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When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions

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WHEN THE SHEPHERD PREYS ON THE FLOCK: CLERGY SEXUAL EXPLOITATION AND THE SEARCH FOR SOLUTIONS

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I. INTRODUCTION

EARLY American society scrutinized the sexual and marital practices of its citizens. The common law considered a wife to be the servant of her husband and provided the husband with a cause of action against anyone who enticed his wife away from him.[1] Eventually, the courts found that a wife also had a proprietary interest in her husband's services and extended this cause of action to women who had their husbands lured away from them by others.[2] This cause of action, alienation of affection, was one of several "amatory actions" that included breach of promise to marry,[3] criminal conversation,[4] and seduction.[5] Since the 1930s, however, a majority of the states have abolished or severely curtailed amatory causes of action, either by statute or by judicial edict.[6]

The trend toward elimination of amatory actions is directly linked to changes in society, including increasing societal interest in personal choice, decriminalization of sexual activities in many states, and growing skepticism about the law's role in protecting feelings and in en-

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1. D. DOBBS, R. KEETON, & D. OWEN, PROSSER & KEETON ON TORTS § 124, at 916 (5th ed. 1984) [hereinafter PROSSER & KEETON].

2. Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889).

3. This cause of action provided recovery for the loss of financial or social benefits that the plaintiff would have otherwise obtained upon marriage. It also allowed recovery for damage to the plaintiff's health, reputation, social status, and future prospects of marriage. Duttenhoffer v. Duttenhoffer, 474 So. 2d 251 (Fla. 3d DCA 1985).

4. "A recovery for criminal conversation requires proof that there was a valid marriage and that the defendant had adulterous relations with the plaintiff's spouse." 1 H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 12.3, at 662 (2d ed. 1987).

5. The tort of seduction provided recovery for damage to character and reputation, for mental anguish, and for pecuniary losses suffered by a female who was lured into having sex out of wedlock. *See* Breon v. Hinkle, 14 Or. 494, 13 P. 289 (1887).

6. *See, e.g.*, ALA. CODE § 6-5-331 (1975); COLO. REV. STAT. § 13-20-202 (1973); DEL. CODE ANN. tit. 10, § 3924 (1974); D.C. CODE ANN. § 16-923 (1981); MONT. CODE ANN. § 27-1-601 (1987); VA. CODE ANN. § 8.01-220 (1980); WYO. STAT. § 1-23-101 (1977). *See also* O'Neil v. Shuckardt, 112 Idaho 472, 733 P.2d 452 (1980); Fundermann v. Mickelson, 304 N.W.2d 790, (Iowa 1981); Wyman v. Wallace, 94 Wash. 2d 99, 615 P.2d 452 (1980).

forcing personal morality.[7] Today, an adult's decision to enter into a sexual relationship with another consenting adult is ordinarily considered to be a private issue outside the scope of legal concern.[8] This laissez-faire attitude toward most sexual relationships between adults, however, does not mean that the government is powerless to intervene in situations where government intervention is considered warranted.[9]

This Comment analyzes one of the situations in which the government should intervene, namely, the sexual exploitation of parishioners[10] by members of the clergy.[11] It argues that sexual relations[12] between clergy[13] and parishioners are inherently problematic and that the clergy has the responsibility to avoid these relations. The Comment posits that sexual contact between clergy and parishioners constitutes sexual exploitation on the part of the clergy. Noting that clergy sexual exploitation of parishioners is a widespread occurrence and is significantly harmful to its victims, this Comment analyzes different solutions and remedies that are available to ameliorate the problem. It concludes that legislative action is necessary and would reap significant benefits, and it proposes a course of action.

II. THE ISSUE OF CONSENT

When two persons decide to enter into a sexual relationship, both par-

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7. PROSSER & KEETON, *supra* note 1, § 930.

8. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (interpreting the right to privacy as granting individuals, married or single, the right to make fundamentally private decisions free from unwarranted government intervention); Griswold v. Connecticut, 381 U.S. 479 (1965) (expounding on the freedom of association component of the right to privacy).

9. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding laws prohibiting homosexual sodomy); Whisenhunt v. Spradlin, 464 U.S. 965, 971 (1983) (Brennan, J., dissenting from denial of certiorari) ("Although the constitutional right to privacy normally shields sexual relations from judicial scrutiny, it does not do so where the right to privacy is used as a shield from liability at the expense of the other party."); State v. Ketter, 364 N.W.2d 459, 462-63 (Minn. Ct. App. 1985) (upholding laws prohibiting prostitution).

10. The term "parishioners" is used to denote the lay persons who form the congregations or followings of religious organizations. In this Comment the term is used interchangeably with the term "followers."

11. The term "clergy" is used to denote religious leaders regardless of the religion or sect to which they belong. Priest, pastor, minister, rabbi, and similar terms may be used interchangeably.

12. This includes not only sexual intercourse, but other forms of sexual behavior—fondling, kissing, and erotic talk—as well.

13. This Comment uses masculine terms, e.g., clergyman and he, when referring to clergy, and feminine terms when referring to a parishioner victim, because the vast majority of sexual exploitation cases involve male clergy and female parishioners. *See* Cooper-White, *Soul Stealing: Power Relations in Pastoral Sexual Abuse*, THE CHRISTIAN CENTURY 196 (1991). Sexual exploitation also occurs between pastors and parishioners of the same sex, *id.*, and the recommendations given in this Comment should be applied with full force to those cases as well.

ties assume the risks inherent in such a relationship. Both parties usually understand that the emotional investment they are making may not pay off and that they may eventually suffer the hurt associated with a failed relationship. When the parties are in relatively equal positions, these risks are voluntarily assumed and the consequences that may result are part and parcel of the social interactions that make up such a large and important part of life. Our society has determined that competent adults should be free to choose their sexual partners, so long as both parties consent to the relationship.[14]

A. The Power Imbalance

Sexual relationships between clergy and parishioners do not fall within the category of voluntary relationships between consenting adults. As several commentators on the subject have noted, authentic consent on the part of the parishioner in this type of relationship does not exist.[15]

Consent is illusory for two reasons. First, there is a disproportionate distribution of power in the clergy-parishioner relationship. The widely-used analogy characterizing the clergyman as a shepherd and the parishioners as his flock attests to the asymmetry of power between the two parties. The clergyman is the congregation's leader, while the parishioner is the follower who places her respect and trust in the clergyman.

The most insidious aspect of the clergyman's power is the role he plays as a link between the parishioners and God. The clergyman is perceived as carrying "ultimate spiritual authority, particularly in the eyes of a trusting parishioner who looks to him for spiritual guidance and support."[16] A parishioner can seldom give true consent to sexual relations with a clergyman when she believes that his power and authority come from God.

The clergyman's role as emotional and spiritual counselor also heightens the power imbalance, making the parishioner more vulnerable and dependent, and further inhibiting any ability to freely consent to sexual relations. During counseling, a woman often shares the most intimate details of her life with her pastor.[17] In his role as a counselor,[18] a clergyman often sees women at their most vulnerable.

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14. *See supra* notes 1-9 and accompanying text.

15. *See* M. FORTUNE, IS NOTHING SACRED? WHEN SEX INVADES THE PASTORAL RELATIONSHIP (1989); Cooper-White, *supra* note 13, at 197; Morey, *Blaming Women for the Sexually Abusive Male Pastor*, THE CHRISTIAN CENTURY 866 (1988); Pellauer, *Sex, Power, and the Family of God: Clergy and Sexual Abuse in Counseling*, CHRISTIANITY AND CRISIS 47 (1987).

16. Cooper-White, *supra* note 13, at 197.

17. *See* Cooper-White, *supra* note 13, at 198.

18. From 1957 to 1976, the number of Americans who sought help from a religious or secular

Further, it is a medically accepted fact that a person undergoing counseling "develop[s] extreme emotional dependence on the therapist."[19] "[A] sexual liaison in such a situation has all the earmarks of exploitation."[20]

B. *The Transference Phenomenon*

The second condition that vitiates true consent in cases of clergy-parishioner sexual relations is the existence of a psychological phenomenon known as "transference." Transference is a term employed by psychologists and psychiatrists to denote a patient's emotional response to a therapist and "is generally applied to the projection of feelings, thoughts and wishes onto an analyst, who has come to represent some person from the patient's past."[21] These feelings can be transferred consciously or unconsciously and are usually feelings that patients have toward their parents.[22]

The occurrence of the transference phenomenon in therapeutic situations was one of the many theories of Sigmund Freud.[23] Although some of Freud's theories and conclusions have been criticized or aban-

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18. From 1957 to 1976, the number of Americans who sought help from a religious or secular counselor increased from one out of every seven Americans to one out of every four. H. CLINEBELL, BASIC TYPES OF PASTORAL CARE AND COUNSELING 47 (1984). Most of these people turned to the clergy with their problems. King & Woodward, *When a Pastor Turns Seducer*, NEWSWEEK, Aug. 28, 1989, at 48.

19. *See* Masters & Johnson, *Principles of the New Sex Therapy*, 133 AM. J. PSYCHIATRY 548, 553 (1976).

20. Siassi & Thomas, *Physicians and the New Sexual Freedom*, 130 AM. J. PSYCHIATRY 1256, 1257 (1973).

21. STEDMAN'S MEDICAL DICTIONARY 1473 (5th ed. 1982).

22. D. DAWIDOFF, THE MALPRACTICE OF PSYCHIATRISTS 6 (1973). A clear and helpful explanation of how transference operates is found in Simmons v. United States:

> What the notion of transference assumes is that as therapy develops, and if therapy is working, the client comes to either consciously or unconsciously, or both, regard the therapist as a child might regard a parent. This is important because in order for a therapist to have positive powerful impact in helping the client to change and heal, the therapist has to have the same kind of authority power in a positive way with the client that the parents once had, or the parental figures once had in a negative way with the client while the client was growing up. And, so what happens when therapy is working . . . is that this transference relationship grows so that the client comes to experience the therapist as a powerful, benevolent parent figure. And, what that means is that you've got a symbolic, sometimes conscious sometimes not, parent-child relationship existing in the therapy setting, even though you have two adults there.

805 F.2d 1363, 1365 (9th Cir. 1986) (quoting the trial court testimony of clinical psychologist Dr. Laura Brown).

23. S. FREUD, ESSENTIAL PAPERS ON TRANSFERENCE 1 (A. Esman ed. 1990). Freud's theories included, among others, "the power of the dynamic unconscious; the meaningfulness of the dream; the phenomena of infantile sexuality." *Id.*

doned by members of the psychoanalytic community,[24] the concept of transference has proven to be a "unifying theme."[25]

The transference phenomenon has serious implications for the propriety of sexual relations between a therapist and a patient. Medical authorities are nearly unanimous in considering sexual contact between therapist and patient to be a mishandling of the transference phenomenon.[26] Sexual relations are unacceptable because "the transference represents a true reconstruction of the past, a vivid reliving of earlier desires and fears that distort the patient's capacity to perceive the 'true nature' of the present reality."[27] Transference robs patients of their ability to exercise independent judgment.[28] Accordingly, true consent to sexual relations on the part of the patient becomes a fiction. One court stated:

> [A] sexual relationship between therapist and patient cannot be viewed separately from the therapeutic relationship that has developed between them. The transference phenomenon makes it *impossible* that the patient will have the same emotional response to sexual contact with the therapist that he or she would have to sexual contact with other persons.[29]

The majority of courts that have considered the problem have recognized the implications of transference for the viability of consent. The courts have been almost unanimous in holding that sexual relations between a therapist and a patient constitute malpractice and permitting recovery of damages for emotional distress or any other resultant harm.[30]

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24. *Id.*

25. *Id.*

26. *See* Stone, *The Legal Implications of Sexual Activity Between Psychiatrist and Patient*, 133 AM. J. PSYCHIATRY 1138, 1139 (1976) (Experts agree that "there are absolutely no circumstances which would permit a psychiatrist to engage in sex with his patient. All such instances constitute misuse of the transference.").

27. Cooper, *Changes in Psychoanalytic Ideas: Transference Interpretation*, 35 J. AM. PSYCHOANALYTIC A. 80, 81 (1987).

28. J. SMITH, MEDICAL MALPRACTICE—PSYCHIATRIC CARE 309 (1986).

29. L.L. v. Medical Protective Co., 122 Wis. 2d 455, 458, 362 N.W.2d 174, 178 (1984) (emphasis added).

30. *See, e.g.*, Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986) (health service counselor); Andrews v. United States, 732 F.2d 366 (4th Cir. 1984) (physician's assistant who had taken counseling and psychology courses); Richard H. v. Larry D., 198 Cal. App. 3d 591, 243 Cal. Rptr. 807 (1988) (psychiatrist); Horak v. Biris, 130 Ill. App. 3d 140, 474 N.E.2d 13 (1985) (social worker); Rowe v. Bennett, 514 A.2d 802 (Me. 1986) (social worker); Cotton v. Kambly, 101 Mich. App. 537, 300 N.W.2d 627 (1980) (psychiatrist); Roy v. Hartogs, 85 Misc. 2d 891, 381 N.Y.S.2d 587 (N.Y. Sup. Ct. 1976) (psychiatrist); Mazza v. Huffaker, 61 N.C. App. 170, 300 S.E.2d 833 (1983) (psychiatrist); Lenhard v. Butler, 745 S.W.2d 101 (Tex. Ct. App. 1988) (psychologist).

Although the transference phenomenon is usually discussed in the context of psychiatrist- or psychologist-patient relationships, the same dynamics are in effect when the clergy assumes the role of religious counselor.[31] In fact, pastoral counseling has been called "the oldest form of psychotherapy."[32] The pioneers of modern psychology realized the basic similarity between secular therapy and religious counseling:

> Freud directly acknowledged the essential similarity between psychoanalytic therapy and religious counseling by describing psychoanalysis as "pastoral work in the best sense of the words." He thus recognized in psychoanalysis what is true in all psychotherapy and counseling; namely that it is similar, and indeed a rival, to the long Christian tradition of confession and counseling.
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> Jung also was quite aware of the religious nature of psychotherapy . . . [as illustrated] when he writes: "Patients force a psychotherapist into a role of priest, and expect that he shall free them from distress. This is why we psychotherapists must occupy ourselves with problems which strictly speaking belong to the theologian."[33]

The ramifications of transference on the issue of parishioner consent cannot be ignored. During the last decade, the clergy has assumed a more prominent role in emotional and spiritual counseling.[34] In fact, many of the clergy are spending from twenty-five to sixty percent of their time in face-to-face consultation.[35] Some churches even advertise positions for clergy who do nothing but counseling.[36] As more of the clergy get into the counseling business with its inherent problems associated with transference, it is not surprising that some commentators have argued that the guidelines and ethics of accountability that apply to secular therapists and proscribe any sexual contact with patients should also apply to the clergy.[37]

III. THE SCOPE AND NATURE OF THE BEAST

Very little has been written on the issue of clergy sexual exploitation of parishioners.[38] A general perception that "these things simply do

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31. *See* Cooper-White, *supra* note 13, at 197.

32. C. STEIN, PRACTICAL PASTORAL COUNSELING at vii (1970).

33. Vitz, *Psychology and Religion*, BAKER ENCYCLOPEDIA OF PSYCHOLOGY 932, 933-34 (D. Benner ed. 1985) (citations omitted).

34. Breecher, *Ministerial Malpractice: Is It a Reasonable Fear?*, TRIAL, July, 1980, at 12.

35. *Id.*

36. *Id.*

37. *See, e.g.*, Morey, *supra* note 15, at 47.

38. Cooper-White, *supra* note 13, at 196.

not happen in the church"[39] explains the lack of comment. This perception is perpetuated by hesitancy on the part of the victims of pastoral sexual exploitation to come forward and tell their stories.[40]

A. *The Code of Secrecy*

Many parishioners victimized by their pastor don't speak out against their abuser because they fear that doing so would wreak catastrophic harm on their reputation.[41] Many also fear that they will become ostracized by their community and friends,[42] suffering "what may amount to a devastating social and spiritual exile."[43] Many are cajoled or threatened into secrecy by the exploiting clergymen,[44] while others blame themselves.[45]

Even in the infrequent situation where clergy sexual abuse is actually reported and believed, it is likely to be brushed off as an extreme and isolated incident.[46]

B. *The High Incidence of Exploitation*

Unfortunately, incidents of clergy sexual misconduct are far more prevalent than is commonly believed.[47] It is estimated that more than ten percent of all clergymen are engaged in sexual or romantic relationships with their parishioners or counselees.[48] This number exceeds the figure commonly ascribed to male psychotherapists.[49] According to the figures gathered by one church, the percentage of clergymen engaged in sexual misconduct may even be as high as twenty-three percent.[50]

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39. M. FORTUNE, *supra* note 15, at xvii.

40. King & Woodard, *supra* note 18, at 48. "The shame of the victims, the embarrassment of the congregation and the pride of church hierarchs all conspire to make sexual abuse by clergy second only to incest as a taboo subject." *Id.*

41. Morey, *supra* note 15, at 866.

42. *Id.*

43. *Id.*

44. Pellauer, *supra* note 15, at 50.

45. King & Woodard, *supra* note 18, at 49.

46. M. FORTUNE, *supra* note 15, at xvii.

47. *Id.*

48. Cooper-White, *supra* note 13, at 196.

49. *Id.*

50. Miami Herald, June 12, 1991, at 20A, col. 2. These figures came from the Presbyterian Church, which found evidence suggesting that between 10% and 23% of clergy nationwide have had sexual contact with parishioners, clients, or employees while performing their religious duties. *Id.*

C. *The Opportunities for Exploitation*

Such a high frequency of exploitation can only be comprehended in light of the numerous opportunities for sexual exploitation that exist in religious organizations. First, the clergy is surrounded by parishioners who, as has already been discussed,[51] are easy prey for the unscrupulous.

Second, churches exhibit systemic factors that are conducive to sexual exploitation, including: "homogenized values within an organization; overcommitment by staff; high stress/low support; and . . . 'no talk' rules about sexuality."[52]

Third, a clergyman's frequent position as counselor also offers opportunities for sexual abuse.[53] The "clear boundaries" that delineate what the proper limits are for interactions between the secular therapist and client do not exist in the religious counseling arena.[54]

Fourth, the clergy often has "almost total access to the homes and lives of their parishioners. Many clergymen are loath to set any limits on where and how they will meet people."[55] Often there is significant social interaction between clergy and parishioners.[56]

Fifth, the clergy seldom receives supervision.[57] Without supervision, the opportunity for sexual exploitation is multiplied. Once a pastor develops a sexual attraction and zeroes in on a particularly vulnerable parishioner, there is no one to intervene and take preventative action.

Sometimes a clergyman realizes how easy it is to take advantage of these opportunities and develops a pattern of victimization. For example, one minister slept with more than thirty women in his congregation.[58] The harm done to the victims was tremendous: of these thirty women, one attempted suicide and several others divorced as a result of the sexual exploitation.[59]

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51. *See supra* notes 15-37 and accompanying text.

52. Pellauer, *supra* note 15, at 48.

53. Morey, *supra* note 15, at 866.

54. Pellauer, *supra* note 15, at 48.

55. King & Woodward, *supra* note 18, at 49 (quoting James Sparks, a Presbyterian minister and University of Wisconsin professor).

56. Pellauer, *supra* note 15, at 48.

57. *Id.* at 49.

58. King & Woodward, *supra* note 18, at 49. Another example of repeated exploitation is the case of Dennis Hawk, a minister in the Lutheran Church for 15 years. Hawk was considered to be successful and hardworking. He had a loving wife and two children. Hawk also had affairs with 16 members of his congregation. Typically targeting women who were emotionally needy, Hawk did not make any sexual advances unless he felt certain that he would not be rebuffed. Hawk eventually sought help through group therapy because he felt ashamed of his actions. *Id.* Hawk understood the dynamics of what was occurring. He admitted that he was the perpetrator: "It was authority rape on my part." *Id.*

59. *Id.*

D. The Victims' Devastation

Although most sexual exploitation cases do not involve such a large number of victims, each victim's harm suffered is extensive. Generally, the psychological and emotional damage suffered by victims of clergy exploitation is severe and long-term. A consultant in a program for survivors of clergy exploitation wrote of "the lasting devastations that these women have experienced."[60] Another expert wrote of the similarity between clergy sexual abuse and incestuous abuse.[61] If the clergyman is acting as a counselor, the victim often sees him as a father figure and subconsciously transfers the love she has for her father onto the clergyman.[62] When a clergyman takes advantage of this situation and sexually exploits the counselee, she suffers the same kind of "shame, guilt and anxiety experienced by incest victims."[63]

Common manifestations of the harm suffered by clients exploited by their secular counselors include diminished self esteem, increased feelings of personal ambivalence, increased sexual difficulties, anger at being exploited, a feeling of being used as a sex object, and an inability to trust other therapists.[64] The more severe cases of anxiety and depression sometimes lead to hospitalization and suicide attempts.[65]

The harms suffered by parishioners exploited by religious counselors are likely to be even more severe than those suffered by clients

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60. Cooper-White, *supra* note 13, at 196.

61. Morey, *supra* note 15, at 866. Morey stated that:

> Sexual abuse by pastors exhibits the same dynamic as incestuous abuse, which takes place within the context of an intimate relationship (family, church, counseling) between an authoritative and powerful person (a relative or minister) and a person who is vulnerable to and trusting of that power (a child or counselee). Victims often feel responsible for the abuser's activity and so are bound in secrecy by a double burden of guilt and shame. Even if the victim does speak up, she or he may not be believed.

Id.

62. This is due to the transference phenomenon. *See supra* notes 21-29 and accompanying text.

63. Simmons v. United States, 805 F.2d 1363, 1367 (9th Cir. 1986) (quoting the district court opinion). The extent of the devastation suffered by incest victims is similar to the long-term harms that may be suffered by clergy exploitation victims. Incest victims exhibit a markedly increased tendency toward substance abuse and addiction, obesity, and sexual dysfunction. Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191, 193-94 (1985). Adults molested as children also have severely impaired relationship skills and are likely to abuse their children. *Id.* at 194. As many as 80% of women molested as children have been institutionalized or have engaged in prostitution and nearly 40% of adult incest victims have attempted suicide. *Id.* at 193.

64. Zelen, *Sexualization of Therapeutic Relationships: The Dual Vulnerability of Patient and Therapist*, 22 PSYCHOTHERAPY 178, 181-82 (1985).

65. *Simmons*, 805 F.2d at 1367 (citing the district court).

similarly victimized by secular therapists. The damage done to parishioners by sexually exploitive clergymen "may be magnified—to cosmic proportions,"[66] by the "God factor." The violation of trust may spur a spiritual crisis in which the victim leaves the church, suffering the "loss of pastor, faith and the community of faith."[67] The victims are often left in a state of "spiritual shock"[68] in which they blame God for violating their sacred trust.[69]

The harms suffered by the victims of clergy sexual exploitation are neither exclusively psychological nor exclusively spiritual in nature. The severe psychological damage experienced by many of the victims requires prolonged and expensive treatment.[70] Yet female parishioners who expose the exploitation are usually blamed for the incidents and labeled seductresses.[71] Their reputations are shredded.[72] The fallout from the incidents exact a heavy toll on victims' families. Women may lose their jobs and sometimes their entire lives in the community.[73] These are not the usual results of a romantic relationship between two "consenting adults." These unique harms highlight the need for swift and effective action on the part of the government.

IV. STATUS QUO SOLUTIONS

An analysis of current remedies indicates that the status quo is not effectively combating clergy sexual exploitation. Neither church self-regulation nor available judicial remedies are particularly effective.

A. Church Self-Regulation

Historically, churches have been lax in policing their clergy for sexual misconduct. Aside from a general lack of supervision[74] and a sexual ethic that stresses secrecy and that treats sex as a taboo subject,[75] church leaders have been unwilling to listen to the stories told by the victims of clergy sexual exploitation.[76]

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66. Pellauer, *supra* note 15, at 48.
67. *Id.*
68. *Id.*
69. King & Woodward, *supra* note 18, at 49.
70. Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 212 (1984).
71. Cooper-White, *supra* note 13, at 197.
72. Morey, *supra* note 15, at 866.
73. Cooper-White, *supra* note 13, at 197-98.
74. Pellauer, *supra* note 15, at 48.
75. *Id.* at 49.
76. King & Woodward, *supra* note 18, at 48. According to United Methodist Bishop Calvin McConnell: "What women have been telling us for a number of years has been true, but we tended to not want to believe them." *Id.*

The traditional response to these situations has been to blame the victims for the sexual transgressions of the clergy.[77] This view was illustrated by one commentator who described clergymen as "sitting duck[s] for the romantically starved."[78] When a woman comes forward and exposes the exploitative clergyman, the congregation is likely to rally around him. Traditional respect for the clergyman's position, and the congregation's reluctance to believe that it could have been mistaken in accepting and trusting its pastor, often lead the congregation to deny the evidence and to blame the victim instead of demanding accountability and justice.[79]

Part of the problem is that there are few explicit pronouncements of professional ethics for clergy. One Minnesota-based survey of thirty-three denominations found that only ten of the thirty-three had a code of ethics that mentioned sexual exploitation; only six had established grievance procedures for victims.[80]

Some churches recently have started to change, recognizing that the problem "has reached critical proportions."[81] In Minnesota, for example, churches have responded to the revelations of the state task force by establishing a statewide interfaith committee to deal with this problem.[82] In June 1991, the Presbyterian Church repealed its three-year statute of limitations for reporting clergy sexual misconduct.[83] It also adopted a policy of advising local church organizations to establish procedures to quickly investigate sexual misconduct complaints and to notify secular authorities if necessary.[84] Similarly, the United Church of Christ has developed national policies on sexual harassment issues.[85]

These efforts, though laudable, are insufficient. Even though some religious denominations are starting to treat the problem more seriously, the overall institutional response to the sexual misconduct of the clergy is woefully inadequate. Typically, when sexually exploitative clergymen are uncovered, they get "a slap on the wrist, a lot of sympathy and [are] referred to a counselor."[86] Frequently the minis-

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77. Morey, *supra* note 15, at 866.
78. *Id.*
79. *Id.*
80. Pellauer, *supra* note 15, at 50. The task force was composed of 100 Minnesota professionals who were assigned to study the problem of sexual exploitation by therapists and counselors and to make legal recommendations. *Id.* at 47.
81. Miami Herald, *supra* note 50, at 20A, col. 2.
82. King & Woodward, *supra* note 18, at 48.
83. Miami Herald, *supra* note 50, at 20A, col. 1.
84. *Id.*
85. King & Woodward, *supra* note 18, at 48.
86. Cooper-White, *supra* note 13, at 197.

ters are simply transferred to another assignment, free to continue to use exploitative tactics on the unsuspecting members of the new congregations.[87]

Nor is it likely that the victims of clergy sexual exploitation will turn to the church for help. Quite often, victims of clergy sexual abuse feel betrayed not only by the exploitative clergyman, but also by the entire church—and even by God.[88] With their trust in the church completely undermined, victims are unlikely to turn to the church for solace and help—especially if they believe the congregation will side with the priest, as is often the case.

Even if victims decide to turn to the church, they can usually expect little more than sympathy.[89] For those who have been so grievously harmed, sympathy is small consolation. The victims of clergy sexual abuse need somewhere other than the church to turn to for help.

B. Clergy Malpractice

It has already been established that when psychiatrists, psychotherapists, or other secular counselors take advantage of the vulnerability of patients and exploit clients for their own sexual gratification, the courts will hold the counselors guilty of malpractice and will demand civil liability for the damages inflicted on the patient.[90] Considering the basic similarities between therapist and clergy sexual exploitation,[91] it would seem at first glance that the victims of clergy sexual exploitation might have an avenue for redress of their grievances in the form of a cause of action for clergy malpractice.

The term malpractice refers to the failure of a professional to exercise that degree of skill and learning normally applied by members of that profession in similar circumstances.[92] One major problem with clergy malpractice actions is that the skill and learning of religious leaders varies from religion to religion.[93] This makes it seemingly impossible for the courts to develop a general objective standard to evaluate the conduct of clergy from the myriad of religions in the United States.[94]

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87. Morey, *supra* note 15, at 869.

88. *See supra* notes 66-69 and accompanying text.

89. Cooper-White, *supra* note 13, at 198.

90. *See supra* note 30 and accompanying text.

91. *See supra* notes 31-37 and accompanying text.

92. RESTATEMENT (SECOND) OF TORTS § 299(A) (1965).

93. Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 289, 763 P.2d 948, 960 (1988), *cert. denied*, 490 U.S. 1007 (1989).

94. *Id.*

Without a generalized objective standard to apply, courts would "inevitably [become involved in making] a judgment of the competence, training, methods and content of the pastoral function in order to determine whether the cleric breached the duty"[95] imposed by the religion's standards. However, the United States Supreme Court has repeatedly held that the first amendment bars the judiciary from considering whether certain religious conduct conforms to the standards of a particular religious group.[96]

In *United States v. Lee*, the Supreme Court refused to make a determination as to which party had the correct interpretation of the Amish faith.[97] Similarly, in *Serbian Eastern Orthodox Diocese for the United States v. Milivojevich*, the Supreme Court held that it was impermissible for the courts to inquire into the propriety of the removal of a bishop from his post and the reorganization of the church diocese.[98] In *Thomas v. Review Board of Indiana Security Division*, the Court reiterated its abhorrence toward judicial probing into the proper interpretation of religious beliefs, making it clear that this sort of inquiry "is not within the judicial function and judicial competence."[99] The Court stated unambiguously that "[c]ourts are not arbiters of scriptural interpretation."[100] According to the Court, "the first amendment forbids civil courts from playing such a role."[101]

This proscription prevents the viability of any clergy malpractice action based on a denomination-specific standard. However, some commentators have argued that when a member of the clergy holds himself out as a skilled and competent counselor, that person should be required to perform with the same degree of skill and learning normally applied by secular counselors.[102] This secular-based standard calls for the application of neutral principles and does not involve the courts in making unconstitutional inquiries into the standards of a particular religious group and a clergyman's compliance with those standards.

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95. *Id.*

96. *See* United States v. Lee, 455 U.S. 252 (1981); Thomas v. Review Bd. of Ind. Sec. Div., 450 U.S. 707 (1981); Serbian E. Orthodox Diocese of the United States v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440 (1969).

97. 455 U.S. at 257.

98. 426 U.S. at 696.

99. 450 U.S. at 716.

100. *Id.*

101. Presbyterian Church in the United States v. Mary Elizabeth Hull Presbyterian Church, 393 U.S. 440, 450 (1969).

102. *See, e.g.*, Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V.L. REV. 47, 57 (1981); Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPPERDINE L. REV. 137, 149 (1986).

Even if the courts were to recognize clergy-as-counselor malpractice, this cause of action would be an inadequate response to the clergy sexual exploitation problem. First, this cause of action would only be available when the clergyman assumes the role of counselor and holds himself out as possessing a high degree of competence and expertise. The power imbalance between priest and parishioner,[103] and the risk that the parishioner will be harmed as a result of sexual contact,[104] exist even if the priest does not assume the role of counselor.

Second, imposing a secular-based standard of care would prove quite harmful to the religious counseling enterprise. "A rule that would subject the religious minister to the standard of practice applicable to licensed psychologists or marriage counselors in the community would endanger the very distinctions which make religious counseling desirable."[105] If a standard of care were imposed on religious counselors, those who would continue to practice could be forced to "insist upon contractual relationships . . . and request releases whenever third parties are to be consulted or treated."[106] Practices such as these are likely to significantly lessen the value of religious counseling by reducing the intimacy between the parties. "[P]eople who have been through painful emotional experiences . . . need a caring, involved person who will accept them as they are and will work with them."[107] What they don't need is a seemingly nontrusting person demanding that they sign a contract or a release form.

As a result of these inherent problems, no court in the land has recognized this theory of malpractice.[108] Consequently, this potential remedy is not now available to the victims of clergy sexual exploitation.

C. *Breach of Fiduciary Duty*

Another legal remedy that could potentially be used by the victims of clergy sexual exploitation is a civil cause of action for breach of

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103. *See supra* notes 15-18 and accompanying text.

104. *See supra* notes 58-60, 70-73 and accompanying text.

105. Destafano v. Grabrian, 763 P.2d 275 (Colo. 1988).

106. Comment, *Made Out of the Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W.L. REV. 507, 515 (1983).

107. Mahood, *Helping Patients Cope With Grief*, 3 OSTOMY MGMT. 14, 15 (1980).

108. *See, e.g.*, Handley v. Richards, 518 So. 2d 682 (Ala. 1987) (per curiam) (Maddox, J., concurring specially); Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 763 P.2d 948 (1988), *cert. denied*, 490 U.S. 1007 (1989); *Destafano*, 763 P.2d at 275; Baumgartner v. First Church of Christ, 141 Ill. App. 3d 898, 490 N.E.2d 1319 (1986), *cert. denied*, 479 U.S. 915; Hester v. Barnett, 723 S.W.2d 544 (Mo. Ct. App. 1987); Strock v. Pressnell, 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988); White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990). One state supreme court, while not actually recognizing clergy malpractice, did hold that such a cause of action might be conceivable. *See* Lund v. Caple, 100 Wash. 2d 739, 675 P.2d 226 (1984).

fiduciary duty. The essence of a fiduciary relationship is that the two parties involved do not deal on equal terms.[109] One party has placed trust and confidence in the other, who has accepted that trust and confidence and is therefore in a superior position and capable of exerting unique influence over the dependent party.[110] The courts have recognized that the fiduciary "is duty bound to act with the utmost good faith for the benefit of the other party."[111] A fiduciary's obligations include, among others, a duty of loyalty,[112] a duty to exercise reasonable care,[113] and a duty to deal impartially with beneficiaries.[114] A person standing in a fiduciary relationship with another is subject to civil liability for any damages suffered by the other resulting from the breach of any duty arising from the relationship.[115]

A fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, attorney and client,[116] or doctor and patient.[117] In general, members of the professions are said to be in fiduciary relationships with their clients.[118] The term "professional" has historically been used to denote those who accept the status, honor, and other benefits of their position and who—in return—agree to place the interests and well being of those whom they serve foremost.[119]

Clergymen and parishioners are clearly in fiduciary relationships. The parishioners place their trust and confidence in the clergymen, who accept that trust and confidence and are therefore in a position to exercise unique influence over them.[120] As members of the clerical profession, clergymen are highly respected and achieve a high degree of status and influence.[121] The courts have recognized the fiduciary nature of the clergy-parishioner relationship.[122] In doing so, the courts

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109. Barbara A. v. John G., 145 Cal. App. 3d 369, 382-83, 193 Cal. Rptr. 422, 431-32 (1983).

110. *Id.*

111. Herbert v. Lankershim, 9 Cal. 2d 409, 483 (1937).

112. RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).

113. *Id.* § 174.

114. *Id.* § 183.

115. RESTATEMENT (SECOND) OF TORTS § 874 (1979).

116. Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795 (1983).

117. Hoopes v. Hammargren, 102 Nev. 425, 725 P.2d 238 (1986).

118. K. POPE & J. BOUHOUTSOS, SEXUAL INTIMACY BETWEEN THERAPISTS AND PATIENTS 24 (1986).

119. *Id.*

120. *See supra* notes 15-18 and accompanying text.

121. *See, e.g.*, Morey, *supra* note 15, at 869.

122. *See* Adams v. Moore, 96 N.C. App. 359, 385 S.E.2d 799 (1989) (preacher owed fiduciary duty to parishioner and violated that duty by using his position and influence to obtain the deed to parishioner's home, then selling it for a quick profit), *review denied*, 389 S.E.2d 83 (N.C. 1990); *see also* Nelson v. Dodge, 76 R.I. 1, 68 A.2d 51 (1949) (priest stood in a confidential relation with parishioner and had duty to act with the utmost good faith).

have realized that the clergy must accept certain obligations in exchange for the respect, status, and influence they are granted.

Victims of clergy sexual exploitation may be able to take advantage of this realization by the courts and file civil actions against the offending clergyman for breach of fiduciary duty. Two recent decisions indicate that the courts might be amenable to such a strategy.[123]

In *Erickson v. Christenson*, the Oregon Court of Appeals ruled that a pastor who takes advantage of his position and engages in sexual relations with a minor can be sued for breach of fiduciary duty.[124] The facts in *Erickson* differ significantly from the typical clergy sexual exploitation scenario that is the subject of this Comment. *Erickson* did not involve sexual relations between consenting adults. In *Erickson*, the pastor began having sexual relations with the plaintiff when she was only thirteen.[125] These relations continued until the victim reached adulthood.[126] Nonetheless, it is encouraging that the court did not seem to base its decision on the plaintiff's minority status. Though the court may have considered the plaintiff's age in deciding that the sexual relations between her and the pastor were not consensual, her age was not the dispositive issue.

In *Destafano v. Grabrian*, the Colorado Supreme Court ruled that a priest who engages in sex with an adult parishioner may be held liable for breach of fiduciary duty.[127] The holding in *Destafano*, however, is quite narrow and may be of little help to most of the victims of clergy sexual exploitation. In *Destafano*, a couple was experiencing marital problems and turned to their parish priest for counseling.[128] The priest represented himself as a competent professional skilled in helping people with marital difficulties.[129] He took advantage of the wife's emotional vulnerability and became engaged in a sexual relationship with her that led to the collapse of her marriage.[130]

The court's holding was based on the priest's role as a marriage counselor, not his role as a priest. The court wrote:

> We have no difficulty in finding that Grabrian, *as a marriage counselor* to Robert and Edna, owed a fiduciary duty to Edna. His

123. *See* Destafano v. Grabrian, 763 P.2d 275 (Colo. 1988); Erickson v. Christenson, 99 Or. App. 104, 781 P.2d 383 (1989).
124. 781 P.2d at 385.
125. *Id.*
126. *Id.*
127. 763 P.2d 275.
128. *Id.* at 278.
129. *Id.* at 279.
130. *Id.*

> duty to Edna was "created by his own undertaking" to counsel her. Grabrian had a duty, *given the nature of the counseling relationship*, to engage in conduct designed to improve the Destefanos' marital relationship. As a fiduciary, he was obligated not to engage in conduct which might harm the Destefanos' relationship. If the allegations are true, it is clear to us that Grabrian breached his duty and obligation when he had sexual intercourse with Edna.[131]

The court in *Destafano* could have said that clergymen have a fiduciary duty to refrain from sexual contact with their parishioners, but it did not do so. In its opinion, the court mentioned two factors that probably influenced its decision.

First, the court noted that the State Legislature had expressly exempted the clergy from legislation that proscribed sexual intimacies between mental health professionals, marriage and family therapists, and their clients or patients.[132] In deference to the State Legislature, the court was unlikely to contravene the legislative intent by ruling that clergymen have a fiduciary duty to refrain from sexual relations with parishioners.

Second, the court noted that its decision would have been significantly more difficult and complicated if the priest had asserted that his conduct had been dictated by his sincerely held religious beliefs or that his conduct was consistent with the practice of his religion.[133] This concern illustrates the caution that courts display whenever they are called upon to venture into the religious realm.[134] This caution is another factor that makes it less likely that courts will recognize a fiduciary duty of the clergy to refrain from sexual contact with parishioners. This avenue, though not completely shut off to clergy sexual exploitation victims, unfortunately holds little promise.

V. THE NEED FOR LEGISLATIVE ACTION

The intractable nature of the clergy sexual exploitation problem, the devastation suffered by its victims, and the inadequacy of church and

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131. *Id.* at 284 (emphasis added).

132. COLO. REV. STAT. § 12-43-111(1)(l) (1985), states that:

> The [Colorado state board of psychologist examiners] has the power to deny, revoke, suspend, or refuse to renew any license, or to place on probation a licensee, upon proof that such person . . . (l) [h]as maintained relationships that are likely to impair his professional judgment or increase the risk of client exploitation, such as . . . having sexual intimacies with clients.

The clergy is generally exempted from these requirements in 1988 COLO. SESS. LAWS § 12-43-215(1). The statute states that persons engaged in the practice of religious ministry are not required to comply with the provisions of the statute unless they hold themselves out to the public to be either a psychologist, licensed marriage counselor, family therapist, or licensed professional counselor.

133. *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988).

134. *See infra* notes 152-66 and accompanying text.

judicial responses all point to the need for swift action on the part of state legislatures. A handful of states, including Minnesota and Wisconsin, have enacted criminal[135] and civil[136] penalties for the perpetrators. Unfortunately, many states, instead of providing solutions, are actually part of the problem.[137] This section proposes a solution to the problem of clergy sexual exploitation and suggests that the Florida Legislature and the legislatures of all states not having similar plans in effect adopt this proposal. Noting that sexual exploitation by *any* therapist is harmful to its victims, the proposal encompasses sexual exploitation by secular therapists and counselors, as well as by the clergy.[138]

A. The Four-Pronged Solution

This Comment advances a solution to clergy sexual exploitation that encompasses four elements: (1) education, (2) support services, (3) criminal sanctions, and (4) a civil remedy.

1. Education

The first element of this proposal is education. It is evident that an extremely large segment of society is unaware of the extent and nature of clergy sexual exploitation.[139] So deeply embedded is society's ignorance that even in the few states that have criminalized this form of

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135. *See* MINN. STAT. ANN. § 609.344(h)-(j) (West 1991); WIS. STAT. ANN. § 940.22 (West 1990).

136. *See* MINN. STAT. ANN. § 148A.01-.06 (West 1991); WIS. STAT. ANN. § 895.70 (West 1990).

137. *See* CAL. BUS. & PROF. CODE § 4508, 4980.01 (West 1974 & Supp. 1986); MICH. COMP. LAWS § 333.18214(5) (1979); N.Y. MENTAL HYG. LAW § 31.02(a)(3)(iii) (McKinney 1978) (statutes regulating secular counselors but exempting the clergy).

138. Although the majority of courts have held that sexual relations between some forms of secular therapists and their patients constitute malpractice, *see supra* note 30 and accompanying text, some courts have been reluctant to hold that these relations are malpractice per se, *see, e.g.*, Jacobsen v. Muller, 181 Ga. App. 382, 352 S.E.2d 604 (1986) (plaintiff could not recover because she was aware that sexual relations were beyond the scope of her counselor's duty and because she responded positively to her counselor's amorous advancements). By requiring that the plaintiff prove that her counselor had made sexual relations a part of the counseling, the court in *Jacobsen* ignored the power dynamics and transference concerns that are inherent in therapeutic relationships. The court's archaic philosophy became evident when the presiding judge wrote that "to allow the appellant to recover . . . would in effect have this court endorse a quixotic view that the virtue of women must be defended whether it exists or not." *Id.* at 608 (Deen, J., concurring specially). Attitudes like this create the need for the states to step in and declare that sexual relations between therapists and their patients are always forbidden during the course of the counseling relationship.

139. *See supra* notes 38-40, 76-79 and accompanying text.

sexual exploitation, there still remains a "lingering acceptance by some of such sexual conduct."[140]

This component of the plan has twin goals: to inform the public, clergy, and others about the dynamics, extent, and devastating nature of sexual exploitation; and thereby to change the attitudes that lead to blaming the victim and ignoring the problem. To accomplish these goals, the Florida Legislature and other state legislatures should mandate that manuals, brochures, and other informational materials on power imbalances and sexual exploitation be developed for distribution to the public, clergy, educational institutions, and secular counselors.

Education should yield several beneficial results. Initially, it is a step toward preventing clergy sexual exploitation. Clergymen who clearly understand that engaging in sexual relations with parishioners can be catastrophic to the victims may be deterred from engaging in such relations. Also, churches and parishioners would become aware of the problem and be more apt to identify "problem" clergymen and to take preventive or remedial steps.

An information campaign could also be successful in helping lift the stigma often suffered by the victims of clergy exploitation when they are blamed for the incident and shunned by their churches and communities. This would have the collateral effect of helping to highlight the problem. Further, in diminishing worry about being blamed and shunned by their churches and communities, many victims may be more likely to report abuse.

2. *Support Services*

The second element of this proposal is support. Victims of clergy sexual exploitation are often abandoned by their churches and communities or feel so betrayed that they can't seek help for their emotional injuries. The victims' harm is frequently extensive, and they need support to aid them through their ordeal.

This part of the proposal calls on the Legislature to provide information and referral services and to facilitate advocacy, crisis intervention, and other help to the victims of clergy sexual exploitation.[141] These measures could be implemented either through existing programs or by establishing new programs.

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140. Ohrtman v. Minnesota, 466 N.W.2d 1, 2 (Minn. Ct. App. 1991).

141. States should also provide these forms of assistance to victims of exploitation by secular therapists or counselors as part of a comprehensive plan aimed at combating sexual exploitation.

3. *Criminal Sanctions*

As evidenced by the high rate of clergy sexual abuse, current disincentives are woefully ineffective in deterring this behavior. The third element of this proposal calls for the adoption of criminal laws patterned after Minnesota[142] and Wisconsin[143] law. To enhance their deterrent effect, these laws should include imprisonment as one of the penalties[144] and may include fines and probation; mandatory counseling may also be included as a rehabilitative measure.

The serious nature of criminal penalties calls for care in their application. The risk and severity of serious harm to sexual exploitation victims significantly increases whenever a clergyman assumes the role of pastoral counselor. Accordingly, criminal penalties should attach only when the sexual contact occurs while the clergyman is involved in a counseling relationship with the parishioner. If the clergyman has served as the parishioner's counselor sometime in the past, criminal penalties should be levied only if the state can establish that the parishioner had become emotionally dependent on the clergyman.[145]

Criminal penalties should significantly deter sexual exploitation by pastoral counselors, while also furthering justice.

In situations where the clergyman has never been the victim's counselor, criminal penalties should not apply. Because many religious denominations allow their religious leaders to marry,[146] some commentators argue that it may be perfectly legitimate for single pastors to court and marry parishioners.[147] The application of criminal penalties outside the pastoral counselor context would have a chilling effect on the relationships between clergy and their parishioners and would in some cases be unduly harsh.

4. *Civil Remedy*

The fourth element of this proposal is the creation of a civil cause of action for sexual exploitation. This cause of action should provide relief for two types of plaintiffs.[148] First, the Legislature should pro-

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142. *See* MINN. STAT. ANN. § 609.344(h)-(j) (West 1991).

143. *See* WIS. STAT. ANN. § 940.22 (West 1990).

144. The amount of jail time can be determined by each state, but it should be significant enough to deter sexual exploitation. The sentences should also vary according to the severity of the offense.

145. The same penalties should be applied to all secular therapists and counselors.

146. *See* Morey, *supra* note 15, at 866.

147. *See* Cooper-White, *supra* note 13, at 197 (citing Lebacaz & Barton, *Pastor-Parishioner Sexuality*, EXPLOR (Winter 1988)).

148. The Minnesota and Wisconsin statutes provide protection for the first category of plaintiffs, but not for the second. MINN. STAT. ANN. § 609.344(h)-(j) (West 1991); WIS. STAT. ANN. § 940.22 (West 1990).

vide that any person who suffers injuries caused by sexual contact with a religious counselor has a civil cause of action for the recovery of all resulting damages. Consent on the part of the victim would not be a defense against this claim. Under this scenario, a plaintiff would only need to establish three elements to prove the pastor's liability: (1) that the religious leader is or was counseling the plaintiff for some mental, emotional, or spiritual problem; (2) that the pastor engaged in some form of intentional sexual contact with plaintiff; and (3) that this sexual contact damaged the plaintiff.

Second, this cause of action would provide relief for parishioners who are sexually exploited by the clergy outside of the counseling sphere. Although these situations are not as problematic, they are still worrisome and damaging enough to warrant providing some form of civil protection to the potential victims. A person who suffers physical, mental, emotional, or pecuniary injury caused by sexual contact with her clergyman who is not rendering and has never rendered counseling services for emotional, mental, or spiritual problems would have a cause of action for resulting damages. The plaintiff would have to establish that she was particularly vulnerable and emotionally dependent on the clergyman and that the clergyman knew or should have known of her vulnerability and dependence. Thus, in these types of suits, consent would be an absolute defense, negated only when the plaintiff establishes that she was emotionally dependent and, therefore, incapable of consent.

The churches themselves should be held liable if it is determined that they were negligent in hiring or supervising their clergy. Many churches already have insurance[149] to cover such suits, and this would provide a source of funds from which the victims of clergy sexual exploitation could be compensated. Compensation is critical because the victims of sexual exploitation often require prolonged and expensive treatment for their injuries.[150] It would also serve the cause of justice that they be compensated for their suffering.

Other likely benefits of this cause of action are increased church supervision of pastors and increased church efforts to eradicate sexual exploitation from clergy-parishioner relationships. Not surprisingly, soon after the Minnesota Legislature made this activity both criminal and civilly actionable, churches set up a statewide interdenominational

149. *See* Note, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*, 19 RUTGERS L.J. 419, 419 & n.1, 421-22.

150. Note, *supra* note 70, at 212.

committee to deal with clergy sexual exploitation.[151] Passage of similar legislation by other states is likely to generate the same response and to stem the tide of clergy sexual exploitation.

The civil cause of action will also shift the risks inherent in clergy-parishioner sexual relations. By holding the clergyman civilly liable, the risk factor changes significantly. The clergyman, the dominant person in these relationships, would be placed in danger of being held liable for any damages he caused by taking advantage of a vulnerable parishioner. It would no longer be the parishioner who is solely in danger. Under this scheme, members of the clergy could still fall in love and marry parishioners, but now they would be assuming some of the inherent risks and would have to refrain from exploiting vulnerable parishioners.

B. The Issue of Constitutionality

The ideas proposed here involve the imposition of government regulation on the clergy. It is therefore necessary to conduct an inquiry into the constitutionality of this proposal.

The freedom of religion clause of the first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[152] The United States Supreme Court has interpreted this clause as providing the absolute freedom to hold and to profess religious beliefs.[153] In doing so, the Court has held that the government may not compel affirmation of repugnant beliefs,[154] punish the expression of religious doctrines it considers fallacious,[155] exclude individuals from receiving the benefits of public welfare legislation because of their faith or lack of it,[156] impose special burdens on certain individuals on the basis of their religious views,[157] or lend its power to one side or another in controversies over religious authority or doctrine.[158] In short, the first amendment excludes "any governmental regulation of religious *beliefs* as such."[159]

The freedom to *act* upon one's religious convictions, however, does not enjoy the same level of absolute protection.[160] The Court has reasoned that "[t]o permit [the uncontrolled exercise of religion] would be to make the professed doctrines of religious belief superior to the

151. King & Woodward, *supra* note 18, at 48.
152. U.S. CONST. amend I.
153. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).
154. Toraso v. Watkins, 367 U.S. 488, 495 (1961).
155. United States v. Ballard, 322 U.S. 78 (1944).
156. Everson v. Board of Educ., 330 U.S. 1 (1947).
157. McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67 (1953).
158. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).
159. Sherbert v. Verner, 374 U.S. 398, 402 (1963) (emphasis in original).
160. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

law of the land, and in effect to permit every citizen to become a law unto himself."[161]

Traditionally, the courts have only permitted regulation of religious conduct that "invariably posed some substantial threat to public safety, peace or order."[162] State laws burdening religion were subjected to strict scrutiny[163] and could be sustained only if shown to be indispensable to accomplishing a compelling state interest.[164]

Protection under the free exercise clause does not automatically attach simply because the party challenging a state regulation is a religious figure or organization.[165] In freedom of religion cases, the threshold question is whether the defendant's conduct is religiously motivated.[166]

Applying the foregoing analysis to the laws proposed in this Comment, it becomes evident that laws imposing civil and criminal penalties on sexually exploitative clergy are constitutional. Several factors lead to this conclusion.

Initially, imposing penalties on clergy sexual abuse arguably does not even implicate the first amendment. As the court in *Strock v. Pressnell*[167] stated: "[W]e find it difficult to conceive of pastoral fornication with a parishioner or communicant as a legitimate religious belief or practice in any faith."[168] Indeed, "an asserted claim so bizarre, so clearly nonreligious in motivation . . . [is] not . . . entitled to protection under the Free Exercise Clause."[169]

However, the issue of religious motivation should not be based on the court's opinion of the particular belief or practice in question.[170] "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protec-

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161. Reynolds v. United States, 98 U.S. 145, 166 (1878).

162. *Sherbert*, 374 U.S. at 403.

163. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987).

164. Bowen v. Roy, 476 U.S. 691, 732 (1986) (O'Connor, J., concurring in part and dissenting in part) ("Our precedents have long required the Government to show that a compelling state interest is served by its refusal to grant a religious exemption."); Thomas v. Review Bd. of Ind. Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

165. *See, e.g.*, Destafano v. Grabrian, 763 P.2d 275 (Colo. 1988) (priest who had sexual relations with a parishioner under his religious counsel not automatically immune from tort liability).

166. *Yoder*, 406 U.S. at 215 ("[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

167. 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988).

168. *Id.* at 209 n.1, 527 N.E.2d 1235, 1238 n.1. (1988).

169. Thomas v. Review Bd. of Ind. Sec. Div., 450 U.S. 707, 715 (1981).

170. *Id.* at 714.

tion."[171] The relevant inquiry is to determine whether the religious belief in question is sincerely held by the claimant.[172] Still, it is unlikely that many claimants will argue that they have a right based on a religious belief to sexually exploit their followers, and it is even less likely that courts will accept the veracity of this claim.

Nevertheless, contrary to the court's conclusion in *Strock*, it is possible to envision some fringe religious sects that might actually include sexual relations between priests and followers as one of its religious practices.[173] Even if it is accepted that the free exercise clause applies in these cases, the laws proposed in this Comment would still pass constitutional scrutiny. These proposed laws are vitally needed to accomplish a compelling and overriding state interest: the protection of parishioners from the devastation caused by clergy sexual exploitation. As this Comment has demonstrated, there are no less restrictive means available to tackle this intractable problem. As such, these laws pass the traditional standard for constitutional infringement on the exercise of religion.

Even assuming that the proposed laws do not meet the compelling state interest and least restrictive means test traditionally applied by the courts, they would still be constitutional. According to the Supreme Court in *Employment Division v. Smith*,[174] the proposed sexual exploitation laws would not have to pass the traditional compelling state interest test.[175] The Court in *Smith* held that as long as a law is not specifically directed at certain religious practices or beliefs and is otherwise applied to those who are engaged in the proscribed behavior for nonreligious reasons, the law is constitutionally sound.[176] The laws proposed here are not specifically directed at the religious practices of any particular denomination; instead, they are directed at persons in power positions who take advantage of their power to prey on vulnerable victims. The laws would apply in full vigor whether the perpetrator was acting on his perceived religious beliefs or simply on a sexual whim. The laws would also apply to psychologists, psychiatrists, and

171. *Id.*

172. Frazee v. Employment Sec. Dept., 489 U.S. 829, 832-33 (1989).

173. Note, *Clergy Malpractice: A Constitutional Approach*, 41 S.C.L. REV. 459, 467 n.55 (1990).

174. 110 S. Ct. 1595 (1990).

175. *Id.* The majority reasoned that if the compelling interest test is to be applied at all, then it must be applied to *all* actions that were thought to be religiously motivated. The Court stated that if the compelling interest test was strictly and faithfully applied, many laws would fail to meet its standard. The Court argued that any society adopting the compelling interest test would be courting anarchy and that countless worthwhile laws would have to be stricken from the books because they did not fulfill interests of the "highest order." *Id.* at 1604-05.

176. *Id.* at 1599.

other secular therapists and counselors.[177] Their general applicability to all therapists should eliminate any constitutional hurdle that might otherwise exist.[178]

VI. CONCLUSION

During the last two decades, the women's movement has battled "to bring violence against women in all of its forms out of the closet."[179] Bringing clergy sexual exploitation into the open is a critical element in eradicating this most reprehensible form of human behavior. Only recently have sexually exploited parishioners begun to come forward.

Now that the extent of this problem is coming to light, states must take strong action to prevent further exploitation, to compensate the victims, and to punish the perpetrators. Clergy sexual exploitation is a problem that can no longer be ignored, and it is one that certainly will not go away by itself. Adoption of the solutions proposed in this Comment will help end this problem.

Knowledge is empowerment,[180] and this proposal will bring that knowledge out of the shadows. Only with knowledge can the current attitudes, which blame the victims for the clergy's wrongdoing, be changed. This proposal puts the blame on the perpetrators and puts the power of the law behind the victims.

This proposal also provides incentives for churches to better police themselves, deters potential perpetrators, and provides compensation for the victims. Perhaps just as important, this proposal will ensure that justice is finally served. After all, "[j]ustice is part of the healing process."[181]

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177. *See supra* note 138.
178. *See Smith*, 110 S. Ct. at 1603.
179. Cooper-White, *supra* note 13, at 196.
180. *Id.*
181. Pellauer, *supra* note 15, at 50.

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