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”Shrinking” the Clergyperson Exemption to Florida’s Mandatory Child Abuse Reporting Statute

Phyllis Coleman*

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Abstract

All states currently require certain persons to report known or suspected cases of any maltreatment of a child, and to testify in court concerning that abuse if the case goes to trial.

KEYWORDS: clergyperson, child, abuse

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I. Introduction

All states[1] currently require certain persons to report known or suspected cases of any maltreatment of a child, and to testify in court concerning that abuse if the case goes to trial. Intrafamily sexual abuse, or incest,[2] is one form of child abuse[3] that must be reported.[4] The Florida mandatory child abuse reporting statute, in addition to mandating reporting, also specifically abrogates certain testimonial privileges,[5] thus requiring testimony from persons in ordinarily protected confidential relationships.[6]

* Professor of Law, Nova University Center for the Study of Law, B.S., 1970; M.Ed., 1975; J.D. 1978, University of Florida.

1. Brown, *Child Abuse: Attempts to Solve the Problem by Reporting Laws*, 60 WOMEN LAW. J. 73, 73-74 (1974). *See also* Besharov, *"Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 HARV. J. L. & PUB. POL'Y 539, 542-45 (1985) for a succinct history of the reporting statutes.

2. Definitions of incest vary from state to state. The Florida statutes actually prohibit two types of activities. First, marriages between relatives of various degrees are void. FLA. STAT. § 741.21 (1985). This prohibition is beyond the scope of this article. The second prohibition is against sexual contact between nonmarried family members. The statute prohibits "knowingly" having "sexual intercourse with a person . . . related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece." "'Sexual intercourse' is the penetration of the female sex organ by the male sex organ, however slight. . . ." FLA. STAT. § 826.04 (1985).

Many psychiatrists and other helping professionals define incest more broadly, as "any sexual activity—intimate physical contact that is sexually arousing—between nonmarried members of a family." B. JUSTICE & R. JUSTICE, THE BROKEN TABOO 25 (1979).

3. FLA. STAT. § 415.5015(3)(b) (Supp. 1986).

4. *See, e.g.*, FLA. STAT. § 415.504(1) (Supp. 1986).

5. Prior to the 1985 statutory amendment which is the subject of this article, the only people exempted from the duties to report and testify were lawyers who learned of the abuse in the confidential attorney-client relationship. *See infra* notes 69-78, and accompanying text.

6. For example, the privilege between husband and wife does not apply in child abuse cases. Further, the marital relationship does not constitute grounds for failure to report or cooperate in any child abuse investigation. FLA. STAT. § 415.512 (1985).

The purpose of this article is to examine the desirability of protection for two specific confidential relationships where a child abuser seeks professional help—those between a psychiatrist and his patient and a clergyman and penitent. These have been chosen for special scrutiny because the Florida Legislature, by recent amendment, has addressed the reporting and privilege issues in what appears to be an illogical and counterproductive fashion.

The clear, important, although somewhat simplistic, reasons underlying mandatory reporting of child abuse are: 1) such abuse ordinarily occurs in the home where witnesses, if any,[7] are family members often understandably reluctant to report or testify against one another; 2) the victim is a child generally too young or too frightened to protect himself or to escape from the abuse; and 3) other people, including doctors, neighbors and relatives, are frequently reluctant to report or testify.[8] Seeking a solution to the related problems of identification of abused children and protection of these children, and responding to the passage by Congress of the Child Abuse Protection and Treatment Act of 1974,[9] states have enacted or modified existing statutes to require reporting.[10] To enhance the effectiveness of these laws and further encourage people to report, these statutes also provide immunity for anyone who makes a good faith report,[11] even if it is in error.

These laws apparently are effective. In 1963, immediately prior to initial state legislation, approximately 150,000 cases of suspected abuse or neglect were reported nationwide. In 1972, two years prior to passage of the federal child protection statute, 610,000 abused children were reported per year. The number climbed to more than 1.3 million

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7. Comment, *State v. McCafferty, The Conflict Between a Defendant's Right to Confrontation and the Need for Children's Hearsay Statements in Sexual Abuse Cases*, 30 S.D.L. Rev. 663 (1985).

8. Coleman, *Creating Therapist-Incest Offender Exception to Mandatory Child Abuse Reporting Statutes—When Psychiatrist Knows Best*, 54 U. Cin. L. Rev. 1113, 1118-20 (1986).

9. 42 U.S.C. §§ 5101-5106 (1986) originally enacted as the Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4. The Child Abuse Protection and Treatment Act of 1974 required state statutes comply with specifically enumerated criteria to qualify for federal funds. One of the required statutory provisions is mandatory reporting. Pub. L. No. 93-247 § (4)(b)(2)(B), 88 Stat. 4, 5-6 (1974).

10. Fraser, *Sexual Child Abuse: The Legislation and the Law in the United States*, in Sexually Abused Children and their Families 55, 56-57 (P. Mrazek & C. Kempe ed. 1981).

11. Pub. L. No. 93-247 § (4)(b)(2)(A).

children in 1982.[12] Although limited research[13] and lax reporting in the past has made it impossible to compile an accurate comparison of the actual incidence of abuse, little doubt exists that but for mandatory reporting laws and public awareness campaigns which accompanied their passage, many reports would never have been filed.[14]

Based on the recurrent and progressive nature of child abuse,[15] these reporting laws undoubtedly have saved many lives. Attempts to protect endangered children by identifying those at risk through mandatory reporting are unquestionably commendable, but with the important caveat that this is true only to the extent that the goal of protection of the abused child is actually achieved. Where the offense is intrafamily sexual abuse rather than physical abuse,[16] the protective purpose of the statutes is arguably not served by mandatory reporting. Legislative myopia apparently blinded Florida legislators to this distinction[17] when it amended the reporting statute to absolutely exempt clergy from the duty to report or testify in all cases of child abuse generally.[18] Interestingly, prior to the 1985 amendment the only group not required to comply with the reporting statute were lawyers who

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12. Besharov, *supra* note 1, at 545.

13. Peters, Wyatt & Finkelhor, *Prevalence*, in SOURCEBOOK ON CHILD SEXUAL ABUSE 15, 15-18 (Finkelhor ed. 1986) [hereinafter SOURCEBOOK.]

14. FLA. STAT. § 415.504(1) (Supp. 1986), which is representative of federally mandated reporting legislation requires "[a]ny person . . . who knows, or has reasonable cause to suspect, that a child is an abused or neglected child . . ." to report. The statute includes a list of persons required to report but states this list is not exclusive. However, FLA. STAT. § 415.512 (1985) specifically excludes attorneys and clergypersons from the duties to report and testify.

15. S. BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 31-32 (1978).

16. *See infra* notes 23-30, and accompanying text.

17. In the introduction to a recent symposium issue on child abuse, Josephine Bulkley explains that some reforms "may have potentially harmful consequences." While not speaking specifically about the clergyperson amendment, her warning is potentially applicable. Due to the fact that some suggestions were "not subject to close scrutiny or analysis [e]ven with relatively uncontroversial issues, . . . scholars and others later discovered unforeseen problems with the legal changes." Bulkley, *Introduction: Background and Review of Child Sexual Abuse: Law Reforms in the Mid-1980's*, 40 U. MIAMI L. REV. 5, 12 (1985).

18. The amendment was passed in response to a case in which a Broward County minister asserted the clergyman-penitent privilege in the child abuse trial of a man he had counseled. Even after being ordered by the judge to testify, subsequently being held in contempt and himself facing a 60-day jail sentence, the minister remained adamant in his refusal to tell the court anything he had learned from the parishioner. The Miami Herald, Aug. 3, 1985, § BR, at 1, col. 1.

could use the attorney-client relationship to shield themselves from the duties to report or testify.[19]

When the child abuser seeks help from a professional, specific and explicit statutory guidance for that professional's response is desirable. These requirements should not focus on the profession of the counselor but rather on the type of abuse—sexual or physical—and the availability of effective treatment for the whole family. Otherwise mandatory reporting might actually thwart rather than serve the overriding protective purpose of the statute. As a result of its failure to appreciate this, Florida's 1985 amendment ignores the realities of different types of abuse and fails to consider and provide for the dissimilar problems faced by the physically and sexually abused child. Recognizing the purposes of mandatory reporting statutes,[20] the distinctions between physical and sexual abuse,[21] and the roles of clergypeople and psychiatrists[22] in counseling offenders compel further amendment of the Florida law. Both clergy and psychiatrists should be required to report the abuse or to provide or seek help for the abusive parent and other family members. However, where the issue is testifying rather than reporting, these professionals must enjoy an absolute privilege.

II. Child Abuse

The term child abuse encompasses physical, emotional and sexual abuse.[23] To be sure, overlap among these categories exists. For exam-

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19. FLA. STAT. § 415.512 (1983).

20. Many states include a purpose clause in their mandatory reporting statutes. Although the language varies, the legislative intent is clear: to protect abused children. De Francis, *Child Abuse—The Legislative Response*, 44 DEN. U.L. REV. 3, 8 (1967). This protective purpose can only be achieved if the abused child is identified, which generally requires a report of the abuse be filed by someone outside the family.

The Florida statute states "[t]he impact that abuse or neglect has on the victimized child, siblings, family structure, and inevitably on all citizens of the state has caused the Legislature to determine that the prevention of child abuse and neglect shall be a priority of this state." FLA. STAT. § 415.501 (Supp. 1986).

21. *See infra* notes 32-58, and accompanying text.

22. *See infra* notes 90-98, 102-106, and accompanying text.

23. FLA. STAT. § 415.5015(3)(b) (Supp. 1986).

States generally enact two types of laws which deal with the problems of child sexual abuse. One type of legislation makes sexual abuse a crime. *See, e.g.*, FLA. STAT. § 827.04 (1985). The focus of criminal laws is the offender and the emphasis is punishment and deterrence. The victim is merely a witness in the prosecution. Neither services nor treatment are provided for either the victim or the rest of the family under

ple, sexual intercourse with a very young child is almost certain to cause non-accidental physical injury.[24] The probability is also extremely high that intrafamily sexual abuse of any child will be followed by adverse long-term emotional consequences.[25] Nevertheless, there are sufficient differences between intrafamily sexual abuse and general physical abuse to warrant different reporting obligations for professionals counseling sexually abusive parents who have voluntarily sought their assistance. These differences include distinctions between the types of harm suffered by physically abused and sexually abused children[26] as well as the effectiveness of psychiatric counseling for the incest offender and his family.[27]

Presently, under Florida law, the offender's psychiatrist would have no choice but to report all abuse—physical or sexual.[28] On the other hand, the abusive parent who speaks with a clergyperson is absolutely protected, whether the abuse is physical or sexual. This distinction, based on the profession of the counselor rather than the nature of the abuse, ignores the realities of abuse and the purposes of the mandatory reporting statutes. If the purposes of the statutes are, as they claim,[29] identification and protection of abused children, different treatment afforded confessions made by the offender to any helping professional is difficult to justify. The focus should be whether reporting is necessary to protect the abused child. In cases of physical abuse, reporting may be critical, even if the source of the information is the offender and the confidant is a clergyperson. Ironically, if the offender is sexually abusive, mandatory reporting might actually harm rather than benefit the abused child the statutes are designed to protect.[30] The shift of focus in the Florida statute from protection of the abused child

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these statutes. Fraser, *supra* note 10, at 55.

To achieve the important state interest of protection of child abuse victims states have enacted civil legislation. *See, e.g.*, FLA. STAT. § 415.501 *et. seq.* (Supp. 1986). The focus of these statutes is the abused child. The purpose is to protect the victim and to provide treatment if necessary. Fraser, *supra* note 10, at 56. Under these statutes the ultimate penalty, rather than jail and a fine, is termination of parental rights through a dependency hearing. FLA. STAT. § 39.41(1)(f) (1985).

24. F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 1 (1980).
25. S. FORWARD & C. BUCK, BETRAYAL OF INNOCENCE 4 (1978).
26. *See infra* notes 32-53, and accompanying text.
27. *See infra* notes 40-42, 56-58, and accompanying text.
28. FLA. STAT. § 415.504 (Supp. 1986).
29. *See supra* note 20.
30. *See generally* Coleman, *supra* note 8.

to concern for the offender seems inexplicable, and arguably unacceptable. Attempts to justify differences in treatment of confidential communications shared with a clergyperson or a psychiatrist are fatally flawed when reflected against the backdrop of the protective purpose of the statutes.

III. Contrasting Physical and Sexual Abuse[31]

Physical abuse escalates over time. Without intervention, the physically abusive parent probably will eventually kill or seriously injure the child.[32] This alarming fact strongly supports mandatory reporting by anyone who knows or suspects physical abuse. The unique characteristics of sexual abuse and its victims require a different statutory approach to reporting. For example, although sexual abuse, like physical abuse, is generally progressive,[33] shifting from inappropriate fondling to more overt sexual activity and possibly even intercourse,[34] the child is usually not in an immediately life-threatening situation. Failure to intervene at once does not place her[35] at risk of imminent death or serious physical injury. Although it is clear that some, especially very

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31. Although little is written about emotional abuse, emotional and physical abuse should be treated the same for reporting because, while physical abuse may be easier to identify, emotional neglect may be even more damaging. M. WEISSBERG, DANGEROUS SECRETS MALADAPTIVE RESPONSES TO STRESS 41 (1983). Further, of course, the very fact that emotional abuse is so difficult to identify makes reporting by those who suspect such abuse even more critical.

32. Child abuse may be the major cause of injuries and death in young children. Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI.[-]KENT L. REV. 45, 81 (1973). Failure to report can be fatal. In a Texas study of 270 children who died as a result of abuse, more than 40 percent had not been reported to the child protection agency. No report had been filed despite the fact that the children were being seen by a public or private agency, such as a hospital, either at the time they died or some time within the previous year. *Id.*

33. Note, *Incest: The Need to Develop a Response to Intrafamily Sexual Abuse*, 22 DUQ. L. REV. 90, 94 (1984).

34. Katz, *Incestuous Families*, 1983 DET. C.L. REV. 79, 83-84.

35. Father-daughter incest accounts for approximately 75 percent of all reported cases. Kempe, *Incest and Other Forms of Sexual Abuse*, in THE BATTERED CHILD, 196, 204 (C. Kempe & R. Helfer 3d ed. 1980). Consequently, references in this article will be to the male offender and female victim. However, it is important to recognize that, although it occurs only infrequently, women do commit sexual abuse and male children are sometimes sexually abused. In some cases the effect on the victim and potential recovery may vary by gender; but for purposes of reporting, the gender of the offender or victim is irrelevant.

young children suffer physical injury as a result of incest, most of the harm is emotional.[36] The emotional damage results from the violation of the trust which a child places in her parent. The trust is violated when the father, for his own gratification, engages in any sexual contact with his child.[37] Consequently, some experts claim that the act of intercourse is no more psychologically harmful to the child than fondling or any other sexual activity. The harm results from the betrayal of trust, not the sexual contact itself.[38] Although each victim may react differently, most are emotionally damaged[39] by the abuse. Nevertheless, with professional help,[40] victims can avoid permanent psychological damage.[41] However, to avoid emotional damage, victims generally

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36. Bittner & Newberger, *Child Abuse: Current Issues of Etiology, Diagnosis and Treatment*, in THE RIGHTS OF CHILDREN 64, 87 (J. Henning ed. 1982) [hereinafter THE RIGHTS OF CHILDREN].

37. "The horror of incest is not in the sexual act, but in the exploitation of children and the corruption of parental love." J. HERMAN, FATHER-DAUGHTER INCEST 4 (1982). Dr. Herman explains that the sexual motivation of the contact, in addition to the need for secrecy, are more important than the act itself. "From the moment that the father initiates the child into activities which serve the father's sexual needs, and which must be hidden from others, the bond between parent and child is corrupted." *Id.* at 70.

38. Empirical studies have reached inconsistent results as to whether the trauma to the victim corresponds to the type of sexual activity. Browne & Finkelhor, *Initial and Long-Term Effects: A Review of the Research*, in SOURCEBOOK, *supra* note 13, at 143, 163-75. This section explores research on different factors often assumed to effect a victim's progress. Although much of the research is not conclusive, some trends are developing. For example, the majority of studies indicate abuse by father has a much greater negative impact than abuse by another offender. *Id.* at 175.

39. Two experts propose a model which specifies how and why sexual abuse may result in the types of trauma often observed in these victims. The model hypothesis provides that such problems as sexual dysfunction, depression and low self-esteem should be examined within the framework of the unfortunate coexistence of four trauma-causing facts: traumatic sexualization, stigmatization, betrayal and powerlessness. Although these problems individually are not unique to sexual abuse, the convergence of these factors distinguishes the trauma from that of other childhood traumas, *even from physical abuse*. Finhelhar & Browne, *Initial and Long-Term Effects: A Conceptual Framework*, in SOURCEBOOK, *supra* note 13, at 180 (emphasis added).

40. Without professional help, victims are likely to engage in self-destructive behavior and, as adults, to have difficulty establishing meaningful trusting relationships. Thurman, *Incest and Ethics: Confidentiality's Severest Test*, 61 DEN. U.L. REV. 619, 624-25 (1984).

41. Incest is likely to have the following effects on the victim: 1) "damaged goods" syndrome; 2) guilt; 3) fear; 4) depression; 5) low self-esteem and poor social skills; 6) repressed anger and hostility; 7) impaired ability to trust; 8) blurred role boundaries and role confusion; 9) pseudomaturity coupled with failure to accomplish

require counseling.[42]

Societal and familial reaction to the sexually abused child once the abuse has been reported, is further reason for a more thoughtful approach to reporting in this context. Recent increased awareness and public education concerning physical abuse of children[43] mean the battered child is being diagnosed more quickly, and thus being helped more effectively. In contrast, the sexually abused child, who is probably already experiencing unwarranted guilt for what has been done to her,[44] now must face what is almost certain to be a hostile environment. Unfortunately, because of a strong desire or need to deny that parents can and do sexually abuse their children, people still tend to disbelieve the incest victim and dismiss her claims as fantasies.[45] Mothers often reject the idea that incest has occurred and frequently reject their daughters as well.[46] This reaction is a predictable example of denial, a universal method of attempting to cope with what is otherwise an unacceptable situation.[47] The child experiences this maternal response as a second betrayal; in addition to father's abuse, mother has failed to protect, or even believe, her.[48] Counseling is critical for both mother and

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developmental tasks; and 10) self-mastery and control. Porter, Blick & Sgroi, *Treatment of the Sexually Abused Child*, in HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE 109 (S. Sgroi ed. 1982) [hereinafter CLINICAL INTERVENTION].

42. This is especially important in the context of mandatory reporting. *See infra* notes 44-53, 56-58, 87, and accompanying text.

Arguments are made that all child victims of sexual abuse need at least "some level" of therapeutic intervention to overcome the trauma. Porter, Blick & Sgroi, *supra* note 41, at 111. "Instead of being forced to 'live crippled,' most victims can be helped to live happy and productive lives despite residual emotional scars." *Id.* at 110.

43. B. SCHLESINGER, SEXUAL ABUSE OF CHILDREN A RESOURCE GUIDE AND ANNOTATED BIBLIOGRAPHY xi (1982).

44. J. HERMAN, *supra* note 37, at 96-99.

45. Dr. Sigmund Freud was the first psychiatrist who believed his female patients when they claimed they had been sexually abused as children by family members. J.M. MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY xviii (1984). Freud published a paper in 1896 advancing the theme. *See generally* Freud, The Aetiology of Hysteria (1896) in J.M. MASSON, Appendix B at 251. However, Freud later abandoned this theory. Dr. Masson argues Freud recanted his belief that actual childhood sexual trauma was the cause of neurosis primarily because his colleagues were reluctant to accept his discovery and consequently ostracized him.

46. D. WALTERS, PHYSICAL AND SEXUAL ABUSE OF CHILDREN 114 (1975).

47. LONGMAN DICTIONARY OF PSYCHOLOGY AND PSYCHIATRY 211 (R. Goldenson ed. 1984).

48. J. HERMAN, *supra* note 37, at 99.

daughter, and reconciliation between the two is often the goal,[49] as the mother is the key to successful intervention.[50] Further, the mother is not the only person likely to disbelieve the incest victim. Non-family members prefer to believe the offender who denies the abuse. Because of strong revulsion to the possibility that a parent could abuse his child for his own sexual gratification, society chooses to deny incest occurs. "Unfortunately, while society protects its own feelings and shuts its eyes tight against the shame, children are being devoured."[51] Moreover, unlike the physically abused child, who generally has evidence by way of bruises, broken bones or burns to corroborate his or her story,[52] the sexually assaulted child may show no physical signs of abuse.[53] Nevertheless, children seldom lie about sexual abuse,[54] unless due to pressure or fear, they recant a story of abuse which did actually occur.[55]

Finally, key to legislative understanding of the need to revise the exemptions to the Florida reporting statute in the intrafamily sexual abuse context is recognition of: 1) the effectiveness some therapists achieve in helping offenders cease the abuse;[56] 2) the remarkable success in reuniting incestuous families; and 3) the almost non-existent recidivism rate.[57] Thus, the current statutory exemption which protects absolutely any communication concerning abuse made to a clergyperson while concurrently failing to protect the same communications made to a psychiatrist, may not serve the protective purpose of the law.

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49. CHILD SEXUAL ABUSE LEGAL ISSUES AND APPROACHES 21 (J. Bulkley ed. rev. ed. 1981) [hereinafter LEGAL ISSUES].

50. McCarty, *Investigation of Incest: Opportunity to Motivate Families to Seek Help*, LX CHILD WELFARE 679, 683 (Dec. 1981).

51. V. GALLAGHER & W. DODDS, SPEAKING OUT, FIGHTING BACK 25 (1985).

52. For a discussion of the types of injuries sustained by child abuse victims, see Wecht & Larkin, *The Battered Child Syndrome—A Forensic Pathologist's Viewpoint*, MEDICAL TRIAL TECH. Q., 1982 Annual 1-16 (1982).

53. J. GIOVANNI & R. BECERRA, DEFINING CHILD ABUSE 242 (1979).

54. GOODWIN, SAHD & RADA, FALSE ACCUSATIONS AND FALSE DENIALS OF INCEST: CLINICAL MYTHS AND CLINICAL REALITIES, IN SEXUAL ABUSES INCEST VICTIMS AND THEIR FAMILIES 17-18 (1982).

55. *Id.* at 21.

56. Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U.L. REV. 437, 449 (1985).

57. One California program seeks to reunite the incestuous family as quickly as possible. Of the 600 families treated, the majority were reunited. Furthermore, no recidivism was reported. *See generally* J. KROTH, CHILD SEXUAL ABUSE, ANALYSIS OF A FAMILY THERAPY APPROACH (1979).

The reason for this is that like a clergyperson it is at least as likely that a professional therapist could achieve this statutory protective goal by maintaining confidentiality and treating the offender.[58]

IV. The Clergyman-Penitent Exemption

Prior to its amendment, the Florida statute required all persons[59] to report known or suspected cases of any type of child abuse. The reporter was also compelled to testify in court if called as a witness at trial.[60] Failure to report was and remains a second degree misdemeanor.[61] Consequently, if an offender confesses to his neighbor that he has been abusing his child, the neighbor must report him or face a possible 60 days in jail and/or $500 fine.[62]

If the offender decides to consult a pyschiatrist, the therapist's options are as limited as the neighbor's. This is so, even where the professional believes that state intervention is often more harmful[63] and irre-

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58. For treatment to be helpful in these situations it is often necessary to do family therapy. Psychiatrists generally agree that although the offender may be the only one acting out the problem by sexualizing his relationship with his daughter, the family was dysfunctional probably even before the child was born. Some third party intervention is necessary to help them through the crisis. One program, the Child Sexual Abuse Treatment Program (CSATP) has as its central idea the treatment of the entire family, including the victim. Weisberg, *The "Discovery" of Sexual Abuse: Experts' Role in Legal Policy Formulation*, 18 U.C. DAVIS L. REV. 1, 31-34 (1984). "A successful treatment program must focus on the family unit and attempt to prevent its disintegration. The program must, therefore, involve family-oriented therapy." Note, *Incest and the Legal System: Inadequacies and Alternatives*, 12 U.C. DAVIS L. REV. 673, 695 (1979). The CSATP is effective but limited in scope.

Some states have enacted legislation providing for treatment alternatives rather than, or at least in addition to, jail time for offenders. To this end, the Florida legislature delegated to HRS the obligation to develop a "model plan for community intervention and treatment of intrafamily sexual abuse." FLA. STAT. § 415.5095(2) (Supp. 1986). The problem with all these diversion programs is financial. Although the Florida statute provides for funding, these treatment programs are labor intensive and very costly. Consequently, even if funded, the programs do not possess sufficient resources to be of service to more than a few troubled families.

59. The only exception to the duties to report and testify was for an attorney who learned of the abuse from the offender, his client. *See* text accompanying notes 69-78, *infra*.

60. FLA. STAT. § 415.504 (1986 Supp.).

61. FLA. STAT. § 415.513(1) (1985).

62. FLA. STAT. §§ 775.082(4)(b), 775.083(1)(e) (1985).

63. LEGAL ISSUES, *supra* note 49, at i.

futably more disruptive[64] to everyone involved. These limitations apply even where the therapist thinks he can help the offender cease the abuse and obtain counseling for the victim and other family members, help which may not be available if a report is made and the offender, usually the wage-earner,[65] is incarcerated.[66] Once the therapist learns of, or has reasonable cause to suspect, child abuse, he or she must report and might also be compelled to testify against the offender, even if the offender is his or her patient and the source of the information.[67]

If the primary purpose of the legislation is to protect the victim and if, as studies have established, offenders can be helped to stop the abuse, and victims can be helped to cope with the effects of the abuse, psychotherapists who learn of the abuse from the offender should be protected from the duties to report and testify. One important reason to protect psychiatrist-patient confidentiality where the incest offender seeks professional help for himself is that the relationship is built on trust. For treatment to be effective, the patient must feel free to be completely candid with the doctor.[68] Obviously an offender would never

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64. Thurman, *supra* note 40, at 626.

65. J. HERMAN, *supra* note 37, at 72.

66. Ahlgren, *Maintaining Incest Victims' Support Relationships*, 22 J. FAM. L. 483, 507 (1983-84).

67. Some offenders are aware that if people knew of the abusive behavior they would be stigmatized and suffer reprisals and other adverse consequences. These "self-identified abusers" are generally socially and professionally "successful." As they are aware of the potential dire results from continuation of the abuse, they are often sincerely and highly motivated to get help. However, they resist seeking such help because of fear of violation of confidentiality. They are afraid that going for treatment may lead to disclosure to the community of the abuse. D. WALTERS, *supra* note 46, at 53-55.

These self-identified abusers clearly present exactly the problem addressed in this article. This group of individuals poses problems for the professional from whom they seek help. "With compulsory reporting laws, professionals receiving a plea for help by these troubled parents either violate the law, draw the mantle of professional privilege around themselves, or report the case, in effect, betraying the patient." *Id.* at 55.

68. 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 is 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 knew 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.

Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting GUTTMACHER & WEIHOFFEN, PSYCHIATRY AND THE LAW 272 (1952).

develop this type of relationship with a psychiatrist he believed intended to breach this confidentiality. Assuming trust had been developed between psychiatrist and patient, such a breach would destroy that relationship. Although the psychiatrist-patient relationship admittedly lacks the constitutional foundation which the attorney-client relationship enjoys,[69] this absolutely critical necessity for trust makes the situations analogous,[70] and supports the argument that they should be treated similarly.

If the offender consults his lawyer, assuming no future crimes exception[71] to the lawyer's duty to protect a client's confidence,[72] the attorney need not report the abuse, and would be protected against compelled testimony if the client asserted the attorney-client privilege.[73] This protection is considered a constitutional necessity.[74] This notion that the best legal advice and effective assistance of counsel depend upon a defendant's opportunity to safely tell his attorney everything about his or her case[75] is so well-established as to preclude any debate. A client who withholds information may seriously hamper the efforts of even the most skillful attorney and adversely affect, if not destroy, any benefit of having counsel. An important corollary is that effective assistance of counsel requires trust between client and attorney.[76] This trust, often not easily earned, would be destroyed if an attorney reported or testified against his client. Consequently, it seems in cases of

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69. *See infra* text accompanying notes 74-75.

70. *See infra* text accompanying notes 76-78.

71. Recognizing that the attorney-client privilege is necessary to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of the law and administration of justice," Upjohn Co. v. United States, 449 U.S. 383, 389 (1981), these reasons "all cease to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*." 8 J. WIGMORE, EVIDENCE § 2298 (McNaughton rev. 1961) (emphasis in original).

72. Fisher v. United States, 425 U.S. 391, 403 (1976). The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. If clients feared their attorneys would disclose confidential information, they would be "reluctant" to confide in their lawyers and "it would be difficult to obtain fully informed legal advice." *Id.*

73. FLA. STAT. § 415.512 (1985).

74. The sixth amendment requires the accused receive assistance of counsel. U.S. CONST. amend. VI.

75. J. WIGMORE, *supra* note 71, at § 2291.

76. Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS L.J. 625, 667 (1986).

child abuse, legislators in Florida,[77] and virtually every other state,[78] apparently have concluded that the benefits of protection of the attorney-client relationship outweigh any potential gain from receiving a report or testimony from the alleged offender's lawyer. It appears that, as with the attorney-client relationship, the Florida Legislature decided protection of communications to a clergyperson is essential. Since October of 1985, the clergyperson who learns of child abuse from a parishioner is freed from the obligations to report or to testify.[79] By enacting an absolute clergyperson exemption, legislators apparently determined that protection of this religion-based relationship outweighs any potential benefit to be gained from receiving a report or testimony from the alleged offender's clergyperson in every case.

Considering the psychology of incest[80] and the effectiveness of professional therapeutic help for both offender and victim,[81] a strong argument exists that the recent amendment to the Florida reporting statute demonstrates legislative tunnel vision. This legislation is too broadly

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77. FLA. STAT. § 415.512 (1985) states in part:

> The privileged quality of communication between husband and wife and between any professional person and his patient or client, and any other privileged communication *except that between attorney and client* . . . as such communication relates both to the competency of the witness and to the exclusion of confidential communications, shall not apply to any situation involving known or suspected child abuse or neglect and shall not constitute grounds for failure to report . . . or failure to give evidence in any judicial proceeding relating to child abuse or neglect.

78. Smith & Meyer, *Child Abuse Reporting Laws and Psychotherapy: A Time for Reconsideration*, 7 INTERNAT'L. J. LAW & PSYCHIATRY 351, 360 (1984).

See, e.g., LA. CIV. CODE ANN. § 403 F (1986) ("Any privilege between . . . any professional person and his client, such as physicians, and *ministers, with the exception of the attorney and his client*, shall not be grounds for excluding evidence at any proceeding regarding the abuse or neglect of the child . . . ." (emphasis added); MICH. COMP. LAWS ANN. § 722.631(11) (1986) ("Any legally recognized privileged communication *except that between attorney and client* is abrogated and shall neither constitute grounds for excusing a report . . . nor for excluding evidence in a civil child protective proceeding . . . ." (emphasis added); N.D. CENT. CODE § 50-25.1-10 (1981) ("Any privilege of communication between . . . any professional person and his patient or client, *except that between attorney and client*, is abrogated and does not constitute grounds for preventing a report to be made or for excluding evidence in any proceeding regarding child abuse . . . ." (emphasis added).

79. FLA. STAT. § 415.512 (1985).

80. *See supra* text accompanying notes 33-58.

81. *See supra* text accompanying notes 56-58.

drawn in that it grants an absolute exemption to clergypersons[82] without imposing any obligation to assure appropriate and necessary psychological help for the offender, victim, and other family members. Thus, ironically, the statute is also drawn too narrowly in that it fails to recognize the need for an exemption for psychiatrists who are confidants of the offender.

The first amendment recognizes a fundamental right of freedom of religion.[83] Such a fundamental right may be overcome only by a compelling government interest[84] achieved by narrowly tailored regulations when no less restrictive means to effectuate that interest exists.[85] Identification and protection of abused children must be seen as a compelling government interest which arguably justifies limited intrusion into an individual's religious freedom. The clergyperson confidant may be the only one who can report intrafamily sexual abuse because no one but he or she and the participants possess the information.[86] Without a

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82. Clergypeople are specifically exempted from the duty to report child abuse in a few other states. However, approximately 35 states mandate reporting by clergy. *Note, "Bless Me Father, For I Am About to Sin . . . : Should Clergy Have A Duty to Protect Third Persons?*, 21 TULSA L.J. 139, 156 n.96 (1986).

One student commentator argues that this is an inappropriate requirement. Focusing on a recent Texas attorney general opinion which denied clergypeople exemption from the duties to report or testify, (Op. Tex. Att'y Gen. No. JM-342) the Note concludes that the legislature should follow Florida's lead. Note, *Texas Clergyman-Penitent Privilege and the Duty to Report Suspected Child Abuse*, 38 BAYLOR L. REV. 231, 247 (1986).

> While there is little quarrel that protecting children from abuse and neglect is a compelling state interest, it is argued that the societal benefits to be derived from fostering relationships of confidence between clergymen and penitents ultimately will outweigh any societal harm resulting from the legislative creation of a limited exception to the general duty of every person to report instances of suspected child abuse.

Id. at 246.

See also Note, *When Must a Priest Report Under a Child Abuse Reporting Statute? — Resolution to the Priests' Conflicting Duties*, 21 VAL. L. REV. 431 (1987); Menendez, *Clergy Confidential*, 128 CHURCH & STATE 8 (June 1986).

83. U.S. CONST. amend. I.

84. Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972).

85. Sherbert v. Verner, 374 U.S. 398, 403, 407 (1963).

86. H.J. HAAS, PASTORAL COUNSELING WITH PEOPLE IN DISTRESS 142 (1970). The author states there are only two situations in which the clergyperson may abrogate absolute confidentiality. The first is when the behavior "is obviously so clearly detrimental to his own welfare or society's welfare that he must be protected from himself or society protected from him." *Id.* Although child abuse is not one of the author's specific examples he does refer to situations in which the person is compelling others to

report or psychiatric intervention the abuse is likely to continue. Even if the clergyperson convinces the offender to stop the abuse, the compelling state interest of protection of abused children is not served in that victims continue to suffer adverse emotional effects which psychiatric intervention could alleviate.[87]

The problem for legislators is to draft an exemption for clergypersons which satisfies the compelling state interest of identification and protection of abused children without unnecessarily infringing upon the religious freedom of the offender to choose either secular or religious counseling. It is obvious that the present absolute protection is not an adequate solution.

An argument might be advanced that the absolute clergyperson exemption is provided to serve constitutional requirements which are at least equal to that of protection of abused children: separation of Church and state and protection of the important relationship between clergyperson and penitent. The claim for co-equal status of these premises is necessary because protection of the child through identification is clearly not remotely achieved, nor was it even considered by the legislature. The focus is protection of the offender and private communications made by him to his clergyperson. Thus, despite the fact that the exemption for clergy from the general duties to report and testify is found in the reporting statute enacted for identification and protection of abused children,[88] the child's rights and needs are obviously ignored by this absolute exemption for clergy.

The statute should mandate reporting if the clergyperson knows or has reasonable cause to suspect child abuse and is unable to insure that the abuse will cease and the victim will obtain professional counseling. An affirmative duty to obtain counseling for the victim if the clergyperson wishes to avoid reporting would be imposed, but this is a small burden compared with the grave harm the victim may suffer without intervention. This suggestion, which recognizes the important distinction between the duty to report and the duty to testify,[89] provides a guideline for drafting a clergyperson protection narrowly tailored to effectuate the compelling state interest of identification and protection of abused children.

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engage in crimes. As incest is criminal behavior, an argument could be made that it falls within the situation Haas posited.

87. CLINICAL INTERVENTION, *supra* note 41, at 111.

88. FLA. STAT. § 415.512 (1985).

89. *See infra* text accompanying notes 91-98.

Arguably this situation is analogous to *Tarasoff v. Board of Regents*.[90] Although communications between patients and psychiatrists are generally confidential, where the patient represents a danger to a third person the law imposes a duty on the therapist to warn the potential victim, even if to do so would breach the patient's expectation of confidentiality.[91] The proposed statutory amendment would impose a similar, but more limited and less predictive,[92] duty on clergy. The clergyperson would be required: 1) to insure that the offender and other family members, including the victim, received psychiatric counseling; or 2) to report. Support for this duty is found in the fact that many clergypeople who encounter parishioners with emotional problems already refer them to other professionals.[93] As clergy have already begun referring some parishioners this proposed duty to refer[94] seems neither too burdensome nor beyond the clergyperson's own definition of his or her role.[95]

As to the duty to testify, the statute should provide an absolute exemption for clergy. The valid and important purpose of identification

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90. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

91. *Id.* at 437, 551 P.2d at 347, 131 Cal. Rptr. at 26.

92. Psychiatrists object to the duty imposed by *Tarasoff* because they claim it is too difficult to predict dangerousness. Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 186 (1978). *But see* Note, *The Tarasoff Progeny: Creating A Weaponless Policeman With A "Deep Pocket,"* 15 CAP. U.L. REV. 699, 707-08 (1986).

93. *See generally* R. MASON, C. CURRIER & J. CURTIS, THE CLERGYMAN AND THE PSYCHIATRIST—WHEN TO REFER (1978).

It is important to note that currently a decision by a clergyperson to refer an offender to a psychiatrist may actually be a decision to report because the doctor must report the abuse or break the law. This dilemma, for both professionals, proves that the recent amendment is underinclusive as to the groups of people exempted from the duties to report and testify. *See infra* text accompanying notes 111-113.

94. *See* Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V.L. REV. 47, 63-64 (1981) where the author analogizes the relationship of clergypersons and psychiatrists to a general practitioner and specialist.

> Just as the medical general practitioner has the duty to call in a specialist if a reasonably careful general practitioner would do so under the circumstances, so the first duty of the clergyman should be to recognize when the problem is beyond his skill and refer the congregant to one with more specialized training.

Id. at 63.

95. Clearly, the clergyperson who decides that reporting is appropriate should report the abuse, and, as with any other person, no liability should be imposed based on a good faith report.

of abused children is in no way thwarted, nor even affected, by a law which retains an absolute testimonial privilege for a clergyperson who learns of abuse from the offender. Once the offender is on trial, identification of the possible child victim is no longer the issue. Now the problem is proof. Can it be proven that the accused actually committed the abuse? Even where the state's burden is a difficult one,[96] it ought to be forced to prove abuse without the infringement upon the religious freedom which would occur if a clergyperson were compelled at trial to reveal confidential information. The only conceivable reason for such an intrusion would be to ease the state's burden to prove the abuse, whether in a civil or criminal proceeding. The legislature seems to have correctly concluded that such an interest is outweighed by the individual's interest in the confidentiality of his presumed private communications to his clergyperson.

The statutory protection for clergy now found in the mandatory reporting statute should: 1) only be an exemption from the duty to testify; and 2) add psychiatrists who learn of the abuse from the offender to those exempted from the duty to testify. The state, once it knows of possible abuse, should prove its case through the use of other, non-exempted witnesses. The privilege, which a parishioner[97] or patient[98] may assert, should be retained to protect the special, confidential clergyman-penitent and psychiatrist-patient relationships.

Beyond the general reason of protection of a relationship society

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96. Abusive parents may face civil and criminal liability. Civil legislation, designed to protect the abused child, may provide for temporary or permanent removal of the victim from the home. The burden of proof varies. Where the issue is dependency and possibly temporary removal from the family the preponderance of the evidence standard is utilized. FLA. STAT. § 39.408(2)(b) (1985). *See also* Zawisza & Williams, *Florida's Dependent Child: The Continuing Search for Realistic Standards*, 8 NOVA L.J. 299, 328 (1984). However, where the issue is termination of parental rights, due to the permanent deprivation of such important interests, the United States Supreme Court has required the more stringent clear and convincing evidence standard. Santosky v. Kramer, 455 U.S. 745, 748 (1982). Where the offender is charged under the criminal child abuse statute, the burden on the state, as with any other criminal case, is proof beyond a reasonable doubt. Fraser, *supra* note 10, at 64.

97. Under certain circumstances the clergyperson might assert the privilege for the benefit of the parishioner. Smith, *The Pastor on the Witness Stand: Toward a Religious Privilege in the Courts*, 29 CATH. LAW. 1, 7 (1984).

98. The privilege belongs to the patient and may be waived only by the patient or his or her authorized representative. *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1541 (1985).

deems special and worthy of preservation,[99] an additional reason to retain the clergyman privilege is the manifest unfairness of any other rule. One recognizes intuitively the extremely prejudicial effect of a clergyperson's testimony against an accused. Arguably, the strong likelihood that jurors would give added credence to the testimony of a member of the clergy renders the risk of prejudice unacceptable.[100] Jurors are unlikely to disbelieve a man or woman of the cloth, especially when the accused is suspected of such a heinous and emotionally upsetting crime as child abuse. The potential grave risk of juror prejudice outweighs any benefit which might result from the clergyperson's testimony. This effect is not, however, a problem when the question is reporting because state child protection agencies must investigate all complaints, within a short, specified period of time.[101] The occupation or status of the reporter is irrelevant to the investigation.

A different, but clearly consistent and understandable, explanation for protection for communications made to a clergyperson is the counseling role, which is an important rapidly expanding function of the clergy.[102] Rather than merely participating in the stereotypical confession and absolution, many of today's clergy are attempting to help people resolve problems.[103] As the line between functions grows less

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99. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 109-14 (1983). Various reasons are proposed to support the clergyman-penitent privilege. These include: 1) the interests of society are served when people are encouraged, through protection of the confidentiality of their communications, to reveal their thoughts to a clergyperson; 2) recognition that ministers will refuse to tesitfy, despite the potential sanctions courts might impose; 3) discomfort judges might suffer in attempting to compel a clergyperson to violate a religious belief; 4) compelling a clergyperson to disclose confidential communications, in violation of his religious beliefs, may be prohibited by the first amendment free exercise clause (although this theory is not viewed with favor by most legal theoreticians and the opposite has been suggested, *e.g.*, that the privilege violates the establishment clause); and 5) that denying the privilege would hamper the activities of religious groups, and thus have adverse effects on society. *Id.*

100. Relevant evidence may be excluded when its costs outweigh the benefits. A judge may exclude relevant evidence " 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .' " C. MCCORMICK, MCCORMICK ON EVIDENCE 544-45 (E. Cleary ed. 3d ed. 1984).

101. FLA. STAT. § 415.505(1)(a) (Supp. 1986).

102. Note, *Clergy Malpractice: Bad News For The Good Samaritan Or A Blessing In Disguise?*, 17 U. TOL. L. REV. 209, 218 (1985) [hereinafter *Clergy Malpractice*].

103. The more active counseling role has resulted in at least one suit against

clear,[104] the distinction between clergyman-penitent and psychiatrist-patient privilege based on source become less persuasive.[105] The sources of the claimed protection remain distinct, but as the functions of the professionals become more similar, the justification for the distinction appears to weaken, at least as to the overlapping function.[106] Contrast this decreasing difference between the functions of psychiatrist and clergy with the obvious strong and continuing interest in protection of the abused child for whom mandatory reporting statutes were enacted.

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clergypeople and their Church. Nally v. Grace Community Church, 157 Cal. App. 3d 912; 204 Cal. Rptr. 303 (1984).

Following the suicide of Kenneth Nally his parents sued a church and its pastors for wrongful death based on clergy malpractice, negligence and intentional infliction of emotional distress. One of the pastors admitted during a deposition that he was aware of Nally's suicidal tendencies during the time he counseled him and that " 'perhaps' he contributed to Kenneth Nally's depression." *Nally*, 157 Cal. App. 3d at 914, 204 Cal. Rptr. at 305. Additionally, other evidence was introduced from which a reasonable inference could be made that the church and individual pastors counseled suicidal people that "if one was unable to overcome one's sins, suicide was an acceptable and even a desirable alternative to living." *Id.* at 915, 204 Cal. Rptr. at 306.

Summary judgment for defendants was reversed. *Id.* at 917, 204 Cal. Rptr. at 309. Acknowledging the religious beliefs at the core of the claimed protected conduct, the California court agreed that religious beliefs are absolutely protected but rejected the notion that the first amendment either licenses intentional infliction of emotional distress in the name of religion or shields clergy from liability for wrongful death if a suicide is caused by his conduct. Consequently, whether Nally's suicide resulted from the intentional infliction of emotional distress was a triable issue and thus it was unnecessary to decide whether the clergyman had a duty to refer Nally to a psychiatrist or other mental health professional. *Id.*

Interestingly, the California Supreme Court, in denying rehearing, ordered that the opinion not be officially published, *Id.*, 204 Cal. Rptr. at 303, probably because of concern about the precedential effect of the case.

Despite all the serious anxiety in religious circles surrounding this case, the judge dismissed for lack of sufficient evidence on retrial. Comment, *Seeing in a Mirror Dimly? Clergy Malpractice as a Cause of Action: Nally v. Grace Community Church*, 15 CAP. U.L. REV. 349, 350 (1986).

104. *See generally* Note, *Functional Overlap Between The Lawyer And Other Professionals: Its Implications For The Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962) which discusses whether as attorneys perform more functions which are the same as those performed by other professionals the privilege should be withdrawn from the lawyer or extended to those others.

105. *See infra* note 129.

106. Some suggest different protection for communications to a clergyperson depending on whether he or she receives the information during a religious confidential discussion. Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163, 166-73 (1981).

A knowledgeable clergyperson will be aware that the offender needs help to enable him to stop the abuse and resolve problems which resulted in his abusive, aberrant behavior. Further, the enlightened clergyperson will understand the victim needs help to overcome the psychological harm almost certain to result from the abuse. Unfortunately, although within the past few years the issue has become more widely publicized, most people, including clergy, know woefully little about physical abuse,[107] and even less about sexual abuse.[108] Due to the somewhat ironic, and seemingly contradictory, fact that many incest offenders claim to be religious,[109] the probability that they will turn to clergy for help seems great.[110] To achieve the goal of the mandatory reporting statute, the clergyperson must ensure that the abuse stops and the child receives counseling and medical attention if necessary. If the only way to achieve this is through disclosure to a designated agency, and the child remains at risk without disclosure, the clergyperson should be required to report if he is unable to convince the offender to report himself. This should be mandatory even if an apparent violation of the offender's rights to, and expectation of, confidentiality.

When rights conflict, balancing those rights is appropriate. However, balancing requires decisions made on a case-by-case discretionary basis, depending on facts and circumstances involved in each situation. Inexplicably, the Florida mandatory reporting statute, legislation enacted for protection of abused children, is absolute. When the parent offender confesses to a clergyperson, the offender's rights are irrebuttably superior to the rights of the abused child. This absolute determination clearly flies in the face of the protective purpose of the mandatory reporting statute. On the other hand, if the offender "confesses" to a psychiatrist or anyone else but his lawyer, the rights of the victim are determined, by the same mandatory reporting statute, to be

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107. ABRAMS, PROBLEMS IN DEFINING CHILD ABUSE AND NEGLECT, IN WHOSE CHILD? 289-90 (1980).

108. SUZANNE M. SGROI, CLINICAL INTERVENTION, *supra* note 41, at 1.

109. PAULSON, STROUSE & CHALEFF, INTRAFAMILIAL INCEST AND SEXUAL MOLESTATION OF CHILDREN, IN THE RIGHTS OF CHILDREN 55 (J. Henning ed. 1982).

110. Statistics show most people consult their clergyperson rather than any other professional in times of emotional or domestic crisis. During these stressful times, approximately forty-two percent sought the advice of their clergyperson, twenty-nine percent sought help from physicians, eighteen percent consulted psychiatrists or psychologists, and ten percent turned to clinics or other social agencies, according to the Joint Commission on Mental Illness and Health. *Clergy Malpractice*, 17 U. TOL. L. REV. 209, 219 (1985).

absolutely superior to any rights the parent offender might have.

Requiring clergy to insure that offenders and victims receive professional therapy raises the necessary corollary: shielding the professional therapist from the duty to testify, and possibly report, where the therapist learns of the abuse from the offender.[111] If the therapist believes he or she can be effective in helping this dysfunctional family, and that reporting will only be counterproductive, no report should be required. If the primary purpose of the legislation is protection of the victim, and if, as studies have established, offenders can be helped to stop the abuse, and victims can be helped to cope with the effects of the abuse, psychotherapists who learn of the abuse from the offender must be protected from the duties to report and testify. Although Florida recognizes a psychiatrist-patient privilege,[112] the privilege is abrogated in child abuse cases.[113] The probable reason for abrogation of the privilege is a mistaken notion that this furthers the commendable goal of protection of abused children. In fact, the result may be exactly the

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111. A recent Minnesota case recognized the need to protect the psychiatrist-patient privilege even in the context of child abuse. State v. Andring, 342 N.W.2d 128 (Minn. 1984). Defendant was charged with sexual contact with his 10-year-old stepdaughter and 11-year-old niece. He voluntarily entered a medical center following a hearing in which probable cause was found but prior to his trial. He revealed the abuse during counseling sessions. The state learned of this disclosure and moved for discovery of his medical records.

The court was faced with two conflicting statutes. The medical center was covered by a federal alcohol treatment act which provided for confidentiality of "patient identity, diagnosis, prognosis or treatment in such treatment centers." *Id.* at 131, quoting 42 U.S.C. § 4582(a) (1976). However, pursuant to federal legislation, Minnesota also had a statute which provided for mandatory reporting of child abuse. The Federal Child Abuse Act and the Federal Alcohol Treatment Act were passed by the same Congress. The court acknowledged that Congress recognized the strong state interest in preventing child abuse and left as much flexibility as possible in the state. "The legislature may well have decided that the need to discover incidents of child abuse and neglect outweighs the policies behind the medical privilege." *Id.* at 132.

However, the court placed an important limitation on the use of the information. Recognizing that the purpose of the reporting statutes is protection of abused children, not the punishment of those who mistreat them, and that a child is often best protected by continued encouragement for child abusers to seek help, the court said "[o]nce abuse is discovered, however, the statute should not be construed, nor can the legislature have intended it to be construed, to permit total elimination of this important privilege." *Id.* Consequently, the court abrogated the privilege "only to the extent that it would permit evidentiary use of the information required to be contained in the maltreatment report." *Id.* at 133.

112. FLA. STAT. § 90.503 (1985).

113. FLA. STAT. § 415.512 (1985).

opposite.[114] Consequently, instead of mandatory reporting, legislators should establish a reasonable length of time to determine the commitment of the offender to resolving his problems and the likely efficacy of treatment. If no progress is evident during or shortly after this statutory time, the psychiatrist should be compelled to report. Moreover, if the therapist believes initially, or comes to believe, that reporting is the best way to stop the abuse, he or she should report and be protected from any liability for a good faith report.[115]

While the psychiatrist's exemption from the duty to report is, as with the clergyperson,[116] problematic in that disclosure by the therapist may be the only means by which the state can learn of the abuse, it is important to remember that mere identification of the victim is insufficient and not a remedy.[117] Certainly, there are instances where intervention has saved a child's life, but these are usually cases of physical abuse. Frequently, however, state intervention is not necessary, and may even be harmful.[118] First, most sexual abuse victims experience a variety of emotions, including guilt and low self-esteem, as a result of the abuse. These guilt feelings are often exacerbated by a report of the abuse, even where the child is not the reporter. Many victims feel guilty for the abuse itself and then for the consequences, which may include incarceration of the offender and further disruption of an al-

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114. *See generally* Coleman, *supra* note 8.

115. The patient should be informed of this procedure for at least two reasons. First, fairness requires the patient offender know the possible adverse consequences before disclosing such potentially explosive and personally devastating information. However, a primary concern seems to be at what point the psychiatrist should explain the rules. If the psychiatrist explains too early in treatment, the patient may be frightened. Although he may continue therapy, he might never reveal the incest. Alternatively, he might just discontinue treatment. Nevertheless, if the psychiatrist waits too long to warn, the offender may blurt out the story prior to understanding the possible result of such an admission.

Add to this the reality that the warning requirement is unnecessary in most cases because it is inapplicable. Most patients do not need a warning concerning a psychiatrist's duty to report or testify in child abuse cases. However, identifying the patients who fall into the category for whom the warning is desirable is impossible until after treatment has begun. Consequently, the only way to prevent these problems is to immediately inform each patient of the psychiatrist's duty. This is not only time-consuming, as the therapist will need to explain the meaning of the rule, but may also be unnecessarily terrifying, even to people to whom the warning does not apply.

116. *See supra* text accompanying notes 79-82, 86-87.

117. *See supra* text accompanying notes 33-42, 86-87.

118. B. JUSTICE & R. JUSTICE, *supra* note 2, at 174-76.

ready troubled family.[119] If the child is removed from the home, rather than the offender, this reinforces her feeling that she has done something wrong for which she is being punished.[120] Also, once a report is filed, unless the court acts quickly to prevent it, the victim's identity might be available to the media for publication.[121] This obviously would be harmful to the victim. Second, the victim is often further traumatized by involvement in the legal system itself.[122] While steps are being taken to help minimize the potential further victimization of

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119. Paulson, Strouse, & Chaleff, in THE RIGHTS OF CHILDREN 43.

120. Coleman, *Incest: A Proper Definition Reveals the Need for a Different Legal Response*, 49 MO. L. REV. 251, 278 (1984).

"This practice is analogous to locking up the victim of the crime and letting the offender go free." Note, *Incest and the Legal System: Inadequacies and Alternatives*, 12 U.C. DAVIS L. REV. 673, 688 n.86 (1979).

121. A Florida statute makes publication of the "name, address or other identifying fact or information of the victim of any sexual offense" a misdemeanor of the second degree. FLA. STAT. § 794.03 (1985). However, the decision of the United States Supreme Court in Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975) challenged the constitutionality of a similar Georgia statute. A 17-year-old girl was raped and murdered. Shortly afterwards, six young men were indicted for the crime. Approximately eight months later five of the defendants plead guilty to rape or attempted rape. The murder charge was dropped. A trial date was set for the remaining defendant.

A reporter discovered the name of the victim in a copy of the indictments made available to him in the courtroom. After his newspaper printed the victim's name, her father sued based on the state statute which, like Florida's, made it unlawful to publish the name of a rape victim. The Supreme Court held that if information is in public records the press cannot be sanctioned for publishing it. "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." *Id.* at 496.

The message is clear. Seal the records so that reporters cannot get access to the identity of the victim because once they have the information, disclosure cannot be prevented.

One final note. A small newspaper in Jacksonville is challenging the constitutionality of the Florida statute. The paper inadvertently published the name of a rape victim. The victim's lawyer distinquished the case from *Cox* by arguing that the reporter found the information in a police report which he alleged was not a public record. The victim was awarded a verdict which, if recovered, would force the newspaper into bankruptcy. The Miami Herald, Dec. 29, 1986, at A1, col. 4. The first district court of appeal affirmed in a short per curiam opinion, holding that the information "was of a private nature and not to be published as a matter of law." The Florida Star v. B.J.F., 499 So.2d 883 (Fla. 1st Dist. Ct. App. 1986). The case is currently on appeal to the Florida Supreme Court. Case No. 70,089 (Feb. 1987).

122. Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U.L. REV. 437, 442-43 (1985).

the child by the legal system,[123] even under the best of circumstances testifying can be a frightening experience. Third, following a report, the offender is likely to be ostracized in his community, lose his job and possibly even be incarcerated.[124] Furthermore, while in jail, he does not receive treatment,[125] and his family, lacking adequate financial support, may not receive counseling. Fourth, it is important to recognize the societal interest in protection of the abused child. Abused children often act out their problems through anti-social behavior, including delinquency and prostitution.[126] In addition to these obvious societal problems, more subtle problems exist. Studies have repeatedly demonstrated that many abused children grow into abusive adults. These people marry and are abusive spouses and parents.[127] Thus, child abuse is a generational problem which increases geometrically. All of these are unacceptable potential costs of filing which may be avoided if the offender and other family members receive adequate psychiatric counseling.

IV. The Establishment Problem

Retaining the clergyperson privilege, with a special discretionary exemption from the duty to report, creates a potential establishment of religion problem clearly not present in the case of the psychiatrist-patient privilege. The California Supreme Court, in *In re Lifschutz*,[128] considered but rejected an equal protection argument based on the claim that the privilege granted clergy was denied other groups. The court upheld the clergyperson privilege against attack by a psychotherapist, rejecting the alleged denial of equal protection argument because the different treatment was not irrational when viewed in the context of

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123. *See generally*, McGrath & Clemens, *The Child Victim as a Witness In Sexual Abuse Cases*, 46 MONT. L. REV. 229 (1985) which discusses such innovations as the use of videotape testimony, anatomically correct dolls and other procedures instrumental in making the child more comfortable in the courtroom. The authors also argue for the admission of reliable hearsay statements of the child victim. *Id.*

124. U.S. Dept. of Health & Human Services, Pub. No. 81-30166, *Child Sexual Abuse: Incest, Assault and Sexual Exploitation* at 7 (1981).

125. *Id.*

126. Wenck, *Sexual Child Abuse: An American Shame That Can Be Changed*, 12 CAP. U.L. REV. 355, 356 (1983).

127. Thurman, *supra* note 40, at 622.

128. 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rpt. 829 (1970).

the different sources from which the asserted privileges arose.[129]

The more interesting and compelling argument is an issue the California court avoided. Arguably because of its "accommodation of religion" purpose,[130] the clergyman-penitent privilege violates the first amendment prohibition against establishment of religion.[131] Although the *Lifschutz* court could avoid the issue because the petitioner psychotherapist did not have standing to raise it,[132] Florida courts should not ignore first amendment implications of the statutory special protection afforded communications made to clergypersons.

The first amendment protects each individual's rights to the free exercise of religion and protects against state establishment of religion.[133] The inherent tension between these two protections is obvious. "The protection of free exercise of religion may require governmental action which may tend to establish religion."[134] This seems to be precisely the effect of the Florida statutory clergyperson exemption, that of favoring or establishing religion. This preference is inappropriate as the Supreme Court has traditionally treated the two religion clauses as

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129. *Id.* at 423, 467 P.2d at 565-66, 85 Cal. Rptr. at 833.

The foundation for the statutory privilege for clergyperson is the state's accomodation to the religious beliefs of a large segment of society. "At least one underlying reason seems to be that the law will not compel a clergyman to violate — nor punish him for refusing to violate — the tenets of his church which require him to maintain secrecy . . . ." *Id.* at 428, 467 P.2d at 565, 85 Cal. Rptr at 837. The court contrasted this absolute prohibition or disclosure by clergy with the tenets of the medical profession which allow disclosure if the physician is "required to do so by law." *Id.* at 429, 467 P.2d at 565-66, 85 Cal.Rptr. at 838. Thus the court said the psychotherapist privilege can be "reasonably distinquished from the distinctive religious conviction out of which the penitential privilege flows." *Id.* at 429, 467 P.2d at 566, 85 Cal. Rptr. at 838. Moreover, the court stated the decision was a practical one, recognizing the law should not attempt to compel a clergyman to violate his religious beliefs, which require confidentiality. *Id.* at 428, 467 P.2d at 565, 85 Cal. Rptr. at 837.

130. *Id.* at 429, 467 P.2d at 566, 85 Cal. Rptr. at 838.

131. *But see* Note, *The Clergy-Penitent Privilege and the Child Abuse Reporting Statute: Is the Secret Sacred?*, 19 J. MARSHALL L. REV. 1031, 1047-50 (1986) where the author argues that compelling a clergyperson to reveal confidences is a potential free exercise problem.

132. He did not seek to compel such a disclosure, nor would he benefit from invalidation of the clergyman privilege. *Lifschutz*, 2 Cal. 3d at 429, 467 P.2d at 566, 85 Cal. Rptr. at 838.

133. U.S. CONST. amend. I.

134. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege - The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27, 51 (1967).

equal.[135] This historical equality of treatment necessitates exploration of the underlying problem: whether, by protecting the free exercise of religion through the statutory exemption of clergy from the duty to report or testify in child abuse cases, the legislature has actually violated the establishment clause. Results of establishment cases are "[l]egendary in their inconsistencies."[136] Nevertheless, despite the uncertainty, discussion and attempted resolution of the establishment issue in this context is warranted.

Synthesizing previous decisions, in *Lemon v. Kurtzman*,[137] the Supreme Court established a three-pronged test to determine the validity of a law claimed to be violative of the establishment clause. Application of this test provides a strong argument for invalidating Florida's exemption from the duty to report child abuse for clergypersons. Acknowledging that even a law which falls short of actually establishing a state religion might be violative of the first amendment prohibition against laws "respecting" religion, the Court held a valid law must: 1) have a "secular legislative purpose"; 2) not have as its "principal or primary effect" the advancement or inhibition of religion; and 3) "not foster 'an excessive government entanglement with religion.' "[138]

The primary problem in Florida's clergyperson exemption is clear. Finding a secular purpose for an absolute clergyperson exemption in a statute which mandates reporting of known or suspected cases of child abuse to identify and protect abused children is futile. Without question, the purpose of this exemption is protection of religion and the religious relationship between clergy and penitents. The abused child is not considered. "[A] statute must be invalidated if it is entirely motivated by a purpose to advance religion,"[139] and thus consideration of the other two prongs of the *Lemon* test is unnecessary. Nevertheless, it is interesting to note that while the exemption might be tenuous under the second prong it clearly passes the third. The second prong requires the law primarily neither advance nor inhibit religion. The incest of-

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135. *Id.* at 40. *But see* Note, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1177-78 (1984) that "[t]he so-called 'high and impregnable' wall of separation is a theory of strict government neutrality toward religion which the Court often has advocated, but never adopted."

136. Marshall, *"We Know It When We See It" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986).

137. 403 U.S. 602 (1971).

138. *Id.* at 612-13.

139. Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

fender faces the reality that confession and discussion of the problem and potential solutions may have profoundly different consequences depending on whether he consults a trained medical counselor or a trained religious advisor. Allowing protection for confidentiality and privilege for religious confessions and not psychiatric discussions may impermissibly be "respecting the establishment of religion" and advancing religion by encouraging people to seek religious rather than psychiatric help. Additionally, the Court, in interpreting the second prong, has required "a direct and substantial advancement of the Sectarian enterprise."[140] The argument could be advanced that the direct benefit flows to the penitent, whose confidences are not disclosed and thus the exemption provides only an indirect or incidental benefit to religion. Therefore, analogy to certain establishment cases might seem to predict satisfaction of the second prong of the test. For example, in *Everson v. Bd. of Education*[141] the state was allowed to reimburse parents for the transportation costs to parochial schools because the money went to the families and not to the religious schools. Utilizing similar analysis, the Court in *Meek v. Pittenger*[142] allowed the use of public funds to purchase textbooks for nonpublic schools because the primary effect was to benefit the children and not the school. Nevertheless, the United States Supreme Court recently decided a free exercise case which by analogy may shed a slightly different light on resolution of the issue. A Connecticut statute which denied employers the right to dismiss employees for refusal to work on their Sabbath was invalidated in *Thornton v. Caldor*.[143] Referring to the three-pronged *Lemon* test, the Court found that an absolute protection of religious concerns over all other interests "contravenes a fundamental principle of the Religion Clauses."[144] As such, the statute goes beyond having an incidental or remote effect of advancing religion "[but] has a primary effect that impermissibly advances a particular religious practice."[145]

The current Florida clergyperson statutory protection suffers from a similar infirmity. By its absolute exemption from the duties to report or testify, the statute "goes beyond having an incidental or remote ef-

140. Wolman v. Walter, 433 U.S. 229, 250 (1977).
141. 330 U.S. 1 (1947).
142. 421 U.S. 349 (1975).
143. 472 U.S. 703 (1985).
144. *Id.* at 710.
145. *Id.*

fect of advancing religion."[146] This is readily understood by remembering the different treatment of confidences told to a psychiatrist, neighbor or clergyperson. By protecting absolutely only those confessions to a clergyperson, the state is, in effect, encouraging the offender to confide in a clergyperson rather than psychiatrist or other secular helping professional, thereby impermissibly favoring religion. This state preference exists even if the offender, family, and society might be better served by psychiatric, or state, intervention. While it is true that the new statutory protection may have the positive effect of encouraging troubled people to seek help, this is not sufficient to resolve the constitutional dilemma, nor, in many cases to achieve the compelling state interest of protection for the abused child. This is because, as previously explained,[147] even if the offender counseled by a clergyperson ceases the abuse, unless the child receives help in resolving emotional problems created by the incest, the protective purpose of the mandatory child abuse statute is not served.

The exemption clearly meets the requirements of the third prong of the *Lemon* test. As a matter of fact, a primary purpose of the exemption appears to be avoidance of any, much less "excessive," government entanglement with religion. While judges and legislators are understandably reluctant to interfere with religious practices, the current absolute exemption goes too far. Arguing for the exemption, proponents might seek support from *Marsh v. Chambers*[148] which approved upholding the practice of opening legislative sessions with a prayer, led by a chaplain employed, and paid, by the state.

Focusing primarily on the "unambiguous and unbroken history of more than 200 years," the *Marsh* Court concluded that as the practice has become "part of the fabric of our society,"[149] it is not an establishment problem.[150] The Court attempted to further buttress its conclusion by tracing the tradition back to 1774. According to the majority, the fact that the drafters of the first amendment had hired and paid a clergyman to begin the first Continental Congress, illustrated their be-

146. *Id.*
147. *See supra* text accompanying notes 33-42, 86-87.
148. 463 U.S. 783 (1983).
149. *Id.* at 792.
150. *But see* Bowers v. Hardwick, 106 S.Ct. 2481 (1986) (Stevens, J. dissenting, at 2485) where Justice Stevens argues that the mere fact that a practice has become well-established through the passage of time cannot insulate it from constitutional scrutiny.

lief that the practice is constitutional.[151]

In a strongly worded dissent, Justice Brennan argued that without historical support the practice clearly would be unconstitutional.[152] He rejected the notion that the words and actions of the drafters proved their belief in the constitutionality of the practice by pointing out that legislators are frequently influenced by things other than "sober constitutional judgment on every piece of legislation they enact."[153] According to Justice Brennan, in recognizing the futility of any attempt to make *Marsh* consistent with prior decisions, the Court merely carved out an exception to establishment clause jurisprudence.[154] Referring to the "unique history" of the practice of beginning legislative sessions with a prayer, the Court followed its own assessment of the legislative intent—that the tradition was "no real threat to the Establishment Clause."[155] Nevertheless Justice Brennan is correct. The *Marsh* Court, in effect, carved out an exception for this long-standing historically based practice of opening legislative sessions with a prayer. While the wisdom of the Court's resolution of this issue remains debatable, that is not the question. The issue is, instead, whether to extend this judicially created "unique history" exception to other establishment clause cases.

Certainly confidentiality between clergy and their parishioners is a long-standing tradition.[156] Therefore, applying *Marsh*, the long-standing tradition argument might insulate clergy from loss of confidentiality or privilege. Nevertheless, the argument for absolute protection should fail for two important reasons. First, the compelling but competing state interest of identification and protection of abused children may sometimes outweigh the concededly important interest in protection of confidential communications made by the offender to his clergyperson. The current absolute statute inappropriately precludes such a determination. Second, although some language in *Marsh* does seem to support the exception for any long-standing tradition, a more careful analysis shows the Court intended that "standing alone historical practices" would not be sufficient.[157] More was necessary. The *Marsh* Court found the additional, apparently critical, element by em-

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151. *Marsh*, 463 U.S. at 790.
152. *Id.* at 814 (Brennan, J., dissenting).
153. *Id.*
154. *Id.* at 796.
155. *Id.* at 791.
156. However, there was no clergyman-penitent privilege at common law. Z.J. Weinstein and M. Berger, Weinstein's Evidence § 506[03] (1985).
157. *Marsh*, 463 U.S. at 790.

phasizing the drafters' intent that the practice be permitted.[158] This, of course, is not applicable to protection from the duty to report child abuse.

Justice Brennan, in dissent, cut through the specious arguments and stated the obvious: the Court refused to apply tests used by previous Courts because it would then be compelled to prohibit the practices. By "carving out an exception"[159] the Court avoids what it apparently considered an undesirable result, that of invalidation of the statutes. However, in doing so, the *Marsh* Court also neatly avoids the first amendment mandate of "government neutrality . . . between religion and nonreligion."[160] Absolute protection from the duties to disclose and testify in child abuse cases for clergypersons but no other group of helping professionals seems to conflict with required government neutrality by favoring, through protection, religious counseling. This protection thus gives the appearance of being designed to encourage the offender to seek religious rather than secular help.

VI. Conclusion

In a society where an apparently increasing number of people are abusing their children,[161] it is imperative to encourage rather than discourage the offender to seek help for himself and his family. The current mandatory child abuse reporting statute, including the clergyperson exemption, cries out for legislative revision or judicial review.

The following represents a proposed revision of the current reporting statute:

1. Mandate reporting by anyone who learns of any form of child abuse from the victim or anyone other than the offender.

2. Mandate reporting by anyone who learns of physical abuse, non-accidental injury due to the acts or failures to act of parents or those in a parental role. Reporting in all cases of physical abuse is essential because of the irrefutable evidence that such behavior escalates and the child is at risk of serious bodily harm or death without intervention.

158. *Id.* at 787-90.
159. *Id.* at 796.
160. *Id.* at 802, quoting from Epperson v. Ark., 393 U.S. 97, 103-04 (1968).
161. McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray Into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 2-5 (1986).

3. Provide for discretionary reporting where the intrafamily sexual offender seeks religious help to cease the abuse and the clergyperson assumes an affirmative duty to ensure that the offender obtains counseling for the victim and non-abusive parent. This family counselor must be protected from the duty to report or testify. However, if at any time either clergyperson or therapist decides reporting is appropriate, he or she must enjoy the same protection from liability for a good faith report as any other individual.

4. Retain the psychiatrist-patient and clergyman-penitent privilege so that the purpose of the reporting statute is served by requiring reporting by the greatest number of people while preserving the privacy rights of the alleged offender, at least to the extent possible under the circumstances.