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Martin R. Bartel

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## CLERGY MALPRACTICE AFTER *NALLY*: "TOUCH NOT MY ANOINTED, AND TO MY PROPHETS DO NO HARM"\*

MARTIN R. BARTEL\*\*

"[T]he [First] Amendment embraces two concepts,— freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are ranked heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in

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\* I *Chronicles* 16:22. This Biblical verse served as the basis for the *privilegium clericale*, the express protection granted to the clergy under English law until 1829. The privilege allowed priests, nuns, and even rabbis in some cases, to claim immunity from secular criminal process in felony cases and the right to be tried in ecclesiastical courts, where punishments were less severe. Carey, *Clergy in Court*, CASE & COM., Nov.-Dec. 1988, at 21.

\*\* Assistant Professor of Business Administration, Saint Vincent College, Latrobe, Pennsylvania; C.P.A. (Pa.); Roman Catholic Benedictine Priest, Saint Vincent Archabbey, Latrobe, Pennsylvania; J.D., University of Pennsylvania (1989); M.Div., Saint Vincent Seminary (1984); M.B.A., Bowling Green State University (1984); B.B.A., Temple University (1978).

the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by the respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any type of religion for preferred treatment. It puts them all in that position.\*\*\*

## I. INTRODUCTION

On April 1, 1979, twenty-four year old Kenneth Nally committed suicide by shooting himself in the head with a shotgun.<sup>1</sup> In California, his parents filed a wrongful death claim, naming as defendants the church where Nally had participated in pastoral counseling programs and four of its ministers.<sup>2</sup> The suit alleged "clergyman malpractice,"<sup>3</sup> that is, negligence and outrageous

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\*\*\* United States v. Ballard, 322 U.S. 78, 86-87 (1944) (citations omitted).

1. Nally v. Grace Community Church, 47 Cal. 3d 278, 283, 763 P.2d 948, 949, 253 Cal. Rptr. 97, 99 (1988), cert. denied, 109 S. Ct. 1644 (1989).

2. *Id.*

3. *Id.* This suit has received nationwide attention because it is apparently the first case specifically alleging clergy malpractice. However, Nally is not entirely without precedent. In *Radecki v. Schuckardt*, an Ohio appellate court reversed a judgment against a pastor accused of alienation of affection. 50 Ohio App. 2d 92, 361 N.E. 2d 543 (1976). The court based its decision on religious grounds. *Id.* at 96, 361 N.E.2d at 546. In *Carnieri v. Bush*, the Washington Supreme Court allowed an alienation of affection claim to go to trial, reasoning that religious freedom does not guarantee the right to interfere with familial relationships. 69 Wash. 2d 536, 538, 419 P.2d 132, 134 (1966). At trial, the plaintiff won a verdict for a few thousand dollars. See Ranii, *Clergy Malpractice—The Prayer for Relief*, NAT'L L.J., Mar. 4, 1985, at 32, col. 1. See generally Carey, *Churches Are Taken to Court More Often in Internal Disputes: Denominations Are Worried*

conduct on the part of the church and its ministers for failing to prevent the suicide.<sup>4</sup> After a long and complicated procedural history,<sup>5</sup> the California Supreme Court finally disposed of the case, holding that pastoral, nontherapist counselors who offer counseling on secular or spiritual matters have no duty of care to potentially suicidal persons.<sup>6</sup> Therefore, the court determined, these nontherapist counselors are not held liable in negligence if the counselee commits suicide.<sup>7</sup>

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by *Suits over Discipline and Pastoral Counseling but Serious Setbacks Are Few*, Wall St. J., Apr. 9, 1985, at 1, col. 1.

Professor Esbeck cites and discusses another case, *Neufang v. Cahn*. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1, 79 n.483 (1986) (citing No. 79-8143 (Fla. Cir. Ct., Broward Co. filed May 2, 1979)). According to Professor Esbeck, the surviving spouse of a suicide victim brought a malpractice action against a psychiatrist and a hospital in this case. *Id.* The defendant-psychiatrist filed a third-party complaint against a church and its pastor alleging negligent counseling. *Id.*

A commentator cites and discusses *Edwards v. Saint Stevens Episcopal Church*. Comment, *Religious Torts: Applying the Consent Doctrine as Definitional Balancing*, 19 U.C. DAVIS L. REV. 949, 952 n.21 (1988) (citing No. 844020 (Cal. Super. Ct. filed Aug. 5, 1985)). According to the author, this case involved a church treasurer who embezzled \$28,000 from the church. The treasurer alleged clergy malpractice when the priest to whom she had confessed the crime informed the police. *Id.* The commentator also discusses *Kelly v. Christian Community Church*. *Id.* (citing No. 545117 (Cal. Super. Ct. filed Mar. 22, 1984)). According to the author, the plaintiff in *Kelly* alleged clergy malpractice when a pastoral counselor revealed to church elders the plaintiff's private confessional admission of visiting a prostitute, which revelation resulted in the plaintiff's excommunication. *Id.*

4. *Nally*, 47 Cal. 3d at 283, 763 P.2d at 949, 253 Cal. Rptr. at 99.

5. *Id.* at 288-91, 763 P.2d at 952-55, 253 Cal. Rptr. at 102-04. The trial court had found no triable issues of fact and had granted summary judgment for the Church. *Nally v. Grace Community Church*, 157 Cal. App. 3d 940 [depublished], 204 Cal. Rptr. 303, 304 (1984) (*Nally I*). The court of appeal reversed the lower court by finding that issues of fact remained regarding whether the suicide was caused by the intentional infliction of emotional distress, a claim related to the original allegation of outrageous conduct. *Id.* at — [depublished], 204 Cal. Rptr. at 309. The Supreme Court of California denied the Church's petition for review, depublished the *Nally I* opinion and returned the case for trial. *Id.* at 940 n.\*, 204 Cal. Rptr. at 303 n.\*. At the close of the plaintiffs' evidence, the trial court granted the defendants' motion to dismiss for insufficient evidence. *Nally v. Grace Community Church*, 194 Cal. App. 3d 1147, — [withdrawn], 240 Cal. Rptr. 215, 222 (1987) (*Nally II*). The court of appeal again reversed, holding that nontherapist spiritual counselors who hold themselves out as competent to treat serious emotional problems have a duty to take appropriate precautions when the counselee exhibits suicidal tendencies. *Id.* at — [withdrawn], 240 Cal. Rptr. at 226.

6. *Nally*, 47 Cal. 3d at 299-300, 763 P.2d at 960-61, 253 Cal. Rptr. at 110.

7. *Id.*; see also Reidinger, *Looking for the Light*, A.B.A. J., Mar. 1989, at 103 (providing concise summary of facts, procedural history and ruling of *Nally*). For a general discussion of the topic of abuse by counselors, see *The Phil Donahue Show* (ABC television broadcast, Dec. 7, 1988) (transcript no. 120788), featuring appearances by Kenneth Nally's father; the Executive Director of Americans United for Separation of Church and State (a Southern Baptist minister); the Coordinator of Stop Abuse by Counselors; an "intervention coordinator" (a

This article first analyzes the California Supreme Court's decision in *Nally*. It briefly considers actions before other state supreme courts in which plaintiffs have alleged liability for pastoral counseling<sup>8</sup> and for clergy malpractice.<sup>9</sup> The article then examines public policy considerations weighing against recognition of actions in negligence against pastoral counselors, and questions whether the judiciary could even develop a coherent standard of care. This article next investigates the constitutionality of holding pastoral counselors liable for negligent counseling. Finally, the wisdom of the *Nally* decision and its impact on members of the clergy and their pastoral practices are considered.

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deprogrammer) and the President of the Coalition for Religious Freedom (a Baptist minister).

8. Pastoral counseling has been defined as an attempt "to combine insights and techniques derived from the contemporary helping professions with the insights of theology and faith." Estadt, *Pastoral Counseling: Today and Tomorrow*, in *PSYCHIATRY, MINISTRY & PASTORAL COUNSELING* 41 (A. Sipe & C. Rowe 2d ed. 1984); see also H. CLINEBELL, *BASIC TYPES OF PASTORAL CARE AND COUNSELING* 26 (1984) (defining pastoral counseling as "utilization [by persons in ministry] of a variety of healing (therapeutic) methods to help people handle their problems and crises more growthfully and thus experience healing of their brokenness").

9. A recent law review article aptly defined the term "clergy malpractice" as "a new tort [in which plaintiffs] attempt to copy other professional malpractice plaintiffs by declaring a standard of behavior for the clergy and then proving that the defendant failed to meet this standard." Comment, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*, 19 *RUTGERS L.J.* 419, 422 (1988) [hereinafter Comment, *Spiritual Counseling Conflicts*].

The tort has been also variously labeled "ministerial malpractice," "spiritual counseling malpractice," "pastoral counseling liability," and "theological malpractice." Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 *CAL. W.L. REV.* 507, 510-11 (1983) [hereinafter Comment, *Made Out of Whole Cloth?*].

More generally, malpractice pertains to the failure of a person "who undertakes to render services in the practice of a profession or trade . . . to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." *RESTATEMENT (SECOND) OF TORTS* § 299A (1965). Or, in other words, malpractice is "any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice or illegal or immoral conduct." *BLACK'S LAW DICTIONARY* 864 (5th ed. 1979).

"[C]lergy malpractice is distinct from an intentional tort, since the latter claims are currently actionable against clergymen regardless of their 'professional' nature." Comment, *Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?*, 17 *U. TOLEDO L. REV.* 209, 212 & n.23 (1985) [hereinafter Comment, *Bad News*] (citing *United States v. Ballard*, 322 U.S. 78 (1944) (mail fraud); *Anderson v. Puhl*, No. 84-645 (D. Minn. Sept. 25, 1984) (homosexual assault); *Nelson v. Dodge*, 76 R.I. 1, 68 A.2d 51 (1949) (obtaining gifts and donations by fraud); *Magnuson v. O'Dea*, 75 Wash. 574, 135 P. 640 (1913) (kidnapping of minor); Comment, *People v. Religious Cults: Legal Guidelines for Criminal Activities, Tort Liability and Parental Remedies*, 11 *SUFFOLK U.L. REV.* 1025, 1037-45 (1977) (examining religious leaders' liability for intentional torts)).

## II. THE FACTS OF NALLY

Kenneth Nally was raised as a Roman Catholic. In 1974, while studying at the University of California at Los Angeles, he began attending Grace Community Church of the Valley (the Church), the largest Protestant congregation in Los Angeles County.<sup>10</sup> Nally's conversion from his parents' religion was a source of tension in the family.<sup>11</sup>

In December 1978, Nally grew despondent after breaking up with his girlfriend and began to participate in "discipleship" sessions held by the Church.<sup>12</sup> Through the sessions, the Church offered pastoral counseling, which consisted of instruction, study, prayer and guidance.<sup>13</sup> In addition to attending the sessions, Nally sought medical care for his depression from two different physicians. One prescribed an anti-depressant drug and recommended further medical testing; the other suggested a physical examination.<sup>14</sup> Neither physician referred Nally to a psychiatrist.<sup>15</sup> Nally's depression did not subside, and he continued discussing his problems with one of the Church's ministers.<sup>16</sup>

In March 1979, Nally attempted suicide by drug overdose.<sup>17</sup> The staff psychiatrist of the hospital to which he was taken recommended that Nally be admitted to a psychiatric hospital, but Nally and his father requested outpatient treatment, and the psychiatrist reluctantly agreed.<sup>18</sup> Upon Nally's release, his attending physician advised his parents to consider involuntary commitment, but they rejected this suggestion as inappropriate.<sup>19</sup>

Eleven days before his suicide, Nally met with a Church minister for spiritual counseling, and asked the pastor whether Christians who kill themselves would nevertheless be "saved."<sup>20</sup> Relying on his seminary training, the clergyman responded that "a person who is once saved is always saved," but added that "it would be wrong to be thinking in such terms."<sup>21</sup> A few days later,

10. *Nally*, 47 Cal. 3d at 283-84, 763 P.2d at 950, 253 Cal. Rptr. at 99.

11. *Id.* at 284, 763 P.2d at 950, 253 Cal. Rptr. at 99.

12. *Id.*

13. *Id.*

14. *Id.* at 284-85, 763 P.2d at 950-51, 253 Cal. Rptr. at 100.

15. *Id.* at 285, 763 P.2d at 951, 253 Cal. Rptr. at 100.

16. *Id.* at 285-86, 763 P.2d at 950-52, 253 Cal. Rptr. at 101-02.

17. *Id.*

18. *Id.*

19. *Id.* at 285-87, 763 P.2d at 951-52, 253 Cal. Rptr. at 101-02.

20. *Id.*

21. *Id.* at 286, 763 P.2d at 952, 253 Cal. Rptr. at 101. At trial, plaintiffs sought to introduce a tape recording from a series of biblical counseling classes

after making some additional inquiries of the pastor and other mental health professionals regarding psychological therapy, Nally apparently proposed marriage to a former girlfriend. She spurned his proposal and told him: “[P]ull yourself together. You’ve got to put God first in your life.”<sup>22</sup> Three days later, Nally was found in a friend’s apartment, dead from a self-inflicted gunshot wound.<sup>23</sup> After his death, his parents filed their clergyman malpractice suit.<sup>24</sup>

### III. A DUTY TO REFER?

The plaintiffs proposed that the negligence of the Church rested in its failure to inquire fully into Nally’s concerns regarding the fate of suicide victims’ souls and in its failure to refer Nally to those trained in psychiatric care.<sup>25</sup> The California Court of Appeal held that nontherapist counselors who hold themselves out as competent to treat severe emotional problems have a duty to refer counsees who exhibit suicidal tendencies to professional therapeutic care.<sup>26</sup> The California Supreme Court granted review and rejected the court of appeal’s imposition of a broad “duty to refer” on nontherapist counselors in general.<sup>27</sup> The court found no duty on the part of spiritual counselors to refer a potentially suicidal person to a professional therapist.<sup>28</sup> The court held that a nontherapist counselor could not be held liable in negligence if

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taught by one of the defendants 18 months after Nally’s suicide. *Id.* at 302-04, 763 P.2d at 962-63, 253 Cal. Rptr. at 112-13. The recording indicated that the pastor, in response to a question, taught that a person who committed suicide could be “saved” and that one does not forfeit salvation by the commission of subsequent sins. *Id.* The California Supreme Court reversed the court of appeal and ruled that the trial court had not abused its discretion in excluding this evidence due to concerns for unduly influencing, confusing and misleading the jury. *Id.*

22. *Id.* at 287, 763 P.2d at 952, 253 Cal. Rptr. at 102.

23. *Id.*

24. *Id.* at 283, 763 P.2d at 949, 253 Cal. Rptr. at 99.

25. *Id.* at 287-88, 763 P.2d at 952-53, 253 Cal. Rptr. at 102. One commentator had theorized:

If the clergy malpractice concept has a future, it lies most likely in allegations of failure to carry out [an] inquiry into the nature and gravity of a counselee’s concerns and in a consequent failure to refer cases beyond the spiritual counselor’s professional competence to those better educated to handle them.

Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be “Free Exercise”?*, 84 MICH. L. REV. 1296, 1298 n.8. (1986).

26. *Nally II*, 194 Cal. App. 3d 1147, — [withdrawn], 240 Cal. Rptr. 215, 222 (1987).

27. *Nally*, 47 Cal. 3d at 299-300, 763 P.2d at 960-61, 253 Cal. Rptr. at 110.

28. *Id.* at 292-93, 763 P.2d at 956, 253 Cal. Rptr. at 105-06.

a counselee committed suicide.<sup>29</sup>

The Chief Justice wrote that “[u]nder traditional tort law principles, one is ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship of custody or control.”<sup>30</sup> In previous cases, the court had imposed a duty of care upon psychiatrists and hospitals.<sup>31</sup> Such a duty was not imputed to the Church and ministers, however, because “[i]n sharp contrast [to the previous decisions], Nally was not involved in a supervised medical relationship with [the] defendants” and “[t]he closeness of connection between defendants['] conduct and Nally’s suicide was tenuous at best.”<sup>32</sup>

29. *Id.* at 299-300, 763 P.2d at 960-61, 253 Cal. Rptr. at 110.

30. *Id.* at 293, 763 P.2d at 956, 253 Cal. Rptr. at 105 (citing *Davidson v. City of Westminster*, 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982) and *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976)).

31. *Id.* at 293-96, 763 P.2d at 956-58, 253 Cal. Rptr. at 106-08 (citing *Meier v. Ross Gen. Hosp.*, 69 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968) (action for negligence held to exist against both treating psychiatrist and hospital for suicide of patient); *Vistica v. Presbyterian Hosp.*, 67 Cal. 2d 464, 432 P.2d 193, 62 Cal. Rptr. 577 (1967) (liability for suicide of in-patient imposed on hospital alone, only named defendant in case); *Bellah v. Greenson*, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978) (although parents’ wrongful death action against psychiatrist treating their daughter on out-patient basis was time barred, cause of action existed for breach of duty of care to patient)).

For a detailed discussion of the important differences between pastoral counseling and psychology or psychiatry, see *infra* notes 107-14 and accompanying text. Here, it is worth noting:

If there is a legal duty to refer counselees to licensed professionals in the disciplines of medicine and psychology, this will clash with the religious beliefs of some faiths. It is well known that there is mistrust between some religious communities and the social science of psychology and the medical science of psychiatry. Each holds radically differing views of the nature of humankind and the cause and treatment of many ailments such as depression and alcoholism. When clerics regard mental health professions with suspicion, free exercise problems will result should the law require cross-disciplinary referral. The issue is made apparent by turning the situation around and contemplating a legal requirement for referrals to clergy by mental health professionals should the problem be “spiritual” rather than “mental.”

Esbeck, *supra* note 3, at 84 (citing J. EIDSMOE, *THE CHRISTIAN LEGAL ADVISOR* 516-18 (1984); P. VITZ, *PSYCHOLOGY AS RELIGION: THE CULT OF SELF WORSHIP* (1977)).

32. *Nally*, 47 Cal. 3d at 294-96, 763 P.2d at 957-58, 253 Cal. Rptr. at 106-08. *Contra id.* at 304-14, 763 P.2d at 964-70, 253 Cal. Rptr. at 113-19 (Kaufman, J., concurring).

The evidence in the record, viewed—as the law requires—in *plaintiffs’* favor, demonstrates that defendants (1) expressly held themselves out as fully competent to deal with the most severe psychological disorders, including depression with suicidal symptoms, (2) developed a close counseling relationship with Kenneth Nally for that very purpose, and



The court also rejected the argument that the foreseeability of Nally's suicide created a duty to refer.<sup>33</sup> Because such an intrusion might stifle counseling, the court deemed it inappropriate to impose such a duty on nontherapist counselors solely on the basis of foreseeability.<sup>34</sup> The court stated that "[m]ere foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm."<sup>35</sup>

#### IV. OTHER STATE COURT OPINIONS

The Alabama, Colorado, and Ohio Supreme Courts have recently addressed the tort of clergy malpractice in the context of the speech or conduct of clerics in their capacity as religious leaders and in the context of clerical counseling. The three cases shared similar factual patterns: clergymen engaged in sexual affairs with the wives of couples to whom they were offering marriage counseling.<sup>36</sup> Each marriage subsequently ended in divorce.<sup>37</sup> Additionally, the husband in the Alabama suit committed suicide.<sup>38</sup> An appellate court in Missouri also addressed the issue of clergy malpractice in a suit that alleged the violation of the counselee's privacy when the counselor revealed confidential communications, an act that caused great emotional distress.<sup>39</sup>

In all of these cases, the courts did not provide any in-depth analysis of the emerging tort of clergy malpractice because they never reached the merits of the claims.<sup>40</sup> The courts refused to

(3) realized that Nally's suicide was at least a possibility. Thus the evidence was more than sufficient, in my view, to trigger a minimal duty of care to Nally. What was fatally *absent* from plaintiffs' case was not evidence of duty, but proof that defendants breached that duty, and such breach constituted a proximate cause of Nally's suicide.

*Id.* at 304, 763 P.2d at 964, 253 Cal. Rptr. at 113-14 (Kaufman, J., concurring).

33. *Nally*, 47 Cal. 3d at 297, 763 P.2d at 959, 253 Cal. Rptr. at 108.

34. *Id.*

35. *Id.* (citing *Davidson v. City of Westminster*, 32 Cal. 3d 197, 209, 649 P.2d 894, 900, 185 Cal. Rptr. 252, 258 (1982)).

36. *Handley v. Richards*, 518 So. 2d 682, 683 (Ala. 1987); *DeStefano v. Grabrian*, 763 P.2d 275, 278 (Colo. 1988); *Strock v. Pressnell*, 38 Ohio St. 3d 207, 208, 527 N.E.2d 1235, 1236 (1988).

37. *Handley*, 518 So. 2d at 683; *DeStefano*, 763 P.2d at 278; *Strock*, 38 Ohio St. 3d at 208, 527 N.E.2d at 1236.

38. *Handley*, 518 So. 2d at 683.

39. *Hester v. Barnett*, 723 S.W.2d 544, 550-54 (Mo. Ct. App. 1987). See generally, Sherman, *Nation's Courts Reject 'Clergy Malpractice' Suits*, NAT'L L.J., Oct. 24, 1988, at 10, col. 1.

40. *Handley*, 518 So. 2d at 683-86; *DeStefano*, 763 P.2d at 285-86; *Hester*, 723 S.W.2d at 554; *Strock*, 38 Ohio St. 3d at 210-12, 527 N.E.2d at 1238-40.

reach the merits of the claims because remedies were already available under existing intentional tort theories or because such claims were simply not recognized by the court.<sup>41</sup>

## V. PUBLIC POLICY CONSIDERATIONS

Perhaps of most significance to future clergy malpractice claims are the public policy considerations that the California Supreme Court identified in arriving at its conclusion: the overall chilling effect on counseling, the legislative exemption, and the promotion of individual assistance efforts.<sup>42</sup> The court judged these considerations to be so overriding and complex that any departure from the status quo was unwarranted.<sup>43</sup>

### A. *The Chilling Effect on Pastoral Counseling*

The court reasoned that imposing a standard of care and duty to refer on nontherapist counselors would have a chilling effect on counseling in general.<sup>44</sup> Such an imposition might deter those most in need of assistance from seeking it because of the fear that their private disclosures could result in their involuntary

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41. The Ohio Supreme Court noted: "For clergy malpractice to be recognized, the cleric's behavior, even if it is related to his 'professional' duties, must fall outside the scope of other recognized torts. . . . In this case, the alleged acts of [the defendant] fell within the realm of intentional tort law, *i.e.*, amatory actions—not malpractice." *Strock*, 38 Ohio St. 3d at 212, 527 N.E.2d at 1239. In the opinion of the Missouri Court of Appeals, "[t]o avoid a redundant remedy, . . . any functional theory of clergy malpractice needs [to] address incidents of the clergy-communicant relationship not already actionable [such as the intentional tort theories of alienation of affections, defamation, intentional infliction of emotional distress, invasion of privacy, and intentional interference with contract]." *Hester*, 723 S.W.2d at 551; *see also Handley*, 518 So. 2d 682 (adopting reasoning of *Hester*). The Colorado Supreme Court determined: "Since the claim for clergy malpractice is not supported by precedent and raises serious first amendment issues, we . . . do not recognize the claim of 'clergy malpractice.'" *DeStefano*, 763 P.2d at 285.

42. *See Nally*, 47 Cal. 3d at 297-99, 763 P.2d at 959-60, 253 Cal. Rptr. at 108-10.

43. *Id.* at 299, 763 P.2d at 960, 253 Cal. Rptr. at 110 (citing *Thompson v. County of Alameda*, 27 Cal. 3d 741, 754-55, 614 P.2d 728, 735-36, 167 Cal. Rptr. 70, 77-78 (1980) and *Bill v. Superior Court*, 137 Cal. App. 3d 1002, 1012-13, 187 Cal. Rptr. 625, 631-32 (1982)). For a discussion of the chilling effect on pastoral counseling that would be caused by the imposition of a standard of care, *see Carey*, *supra* note 3, at 25, col. 1.

44. *Nally*, 47 Cal. 3d at 297, 763 P.2d at 959, 253 Cal. Rptr. at 109. *But see* H. MALONY, T. NEEDHAM & S. SOUTHARD, CLERGY MALPRACTICE 20-21 (1986) [hereinafter H. MALONY] (quoting opinion of Dr. James Ewing, Executive of the American Association of Pastoral Counselors, and Newton Malony, pastoral counselor, psychologist, and past president of the American Psychological Association's Division of Psychologists Interested in Religious Issues, that church and clergy should not be exempted from professional standards of care).

commitment to psychiatric facilities.<sup>45</sup> Furthermore, as the dissenting justice in the first *Nally* appellate court opinion pointed out, the threat of litigation will inhibit even the most sincere and well-meaning of counselors.<sup>46</sup>

This chilling effect is evident in the form of advice now given to pastoral counselors. One author warned that because malpractice suits are likely to occur, clergy should adopt practices that will "insulate [them] from what could be a professionally hazardous experience."<sup>47</sup> The writer recommended that pastoral counselors procure malpractice insurance, consult attorneys regarding the consequences of all actions, insist upon contractual relationships, and require releases before counseling.<sup>48</sup> These practices can only detract from the trusting, caring atmosphere necessary for productive counseling. Indeed, they could limit the effectiveness and value of pastoral care to the point of its abandonment.

Alternatively, it has been suggested that "[t]he "imposition of liability, far from exerting a chilling effect upon the clergy-congregant relationship, would enhance it by giving the congregant a greater sense of security in the clergyman's competence and sincerity."<sup>49</sup> This line of reasoning is tenuous at best. An individual approaches a member of the clergy for guidance and counseling at a time of heightened emotions, anxiously searching for religiously inspired solutions to problems from a familiar and local pastor. Confronted with a desperate situation, the counselee is unlikely to devote much time or attention to "comparison shopping" by actively searching for the most competent or most sin-

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45. *Nally*, 47 Cal. 3d at 297, 763 P.2d at 959, 235 Cal. Rptr. at 109. *Contra id.* at 312, 763 P.2d at 969, 235 Cal. Rptr. at 118 (Kaufman, J., concurring) ("Such concerns are unfounded.").

46. *Nally I*, 157 Cal. App. 3d 940, — [depublished], 204 Cal. Rptr. 303, 321 (1984) (Hanson, J., dissenting). Justice Hanson wrote:

[Consider the] deleterious effect of opening a virtual Pandora's box of litigation by subjecting all the various religious faiths and their clergy . . . to wrongful death actions and expensive full blown trials simply because they were unsuccessful in their sincere efforts through spiritual counseling to help or dissuade emotionally disturbed members of their congregations who may be suicide prone from carrying out such a predisposition.

*Id.*; see also *Hauled Into Court: The New Trials of Ministry*, LEADERSHIP 127 (Winter 1985) (three pastors and lawyer, all of whom have been subject to litigation while in line of duty, "explore the fallout in terms of week-to-week ministry").

47. B. Bernstein, *A Potential Peril of Pastoral Care: Malpractice*, 19 J. RELIGION & HEALTH 48, 57 (Spring 1980).

48. *Id.*

49. Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V.L. REV. 47, 61-62 (1981).

cere religious counselor. Thus, there is little support for the claim that imposing a standard of care on clergy will enhance the clergy-congregant relationship by increasing congregant confidence in the clergy. Instead, imposition of such a standard, through its consequent increase in the clergy's fear of liability, would most likely have a chilling effect on pastoral care.

Possible chilling effects on spiritual counseling should be avoided because of the benefits provided by the clergy's presence in the mental health support system and its unparalleled standing to effect better mental health. A spiritual counselor has the opportunity to improve the mental health of a great number of people, to calm their fears, to cure their ills and to prevent future distress.<sup>50</sup> There are numerous other benefits provided by pastoral counselors. For example, the lack of social stigma attached to approaching clergy results in early intervention. In times of emotional distress, more people seek counseling from members of the clergy than from any other single source.<sup>51</sup> Other advantages are the clergy's personal knowledge of the counselee,<sup>52</sup> the opportunity for home visitation,<sup>53</sup> and the clergy's ability to dispel any possible fear of psychiatry.<sup>54</sup> "[T]he limitations of secular psychological solutions to problems of living" have also been noted, as has the increasing trend for people to look "to their church and their faith to find solutions that incorporate what they

50. See Comment, *Bad News*, *supra* note 9, at 218 (discussing importance of clergy's role in community mental health work).

51. J. VEROFF, R. KULKA & E. DOUVAN, *MENTAL HEALTH IN AMERICA: PATTERNS OF HELP-SEEKING FROM 1957 TO 1976*, at 134 (1981). Specifically, the authors reported the following findings regarding the sources of professional help for personal problems:

	<u>1957</u>	<u>1976</u>
Clergy	42%	39%
Physicians	29%	21%
Psychiatrists and Psychologists	17%	29%
Other	36%	40%

*Id.* (columns total more than 100% because some respondents mentioned more than one source). The researchers conclude that "[i]n spite of the clear and important shift in 1976 toward the consultation of mental health professionals for personal problems, one cannot fail to be impressed by the continuing critical role that the clergy play in assisting many Americans in dealing with personal problems." *Id.*; see also Comment, *Bad News*, *supra* note 9, at 219 (citing G. WHITLOCK, *PREVENTIVE PSYCHOLOGY AND THE CHURCH* 33 (1973)).

52. Comment, *Bad News*, *supra* note 9, at 219.

53. *Id.* at 220.

54. *Id.*

believe with their personal growth and problem solving.”<sup>55</sup> Both the unique mental health benefits provided by ministers and the public’s willingness to seek them indicate that clergy involvement in treating emotional disturbance should be supported rather than discouraged. Otherwise, those in need of counseling will suffer the greatest loss.

### B. *Furthering Private Assistance Efforts*

The California Supreme Court also found worthy the goal of furthering private assistance efforts. The court found evidence of this goal in the legislative acts which abolished the “Good Samaritan” rule<sup>56</sup> and barred the imposition of ordinary negligence liability on those who provide aid to others.<sup>57</sup> Holding clergy to a court-imposed standard of care would stifle, rather than encourage, individual assistance endeavors.

If a court attempts to establish liability for the breach of a new duty of care,<sup>58</sup> it can only do so when the existing judicial framework can competently pass judgment on the alleged wrongs and injuries. In the case of pastoral counseling, however, a court would find it difficult, if not impossible, to pass judgment on the work of spiritual counselors. This impossibility stems from the difficulty inherent in determining to whom the duty should apply, and because the duty is likely to interfere with the philosophy or teachings of a variety of religions in an unconstitutional manner.<sup>59</sup>

55. H. MALONY, *supra* note 44, at 93.

56. According to Professor Prosser, one who acts to aid another “is regarded as entering voluntarily into a relation of responsibility.” W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 186 (2d ed. 1955). Therefore, the actor is liable to the rescuee for acts of ordinary negligence because the standard is set by what a reasonable person would do under those circumstances. *Id.* at 186-87.

57. *Nally*, 47 Cal. 3d at 298, 763 P.2d at 960, 235 Cal. Rptr. at 109 (citing CAL. GOV’T CODE § 50086 (West 1983) (exempting from liability first aid volunteers summoned by authorities to help in search or rescue operations); CAL. HEALTH & SAFETY CODE §§ 1799.100, 1799.102 (West Supp. 1990) (exempting from liability nonprofessional persons giving cardiopulmonary resuscitation)).

58. In order for liability to be imposed, there must be a duty, a failure to conform to the standard of care, a causal connection between the conduct and resulting injury, and actual loss or damage. W. KEETON, D. DOBBS, R. KEATON & D. OWEN, *PROSSER AND KEETON ON TORTS* § 30, at 164-65 (5th ed. 1984).

59. *Nally*, 47 Cal. 3d at 299, 763 P.2d at 960, 235 Cal. Rptr. at 109. The court noted:

[E]ven assuming that workable standards of care could be established in the present case, an additional difficulty arises in attempting to identify with precision those to whom the duty should apply. Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impracti-

Establishing reasonable standards for the counseling clergy is wrought with significant, perhaps even insurmountable, problems. While legislatures and courts have defined the acceptable minimum standards in areas such as medicine and psychology, they are unable to set standards for pastoral counseling. This inability stems from the various religious denominations' lack of uniformity in their approaches to spiritual counseling.<sup>60</sup> Because of the diversity of religions, it is impossible to set a standard that could measure the widely divergent practices of all pastoral counselors.<sup>61</sup> Furthermore, since clergy counseling is distinct from licensed therapeutic care, it is inappropriate to analogize clergy malpractice to malpractice in the fields of medicine and psychology.<sup>62</sup>

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cal, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of a particular denomination or ecclesiastical teachings of the religious entity.

*Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971); Esbeck, *supra* note 3, at 82-84; Comment, *supra* note 3, at 963-64 & n.69).

60. See Comment, *Spiritual Counseling Conflicts*, *supra* note 9, at 444 & n.96.

The author recognized:

Analogies to other professional malpractice principles, however, may be of limited benefit in analyzing clergy malpractice due to the diversity of counseling methods employed by different religious sects. . . . [I]t would be unworkable to extend this principle of [judging a doctor in accordance with the tenets of the "school" which he or she professes to follow] by analogy to religious practices in order to set standards for spiritual counseling behavior. Courts are not competent to examine competing religious practices or beliefs to determine if they are "in line" with other beliefs or practices. . . . Therefore, such methods of setting standards, derived from secular malpractice law, are inappropriate in spiritual counseling cases.

*Id.* (citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976); *Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (per curiam) (Brennan, J., concurring); W. KEETON, D. DOBBS, R. KEATON & D. OWEN, *supra* note 58, § 32, at 187).

61. See Comment, *Made Out of Whole Cloth?*, *supra* note 9, at 520-21. The commentator appreciates that "the style and content of a pastor's advice may differ from another's as each is influenced by the theological concepts to which he adheres. . . . [Unlike medicine and psychiatry,] the diversity of religious belief systems would make it practically impossible to define a general standard with sufficient precision to measure conduct." *Id.* (footnotes omitted).

62. See Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPPERDINE L. REV. 137, 139 (1986). The author maintains:

While some degree of overlap and similarity may exist, the religious counselor remains distinct and unique from his secular counterpart, approaching therapy from an entirely different perspective. Therefore, a cause of action for clergy malpractice based on incompetent religious counseling cannot rely upon the elements traditionally required in psychiatric malpractice causes of action.

*Id.*

Although the *Nally* court did not mention them specifically, there are other problems associated with establishing a standard of care for use in clergy malpractice claims.<sup>63</sup> The first issue to resolve is a determination of what constitutes "spiritual counseling." Ordinarily, there is no fee or contract to indicate the beginning of the counselor-counselee relationship, thus it would be difficult for a court to determine precisely when the duty of care becomes operative.<sup>64</sup> Imposing a duty could conceivably lead to judicial scrutiny of audio and video cassettes, tracts, books, and radio and television broadcasts.<sup>65</sup>

In addition to the difficulty in determining the precise time when the duty arises, determining where and whether spiritual counseling has occurred is also problematic. There are a variety of settings and means of rendering spiritual guidance: formal confession, office visits, telephone calls, group meetings, sermons, and classroom teaching. These avenues are unlike the typical formal office visit to a psychiatrist or a psychologist.<sup>66</sup> The lack of a professional setting in which a pastoral counselor en-

63. See generally *Strock v. Pressnell*, 38 Ohio St. 3d 207, 211, 527 N.E.2d 1235, 1239 (1988) ("The reluctance of courts to embrace the tort of clergy malpractice may be attributed to the many, and often complex, questions, that arise under it.").

64. Esbeck, *supra* note 3, at 83. *But cf.*, Comment, *supra* note 62, at 150 ("[T]he problem does not center on the time or circumstances surrounding the counseling activity, but on the impression the clergy member has created in the mind of the counselee regarding their interaction.").

65. Esbeck, *supra* note 3, at 83.

66. See Dickson & Bloss, *A Minister and a Lawyer Look At: Clergy Malpractice*, CHURCH MANAGEMENT-THE CLERGY J., July 1989, at 8. The authors declare:

[Y]ou can't compare counseling by a psychologist or psychiatrist with counseling done by the average pastor. Clergy don't always have the advantage of dealing with a parishioner's needs during the best of times and places. For example, a church member stops by a pastor's table at a restaurant for a brief chat that turns into something more intense and personal. Not exactly a professional setting. The pastor may patiently listen and encourage the member to pray about his problem and schedule a private appointment with the minister. Instead, the member returns home and commits suicide. Should the family consider the pastor legally liable for their loved one's death?

A licensed counselor probably would have refused to conduct a session in a restaurant. But if a clergy person turned a member away, he would have been seen as cold and uncaring. Licensed counselors have technical professional training which ministers don't have, and talking to a minister, priest or rabbi about personal problems is not the same as a counseling session with a professional therapist.

*Id.* (statement of Dr. Dickson); see also H. MALONY, *supra* note 44, at 118 (pastoral functions differ from those of psychologist and ministerial role includes more unofficial and casual interaction than psychological one).

counters a counselee makes it arduous to discern just when a polite exchange becomes spiritual counseling.

Yet another difficulty with imposing a single standard of care arises from the variety of ecclesiastical officers within a church, religion or denomination. For example, training and experience vary widely among priests, rabbis, bishops, pastors, ministers, evangelists, deacons, and elders. In addition, potential counsees may also have divergent expectations of each officer. In light of these differences, it is hardly appropriate to impose a single standard of care on each church official.<sup>67</sup>

Due to the problems associated with identifying persons engaged in pastoral counseling, with determining when pastoral counseling occurs, with the diversity of practices among religions and with the diversity of persons within religions, it would be virtually impossible to standardize clerical counseling.<sup>68</sup>

## VI. CONSTITUTIONAL CONCERNS

Even if courts or legislatures could develop a general, objective standard for the counseling activities of all religious groups, denominational neutrality would not suffice to overcome establishment clause objections.<sup>69</sup> Additionally, such a standard would

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67. Esbeck, *supra* note 3, at 83-84. *But cf.* Comment, *supra* note 62, at 151 (“[T]he office of the religious professional should not be determinative as to the existence of any potential liability.”). One court has noted:

[A theory of clergy malpractice] is a theory of tort . . . which presupposes that every cleric owes the same duty of care, whatever the religious order which granted ordination, or the cleric serves, or the beliefs espoused. It is a theory of tort, moreover, which inevitably involves the court in a judgment of the competence, training, methods and content of the pastoral function in order to determine whether the cleric breached the duty “to act with that degree of skill and learning ordinarily used in the same or similar circumstances by members of that profession.”

Hester v. Barnett, 723 S.W.2d 544, 553 (Mo. Ct. App. 1987) (quoting MAI 11.06 (3d ed. 1981)).

68. See generally Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163, 170-72 (1981); Comment, *Clergy Malpractice: Should Pennsylvania Recognize a Cause of Action for Improper Counseling by a Clergyman?*, 92 DICK. L. REV. 223, 227-30 (1987).

One author espouses a contrary view, proposing a three pronged standard of care applicable to all members of the clergy to protect themselves from civil liability. Comment, *supra* note 62, at 157-60. Under this standard, a religious counselor must be able to identify a counselee’s problems, refer the counselee to others should it become necessary, and train associates to meet these minimal standards. *Id.* at 160.

69. As the Supreme Court said in disapproving a government sponsored nonsectarian prayer, “the fact that the prayer may be denominationally neutral



also violate the free exercise clause.<sup>70</sup>

In *Nally*, the California Supreme Court made only a passing reference to the possible unconstitutionality of imposing a duty of care on pastoral counselors.<sup>71</sup> With this reference, the court at least acknowledged the problems associated with a clergy malpractice action in light of the establishment and free exercise clauses of the first amendment.<sup>72</sup> Unfortunately, the court provided no guidance as to any possible resolution of these difficulties. The court's failure to confront directly the issue allows the

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... can[not] serve to free it from the limitations of the Establishment Clause." *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

70. For a discussion of the problems under the free exercise clause, see *infra* notes 114-45 and accompanying text.

71. *Nally*, 47 Cal. 3d at 299, 763 P.2d at 960, 253 Cal. Rptr. at 109. The concurrence by Justice Kaufman, while not providing a detailed analysis of the constitutional issues involved, does examine the issues in more detail than the majority. Justice Kaufman ultimately concludes that imposing a duty of care on the defendants would not unconstitutionally burden their first amendment right to the free exercise of religion. *Nally*, 47 Cal. 3d at 312-13, 763 P.2d at 969-70, 253 Cal. Rptr. at 118-19 (Kaufman, J., concurring) ("While the First Amendment bars the government from 'prohibiting the free exercise [of religion],' religiously motivated *conduct* 'remains subject to regulation for the protection of society.'") (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)). Justice Kaufman also cites: *United States v. Lee*, 455 U.S. 252, 261 (1982) (upholding federal law requiring Amish to participate in social security system in violation of their faith); *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1906) (upholding law requiring vaccination despite parental religious objections); *Molko v. Holy Spirit Ass'n*, 46 Cal. 3d 1092, 1112-17, 762 P.2d 46, 56-59, 252 Cal. Rptr. 122, 132-35 (1988), *cert. denied*, 109 S. Ct. 2110 (1989) (former members of religious organization may sue organization on various causes of action arising out of its allegedly deceptive recruitment practices); *O'Neil v. Schuckardt*, 112 Idaho 472, 477-79, 733 P.2d 693, 699-700 (1986) (church may be liable for invasion of privacy due to marital counseling); *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 334-35, 341 A.2d 105, 107-08 (1975) (first amendment not complete defense to actions by church); *Carrieri v. Bush*, 69 Wash. 2d 536, 544-45, 419 P.2d 132, 137 (1966). Interestingly, the concurrence made no mention of the tests established by the Supreme Court to determine the existence of state violations of the establishment or free exercise clauses. For a discussion of these issues, see *infra* notes 83-146 and accompanying text. See generally Reidinger, *Puncturing the Faith Defense*, A.B.A. J., Feb. 1989, at 89 (discussing *Moko v. Holy Spirit Ass'n*, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122, *cert. denied*, 109 S. Ct. 2110 (1989); *Walker v. Superior Court*, 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied*, 109 S. Ct. 3186 (1989) (Christian Scientist parent had no right to withhold medical treatment from daughter suffering from meningitis, who eventually died); *Davis v. United States*, 861 F.2d 558 (9th Cir. 1988), *aff'd*, 110 S. Ct. 2014 (1990) (parents who fund their children's religious missions cannot deduct outlays as charitable contributions on their tax returns)).

72. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. CONST. amend. I. One commentator notes: "On its face, the first amendment prohibits state interference with the practice of religious faith, and prohibits the establishment of a state religion." Comment, *Bad News*, *supra* note 9, at 223 (citing *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982)).

debate regarding the constitutionality of this tort to continue.<sup>73</sup>

Reproduced at the beginning of this article is a quote from Justice Douglas's opinion in *United States v. Ballard*.<sup>74</sup> Although *Ballard* concerned an action for mail fraud, the words of Justice Douglas apply equally to cases involving clergy malpractice. Under *Ballard*, the only issue presented by cases involving religious beliefs is whether the beliefs are held honestly and in good faith.<sup>75</sup> In Justice Douglas's view, the first amendment safeguards the dissemination of beliefs no matter how "incomprehensible," "incredible," or "preposterous" they may be.<sup>76</sup> At times, the Supreme Court subscribes to Justice Douglas's wisdom.

Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. . . . The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.<sup>77</sup>

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73. As another state court noted when commenting on the first *Nally* opinion rendered by the court of appeal:

[T]he question *Nally* leaves unanswered is whether pastoral counseling is so ineluctably a function of the particular religion that no one definition of its malpractice can evolve into a standard of professional performance, and is otherwise so purely sacerdotal a function, that it is both unfeasible as a theory of tort and not constitutionally permissible.

*Hester v. Barnett*, 723 S.W.2d 544, 553 (Mo. Ct. App. 1987). The same state of affairs exists now even after the California Supreme Court decision.

74. 322 U.S. 78 (1944). The quote appears at *supra* note \*\*\* and accompanying text. The Ballards had represented to the public that they possessed miraculous powers which enabled them to heal persons of incurable diseases, and that they had used these powers to cure hundreds of persons. *Id.* at 79-80. At trial, the district court had instructed the jury that the key question was whether the Ballards honestly and in good faith believed their claims, not whether their representations were actually true. *Id.* at 81-82. The jury convicted the Ballards of using and conspiring to use the mails to defraud. *Id.* at 79. The Ninth Circuit reversed the conviction by holding that limiting the issue to good faith belief was error. *Id.* at 83. The Supreme Court disagreed with the Ninth Circuit and affirmed the conviction. *Id.* at 88. The Court held that all questions concerning the truth or falsity of the Ballards' religious beliefs were properly withheld from the jury. *Id.* at 88. The only permissible inquiry that could be presented to the jury was whether the Ballards sincerely believed their claims to be true. *See id.* at 87-88.

75. *Id.* at 85-86.

76. *Id.* at 86-87.

77. *Thomas v. Review Bd. of the Ind. Employment Secur. Div.*, 450 U.S.

As a practical matter, however, the Court has not adhered to Justice Douglas's reasoning when deciding most freedom of religion cases. Instead, it has established tests to determine whether state action has violated the establishment or free exercise clauses.<sup>78</sup>

It appears well settled that state judicial action is properly regarded as state action within the meaning of the fourteenth amendment.<sup>79</sup> Therefore, under the fourteenth amendment judicial acknowledgment of a state rule of law that impinges upon the religious freedoms protected under the first amendment would be subject to constitutional scrutiny.<sup>80</sup> There is disagreement, however, on whether Supreme Court rulings on the free exercise clause or the establishment clause govern the constitutional analysis of clergy malpractice.<sup>81</sup> If the establishment clause is used to evaluate spiritual counseling, then the applicable judicial standard is that enunciated in *Lemon v. Kurtzman*.<sup>82</sup> If clergy malpractice is analyzed under the free exercise clause, then the reasoning to be applied is found in *School District of Abington v. Schempp*<sup>83</sup> and *Sherbert v. Verner*.<sup>84</sup>

#### A. *The Establishment Clause*

In *Lemon*, the Court reviewed two statutes that provided state aid to church-related schools.<sup>85</sup> One statute, enacted by Rhode Island, established a salary supplement to be paid to nonpublic school teachers if the school's average per pupil expenditure on secular education was below that of the public schools.<sup>86</sup> In order for the teachers to receive that salary supplement, the statute required that they agree not to teach any course in religion.<sup>87</sup>

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707, 713-14 (1981). Of course religious belief is not an absolute right. "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as to not be entitled to protection under the Free Exercise Clause . . . ." *Id.* at 715.

78. For a discussion of the tests, see *infra* notes 82-145 and accompanying text.

79. *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964).

80. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (establishment clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise clause).

81. See Note, *supra* note 25, at 1324 (Supreme Court has yet to address case involving issue of free exercise defense).

82. 403 U.S. 602 (1971), *reh'g denied*, 404 U.S. 876 (1973).

83. 374 U.S. 203 (1963).

84. 374 U.S. 398 (1963). For a general discussion of the challenge which clergy malpractice claims present to the religion clauses, see Comment, *supra* note 3, at 958-70.

85. *Lemon*, 403 U.S. at 606-07.

86. *Id.* at 607.

87. *Id.* at 608.

Under the statute enacted by Pennsylvania, the state could reimburse nonpublic schools for the money expended on teachers' salaries, textbooks and instructional materials, provided that only secular courses were taught by these teachers and that the educational materials were approved by the state Superintendent of Public Instruction.<sup>88</sup> The Court declared both statutes unconstitutional because of excessive entanglement between government and religion.<sup>89</sup>

The Court determined in *Lemon* that state action must satisfy three tests in order to survive scrutiny under the establishment clause. First, the state action must have a secular purpose; second, it must not primarily advance nor inhibit religion; and third, it must not lead to excessive government entanglement in religion.<sup>90</sup> The difficulty in meeting all three tests compels the conclusion that "[t]he establishment clause . . . makes the civil courts' enforcement of a standard of pastoral conduct improper and thus provides a constitutional defense to clergy malpractice actions."<sup>91</sup>

This conclusion is easily confirmed. At first glance, the purpose of imposing a standard of care for the clergy in their pastoral counseling ministry may seem secular. Certainly the state has a legitimate interest in establishing codes of conduct for the prevention of injury. By definition, however, "[p]astoral counseling involves the application of religious insight to day-to-day problems, such as difficulties in marriage, parenthood, employment, or other relationships, to produce new religious understanding and, thereby, change in the counselee."<sup>92</sup> Therefore, the establishment of a judicial standard of pastoral care necessarily would be an attempt to impose a rule on how to apply spiritual values and beliefs to temporal life. In light of this interference with religious values and beliefs, the argument that this state action is solely secular is unconvincing.<sup>93</sup>

The second prong of the *Lemon* test, which forbids state action from either advancing or inhibiting religion, is not met by a clergy malpractice standard. Such a standard would not be relig-

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88. *Id.* at 609-10.

89. *Id.* at 613-14 ("[T]he cumulative impact of the entire relationship arising under the statutes in each state involves excessive entanglement between government and religion.").

90. *Id.* at 612-13.

91. Comment, *Made Out of Whole Cloth?*, *supra* note 9, at 533; see also Comment, *supra* note 68, at 236-37.

92. Comment, *Made Out of Whole Cloth?*, *supra* note 9, at 515.

93. See *id.* at 530-31 (citing *United States v. Ballard*, 322 U.S. 78, 94-95 (1944) (Jackson, J., dissenting)).

iously neutral because it would detract from a denomination's ability to train, educate, and supervise members of its clergy. Furthermore, depending on the particular pastoral practices involved, the standard might foster a nonreligious approach to counseling, which would inhibit religion. It might even encourage a particular type of spiritual orientation to therapy, one that would favor one religion and discriminate against others.<sup>94</sup> For these reasons, state action establishing a standard of care for pastoral counselors cannot be considered religiously neutral.

Interestingly, in his concurrence in *Nally*, Justice Kaufman suggested:

The intrusion in this case (i.e., the duty to advise a suicidal counselee to seek medical care) is religiously *neutral*. Defendants are not exposed to liability for refusing to counsel contrary to their religious beliefs or for affirmatively counseling in conformity with their beliefs. Thus the burden on religion is relatively minimal.<sup>95</sup>

While this statement may be true in light of the particular beliefs adhered to by *Nally* and the Grace Community Church, it is not true that the burden on all religions would be minimal. As Justice Kaufman pointed out:

[I]t should be noted that [the] *defendants here* do not claim that *their* religious principles prohibit resort to psychiatric counseling or the use of antidepressant drugs, nor do they claim that *their* religious beliefs prohibit a pastoral counselor from advising a counselee to seek psychiatric care. On the contrary, the record shows that defendants not only acquiesced in, but on occasion recommended such treatment.<sup>96</sup>

Such statements cannot refer to all pastoral counselors, especially to those whose beliefs forbid medical treatment. Consequently, imposing a duty on all pastoral counselors to refer a potentially suicidal counselee to professional therapeutic care cannot be viewed as religiously neutral.

A cause of action against clergy for malpractice would also constitute excessive intrusion into the affairs of religion and,

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94. *See id.* at 531 (citing *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 115-16 (1952)).

95. *Nally*, 47 Cal. 3d at 313, 763 P.2d at 970, 253 Cal. Rptr. at 119 (Kaufman, J., concurring).

96. *Id.* at 312, 763 P.2d at 969, 253 Cal. Rptr. at 118 (emphasis added).

therefore, violate the third prong of the *Lemon* test. Judicial regulation of the advice that a pastor may lawfully dispense surpasses the bounds of reasonable involvement. Allowing the courts to dictate the limits of what a minister may impart to believers is tantamount to giving the courts permission to decide which churches will survive and which will not. Religions that advise their adherents in a manner that is consistent with their beliefs, but repugnant to the courts, would find themselves on the losing side of eventual lawsuits. Other denominations, judged by the courts to be orthodox dispensers of suitable pastoral advice, would be protected by judicial approbation. Such control of religion by government far surpasses any tolerable limit.

Analogies drawn from cases concerning similar religious practices such as prayer and preaching further support this conclusion.<sup>97</sup> Addressing the regulation of preaching in *Fowler v. Rhode Island*,<sup>98</sup> the Court stated that "under our constitutional scheme, [courts are not competent] to approve, disapprove, classify, regulate or in any manner control sermons delivered at religious meetings."<sup>99</sup> On the regulation of prayer, the Court in *Engel v. Vitale*<sup>100</sup> found it desirable to "leave . . . religious function[s] to the people themselves and to those the people choose to look to for religious guidance."<sup>101</sup> Because in each case the Court rejected suggestions of judicial competence to control such activities, "*Engel*, like *Fowler*, raises the inference that civil courts may not develop or apply a standard of conduct to judge a cleric's counseling activities."<sup>102</sup>

Some argue that analyzing standards of care for pastoral counseling under the establishment clause is inappropriate.<sup>103</sup> This argument relies on Professor Tribe's suggestion that, for purposes of the establishment clause, one must distinguish "all that is 'arguably non-religious' from all that is clearly religious; anything 'arguably non-religious' should not be considered religious in applying the establishment clause."<sup>104</sup> Therefore, "[i]nasmuch

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97. Comment, *Made Out of Whole Cloth?*, *supra* note 9, at 532.

98. 345 U.S. 67 (1952).

99. *Id.* at 70.

100. 370 U.S. 421 (1962).

101. *Id.* at 435 (school board could not prescribe nonsectarian form of prayer to be used voluntarily in public schools).

102. Comment, *Made Out of Whole Cloth?*, *supra* note 9, at 533.

103. *Id.*

104. *Id.* at 533-34 (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 828 (1978) (emphasis in original)).

as some have argued or assumed that pastoral counseling is simply a form of psychotherapy, a secular activity, judicial enforcement of a standard of care applicable thereto might be considered 'arguably non-religious' and, therefore, not contrary to the establishment clause."<sup>105</sup> While this conclusion follows logically from the argument's premise, the premise is fundamentally flawed.

Granted, there are similarities between the services provided by ministers and by psychotherapists. Generally, both professionals engage in a therapeutic relationship with a client, individually or in a group. The two professions also share similar goals. Both center on family, marriage or sex counseling with the goal of enabling a person to resolve difficult and painful problems.<sup>106</sup> Yet from these similarities it does not follow that pastoral counseling is "simply a form of psychotherapy, a secular activity." Rather, it is "a unique helping profession because of the amalgam of religion and mental health."<sup>107</sup> Despite continuing objections to the contrary,<sup>108</sup> pastoral counseling is a unified whole that cannot be divided into discrete components. In this case, the whole is greater than the sum of its parts.

By its very name and definition, pastoral counseling is a synthesis of psychotherapy *and* religion.<sup>109</sup> The word "pastoral" relates to "spiritual care or guidance esp[ecially] as carried on through visiting and counseling."<sup>110</sup> It is hard to imagine, then, *pastoral* counseling as a secular activity, not overtly or specifically religious.<sup>111</sup> Moreover, psychotherapy has been defined as "a situation where two people interact and try to come to an understanding of one another, with the specific goal of accomplishing something beneficial for the complaining person."<sup>112</sup> This defini-

105. *Id.* at 534 (citing, as advocates of position that religious counseling is secular activity, Augspurger, *Legal Concerns of the Pastoral Counselor*, 29 *PASTORAL PSYCHOLOGY* 109 (Winter 1980), and Bernstein, *supra* note 47).

106. Bernstein, *supra* note 47, at 49.

107. *Id.* at 57.

108. See Bergman, *supra* note 49, at 59 ("With the secularization of the counseling function, it can conceptually be separable from the clergyman's ecclesiastic or purely religious function, and the imposition of a duty of care and competence could be considered not violative of first amendment strictures against governmental interference with the free exercise of religion.").

109. For a definition of pastoral counseling that synthesizes psychotherapy and religion, see *supra* note 8.

110. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1653 (1986).

111. *But cf.* Bergman, *supra* note 49, at 57-59 (clergy counseling function is separable from purely religious function).

112. H. BRUCH, *LEARNING PSYCHOTHERAPY* ix (1974).

tion lacks any reference to religion, faith or theology, the essential elements of *pastoral counseling*.<sup>113</sup>

Consequently, the imposition of a standard of care upon religious counselors would violate the establishment clause. Such state action must fail under *Lemon* because it would have a non-secular purpose, it would inhibit religion (and possibly advance some religions to the detriment of others), and it would lead to excessive government interference with religion. Therefore, if the Court's rulings on the establishment clause govern the analysis of clergy malpractice claims, religious counselors will have the violation of that clause as a defense.

### B. *The Free Exercise Clause*

Application of the *Lemon* test does not end the analysis of the constitutional dimension of a clergy malpractice standard. The standard must also be considered under the free exercise clause. The Court's decisions in *Schempp* and *Sherbert* guide analysis under the free exercise clause.

In *Schempp*, a Pennsylvania statute required verses to be read from the Bible without comment in the public schools at the beginning of every school day.<sup>114</sup> Upon the written request of a parent or guardian, a child could be excused from this exercise.<sup>115</sup> The Court declared the law to be a violation of the first amendment.<sup>116</sup> In *Sherbert*, an employee was discharged because she refused to work on Saturday, the Sabbath for her denomination.<sup>117</sup> After the firing, the plaintiff was unable to procure other employment, also because she would not work on Saturday.<sup>118</sup> An application to receive unemployment compensation was denied on the ground that the plaintiff had failed to accept available suitable

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113. See Esbeck, *supra* note 3, at 83. The author notes:

Counsel for the Nallys sought to overcome this definitional quandary by borrowing the professional standards of psychological and psychiatric counseling, and "bootlegging" them into the world of clergy and church. This entails having to untangle guidance directed at "spiritual health" from that addressing "mental health," and then applying the standards of professions only to the latter. Both in theory and practice, however, the "cure of minds" and the "healing of souls" does not segment so neatly.

*Id.* (citing Ericsson, *supra* note 68, at 166).

114. *Abington School Dist. v. Schempp*, 374 U.S. 203, 205 (1963).

115. *Id.*

116. *Id.* at 223.

117. *Sherbert v. Verner*, 374 U.S. 398, 399 (1963).

118. *Id.*



work.<sup>119</sup> The Court found that the denial of benefits unconstitutionally infringed upon the plaintiff's free exercise right, and that the state had no compelling interest which justified the infringement.<sup>120</sup>

*Schempp* and *Sherbert* demand the application a two-pronged balancing test.<sup>121</sup> First, a court must determine whether the governmental action has a coercive effect upon an individual, operating against him in the practice of his religion.<sup>122</sup> If the effect is coercive, a court must then determine whether the state interference is justified because the regulated conduct presents a threat to public safety, peace and order,<sup>123</sup> and therefore outweighs the degree of impairment of the individual's free exercise rights. Even if the state interest appears great enough to justify some burden on religious activity, however, a court will invalidate the regulation unless it burdens religious freedom no more than necessary to promote the overriding secular interest.<sup>124</sup>

The first element of the free exercise test requires an evaluation of whether imposition of a standard of care constitutes coercion. When a court compels an individual to conform to a societal standard, it imposes a restraint upon the individual. If the person fails to abide by the standard, she can be found responsible for any resulting injury. The prospect of this eventual liability forces adherence to the standard. Consequently, it is proper to deem coercive judicial application of a standard of pastoral care.

Analogy to the Supreme Court's decision in *McDaniel v. Paty*,<sup>125</sup> in which the Court struck down a governmental attempt to regulate ministerial activity, provides another persuasive argument that judicial application of a standard of care to pastoral counseling would be coercive.<sup>126</sup> In *McDaniel*, the Court overturned the disqualification of a Baptist minister from serving as a delegate to a Tennessee constitutional convention under a statute barring clerics. The Court stated, "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or

119. *Id.* at 399-400.

120. *Id.* at 408-09.

121. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1072-73 (3d ed. 1986).

122. *Schempp*, 374 U.S. at 223.

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

124. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 121, at 1079.

125. 435 U.S. 618 (1978).

126. See Comment, *Made Out of Whole Cloth?*, *supra* note 9, at 536-38.

rewarding religious beliefs as such."<sup>127</sup>

The second prong of the test to determine whether a violation of the free exercise clause has occurred is more troublesome. Once a court has determined that the effect of governmental action is coercive, it must then determine if the action is justified because the regulated conduct threatens public welfare.<sup>128</sup> A state interest in protecting the public may justify allowing clergy malpractice claims to proceed. Although there is little evidence to suggest that injuries due to improper pastoral counseling have reached an alarming number,<sup>129</sup> the state does indeed have an interest in protecting counselees from any such injury.<sup>130</sup> Furthermore, it is conceivable that in some circumstances clerical counseling might endanger the public sufficiently to justify state regulation.<sup>131</sup> The task would then fall to the courts to determine whether the state interest in protecting its citizens outweighs the cleric's right to free exercise of religion.<sup>132</sup>

But a court would engage in this weighing only if the negligent spiritual counseling threatened the public. Despite asser-

127. *McDaniel*, 435 U.S. at 626.

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

129. *But see* Siegel, *Laws That Help When Therapists Do Harm*, STUDENT LAW., Dec. 1988, at 33 (abuse by mental health counselors increasing to such extent that some attorneys specialize in problem).

130. *See Nally*, 47 Cal. 3d at 313, 763 P.2d at 970, 253 Cal. Rptr. at 119 (Kaufman, J., concurring). In Justice Kaufman's view, [t]he governmental interest . . . is compelling; society's interest in preserving the life of a would-be suicide is as profound as its interest in preserving life generally. To this end, society surely may require a pastoral counselor who invites and undertakes a counseling relationship with an individual in whom he recognizes suicidal tendencies, to advise that individual to seek competent medical care.

*Id.* (Kaufman, J., concurring). For an analysis of the justice's reasoning, see *supra* notes 95-96 and accompanying text.

131. *See, e.g., Nally I*, 157 Cal. App. 3d at — [depublished], 204 Cal. Rptr. at 307-09.

132. *See* Comment, *Spiritual Counseling Conflicts*, *supra* note 9, at 429; Comment, *supra* note 3, at 964-67; *see also* Bergman, *supra* note 49, at 56 ("[F]reedom of religion cannot be used to subvert the state's legitimate police power. Nor can freedom of religion be used to escape liability to innocent third parties or to the public. This would permit religious functionaries to commit the most egregious acts with impunity.").

One commentator argues that the church expulsion cases suggest that regulation of pastoral counseling may be permitted due to concerns for general welfare. *See* Comment, *Made Out of Whole Cloth?*, *supra* note 9, at 538-41 (citing *Baugh v. Thomas*, 56 N.J. 203, 265 A.2d 675 (1970); *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975)). At the same time, the commentator submits that cases concerned with giving religious advice indicate that free exercise clause is a defense to any infringement of religious counsel. *Id.* (citing *Radecki v. Schuckardt*, 50 Ohio App. 2d 92, 361 N.E.2d 543 (1976); *Bradesku v. Antion*, 21 Ohio App. 2d 67, 255 N.E.2d 265 (1969)).

tions that "[t]he state's interest in protecting the health of its citizens by prohibiting suicide is nevertheless compelling and would override the coercive effect of imposing liability,"<sup>133</sup> the public welfare is not so endangered by improper pastoral counseling as to require regulation.<sup>134</sup> First, state legislatures have acted specifically to exempt members of the clergy from statutes that regulate other counselors. "[S]pecifically enacted exemptions not only imply a legislative recognition of the value of unrestricted pastoral counseling but also a determination such counseling is not threatening to public welfare."<sup>135</sup>

Some commentators reject this argument from legislative exemption. They point to amendments to the California Business and Professions Code which impose strict educational standards and require members of the clergy to obtain two years of experience under the supervision of licensed mental health professionals such as marriage, family or child counselors, psychiatrists or psychologists.<sup>136</sup> They suggest that these amendments indicate the legislature's willingness to regulate the clergy, and attribute its reluctance to regulate pastoral counseling to the state's hesitancy to interfere with the clergy's religious functioning and ecclesiastical duties. They conclude that the lack of state interference with pastoral counseling carries no implication con-

133. Note, *Religious Counseling - Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide*, 1985 ARIZ. ST. L.J. 213, 231-32.

134. *Contra* Comment, *Bad News*, *supra* note 9, at 225-26.

135. Comment, *Made Out of Whole Cloth?*, *supra* note 9, at 543. The commentator asserts, "In light of these implications and the legislatures' clear intent that counseling by ministers not be subject to state regulation, actions based on the clergy malpractice theory, which would require the civil courts to perform such regulation, would appear to contravene public policy." *Id.* There is support for this view in *Nally*, where the court noted:

[In California] the Legislature has exempted the clergy from the licensing requirements applicable to marriage, family, child and domestic counselors (Bus. & Prof. Code, § 2908 et seq.). . . . In so doing, the Legislature has recognized that access to the clergy for counseling should be free from state imposed counseling standards, and that "the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations."

*Nally*, 47 Cal. 3d at 298, 763 P.2d at 959-60, 253 Cal. Rptr. at 119 (quoting Ericsson, *supra* note 66, at 176).

New York, New Jersey and Rhode Island also exempt clergy and religious organizations providing mental health care from licensing requirements. N.J. STAT. ANN. §§ 45:8B-8, 45:14B-8, 45:9-21(f) (West 1978); N.Y. MENTAL HYG. LAW § 31.02 (McKinney 1983 & Supp. 1990); R.I. GEN. LAWS. § 5-37-15 (1987).

136. Comment, *Bad News*, *supra* note 9, at 226-27 (citing CAL. BUS. & PROF. CODE § 4980.40 (West Supp. 1985)); Bergman, *supra* note 49, at 52-53 (citing CAL. BUS. & PROF. CODE § 17804 (West Supp. 1981) (later codified as CAL. BUS. & PROF. CODE § 4980.40 (West Supp. 1985))).

cerning whether the practice itself threatens public safety.<sup>137</sup> This argument is unpersuasive. It overlooks the fact that, by definition, it is impossible to separate the clergy's *pastoral* counseling from the context of its ministerial tasks and church obligations.<sup>138</sup>

The argument also fails to account for legislative exemptions of the clergy in addition to those that distinguish the clergy from other types of counselors. Prominent among these exemptions is the clergy-penitent privilege, recognized in nearly every jurisdiction.<sup>139</sup> Although individual statutes have varying provisions, the general rule is that the protected communication must be made to the cleric in his professional capacity to provide religious or spiritual advice relating to one's sinfulness or regret for misdeeds.<sup>140</sup> If any of these elements are not present, courts have held the privilege is not available.<sup>141</sup>

137. Comment, *Bad News*, *supra* note 9, at 226-27; Bergman, *supra* note 49, at 52-53.

138. For a discussion of the essential connection between pastoral counseling and performance of religious functions, see *supra* notes 109-13 and accompanying text.

139. ALA. CODE § 12-21-166 (1986); ARIZ. REV. STAT. ANN. §§ 12-2233, 13-4062 (1989); ARK. R. EVID. 505; CAL. EVID. CODE §§ 1030-34 (West 1966); COLO. REV. STAT. § 13-90-107 (1989); CONN. GEN. STAT. ANN. § 52-146b (West Supp. 1990); D.C. CODE ANN. § 14-309 (1981); FLA. STAT. ANN. § 90.505 (West 1979); GA. CODE ANN. § 24-9-22 (1982 & Supp. 1990); IDAHO CODE § 9-203 (Supp. 1990); IND. CODE ANN. § 34-1-14-5 (Burns 1986 & Supp. 1990); IOWA CODE ANN. § 622.10 (West Supp. 1990); KAN. STAT. ANN. § 60-429 (1983); KY. REV. STAT. § 421.210 (1972); LA. REV. STAT. ANN. § 15.477 (West 1981); ME. R. EVID. 505; MD. CTS. & JUD. PROC. CODE ANN. § 9-111 (1988); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1987); MICH. COMP. LAWS § 600.2156 (1986); MINN. STAT. ANN. § 595.02 (West Supp. 1988); MISS. CODE ANN. § 13-1-22 (Supp. 1989); MO. ANN. STAT. § 491.060 (Vernon 1987); MONT. CODE ANN. § 26-1-804 (1989); NEB. REV. STAT. § 27-506 (1989); NEV. REV. STAT. § 49.255 (1987); N.H. REV. STAT. ANN. § 516.35 (Supp. 1989); N.J. STAT. ANN. § 2A:84A-23 (West Supp. 1990); N.M. R. EVID. 11-506; N.Y. CIV. PRAC. LAW § 4505 (McKinney 1978); N.C. GEN. STAT. § 8-53.2 (1986); N.D. R. EVID. 505; OHIO REV. CODE ANN. § 2317.02 (1987); OKLA. STAT. ANN. tit. 12, § 2505 (West 1980); OR. REV. STAT. § 44.260 (1989); R.I. GEN. LAWS § 9-17-23 (1985); S.C. CODE ANN. § 19-11-90 (Law Co-op. 1985); S.D. CODIFIED LAWS ANN. § 19-13-16 (1987); TENN. CODE ANN. § 24-1-206 (1980); UTAH CODE ANN. § 78-24-8 (1977); VT. STAT. ANN. tit. 12, § 1607 (1973); VA. CODE § 8.01-400 (1984); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1990); WIS. STAT. ANN. § 905.06 (West 1975); WYO. STAT. § 1-12-101 (1988). For general discussions of the clergy-penitent privilege, see Comment, *supra* note 69, at 240-42; Comment, *Bad News*, *supra* note 9, at 229-35.

140. Nearly half of the statutes have substantially the same wording: "A priest or clergyman shall not, without the consent of a person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs." Comment, *Bad News*, *supra* note 9, at 230.

141. See Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 122 (1983); see, e.g., *Burger v. State*, 238 Ga. 171, 231 S.E.2d 769 (1977) (statement made to person as friend who was also member of

The clergy-penitent privilege is evidence of a legislative determination that the public welfare is not sufficiently threatened by possible abuses within the cleric-parishioner relationship to warrant state regulation.<sup>142</sup> By not compelling a pastor to divulge information about a member of his congregation, even when criminal behavior may be at issue, society has in effect recognized the bond between the two to be inviolable and sacred. The clergy-penitent privilege encourages a “‘sanctuary for the disclosure of emotional distresses’”<sup>143</sup> and “‘[i]f the privilege were taken away and the confidential nature of penitential communication violated and disregarded, the work of the church would be greatly hampered and a purely secular society would be well on its way.’”<sup>144</sup>

Legislatures' distinctions between the clergy and other counselors and their recognition of the clergy-penitent privilege provide good policy arguments against recognition of clergy malpractice claims. Moreover, they bolster the argument that because the legislature has deemed protection in these areas unnecessary, the free exercise clause is a defense to claims of spiritual misguidance.<sup>145</sup> The imposition of a standard of care upon pastoral counselors would have a coercive effect on the counselors.

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clergy not privileged); *In re Koelher's Estate*, 162 Kan. 395, 176 P.2d 544 (1947) (statement made to priest in his capacity as witness to will not privileged); *State v. Black*, 291 N.W.2d 208 (Minn. 1980) (assistance requested of jail chaplain must be religious aid to be privileged); *In re Swenson*, 183 Minn. 602, 237 N.W. 589 (1931) (privilege available even to churches that do not have formal secrecy requirements); *Keenan v. Gigante*, 47 N.Y.2d 160, 166, 390 N.E.2d 1151, 1154, 417 N.Y.S.2d 226, 229 (“only confidential communications made to a clergyman in his spiritual capacity” are protected), *cert. denied sub nom. Gigante v. Lankler*, 444 U.S. 887 (1979).

142. “Such state statute provisions are indicative of the public attitude toward the necessity for the privilege.” Comment, *Bad News*, *supra* note 9, at 229 (citing Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 59-60 (1963) and the preamble to Mississippi's privilege statute: “Whereas, the emotional, mental and spiritual health of many of our citizens depends upon the free and confidential access to their clergymen or spiritual advisors . . .” 1976 Miss. LAWS 711 (codified at MISS. CODE ANN. § 13-1-22 (Supp. 1982))).

143. Ericsson, *supra* note 68, at 173 (quoting *In re Lifschutz*, 2 Cal. 3d 415, 428, 467 P.2d 557, 565, 85 Cal. Rptr. 829, 837 (1970)).

144. Comment, *Bad News*, *supra* note 9, at 229-30 (quoting Ponder, *Will Your Pastor Tell?*, LIBERTY, May-June 1978, at 2, 3).

145. These exempted provisions are interpreted more pointedly by Samuel Ericsson, counsel to the Center for Law and Religious Freedom of the Christian Legal Society, who asserts that they are the legislature's recognition that “the secular state is *not equipped* to ascertain the competence of counseling when performed by those affiliated with religious organizations.” Ericsson, *supra* note 68, at 176 (emphasis added). *Contra* Comment, *Bad News*, *supra* note 9, at 227 (“[T]he state's reluctance to regulate the counseling activities of the clergy relates to their duties as religious functionaries. Therefore, the exemption is not

Although there is some state interest in protecting counselees from injury, pastoral counseling does not present a sufficient threat to the public welfare to justify the burden on religion. Therefore, if the free exercise clause governs the constitutional analysis of clergy malpractice claims, religious counselors would have the defense that the cause of action unconstitutionally infringes upon their free exercise rights.

## VII. INSURANCE

The court in *Nally* acknowledged the availability of a new type of insurance to religious organizations and members of the clergy to protect them against potential liability for injuries caused by spiritual counseling.<sup>146</sup> The court gave little weight to the existence of such insurance because its value is not only unknown but also difficult to determine, since so few cases have been filed against the clergy.<sup>147</sup> Furthermore, the *Nally* court failed to recognize the implication that spiritual counseling malpractice insurance would have for the clergy-penitent privilege.

Suppose an insured member of the clergy faces a malpractice action. To avoid the risk of releasing the insurer from its duty to defend in the action, the clergy member would have to cooperate with the insurer. Cooperation could entail disclosure of confidential communications, thereby impairing the protection of the

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meant to imply the state's determination as to the safety of pastoral counseling in and of itself.") (footnotes omitted).

146. 47 Cal. 3d at 278, 763 P.2d at 960, 253 Cal. Rptr. at 97 (citing Note, *supra* note 25, at 1300 & n.12); see also Marty, *Ministerial Malpractice*, 96 CHRISTIAN CENTURY 511 (1979) (reporting first offering of clergy malpractice insurance coverage, author playfully suggests, "No insurance policy could fully protect the cleric who would be so radical as to offer the counsel, 'Love your enemies. . . .' Those who followed it would certainly be clobbered, and they would clobber their advisers, and where would love be then?"); Quade, *Holy Terror: Clergy Buying Insurance*, 69 A.B.A. J. 1206 (1983). See generally H. MALONY, *supra* note 44, at 123-35; Breecher, *Ministerial Malpractice: Is It a Reasonable Fear?* TRIAL, July 1980, at 11 (to boost sales insurance companies fabricated fictional accounts of clergy malpractice).

147. See *Nally*, 47 Cal. 3d at 299, 763 P.2d at 960, 253 Cal. Rptr. at 109. On the subject of clergy malpractice insurance, a New York court has noted: "[The] advertisement conveys the frightening idea that some members of the clergy have stopped counseling their parishioners because they are afraid of lawsuits. Petitioners contend, and defendant does not dispute that, in fact, no member of the clergy has ever been held liable for clerical malpractice." New York Pub. Interest Res. Group, Inc. v. Insurance Information Inst., 140 Misc. 2d 920, 927, 531 N.Y.S.2d 1002, 1007 (Sup. Ct. 1988) (action for false advertisement), *aff'd* — A.D.2d —, 554 N.Y.S.2d 590 (1990).

clergy-penitent privilege.<sup>148</sup> So, while it is usually presumed that the availability of insurance would foster recovery for allegedly tortious conduct, in the case of clergy malpractice, the existence of insurance might prove to be more problematic than remedial.

One commentator has suggested that this argument is specious. By waging a lawsuit against the clergy member, the penitent would have impliedly waived the privilege; consequently, the penitent could not invoke the privilege to deny the clergy member a defense in the action.<sup>149</sup> But this reasoning would not apply universally. In sacramental situations, such as those in the Roman Catholic tradition, the privilege is not waivable. The seal of the confessional is absolutely sacred and inviolable regardless of any action on the part of the penitent including actual or threatened litigation.<sup>150</sup>

### VIII. THE FUTURE

Interestingly, the California Supreme Court indicated that, while it was rejecting the Nallys' malpractice claim, it was not foreclosing the possibility of a valid claim against a member of the clergy in other scenarios. In a footnote, the Chief Justice expressly reserved this possibility: "Our opinion does not foreclose

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148. See Ericsson, *supra* note 68, at 174. On the conflict between cooperation with an insurer and the clergy-penitent privilege the author comments: It is well settled that the insured has a duty to cooperate with the insurer in defending a lawsuit. Without such cooperation and assistance, the insurer is severely handicapped and may in some instances be absolutely precluded from advancing any defense. In a case where the penitent/counselee is not available to testify, the defense may hinge on a clergyman disclosing confidential communications. If the clergyman refuses to make such a disclosure, he might be held to have violated the duty to cooperate with the insurer and thereby release the insurer from his obligation to defend the suit. Thus, malpractice insurance may not be an effective protection.

*Id.*; see also Comment, *Bad News*, *supra* note 9, at 228.

149. See Bergman, *supra* note 49, at 65. The author argues that the penitent has waived the privilege on the grounds that [t]he clergyman-penitent privilege is dual; it can be invoked by either party when testimony is solicited by a third party. When the clergyman is sued for malpractice by the penitent, the latter has impliedly waived his privilege. It would be incongruous to deny the clergyman, or any other privileged professional, the right to defend himself by allowing his opponent to invoke the privilege.

*Id.*

150. 1983 Code c.983, § 1 (sacramental seal is inviolable; therefore it is crime for confessor in any way to betray penitent by word or in any other manner or for any reason); *id.* c.984, § 1 (even if every danger of revelation is excluded, confessor is absolutely forbidden to use knowledge acquired from confession when it might harm penitent).

imposing liability on nontherapist counselors, who hold themselves out as professionals, for injuries related to their counseling activities.”<sup>151</sup> It is not clear whether this caveat refers to intentional torts<sup>152</sup> arising out of clergy counseling misconduct or to claims of clergy malpractice not involving potentially suicidal counselees. Nevertheless, coupled with the erosion of churches’ charitable immunity from many lawsuits, one might read the opinion to foretell a gradual increase in counselees’ tendency to file suits against members of the clergy and in the courts’ willingness to recognize such actions.<sup>153</sup>

This reading should be resisted. In addition to the already mentioned difficulties surrounding the imposition of a standard of care upon pastoral counselors, courts should recognize the apparent voluntariness exhibited by any religious adherent. Parishioners certainly appreciate the risks involved in subscribing to a certain religious belief system. Yet, because of their faith and hope in intangible benefits, they continue to adhere to their beliefs. Furthermore, by consenting to enter into a counseling relationship with a minister, the counselee voluntarily agrees to proceed with a counselor who has not been licensed or certified by the state rather than with a mental health professional that has met these requirements. The counselee selects her denomination and chooses a counselor voluntarily and with full knowledge.

Relying on principles of contract law, the California Supreme Court recognized the consensual nature of the relationship between the believer and the church selected.<sup>154</sup> This approach to

151. *Nally*, 47 Cal. 3d at 300 n.8, 763 P.2d at 960 n.8, 253 Cal. Rptr. at 110 n.8.

152. For a discussion of the relationship between well-recognized intentional torts and clergy malpractice, see *supra* note 41 and accompanying text.

153. See H. MALONY, *supra* note 44, at 22. The author quotes Mr. John Cleary, corporate counsel for Church Mutual Insurance Company and an analyst of legal trends in the church:

In the future, I expect to see more suits of this nature filed. I don’t expect to see large verdicts rendered. Gradually, there may be some inroads to the traditional doctrines of law which allow an action to exist, and ultimately a verdict may be paid in a clergy malpractice lawsuit. I say this not because I look with disfavor on the facts of the cases that I have handled; rather, I say it because, in the past, that is the way it has always happened. Remember, at one time you could not sue or recover a judgment from a church. It now happens on a regular basis, although it happened over a period of fifty years.

*Id.* (quoting Cleary, Clergy Malpractice: The Insurance Carrier’s Perspective (1985) (unpublished paper)).

154. The *Nally* opinion was not the first instance of the California Supreme Court’s recognition of the consensual nature of the believer’s relationship with his or her church.



the litigation of religious issues, which recognizes the contractual aspects of the relationship entered into by the believer with the church selected, suggests that a consent-based standard is appropriate in causes of action such as clergy malpractice.<sup>155</sup> This approach holds great promise in the midst of continuing clergy malpractice litigation. While it protects the integrity of constitu-

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It is perfectly clear that, whatever church relationship is maintained in the United States is not a matter of status. It is based, not on residence, or birth, or compulsion, but on voluntary consent. It rests on faith, 'primarily, faith in God and his teachings; secondarily, faith in and reliance upon each other.' It is 'one of contract,' and is therefore exactly what the parties to it make it and nothing more. A person who joins a church covenants expressly or impliedly that in consideration of the benefits which result from such a union he will submit to its control and be governed by its law, usages and customs whether they are of an ecclesiastical or temporal character to which laws, usages, and customs he assents as to so many stipulations of a contract.

*Rosicrucian Fellowship v. Rosicrucian Nonsectarian Church*, 39 Cal. 2d 121, 131-32, 245 P.2d 481, 487-88 (1952) (citation omitted), *cert. denied*, 345 U.S. 938 (1953).

155. See Comment, *supra* note 3, at 974-75. The commentator argues persuasively for the appropriateness of the consent-based standard.

Applying the consent doctrine would create a partially definitional balancing standard well fitted to government and individual interests in religious tort lawsuits. The consent doctrine bars recovery by plaintiffs who willingly engage in dangerous conduct. Courts often imply consent even if the plaintiff hopes to avoid the injury. For example, a boxer, by participating in the sport, impliedly consents to an opponent's blows even though hoping to avoid them. Similarly, when an individual joins a religious group she impliedly consents to her own excommunication, even though she hopes to avoid it.

Voluntary membership in a religious group should create a rebuttable presumption that an individual consents to the group's religious conduct. Shifting the burden of proof to the member/plaintiff would reduce ad hoc considerations, and make recovery more difficult. Thus, it would ease the challenge religious tort lawsuits pose to the religion clauses. Equally important, the presumption would recognize that the plaintiff's voluntariness greatly reduces the government interest in allowing tort recovery. Courts refrain from paternalism when individuals voluntarily expose themselves to tortious conduct. Thus, the standard is well fitted to the government and individual interests implicated.

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Rather than completely eliminating lawsuits by member/plaintiffs for religiously motivated conduct, the proposed standard would create a preliminary barrier to recovery: proof that membership did not constitute consent. To erect this barrier, the religious defendant must first show that its conduct was religiously motivated and that the plaintiff was a church member when the tort occurred. Once the defendant establishes these facts, the burden would shift to the member/plaintiff to prove lack of consent. Traditional consent doctrine recognizes several factors that negate consent [incapacity to consent, outside the scope of consent, and fraud in obtaining consent]. Under the proposed standard, if a member/plaintiff proves one of these negating factors, the court proceeds to the merits of the case. If not, the case fails.

*Id.* (footnotes omitted).

tionally protected freedom of religion, it also provides judicial relief to individuals wrongly injured under the guise of religion. Believers are in the best position to evaluate the implications and consequences of their beliefs. They can and should look before voluntarily making the leap of faith that religious experience demands. "The Bible requires believers to carefully 'count the cost' of discipleship. This admonition makes sense not only for the religious, but for the caretakers of the Constitution as well."<sup>156</sup>

### IX. CONCLUSION

A tort claim asserting clergy malpractice cannot be entertained because it "unduly involves courts in matters purely sacerdotal."<sup>157</sup> Any proposed standard of care judicially imposed upon a member of the clergy would be too inextricably interwoven with religious beliefs, theological training and spiritual practices to be workable or to pass constitutional muster. The "wall of separation between church and state"<sup>158</sup> must not be permitted to crumble. Furthermore, the mere availability of insurance is not an adequate justification for allowing the claims to be recognized by a court of law.

None of the foregoing discussion should be construed as advocating irresponsible behavior on the part of clerics. A consent-based standard is workable and affords protection to all the parties involved. Furthermore, each church should establish internal procedures to resolve pastoral counseling problems.<sup>159</sup> Ethical principles and statements such as those of the Code of Ethics adopted by the American Association of Pastoral Counselors<sup>160</sup>

156. *Id.* at 985 (citing *Luke* 15:25-33).

157. *Hester v. Barnett*, 723 S.W.2d 544, 553 (Mo. Ct. App. 1987).

158. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

159. *See, e.g.*, H. MALONY, *supra* note 44, at 96 (guidelines for expanding and developing caring ministries while reducing risk of malpractice suits). A priest who is also a canon lawyer and a civil lawyer has noted that, from the Roman Catholic perspective,

[t]he best approach to prevent civil courts from interfering in Church matters is to have an adequate system of resolving problems internally. If the Church does not provide a remedy for someone's complaint, the civil courts will be more inclined to assert jurisdiction to fill the void.

Thus, local dioceses should have tribunals and offices of conciliation and arbitration which are competent to deal with internal disputes and provide satisfactory redress of grievances. The Code of Canon Law allows for an investigation of a claim under canon 1717. A judicial penal process is described in canons 1720-1728. In addition, there is a possible separate action for damages outlined in canons 1729-1731.

Paprocki, *Clergy Malpractice and the Law*, *THE PRIEST*, Sept. 1987, at 13, 19.

160. CODE OF ETHICS (American Ass'n of Pastoral Counselors May 1990)

and the Proposed Code of Ethics of the Christian Association for Psychological Studies<sup>161</sup> should be developed in accordance with church doctrine and enforced as a matter of church discipline.<sup>162</sup>

Some denominations have already taken steps to clarify the role of church courts, to publicize internal procedures, and to establish arbitration and conciliation services to handle disputes between churches and their members.<sup>163</sup> These solutions are best handled by an individual church or denomination: "In the final analysis, accountability for one's ministry is to the denomination or faith group which ordains a person and continues one's ministerial credential."<sup>164</sup> The judicial system is not equipped to analyze the accountability of a denomination to its members, nor

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(available from AAPC, 9508A Lee Highway, Fairfax, VA 22031) [hereinafter AAPC CODE OF ETHICS].

161. CODE OF ETHICS (Christian Ass'n for Psychological Studies Proposed Draft April 1985), *reprinted in* H. MALONY, *supra* note 44, at 163-70. The proposed code provides in part:

Scientific and humanistic activities in the helping professions are good, even excellent, but not good enough. While love without professional standards can become mere sentimentality, scientific observations and professional standards without love and Godly ethics can become mere clinical experiments. Thus, the Christian is called to maximize helping others by integrating the distinctives of Christian commitment—including prayer—with professional education, training, and, if appropriate, licensing.

*Id.*, *reprinted in* H. MALONY, *supra*, at 165.

162. *See, e.g.*, Postell, *Clergy Malpractice: An Emerging Field of Law*, TRIAL, Dec. 1985, at 91 (Methodist Church's *Book of Discipline*, which establishes standards of conduct and procedures for disciplining members, set guidelines for trial of minister for sexual harassment before jury of fellow clergy members); *see also* Carey, *supra* note 3, at 25, col. 5. The AAPC Code of Ethics provides in part:

Pastoral counselors are committed to a belief in God and in the dignity and worth of each individual. They accept and maintain in their own personal lives the highest ethical standards, but do not judge others by these standards.

The maintenance of high standards of professional competence is a responsibility shared by all pastoral counselors in the interests of the public, the religious community, and the profession. The pastoral counselor works toward the improvement and refinement of counseling through the establishment of ethical standards in pastoral counseling generally and especially at all pastoral counseling centers.

Pastoral counselors are accountable for their total ministry whatever its setting. This accountability is expressed in relationship to clients, colleagues, and the faith community, and in the acceptance of, and practice based upon, this Code of Ethics of the Association.

In the practice of the profession, pastoral counselors show sensible regard for moral, social, and religious standards, realizing that any violation on their part may be damaging to their clients, students, and colleagues and their profession.

AAPC CODE OF ETHICS, *supra* note 160, at 1.

163. Carey, *supra* note 3, at 25, col. 5.

164. Augspurger, *Legal Concerns of the Pastoral Counselor*, 29 PASTORAL PSY-

could engagement in such an analysis survive constitutional scrutiny.

The nation-wide patronage of pastoral counselors<sup>165</sup> and the dearth of relevant cases involving members of the clergy suggest that the majority of religious counselors approach their duties with the utmost diligence and care. For those who do not, recovery against members of the clergy under intentional tort theories is readily available regardless of their professional status. Furthermore, under a consent-based standard, even clerical negligence would be actionable in those rare cases of extreme misbehavior by members of the clergy.

In conclusion, this author agrees with a colleague who said:

As a priest-lawyer, I would expect to be sued, probably successfully, if I failed to file a lawsuit before the statute of limitations expired. Although some may find my Sunday sermons objectionable, I thank God that I fully expect never to have to defend one of them before other mortals in a court of law. For that, there will be one Judgment, with no appeal.<sup>166</sup>

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CHOLOGY 109, 113 (Winter 1990) (quoting AMERICAN ASSOCIATION OF PASTORAL COUNSELORS HANDBOOK 24 (1978)).

165. Siegel, *supra* note 129, at 34. In acknowledging an increasing number of reports of abuse by mental health care providers, the author points out that “[o]ne American in four will have an experience with therapy. It’s not clear if abuse reports are rising because there is more abuse or because more people are in treatment.” *Id.*

166. Paprocki, *supra* note 159, at 19.

