CODE § 1024 (West 1966).

penitent privilege. Because the clergy-penitent privilege affords greater protection than the psychotherapist-patient privilege, in cases dealing with possible injury to third person, it should also afford greater protection in cases dealing with child abuse. The underlying basis for this distinction may be the first amendment interest in the free exercise of religion.

### *Constitutional Justifications*

The primary purpose of the free exercise clause is to preserve religion and religious practices against government interference.<sup>101</sup> It is difficult to imagine a more intrusive act of government than compelling clergymen to reveal what was said to them in confidence.<sup>102</sup> To compel disclosure in such cases would force clergymen to choose between obeying the dictates of their religion and complying with the law. Similarly, the penitent would also have to choose between complying with the dictates of his religion and facing possible criminal sanctions if the clergyman did reveal the confidences.

In *Sherbert v. Verner*,<sup>103</sup> the Supreme Court held that when a regulation interferes with an individual's right to freely exercise his religion there must be a compelling state interest involved. The Court concluded that even if a compelling state interest is involved, the state has the burden of demonstrating that less restrictive forms of regulation are unavailable.<sup>104</sup> The child abuse reporting statutes are based upon a compelling state interest. However, they are tolerable only if no less restrictive alternatives are available. In *Wisconsin v. Yoder*,<sup>105</sup> the Court held that where the state is pursuing a compelling nonreligious goal, and that goal could also be achieved by granting an exemption to those whose religious beliefs dictate non-compliance, such an exemption must be given.

In *Yoder*, Amish parents were convicted of violating Wisconsin's compulsory school-attendance law, which required children to attend public or private school until the age of sixteen.<sup>106</sup> The

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101. See *School Dist. v. Schempp*, 374 U.S. 203 (1963); *McGowan v. Maryland*, 366 U.S. 420 (1961).

102. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 846 (1978). Professor Tribe states that any intrusion into religious liberty must be the least restrictive means of achieving a compelling state interest. *Id.*

103. 374 U.S. 398 (1963). *Sherbert* had been fired by her employer for refusing to work on Saturday, the Sabbath day of her faith. She then filed for unemployment compensation after she was unable to find work that would not require her to work on Saturdays. South Carolina denied her unemployment benefits because the statute prohibited compensation unless one could show "good cause" for failing to accept work. *Id.* at 399-402. The Court held that the South Carolina statute violated *Sherbert's* right to freely exercise her religion. *Id.* at 403-05.

104. *Id.* at 406-07.

105. 406 U.S. 205 (1972).

106. *Id.* at 205-07.

Amish religion prohibits formal education beyond eighth grade.<sup>107</sup> The Court held that although a compelling state interest was involved, it did not outweigh the burden imposed upon the Amish to freely exercise their religion.<sup>108</sup> Therefore, the Court granted an exemption from the law to the Amish.<sup>109</sup>

The Texas child abuse reporting statute<sup>110</sup> represents a compelling state interest, however, an exemption should be granted to those whose religious beliefs dictate noncompliance. Even if an exemption is granted to clergymen, the state can still achieve its goal of detecting and preventing child abuse. The statute requires all persons with knowledge of known or suspected cases of child abuse to report it to the authorities.<sup>111</sup> Under this statute, professionals who are most likely to see and detect child abuse would have a duty to report such cases.<sup>112</sup> This includes various professionals who often have close contact with the child or other family members,<sup>113</sup> for instance, doctors who treat the child, and teachers who see the child daily. Exempting the clergy from reporting confidential communications does not necessarily inhibit the state's goal because of all the other professionals who must report. In fact, one scholar suggests that broadening the class of persons who are legally required to report may reduce the impact of reporting requirements because "everyone's duty may easily become nobody's duty."<sup>114</sup>

Despite the trend towards broadening the class of those required to report, the great majority of reports of child abuse continue to be made by people not required to do so.<sup>115</sup> Friends, neigh-

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107. *Id.* at 210-11.

108. *Id.* at 213-14.

109. *Id.* at 234-36. Although the Court recognized the state's power to establish requirements for basic education, it added that a "[s]tate's interest in universal education . . . is not totally free from a balancing process when it impinges on fundamental rights and interests . . ." *Id.* at 213-14. In weighing the competing interests, the Court found a strong state interest in compulsory education, but one that "is by no means absolute to the exclusion or subordination of all interests." *Id.* at 215. The Court concluded that the compulsory-education law substantially interfered with the basic religious beliefs and practices of the Amish, and therefore, an exemption had to be granted. *Id.* at 218.

110. *See supra* note 2.

111. *Id.*

112. *See* Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE L. REV. 437 (1985). Victims of child abuse often show the following signs: incredible anguish, shame and humiliation, regressive behavior or a variety of personality and physical disorders, and mistrust of adults. *Id.* at 441. *See also* Besharov, *supra* note 54, at 466-68. Some professionals are considered most likely to see abused children and are presumed to be able to detect the symptoms of abuse and neglect. *Id.* at 467.

113. *See* Besharov, *supra* note 53, at 545.

114. *See* Paulsen, *supra* note 55, at 713.

115. *See* Besharov, *supra* note 54, at 469; *see also* Besharov, *supra* note 53, at 545. The author suggests the current problem with child abuse reporting statutes is not the lack of reported cases, but rather the system's failure to deal effectively with

bors and relatives, though not subject to mandatory reporting laws in most states, make most of the reports.<sup>116</sup> Since the majority of people who report cases of child abuse are not usually required to do so, the state must grant an exemption to clergymen whose religious beliefs dictate noncompliance because the state can still achieve its goal. The requirement that clergymen report child abuse is more broad than necessary.

Granting an exemption for clergymen whose religion dictates noncompliance would not prevent other clergymen from making voluntary reports like any other citizen. Some religions expressly recognize exceptions to the confidentiality of the clergy-penitent privilege in order "to prevent the commission of a crime,"<sup>117</sup> and others permit communications to be revealed when the clergyman's "conscience so requires."<sup>118</sup> Given the fact that the states' goal of detecting child abuse can still be achieved, an exemption should be granted to those whose religious beliefs dictate noncompliance with the law.<sup>119</sup>

When religious conduct endangers other people, the state's interest may outweigh whatever rights of religious liberty are at stake.<sup>120</sup> Thus, courts have upheld laws prohibiting religious practices that involve the handling of poisonous snakes,<sup>121</sup> bigamy,<sup>122</sup> the use of illegal drugs,<sup>123</sup> or using children to distribute religious litera-

those cases reported. *Id.*

116. See Besharov, *supra* note 53, at 469.

117. For example, the Lutheran Church states in its bylaws that: No minister of the Lutheran Church in America shall divulge any confidential disclosure given to him in the course of his care of souls or otherwise in his professional capacity . . . except with the express permission of the person who had confided to him or in order to prevent the commission of a crime. *Bylaws of the Lutheran Church of America, quoted in Jones, Privileged Communications and the Military Chaplain: Some Ethical Considerations*, 1 CHAPLAINCY 15 (1978).

118. See Yellin, *supra* note 3, at 146.

119. See 4 NEW CAT. ENCY. 135 (1967). The Catholic Church's position on revealing confessions is absolute: "The seal of confession must always be meticulously safeguarded and observed in regard to all matters that come under it. The law of the seal admits of no excusation. No cause, however great, whatever the circumstances, will justify its violation. The seal is inviolable . . ."

120. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory small pox vaccination).

121. *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975) *cert. denied*, 424 U.S. 954 (1976) (a statute prohibiting the handling of poisonous snakes, even if done as part of religious services, is constitutional).

122. *Reynolds v. United States*, 98 U.S. 145 (1878) (Court upheld law prohibiting bigamy even though bigamy was an accepted doctrine of the Mormon Church). The authority of *Reynolds* is questionable; for a discussion, see Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 8-11 (1961).

123. *Town v. State*, 377 So.2d 648 (Fla. 1979) (the free exercise clause does not permit the use of cannabis). *Contra* *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (the court held that an exemption must be given to American Indian religion for the sacramental use of peyote, a narcotic).

ture in violation of child labor laws.<sup>124</sup> Although these laws interfere with an individual's right to freely exercise his religion, courts have justified the intrusion because the actual religious practice involves socially undesirable behavior or harm to others.<sup>125</sup> Mandatory child abuse reporting statutes requiring clergymen to report confidential communications results in serious intrusions into religious practices. These statutes are socially desirable, however, they subvert the clergy-penitent privilege. Confession and spiritual counseling are not inherently harmful or socially undesirable acts, and therefore, are distinguishable from cases where the Court has upheld laws prohibiting religious practices. The state, therefore, should not be able to regulate confession even if it is an attempt to detect and prevent child abuse.

The statutory duty requiring clergymen to report known and suspected cases of child abuse has the practical effect of inhibiting communications to members of the clergy. Once the penitent becomes aware that clergymen have a duty to report confidential communications that involve child abuse, he will stop making such statements to clergymen. Thus, the states' goal of detecting child abuse will not be furthered at all because the source of the information will soon stop. Additionally, any potential benefit society may have gained from the penitent seeking religious guidance will also be lost.

### CONCLUSION

The principle of religious freedom embodied in the first amendment requires that there be an exemption for clergymen whose beliefs dictate noncompliance with mandatory child abuse reporting laws. Denying an exemption in this case would force clergymen to choose between following the dictates of their religion and possible criminal sanctions for refusing to comply with the law. Furthermore, if these religious communications are not protected, individuals will not feel free to seek spiritual guidance and society will lose any potential benefit from these relationships.

Preserving religion and religious practices from governmental interference is the primary purpose of the free exercise clause of the first amendment. Additionally, religious freedom is a fundamental tenet of the American legal system. Requiring clergymen to report confidential communications contravenes this tradition. While

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124. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (the conviction of a Jehovah's Witness of violating child labor laws by permitting a child under her guardianship to distribute religious literature was upheld over claim that it was the child's religious duty to preach the gospel in this manner).

125. *Id.* at 166-67.

mandatory child abuse reporting statutes are socially desirable, the burden imposed on clergymen unconstitutionally violates the free exercise clause. Consequently, clergymen should not be compelled to subvert their religious beliefs in order to comply with the law.

*Kathryn Keegan*

