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Constitutional Law—Freedom of Religion—Requiring Reports of Religious Counseling Sessions Under Child Abuse Reporting Statutes Does Not Violate the First Amendment. State v. Motherwell, 114 Wash. 2d 353, 788 P.2d 1066 (1990).

Mona J. McNutt

CONSTITUTIONAL LAW—FREEDOM OF RELIGION—REQUIRING REPORTS OF RELIGIOUS COUNSELING SESSIONS UNDER CHILD ABUSE REPORTING STATUTES DOES NOT VIOLATE THE FIRST AMENDMENT. *State v. Motherwell*, 114 Wash. 2d 353, 788 P.2d 1066 (1990).

David Motherwell, E. Scott Hartley, and Louis Mensonides were religious counselors employed by Community Chapel, an evangelical Christian church in Seattle, Washington.[1] Their primary role was to help individual members develop and enhance their relationship with Jesus Christ through spiritual counseling.[2] Counseling topics varied according to need and included marriage, family, and other personal relationships.[3]

During counseling sessions, each of the three counselors learned of child abuse incidents.[4] The counselors attempted to help the families resolve the problems instead of reporting the alleged abuse to the appropriate authorities.[5]

The State of Washington charged the three counselors with violating Washington's child abuse reporting statute.[6] The statute required individuals in particular professions to notify state authorities within forty-eight hours of receipt of information giving "reasonable cause to believe that a child or adult dependent person has suffered abuse or neglect."[7]Although the reporting statute did not mention religious counselors specifically, the court found them to be mandatory reporters

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1. State v. Motherwell, 114 Wash. 2d 353, 356, 788 P.2d 1066, 1067 (1990).
2. *Id.*
3. *Id.*
4. *Id.* Hartley and Motherwell were each told by different women that their husbands had sexually abused their daughters. Another woman told Mensonides that her husband had beaten their two small sons. *Id.*
5. *Id.* at 356, 370, 788 P.2d at 1067, 1075. One method each counselor used was temporary removal of family members from the home. *Id.* at 370, 788 P.2d at 1075.
6. *Id.* at 356, 788 P.2d at 1068.
7. WASH. REV. CODE ANN. § 26.44.030 (1) (Supp. 1990) provides:
When any practitioner, professional school personnel, registered or licensed nurse, social worker, psychologist, pharmacist, licensed or certified child care providers or their employees, employee of the department, or juvenile probation officer has reasonable cause to believe that a child or adult dependent person has suffered abuse or neglect, he shall report such incident, or cause a report to be made, to the proper law enforcement agency or to the department as provided in RCW 26.44.040. The report shall be made at the first opportunity, but in no case longer than forty-eight hours after there is reasonable cause to believe that the child or adult has suffered abuse or neglect.

under the statute's definition of "social worker."[8]

In separate trials, each counselor was convicted of a misdemeanor for failure to report child abuse.[9] The respective courts gave each counselor a deferred sentence with one year of probation and ordered each to complete an educational course on sexual abuse.[10]

On consolidated appeal,[11] the Supreme Court of Washington affirmed the convictions of Motherwell and Mensonides, but reversed Hartley's conviction.[12] The court held that Hartley, an ordained minister, was exempt from reporting under an implied exemption for clergy.[13] The court concluded that Motherwell and Mensonides were not entitled to the clergy privilege because neither was licensed or ordained when he first learned of the suspected child abuse.[14]

Motherwell and Mensonides contended that the reporting statute violated their first amendment rights to free exercise of religion.[15] The Washington Supreme Court held that the defendants had not established infringement of these rights.[16] The court further held that requiring the counselors to report did not violate the establishment clause of the first amendment.[17]

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8. *See* WASH. REV. CODE ANN. § 26.44.020 (8) (1986 & Supp. 1990). Social worker is defined as:

> anyone engaged in a professional capacity during the regular course of employment in encouraging or promoting the health, welfare, support or education of children, or providing social services to adults or families, whether in an individual capacity, or as an employee or agent of any public or private organization or institution (*amended* 1987, substituting "social service counselor" for "social worker" and inserting "including mental health, drug, and alcohol treatment, and domestic violence programs" after phrase "or providing social services to adults or families").

9. 114 Wash. 2d at 356, 788 P.2d at 1068.

10. *Id.* at 356-57, 788 P.2d at 1068.

11. *Id.* at 357, 788 P.2d at 1068. Motherwell, Hartley, and Mensonides appealed to the Washington Court of Appeals, which consolidated the cases. The court of appeals certified the case to the Supreme Court of Washington, and it was accepted for review. *Id.*

12. *Id.* at 359, 788 P.2d at 1069.

13. *Id.* at 358-59, 788 P.2d at 1069. In 1975 the Washington legislature deleted clergy members from the list of required reporters. Therefore, the court reasoned that the legislature intended to exempt clergymembers from mandatory reporting when they were counseling their parishioners in a religious context. *Id.*

14. *Id.* at 360, 788 P.2d at 1069. WASH. REV. CODE ANN. § 26.44.020 (11) (Supp. 1990) defines "clergy" as "any regularly *licensed* or *ordained* minister, priest, or rabbi . . . ." (emphasis added).

15. 114 Wash. 2d at 360-62, 788 P.2d at 1069-71. See U.S. CONST. amend. I: "Congress shall make no law . . . prohibiting the free exercise . . ." of religion.

16. *Id.* at 364, 788 P.2d at 1072.

17. *Id.* at 368, 788 P.2d at 1074. See U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion . . . ."

The court also rejected the defendants' argument that the reporting statute was void for vagueness.[18] Finally, Motherwell and Mensonides alleged that the reporting statute was overbroad and, therefore, violated the first amendment.[19] The court held that the statute was not sufficiently overbroad since it did not "reach a substantial amount of constitutionally protected activity."[20] *State v. Motherwell*, 114 Wash. 2d 353, 788 P.2d 1066 (1990).

Like other privileges, the religious privilege stems from a balancing of interests.[21] The privilege exists because an exemption of confidential communications with clergy is deemed more important to society than the introduction of all relevant evidence in court.[22] Society acknowledges the need of individuals to confide in a clergyman without fear of exposure.[23] If the clergy privilege is not allowed, people may refrain from seeking counseling with ministers.[24]

The common law refused to recognize a clergy-penitent privilege.[25] However, in 1813 a New York court acknowledged the exemption in *People v. Phillips*.[26] The United States Supreme Court followed suit, recognizing the value of the clergy privilege in 1875.[27]

In the early 1800s the New York legislature passed the first statute providing a clergy-penitent privilege.[28] Other states followed, and by 1987 forty-nine states, the District of Columbia, and the Virgin Islands all provided the exemption.[29] Although state statutes vary, most

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18. 114 Wash. 2d at 370, 788 P.2d at 1075.

19. *Id.* at 371, 788 P.2d at 1075.

20. *Id.* at 372, 788 P.2d at 1076.

21. Comment, *The Clergy-Penitent Privilege and the Child Abuse Reporting Statute: Is the Secret Sacred?*, 19 J. MARSHALL L. REV. 1031, 1038 (1986).

22. *Id.*

23. Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163, 173 (1981).

24. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 109 (1983).

25. Note, *Texas' Clergyman-Penitent Privilege and the Duty to Report Suspected Child Abuse*, 38 BAYLOR L. REV. 231, 232 (1986).

26. People v. Phillips, N.Y. Ct. Gen. Sess. (1813) (a Roman Catholic priest learned of child abuse during administration of the sacrament of penance, but refused to testify)(unreported case in 1 W.L.J. 109 (1843)), *cited in* Note, *When Must a Priest Report Under a Child Abuse Reporting Statute? - Resolution to the Priests' Conflicting Duties*, 21 VAL. U.L. REV. 431, 437 & n.43, 438 & n.45 (1987). *See also* Comment, *supra* note 21, at 1032 n.7.

27. Totten v. United States, 92 U.S. 105 (1875). The court stated "suits cannot be maintained which would require a disclosure of the confidences of the confessional . . . ." *Id.* at 107.

28. N.Y. REV. STAT. § 72, pt. 3, ch. VII, tit. III, art. 8 (1828), *cited in* Note, *supra* note 26, at 438 n.54.

29. Note, *supra* note 26, at 438-39.

statutes contain similar prerequisites to application of the privilege.[30] To be privileged, there must be a religious communication[31] with a clergyman[32] when he is functioning in his official capacity.[33] There must also be an intention of confidentiality.[34] Finally, confidentiality must be required by the particular religious discipline.[35]

States differ as to who qualifies as a clergyman.[36] An early Iowa case held that Presbyterian church elders were "ministers of the gospel" and entitled to protection under the privilege.[37] The New Jersey Superior Court decided that a nun did not qualify as a clergyman,[38] while a Missouri court concluded that a nun's position as spiritual advisor was sufficient to invoke the privilege.[39]

To be privileged, the communication must be made to a clergyman while he is acting in his professional capacity.[40] The South Carolina Court of Appeals held that marriage counseling by a clergyman was within his professional capacity.[41] Similarly, in *In re Verplank*[42] the court decided that a chaplain performing draft counseling services was acting in his official capacity.[43] Counselors assisting the chaplain were also privileged because they were performing the same activities.[44] Other courts have denied the clergy privilege to a rabbi assisting defense preparations,[45] a nun functioning as a hospital administrator,[46]

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30. Note, *supra* note 26, at 439.

31. Smith, *The Pastor on the Witness Stand: Toward a Religious Privilege in the Courts*, 29 CATH. LAW. 1, 10-11 (1984).

32. *Id.* at 7.

33. Note, *supra* note 26, at 440.

34. Smith, *supra* note 31, at 6.

35. Note, *supra* note 26, at 442.

36. Note, *supra* note 26, at 439.

37. Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917) (elders were entitled to clergy privilege because they were appointed for life and authorized to conduct services in the pastor's absence).

38. In re Murtha, 115 N.J. Super. 380, 279 A.2d 889, *cert. denied*, 59 N.J. 239, 281 A.2d 278 (1971). The court relied heavily upon the fact that Sister Margaret did not perform any of the normal priestly functions. *Id.*

39. Eckmann v. Board of Educ., 106 F.R.D. 70, 72 (E.D. Mo. 1985).

40. Yellin, *supra* note 24, at 121-24.

41. Rivers v. Rivers, 292 S.C. 21, 354 S.E.2d 784 (S.C. Ct. App. 1987).

42. 329 F. Supp. 433 (C.D. Cal. 1971).

43. *Id.* The chaplain and other staff members counseled draft registrants concerning service in the armed forces. The court concluded that this counseling was privileged because a draft registrant's response to selective service regulations often involves spiritual and moral decisions. *Id.* at 435-36.

44. *Id.* at 436.

45. People v. Drelich, 123 A.D.2d 441, 506 N.Y.S.2d 746 (1986).

46. Masquat v. Maguire, 638 P.2d 1105 (Okla. 1981).

and a church elder investigating rumors.[47]

The clergy privilege does not apply unless the communication is made by someone seeking spiritual assistance.[48] Generally, conversations with a friend who happens to be a clergyperson are not protected under the privilege.[49] Nonetheless, a North Carolina court allowed an exemption for statements made to an aunt who was also a clergymember.[50]

To claim the clergy privilege, the communication must be made with the intention of confidentiality.[51] Statements made during pastoral visits are confidential.[52] However, statements made to a clergyman during a business consultation[53] or to a pastor in his wife's presence[54] are not confidential. Also, records of a Catholic welfare association are not privileged unless they contain confidential communications with a priest.[55]

Finally, many states do not recognize a clergy privilege unless the particular religious discipline requires confidentiality.[56] Thus, an incriminating letter to a pastor whose denomination did not practice confession was held not privileged.[57] Other courts allow the privilege when the communication is made as part of a church practice or proceeding, even if confession is not required by the discipline.[58]

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47. Knight v. Lee, 80 Ind. 201 (1881).

48. Note, *supra* note 26, at 441. *See* Lucy v. State, 443 So. 2d 1335 (Ala. Crim. App. 1983) (statements made while seeking a place to hide from police were not penitential in nature); Cottrill v. State, 365 So. 2d 450 (Fla. Dist. Ct. App. 1978) (statements during marriage counseling exempt only if spiritual in nature); State v. Berry, 324 So. 2d 822 (La. 1975), *cert. denied*, 425 U.S. 954 (1976) (statements while attempting to pawn watch not penitential); United States v. Gordon, 655 F.2d 478 (2d Cir. 1981) (conversations related to business transactions not spiritual).

49. Yellin, *supra* note 24, at 121. *See also* Burger v. State, 238 Ga. 171, 231 S.E.2d 769 (1977) (statements were not made in "professing religious faith or seeking spiritual 'comfort' or 'guidance' ").

50. State v. Jackson, 77 N.C. App. 832, 336 S.E.2d 437 (1985), *review denied*, 316 N.C. 199, 341 S.E.2d 572 (1986) (admission of defendant after praying with aunt/clergymember; court could not determine to what extent personal or as clergymember).

51. Note, *supra* note 26, at 441.

52. Snyder v. Poplett, 98 Ill. App. 3d 359, 424 N.E.2d 396 (1981).

53. People v. Thompson, 133 Cal. App. 3d 419, 184 Cal. Rptr. 72 (1982).

54. State v. West, 317 N.E. 219, 345 S.E.2d 186 (1986).

55. State v. Lender, 266 Minn. 561, 124 N.W.2d 355 (1963).

56. Note, *supra* note 26, at 442.

57. Sherman v. State, 170 Ark. 148, 279 S.W. 353 (1926).

58. Rivers v. Rivers, 292 S.C. 21, 354 S.E.2d 784 (S.C. Ct. App. 1987) (held marriage counseling to be a church practice and privilege applied); Milburn v. Haworth, 47 Colo. 593, 108 P. 155 (1910) (held statements to minister and three church members not connected with church proceedings, so not privileged).

Although all five prerequisites have been met, the court may find the privilege has been waived.[59] In *Perry v. State*[60] the Supreme Court of Arkansas held that the defendant waived the clergy-penitent privilege by disclosing the same information to others.[61] Similarly, in *Church of Jesus Christ of Latter-Day Saints v. Superior Court*[62] an Arizona court held that the privilege had been waived by implication when the defendant revealed the substance of the conversation to the police.[63]

In recent years, courts and legislatures have broadened the scope of the clergy-penitent privilege in an effort to prevent discrimination against certain religious groups.[64] The privilege has also been extended to cover draft, marital, and other secular counseling by clergy.[65] This trend reveals legislative recognition of the importance of protecting confidentiality of religious communications.[66]

At the same time, society has become increasingly aware of child abuse.[67] In reaction to this problem, state legislatures swiftly enacted child abuse legislation.[68] By 1965 all fifty states and Washington D.C. had enacted a child abuse reporting statute.[69] Revised versions of these statutes are currently in force.[70]

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59. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege - The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27, 38 (1968).

60. 280 Ark. 36, 655 S.W.2d 380 (1983).

61. *Id.* at 37, 655 S.W.2d at 380-81.

62. 159 Ariz. 24, 764 P.2d 759 (Ariz. Ct. App. 1988).

63. *Id.*

64. Comment, *Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis*, 21 COLUM. J.L. & SOC. PROBS. 1, 23 (1987).

65. *See* People v. Pecora, 107 Ill. App. 2d 283, 246 N.E.2d 865, *cert. denied*, 397 U.S. 1028 (1969) (holding communications during marital counseling with clergy are privileged); Rivers v. Rivers, 292 S.C. 21, 354 S.E.2d 784 (S.C. Ct. App. 1987) (holding communications during marital counseling with clergy are privileged); In re Verplank, 329 F. Supp. 433 (C.D. Cal. 1971) (holding communications with clergy during draft counseling are privileged).

66. Comment, *supra* note 64, at 24.

67. Comment, *supra* note 64, at 3-4. In an effort to protect abused children, some legislatures have expanded the categories of mandatory child abuse reporters to include clergymen. Comment, *supra* note 64, at 24. Child abuse is a serious problem in America. Although it is impossible to determine the extent of such abuse, it is estimated that 76,000 to 4.1 million children are abused annually. Note, *supra* note 25, at 237.

68. Myers, *A Survey of Child Abuse and Neglect Reporting Statutes*, 10 J. JUV. LAW 1, 2 (1986).

69. Comment, *Civil Liability for Failing to Report Child Abuse*, 1 DET. C.L. REV. 135, 139 (1977).

70. ALA. CODE § 26-14-3 (1986); ALASKA STAT. § 47.17.020 (Supp. 1989); ARIZ. REV. STAT. ANN. § 13-3620 (1989); ARK. CODE ANN. § 12-12-504 (Supp. 1989); CAL. PENAL CODE § 11166 (West Supp. 1990); COLO. REV. STAT. § 19-10-104 (1986); CONN. GEN. STAT. ANN. § 17-

Although child abuse reporting statutes differ considerably from state to state, they commonly include sections setting forth the purpose of the statute, relevant terms, mandatory reporters, voluntary reporters, circumstances requiring a report, time limits for reporting, immunities, abrogation of privileges, and penalties for failure to report.[71] All reporting statutes share the threefold purpose of identification of abused children, investigation of reports of abuse, and treatment for abuse.[72]

Reporting statutes designate who must report child abuse.[73] While the earliest statutes required only physicians to report,[74] modern statutes include other professions as well.[75] The majority of states classify physicians, nurses, law enforcement officers, social workers, and teachers as mandatory reporters.[76]

In addition, fifteen states now require reporting by any person,[77]

38a (West Supp. 1990); DEL. CODE ANN. tit. 16, § 903 (1983) D.C. CODE ANN. § 2-1352 (1988 & Supp. 1990); FLA. STAT. ANN. § 415.504 (West 1986 & Supp. 1990); GA. CODE ANN. § 19-7-5 (Supp. 1990); HAW. REV. STAT. § 350-1.1 (Supp. 1989); IDAHO CODE § 16-1619 (Supp. 1990); ILL. ANN. STAT. ch. 23, para. 2054 (Smith-Hurd Supp. 1990); IND. CODE ANN. § 31-6-11-3 (Burns 1987); IOWA CODE ANN. § 232.69 (West 1985 & Supp. 1990); KAN. STAT. ANN. § 38-1522 (Supp. 1989); KY. REV. STAT. ANN § 620.030 (Michie/Bobbs-Merrill Supp. 1988); LA. REV. STAT. ANN. § 14:403 (West 1986 & Supp. 1990); ME. REV. STAT. ANN. tit. 22, § 4011 (Supp. 1989); MD. FAM. LAW CODE ANN. §§ 5-704 to 705 (Supp. 1989); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1990); MICH. COMP. LAWS ANN. § 722.623 (West Supp. 1990); MINN. STAT. ANN. § 626.556 (West Supp. 1990); MISS. CODE ANN. § 43-21-353 (Supp. 1989); MO. ANN. STAT. § 210.115 (Vernon 1983); MONT. CODE ANN. § 41-3-201 (1989); NEB. REV. STAT. § 28-711 (1989); NEV. REV. STAT. § 432B.220 (Supp. 1989); N.H. REV. STAT. ANN. § 169-C:29 (Supp. 1989); N.J. STAT. ANN. § 9:6-8.10 (West Supp. 1990); N.M. STAT. ANN. § 32-1-15 (1989); N.Y. SOC. SERV. LAW § 413 (McKinney Supp. 1990); N.C. GEN. STAT. § 7A-543 (1989); N.D. CENT. CODE § 50-25.1-03 (1989); OHIO REV. CODE ANN. § 2151.42.1 (Anderson 1990); OKLA. STAT. tit. 21, § 846 (Supp. 1990); OR. REV. STAT. § 418.750 (Supp. 1990); PA. STAT. ANN. tit. 11, § 2204 (Purdon Supp. 1990); R.I. GEN. LAWS § 40-11-3 (Supp. 1989); S.C. CODE ANN. § 20-7-510 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 26-10-10 (Supp. 1990); TENN. CODE ANN. § 37-1-403 (Supp. 1990); TEX. FAM. CODE ANN. § 34.01 (Vernon Supp. 1990); UTAH CODE ANN. § 62A-4-503 (1989); VT. STAT. ANN. tit. 33, § 683 (Supp. 1989); VA. CODE ANN. § 63.1-248.3 (1987); WASH. REV. CODE ANN. § 26.44.030 (Supp. 1990); W. VA. CODE § 49-6A-2 (1986); WIS. STAT. ANN. § 48.981 (West Supp. 1989); WYO. STAT. § 14-3-205 (1986) [hereinafter Reporting Statutes].

71. Reporting Statutes, *supra* note 70.

72. Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.[-] KENT L. REV. 641, 651 (1978).

73. Reporting Statutes, *supra* note 70.

74. Fraser, *supra* note 72, at 656.

75. Fraser, *supra* note 72, at 657.

76. Fraser, *supra* note 72, at 657-58.

77. DEL. CODE ANN. tit. 16, § 903 (1983); FLA. STAT. ANN. § 415.504 (West 1986 & Supp. 1990); IDAHO CODE § 16-1619 (Supp. 1990); IND. CODE ANN. § 31-6-11-3 (Burns 1987); NEB. REV. STAT. § 28-711 (1989); N.H. REV. STAT. ANN. § 169-C:29 (Supp. 1989); N.J. STAT. ANN. §

and four additional states require reporting by any person who encounters an abused child during performance of his professional duties.[78] Although forty-nine states have a clergy-penitent statutory privilege, some reporting statutes specifically designate clergymen as mandatory reporters.[79]

Every reporting statute sets forth the circumstances mandating a report.[80] Reports are not limited to known child abuse.[81] Some states require a greater degree of certainty of abuse than do others.[82] While some statutes require reporting when there is "reasonable cause to believe" there has been child abuse or neglect,[83] other statutes mandate reporting when there is any "reason to suspect" abuse or neglect.[84]

Although most statutes impose criminal sanctions for failure to report suspected child abuse, some professionals may be disregarding this mandate.[85] Others may be reporting cases which do not involve genuine abuse out of fear of criminal liability for failure to report.[86] It is sometimes difficult to distinguish cases of actual abuse from legitimate punishment.[87]

It is impossible to determine the impact of reporting statutes upon child abuse.[88] The number of reports of suspected child abuse has substantially increased since the enactment of these statutes.[89] Yet the in-

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9:6-8.10 (West Supp. 1990); N.M. STAT. ANN. § 32-1-15 (1978); N.C. GEN. STAT. 7A-543 (1989); OKLA. STAT. tit. 21. § 846 (Supp. 1990); R.I. GEN. LAWS § 40-11-3 (Supp. 1989); TENN. CODE ANN. § 37-1-403 (Supp. 1990); TEX. FAM. CODE ANN. § 34.01 (Vernon Supp. 1990); UTAH CODE ANN. § 62A-4-503 (1989); WYO. STA. § 14-3-205 (1986).

78. ALA. CODE § 26-14-3 (1986); KY. REV. STAT. ANN. § 620.030 (Michie/Bobbs-Merrill Supp. 1988); MISS. CODE ANN. § 43-21-353 (Supp. 1989); PA. STAT. ANN. tit. 11, § 2204 (Purdon Supp. 1990).

79. CONN. GEN. STAT. ANN. § 17-38a (West Supp. 1990); MISS. CODE ANN. § 43-21-353 (Supp. 1989); N.H. REV. STAT. ANN. § 169-C:29 (Supp. 1989).

80. Reporting Statutes, *supra* note 70.

81. Fraser, *supra* note 72, at 659.

82. Fraser, *supra* note 72, at 659.

83. *E.g.*, GA. CODE ANN. § 19-7-5 (Supp. 1990).

84. *E.g.*, N.H. REV. STAT. ANN. § 169-C:29 (Supp. 1989).

85. Comment, *supra* note 64, at 7.

86. Comment, *supra* note 64, at 7-8.

87. Comment, *Reporting Child Abuse: When Moral Obligations Fail*, 15 PAC. L.J. 189, 192-93 (1983). The U.S. National Center on Child Abuse and Neglect published one report indicating that more than sixty-five percent of reported cases of abuse are "unfounded." Unfounded reports damage family relationships and divert valuable resources from use in protecting children in immediate peril. Comment, *supra* note 64, at 4 n.23, 8.

88. Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 715 (1966).

89. Fraser, *supra* note 72, at 646.

crease may not be directly attributable to this legislation.[90] Despite the broad range of professionals designated as mandatory reporters, nonmandatory reporters make the vast majority of reports.[91] Most child abuse reports are made by nonprofessionals such as relatives, neighbors, and coworkers.[92]

Despite dramatically increased reporting, child abuse still goes largely undetected.[93] Child abuse is difficult to detect[94] and prove.[95] Although more cases are being reported, the number of trained personnel to investigate reports is not being proportionately increased.[96] Consequently, the time available for thorough investigation of each individual report is constantly diminishing.[97]

Because of the inherent difficulties in proving child abuse, most states abrogate some statutory privileges such as husband-wife, doctor-patient, or clergyman-penitent.[98] The majority of states allow an attorney-client privilege even when other privileges are denied.[99] Twenty-six state statutes do not specifically abrogate the clergy-penitent privilege.[100] However, the language in many of these statutes is unclear about whether the privilege is recognized.[101]

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90. Fraser, *supra* note 72, at 646.

91. Comment, *supra* note 21, at 1048-49.

92. Fraser, *supra* note 72, at 646.

93. Besharov, *"Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 HARV. J.L. & PUB. POL'Y 539, 556 & n.62 (1985).

94. Fraser, *supra* note 72, at 670.

95. Burke, *Evidentiary Problems of Proof in Child Abuse Cases: Why Family and Juvenile Courts Fail*, 13 J. FAM. L. 819 (1974).

96. Fraser, *supra* note 72, at 646.

97. Fraser, *supra* note 72, at 646.

98. Fraser, *supra* note 72, at 664.

99. Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1227 (1962).

100. ALA. CODE § 26-14-3 (1986); ARK. CODE ANN. § 12-12-504 (Supp. 1989); CAL. PENAL CODE § 11166 (West Supp. 1990); COLO. REV. STAT. § 19-10-104 (1986); D.C. CODE ANN. § 2-1352 (1988 & Supp. 1990); GA. CODE ANN. § 19-7-5 (Supp. 1990); HAW. REV. STAT. § 350-1.1 (Supp. 1989); IDAHO CODE § 16-1619 (Supp. 1990); IND. CODE ANN. § 31-6-11-3 (Burns 1987); IOWA CODE ANN. § 232.69 (West 1985 & Supp. 1990); KAN. STAT. ANN. § 38-1522 (Supp. 1989); KY. REV. STAT. ANN. § 620.030 (Michie/Bobbs-Merrill Supp. 1988); ME. REV. STAT. ANN. tit. 22, § 4011 (Supp. 1989); MD. FAM. LAW CODE ANN. §§ 5-704 to 705 (Supp. 1989); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1990); MINN. STAT. ANN. § 626.556 (West Supp. 1990); NEV. REV. STAT. § 432B.220 (Supp. 1989); N.Y. SOC. SERV. LAW §413 (McKinney Supp. 1990); N.C. GEN. STAT. § 7A-543 (1989); S.C. CODE ANN. § 20-7-510 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 26-10-10 (Supp. 1990); UTAH CODE ANN. § 62A-4-503 (1989); VT. STAT. ANN. tit. 33, § 683 (Supp. 1989); VA. CODE ANN. § 63.1-248.3 (1987); WASH. REV. CODE ANN. § 26.44.030 (Supp. 1990); WIS. STAT. ANN. § 48.981 (West Supp. 1989).

101. *See* IND. CODE ANN. § 31-6-11-3 (Burns 1987) (stating "any individual" must report);

Denial of the clergy privilege under child abuse reporting statutes raises the issue of unconstitutional violation of the religion clauses of the first amendment.[102] In *Lemon v. Kurtzman*[103] the United States Supreme Court used a three-part test for determining establishment clause violations.[104] The *Lemon* test requires that the law be secular in purpose, not primarily advance or inhibit religion, and not create excessive entanglement of government and religion.[105] Some states interpret their reporting statutes as allowing a clergy exemption only if the denomination requires confidentiality of confession.[106] The question becomes whether such an interpretation primarily advances religions, such as the Roman Catholic Church, which have this requirement.[107]

Another question is whether requiring a minister to reveal confidential communications burdens the free exercise of religion.[108] If a burden is found, the sincerity of the belief and degree of interference are examined to determine if the burden is constitutionally impermissible.[109] Once sincerity is established, the government must show a compelling state interest.[110] Furthermore, if a less restrictive alternative is available to protect the interest, it must be used.[111] A statute that burdens the exercise of religion violates the free exercise clause, absent a showing that the state has used the least obtrusive means available to achieve a compelling state interest.[112]

In *State v. Motherwell*[113] the Washington Supreme Court addressed the issue of whether the Washington child abuse reporting statute violated religious counselors' first amendment right to the free exer-

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N.C. GEN. STAT. § 7A-543 (1990) (stating "any person or institution" must report).

102. Note, *supra* note 25, at 242. See U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

103. 403 U.S. 602 (1971).

104. *Id.* at 612-13.

105. Cox, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1176 (1984).

106. Note, *supra* note 25, at 244.

107. Note, *supra* note 25, at 243-44.

108. *See* Comment, *supra* note 64, at 36; Comment, *supra* note 21, at 1047; Smith, *supra* note 31, at 15.

109. Comment, *supra* note 64, at 36-37.

110. Comment, *"Bless Me Father, For I Am About To Sin . . .": Should Clergy Counselors Have a Duty to Protect Third Parties*, 22 TULSA L.J. 139, 157 (1986).

111. Note, *Seeing in a Mirror Dimly? Clergy Malpractice as a Cause of Action: Nally v. Grace Community Church*, 15 CAP. U.L. REV. 349, 367 (1986).

112. Sherbert v. Verner, 374 U.S. 398 (1963).

113. 114 Wash. 2d 353, 788 P.2d 1066 (1990).

cise of religion.[114] Justice Durham, writing for a unanimous court, stated that in order to establish a violation, the defendants must show that the state compelled them to violate a sincerely held religious tenet.[115] The counselors argued that their religious beliefs required them to attempt to help parishioners through counseling and prayer and to inform the authorities only when these methods proved unsuccessful.[116]

The court reasoned that the government had not coerced the defendants to violate a religious tenet since they could continue counseling after reporting.[117] The court did note that it might reach a different conclusion if the religious discipline required confidentiality in counseling sessions.[118] However, the court held that there was no coercion to violate a religious tenet because the defendants' beliefs did not require confidentiality.[119] The court concluded that impairment of religious practices due to child abuse reporting requirements did not establish infringement of the first amendment right to the free exercise of religion.[120]

The court further stated that even if the defendants had established infringement, the government's compelling interest in protecting children from abuse justified the alleged constitutional violation.[121] The court then concluded that the state had used the least restrictive means available to achieve its purpose.[122] Mandatory reporting, as opposed to intervention to prevent abuse, was less intrusive.[123] The court rejected the defendants' suggestion that all religious counselors be exempt from reporting, maintaining that this exemption would "unduly interfere" with the state's goal of protecting children from abuse.[124]

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114. *Id.* at 360-64, 788 P.2d at 1070-72. See U.S. CONST. amend. I provides: "Congress shall make no law . . . prohibiting the free exercise . . ." of religion.

115. 114 Wash. 2d at 361, 788 P.2d at 1070.

116. *Id.* at 362, 788 P.2d at 1070-71.

117. *Id.* at 362-63, 788 P.2d at 1071 (citing Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983), where the Supreme Court held that denial of tax benefits to private schools did not prevent the schools from observing their religious tenets; and Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), where the Supreme Court held that impaired religious practices were not sufficient to establish a free exercise violation).

118. *Id.* at 363, 788 P.2d at 1071 n.8.

119. *Id.* at 362-63, 788 P.2d at 1071. The lower court found infringement of religious rights, but justified because of the state's compelling interest. *Id.* at 360-61, 788 P.2d at 1070.

120. *Id.* at 363-64, 788 P.2d at 1071-72.

121. *Id.* at 364-66, 788 P.2d at 1072-73.

122. *Id.* at 366, 788 P.2d at 1073.

123. *Id.*

124. *Id.*

The counselors also argued that the reporting requirement violated the establishment clause of the first amendment.[125] Using the threefold test of *Lemon v. Kurtzman*,[126] the court found the reporting statute had a secular purpose and did not primarily affect religion.[127] The court rejected the defendants' contentions that the reporting statute resulted in entanglement of government and religion when the court determined that the counselors' acts constituted "social work."[128] The court stated that the definition of "social worker" in the reporting statute encompassed both secular and religious activities, making it unnecessary to determine which category applied to the counseling services.[129]

Motherwell and Mensonides alleged that the reporting statute was unconstitutionally vague because ordinary individuals would not anticipate that "social worker" included religious counselors.[130] The court found this argument unpersuasive since the reporting statute specifically defined the role of a social worker.[131] Moreover, a memorandum from Motherwell to the other counselors stated unequivocally that they were required to report information concerning child abuse under the statute.[132]

Additionally, the counselors argued that the reporting statute was overbroad because it would be unconstitutional to apply it to ordained ministers.[133] Justice Durham declared that application of the statute to ordained ministers would not be unconstitutional.[134] He stated that the religious belief is determinative, rather than the status of the individual.[135] However, the court yielded to the legislative application of status to determine that only Hartley had *not* violated the reporting statute.[136]

Finally, the defendants argued that the reporting statute was un-

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125. *Id.* See U.S. CONST. amend. I which provides: "Congress shall make no law respecting an establishment of religion . . . ."

126. 403 U.S. 602 (1971). *See supra* notes 103-05 and accompanying text.

127. 114 Wash. 2d at 367, 788 P.2d at 1073.

128. *Id.* at 367-68, 788 P.2d at 1073-74.

129. *Id.*

130. *Id.* at 369, 788 P.2d at 1074.

131. *Id.* at 369-70, 788 P.2d at 1074-75.

132. *Id.* at 370, 788 P.2d at 1075.

133. *Id.* at 371, 788 P.2d at 1075.

134. *Id.* A statute which prohibits constitutionally protected activities is overbroad and, therefore, unconstitutional. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 (1970).

135. 114 Wash. 2d at 371, 788 P.2d at 1075.

136. *Id.* at 360, 788 P.2d at 1069. *See supra* notes 13-14 and accompanying text.

constitutionally overbroad when applied to ministers whose religion required confidentiality of confession.[137] The court reasoned that overbreadth must be substantial to render a statute unconstitutional.[138] The court concluded that the Washington statute did not affect "a substantial amount of constitutionally protected activity" because religious personnel made less than two percent of total child abuse reports in 1984.[139]

Motherwell reinforced the clergy-penitent privilege in child abuse reporting.[140] The court acknowledged that requiring reports by clergy could cause perpetrators of abuse to refrain from seeking help.[141] The court also extended the privilege to secular counseling by clergy outside the scope of conventional religious activities.[142] Yet, the court refused to broaden the privilege to include associate counselors.[143]

This decision demonstrates strong judicial support for child abuse legislation and a reluctance to find first amendment infringement under state reporting requirements. Ironically, the court concluded that the reporting statute was not overbroad because statistics indicated that only two percent of child abuse reports were made by religious personnel.[144] These statistics would also support a conclusion that the government does not have a compelling interest in requiring clergy to report child abuse.[145]

The court's determination that religious counselors could continue counseling after revealing the contents of private conversations with a parishioner to the authorities[146] is troubling. When applying the clergy exemption to Hartley, the court acknowledged that requiring clergy to report child abuse could cause parishioners to refrain from confiding in

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137. *Id.* at 371, 788 P.2d at 1075.

138. *Id.* (citing Houston v. Hill, 482 U.S. 451 (1987)).

139. *Id.* at 372, 788 P.2d at 1076.

140. *Id.* at 359, 788 P.2d at 1069.

141. *Id.* The court stated "Announcing a rule that requires clergy to report under all circumstances could serve to dissuade parishioners from acknowledging in consultation with their ministers the existence of abuse and seeking a solution to it." *Id.*

142. *Id. See supra* note 65 and accompanying text.

143. *Cf. In re* Verplank, 329 F. Supp. 433 (C.D. Cal. 1971) (the California court allowed a privilege for all counselors; the court found it significant that the activities of the unordained counselors conformed to those of a Protestant minister). *Id.* at 436. *See supra* notes 42-44 and accompanying text.

144. 114 Wash. 2d at 372, 788 P.2d at 1076.

145. *See* Comment, *supra* note 64, at 40-46.

146. 114 Wash. 2d at 362-63, 788 P.2d at 1071.

ministers.[147] It appears even more likely that a counselee would not continue counseling sessions after learning that the counselor had reported his disclosures to law enforcement agencies. Yet, the court held that this impairment of counseling ability was insufficient to establish first amendment infringement.[148]

Although the court held that the state was using the least restrictive means to achieve its goal of protecting children from abuse,[149] there are other reporting options which the defendants did not raise and the court did not address. Religious counselors could be required to report only in cases of *known* abuse or neglect.[150] The state could limit reports by religious personnel to observations.[151] This would allow ministers to maintain confidential communications without greatly impairing the State's interest.[152]

By refusing to even consider the impairment of religious counseling as sufficient to establish a free exercise infringement,[153] the court closed the door on many future constitutional challenges. The court left one small crack by stating that a different conclusion might be in order if a religious denomination specifically required confidentiality.[154] However, the court did not address the issue of whether an exclusion for some denominations, and not others, would violate the establishment clause.[155] This dictum may encourage other religious sects to adopt policy statements affirming confidentiality as a central tenet,[156] which could increase future conflicts between the child abuse reporting statutes and the first amendment.

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147. *Id.* at 359, 788 P.2d at 1069.

148. *Id.* at 364, 788 P.2d at 1072.

149. *Id.* at 366, 788 P.2d at 1073.

150. Under the Washington statute reports are required if there is "reasonable cause to believe a child . . . has suffered abuse or neglect." *See supra* note 7 and accompanying text. *See also* Comment, *supra* note 64, at 47-48.

151. *See* Note, *supra* note 26, at 464.

152. *See* Note, *supra* note 26, at 464.

153. 114 Wash. 2d at 362-64, 788 P.2d at 1071-72.

154. *Id.* at 363 n.8, 788 P.2d at 1071 n.8.

155. See Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege - The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27, 41-47 (1968) for a discussion of this issue.

156. See Comment, *supra* note 64, at 14-19 for an excellent discussion of confidentiality within denominations. It appears that many denominations have already adopted confidentiality as a central tenet. *Id.*