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CLERGY MALPRACTICE REVISITED: LIABILITY FOR SEXUAL MISCONDUCT IN THE COUNSELING RELATIONSHIP

JANICE D. VILLIERS*

I. INTRODUCTION

Clergy[1] counseling[2] clients[3] today face challenges in several spheres, including the spiritual, the moral, and the secular. As the clergy face these challenges, blurred boundaries result in some clergy engaging in prohibited sexual contact with vulnerable parishioners.[4]

Although this behavior is not a late twentieth century phenomenon,[5] the

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1. The term "clergy" is used to denote religious leaders. There are 166 separate religious groups in the United States. *Census of Religious Groups in the U.S.*, *in* THE WORLD ALMANAC AND BOOK OF FACTS 644, at 644-45 (1996). Each denomination may be subdivided further into thousands of churches, the parishioners of which hold common views, and hundreds of different ecclesiastical offices (e.g. nuns, mothers superior, brothers, fathers, priests, bishops, cardinals, evangelists, pastors, elders, apostles, prophets, rabbis, vicars, seers, etc.). Samuel E. Ericsson, *Clergyman Malpractice*: *Ramifications of a New Theory*, 16 VAL. U. L. REV. 163, 170 (1981) [hereinafter Ericsson, *Clergyman Malpractice*]. A functional definition given by one commentator is "those persons ordained, licensed, or otherwise empowered by a church or a sect, following training prescribed by that organization, to provide spiritual or pastoral counseling to members and others requesting such guidance." C. Eric Funston, *Made out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W. L. REV. 507, 508 n.12 (1983).

2. "Counseling," as used in this article, refers to a pastoral relationship between a member of the clergy and any person to whom that cleric provides counseling, pastoral care, spiritual guidance, or direction. This includes the hearing of a confession, or confidential or privileged information from a congregant.

3. "Clients," in the context of the counseling relationship with a member of the clergy, is used to denote parishioners or followers, and is used interchangeably with those terms in this article. This article also uses the term "women" to refer to clients, because cases of sexual abuse of male clients by female clerics are rare. *See infra* note 87.

4. Sexual relationships between clergy and adult parishioners are not necessarily voluntary consensual relationships. Consent on the part of the parishioner may be illusory, because the power relationship is disproportionate, and the clergy's role as emotional and spiritual counselors adds to the power imbalance as the sharing of intimate details in the counseling relationship increases a woman's vulnerability. *See* Eduardo Cruz, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions*, 19 FLA. ST. U. L. REV. 499, 502 (1991). The psychological phenomenon of transference compounds the inability of the woman undergoing counseling to consent. *Id.*

5. *See* MARIE M. FORTUNE, IS NOTHING SACRED? xii (1989) [hereinafter FORTUNE, IS NOTHING SACRED]. Reverend Fortune relates the story of Henry Ward Beecher, a leader in the abolition and suffrage movements and pastor of Plymouth Congregation Church, who in 1872 was accused of a sexual liaison with Elizabeth Tilton, a married parishioner. The congregation

current litigious climate increases the potential liability of churches and their clergy. Despite the heightened awareness of the extent of clergy malpractice, the subject is still discussed in hushed tones, as taboo as incest, within congregations where such behavior occurs.[6] Recently, clergy accused of pedophilia have garnered considerable press attention and the ire of the general public.[7] Many of the more notorious cases have involved juveniles,[8] but this article limits itself to actions brought by female adult victims of clergy sexual misconduct, and views these cases as reflective of a larger problem—the role of women in society and in the church.[9] Women plaintiffs are generally viewed less sympathetically. Frequently, women who are abused by clergy find little refuge in the courts, because clergy malpractice[10] is not recognized as a viable cause of action.[11] Courts dismiss the clergy malpractice cases for various reasons, with constitutional prohibitions

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defended the charismatic church leader despite the presence of other accusers, and he publicly denied any wrongdoing, while privately admitting to the sexual misconduct. *Id.* "[T]he scandal as it was viewed then was Beecher's disregard for Victorian morality and his hypocrisy. Questions were never raised about his professional ethics as a pastor in relation to his parishioners." *Id.* at xi-xii. In her book, the Rev. Fortune also relates the story of the Rev. Peter Donovan, a modern-day Henry Beecher. *Id.* at xiii. Donovan, a charismatic young preacher, developed a loyal following and despite the testimony of many women who were abused by him, the congregation supported him until his resignation. Donovan's victims became disillusioned by the hierarchical church and the parishioners' lack of support for them. *Id.*

6. The church as family is a metaphor which aids to build "intimate, caring relationships" within the church, and the church reacts like family members to the revelation of incest. *Id.* at xiv-xv; *see* Kenneth L. Woodward & Patricia King, *When a Pastor Turns Seducer*, NEWSWEEK, Aug. 28, 1989, at 48; Ann-Janine Morey, *Blaming Women for the Sexually Abusive Male Pastor*, CHRISTIAN CENTURY, Oct. 5, 1988, at 866. Morey states:

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

Id.

7. *E.g.*, Martha Sawyer Allen, *She Wanted Support; Pastor Wanted More*, STAR TRIBUNE, Feb. 21, 1993, at 18A.

8. *See id.* Gary Schoener of Minneapolis, a national expert on sexual misconduct by professionals, reports that although the cases involving Roman Catholic priests who abuse children have received greater media coverage, the vast majority of cases involve adults, and a large number occur within the Protestant denominations. *Id.* Catholic priests, because of their vow of celibacy, may be media targets when cases involving sexual misconduct are reported. It may be also that the prurient interest of the public contributes to the sensationalism of cases involving pedophilia.

9. No national statistics are available on sexual misconduct by clergy. A three-year survey of religious and secular counselors conducted by the Wisconsin Coalition on Sexual Misconduct found that 11% of the perpetrators were clerics, and 89% of the victims were women. Woodward & King, *supra* note 6, at 48.

10. Although liability for malpractice has been imposed on those who practice in the areas of psychiatry, psychology, and even in social work, there has been an insurmountable stumbling block in imposing similar liability on clergy. *See infra* note 133 and accompanying text. In referring to clergy malpractice, I am limiting my discussion to sexual misconduct by a member of the clergy in his or her capacity as counselor or advisor to a parishioner. It is essentially a claim that the clergy has failed to use due care while counseling. *See generally* Constance Frisby Fain, *Clergy Malpractice: Liability for Negligent Counseling and Sexual Misconduct*, 12 MISS. C. L. REV. 97, 98 (1991) (advocating imposition of liability when clergy fail to use due care).

11. *See* Carl H. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1, 4 (1986).

regarding the free exercise of religion being the one most frequently cited.[12] By dismissing these cases, the courts have resurrected the concept of charitable immunity—long discarded in most states by either judicial decision or legislative fiat.[13]

The Right Reverend Orris G. Walker, Episcopal Bishop of Long Island, states in a foreword to a diocesan publication on procedures for handling reports of sexual misconduct:

> To be a minister in the Church is to be entrusted with sacred responsibilities. As ministers, we become important symbols of moral and spiritual integrity, and people expect us to act in their best interests. Sexual harassment or abuse is a betrayal of the sacred trust placed in the one who ministers and is a damaging experience for all parties involved. Exploitative sexual behavior, because it is focused on one's personal gratification at the expense of the humanity of another person, is contrary to what the Gospel teaches. Therefore, those who sexually abuse or sexually harass someone who is in a ministerial relationship with them, exhibit unethical as well as unprofessional behavior.[14]

This article proposes that sexual misconduct of clergy with a counselee amounts to malpractice. During an emotional or psychological crisis, many parishioners seek counseling from a local pastor. If such outreach for help results in abuse, it is especially contemptible because the perpetrator's power and authority are perceived as derived from God.[15] However, blaming the victim—often engaged in even by the victim—is a common response.[16] The woman is viewed as a seductive temptress, leading the righteous clergy astray.[17] Even in the face of overwhelming evidence of clergy misdeeds,

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12. *Id.* Esbeck posits that despite the civil courts' neutral role in deciding a case initiated by one of the parties, the mere holding that a claim is justiciable raises serious issues concerning "interference with church affairs and . . . religious liberty." *Id.* He describes many tort claims, including claims of clergy malpractice, as being incompatible with the separation of church and state. *Id.* at 6.

13. Annotation, *Immunity of Nongovernmental Charity from Liability for Damages in Tort*, 25 A.L.R.2d 29 (1952); RESTATEMENT (SECOND) OF TORTS § 895E (1979). Section 895E states: "One engaged in a charitable, educational, religious or benevolent enterprise or activity is not for that reason immune from tort liability." *Id.* Some states, such as Massachusetts, place strict limits of $20,000 on liability of non-profit organizations. Alison Bass, *Law Limits Church Liability to $20,000*, BOSTON GLOBE, May 13, 1992, at 8. South Carolina, Maryland and Texas impose similar limits, and Arkansas gives nonprofit institutions complete immunity from all legal damages. *Id.*

14. The Diocesan Pastoral Concerns Committee, *Policies and Procedures for Preventing and Responding to Allegations of Sexual Misconduct in the Ministerial Relationship Within the Diocese of Long Island*, Apr. 1993.

15. *See* Woodward & King, *supra* note 6, at 48; *see also* FORTUNE, IS NOTHING SACRED, *supra* note 5, at 102 (describing the power as derived from training, credentials, gifts, and the employment contract between the laity and the clergy). "The minister is a physical representation of the whole community of faith, of the tradition, of a way of viewing the meaning of life . . . and of God." *Id.* (quoting DAVID K. SWITZER, PASTOR, PREACHER, PERSON: DEVELOPING A PASTORAL MINISTRY IN DEPTH 17 (1979)).

16. *See* FORTUNE, IS NOTHING SACRED, *supra* note 5, at 105, 122; Morey, *supra* note 6, at 866, 869.

17. *See infra* note 26, and accompanying text.

many parishioners still support the pastor and denounce the female victim.[18] Afterwards, the victim seldom feels safe in the church. She feels betrayed, hurt, and angry, primarily because of a lack of responsiveness to her plight within the church hierarchy.[19] Professionals, whether they serve in the secular world or the church, should be liable when they fail to meet a certain standard of care toward their clients. Interestingly, some courts, while refusing to recognize a cause of action for malpractice, have applied fiduciary law to impose liability upon clergy. Other courts have refused to apply either theory to allow recovery for women who have been sexually abused by clergy.[20]

The doctrine of separation of church and state does not relieve the state of its responsibility to protect its citizens from harm when clergy are engaged in nonreligious activities. If women do not get redress for these wrongs, they are victimized repeatedly, first by the clergy and then by the legal system. To correct this manifest injustice, the courts must acknowledge the balance envisioned by the Framers of the Constitution, where an equally powerful state and church coexist. This balance is not upset by recognition of the clergy malpractice action.[21]

Churches often respond to allegations of transgressions by clergy with silence, and occasional denials—from both the clergy's superiors and the congregations. Forcing clergy and their churches to accept secular legal liability and responsibility for their tortious wrongs should have a deterrent

18. The Rev. Thomas Streitferdt was convicted of one count of rape and three counts of sexual abuse. The attack on three female members of his congregation took place during counseling sessions in the basement of the East Harlem Church. After his conviction, his congregation welcomed him back with open arms and told him not to resign as pastor. Dan Andrews, *Convicted Pastor Welcomed Back by Flock*, UNITED PRESS INT'L, May 28, 1989. Often the pastors are charismatic and weave a web of betrayal which is not easily penetrated. This "web" and the collar protect pastors from the accusations of the women, and the pastors are cognizant of the fact that they are more credible than the less influential female accusers. *See* FORTUNE, IS NOTHING SACRED, *supra* note 5, at 65, 81-87, 104-05 (reporting that during the investigation of a clergyman's misdeeds, the parishioners concluded that "the women were the source of the problem," resulting in stigmatization, isolation, and silencing of the female accusers).

19. *See* Allen, *supra* note 7, at 18A; FORTUNE, IS NOTHING SACRED, *supra* note 5, at 110-11, 127-29; *see also* Gayle White, *When Men of the Cloth Fall from Grace*, ATLANTA J. & CONST., July 27, 1991, at E6 (describing the feeling of betrayal experienced by women, often resulting in leaving organized religion and a loss of faith in God, the latter having been termed the "God factor"—where victims are left blaming God for violating their sacred trust). There are some instances when, even among "consenting adults," the effect of the liaison can be post-traumatic stress disorder, characterized by flashbacks, which is usually seen in veterans of war. Post-traumatic stress disorder occurs when a "person has experienced an event that is outside the range of usual human experiences and that would be markedly distressing to almost anyone." DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS 250 (3rd ed. rev. 1987). It has been identified in victims of battering. *See* Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1008 (1995). Women who are sexually abused by their therapists have also manifested the symptoms of post-traumatic stress disorder. Ronald J. Maurer, *Ohio Psychotherapists' Civil Liability for Sexual Relations with Former Patients*, 26 U. TOL. L. REV. 547, 558 (1995).

20. *See infra* Part III.B.

21. Other commentators have suggested that only tort claims that address compelling societal interests of health, safety, or public peace should be permitted. *See* Esbeck, *supra* note 11, at 6, 8 (suggesting that in order to maintain the balance envisioned by the Framers, religious organizations must be afforded a high level of immunity from governmental interference). This is described as the price one pays for living in a free and plural society. *Id.*

effect on such behavior. It would also force churches to begin the painstaking process of self-evaluation and development of policies and procedures to assist in reporting and treatment—to benefit the victim and the clergy.[22] On rare occasions, churches become hypersensitive because of fear of litigation and penalize the cleric accused of sexual misconduct without due process.

Part II of this article views the response to clergy sexual misconduct as systemic—an issue deeply rooted in women's role in society as well as their role in a patriarchal church. Part III discusses the problem of clergy sexual misconduct, explores the churches' delayed recognition of a need for internal monitoring, and critiques the judiciary's inadequate response to the problem. Part IV discusses solutions, including the approaches taken by legislatures to curb abuses by clergy engaged in counseling relationships and potential solutions in the courts employing a fiduciary duty or professional malpractice paradigm. The conclusion summarizes viable solutions to this problem, fashioning narrow remedies which will address the problem without creating additional difficulties in their wake.

II. CLERGY MALPRACTICE AS A WOMEN'S ISSUE

The patriarchal organizational structure of the church plays a key role in the problem of the failure to recognize clergy misconduct as a viable cause action, because patriarchal views are integrated in the legal process, to the detriment of women.[23] If women do not have a voice, the church and the courts will not believe their accusations and take official corrective action.[24] The unresolved and most divisive questions in many denominations involve "[q]uestions of women's ordination, women's employment as pastors,

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22. Many churches have no policies or procedures in place for the resolution of the problem of sexual misconduct of clergy. Rev. Fortune attributes this to the myopia of the institutional church: "Conservative churches deny the existence of the problem as long as possible. When they cannot deny it any longer, they deal with it as a matter of the pastor's adultery, ignoring the issue of professional ethics. . . . [In addition, due to lack of affiliation,] there is no denominational structure to monitor or discipline clergy." FORTUNE, IS NOTHING SACRED, *supra* note 5, at 100. More liberal churches, in an attempt to increase employment opportunities for gay and lesbian clergy, have removed all references to clerical sexual conduct. *Id.* "[T]hese well-motivated actions, which sought not to prescribe sexual behavior for clergy's private lives, left the District with no standards of *professional* conduct." *Id.* at 101.

23. Angela L. Padilla & Jennifer J. Winrich, *Christianity, Feminism, and the Law*, 1 COLUM. J. GENDER & L. 67, 73, 87-102 (1991); Michael McAteer, *A Voice for Catholic Feminists*, TORONTO STAR, Dec. 10, 1994, at H24. Maria Riley (a member of the Dominican order of nuns as well as a research staff member and coordinator of the Women's Project at Washington's Center for Concern) stated that the women's movement "is impacting on the Church because one of the fundamental issues is patriarchy or the subordination of women by men. . . . [T]he fact that these are women's voices that are now being raised is particularly problematic to some of the male leaders of the church." *Id.; see also* Joan Leonard, *Women Challenge Church for Equality*, CAPITAL TIMES, Feb. 12, 1994, at 9A (postulating that the current and traditional patriarchy "excludes the presence, insights and experience of women . . . [and] rob[s] women of their full personhood," while encouraging "men to be domineering, aggressive and selfish").

24. It is extremely difficult to understand why women bringing these charges are often not believed, since "very rarely do victims falsely report an offense. If they have the courage to tell someone about their situation, they almost always have been harmed by someone." Marie M. Fortune, *Reporting Child Abuse: An Ethical Mandate for Ministry*, *in* ABUSE AND RELIGION: WHEN PRAYING ISN'T ENOUGH 193 (Anne L. Horton & Judith A. Williamson eds., 1988) [hereinafter Fortune, *Child Abuse*].

contraception, inclusive language, abortion, sexuality, and so forth. . . ."[25] Most churches still maintain a structure under which men have the power of authority on the altar, while women fill the pews—outnumbering men in most congregations. This patriarchal structure facilitates manipulative abusers and increases their access to vulnerable parishioners.

Women's experiences receive scant attention in the "theology, ethics, doctrine, or pastoral care. If considered at all, women's experiences carry an overlay of the image of woman as temptress, source of evil, and 'gateway to hell. . . .'"[26] The most striking exception in Christian theology is the elevated status of Mary—revered for her role as the virginal mother of the son of God—a paradoxical and unattainable image for women.[27] Thus, the church is merely a mirror of society's view of women, albeit a distorted mirror, reflecting more of the past than the present or the future. While this inequality exists in society, and is reflected in the church, it will be difficult to address

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25. FORTUNE, IS NOTHING SACRED, *supra* note 5, at 123.

26. *Id.*; *see also* Padilla & Winrich, *supra* note 23, at 73-87 (describing the view of woman as guilty and deserving of punishment based on Eve's role in the creation story and in mankind's fall from grace and as seductive and wily based on the story of Lot's daughters' role in seducing their father in order to preserve their father's blood line). In *Genesis* 19:32-36, Lot's daughters conspire to ply their father with wine and share his bed without his knowledge. "This highly unlikely scenario sets the stage for a 'blame the victim' attitude about female victims of sexual offenses, and it allows the true aggressor to escape guilt." *Id* at 79. Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1154-55 (1990) describes medieval views of women as an afterthought, discussed only in terms of their differences from men: "Feminine nature was conceived as being the opposite of male nature [which was defined by the feudal society and the loyalty and love of a vassal to his lord]: individualistic, selfish, cunning, and sexually voracious." *Id.* at 1155. Professor Schroeder describes one medieval interpretation of original sin where Eve ate the fruit of the Garden of Eden in an effort to be autonomous (God-like). Adam viewed this as an impossible and unwelcome aspiration, but realized that Eve would be damned, and out of love and loyalty for her, abandoned his duty to God. *Id.* It was the rare woman who could control her natural individualistic and selfish desires and remember the honor of the family and community, which was the natural desire of men. Women, by their nature, were a constant threat to the order of society and to the purity and holiness of men. *Id.* at 1156. *See also* Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 464-70 (1995) (discussing biblical and rabbinical ambivalence towards women and misogynist views of women). Women are repeatedly depicted as temptresses, incapable of rational thought or moral decisions, particularly in matters of sexuality. Women needed to be controlled, not only to protect them from falling victim to their own passions, but also to protect men from being led from the righteous path of virtue and intellect. *Id.* at 470.

27. Padilla and Winrich contrast the "bad" woman, epitomized by Eve, with the "good" woman, epitomized by Mary:

> For both men who judge women and women who judge themselves, the polarities are clear. "[Woman's] 'Eve nature' justifies punishment . . . . [S]he can be raped, battered, dominated, exiled. When she is seen as 'Mary,' she is honored and patronized, protected but excluded from decision making, seen as pure but without passion." Either way women are victims of patriarchal morality. And in practice, they can never be "good" because the inimicability of the virgin-mother model (literally understood) has left all women essentially identified with Eve.

Padilla & Winrich, *supra* note 23, at 84 (citations omitted).

this problem adequately.[28] The subordination of women—encompassed in the biblical view of women—is ultimately evidenced in the legal system.[29]

"Theology and law share much in common, including a long history of justifying violence against women. . . . [Each institution is] mired in a patriarchal history that renders them obsolete, and apparently unable to offer any significant justice for young women victims of abuse."[30] The parallels between women's treatment in the judicial system and in the church are striking, particularly with respect to the women's lack of voice as they rail against these patriarchal systems. The women's movement has amplified the voice of women demanding equal justice in the church and in society. Feminists may disagree on the sources of women's oppression and the means and strategies of empowerment, but many believe that "female subordination is rooted in a set of customary and legal constraints that blocks women's

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28. Men in pastoral roles are aided by the patriarchal structure. FORTUNE, IS NOTHING SACRED, *supra* note 5, at 124. Rev. Fortune's case study of Peter Donovan describes a minister who engaged in numerous sexual liaisons with female parishioners, including the rape of two women, and promised marriage to others. Donovan's activities continued for years before he was forced to resign. *Id.* at 46-47, 124. Fortune comments:

> [I]f Donovan had been engaging in the same conduct with men that he did with women in the church, he would have been relieved of his pastoral privilege long ago. But the fact that the victims were women, the acceptance of the adage that "boys will be boys," and the hesitancy of some men to confront other men's behavior all meant that the women had to look initially outside of the church for a sympathetic ear and a person willing to act. The patriarchy prevented the women from getting justice within the church.

Id. at 124.

29. Padilla and Winrich suggest that religion and the law cooperate in this destructive patriarchal view:

> Because violence against women functions in a patriarchal society as a form of social control, the legal system, by failing to take violence against women seriously, aids and abets the continued existence of patriarchy. By blaming, disbelieving, and allowing the female victim of domestic violence, incest and rape to blame herself for her victimization, the legal system reproduces and legitimizes women's inferior status as constructed in the traditional Christian world view. In turn, the religious system "sacralizes" women's subordinate legal position and elevates social norms into divinely mandated moral paradigms. Thus, religion and law, each in turn, legitimizes the other's patriarchal construction of woman.

Padilla and Winrich, *supra* note 23, at 87-88. First published at the turn of the century, Matilda Joslyn Gage's feminist work, WOMAN, CHURCH AND STATE, attributed many of the injustices toward women in the United States to the influence that Christianity has had on the state. She claimed that under "Usus," a form of Roman law prevalent before Christianity, women enjoyed greater freedom and could maintain their own property during marriage. MATILDA JOSLYN GAGE, WOMAN, CHURCH AND STATE: A HISTORICAL ACCOUNT OF THE STATUS OF WOMEN THROUGH THE CHRISTIAN AGES 295-99 (1893).

In contrast, Christianity was synonymous with subordination of women:

> From Moses to Paul, the Bible everywhere speaks of her as a being made for man, secondary to man, and under his authority by direct command of the Almighty; the state as coadjutor and servant of the church, basing her codes of law upon its teachings. Under these codes woman has not only been looked upon as naturally unchaste, but also regarded as a liar, the state demanding the testimony of two or three, and in some instances of seven women to invalidate that of one man; clearing himself by his single oath. Condemned as having brought evil into the world, woman's every step was looked upon with suspicion, and short of her just desserts.

Id. at 305-06 (citation omitted).

30. Joyce A. Mercer, *Legal and Theological Justice for Abused Adolescent Girls*, 9 J.L. & RELIGION 451, 451 (1992).

entrance and/or success in the so-called public world."[31] The lessons gleaned from the difficulty women face in obtaining justice in the areas of incest, domestic violence and sexual harassment can shed some light on the struggle to obtain justice for abuse within the church.[32]

A. *Incest*

Female victims of incest,[33] like other female victims in a patriarchal society, frequently have their harms discounted.[34] Incest occurs in the private confines of the home, usually between a father or stepfather and a daughter.[35] With the family serving as the model for interaction, as it does in the church,[36] incest thus arises within the same contexts, and creates the same tensions, as clergy sexual abuse.[37] While the feminist movement has been in the forefront in seeking judicial redress for the victims of incest, its success has been limited.[38]

As is now the case with most victims of clergy malpractice, the harm to female incest victims is ignored,[39] or the focus of the inquiry is shifted to the nature of the family's dysfunction, even when criminal penalties are necessary.[40] Undoubtedly, the current criminal sanctions against defendants in incest cases provide some deterrent.[41] The literature shows, however, that criminal proceedings are not often initiated, and that the defendants are rarely

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31. ROSEMARIE TONG, FEMINIST THOUGHT: A COMPREHENSIVE INTRODUCTION 2, 8 (1989) (surveying the strengths and weaknesses of feminist theories).

32. ROSEMARIE TONG, WOMEN, SEX AND THE LAW 2 (1984) [hereinafter TONG, WOMEN]. "[T]he law has frequently chosen to trivialize these harms [or] [w]here harm has resisted such facile trivialization, the law has frequently sought to blame the victim for her plight." *Id.*; *see also* FORTUNE, IS NOTHING SACRED, *supra* note 5, at 122.

33. Incest is defined as the crime of sexual intercourse or cohabitation between a man and woman whose familial relationship would, at law, preclude marriage. BLACK'S LAW DICTIONARY 761 (6th ed. 1990). The vast majority of incest victims are female, while the perpetrators are almost invariably male. JUDITH L. HERMAN, FATHER-DAUGHTER INCEST 3-4 (1981).

34. Joyce McCell, *Incest as Conundrum: Judicial Discourse on Private Wrong and Public Harm*, 1 TEX. J. WOMEN & L. 143, 145 (1992).

35. *Id.* at 143. The overwhelming majority—94.6%, to be precise—of the reported incest cases involve father figures and daughters; less than 3% of the cases involve either father-son or mother-son relationships. *Id.* There are no reported cases of mother-daughter incest. *Id.*

36. FORTUNE, IS NOTHING SACRED, *supra* note 5, at 99. "The church is frequently referred to as the family of God." *Id.* This creates an unbalanced setting where the congregants place unconditional trust in a pastor, not unlike that of children in their fathers. *Id.* at 103.

37. Just as members of the religious family are often more preoccupied with protecting the image of the institution or the reputation of the clerics, so, too, are the parents concerned about scandal, preserving the family unit, or keeping the male breadwinner in the home. Frequently these concerns override the child's best interests. McConnell, *supra* note 34, at 172 nn.23-24 (quoting Diane H. Browning & Bonny Boatman, *Incest: Children at Risk*, 134 AM. J. PSYCHIATRY 69 (1977)).

38. McConnell, *supra* note 34, at 149.

39. The literature on incest victims, who are overwhelmingly female, is overly preoccupied with the victims' complicity. Charlotte L. Mitra, *Judicial Discourse in Father-Daughter Incest Appeal Cases*, 15 INT'L J. SOC. L. 121, 123 (1987); Padilla & Winrich, *supra* note 23, at 90-92 (suggesting that mothers, as well as daughters, are frequently blamed).

40. Padilla & Winrich, *supra* note 23, at 90-92.

41. Incestuous behavior is a felony in every state, and most states are making serious attempts to prosecute child sexual abuse cases. Carol W. Napier, Note, *Civil Incest Suits: Getting Beyond the Statute of Limitations*, 68 WASH. U. L.Q. 995, 998 (1990).

successfully prosecuted.[42] Because of the inadequate redress obtained through the routine channels in criminal or family law, an increasing number of adult incest victims bring tort suits against close family members.[43]

Not surprisingly, incest claims seem to merit little consideration within the tort system.[44] Undaunted, incest victims have pursued compensatory damages for their emotional and physical injuries, expensive psychological treatment, and lost wages directly attributable to the serious debilitating impact of incest on their lives.[45] Victims of clergy malpractice deserve no less for the proven harms done to them. Trust in a clergy member makes the parishioner more vulnerable and less likely to report the wrongdoer. A parallel exists to the incest victim who remains silent for years after the abuse.[46] Once that trust is betrayed, the victim loses not only trust in the cleric, but her faith in God and the Church.[47] The problem often is tied to the silencing of the victim that occurs in the church and in society in general. The victim will often fear reprisals, not only from the church and her fellow parishioners, but possibly even divine retribution.[48] Those who oppose liability for clergy malpractice state that if liability attaches for this behavior clergy will be at the mercy of their female parishioners, who could misconstrue a simple show of concern, or a fatherly touch, and ruin the reputation and career of innocent clergy.[49]

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42. Joycelyn B. Lamm, Note, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189, 2189 (1991). Some commentators suggest two main reasons for the lack of enforcement of statutes which prohibit domestic violence and incest: "[f]irst, the lawyers, police, judges, and juries charged with carrying out the law are impaired by patriarchal attitudes about a woman's subordinate status in society; . . . [s]econd, the female victims themselves, having internalized this debilitating definition of their role, often do not seek legal remedies for their injuries." Padilla & Winrich, *supra* note 23, at 90.

43. Lamm, *supra* note 42, at 2189.

44. *Id.* at 2190.

45. *Id.*

46. *See* Morey, *supra* note 6, at 866; *see also* FORTUNE, IS NOTHING SACRED, *supra* note 5, at xiv-xv, 103-106 (describing parishioner assumption of trust in the clergy).

47. Moses v. Diocese of Colorado, 863 P.2d 310, 318 (Colo. 1993), *cert. denied*, 114 S. Ct. 2153 (1994). After the married victim engaged in the sexual relationship with the priest, who was also married, she experienced a loss of faith in God and the Church. *Id.* at 312-18. When she reported the sexual relationship to the Bishop, he advised her that if "she loved Father Robinson she should not talk to anyone about her relationship with him, never go near the church, and never talk to Father Robinson again." *Id.* at 318. Her loss of faith was aggravated when Bishop Frey made her believe she was primarily at fault, never asked for her version of the story, never inquired as to her feelings about the relationship or her plans, and demanded secrecy from her. *Id.* at 318 n.9.

48. In order to engage in sexual relations with the women, the clerics often invoke God's approval of the relationship, in the ultimate act of manipulation and selfishness. FORTUNE, IS NOTHING SACRED, *supra* note 5, at 65, 120-21 (discussing the alienation suffered by women who report abuse within the church).

49. Byrd v. Faber, 565 N.E.2d 584, 589 (Ohio 1991). Where a heightened standard of pleading was introduced in negligent hiring claims, the court stated that "the goal of protecting the reputations of upstanding members of the community is important enough to require that facts be pled with particularity in order for a plaintiff to survive a motion to dismiss." *Id.* Undoubtedly, there is some merit in the concern about damaged reputations. For instance, Joseph Cardinal Bernardin was accused of sexual misconduct on the basis of a "repressed memory," and the accusation was later retracted. Margaret Carlson, *Full of Grace*, TIME, Mar. 14, 1994, at 37. Ironically, when his accuser died, Cardinal Bernardin stated that the incident, although regrettable and painful, had positive effects, including improving his standing with the local Catholics.

Certainly internal boards of review should be able to determine whether the contact was sexual in nature and, if not, courts are able to discern sexual touching.[50] However, because the injuries claimed are often psychological or emotional, some courts express a fear of fraud, especially when the claim is made years after the alleged abuse.[51] This rationale for denying abused women their voice in the churches and the courts seems to be based less on concern for the clergy than on lack of concern for the women. The slow response of the courts in providing remedies for women is a sign of societal indifference to their plight. While everyone sympathizes with men wrongly accused of rape, no one has suggested that the civil cause of action for sexual battery should be abolished. Besides, concerns about fraud have not prevented the imposition of liability on secular counselors.[52] To deny all clergy malpractice claims on this basis is thus unjust.

B. *Domestic Violence*

Most states prohibited wife-beating by 1870.[53] Although it is questionable whether a "rule of thumb" ever existed--giving men permission to beat their wives, provided the stick used in the beating was no thicker than a thumb[54]—many women, even at the beginning of this century, did not enjoy a daily existence confident that they would be free from physical violence.[55] Unfortunately, wife-beating has been "sanctioned and controlled through culture, religious beliefs, law, and most importantly, the norms of friendship, kinship and neighborhood groups."[56]

Andrew Herrmann, *Bernardin Accuser Dies: Cook Charge May Have United Local Catholics*, CHICAGO SUN-TIMES, Sept. 24, 1995, at 9. A survey reported that 83% described him as a good or excellent leader, and Cardinal Bernardin attributed this to his openness in handling the Cook case. *Id.*; *see also* Scott Fornek, *"He Will Accept God's Will and Move On From There": Admirers Cite His Deep Faith and Work Ethic*, CHICAGO SUN-TIMES, June 11, 1995, at 16 ("'I . . . have a great faith—a faith in God, a faith in the people I serve. In the final analysis, that kind of faith and a willingness and indeed a determination to make your best effort, that will carry the day.'"); Andrew Herrmann, *Bernardin Achieves "Closure" With Accuser*, CHICAGO SUN-TIMES, Jan. 5, 1995, at 3 ("[T]he meeting [between Bernardin and the man who had accused him of sexual abuse] 'brought closure and peace to both of us.'"). Cardinal Bernardin said, "'If there's an accusation of sexual abuse against anyone, priest or otherwise, I think that that accusation has to be taken seriously. . . . [I]n the final analysis, truth will win out.'" *Ohio Man Drops Cardinal Bernardin from Suit Claiming Abuse*, LIABILITY WK., March 7, 1994, at 1, *available in* 1994 WL 2541644.

50. *See* State v. Ohrtman, 466 N.W.2d 1, 2-3 (Minn. Ct. App. 1991) (finding that pastor's hug of a female parishioner during a counseling session which compressed her breasts against his chest was not "touching" within the meaning of a statute which prohibited sexual contact with a psychotherapist).

51. Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 788 (Wis. 1995), *cert. denied* 116 S. Ct. 920 (1996) (denying extension of a judicially created discovery rule on public policy grounds).

52. *See infra* note 367 and accompanying text.

53. *See generally* SUSAN GLUCK MEZEY, IN PURSUIT OF EQUALITY: WOMEN, PUBLIC POLICY AND THE FEDERAL COURTS 2 (1992).

54. Henry A. Kelly, *Rule of Thumb and the Folklaw of the Husband's Stick*, 44 J. LEGAL EDUC. 341, 341 (1994) (chronicling the dubious origin and frequent misuse of the term); *see also* Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 LAW & INEQ. J. 401 (1995) (asserting the relevance of family violence to family property policy).

55. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 888-93 (1992).

56. "[U]nlike male victims of violent crime, women are prone to blame themselves for their

In striving for an illusion of peaceful family life, society has traditionally denied and suppressed the evidence of family violence.[57] Only since the 1960s have the reality and depth of the problem of family violence—particularly child abuse and wife-beating—earned widespread public attention as a problem that knows no boundaries of class or color.[58] Frequently, women who report incidents of abuse in the home are not believed because the men who beat them seem to epitomize respectability.[59] Despite the perception of marital abuse as a lower or working-class, people-of-color problem, studies show that wife beating crosses all social classes and racial lines.[60]

By the 1940s gender-neutral expressions such as "marital discord" and "marital disharmony" surfaced, evidencing society's attempts to forge a woman-blaming response to the problem.[61] To many, marital violence became a sign of wifely dysfunction. Often, battered wives would also blame themselves by believing that they somehow deserved to be beaten. Frequently after the authorities became involved, the man "bec[ame] contrite and tender, . . . or the victim exhibit[ed] compassion or concern for the abuser."[62] Historically, the mostly-male authorities then retreated, treating the problem as

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own victimization." TONG, WOMEN, *supra* note 32, at 195. Religious and family support groups often focus on preserving the family unit and emphasize wifely submission when encouraging women to remain in abusive homes. Fortune, *Child Abuse*, *supra* note 24, at 165.

57. *Casey*, 505 U.S. at 889.

58. *Id.*; *see also* Maria L. Ganga & Elizabeth Mehren, *Simpson Case Compels Nation to Look at Domestic Violence*, L.A. TIMES, June 20, 1994, at 1 (noting the celebrity of the domestic violence case of O.J. Simpson). The nation also confronted the reality that domestic abuse cuts across color and socioeconomic barriers when live-in-companions, Joel Steinberg, a lawyer, and Hedda Nussbaum, an editor, were in the media spotlight for the traumatic death of their adopted daughter at Steinberg's hands. People v. Steinberg, 595 N.E.2d 845, 846 (N.Y. 1992). The courts found that Hedda Nussbaum was also severely abused, and media attention focused momentarily on both child and spousal abuse. *Id.* at 846-47.

59. *See* LINDA GORDON, HEROES OF THEIR OWN LIVES, 18-19 (1988) (describing an early case history of the Amato family—a mother, father and six young children). Mrs. Amato sought help from many social agencies and often reported that her husband was a "drunkard, a gambler, a non-supporter, and a wife-beater." *Id.* at 18. Social workers doubted Mrs. Amato because Mr. Amato appeared to be a "good and sober man" who blamed family problems on his wife's inability to manage the wages he brought home to her. *Id.* Only the corroboration by her husband's own father and physical evidence of abuse convinced the agencies. *Id.* at 19. Although Mr. Amato was convicted of abuse and sentenced to six months in prison, he returned to the home more violent and abusive than before, continuing to abuse his wife and children. *Id.* The case was eventually closed with no resolution. *Id.*

60. Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 ALB. L. REV. 1027, 1027-135 (1995) (explaining that as one realizes battering occurs in all socioeconomic, racial, and ethnic groups, it becomes clear that corporate lawyers will encounter battered women.); *see also* Diane Patton, *"He Never Hit Me"—The Need for Expert Testimony in Domestic Violence Cases*, ARIZ. ATT'Y, Jan. 30, 1994, at 10 (stating that wife battering is a serious and prevalent problem which affects all socio-economic and religious groups). The defense of battered woman's syndrome has been successful in cases where women kill their batterer. Ammons, *supra* note 19 at 1015. However, some object to describing a syndrome which will result in stereotyping and conviction for those who do not fit the stereotype. *Id.* The battered woman stereotype is a "white, middle class, passive, weak woman who in a moment of terror, lost control and committed a crime because she was being abused." *Id.* at 1016.

61. GORDON, *supra* note 59, at 284.

62. MARY J. FRUG, WOMEN AND THE LAW 555 (1992).

a private family matter and less than serious.[63] When battered women aligned themselves with the feminist movement, the struggle was no longer an individual one, but became both political and ideological.[64]

Women sexually abused by clergy share characteristics with physically abused women—most notably the phenomenon of blaming the victim, and the public reluctance to believe the women because the men seem highly credible and respectable.[65] Like women in physically abusive relationships, women who become engaged in sexual relationships during the course of counseling are often living out a pattern of psychological abuse.[66] A cleric who participates in such activity with a vulnerable parishioner is manipulative and, like the wife beater, needs assistance. Often the men indulge in abusive acts because they view it as low-risk; the women's self-esteem is so low that they are unlikely to reveal the secret and, if they do, they are unlikely to be taken seriously.[67] The shame the women experience also silences them. Society often views the female victim with incredulity. Women fear that speaking up will lead others to believe that they are merely experiencing "buyers' remorse"—belated regrets over unwise choices freely made by both parties. By silencing the abused woman, society facilitates the abuser.

C. *Sexual Harassment*

Men inside and outside of the church complain about the labelling of innocent behavior as sexual harassment.[68] These complaints frequently demonstrate ignorance about the subject. The term "sexual harassment" is used to identify "those kinds of sexual coercion and exploitation that occur neither between complete strangers nor between purely social acquaintances or family members, but between men and women in a formal structured relationship in which women have an expectation that the basis of the relationship has nothing to do with sex."[69] Incidents of sexual harassment range from outright demands for sexual services, vulgar advances, pinching, fondling, sexual

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63. *Id.*

64. *Id.* at 288.

65. Linda Jorgenson & Rebecca Randles, *Time Out: The Statue of Limitations and Fiduciary Theory in Psychotherapist Sexual Misconduct Cases*, 44 OKLA. L. REV. 181, 200 (1991) (suggesting that a double standard is working against women claiming sexual misconduct, because their claims would be taken seriously if they complained of physical violence by their therapists). Elijah Muhammad, 67 year-old leader of the Black Muslim Movement, allegedly "had intimacies" with a "succession of personal secretaries" who became pregnant. MALCOLM X, AUTOBIOGRAPHY OF MALCOM X 299 (1964). The women were charged with adultery in Muslim courts and received sentences of isolation, forbidden to have any contact with other Muslims. *Id.* When this news was about to become public knowledge, the leaders of the movement "desperately wanted to find some . . . bridge—over which . . . the Nation of Islam could be saved from self-destruction." *Id.* at 302. Following a recurring theme, the reputation of the minister and the survival of the religious group took precedence over the women and their children.

66. GORDON, *supra* note 59, at 285-86.

67. *Id.* at 284-86.

68. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 820-23 (1991).

69. Jill Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go*, 10 CAP. U. L. REV. 445, 445-46 (1981).

remarks or jokes made in women's presence, to sexual assault.[70] The gravamen of a sexual harassment claim is a power imbalance.[71]

Frequently, incidents of sexual harassment occur in the workplace, with the most notorious examples being the claims made by Professor Anita Hill and others against Justice Clarence Thomas during his nomination hearing,[72] and the many accusations which culminated in the resignation of Senator Packwood.[73] Recent studies indicate that occupations of harassed women and their harassers vary greatly and cross socioeconomic lines. Male harassers are found among the ranks of doctors, lawyers, social workers, clergy persons, salespersons, construction workers, auto mechanics, and librarians.[74] Again the voices of women were silenced when they sought remedies in the court.[75]

Instead of disciplining men for such behavior, women were expected to leave employment where they experienced such treatment.[76] The women were expendable, because their jobs were less important to the survival of the companies.[77] Few women complained, preferring to suffer in silence than face the reprisals which would inevitably include loss of employment for the victim rather than the harasser, or increased harassment.[78] Some were told to consider it a compliment or to stop the provocative dress or immoral behavior that had encouraged the treatment by their male counterparts.[79]

The legislature, rather than the common law, finally provided a vehicle for victims of harassment through Title VII of the Civil Rights Act of 1964.[80] Under Title VII, women who lost their jobs for resisting sexual demands began to sue their former employers. Although early plaintiffs' cases were unsuccessful in the district courts, the Third, Ninth, and District of Columbia Circuits upheld the right of a woman to sue for such employment discrimination under this Act.[81] Finally, in *Meritor Savings Bank v. Vinson*[82]

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70. *Id.* at 448-55.

71. Estrich, *supra* note 68, at 820.

72. Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367, 1367-68 (1992).

73. Harvey Berkman, *With a Little Help from His Supporters: Senator Packwood's Allies Contribute More Than $1 Million for His Defense*, NAT'L L.J., June 12, 1995, at A6 (reporting that Sen. Bob Packwood's "20 years worth of sexual harassment allegations" cost his political supporters $1.1 million, and counting).

74. Goodman, *supra* note 69, at 453.

75. Ultimately Senator Packwood resigned from the Senate, the charges were dismissed by the authorities, and the women harmed by Packwood were arguably harmed a second time when he departed the Senate with emotional commendations from his colleagues, yet without any hint of an apology to the injured women. *See* 141 CONG. REC. S12, 796-97 (1995).

76. *See* Goodman, *supra* note 69, at 456.

77. CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 12-13 (1979).

78. *Id.* at 48-49 (discussing ongoing intimidations suffered by women during the development of sexual harassment law).

79. *Id.*

80. "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of . . . sex . . . . " 42 U.S.C. § 2000e-2(a)(1) (1994).

81. *See* Miller v. Bank of America, 600 F.2d 211, 213-14 (9th Cir. 1979); Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir. 1977); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977).

82. 477 U.S. 57, 65-68 (1986) (holding that sexual harassment constitutes sex discrimination in violation of Title VII, and that the victim could not submit voluntarily to unlawful sex discrimination).

the Supreme Court put its imprimatur on a woman's right to sue under Title VII for sexual harassment. Ironically, within the institution that passed Title VII legislation, the voice of women crying out against sexual harassment in the workplace was ignored.[83]

Moreover, in a practical sense, women who sue have a substantial burden to overcome by establishing that the sexual harassment they experience is closely linked to their employment. Employers who can show that the advances were of a "personal" nature and unrelated to the workplace will prevail.[84] Women who complain of sexual harassment also bear the burden of not being believed.[85] Women who claim that clergy have engaged in sexual misconduct bear a similar burden. The women bringing claims of clergy malpractice often lack credibility; the clergy, in contrast, has enormous credibility. This imbalance frequently prevents victims from coming forward.[86]

Each of these examples of injustice against women serves as a backdrop for another example of women receiving short shrift in the churches and courts: the reluctance to recognize the problem of clergy sexual misconduct as one worthy of a remedy.

III. CLERGY SEXUAL MISCONDUCT

A. *Churches Respond to Problem*

The magnitude of the clergy sexual abuse epidemic is no secret in the public press or in recent surveys of clergy. Surveys consistently show that between ten and thirty-eight percent of clerical respondents report some level of sexual contact with a congregant.[87] The pervasiveness of the problem is

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83. In the case of Senator Packwood, the first charges were made three years before his resignation. *See* Christine Gonzalez & Roger O. Crockett, *Gender in the Workplace After Packwood, Companies Relocate with Awareness*, PORTLAND OREGONIAN, Sept. 9, 1995, at C7. Senator Packwood had vowed to fight the charges and only after pressure from within the Republican party, for reasons which had little to do with the clear merits of the women's case, was he forced to resign. *Id.*

84. *See* MACKINNON, *supra* note 77, at 83-90.

85. *See id.*

86. FORTUNE, IS NOTHING SACRED, *supra* note 5, at 82, 104-05.

87. Surveys of 300 clergy from four U.S. Christian denominations (Assemblies of God, Episcopal Church U.S.A., Presbyterian Church U.S.A., and United Methodist), reported that 38% admitted to some form of sexual contact with a member of their congregation, and 12% admitted to having sexual intercourse with a congregant. An astonishing 76% said they knew of another clergy member who had engaged in sexual intercourse with a congregant. Alison Mayes, *Crossing the Line*, CALGARY HERALD, Sept. 19, 1992, at 14; *see also* Eric Frazier, *Churches are Seeking Ways to Curb Clerical Misconduct*, POST & COURIER, Dec. 11, 1994, at F9; Mike Wilson, *The Wrong Kind of Relationship*, ST. PETERSBURG TIMES, May 17, 1995, at 1D. A mail survey of 80 pastors, conducted by the Center for Ethics and Social Policy of the Graduate Theological Union in Berkeley, revealed that approximately 10% of the respondents admitted to having a sexual relationship with a church member. David Briggs, *Churches Become More Aware of Sexual Misconduct by Clergy*, L.A. TIMES, Mar. 31, 1990, at F14. Furthermore, according to another Christian magazine survey, one in ten pastors (12%) admitted to having sexual affairs outside their marriages; one in five (18%) admitted to some form of sexual contact with someone other than spouses. *Id.* The majority (69%) became involved with congregants, church staff or counselees. *Id.* Although the high-profile cases have involved children, the majority of cases reported to the

just being recognized by the church hierarchy.[88] Reports from other countries confirm that this problem is not unique to the United States or to Christianity but, rather, transcends denominational and geographic boundaries.[89]

Reports of sexual improprieties and litigation have had a severe financial impact on churches, and have led to questioning of their moral authority.[90] In response, many churches have begun to develop policies to deal with sex abuse by clergy.[91] This contrasts with the initial response of churches—one

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Baptist Union of Western Canada, in Calgary, involve adults. Kim Lunman, *Adults Suffering Bulk of Sexual Abuse*, CALGARY HERALD, Sept. 24, 1994, at A8. Sexual involvement by female ministers with male counselees is rare; the majority of cases reported in the United Church in Edmonton involved female victims. *Id.* A policy report of the Presbyterian Church (U.S.A.) reported that "between 10 and 23 percent of clergy nationwide have engaged in sexualized behavior or sexual contact with parishioners, clients or employees . . . within a professional relationship." *Presbyterians Adopt Guidelines to Curb Sex Misconduct by Clergy*, N.Y. TIMES, June 12, 1991, at A20. According to A.W. Richard Sipe, a Baltimore psychotherapist and former priest who has studied the sexual activities of the clergy since 1960, at any one time 20% of Roman Catholic priests are involved in sexual relationships with women. Joanne Wojcik, *Church Scandals Prompt Action; Risk Management Strategies Adopted by Several Dioceses*, BUS. INS., Jan. 3, 1994, at 1. A study released in 1990 by the Park Ridge Center for the Study of Health, Faith and Ethics, in Chicago, claimed that one in every ten clergy has had an affair, while one in four has had sexual contact with members of the congregation. John Dart, *Churches Move Toward Reducing Sexual Misconduct by Clergy*, L.A. TIMES, July 13, 1991, at F18. Twelve percent of 300 ministers surveyed by *Christianity Today* magazine admitted to committing adultery. Of those, 39% admitted to such behavior with a church member, 17% with a person being counseled, and 13% with a staff member. White, *supra* note 19, at E6.

88. Briggs, *supra* note 87, at F14.

89. Documented reports of clergy sexual misconduct come from all four corners of the globe, and transect all religions. *See, e.g.*, Bob Harvey, *Harassment in Church; Various Denominations Come to Grips with Growing Crisis*, OTTAWA CITIZEN, July 13, 1991, at E10 (describing a survey of female clergy and female students in theological colleges within the United Church in Canada which revealed that about a third of them reported experiencing sexual harassment within the church). Lee S. Hua, *Sex-scandal Monk Quits, But Insists He is Innocent*, STRAITS TIMES, Apr. 21, 1995, at 21 (describing the scandalous sexual behavior of Buddhist monk Phra Yantra Amaro Bhikku, that "prompted a near crisis of faith in Buddhist Thailand"); Tim McGirk, *All Kinds of Monkey Business*, THE INDEPENDENT (London), Nov. 12, 1995, at 18, 19; Kevin Myers, *The Face Behind Ireland's Turmoil*, THE DAILY TELEGRAPH (London), Nov. 17, 1994, at 17 (documenting the "sex abuse crisis" in the Catholic Church in Ireland); Michael Rotem, *Rabbi Starts 6 Months in Jail for Sex Abuse*, JERUSALEM POST, Jan. 1, 1991, at 02 (documenting a rabbi convicted of committing obscene sexual acts, fraud, and breach of trust after molesting a woman during counseling related to an alimony matter); David Ward, *Churchgoers "Betrayed" by Rave Vicar*, GUARDIAN (London), Aug. 24, 1995, at 005 (documenting the rise and fall of British "rave" vicar Chris Brain, who is alleged to have sexually abused more than 20 women during healing sessions at Brain's home). More than 25% of female students at a Mennonite bible college in Winnipeg reported sexual abuse within the church during the previous year, ranging from fondling to forced sex. Harvey, *Harassment in Church*, at E10; *see also Misconduct Will Join Any Denomination*, ORLANDO SENTINEL, May 24, 1992, at A13 (stating that the Rev. Marie Fortune, after examining over 700 cases of clergy sexual abuse, has found no denominational pattern).

90. One journalist estimates that the Roman Catholic Church paid more than a half billion dollars in medical and legal costs from 1982 to 1992. Carol McGraw, *Casualties Abound When Priests Stand Accused*, ORANGE COUNTY REG., Oct. 24, 1994, at A01. A study conducted for the National Conference of Bishops in 1984 estimated that litigation could eventually cost $1 billion. *Id.*

91. John D. Vogelsang, *Reconstructing the Response to Clergy Sexual Abuse*, Q. REV. 3-10 (Winter 1993). Vogelsang identifies five models used by church officials to understand and respond to sexual abuse within the church: the first model sees abuse as "sexual sin"; the second views it as the act of a disturbed individual, a sociopath, or sexual addict; the third is the therapeutic model, with both complainant and accused categorized as products of dysfunctional

of denial and attacking the accusers in an attempt to avoid a scandal.[92] The Presbyterian Church (U.S.A.) General Assembly adopted guidelines in 1991 for use in the national office and as a model for individual presbyteries.[93] The United Methodist Church is training bishops, pastors, and district superintendents to deal with cases of sexual abuse and avoid sexual harassment.[94] The North Georgia Conference of the United Methodist Church's Pastoral Care Symposium, held in November of 1993, focused on "sexuality and the ministry," and the North and South Georgia conferences have held crisis management workshops, which included discussion of the clergy's sexual transgressions with parishioners.[95] Reform Jewish rabbis added new warnings against even the "appearance of sexual impropriety" to their revised code of ethics at a June 1991 meeting in Florida.[96]

In the Roman Catholic Church, celibacy is an integral aspect of the priesthood, yet, there are estimates that at least fifty percent of the clergy are not celibate at any given time.[97] The Archdiocese of St. Paul and Minneapolis has promulgated a policy on sexual misconduct by the clergy and church employees, which is explained in a videotape and booklet sent to every Roman Catholic household in the Archdiocese.[98] The Roman Catholic Archdiocese of

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families; the fourth sees the clergy as having betrayed a professional relationship; and the fifth subscribes to the theory that sexual abuse in the clergy/congregant relationship is a "manifestation of the culturally condoned abuse of power and sexuality perpetrated by men on women and children." *Id.*

92. *See, e.g.*, Moses v. Diocese of Colo., 863 P.2d 310, 318 (Colo. 1993), *cert. denied*, 114 S. Ct. 2153 (1994).

93. *Presbyterians Adopt Guidelines to Curb Sex Misconduct by Clergy*, N.Y. TIMES, June 12, 1991, at A20. General Assembly guidelines include a definition of misconduct, theological and ethical reflection, guidelines for adjudicating cases, responses to victims and congregations, employment and reporting procedures, description of a sexual misconduct response team, and sample complaint-processing documents. Thomas S. Giles, *Coping with Sexual Misconduct in the Church*, CHRISTIANITY TODAY, Jan. 11, 1993, at 48.

94. Stuart Vincent, *Policy on Sex Abuse Complaints*, NEWSDAY, Feb. 24, 1994, at 39; *see also* Virginia Culver, *Methodists to Form Sex Conduct Team*, DENVER POST, June 7, 1994, at B-01 (discussing efforts of the Regional United Methodists to form "intervention and response" teams).

95. Celia Sibley, *Churches Forging Policies on Clergy Sexual Misconduct*, ATLANTA J. & CONST., Nov. 18, 1993, at A15.

96. Dart, *supra*, note 87, at F18.

97. Kay Longcope, *Sex Cases Put Celibacy Back in Spotlight*, BOSTON GLOBE, May 30, 1992, at 1. A. W. Richard Sipe, a psychologist from Johns Hopkins University, conducted a 25-year study which was released in 1990, and which revealed rates of celibacy in the church. *Id.* Sipe, a former Benedictine monk, estimates that more than half of the 53,000 Roman Catholic priests in the United States are breaking their vow of celibacy. Of those, about 28% are engaged in long term relationships with women, while 10-13% are involved with men. He estimates that nearly six percent are involved with adolescents—usually boys. Critics of Dr. Sipes point out that many of the clergy interviewed for his study were already in therapy, so that the claimed percentages are skewed and not representative of "typical" clergy. *See* Anastasia Toufexis, *What to do When Priests Stray*, TIME, Sept. 24, 1990, at 79.

98. Martha Sawyer Allen, *Archdiocese Expands Its Policy on Sexual Misconduct; Document Will Go to All Catholics*, STAR TRIBUNE, Nov. 6, 1992, at 1A. The video includes vignettes showing appropriate and inappropriate behavior, and provides information to the viewer regarding reporting instances of abuse. *Id.* The policy includes performing background checks on all of the Church's 4,000 employees, as well as providing an "advocate" system to facilitate the reporting of incidents of abuse. *Id.* Additionally, the policy clearly defines "sexual harassment," "exploitation," and "abuse" so as to provide a sense of clarity on appropriate boundaries and behaviors. *Id.* The Twin Cities archdiocese has been considered a leader within the church on this issue, as they have

Chicago has instituted a toll-free hot line and an independent panel composed of laymen to handle complaints of sexual abuse by priests.[99] The Roman Catholic Diocese of Joliet added lay people to the investigating team in order to address the suspicion that church officials probing sexual misconduct by clergy cover up the truth.[100] Two Roman Catholic dioceses in Ohio depend on police checks to look into the backgrounds of priests and lay workers.[101] Recently, the Roman Catholic Diocese of Sacramento released its procedures for handling sexual misconduct of its employees, to be made available to anyone who wants a copy.[102] The Catholic Diocese of Pittsburgh has established a policy to deal with sexual misconduct of clerics.[103] The policy creates a comprehensive administrative process under which an assessment board consisting of laity and priests evaluates the credibility of an accusation, and recommends to the bishop the retention or dismissal of the accused. It encourages victims to report the alleged abuse to the proper civil authorities.[104] The Roman Catholic Archdiocese of New York has instituted a similar policy of advising all complainants that any issues may be reported to legal authorities.[105] The New Mexico Archdiocese established a four-step risk management program and installed a toll-free line for victims to call to register confidential complaints.[106] It also formed a lay commission which includes non-Catholics, a victim, the parent of a victim, and several therapists, to investigate past, present, and future claims of clergy misconduct.[107]

Episcopal dioceses in New England require priests to fill out background questionnaires.[108] Religious leaders hope the checks will restore confidence in the church.[109] Some insurance companies are requiring these measures before giving churches coverage for sexual misconduct.[110] The Episcopal

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had a policy on sexual abuse since 1988. *Id.* However, in 1990, a jury awarded $2 million (later reduced in *remittitur*) to one of the victims of Thomas Adamson, a former priest in the archdiocese who was accused in the early 1980s of abusing at least six boys while he was a priest in the 1970s. *Id.* This has been an expensive lesson for the archdiocese, not only in terms of money, but also resulting in a tarnished public image.

99. Larry Witham, *Sex Scandals Lead Churches to Reassess Their Counseling Role,* WASH. TIMES, Sept. 22, 1992, at A5; *see also Archdiocese Issues Report on Sexual Abuse by Priests,* REUTERS (North American Wire), June 15, 1992 (outlining the recommendations of Chicago archdiocese, including an independent nine-member review board consisting in part of laypersons, a professional caseworker to deal with all allegations of sexual misconduct, and a mandatory program of intensive and continuing therapy for guilty priests).

100. Andrew Herrmann, *Diocese to Add Laity in Sex Abuse Probes,* CHICAGO SUN-TIMES, Oct. 29, 1993, at 14; *see also Archdiocese Issues Report on Sexual Abuse by Priests, supra* note 99.

101. Bill Lindelof, *Churches Screen Clergy for Scandal,* SACRAMENTO BEE, Aug. 11, 1995, at B1.

102. *Diocese Formulates Sex Policy,* SACRAMENTO BEE, Apr. 3, 1995, at B1.

103. *Diocese Revises Policy on Sexual Abuse by Clergy,* PR NEWSWIRE, Mar. 11, 1993.

104. *Id.*

105. An advisory board composed of four priests and eight lay people with backgrounds in psychiatry, social work, law, and communications will review overall policy and procedures. Peter Steinfels, *Policy is Issued on Investigating Abuse by Priests,* N.Y. TIMES, July 2, 1993, at A1.

106. Wojcik, *supra* note 87, at 1.

107. *Id.*

108. *See, e.g., Priests Undergo Background Checks,* DAYTON DAILY NEWS, Aug. 8, 1995, at 1A.

109. *See, e.g., id.*

110. *Background Checks Extended to Clergy,* PHOENIX GAZETTE, Aug. 8, 1995, at A2.

Diocese of Southwest Florida, in 1994, issued a written policy on sexual misconduct. The thirty-three-page document gives plain-spoken advice to priests who counsel parishioners.[111] The Diocese of Long Island has developed guidelines for churches within the diocese.[112] In Minnesota, a statewide interfaith committee has been developed to deal with sexual exploitation by clergy.[113] Furthermore, in 1994, the Episcopal Church's General Convention passed strict new procedures for the trial and discipline of clerics accused of misconduct.[114] Some Lutheran churches are also doing background checks on new pastors and requiring ministers to attend seminars on sexual harassment.[115] The North Carolina Synod of the Evangelical Lutheran Church has begun "study days" for church leaders, geared toward prevention of misconduct and toward helping clergy learn to take care of themselves.[116] The Christian Reformed Church, Church of the Brethren, and Mennonite Brethren, and United States Conference have adopted similar policies.[117] The Mennonite Church, Congregation Leadership Office, has published guidelines for disciplining clergy for sexual and other transgressions.[118] Southern Baptists are beginning to keep records on clerics' sexual improprieties, on moral grounds and because of possible litigation.[119]

Among the questions being asked are:

(i) Have you ever been charged or adjudicated with sexual misconduct?

(ii) Do you have a history of drug abuse?

(iii) Have you ever been charged with misappropriating funds?

Id. The responses are then forwarded to a Minnesota records company, which then verifies them with the references the ministers also are asked to provide. *Id.*

111. Wilson, *supra* note 87. The plain-speaking manual includes advice on ways to minimize the risk inherent in private meetings: "One seasoned priest has a corner in the local Denny's to meet certain people for coffee. The waitresses know how to make themselves scarce so a private conversation can happen." *Id.* Additionally, the policy recommends that priests "should be prudent about self-disclosure, especially around sexual or highly personal matters," because "it is easy for people to misinterpret." *Id.* "Finally, the policy urges priests to 'use care when exchanging the Peace'—in other words, hug someone only when it is clear that a hug is welcome." *Id.*

112. J. Michael Parker, *Episcopalians Tighten Policy on Clergy Sexual Misconduct*, SAN ANTONIO EXPRESS-NEWS, Sept. 3, 1994, at 19A. Robert Royce of the Diocese of Long Island characterized the changes, effective as of January 1, 1996, as having dragged the Episcopal Church "kicking and screaming into the modern era." *Id.* The major focal point of change involved eliminating the statute of limitations for charges of sexual abuse of people under the age of 21. *Id.* The revisions also increase the period available to file suit for those over the age of 21. Jim W. Jones, *Episcopal Misconduct Code Revised*, FT. WORTH STAR-TELEGRAM, Sept. 1, 1994, at 6. Revisions also state guidelines on who has standing to file a complaint, including the victim, the victim's spouse, the victim's parents, and groups of clergy. *Id.* Additionally, the position of "church advocate" is created, whose role is to aid the victim in interpreting the church's disciplinary process. *Id.*

113. *See* Woodward & King, *supra* note 6, at 48.

114. *Clergy Discipline Procedures Revised*, ORLANDO SENTINEL, Sept. 3, 1994, at D9.

115. Wendy Hundley, *Churches Eye Ways to Deal With Clergy Misconduct*, DAYTON DAILY NEWS, Sept. 3, 1994, at 6C.

116. Flo Johnston, *Sexual Crimes by Clergy Addressed—Lutherans Adopt Procedures, Policies*, DURHAM HERALD-SUN, July 2, 1994, at C1.

117. Giles, *supra* note 93, at 48.

118. MENNONITE BOARD OF CONGREGATIONAL MINISTRIES, GUIDELINES FOR DISCIPLINE REGARDING MINISTERIAL CREDENTIALS (2d ed. 1993).

119. Sibley, *supra* note 95, at A15.

Reverend Marie Fortune, an expert in the prevention of sexual and domestic violence, conducts workshops for clergy on sexual misconduct.[120] She sees the counseling relationship as fraught with potential dangers. She recommends written policies that spell out the professional conduct expected of clergy and the consequences of violating the agreement.[121] Priests engaged in long-term counseling should be supervised and held professionally accountable in a manner similar to psychologists, social workers, and doctors.[122] Some large denominations have instituted rules regarding the counseling situation, such as recommending ministers counsel a person only three times, and that all counseling be done during working hours at the church.[123] Other safeguards include making sure there is a window in the counseling room, and some have gone as far as to ban all opposite-sex counseling.[124]

Often, however, the church is unwilling or unable to address this problem because of its own shortcomings. In *Moses v. Diocese of Colorado*,[125] church fathers tried to silence the victim to preserve the integrity of the "old boy network" and the reputation of a minister who was considered "bishop material."[126] In many instances, priests who had committed sexual abuse returned from brief rehabilitation sessions to other parishes whose parishioners were not aware of their histories.[127] If a minister embezzled money from his church, it is unlikely that the hierarchy would recommend him to another church, yet, as *Moses* illustrates, there are routine "cover-ups" of actions viewed as mere sexual peccadillos. The interests of the woman should not be subordinate to the interests of the church in protecting the priest engaged in the misconduct.

B. *Judicial Treatment of Clergy Malpractice Claims*

The seminal case of clergy malpractice is *Nally v. Grace Community Church of the Valley*.[128] The facts of *Nally* are very different from the cases discussed in this article. *Nally* involved a wrongful death action filed against the church and its pastors by the parents of a young man who committed suicide after receiving informal counseling from the church.[129] The plaintiffs asserted that the defendants were negligent in failing to prevent the suicide, and had engaged in outrageous conduct.[130] The defendants claimed that as pastoral counselors, not professional, medical or psychiatric counselors, no

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120. *See* FORTUNE, IS NOTHING SACRED, *supra* note 5.
121. *See id.* at 135-153.
122. Mayes, *supra* note 87, at 14.
123. Virginia Culver, *Sex Lawsuits Force Changes in Churches*, DENVER POST, May 1, 1994, at A-01.
124. *Id.*
125. 863 P.2d 310, 316 (Colo. 1993), *cert. denied*, 114 S. Ct. 2153 (1994).
126. *Moses*, 863 P.2d at 42.
127. *See* Culver, *supra* note 123.
128. 763 P.2d 948 (Cal. 1988).
129. *Nally*, 763 P.2d at 950-51.
130. *Id.* at 952-53.

duty was owed to the plaintiff.[131] The court correctly declined to impose a duty to refer difficult cases to professional counselors on the defendants, allegedly fearful of stifling all gratuitous or religious counseling.[132] Although many courts have addressed the question of whether a separate cause of action exists for the malpractice of a member of the clergy while acting in a clerical capacity, no court has allowed recovery under this theory.[133] Some courts have held that the tort of clergy malpractice does not exist,[134] while others have found that no clergy malpractice had been committed under the specific facts of the case.[135] After *Nally,* claims against clergy for sexual misconduct and negligent counseling steadily increased.[136] Furthermore, as churches nationwide become more involved in the personal, spiritual and psychological lives of parishioners, and more clergy provide pastoral counseling, these claims are expected to multiply.[137]

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131. *Id.* at 950.

132. The *Nally* court considered these barriers under the heading of "public policy considerations." *Id.* at 959. Specifically, the court stated:

> Imposing a duty on defendants or other nontherapist counselors to . . . insure their counselees [are also] under the care of psychotherapists, psychiatric facilities, or others authorized and equipped to forestall imminent suicide, could have a deleterious effect on counseling in general. . . . [T]he indeterminate nature of liability . . . could deter those most in need of help from seeking treatment out of fear that their private disclosures could subject them to involuntary commitment to psychiatric facilities.

Id. at 960. The *Nally* Court also saw constitutional barriers to the imposition of liability:

> Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, 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 the particular denomination or ecclesiastical teachings of the religious entity.

Id.

In his concurrence, Justice Kaufman discounted both "public policy" concerns. Specifically, as to the constitutional objections, he found that the compelling state interest in preserving the lives of would-be suicides justified sanctioning tort recovery for non-religiously motivated actions that occur within the scope of a pastoral counseling relationship. *Id.* at 969-70. "'Good faith and reasonable conduct are the necessary touchstones to any qualified [First Amendment] privilege that may arise from any invited and religiously directed family counseling, assistance, or advice.'" *Id.* at 970 (quoting Carrieri v. Bush, 419 P.2d 132, 137 (Cal. 1966)).

133. Destefano v. Gabrian, 763 P.2d 275, 285 n.11 (Colo. 1988); *see also* Handley v. Richards, 518 So. 2d 682 (Ala. 1987); Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993), *cert denied,* 114 S. Ct. 2153 (1994); Schieffer v. Catholic Archdiocese, 508 N.W.2d 907 (Neb. 1993); Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991); Strock v. Pressnell, 527 N.E.2d 1235 (Ohio 1988). Several courts have refused to recognize a cause of action for clergy malpractice. *See* Isely v. Capuchin Province, 880 F. Supp. 1138 (E.D. Mich. 1995); Rita M. v. Roman Catholic Archbishop, 232 Cal. Rptr. 685 (Cal. Ct. App. 1986); Fontaine v. Roman Catholic Church, 625 So. 2d 548 (La. Ct. App. 1993); Hester v. Barnett, 723 S.W.2d 544 (Mo. Ct. App. 1987); Jones v. Trane, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992); Lund v. Caple, 675 P.2d 226 (Wash. 1984). *But see* Sanders v. Casa View Baptist Church, 898 F. Supp. 1169 (N.D. Tex. 1995) (recognizing a cause of action in malpractice against a cleric acting in the capacity of a marriage counselor); Maryland Casualty Co. v. Harvey, 887 F. Supp. 195 (C.D. Ill. 1995).

134. John F. Wagner, Jr., Annotation, *Cause of Action for Clergy Malpractice,* 75 A.L.R.4th 752, 753-54 (1990).

135. *Id.* at 754-55; *Strock,* 527 N.E.2d at 1239; *Hester,* 723 S.W.2d at 551; *Byrd,* 565 N.E.2d at 587.

136. Fain, *supra* note 10, at 99.

137. *Id.* Pastoral counseling has been described as "the use by clergy of counseling and psychotherapeutic methods to enable individuals, couples, and families to handle constructively their personal crises and problems in living. Pastoral counseling draws on insights from

1. Clergy Sexual Misconduct as An Amatory Action

Cases like *Nally* are difficult ones, since questions concerning the content of the counseling pose constitutional problems, in particular the First Amendment Religion Clause, Establishment Clause, and free speech concerns. *Nally*, however, is not the typical case; far more common are cases alleging sexual misconduct. A plethora of cases are filed by men[138] who allege that the defendant pastor developed a sexual and romantic relationship with the plaintiff's wife during marital counseling. *Strock v. Pressnell*[139] is typical of cases involving husband plaintiffs. Courts frequently dismiss these cases as amatory actions[140] which are barred by statute.[141] In *Strock v Pressnell*, for example, the court refused to recognize the tort of clergy malpractice under the facts given, because the "alleged acts of Pressnell fell within the realm of intentional tort law, i.e., amatory actions—not malpractice."[142] The *Strock* court dismissed the plaintiff's claims as an attempt to circumvent the ban on amatory actions, and held that no legal right existed. "Indeed, a fundamental principle of the law of all torts is that a legal right must exist and that this right must be violated in order to warrant redress."[143] The *Strock* court also

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contemporary understanding of human personality, therapeutic methods from current counseling approaches, and scriptural and theological resources." *Id.* at 103-04 (*quoting* Patrick I. Shea, *Constitutional Issues Involved in Regulation of Spiritual Counseling and the Duty to Train*, 1990 ABA TORT AND RELIGION F4).

138. *See, e.g.*, Cherepski v. Walker, 913 S.W.2d 761 (Ark. 1996); Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988); Roppollo v. Moore, 644 So. 2d 206 (La. Ct. App. 1994); Greene v. Roy, 604 So. 2d 1359 (La. Ct. App. 1992); Hester v. Barnett, 723 S.W.2d 544 (Mo. Ct. App. 1987); Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907 (Neb. 1993); Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991); Bladen v. First Presbyterian Church of Sallisaw, 857 P.2d 789 (Okla. 1993).

139. 527 N.E.2d 1235 (Ohio 1988). A husband brought suit against a minister of the Lutheran Church for clergy malpractice, breach of a fiduciary duty, fraud, misrepresentation, nondisclosure, and intentional infliction of emotional distress. *Strock*, 527 N.E.2d at 1236. The church was also a defendant based on agency principles, and claims of negligent supervision and training of Pressnell. *Id.*

140. The group of actions termed amatory actions includes criminal conversation, seduction, alienation of affection, and breach of promise to marry. *See infra* notes 150-76 and accompanying text.

141. *See, e.g.*, ALA. CODE § 6-5-331 (1975); COLO. REV. STAT. § 13-20-202 (1987); DEL. CODE ANN. tit. 10, § 3924 (1974); D.C. CODE ANN. § 16-923 (1981); MONT. CODE ANN. § 27-1-601 (1995); OHIO REV. CODE ANN. § 2305.29 (Anderson 1995); VA. CODE ANN. § 8.01-220 (Michie 1992); WYO. STAT. § 1-23-101 (1977).

142. *Strock*, 527 N.E.2d at 1239. "For clergy malpractice to be recognized, the cleric's behavior . . . must fall outside the scope of other recognized torts. It is clear . . . that clergy malpractice is distinct from an intentional tort, since the latter claims are currently actionable against clergymen regardless of their 'professional nature.'" *Id.* (citations omitted). The Ohio Supreme Court left open, however, the possibility of maintaining an action for clergy malpractice with the suitable facts. "This opinion should not be read as precluding an action, against a counselor, pastoral or otherwise, in which a counselor is negligent in treating a patient. This opinion is limited to the narrow holding that clergy malpractice is not a viable cause of action under the facts of this case." *Id.* at 1240 n.5. "Moreover, we are unaware of any authority supporting the proposition that sexual abuse by a member of the clergy is cognizable as 'clergy malpractice.'" *Id.* The court also ruled on the constitutionality of an Ohio statute which abolished amatory actions, stating that it does not violate the Ohio Constitution or the Equal Protection or Due Process Clauses of the Fourteenth Amendment to the United States Constitution. *Id.*; *see also* Schmidt v. Bishop, 779 F. Supp. 321, 325 (S.D.N.Y. 1991) ("'[O]nce intentional offensive conduct has been established, the actor is liable for assault and not negligence.'") (quoting Mazzaferro v. Albany Motel Enters., 515 N.Y.S.2d 631, 632 (N.Y. App. Div. 1987)).

143. *Strock*, 527 N.E.2d at 1243. The *Strock* court stated:

relied on the view that in order to recognize a cause of action for clergy malpractice, the cleric's behavior must fall outside the scope of other recognized torts.[144] Because Strock's injury resembled an amatory injury, the court ignored his allegation that the breach of trust had caused immeasurable damage to his marriage relations and his personal psyche.[145] The Ohio Supreme Court reinstated the trial court's order granting the defendants' motion to dismiss.[146]

The *Strock* plaintiff's damage and the violation alleged were not a "heart balm,"[147] despite the court's view.[148] It was a breach of trust by a clerical counselor who had been expected to act in the best interests of his clients—both wife and husband. The *Strock* court missed an opportunity to set important public policy. The question before it was not one of moral relativism, nor was it an issue of disgrace visited upon the family. The imposition of civil liability would have a deterrent effect on this type of relationship, which is abusive and manipulative, rather than a matter of the heart. Whether the behavior results in harm to the husband or the wife, the plaintiff should be able to recover against the cleric for the misconduct.

Courts have followed a policy of dismissing many actions brought by wives or husbands who began counseling with a priest who subsequently engaged in a sexual relationship with the wife.[149] Courts rejecting these claims are usually relying on the abolition of amatory action torts such as criminal conversation,[150] seduction,[151] alienation of affection,[152] and

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> Because OHIO R.C. 2305.29 abolished the torts of alienation of affections and criminal conversation, any legal right that a spouse may have had under these common law actions has been abrogated and, thus, there can be no violation of a nonexistent right. Therefore, [the defendant] is not liable for breach of fiduciary duty, fraud, misrepresentation, or nondisclosure.

Id. at 1244. It is unclear why the court focused on the instrumentality of the injury rather than the specific duties and rights being violated.

144. *Id.* at 1239; *see also* Byrd v. Faber, 565 N.E.2d 584, 587 (Ohio 1991) (expressing concern that "through the creative use of tort law, appellees may recover several times for the same injury"); Hester v. Barnett, 723 S.W.2d 544, 551 (Mo. App. 1987) (stating that "to avoid a redundant remedy, . . . any functional theory of clergy malpractice needs [to] address incidents of the clergy-communicant relationship not already actionable").

145. *Strock*, 527 N.E.2d at 1239-42.

146. *Id.* at 1244.

147. *Id.* at 1242.

148. "In fact, the special relationship existing between Pressnell and appellant in the instant action is what distinguishes this case from a common amatory action." *Id.* at 1246 (Sweeney, J., dissenting). In his well reasoned contrast between amatory actions and breach of fiduciary duty, Judge Sweeney noted:

> Here, the couple's minister, under guise of offering pastoral counseling services, abused the trust placed in him. This trust was the *raison d'etre* of the relationship. It is also what distinguishes this case from those which the legislature intended to abolish when it did away with amatory actions. This distinction also applies to Strock's claim of misrepresentation—this was not your average lover's ruse.

Id. at 1246 (quoting Strock v. Presnell, Nos. 4127, 4146, 1987 WL 14434, at *6 (Ohio Ct. App. July 15, 1987) (Cacioppo, J., dissenting in part and concurring in result)).

149. *See, e.g.*, Handley v. Richards, 518 So. 2d 682 (Ala. 1987) (Maddox, J., concurring; majority affirming dismissal on unstated grounds); Roppolo v. Moore, 644 So. 2d 206 (La. Ct. App. 1994); Greene v. Roy, 604 So. 2d 1359 (La. Ct. App. 1992); Strock v. Presnell, 527 N.E.2d 1235 (Ohio 1988); Bladen v. First Presbyterian Church, 857 P.2d 789 (Okla. 1993).

150. Criminal conversation is essentially defined as the sexual intercourse of an outsider with

breach of a promise to marry.[153] The courts have, in effect, abolished torts where the injury incidentally or expressly involves a sexual act. One of the concerns expressed is that this is a "slippery slope," where liability based on sexual misconduct will lead to the establishment of liability in the *Nally*-type case.[154] This emphasis is misplaced. The courts should not be concerned with the sexual nature of the act, but with whether the act involved a breach of a fiduciary duty owed by the pastor toward his parishioner.[155] That misconduct is the gravamen of the clergy malpractice claim.

The rationale behind the amatory torts was that one's affection was a property interest, the loss of which had a pecuniary value recoverable under tort law.[156] Some have speculated that the laws "developed . . . as an offshoot of the action for enticing away a servant and depriving the master of the quasi-proprietary interest in her services."[157] Eventually parents, employers, or spouses could all sue for seduction, assuming that the "seducee" had previously been chaste and of some service to the plaintiff.[158] At early

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a husband or wife. BLACK'S LAW DICTIONARY 373 (6th ed. 1990). The Supreme Court apparently felt strongly about the importance of the action when it stated:

> Many of the cases hold that the essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife and to beget his own children. This is a right of the highest kind, upon the thorough maintenance of which the whole social order rests, and in order to the maintenance of the action it may properly be regarded as a property right.

Tinker v. Colwell, 193 U.S. 473, 484 (1904).

151. "Seduction [is] 'the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles which are calculated to have, and do have, that effect and resulting in her ultimately submitting . . . . to the sexual embraces of the person accused.'" Cotton v. Kambly, 300 N.W.2d 627, 628 (Mich. Ct. App. 1980) (quoting Savage v. Embrey, 184 N.W. 503, 505 (Mich. 1921)); *see also* Destefano v. Grabrian, 763 P.2d 275, 282 (Colo. 1988) (quoting Weinlich v. Coffee, 176 P. 210 (Colo. 1919) ("Seduction is 'the act of a man in enticing a woman to have unlawful intercourse with him by means of persuasion, solicitation, promise, bribes, or other means without the employment of force.'")).

152. This tort involves an adulterer encouraging a spouse to leave the plaintiff, and is a step removed from "criminal conversation." *See Destefano*, 763 P.2d at 279 & n.3.

153. Stanard v. Bolin, 565 P.2d 94, 96 (Wash. 1977). That court described the cause of action:

> The breach-of-promise-to-marry action is one not easy to classify. Although the action is treated as arising from the breach of a contract . . . , the damages allowable . . . resemble a tort action. Thus, . . . [one can] recover for loss to reputation, mental anguish, and injury to health, in addition to recovering for expenditures made in preparation for the marriage and loss of pecuniary and social advantages which the promised marriage offered.

Id.

154. Schmidt v. Bishop, 779 F. Supp. 321, 328 (S.D.N.Y. 1991).

155. *See* Dausch v. Rykse, 52 F.3d 1425, 1429 (7th Cir. 1994) (affirming district court's dismissal of breach of fiduciary duty claim because it "was simply an elliptical way to state a clergy malpractice claim, a cause of action that it had already held to be not recognized in Illinois").

156. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 915-16 (5th ed. 1984).

157. *Id.*; *see also* Magierowski v. Buckley, 121 A.2d 749, 753 (N.J. Super. Ct. App. Div. 1956) ("The wife and minor children were considered, in early common law, as superior servants of the husband and father. . . .").

158. The theory of recovery for all groups originated in the tort of "enticement," a common law reformulation of the ancient doctrine of "*per quod servitium amisit.*" *See* Cravens/Povock Ins. Agency v. Beasley Constr., 766 S.W.2d 309, 310-11 (Tex. Ct. App. 1989) (citing Francis Bowes

common law, a seduced female did not have a cause of action against her seducer because she was also engaged in the wrongful act, and because loss of service was indispensable to the plaintiff's right of recovery, based upon the relation of master to servant.[159] Later, the seducee herself got the statutory right to sue for the seduction, although the action was limited to unmarried females.[160]

States eventually began to pass statutes to abolish these common-law amatory actions. In many states, the legislative intent was to limit the abuses generated by a plaintiff using the cause of action for extortion purposes,[161]

Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 663 (1923)).

> This remedy originated in early Roman law when children, servants, and slaves were so closely identified with the domestic head of the house that an injury to them gave rise to an action by the pater familias, the male head of the house, who alone was entitled to recover for these damages.

Id. at 310. So scarce was labor during and after the Black Death in Europe, that a *statutory* right was created for employers allowing recovery for servants "enticed" away from their employment. KEETON ET AL., *supra* note 156, § 129 at 980.

The same "loss of services" rationale extended the cause of action to fathers, allowing them to sue their daughters' seducers for the loss of the daughters' services. For an excellent description of the evolution of the tort of seduction, see Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993). Ms. Larson points out that as the nineteenth century passed, daughters no longer possessed the same pecuniary interest for their fathers. "Urbanization and expanding wage labor opportunities took young women outside the home to work, eroding fathers' control over their daughters' activities. Many unmarried women gained unprecedented personal and economic independence by taking work in factories and domestic service, and some began to live apart from their families before marriage." *Id.* at 384.

159. Weinlich v. Coffee, 176 P. 210, 211 (Colo. 1919). In denying the plaintiff's action for seduction, the court stated:

> At common law a seduced female has no cause of action against her seducer, not only because she is a party to the wrongful act, but also because loss of service is indispensable to a right of recovery, and no one except those entitled to the services of the female can maintain an action for the seduction; the right of action being based solely upon the relation of master and servant.

Id. See also Welsund v. Schueller, 108 N.W. 483, 484 (Minn. 1906); Oberlin v. Upson, 95 N.E. 511, 512 (Ohio 1911). Even after statutes were passed allowing married women to sue in their own right (the Married Women's Acts), courts went to extremes to deny recovery to women for the alienation of their spouses' affection. Consider the following statement by the court in Duffies v. Duffies, 45 N.W. 522, 525 (Wis. 1890), in justifying denial of recovery to the wife:

> There are natural and unchangeable conditions of husband and wife that make that right radically unequal and different. . . . [The wife] is purer and better by nature than her husband and more governed by principle and a sense of duty and right, and she seldom violates her marriage obligations, or abandons her home, or denies to her husband the comforts and advantages of her society by any inducement or influence of others, without just cause. With the husband the case is different. . . . He is exposed to the temptations, enticements, and allurements of the world, which easily withdraw him from her society, or cause him to desert or abandon her. . . . The wife had reason to expect all these things when she entered the marriage relation, and her right to his society has all these conditions, and is not the same in "degree and value" as his rights to her.

Id. at 525.

160. Destefano v. Grabrian, 763 P.2d 275, 282 (Colo. 1988) (citing Weinlich v. Coffee, 176 P. 210, 211 (Colo. 1919)).

161. *See* Strock v. Pressnell, 527 N.E.2d 1235, 1240 (Ohio 1988). The court noted:

> [I]t is notorious that . . . [amatory actions] have afforded a fertile field for blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force a settlement. There is good reason to believe that even genuine actions of this type are brought more frequently than not with purely mercenary or vindictive motives; that

not a feminist aversion to "woman as property." The court in *Strock* speculated that an "increased societal interest in personal choice, the decriminalization of sexual activities in many states, and skepticism about the role of law in protecting feelings and enforcing highly personal morality" contributed to the passage of anti-heart balm statutes.[162]

2. Beyond Amatory Torts

In a vigorous dissent in *Strock v. Pressnell*,[163] Justice Sweeney contended that clerics should be held to the same duty of care as secular counselors by focusing on the behavior of the practitioner and not his religious or secular status.[164] He also pointed out that both religious and secular counselors would reject sexual relations as a viable treatment technique.[165] He regarded "clergy malpractice" to be a misnomer, and would have held "that a marriage counselor who engages in sexual relations with the spouse of a client seeking professional guidance may be answerable in damages for malpractice."[166]

One of the distinct difficulties faced by claimants is showing that the clergy malpractice claim is distinct from existing intentional tort and negligence claims, and has not been thrown in as a "catch all" claim.[167] Justice Sweeney responded to the court's assertion that the tort of clergy malpractice must fall entirely outside the scope of other defined torts:

> [T]he counselor-client relationship is the basis of the cause of action. It is because of this special relationship that liability results. The standard of care applicable to the relationship exists irrespective of any liability resulting from the negligent performance of acts arising

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> it is impossible to compensate for such damage which has derisively been called "heart balm"; that people of any decent instincts do not bring an action which merely adds to the family disgrace; and that no preventive purpose is served, since such torts are seldom committed with deliberate plan.

Id. (quoting KEETON ET AL., *supra* note 156, § 124, at 929 (5th ed. 1984)); *see also* Destefano v. Grabrian, 763 P.2d 275, 281 (Colo. 1988) (discussing the abuses perpetuated under alienation of affection, criminal conversation, seduction, and breach of contract to marry claims, and declaring a legislative intent that the best interests of the people of the state will be served by the abolition of these statutes).

162. *Strock*, 527 N.E.2d at 1240.

163. *Id.*

164. *Id.* at 1244.

165. *Id.* ("The method by which each would be qualified to perform his respective functions is wholly immaterial . . . , since, in either situation, sexual relations have never been an accepted mode of treatment.").

166. *Id.* at 1245.

167. Mark A. Anthony, *Through the Narrow Door: An Examination of Possible Criteria for a Clergy Malpractice Action*, 15 U. DAYTON L. REV. 493, 493-94 (1990); *see also* Hester v. Barnett, 723 S.W.2d 544, 551 (Mo. Ct. App. 1987) ("To avoid a redundant remedy, . . . any functional theory of clergy malpractice needs [to] address incidents of the clergy-communicant relationship not already actionable."). That is, the court would find that conduct fitting within assault and battery, intentional infliction of emotional distress, tortious interference with business relationships, or obtaining donations of money by fraud, would be carved out of conduct actionable for clergy malpractice.

in a context unrelated to the fulfillment of professional responsibilities.[168]

Thus, Justice Sweeney hurdled an obstacle that other courts found insurmountable: the foundation of the action is inextricable from the environment in which the harm occurs. It does not matter that the minister's acts, if committed privately, may historically have been amatory torts;[169] when a fiduciary or professional relationship exists and the fiduciary breaches his duty, the law should provide protection, as it has traditionally done. A minister who sleeps with a woman he is supposed to be counseling has abused the trust placed in him.[170] He should be held accountable for that breach of trust, whether by the husband whose marriage has been affected by the priest's malpractice, or the victim herself.

The Svengali-like influence of a manipulative priest, in a position of direct authority over the victim, does not permit an inference of a sexual relationship between consenting adults.[171] Sex between equals is very different from sexual contact between guardian and ward, yet the court in *Schmidt v. Bishop*[172] demonstrates the challenge faced by victims. Although conceding that a fiduciary relationship was "one founded upon trust or confidence reposed by one person in the integrity and fidelity of another,"[173] the *Schmidt* court failed to find a fiduciary relationship in a counseling

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168. *Strock*, 527 N.E.2d at 1245.

169. It might also be argued that the amatory actions enumerated in the statutes are the only ones abolished. *See Destefano*, 763 P.2d at 283, which stated:

> In interpreting [the statute], we must give effect to the policy considerations enumerated [therein], but should not read the statute so broadly as to preclude any cause of action involving extramarital affairs, regardless of whether a claim for relief which is not included in [the statute] is enumerated. In our view, the heart balm statute only precludes those causes of action specifically listed in the statute.

Id.

170. *Strock*, 527 N.E.2d at 1246.

171. Some courts take the view that despite the plaintiff's claims of emotional vulnerability, an action for intentional infliction of emotional distress against a clergy was subject to demurrer, because the actions involved conduct between "consenting adults." Schieffer v. Catholic Archdiocese, 508 N.W.2d 907, 910-11 (Neb. 1993). *But cf.* F.G. v. McDonell, 677 A.2d 258 (N.J. Sup. Ct. 1996) (noting that an allegation that a cleric had exploited vulnerabilities of adult counselee and induced her to engage in sexual acts was sufficient to state a claim of clergy malpractice).

172. 779 F. Supp. 321 (S.D.N.Y. 1991). In *Schmidt*, the plaintiff alleged that when she was 12 years old, Joseph Bishop initiated sexual contact which "did not involve rape or sexual intercourse, but . . . the crime of sexual abuse in the second degree, in violation of New York Penal Law § 130.60 . . . ." *Schmidt*, 779 F. Supp. at 324. He invoked God while sexually abusing Ms. Schmidt, assuring her that "the relationship was special and acceptable in the eyes of the Lord . . . ." *Id.* The counseling relationship and abuse continued for 28 years, and the plaintiff's affidavit states that during psychotherapy she "began to understand that the contact with Joseph Bishop was wrong, that he sexually abused [her] and that [she] suffered severe damage as a result of that abuse." *Id.* The court rejected the view that engaging in sexual contact during the counseling relationship amounted to malpractice, instead saying that it "clearly" supported an action for battery or "some similar intentional tort for which the statute of limitations is one year." *Id.* The court also asserted that "[e]ven if the court were to invite a trial jury to engage in the Constitutionally dubious task of setting a standard of reasonable care for clergymen engaged in counseling, the obstacle remains that New York courts have rejected uniformly such attempts to transmogrify intentional torts into negligence." *Id.*

173. *Id.* at 325 (quoting Penato v. George, 383 N.Y.S.2d 900, 904 (N.Y. Sup. Ct. 1976)).

relationship between the minister and plaintiff which began when she was twelve years of age. The court refused to hold the minister to a fiduciary standard, imposed as a matter of social policy; he had only a general duty not to violate the law.[174]

In *Roppolo v. Moore*,[175] the counselee committed suicide, in part, because of an adulterous affair she had with the defendant, a medical doctor and an Episcopal priest, when he was counseling her. In dismissing the woman's claim, the court stated:

> As there is no civil nor criminal prohibition against such conduct between adult laypersons, the State cannot penalize such conduct because Dr. Moore was an Episcopal priest. . . . To do so would require this Court to determine the standards of the Episcopal Church and then put the weight of the State behind those standards or to require a different standard of behavior of the clergy, neither of which is permissible.[176]

The *Roppolo* court failed to distinguish between the priest's negligence, which is unrelated to his status as a priest, and his breach of a fiduciary duty which is inextricable from that status. By invoking the First Amendment's Establishment and Free Exercise Clauses, the court promoted a policy whereby those who incidentally wear a collar may engage in civil wrongs without redress, even if the conduct complained of is not religious. The *Roppolo* court, like the court in *Schmidt*,[177] ignored the power exerted by a spiritual pastor over a parishioner when it alluded to conduct between "adult laypersons."[178] Both courts failed to distinguish consenting adults from someone engaged in a sexual relationship with a counselee. The courts must impose a fiduciary duty on ministers to abstain from sexual relationships with their parishioners. Further, this rule will put the bad actors among the profession on notice that, as a representative of the church, abuse of the parishioner's trust will not be tolerated.[179]

When the church is not involved, the courts have less difficulty finding liability for similar sexual misconduct. In *Roy v. Hartogs*,[180] the plaintiff

174. *Id.* at 325-26. The court so decided even though the plaintiff was sent to the defendant for "emotional, spiritual and familial counseling." *Id.* at 324.

175. 644 So. 2d 206 (La. Ct. App. 1994).

176. *Roppolo*, 644 So. 2d at 208 (citation omitted).

177. *Schmidt*, 779 F. Supp. at 325-26.

178. *See* discussion *infra* Part IV.B.

179. Consider the argument of Judge Cacioppo, in her dissent in *Strock v. Pressnell*: "Ironically, far from impeding religious liberty, allowing malpractice claims against prurient pastoral counselors reinforces the Church's own religious doctrine. . . . Imposing societal prohibitions of such conduct on a minister through the civil law does not restrict religious liberty, but actually enhances it." Strock v. Presnell, Nos. 4127, 4146, 1987 WL 14434, at *7 (Ohio Ct. App. 1987), *judgment aff'd in part, rev'd in part on other grounds sub nom* Strock v. Pressnell, 527 N.E.2d 1235, 1243 (Ohio 1988) (rejecting, among other things, breach of fiduciary duty as a viable cause of action)). Several courts have recognized breach of fiduciary duty in clergy sexual misconduct cases. *See* Sanders v. Casa View Baptist Church, 898 F. Supp. 1169 (N.D. Tex. 1995); Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993), *cert. denied*, 114 S. Ct. 2153 (1994); Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988).

180. 366 N.Y.S.2d 297 (N.Y. Civ. Ct. 1975).

alleged that her psychiatrist had engaged in a sexual relationship with her during a course of treatment.[181] Using consent as a defense, the defendant moved to dismiss the claim because the amatory action of seduction is no longer recognized as a valid cause of action. The court rejected that defense, noting that:

> It was never the intention of the legislature to outlaw all actions in which sexual intercourse is an element . . . . [W]here consent could not be given or where it was coerced as in cases of statutory rape, rape or where there was a fiduciary relationship between guardian and ward, there was always an action for damages on the case.[182]

Using the analogy of guardian and ward, the court determined that the consent of a vulnerable patient given to a psychiatrist, who is in the position of "overpowering influence and trust," is not a bar to the cause of action.[183] The breach of the fiduciary is unrelated to the "consent" of the ward.[184] The *Roy* court heralded a public policy rationale for the recognition of a cause of action for malpractice.[185] There can be no consent[186] when the victim holds the person making the advances in such high esteem that she would be willing to do anything. Charismatic leaders such as Jim Jones in Jonestown, Guyana,[187] and David Koresh in Waco, Texas,[188] are extreme examples of the loss of will and the level of dedication that a religious leader can inspire.

C. *Holding Churches Liable*

The courts must balance claims alleging inappropriate behavior by clerics against the church's vulnerability from its detractors and unscrupulous persons. Admittedly, the church is a deep pocket, and many clergy are unable to pay large damage awards; so, some plaintiffs seek to hold the hierarchical church liable on the basis of vicarious liability, negligent hiring, or negligent supervision of the offending clergyman.

Torts committed within the scope of employment may create vicarious liability. This imputed negligence or respondeat superior liability results from the nature of the relationship between the clergy and the church. The church,

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181. *Roy*, 366 N.Y.S.2d at 351.

182. *Id.* at 299 (quotations omitted).

183. *Id.* at 300-01.

184. *Id.* at 299.

185. The New York court stated:

> There is a public policy to protect a patient from the deliberate and malicious abuse of power and breach of trust by a psychiatrist when that patient entrusts to him her body and mind in the hope that he will use his best efforts to effect a cure. That right is best protected by permitting the victim to pursue civil remedies, not only to vindicate a wrong against her, but to vindicate the public interest as well.

Id. at 301.

186. Authentic consent "must take place in a context of mutuality, choice, full knowledge, and equal power, and in the absence of coercion or fear. When there is an imbalance of power in a relationship, these necessary factors will not be present." FORTUNE, IS NOTHING SACRED, *supra* note 5, at 38.

187. *See infra* note 280.

188. *Id.*

as master, has control over the actions of the servant, because the master has selected and trained the servant and should therefore be responsible for his wrongs.[189] This allocation of risk supposes that the employer who benefits from the enterprise is in a better position to bear the loss than the innocent victim.[190]

Primarily in response to demands of insurance companies, churches became concerned about the imposition of vicarious liability.[191] As a threshold requirement for holding churches liable, the clerics must be found liable.[192] Some commentators have argued potential liability under agency theory since "churches represent their clergy as standing in a special relationship to God."[193] In order to impose respondeat superior liability, the employee must be viewed as a servant, under the control of the master, but since most churches do not control the day-to-day activities of clergy, liability should be avoidable. Besides, engaging in sexual activity with a counselee can never be viewed as falling within the scope of the priest's employment, so churches should be able to escape liability on that basis.[194]

In addition, the public policy reasons for imposing vicarious liability do not exist in this realm. Recognizing that churches are not-for-profit entities that provide free counseling to needy clients, courts may be reluctant to impose liability, fearing that churches may no longer engage in gratuitous counseling of parishioners. In private industry, liability was imposed as a

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189. *See Moses*, 863 P.2d at 327.

190. KEETON ET AL, *supra* note 156, § 69, at 500-01.

191. The Very Reverend Lloyd A. Lewis, Jr., Dean of the George Mercer, Jr. Memorial School of Theology, expressed grave concerns about the Episcopal diocese's reason for embarking on an educational campaign for clergy, deacons, and lay church employees around the issue of sexual misconduct. The Church Insurance Fund mandated that churches and church organizations participate in diocesan-run training in order to be indemnified in suits for sexual harassment, child sexual abuse, or other sexual misconduct. As a result, the diocese embarked upon the training. Dean Lewis stated that the essential nature of the Christian community is non-exploitive and this should serve as an impetus for such training, not legal and financial threats. Interview with The Very Rev. Lloyd A. Lewis, Jr., Dean of the George Mercer, Jr. Memorial Sch. of Theology, in Garden City, Long Island, N.Y. (June 24, 1996). Although the availability of insurance is an important issue in the resolution of whether clergy or their churches should be held liable for clergy's sexual misconduct, this discussion is beyond the scope of this article.

192. *Strock*, 527 N.E.2d at 1244; *see also* Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907, 913 (Neb. 1993) (citing *Strock*).

193. Jill Fedje, *Liability for Sexual Abuse: The Anomalous Immunity of Churches*, 9 LAW & INEQ. J. 133, 154-55 (1990).

194. *Id.* at 587-88; *see also* Scott v. Central Baptist Church, 243 Cal. Rptr. 128, 129-30 (Cal. Ct. App. 1988) (stating that employer is not vicariously liable when employee substantially deviates from his duties); Rita M. v. Roman Catholic Archbishop, 232 Cal. Rptr. 685, 690 (Cal. Ct. App. 1986) (holding that for respondeat superior liability to apply, the conduct must be characteristic of the activities of the church or reasonably foreseeable, and "[i]t would defy every notion of logic and fairness to say that sexual activity between a priest and a parishioner is characteristic of the Archbishop of the Roman Catholic Church"); Moses v. Diocese of Colorado, 862 P.2d 310, 330 (Colo. 1993) (stating that priest engaging in oral sex was "serious breach of [his] ordination vows" and not within the scope of employment with church); Alpharelta First United Methodist Church v. Stewart, 472 S.E.2d 532, 535 (Ga. 1996) (finding that the defendant church organizations were not liable under the theory of respondeat superior, because sexual behavior was contrary to the tenets and principles of the Methodist Church and is not a part of, or in any way incidental to, a minister's duties and responsibilities).

deliberate allocation of risk.[195] The private enterprise which profited while injuring others through its employees' torts was viewed as better able to absorb the risk and distribute it through higher prices or insurance.[196] The problem of who should bear the loss was at the core of the discussion, and it was clear that the private employer was in a better position to do so. In addition, if an employer were held liable, there would be a greater incentive to be careful in the selection, instruction, and supervision of the employees.[197]

Negligent hiring is a separate cause of action which falls outside the scope of vicarious liability.[198] Vicarious liability is based on an agency theory, while negligent hiring is based on the law of torts.[199] Some courts have protected churches by requiring that plaintiffs state with particularity all claims alleging negligent hiring of clergy.[200] Negligent hiring claims require that the church knew or should have known of the cleric's propensity for sexual misconduct.[201] This can be shown when there is a history of sexual improprieties or through psychological evaluations. Liability should be imposed only on a clear showing of sexual dysfunction.[202] To impose liability on the basis of negligent hiring, the plaintiff must allege that the actions of the cleric were foreseeable because the individual cleric was known to be potentially dangerous.[203] If psychological tests are conducted[204] or the cleric has a history of such behavior, this will be easier to establish.

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195. KEETON ET AL., *supra* note 156, § 69, at 500.
196. *Id.* at 500-01.
197. *Id.* at 501.
198. *Moses*, 863 P.2d at 324 n.16.
199. *Id.*
200. Byrd v. Faber, 565 N.E.2d 584, 589-90 (Ohio 1991).
201. *See infra* note 203 and accompanying text.
202. *See* Alpharetta First United Methodist Church v. Stewart, 472 S.E.2d 532, 536 (Ga. Ct. App. 1996) (requiring a showing that the church knew of the propensity for the type of misconduct alleged by plaintiff, and rejecting negligent hiring claim where plaintiff could only show generalized knowledge of misconduct based on cheating on exams at seminary, and psychological testing which revealed difficulty controlling impulses, aggression, etc.).
203. A church will be exposed to liability if it fails to inform prospective employers about a former minister's employment record, especially incidents of sexual misconduct. For instance, in *Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992), the court awarded $855,000 in compensatory damages and $2.7 million in punitive damages to a child who alleged that a priest had sexually molested children for years. The appeals court upheld the lower court's reduction of the punitive damage award but also held liable the Diocese of Winona, which transferred the priest to the Archdiocese, since a clergyman in the former was aware of the priest's sexual transgressions. *Id.* at 809-10. The rationale for liability in these cases is summarized by the Ohio Supreme Court: "[E]ven the most liberal construction of the First Amendment will not protect a religious organization's decision to hire someone who it knows is likely to commit criminal or tortious acts. . . ." Byrd v. Faber, 565 N.E.2d 584, 590 (Ohio 1991). The Colorado Supreme Court has gone even further than the Minnesota and Ohio courts, imposing liability for foreseeable behavior based not only on past conduct, but also on character attributes of the employee. Liability attaches when the employer hires a person when that employer has "reason to believe that the person, by reason of some attribute of character or prior conduct, would create an undue risk of harm to others in carrying out his or her employment responsibilities." Connes v. Molalla Transp. Sys., Inc., 831 P.2d 1316, 1321 (Colo. 1992). *See* J. Brent Walker, *Sins of the Flesh: When Preachers Sexually Transgress*, LIBERTY, Nov./Dec. 1993, at 24.
204. *See Moses*, 863 P.2d at 327-29.

Churches should have a duty to disclose information about prior misconduct of clerics and any resultant treatment. This duty will break the code of silence which presently exists. If a priest has engaged in sexual improprieties, the church should be required to submit a confidential report to the hiring body at any prospective church and should be held liable to the victims if it does not disclose this information.[205] Pressure from their denominations will make clergy cognizant of the seriousness of their sexual improprieties, which should have a deterrent effect. Even if appellate courts did not uphold damage awards, the loss of faith in the churches and the lack of stewardship of its members would have a financial impact. Moreover, even if the courts do not impose legal liability on churches for their clerics' misconduct, the churches have a moral duty to protect the women involved.

Negligent retention and/or supervision claims also require a showing that the church organization knew or should have known of the priest's behavior, so that a trier of fact can find that the type of harm suffered by the plaintiff was foreseeable.[206] To avoid liability, a church must act promptly to investigate thoroughly any claims of sexual misconduct. If there is a pattern of claims and the cleric is retained without adequate ameliorative action, the church should be found liable.

Both the courts and legislature have rejected attempts to protect the church from liability through charitable immunity.[207] In addition, although churches are not profit-making establishments, they can allocate the risk by obtaining liability insurance. Women have not received justice in society in general, or in the courts in particular, and these injustices are reflected and magnified as women enter the judicial system to seek legal remedies for sexual abuse within the church. Women who seek redress within the legal system often face a particularly difficult evidentiary burden because problems derived from abuse do not necessarily surface in the area of sexual dysfunction, but in seemingly unrelated areas such as anxiety disorders, psychiatric hospitalizations, suicide attempts, depression, dissociative disorders and pathological guilt.[208] In addition, the client's initial goal of the therapy

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205. The vicarious liability claim is frequently based on an allegation that the church negligently hired, supervised and/or retained the priest. An employment or agency relationship is a prerequisite to this finding. *Id.* at 323-24. The existence of this relationship is determined by the conduct of the parties and is a question of fact for the jury. *Id.* at 323-24. Denominations which have a hierarchical church structure will be more vulnerable. If there is monitoring of the priest's education, screening, and psychological evaluation by the governing body, compensation monitoring, discipline and/or guidelines for pastoral counseling, then it is more likely that there will be a finding of vicarious liability. *Id.* at 327. The agency doctrine of vicarious tort liability is limited by a requirement that the principal may only be found liable if the agent is acting within the scope of his employment. *Id.* at 324 n.16; Destefano v. Grabrian, 763 P.2d 275, 286-87 (Colo. 1988).

206. *See* Erickson v. Christenson, 781 P.2d 383, 386-87 (Or. Ct. App. 1989) (acknowledging a claim of negligent supervision where the plaintiff alleged that church employed cleric to counsel parishioners, but failed to investigate claims of sexual misconduct, and failed to remove or supervise cleric or warn parishioners after cleric's nervous breakdown).

207. James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 59-60 (1994). Only a few jurisdictions retain the doctrine of charitable immunity under very limited circumstances. *Id.* at 60.

208. *See* Victoria J. Swenson, *A Proposal for Texas Re: Non-Psychiatric Physicians Who*

was never met and these problems may resurface, in an aggravated form, as a result of the cleric's sexual abuse. Research shows that abuse by a therapist or counselor discourages victims from seeking help for subsequent disorders,[209] alienates parishioners from their churches, often cuts them off from their peers,[210] and results in the frequent dissolution of marriages. Hence, the cleric has doubly sinned, by failing to act in the best interests of his parishioners, and by depriving them of the benefits of effective counseling, now and in the future. When courts refuse to recognize a cause of action for this type of abuse, the legal system becomes an unwitting accomplice of the abusive priest.

IV. SOLUTIONS

A. *Legislative Approaches*

In the interest of maintaining the fine line of division between church and state, states have statutorily exempted clergy from governmental regulation or licensing.[211] "Were the state to require licensing of the clergy, it would, on the one hand, have to establish criteria of eligibility which would necessitate the state's involvement in doctrinal and theological matters clearly forbidden by the First Amendment, one purpose of which was to free religious institutions from domination or interference by the state."[212] Even where the state regulates psychiatrists, psychologists, social workers, or other counseling professionals, these states exempt clergy.[213] This has been viewed as evidence of a public policy not to regulate any form of counseling activities engaged in by clergy.[214] Such an interpretation reflects an overly restrictive view of the public policy. There is no need for the legislature to turn a blind eye to all activities engaged in by clergy, particularly when those activities

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Engage in Sexual Conduct with Their Patients, 19 T. MARSHALL L. REV. 269, 285-86 & n.100 (1994) (reporting on a survey of patients who engaged in sexual relations with their therapists showing that 90% of the victims were psychologically damaged, 11% serious enough to be hospitalized as a result of the sexual exploitation, while one percent committed suicide); *see also* Jorgenson & Randles, *supra* note 65, at 188 (discussing array of injuries to patients who engage in sexual contact with their psychotherapists). In one reported case, a pastor slept with more than 30 women, one of whom tried to commit suicide while several got divorced. After an investigation, "[t]he pastor was quietly removed, the records of the inquiry were destroyed and [the accuser] . . . was branded a 'troublemaker' by the new minister. The old minister moved on to a larger, wealthier parish." Woodward & King, *supra* note 6, at 48.

209. Jorgenson & Randles, *supra* note 65, at 186-87.

210. FORTUNE, IS NOTHING SACRED, *supra* note 5, at 110-12.

211. *See* Ben Zion Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, *in* H. NEWTON MALONY ET AL., CLERGY MALPRACTICE 48, 56 (1986).

212. *Id.* at 48-49.

213. *Id.* at 49.

214. *See* Ericsson, *Clergyman Malpractice supra* note 1, at 176.

> Exemption provisions . . . indicate that the legislature has recognized that the subject matter of counseling by the clergy may often be the same as that facing the licensed and regulated profession. However, the legislature, through the exemption provisions, has recognized that the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations.

Id.

exploit women sexually. As illogical as it may appear, some legislatures have done this.

Illinois statutes specifically exclude religious or spiritual counseling from the reach of the statutes which purport to punish therapists engaged in prohibited sexual contact with their clients.[215] The case of *Dausch v. Rykse*[216] addresses the issue of whether a cleric's counseling is psychotherapy within the meaning of a state statute which prohibits sexual exploitation by psychotherapists.[217] The district court granted the defendant's motion to dismiss, finding that the plaintiff's allegations of professional negligence against the church defendants amounted to a claim for clergy malpractice, a cause of action not recognized under Illinois law.[218] Regarding the professional negligence allegation against Rykse, the district court concluded that Mrs. Dausch "had failed to allege adequately that Rykse's psychological counseling was not part of the church's religious beliefs and practices. . . . [Therefore] the First Amendment was implicated and Mrs. Dausch failed to state a valid claim."[219] The Seventh Circuit affirmed in part and reversed and remanded in part, upholding claims for professional negligence against the individual defendant and violation of the sexual exploitation by psychotherapists statute.[220]

Five states—Colorado, Michigan, New Hampshire, Rhode Island, and Wyoming—specifically criminalize sexual contact or assault occurring under the guise of medical treatment.[221] In general, these states made it a felony for a physician to engage in sexual contact during medical treatment or examination.[222] One New Hampshire court applied the New Hampshire

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215. *See, e.g.*, 740 ILL. COMP. STAT. ANN. 140/1-1(e) (West 1993) ("Psychotherapy does not include counseling of a spiritual or religious nature.")

216. 52 F.3d 1425 (7th Cir. 1994).

217. Ms. Dausch alleged that between January 1988 and June 1990, the pastor of Knox Presbyterian Church held himself out, as did his church, as a "duly qualified person engaged in providing psychological counseling to members of his congregation." *Dausch*, 52 F.3d at 1427-28. Ms. Dausch, while a member of the congregation, received psychological counseling from the defendant to assist her in coping with ongoing depression. *Id.* at 1428. According to the complaint, in the course of this counseling relationship, "Rykse compelled, encouraged, fostered and engaged in dangerous and improper counseling relations" with Dausch, which culminated in sexual relations during the psychotherapy sessions. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 1429.

221. *See* COLO. REV. STAT. §§ 18-3-403(1)(h), 404(1)(g) (1986); MICH. COMP. LAWS ANN. § 750.520b(1)(f)(iv) (West 1991); N.H. REV. STAT. ANN. § 632-A:2 I(g) (1996); R.I. GEN. LAWS § 11-37-2(4) (1994); WYO. STAT. § 6-2-303 (a)(vii) (1988).

In *People v. Terry*, 720 P.2d 125 (Colo. 1986), the Colorado Supreme Court interpreted COLO. REV. STAT. § 18-3-403(1)(h). The court upheld the constitutionality of the statute, stating that the phrase "*bona fide* medical purposes" is not unconstitutionally vague. *Id.* at 127. The court said that "sexual penetration or intrusion made during treatment or examination is for other than 'bona fide medical purposes' [as the phrase is used in § 18-3-403(1)(h)], when it is not taken in good faith, honestly, and sincerely in the course of investigating, preventing, alleviating, or curing a disease or malady." *Id.* The statute was not found to be overbroad because constitutionally protected behavior was not infringed. *Id.* at 128. "Defendant was convicted for committing a sexual intrusion during the course of an examination on a patient. . . . Such conduct is not constitutionally protected and, thus, defendant's overbreadth argument fails." *Id.*

222. Linda Jorgenson et al., *The Furor over Psychotherapist-Patient Sexual Contact: New Solutions to an Old Problem*, 32 WM. & MARY L. REV. 645, 668-70 (1991).

statute to a psychologist who was not a licensed physician since that state's definition of "practicing medicine" included persons who "shall diagnose, operate on, prescribe for or otherwise treat any human ailment, physical or mental."[223] On the other hand, Michigan courts have refused to apply the Michigan statute to psychologists.[224] Wyoming, which includes as potential defendants anyone "who by reason of his position, is able to exercise significant influence over a person," has found that the statute applies to a girls' volleyball coach accused of sexual assault by a student.[225]

Some states prosecute psychotherapists who sexually exploit their clients. Proper wording of these statutes is essential to include all appropriate potential defendants and all prohibited behavior. The language of the statutes, however, varies significantly. For example "psychotherapy" is defined as "the professional treatment, assessment, or counseling of a mental or emotional illness, symptom or condition" in Minnesota, California, and Florida.[226] Yet Colorado more broadly defines it as "the treatment, diagnosis, or counseling in a professional relationship to assist individuals or groups to alleviate mental disorders, understand unconscious or conscious motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors which interfere with effective emotional, social or intellectual functioning."[227] Moreover, some state statutes speak not to psychotherapy but to "mental health services," and define such as "the treatment, assessment, or counseling of another person for a cognitive, behavioral, emotional, mental or social dysfunction, including an intrapersonal or interpersonal dysfunction."[228]

Six states—Wisconsin,[229] Texas,[230] South Dakota,[231] North

223. State v. VonKlock, 433 A.2d 1299, 1302 (N.H. 1981) (quoting N.H. REV. STAT. ANN. § 329:1 (1955)), *overruled on other grounds by* State v. Smith, 503 A.2d 774 (N.H. 1985).

224. Jorgenson, et al., *supra* note 222, at 670 n.143.

225. *See* Scadden v. State, 732 P.2d 1036, 1042-43 (Wyo. 1987); WYO. STAT. § 6-2-303(a)(vi) (1988).

226. CAL. CIV. CODE § 43.93(a)(1) (West Supp. 1996); FLA. STAT. ANN. § 491.0112(4)(a) (West 1991); MINN. STAT. ANN. § 148A.01 (West 1989).

227. *See* Jorgenson, et al., *supra* note 222, at 673 (quoting COLO. REV. STAT § 18-3-405.5(4)(i) (Supp. 1995); CAL. CIV. CODE § 43.93(a)(1) (West Supp. 1996); FLA. STAT. ANN. § 491.0112(4)(a) (West 1991)).

228. IOWA CODE ANN. § 709.15(1)(d) (West 1993).

229. WIS. STAT. ANN. § 895.70(2)(a) (West Supp. 1995). That statute provides:

> (a) Any person who suffers, directly or indirectly, a physical, mental or emotional injury caused by, resulting from or arising out of sexual contact with a therapist who is rendering or has rendered to that person psychotherapy, counseling or other assessment or treatment of or involving any mental or emotional illness, symptom or condition has a civil cause of action against the psychotherapist for all damages resulting from, arising out of or caused by that sexual contact. Consent is not an issue in an action under this section, unless the sexual contact that is the subject of the action occurred more than 6 months after the psychotherapy, counseling, assessment or treatment ended.

Id.

230. TEX. CIV. PRAC. & REM. CODE ANN. §§ 81.003 (West Supp. 1996). The Texas statute provides a cause of action against a mental health provider for sexual exploitation causing damages. *Id.* § 81.002. However, "mental health services" provided by a cleric do not include "religious, moral, and spiritual counseling, teaching, and instruction." Apparently the legislature is attempting to prohibit sexual conduct during personal counseling sessions, but excludes "spiritual counseling" to ward off First Amendment challenges. § 81.001(7) (1996).

231. S.D. CODIFIED LAWS ANN. §§ 22-22-27 to -29 (Michie Supp. 1996). The definition of

Dakota,[232] Iowa,[233] and Minnesota[234]—expressly prohibit clergy persons from sexual exploitation of counselees. Each of these states includes clerics in the definition of "therapist" or "psychotherapist" in the statutes that prohibit sexual exploitation in the psychotherapist-client relationship.[235] In addition to civil penalties, Minnesota, under its Criminal Code, provides that criminal sexual conduct in the third degree includes consensual sexual relations between a psychotherapist and patient or former patient.[236] The penalty includes imprisonment for not more than fifteen years or payment of a fine of not more than $30,000, or both.[237]

Psychotherapist sexual contact with a patient is a felony in nearly all the states that have criminalized such behavior.[238] For example, the Iowa Statute makes it a felony for a counselor or therapist to engage in sexual contact with a patient or client (or former patient or client) and defines counselor or therapist as a "physician, psychologist, nurse, professional counselor, social

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"psychotherapist" includes a member of the clergy. *Id.* § 22-22-27(3). A psychotherapist who engages in sexual contact with an emotionally dependent patient commits a Class 5 felony. *Id.* § 22-22-28. A psychotherapist who knowingly engages in an act of sexual penetration with an emotionally dependent patient commits a Class 4 felony. *Id.* § 22-22-29.

232. N.D. CENT. CODE § 12.1-20-06.1 (Supp. 1995).

233. IOWA CODE ANN. § 709.15 (West 1993).

234. MINN. STAT. ANN. § 148A.02 (West 1989) (stating that a "cause of action against a psychotherapist for sexual exploitation exists for a patient or former patient for injury caused by sexual contact with the psychotherapist, if the sexual contact occurred"); *see also* State v. Ohrtman, 466 N.W.2d 1, 2-3 (Minn. Ct. App. 1991) (construing § 609.345(1)(h) (1990), and finding no liability under this fourth-degree criminal conduct statute when a complainant alleged that a pastor, during a counseling session,"requested a beer, asked for and, after pulling up his shirt, received a back rub, allegedly encouraged [complainant] to divorce her husband and . . . gave [complainant] a hug during which he compressed her breasts against his chest . . . [and] [h]is penis was erect during the hug").

235. *See, e.g.*, WIS. STAT. ANN. § 895.70(1)(e) (West Supp. 1995) ("'Therapist' means a physician, psychologist, social worker, marriage and family therapist, professional counselor, nurse, chemical dependency counselor, member of the clergy or other person, whether or not licensed or certified by the state, who performs or purports to perform psychotherapy."); MINN. STAT. ANN. § 148A.01. Subd. 5 (West 1989) ("'Psychotherapist' means a physician, psychologist, nurse, chemical dependency counselor, social worker, member of the clergy, marriage and family therapist, mental health service provider, or other person, whether or not licensed by the state, who performs or purports to perform psychotherapy.")
Id.

236. MINN. STAT. ANN. § 609.344. (West Supp. 1996). That section states, in part:

> (g) . . . [N]either mistake as to the complainant's age nor consent to the act by the complainant is a defense;
> (h) the actor is a psychologist and the complainant is a patient of the psychotherapist and the sexual penetration occurred:
>> (i) during the psychotherapy session; or
>> (ii) outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists.
>> Consent by the complainant is not a defense;
>
> (i) the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist;
> (j) the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception. Consent by the complainant is not a defense;

Id. § 609.344(1)(g)-(j).

237. *Id.* § 609.344(2).

238. *See* Jorgensen et al., *supra* note 222 at 683.

worker, marriage or family therapist, alcohol or drug counselor, member of the clergy, or any other person, whether or not licensed or registered by the state, who provides or purports to provide mental health services."[239] Mental health service is defined as the "treatment, assessment, or counseling of another person for cognitive, behavioral, emotional, mental, or social dysfunction, including an intrapersonal or interpersonal dysfunction."[240] In Georgia, the call for legislation came on the heels of reports of the sexual exploitation of parishioners by clergy.[241] Washington has a law requiring a background check on anyone working with children or vulnerable adults, regardless of whether they are clergy.[242]

This approach is directed at punishing the offending behavior without interfering with the general counseling relationship or running afoul of the First Amendment. It is unlikely that any judge, politician or clergy would make an argument that sexual relations with a parishioner is an integral and protected aspect of a therapeutic relationship. In fact, Minnesota's criminal statute may be criticized for not going far enough, by limiting the complainant to "sexual penetration" which occurs during the "psychotherapy session"[243] when "former patient is emotionally dependent upon the psychotherapist,"[244] or the "sexual penetration occurred by means of therapeutic deception."[245] Under Minnesota's statute, a civil action permits a cause of action for injury caused by the more broadly defined "sexual contact."[246] This more expansive

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239. IOWA CODE ANN. § 709.15(1)(a) (West 1993).

240. *Id.* § 709.15(1)(d).

241. Gayle White, *Women Alleging Sex Links to Ministers Push for Law: Bill Would Make It Illegal for Clergy to Exploit Flock*, ATLANTA J. & CONST., Dec. 22, 1992, at C4.

242. *See* WASH. REV. CODE ANN. §§ 43.43.830-.832 (West Supp. 1996); John Dart, *Churches Move Toward Reducing Sexual Misconduct by Clergy Abuse*, L.A. TIMES, July 13, 1991, at F18.

243. MINN. STAT. ANN. § 609.344(h)-(i) (West Supp. 1996).

244. *Id.* § 609.344(i).

245. *Id.* § 609.344(j). Therapeutic deception is defined as "a representation by a psychotherapist that sexual contact with the psychotherapist is consistent with or part of the patient's or former patient's treatment." MINN. STAT. ANN. § 148A.01(8) (West 1989).

246. MINN. STAT. ANN. § 148A.01(7) (West 1989). That section states:

> "Sexual Contact" means any of the following, whether or not occurring with the consent of a patient or former patient:
>
> (1) sexual intercourse, cunnilingus, fellatio, anal intercourse or any intrusion, however slight, into the genital or anal openings of the patient's or former patient's body by any part of the psychotherapist's body or by any object used by the psychotherapist for this purpose, or any intrusion, however slight, into the genital or anal openings of the psychotherapist's body by any part of the patient's or former patient's body or by any object used by the patient or former patient for this purpose, if agreed to by the psychotherapist;
>
> (2) kissing of, or the intentional touching by the psychotherapist of the patient's or former patient's genital area, groin, inner thigh, buttocks, or breast or of the clothing covering any of these body parts;
>
> (3) kissing of, or the intentional touching by the patient or former patient of the psychotherapist's genital area, groin, inner thigh, buttocks, or breast or of the clothing covering any of these body parts if the psychotherapist agrees to the kissing or intentional touching.
>
> "Sexual contact" includes requests by the psychotherapist for conduct described in clauses (1) to (3).
>
> "Sexual contact" does not include conduct described in clause (1) or (2) that is a part of standard medical treatment of a patient.

Id.

view is exactly what the courts should have done, but have neglected to do, to date.

The involvement of the legislature in curbing abusive behavior by clergy engaged in this type of predatory behavior is essential. The legislature is able to fashion a narrow remedy, tailored to the evil to be remedied—the use of the clergy's position and influence to engage in sexual relationships with vulnerable women. Because the parameters would be prescribed in the statute, First Amendment difficulties and extension of liability to cover the *Nally* type of case could be avoided. Therefore, when the case involves the content of the counseling and the religious beliefs imparted by the priest, rather than the priest's conduct, the statute would not be applicable. The courts, however, could also recognize that once a cleric has gained the trust of his parishioner during counseling, a duty to act in the best interests of the counselee attaches.

B. *Judicial Solutions*

1. Clergy-Counselee as a Fiduciary Relationship

a. *Towards Recognition of Fiduciary Duty Liability*

Some federal courts, applying New York and Illinois law,[247] as well as some state courts,[248] have rejected both the fiduciary duty theory and the clergy malpractice theory to allow recovery for counselees injured by the sexual misconduct of their clergy. Other courts have denied clergy malpractice claims, but allowed claims based on breach of fiduciary duty,[249] reasoning that a breach of fiduciary duty involves a betrayal of trust and does not require a professional relationship or a professional standard of care—two criteria of a clergy malpractice action cited by courts as reasons for the denial of clergy malpractice causes of action.[250] Courts allowing fiduciary duty actions to

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247. *See* Schmidt v. Bishop, 779 F. Supp. 321, 326 (S.D.N.Y. 1991) (stating that defining the scope of fiduciary duty would raise the same constitutional difficulties as formulation of a malpractice standard); Dausch v. Rykse, 52 F.3d 1425, 1427 (7th Cir. 1994) (applying Illinois law).

248. *See, e.g.*, Cherepski v. Walker, 913 S.W.2d 761, 767 (Ark. 1996) (barring breach of fiduciary duty claim based on heart balm statute); Strock v. Pressnell, 527 N.E.2d 1235, 1239, 1243 (Ohio 1988) (questioning viability of clergy malpractice action but not finding on the facts, and barring breach of fiduciary duty claim based on heart balm statute); Bladen v. First Presbyterian Church, 857 P.2d 789, 794, 796 (Okla. 1993) (finding that since the clergy do not utilize transference as a therapeutic tool, they cannot be charged with malpractice for mishandling the transference phenomena, and barring breach of fiduciary duty claim based on heart balm statute); Schieffer v. Catholic Archdiocese, 508 N.W.2d 907, 911-12 (Neb. 1993) (finding that parishioner's breach of fiduciary duty claim merely alleged the elements of clergy malpractice and was, hence, not actionable).

249. *See, e.g.*, Sanders v. Casa View Baptist Church, 898 F. Supp. 1169 (N.D. Tex. 1995); Moses v. Diocese of Colorado, 863 P.2d 310, 314 (Colo. 1993), *cert. denied*, 114 S. Ct. 2153 (1993); Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988); DeBose v. Bear Valley Church of Christ, 890 P.2d 214 (Colo. Ct. App. 1994), *cert. granted*, No. 95SC42 (June 19, 1995); Jones v. Trane, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992) (distinguishing Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991), on grounds that breach of fiduciary duty occurred outside the counseling relationship, obviating the need to impose a uniform standard of religious counseling); Erickson v. Christenson, 781 P.2d 383 (Or. Ct. App. 1989).

250. *Destefano*, 763 P.2d at 284. The Colorado Supreme Court stated, "We have no difficulty in finding that Grabrian, as a marriage counselor to [the plaintiffs], owed a fiduciary duty [to

proceed find that the combination of the position of trust held by the clergy, exacerbated by the counseling relationship, meant that the clergy, who were in a superior position to the counselees, assumed a duty to act in good faith, and then breached that duty.[251] The courts that make this distinction are willing to allow recovery for sexual abuse and other limited transgressions of clergy,[252] while preserving the content of religious counseling from judicial scrutiny.[253] A fiduciary relationship has been defined as one in which "trust

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them]. His duty to the [counselee] was 'created by his undertaking' to counsel her." *Id.; see also, Moses*, 863 P.2d at 321 n.13 (reaffirming the result in *DeStefano*). Specifically, the *Moses* court noted that the relevant common facts were not the profession of the defendants but, rather, the "relevant facts are that the defendants in both cases occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty." *Id.*

Destefano and *Moses* were distinguished somewhat by *DeBose*, 890 P.2d at 220-21. The Colorado Court of Appeals found that in establishing the breach of fiduciary duty, the court must look to the motivation behind the defendant's acts. *Id.* If actuated by a sincerely held religious belief, all the attendant First Amendment free exercise concerns would be implicated, even in cases based on breach of fiduciary duty. *Id.* Whether a belief is "religious" is an issue of law, but whether the defendant's conduct was motivated by this belief is a fact question for the jury. *Id.* The proposed legislative solution in Part IV of this paper attempts to balance these concerns. *See* discussion *infra* Part IV.A.

The New York courts have found a fiduciary relationship outside the counseling scenario. *Jones*, 591 N.Y.S.2d at 929. The New York Supreme Court found a fiduciary relationship between a clergy member and a minor parishioner with whom he played sports. *Id.* However, the *Jones* court found the lack of a counseling relationship a crucial element, as it obviated the perceived need to implicate the court in the religious dogma and practices of the church. *Id.* at 930. This distinction rests on the most tenuous of principles, and it pays undue homage to form over substance. The same standard should apply to both scenarios, that is, the duty to act in the best interests of the beneficiary of the fiduciary relationship.

251. *Moses*, 863 P.2d at 321 n.13.

252. *See, e.g.*, Adams v. Moore, 385 S.E.2d 799 (N.C. Ct. App. 1989). The court found a fiduciary relationship between a preacher and a member of his congregation in a real estate matter. *Id.* at 801. Allegedly to assist a financially strapped parishioner, a pastor and a friend assumed the parishioner's mortgage of $12,000 and paid her $1,000 in exchange for the house which was valued at $32,000. *Id.* at 800. The pastor sold the house for a significant profit and the plaintiff sued, alleging a breach of fiduciary duty. *Id.* The court upheld her claim. *Id.* at 801.

253. Concerns are often voiced of a slippery slope progression to a *Nally*-type "negligent counseling" claim. Such concerns were best expressed by Judge Brieant of the United States District Court sitting in the Southern District of New York. After concluding that a claim premised upon a breach of fiduciary duty was merely a clergy malpractice action in disguise, he stated:

> The difficulty is that this Court . . . must consider not only this case, but the next case to follow, and the ones after that, before we embrace the newly invented tort of clergy malpractice. This places us clearly on the slippery slope and is an unnecessary venture since existing laws . . . provide adequate protection for society's interests. Where could we stop? Assume a severely depressed person consults a storefront preacher, unaffiliated with any of the mainstream denominations, but with them, equally protected by the First Amendment. The cleric consults with our hypothetical citizen, reminds him of his slothful life, and that he is a miserable sinner; recommends prayer and fasting and warns of the Day of Judgment. Our depressed person becomes more so, and kills himself and a few more people. . . . As to a licensed psychiatrist or social worker, our lay courts should have no trouble adjudicating a claim of professional malpractice on these facts. As to a clergyman, it would be both impossible and unconstitutional to attempt to do so.

Schmidt, 779 F. Supp. at 328. The New York Supreme Court does not share this view:

> This Court . . . is confident the judicial process can provide a brake to the slide when needed. In the words of Mr. Justice Harlan, "It is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls that lie in the trail ahead. I, for one, do not believe that a "slippery slope" is necessarily without a constitutional toehold.

Jones, 591 N.Y.S.2d at 931 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669-70 (1970)).

and confidence are necessarily reposed by one party, investing in the other party a corresponding amount of power."[254] Hence, an imbalance of power is inherent in fiduciary relationships. Fiduciary law, rooted in equity, is designed to counteract the risks associated with this imbalance of power by a variety of protective rules and evidentiary presumptions.[255] Judge Cardozo's description of the role of fiduciaries is instructive:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[256]

The "constitutional toehold" referred to by Justice Harlan may very well be the distinction between the sexual misconduct cases and the content-based negligent counseling claims of *Nally*. Classically, the goal of fiduciary law is to minimize the inherent risk of the unequal power relationship between the fiduciary and the "entrustor." *See* Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 946 n.227 (1993) (citing Niels B. Schaumann, *The Lender as Unconstitutional Fiduciary*, 23 SETON HALL L. REV. 21, 25, 49 n.103 (1992)). One of the rules that has developed over time to protect the interests of the entrustor is that which forbids the fiduciary from self dealing, that is, the fiduciary cannot put his own interests above that of his charge, even if the charge also benefits from the transaction. *Id.* at 909-10.

From a fiduciary law perspective, sexual misconduct between the counselor and counselee is a per se violation of the fiduciary's duty to act in the best interests of his entrustor. This is so because regardless of the fiduciary's belief that the act is in the "best interests" of the counselee, there is an element of immediate sexual and ego gratification that inures to the fiduciary's benefit, almost always at the expense of his counselee. In the *Nally* negligent counseling scenario, however, this element of self gratification is conspicuously absent. Although it is conceivable that a clergy counselor that deliberately manipulated his counselee to reach a certain result beneficial to the counselor would also be in violation of a fiduciary duty, such a situation is not amenable to the proposed per se rule of sexual misconduct.

254. Jorgenson & Randles, *supra* note 65, at 196; *see also* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 800 (1983) (providing a general discussion of fiduciary law, and coining the term "entrustor" to indicate the beneficiary of a fiduciary relationship).

255. Some of the advantages that typically accrue to the beneficiary of a fiduciary relationship include: 1) the fiduciary will have the burden of showing the fairness of the transaction in dispute; 2) the fiduciary will be subject to a duty of full disclosure, reversing the presumption of *caveat emptor*; 3) the duty of the beneficiary to discover fraud will be relaxed; 4) the fiduciary relationship may operate to remove an oral or defectively executed contract from the Statute of Frauds in favor of the beneficiary; and 5) benefits accruing to the fiduciary may be held in trust for the beneficiary. Gregory B. Westfall, *"But I Know It When I See It": A Practical Framework for Analysis and Argument of Informal Fiduciary Relationships*, 23 TEX. TECH L. REV. 835, 869 n.3 (1992) (focusing on Texas law).

Of course, the overriding duty of all fiduciaries is the duty of loyalty. *See generally*, Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539 (1949); RESTATEMENT (SECOND) OF TRUSTS § 170 (1959). Hence, even if the beneficiary gives his consent to the fiduciary, the transaction can be voided if the consent was uninformed, or it was induced by improper conduct of the fiduciary, or if the beneficiary was not of competent age and understanding. *Scott*, *supra* at 541-42. "[T]he consent of the beneficiary is indeed a slender reed upon which a trustee may lean." *Id.* at 542. Even upon full disclosure and consent by the beneficiary, the transaction must be objectively reasonable and undertaken in good faith. *Id.* At times, courts have made a distinction between a "fiduciary relationship" and a merely "confidential relationship." Scallen, *supra* note 253, at 906-07; *see also* Westfall, *supra*, at 837-41 (describing the three types of fiduciary relationships recognized by Texas courts: the "formal" or "technical"; the informal, or "confidential relationship"; and "special relationships"). The distinction between the two groups is reflected more in evidentiary burdens rather than in substantive duties. *See infra* note 264 and accompanying text.

256. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). This definition has been criticized

Historically, fiduciary relationships include: trustee to beneficiary; guardian to ward; agent to principal; attorney to client; executor to legatees or beneficiaries; partner to partner; corporate directors or officers to the corporation; majority shareholders to other shareholders; and bailor to bailee.[257] This range of relationships demonstrates that a professional relationship does not preclude the existence of a fiduciary relationship.[258] When presented with a new type of relationship which does not fit within the parameters of a traditional fiduciary relationship, courts will analogize to determine if a fiduciary relationship exists.[259] Consequently, some courts have found fiduciary relationships between physicians and their patients,[260] social workers and their charges[261] and, of course, between minister and parishioner.[262] The pattern that emerges is one where courts will extend the

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as being unduly vague and nebulous. *See, e.g*, Scallen, *supra* note 253, at 907 n.36 ("Although certainly a classic and vivid example of Cardozo's rhetorical prowess, one cannot defend it on the grounds of clarity.").

257. Frankel, *supra* note 254, at 795-96. Cases illustrating these relationships include: Tante v. Herring, 453 S.E.2d 686, 689 (Ga. 1994) (attorney to client); Mark Twain Kansas City Bank v. Kroh Bros. Dev. Co., 863 P.2d 355, 362 (Kan. 1992) (trustee to beneficiary); Steelman v. Mallory, 716 P.2d 1282, 1285 (Idaho 1986) (corporate director to corporation); Greene v. First Nat'l Bank, 516 N.E.2d 311, 315 (Ill. App. Ct. 1987) (executor to beneficiaries); Deason v. Gutzler, 622 N.E.2d 1276, 1281 (Ill. App. Ct. 1993) (principal to agent); Linge v. Ralston Purina Co., 293 N.W.2d 191, 194 (Iowa 1980) (majority shareholders to minority shareholders); and Arpadi v. First MSP Corp., 628 N.E.2d 1335, 1336 (Ohio 1994) (partner to partner).

However, "[t]he characterization of these relationships as 'traditional' ignores the unequivocable fact that fiduciary law is a product of many centuries of development, some categories may be more 'traditional' than others." Scallen, *supra* note 253, at 905.

258. Moses v. Diocese of Colorado, 863 P.2d 310, 322 (Colo. 1993), *cert. denied*, 114 S. Ct. 2153 (1994).

259. Scallen, *supra* note 253, at 905; *see also* Frankel, *supra* note 254, at 804-05. The method of analogy has been criticized, most notably by Professor Frankel, as being "uninstructive" and "inconsistent." *Id.* at 805. However, the use of analogy to characterize novel fiduciary relationships remains a prevalent judicial exercise. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 891 (1988). Professor Scallen states that:

> The evolution of the law of fiduciary obligation illustrates, perhaps more powerfully than most bodies of law, the power of analogy in legal argumentation. Courts considering whether to impose a fiduciary constraint in a novel context rely heavily on comparisons to more conventional contexts in which the constraint does apply. Although some commentators find this pattern intellectually unsatisfying, its pervasiveness and persistence suggest that it is an inevitable aspect of fiduciary analysis.

Scallen, *supra* note 253, at 903 n.18. Hence, it is the proposal of this paper that the clergy-counselee relationship requires constraints that are similarly imposed in analogous relationships, in order to guard against the abuse of the inherent power imbalance between the clergy and their counselees.

260. *See* Hoopes v. Hammargren, 725 P.2d 238, 242 (Nev. 1986) (holding that fiduciary obligations prohibit a neurologist from sleeping with his patient under the guise of treatment, thereby aggravating her condition); Demers v. Gerety, 515 P.2d 645, 649 (N.M. Ct. App. 1973), *rev'd*, 589 P.2d 180 (N.M. 1978) (requiring physician to exercise utmost good faith toward patient); Morris v. Consolidation Coal Co., 446 S.E.2d 648, 649 (W. Va. 1994) (holding that fiduciary relationship exists between physician and his patient, prohibiting unauthorized release of confidential information).

261. Horak v. Biris, 474 N.E.2d 13, 17 (Ill. App. Ct. 1985) (finding a state-licensed social worker placed in position of trust, the breach of which would constitute a breach of the fiduciary relationship).

262. Destefano v. Grabrian, 763 P.2d 275, 284 (Colo. 1988) (holding that defendant owed fiduciary duty to the plaintiff); *see also Moses*, 863 P.2d at 321 n.13 (reasoning that "[t]he position of trust occupied by the defendant, when coupled with his positive act of counseling the plaintiff, resulted in a duty to the plaintiff," and holding that the "position of trust . . . a person in

protection of fiduciary law to relationships whenever their prime characteristic is that "the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party."[263]

Some courts recognize a difference between a "fiduciary relationship" and a merely "confidential relationship," but have generally applied the substantive rules of fiduciary law to both.[264] These courts will set aside a deal or undertaking between the parties upon a showing that the fiduciary or more powerful party breached his fiduciary duty.

The difference between a confidential and fiduciary relationship is greatest in the realm of evidentiary burdens. Various evidentiary presumptions work in favor of the entrustor in a fiduciary relationship, but not for the dependent in a confidential relationship.[265] Specifically, the entrustor is entitled to a presumption that she relied on the fiduciary to act in her best interests, whether or not she actually did rely.[266] In addition, the entrustor alone is entitled to cancel certain transactions between the fiduciary and the entrustor.[267] The fiduciary has the burden of proof that his actions were fair and in the best interest of the entrustor.[268] In a confidential relationship, the dependent must prove that she in fact relied upon the power-bearer without the

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a fiduciary relation [owes] to another [implies] a duty to act for the benefit of the other as to matters within the scope of the relation").

263. Barbara A. v. John G., 193 Cal. Rptr. 422, 432 (Cal. Ct. App. 1983). Professor Scallen suggests that courts have been willing to extend fiduciary obligations, though in various guises, when there is a pattern of elements, such as:

> (1) dependence or vulnerability by one party on the other, that
> (2) results in power being conferred on the other,
> (3) such that the entrusting party is not able to protect itself effectively, . . . and
> (4) this entrustment has been solicited or accepted by the party on which the fiduciary obligation is imposed.

Scallen, *supra* note 253, at 922. While all fiduciary relationships involve the first two elements of dependence, resulting in a conferral of power, these elements by themselves would typify most contract claims. The practical inability of the entrusting party to protect itself typifies a fiduciary relationship, entitling the relationship to the benefits of the fiduciary legal framework. *Id.* at 925. Clergy counselees fall well within this paradigm.

264. *See* AUSTIN WAKERMAN SCOTT, THE LAW OF TRUSTS § 2.5, at 39-40 (3d ed. 1967). Scott writes:

> A fiduciary relation is to be distinguished from a merely confidential relation. A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation may exist although there is no fiduciary relation; it is particularly likely to exist where there is a family relationship or such a relation of confidence as that which arises between physician and patient or priest and penitent. If one person is in a confidential, but not a fiduciary, relation to another, a transaction between them will not be set aside at the instance of one of them unless in fact he reposed confidence in the other, and the other, by fraud or undue influence or otherwise, abused the confidence placed in him. A fiduciary relation involves certain consequences to transactions between the parties that follow automatically as a matter of law from the relation.

Id. Among the fiduciary relationships which typically serve as the foundation for the establishment of a duty are those of guardian and ward, doctor and patient, attorney and client, and priest and communicant. 36A C.J.S. *Fiduciary* § 383, at 386-89 (1961).

265. Scallen, *supra* note 253, at 907.

266. *Id.*

267. *Id.*

268. *Id.*

benefit of any presumption, and she will also have the burden of establishing breach.[269]

Fiduciary relationships are inherently risky.[270] The fiduciary is supposed to be acting in the best interest of the entrustor, not in a manner that benefits himself at the expense of the entrustor.[271] So great is the need felt to minimize the inherent risk of fiduciary relationships, many courts find that the fiduciary is accountable for any benefit he receives, even if it is consistent with the best interests of the entrustor.[272]

In light of (1) the nature of the clergy-counselee relationship, (2) the power imbalance between the clergy counselor and his victim,[273] and (3) the paucity of alternatives for the victim,[274] the clergy-counselee relationship should be deemed a fiduciary relationship as a matter of law.

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269. *Id.*

270. *See* Frankel, *supra* note 254, at 808-12. Two elements exist in all fiduciary relationships that "give rise to a risk that the fiduciary will misuse the power entrusted to him to the detriment of the entrustor." *Id.* at 808. In fact, it is the inadequacy of protective mechanisms outside fiduciary law to eliminate this risk that should guide courts in the imposition of fiducial restraint. *Id.* These two elements are the "substitution role of the fiduciary," and the "delegation of power to the fiduciary." *Id.* at 808-09. Hence, the fiduciary may act as a substitute for the entrustor in the sense that the fiduciary has greater expertise in a certain area that makes his judgment valuable. Secondly, the power is delegated to the fiduciary "not for his own use, but solely for the purpose of facilitating the performance of his functions." *Id.* at 809. The risk of fiduciary relationships is thus summarized:

> [W]hile the fiduciary must be entrusted with power in order to perform his function, his possession of the power creates a risk that he will misuse it and injure the entrustor. . . . Yet if the entrustor lessens his exposure to loss by reducing the delegated power, he may also reduce the benefit expected from the relation.

Id.

271. *Id.* at 811.

272. *Guth* states the classic rule of fiducial accountability:

> If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit. The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of wise public policy that, for the purpose of removing all temptation extinguishes all possibility of profit flowing from a breach of confidence imposed by the fiduciary relation. Given the relation between the parties, a certain result follows; and a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty.

Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) (citations omitted); *accord*, Borden v. Sinskey, 530 F.2d 478, 498 (3rd Cir. 1976); Savage v. Mayer, 203 P.2d 9, 10 (Cal. 1949); Billman v. Maryland Deposit Ins. Fund Corp., 585 A.2d 238, 246 (Md. Ct. Spec. App.), *cert. denied*, 502 U.S. 909 (1991); Leppaluoto v. Eggleston, 357 P.2d 725, 731 (Wash. 1960).

273. Jorgenson & Randles, *supra* note 65, at 189-94. Jorgenson and Randles suggest that the following five factors contribute to the imbalance of power between counselors and counselees:

> (1) the client's initial vulnerability;
> (2) the therapist's control of the environment;
> (3) the threat of breach of confidentiality;
> (4) client intimacy; and
> (5) unilateral self-revelation.

Id. at 194. These factors should be strongly considered by courts in fashioning the appropriate scope of fiduciary duty to apply; the larger the power imbalance, the more protections should be granted to protect congregant/patients from the misuse of that power.

274. *See* Frankel, *supra* note 254, at 808-12.

i. The Nature of the Relationship

Courts have generally found that secular counselors who engage in sexual relationships with their clients incur liability under either a professional malpractice or a fiduciary duty theory.[275] Psychotherapists' sexual involvement with their patients is a growing problem.[276] The clergy relationship shares the same attributes that imbue the secular relationship with such high risk. People seeking help, whether of a spiritual or secular nature, are likely to be vulnerable and dependent.[277] They perceive some area of their lives as deficient and the counselor as having the ability to make it whole.[278] For any counseling relationship to work, the counselee has to place her absolute trust in the counselor, and believe that the counselor will be acting in her best interest.[279]

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275. *See, e.g.*, Lenhard v. Butler, 745 S.W.2d 101, 103 (Tex. Ct. App. 1988) ("Where a therapist mishandles transference and becomes sexually involved with his patient, courts commonly hold such action to constitute malpractice."); *accord* Simmons v. United States, 805 F.2d 1363, 1365 (9th Cir. 1986); Waters v. Bourhis, 709 P.2d 469, 476 (Cal. 1985); St. Paul Fire & Marine Ins. Co. v. Mitchell, 296 S.E.2d 126 (Ga. Ct. App. 1982); Corgan v. Muehling, 522 N.E.2d 153, 156-57 (Ill. App. Ct. 1988) (unregistered psychologist); Rowe v. Bennett, 514 A.2d 802, 804 (Me. 1986) (social worker); Cotton v. Kambly, 300 N.W.2d 627, 628-29 (Mich. Ct. App. 1980); Zipkin v. Freeman, 436 S.W.2d 753, 761-62 (Mo. 1968); MacClements v. LaFone, 408 S.E.2d 878, 880 (N.C. Ct. App. 1991).

276. *See* Swenson, *supra* note 208, at 269 n.40 (reporting sexual misconduct as the most frequent cause of malpractice suits against psychologists insured under the American Psychological Association's policy in a ten year period from 1976 to 1986). The prevalence of sexual misconduct claims against therapists has greatly increased the cost of malpractice insurance, and almost all agencies refuse to cover for negligence grounded in mishandling of the transference phenomena by engaging in sexual contact with a patient. Linda Jorgenson, et al., *Therapist-Patient Sexual Exploitation and Insurance Liability*, 27 TORT & INS. L.J. 595, 599-608 (1992). It has been noted, however, that the actual rates of sexual misconduct by professionals may be declining. Carl Sherman, *Behind Closed Doors: Therapist-Client Sex*, PSYCHOLOGY TODAY, May/June 1993, at 64-65. Rather, what may be on the increase is an awareness among the authorities of the reality of such abuse. So stated Glen O. Gabbard, M.D., Director of the Menninger Clinic in Topeka, Kansas:

> The abuse went on for years, but it didn't come out into the open until the last decade or so. It used to be, when a patient said her therapist had sex with her, we assumed it was a fantasy. The rise of feminism made us all more aware of what is really going on.

Id. at 65.

277. Jorgenson & Randles, *supra* note 65, at 190 n.52 (describing that vulnerability is, in fact, a necessary pre-requisite to effective treatment in many schools of psychoanalytic thought). As it pertains to therapists in general:

> Clients come to therapy with personal crises and problems that they have been unable to resolve themselves. Many times patients lack self-esteem or are fearful and doubting of their own sanity. Patients often feel they must rely upon a professional to help them resolve their conflicts. Clients come to therapy in search of approval and concrete answers to their problems. Struggling with their private crises, many clients are in a helpless, almost childlike position in relation to the therapist. The therapist often becomes a parental-type caretaker, exercising a power over the patient similar to a parent's power over a child.

Id. at 190-92.

278. *Id.*

279. Instructive on the necessity of trust in the therapist-counselee relationship is Melvin S. Heller, *Some Comments to Lawyers on the Practice of Psychiatry*, 30 TEMP. L.Q. 401 (1957). Heller states:

> The kind of self-awareness necessary for a cure is come by painfully and reluctantly. The patient is called upon to discuss in a candid and frank manner personal material of the most intimate and disturbing nature. . . . He is expected to bring up all manner of

The overlay of religious doctrine further complicates the relationship. The counselee sees the minister as spiritually superior—more enlightened and closer to understanding the will of God.[280] The structural organization of the church, or even the tenets of the religion itself, may foster this perception. For example, parishioners call a priest in the Episcopal and Roman Catholic denominations "father," evoking both the patriarchal structure of the church hierarchy, as well as his religious significance as a guide, authority figure, and a source of parental love and approval.

The transference phenomenon is also at work in this relationship,[281] as

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> socially unacceptable instincts and urges, immature wishes, perverse sexual thoughts—in short, the unspeakable, the unthinkable, the repressed. To speak of such things to another human requires an atmosphere of unusual trust, confidence and tolerance. . . . Patients will be helped only if they can form a trusting relationship with the psychiatrist. Psychology becomes otherwise an ineffective and intellectual exercise.

Id. at 405-06.

280. "What makes clerical seduction different from those of secular counselors is the God factor: unlike other therapists, the minister's power and authority are perceived as ultimately derived from the Lord." Woodward & King, *supra* note 6, at 48. It has also been observed that "'the more the minister sees his own person as central to delivering the message of God, the more he is likely to become sexually involved with members of his congregation.'" *Id.* at 49 (quoting psychiatrist Glenn Gabbard, director of the Menninger Hospital in Topeka, Kansas). Hence, it is suggested that in denominations having a "strong Pentecostal or revivalist tradition," religious rituals and ceremonies are "linked to sexual passion." *Id.* "'[W]omen may well imagine that a sexual union with this figure is going to have a tremendous benefit.'" *Id.* (quoting Dr. Gabbard). When pathological narcissism is alloyed with a claim of a divine mandate, the results have often been tragic. Most notably in recent history was the death in a fiery inferno of more than 80 followers of David Koresh. Tim Reiterman, *Parallel Roads Led to Jonestown, Waco; Cults: Similar Forces Shaped Jim Jones and David Koresh into the Violent, Power-Mad "Messiahs" Who Doomed Their Followers to Death*, L.A. TIMES, Apr. 23, 1993, at A24. Koresh was the leader of a splinter group of the Seventh-day Adventists called the Branch Davidians. Born in a small town in Texas, Koresh ultimately became "The Lamb of God" and a doomsday prophet. *Id.* "In [his] endless harangues, [Koresh] bent the Bible to shake the traditional beliefs of [his] followers—and to suit [his] own needs. Growing increasingly grandiose, [he] professed to be a pipeline to God, then God himself." *Id.* After a seven week siege by the Bureau of Alcohol, Tobacco and Firearms, who had been investigating Koresh on allegations of weapons violations and child molestation, the Branch Davidian compound was set ablaze. *Id.* It is still unclear whether the incident was a mass suicide or a mass murder. *Id.*

Other self proclaimed messiahs have included the Reverend Jim Jones, who told his followers, "'Everyone has to die. . . . If you love me as much as I love you, we must all die or be destroyed from the outside.'" Tom Mathews, *The Cult of Death*, NEWSWEEK, Dec. 4, 1978, at 38. After a hellish morning of confusion and despair, more than 900 of Jones's followers were dead after drinking a poison concoction of cyanide, tranquilizers, and strawberry-flavored Kool-aid. *Id.* at 39. Some took the potion voluntarily, believing in the prospect of reunion with Jones in the afterlife, others were forced to drink at the muzzle of a gun. *Id.* at 40. "One old man resisted violently; he was thrown to the ground, his jaws were pulled open and a cupful of poison was poured down his throat." *Id.* Babies were murdered by spraying the cyanide down their throats with a hypodermic syringe. *Id.* at 39. *See also* Richard Lacayo, *In the Reign of Fire*, TIME, Oct. 17, 1994, at 59 (describing apparent murder suicides of over 50 people in two countries at the direction of Luc Jouret, the self-proclaimed messiah of the 'Solar Temple' sect). Glen Gabbard explains:

> I've noticed again and again that ministers go into the profession with a longing to be loved, to be idealized, to be godlike. . . . When middle age sets in, . . . a minister frequently is disappointed with the congregation's response to him. He wants to be idealized but his congregation dwells on his human frailties. Then a young woman comes to him for pastoral counseling. He is attracted to her and . . . "the client gratifies the minister's original wish to be loved like God is."

Woodward & King, *supra* note 6, at 48 (quoting in part, and citing, Dr. Glenn Gabbard, psychiatrist and director of the Menninger Hospital in Topeka, Kansas).

281. A parishioner involved in pastoral counseling may develop a "deep emotional depen-

in all counseling relationships.[282] Transference involves a process where the counselee identifies the counselor with a character from her past, typically a father figure.[283] The counselee is able to resolve past conflicts by confronting the counselor.[284] A competent counselor will handle this transference appropriately and allow the counselee to resolve the conflict.[285] However, when the counselor engages in a sexual relationship with the counselee in the course of the transference phenomenon, he has switched roles and creates psychological confusion in the counselee.[286] The counselee cannot resolve the past issues, and faces new obstructions to recovery, one of which is that she has to "keep the secret."[287] The counselor, on the other hand, is no lon-

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dence on a priest." Moses, 863 P.2d at 328 (Colo. 1993). The emotional dependence is a significant concept in therapy known as "transference." It is the term used by therapists to describe a counselee's emotional reaction to the therapist, and is "'generally applied to the projection of feelings, thoughts and wishes onto the analyst, who has come to represent some person from the patient's past.'" Simmons v. United States, 805 F.2d 1363, 1364 (9th Cir. 1986) (quoting STEDMAN'S MEDICAL DICTIONARY 1473 (5th Lawyers' ed. 1982)). Hence, therapists often become the personification of repressed hopes, fears and frustrations. Joseph C. George, *Psychotherapist-Patient Sex: A Proposal for a Mandatory Reporting Law*, 16 PAC. L.J. 431, 437 (1985). As a result, a patient may react sexually or affectionately to the persona represented by the priest, rather than being actuated by a desire for the priest himself. "Transference is crucial to the therapeutic process because . . . '[i]t is through the creation, experiencing and resolution of these feelings that [the patient] becomes well.'" *Simmons*, 805 F.2d at 1365 (quoting DONALD J. DAWIDOFF, THE MALPRACTICE OF PSYCHIATRISTS 6 (1973)). Similarly, the priest may experience a phenomenon of "counter-transference," whereby the counselee/parishioner represents to him an idealization of his dreams, hopes, and fears. George, *supra* at 437. The dictionary of the American Psychoanalytic Association defines countertransference as "[a] situation in which an analyst's feelings and attitudes toward a patient are derived from earlier situations in the analyst's life that have been displaced onto the patient." BURNESS E. MOORE AND BERNARD A. FINE, eds., PSYCHOANALYTIC TERMS AND CONCEPTS 47 (Yale 1990). Hence, an underlying sense of inadequacy or unfulfilled narcissism may cause the priest to engage in sexual behavior in an effort to unite with his "idealization" of what the counselee represents. Clearly, the duty is on the priest/counselor to recognize the transference phenomena, which occurs in every therapeutic relationship, even if not affirmatively used as a psychoanalytic tool, and deal with it effectively. Forewarned is forearmed.

282. *See* Hans H. Strupp, *A Reformulation of the Dynamics of the Therapist's Contribution, in* EFFECTIVE PSYCHOTHERAPY: A HANDBOOK OF RESEARCH (Alan S. Gurman & Andrew M. Razin eds., 1977) (stating that transference is associated with, but not limited to, the psychotherapeutic relationship). Management theorists suggest that transference occurs in any leader-follower relationship, rendering followers vulnerable to the way a leader communicates and proposes action. Daniel Sankowsky, *The Charismatic Leader as Narcissist: Understanding the Abuse of Power*, ORGANIZATIONAL DYNAMICS, Spring 1995, at 57, 59.

283. *See* STEDMAN'S MEDICAL DICTIONARY 1473 (5th Lawyers' ed. 1982).

284. *See* DONALD J. DAWIDOFF, THE MALPRACTICE OF PSYCHIATRISTS 6 (1973).

285. Courts have held that mishandling of the transference phenomenon is malpractice or gross negligence. *See* Waters v. Bourhis, 709 P.2d 469 (Cal. 1985); Moses, 863 P.2d at 328 n.22; Seymour v. Lofgreen, 495 P.2d 969 (Kan. 1972); Aetna Life & Cas. Co. v. McCabe, 556 F. Supp. 1342 (E.D. Pa. 1983); L.L. v. Medical Protective Co., 362 N.W.2d 174, 178 (Wis. Ct. App. 1984).

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

L.L., 362 N.W.2d at 178.

286. George, *supra* note 281, at 437.

287. *See Moses*, 863 P.2d at 316. The parishioner's sister was also asked to keep the secret after she confronted the offending priest, Father Robinson. *Id.* He claimed that by admitting the sexual relationship with Moses, he had made a "confession" which she could not divulge. *Id.* The priest's superior also ascribed to this warped view:

ger a facilitator and trusted fiduciary acting in the counselee's self interest; rather, he is an impediment to effective healing by acting in his own self interest.

ii. The Power Imbalance

There are six identifiable factors involved in the counseling relationship between the cleric and parishioner that aggravate the imbalance of power between the parties: the counselee's initial vulnerability; the counselor's control of the environment; the confidentiality of the relationship; the leverage gained from unilateral self-revelation; the spiritual superiority or worthiness associated with the clergy; and finally, the counselee's desire to achieve salvation.[288] The counselee typically pursues secular or religious counseling for marital difficulties, depression and suicidal tendencies, faith crises or uncertainty or coping skills in many facets of her life.[289] The social stigma of seeking outside help may aggravate the counselee's vulnerable state.[290] Many people envision the counseling request as a sign of weakness and lack of self-sufficiency.[291] Hence, counselees may enter the counseling relationship full of self-doubt in their capabilities to handle the problems facing them.

The counselor generally plays the dominant role in determining the sequence and location of therapy. The counselee looks to the counselor to determine how long and how often the sessions should be. The meetings often take place in the minister's office, away from the comforts and securities of the parishioner's home. The counselor sets the rules and leads the discussions in an attempt to get at the root of the problem. Hence, the minister's control of the counseling environment, literally as well as figuratively, serves to increase the imbalance of power.

The counselor also gains power by informing the counselee that the relationship is confidential and the counselee can put absolute trust in him. By being the repository of confidential information, including the darkest fears and desires of the counselee, the counselor remains in a dominant role.[292]

> Father Myers was angered that Mohr [the sister] did not keep Father Robinson's secret and scolded her for discussing the relationship. . . . Father Myers said Father Robinson was bishop material and that Mohr and her husband should not ruin his career. Father Myers also . . . said that Father Robinson's actions were not that bad and that Tenantry [the victim, Moses] had not been injured.

Id. The burden of keeping the secret led to the fragile plaintiff's mental and physical deterioration, as well as the demise of her marriage and business. At the time of trial, she was under indefinite psychiatric care. *Id.* at 314.

288. Four of these elements have been generally adapted from Jorgenson & Randles, *supra* note 65, at 190-94. The last two factors are peculiar to religious counselors. There have been occasions, however, where the therapist's control has been so complete that the patient sees him as a "God-like" figure. *See, e.g.*, Greenberg v. McCabe, 453 F. Supp. 765, 771 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979) (recounting that the patient testified that the therapist had become a "God," and that she dared not act contrary to his wishes lest she displease him).

289. *See* Fain, *supra* note 10, at 103.

290. Jorgenson & Randles, *supra* note 65, at 190-92.

291. *Id.*

292. *Id.* at 193; *see also* GERALD COREY, THEORY AND PRACTICE OF COUNSELING AND PSY-

The counselee is there not to convince the counselor that she is a nice person,[293] but to unburden herself from the weight of the most troublesome aspects of her life. Revelations of sexual indiscretions, fears of homosexuality, criminal behavior and every type of secular or spiritual confession are risky for the counselee, but may be encouraged by the counselor as necessary for her treatment. She must trust the minister completely not to divulge this information to anybody else.[294] This aggravates the power imbalance.[295]

The fact that only one party, the counselee, is disclosing information, also contributes to the power imbalance.[296] More specifically, the minister may sit in silence during these revelations and the success of the therapy does not require him to reveal any of his own deepest, darkest fears. Because he is in control of his own disclosures and may legitimately refuse to answer personal questions posed by the counselee, the transference phenomenon is facilitated. The counselee can transform him into anyone from her past that she wishes. Interestingly, many documented cases of sexual abuse by psychotherapists show a pattern of the therapist selectively disclosing personal aspects of his life in order to make the victim believe "she was special."[297] The victim is then lulled into a false sense of security and familiarity with the counselor and becomes an easy prey.

The final two elements are interrelated. Clergy are often considered authorities on spiritual matters and act, in many denominations, as intermediaries between the parishioner and God. Regardless of whether the religion holds that a parishioner cannot hope for salvation without confession to a priest, the cleric stands in a superior position to a parishioner. The cleric is respected and revered. Often, clergy are entrusted to tell their parishioners the "correct" path to salvation in compliance with the tenets of the religion. The risk of abuse in this area is extreme and the consequences are devastating. When a parishioner fears for the salvation of her soul, she is willing to acquiesce to treatment that she would otherwise reject.[298] This salvation

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CHOTHERAPY 31-32 (1986).

293. *See* Heller, *supra* note 279, at 405.

294. *Id.* at 405-06; *see also* Jorgenson & Randles, *supra* note 65, at 193.

295. *Id.*

296. Jorgenson & Randles, *supra* note 65, at 193 n.69 ("Classical analysts assume anonymity toward clients, sometimes called blank-screen approach; they engage in very little self-disclosure to foster transference.").

297. Swenson, *supra* note 208, at 283. Factors identified by researchers Gutheil and Gabbard as warning signs of the violation of the boundaries of the counseling relationship are:

(1) Changing from a last name to a first name basis, thus developing a false sense of intimacy;
(2) Discussing personal matters, particularly those of the therapist's;
(3) Moving from handshakes to pats and hugs;
(4) Meeting outside the office or for a lunchtime session;
(5) Meeting for social events;
(6) Giving gifts, waiving debts, offering a ride home.

Id. Gutheil also noted that such behavior is often preceded by comments such as, "'I ordinarily don't do this . . . '" or, "'While I don't usually do this with my patient. . . .'" *Id.* (quoting Thomas G. Gutheil, *Borderline Personality Disorder, Boundary Violations, and Patient-Therapist Sex: Medicolegal Pitfalls*, 146 AM. J. PSYCHIATRY 599 (1989).

298. *See Moses*, 863 P.2d at 318 (stating that the victim was so concerned about her salvation that she requested and received absolution from the Bishop who had previously refused to disci-

"trump card" is unparalleled in the realm of secular counseling. Religious counselors are not compelled to find a logical or rational explanation for the path they suggest as correct, for faith is not built on foundations as fragile as logic or social conventions. Additionally, a major Christian tenet is to unquestioningly accept the burdens placed upon us, because who are we to question the will of God?

iii. Alternatives for Victims

Judges often look with incredulity at the professed naiveté of the female victims of sexual abuse. Ignoring the classic pattern that exists in incest victims, battered women, and victims of abuse generally, the male judge will often apply the more rational explanation from the male perspective—that the female consented to the sexual relationship, and now in the cold, harsh, reality of day, she is belatedly sorry.[299] Consequently, female victims of sexual abuse by the clergy or others lack appropriate remedies in the courts. The damage from such abuse is long-lasting, often surfacing years after the abuse, which adds to the woman's lack of credibility.[300]

Churches should have a duty to investigate thoroughly any reports of sexual impropriety on the part of clergy. If, however, the plaintiffs could show that the church ignored prior complaints, failed to conduct an investigation or undertake internal measures to determine the veracity of the complaints, actual notice could be demonstrated. Once the organization is put on notice, there is a duty to monitor carefully the clergy's conduct, provide assistance for the clergy, and take appropriate disciplinary measures against repeat offenders.[301]

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pline her clergy/therapist abuser).

299. This can lead to overly simplistic analysis. *See* Roppollo v. Moore, 644 So. 2d 206 (La. Ct. App. 1994). Judge Byrnes wrote of an Episcopalian priest who slept with his counselee:

> Plaintiff complains about the adulterous sexual relationship between the decedent and Dr. Moore. . . . But they were both adults. As there is no civil nor criminal prohibition against such conduct between adult laypersons the State cannot penalize such conduct because Dr. Moore was an Episcopal priest.

Id. at 208. By ignoring the true cause of injury that is conferred solely by the relation of the parties, that is, a breach of trust, and equating that to a nonfiduciary relationship, Judge Byrnes decided the case on grounds of form rather than substance. The decision in *Roy v. Hartogs* provides a more enlightened approach, recognizing a counselee's inability to effectively consent to abuse at the hands of her counselor:

> The ward cannot waive performance of this duty or surrender these rights of protection. . . . [The guardian] should not be heard to say in a court of justice, by way of legal excuse or justification for the seduction, that the ward was capable of consenting. Consent obtained under such circumstances is no consent and should stand for naught.

Roy v. Hartogs, 366 N.Y.S.2d 297, 299 (N.Y. 1975). By placing the focus on the relationship between the parties rather than on the formalistic aspects of the sex act, the law attempts to provide an avenue to check the inherent risk of a fiduciary relationship. Such a treatment is not based on the patronizing view of the hysterical woman unable to determine her own sexual destiny; rather, it recognizes that the counselor-counselee relationship is analogous to other fiduciary relationships, and one cannot remove the sex act from the environment in which it occurs. Denise LeBouef, *Psychiatric Malpractice: Exploitation of Women Patients*, 11 HARV. WOM. L.J. 83, 102 (1988).

300. *See* Teresa K. Douglass, Comment, *Psychotherapist Sexual Misconduct: A Proposal for Legislative Change in Missouri*, 62 UMKC L. REV. 777, 805 n.195 (1994).

301. *Moses*, 863 P.2d at 328.

A plaintiff would then escape summary judgment in a negligent hiring or retention case only if she could plead with particularity facts which indicate that the clergy had a past history that the employer knew or could have reasonably discovered.[302] Liability would attach only if the plaintiff could demonstrate that the cleric had sexual contact with her while engaged in a counseling relationship. Sexual contact during the course of counseling would be *prima facie* evidence of malpractice. This proposed scheme protects all the parties, and the church would not be liable unless the cleric's propensity for prohibited sexual contact were or should have been known. The plaintiff would find refuge, under limited circumstances, in the court. To allow churches and clergy to escape liability on the basis of the First Amendment "would go beyond First Amendment protection and cloak such bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded."[303] Unfortunately, a clergyman falsely accused on more than one occasion would then be subject to liability. Although the specter of false accusations is very real, and institutions may overreact to any accusation, the legal system is capable of determining the veracity of witnesses, and the clergy would already have the advantage of credibility in this area.

b. *Professional Malpractice Standard*

The standard for professional malpractice in jury instructions is that the professional "must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing."[304] This refers to the skill of the practitioner in good professional standing—one who meets the minimum negligence standard.[305] Some commentators and courts claim that this poses a dilemma when clergy are involved.[306] For

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302. Byrd v. Faber, 565 N.E.2d 584, 589-90 (Ohio 1991).

303. Jones v. Trane, 591 N.Y.S.2d 927, 932 (N.Y. Sup. Ct. 1992).

304. KEETON ET AL., *supra* note 156, § 32, at 187. Malpractice is also defined more expansively as "[p]rofessional misconduct or unreasonable lack of skill. . . . It 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 959 (6th ed. 1990).

305. *See* KEETON ET AL., *supra* note 156, § 30 at 164-65. The elements of a cause of action in negligence are:

(1) A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

(2) A failure on the person's part to conform to the standard required: breach of duty.

(3) A reasonably close causal connection between the conduct and the resulting injury [legal or proximate cause].

(4) Actual loss or damage resulting to the interests of another.

Id.

306. *Id.*; *see also* Ericsson, *Clergyman Malpractice*, *supra* note 1. Ericsson, who was defense counsel in *Nally v. Grace Community Church*, asserts that courts are equipped to handle empirical issues, but "[t]he issues raised in clergy counseling cases are not empirical, but religious. . . . They are not conducive to judicial review because they lack objective standards." *Id.* at 169. Other problems delineated by this author include the identification of the scope and nature of church-related counseling. *Id.* Does it include short emergency calls as well as confessions, or extended office or home visits over long periods of time? *Id.* at 170. Does the duty owed to the counselee

clergy malpractice to occur, there must be "professional misconduct," or some deviation from a standard of care on the part of the cleric.[307] Yet determination of the appropriate standard of care for clergy is fraught with difficulty. If the courts must determine which activities are secular and which are spiritual, the mere analysis of activities, it is argued, will intrude upon the First Amendment.[308] However, it is arguable that the secularization of the counseling function separates this activity from the ecclesiastical functions performed by the clergy, and that imposition of a duty of care and competence in this area would not violate First Amendment principles.[309]

Another difficulty faced by the courts is that there is no prescribed educational standard for clergy. Religion is the ultimate equal opportunity employer. Individuals with less than a high school education and those with postdoctoral work may achieve the same degree of success in terms of size of congregations and incomes.[310] Because there is no objective standard that can be applied to the conduct of clergy from the wide range of denominations, some argue that courts would become involved in making judgments regarding the competence and training of clergy and the methods and content of their counseling in order to determine whether the cleric breached the duty imposed by the standards of that denomination.[311] This argument is specious. Certainly the tenets of organized religions and cultural norms do not approve of sexual activity as a counseling method.[312] A secular professional is subject

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vary according to the "ecclesiastical office and authority flowing from such office"? *Id.* Should the training and competence inquiry of the court be limited to secular training because of the difficulty of evaluating the "spiritual gifts" of the counselor? *Id.* at 171. Finally, in addition to constitutional problems, evaluating the content of the counseling to church members is fraught with difficulties. *Id.* at 172. These objections are smokescreens. Courts are well equipped to determine, on a case by case basis, whether a counseling relationship exists. If a clergyman hears a parishioner's confession only, this would not qualify as counseling, because this is part of a liturgical function. Home visits could qualify if they were part of an ongoing attempt to provide assistance with a psychological problem. Bible study in the home would not be considered counseling. If the court is determining liability for sexual misconduct, then the ecclesiastical office of the clergy, the competence and training of the pastors, and the content of the counseling should all be secondary considerations. The cleric's conduct should be the primary consideration.

307. "Standard of care" refers to the conduct required of an individual in a given situation. *See* KEETON ET AL., *supra* note 156, at 164. In negligent tort actions, that standard is often described as that degree of care which a reasonably prudent person should exercise "under the same or similar circumstances." *Id.* at 175. In the professional context, the standard of care refers to the standard established by the professionals, and in the medical profession it has either varied by locality or been applied according to a national standard. *Id.* at 185-88.

308. *See* Destefano v. Grabrian, 763 P.2d 275, 290 (Colo. 1988) (Quinn, J., concurring).

309. Bergman, *supra* note 211, at 45.

310. *Accord* Kelly Beers Rouse, Note, *Clergy Malpractice Claims*, 16 N. KY. L. REV. 383, 385 (1989).

311. Ericsson, *Clergyman Malpractice*, *supra* note 1, at 171.

312. In a national random-sample survey of 1,423 practicing psychiatrists, the majority (97.-4%) believed that sexual contact between patient and therapist is usually or always harmful to the patient. Judith Lewis Herman et al., *Psychiatrist-Patient Sexual Contact: Results of a National Survey, II: Psychiatrists' Attitudes*, 144 AM. J. PSYCHIATRY 165 (1987). Ninety percent of patients who had engaged in sexual relationships are psychologically damaged—many severely. Carl Sherman, *Behind Closed Doors: Therapist-Client Sex*, PSYCHOL. TODAY, May 1993, at 66. Eleven percent of sexually exploited victims were hospitalized; one percent committed suicide as a result of their involvement. *Id.* A Wisconsin survey showed, without exception, that every professional group polled believed sexual contact between therapists and client/patient is highly likely to have an injurious effect on the latter. Anthony Kuchan, *Survey of Incidence of Psychotherapists' Sexual*

to a duty imposed based upon the state of the art within the professional standards prescribed by his or her profession. Clergy engaged in counseling should be subject to some minimal standard of competence—based on the state of the art in counseling—as a psychiatrist, psychologist, or social worker should be.[313] The clergy, however, would not be held to the level of competence of the specialist.[314]

In the case of clergy engaged in counseling, the cleric should be held liable if his conduct did not conform to what a reasonable, prudent, competent counselor would have done under similar circumstances.[315] This should not be difficult to establish when the cleric has engaged in sexual misconduct during the counseling relationship. This view of malpractice as the deviation from predetermined professional standards is used successfully in defending suits in clergy malpractice.[316] The defendants' rationale is that since clergy cannot and should not be regulated by society, determining the appropriate "standards" for clergy violates the separation of church and state.[317] This may be true for content-based analysis of the cleric's actions (that is, examining a cleric's statements does implicate the First Amendment), but analyzing what he does (that is, conduct-based analysis) may avoid these thorny constitutional issues.[318]

Contact with Clients in Wisconsin, *in* PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS: INTERVENTION AND PREVENTION 51, 63 (Gary S. Schoener, et al. eds., 1989). Therapist-patient sex may produce disorders including depression, sleep adjustment, and sexual dysfunction. KENNETH S. POPE & JACQUELINE C. BOUHOUTSOS, SEXUAL INTIMACY BETWEEN THERAPISTS AND PATIENTS 63-66 (1986); *see also* Jorgenson et al., *supra* note 222, at 662-63 & n.90 (discussing damage caused by sexual exploitation to a patient by a therapist).

313. Bergman compares the clergy engaged in counseling to the *mohel:*

> The practice of ritual circumcision originated in antiquity and its rules were developed before the discovery of microscopic organisms and their relation to infection. If a *mohel* today were to perform a circumcision in the same manner as it was performed two thousand years ago, without sterilizing his instruments, and if infection were to result, would we not be justified in considering him to have breached a duty of care?

Bergman, *supra* note 211, at 57-58.

314. *Id.* at 60-61.

315. Among the standards suggested and discarded are the "secular standard," the "state of the art standard," and the "denominationally specific standard." Fain, *supra* note 10, at 101-03; Lawrence M. Burek, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPP. L. REV. 137, 152-54 (1986).

The secular standard would require that clergy conform to the standard held by mental health professionals, and is viewed as a temporal, non-religious standard. Fain, *supra* note 10, at 101. It has been criticized as inappropriate largely because of the differences in training and techniques employed by secular mental health professionals and religious counselors. *Id.* at 102.

The state of the art standard poses similar problems, since it would require clergy to become conversant with the latest psychological theories and therapeutic methods and to employ them. *Id.* at 102-03. This has been identified as an unrealistic requirement, given that these psychological techniques may be contrary to the clergy's religious beliefs. *Id.* at 103. The denominationally specific standard, while comparing clergy to other clergy rather than mental health professionals, requires entanglement by the court, which may be most offensive to the First Amendment. *Id.*

316. *See* Esbeck, *supra* note 11, at 8 (indicating that if the matters of creed, teaching and ecclesiastical discipline are implicated in a lawsuit, the First Amendment provides an "immunizing" defense).

317. Esbeck has suggested that the barriers imposed by the Free Exercise Clause and the Establishment Clause of the First Amendment are insurmountable. *Id.* at 8-9.

318. Asking the court to distinguish between religious and secular content in counseling may

The mere settlement of a dispute involving a cleric by a civil court does not imply that the civil court has inhibited the free exercise of religion. Society should provide some redress for the victim when a counselor betrays her trust and causes her psychological harm. The content of the counseling relationship is clearly privileged,[319] but this shield of privilege is intended to protect the parishioner, and the courts should not let the clergy use it to protect themselves from exposure for their misdeeds.

3. The First Amendment Barrier Removed

a. *Counseling—Religious or Secular Activity?*

One commentator has suggested that the counseling conducted by clergy is not equivalent to secular counseling, because it is a religious activity that "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. 'The counselor and the troubled person . . . enter into an emotional relationship, in which God is the third party.'"[320] This religious component, it is argued, precludes the use of scientifically or medically based forms of counseling in developing a standard of care.[321] In addition, the diversity of religious belief systems prevents the definition of a general standard by which conduct may be measured. One potential solution is the application of a

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require the court to interfere in issues which are inextricably intertwined. This, in itself, may be a violation of the Establishment Clause. Mark Taylor, Nally v. Grace Community Church: *The Future of Clergy Malpractice Under Content-Based Analysis*, 1990 UTAH L. REV. 661, 678-79 (1990).

319. *See* N.Y. Civ. Prac. L. & R. § 4505 (McKinney 1992); *see also* People v. Carmona, 627 N.E.2d 959, 962 (N.Y. 1993) (recently interpreting § 4505).

320. Funston, *supra* note 1, at 515 (citing F. Braceland & D. Farnsworth, *Psychiatry and Religion*, *in* PSYCHIATRY, THE CLERGY AND PASTORAL COUNSELING 1, 5-6 (D. Farnsworth & F. Braceland eds., 1969)). There is an inherent tension between religious or pastoral counseling and secular psychological treatment. David Delapane, *Stand by Me: The Role of the Clergy and Congregation in Assisting the Family Once It Is Involved in the Legal and Treatment Process, in* ABUSE AND RELIGION: WHEN PRAYING ISN'T ENOUGH, 173, 178 (Anne L. Horton & Judith A. Williamson eds., 1988). Religious counselors often fear that secular therapists will discount the faith and religious beliefs of the counselee, while secular therapists seek to find an underlying pathology, the discovery of which may necessitate coming to grips with realizations or desires that run contrary to the tenets of the church. *Id.*

Although Funston argues that the religious nature of counseling is not severable from its secular components, this concern only seems pertinent when addressing the "negligent counseling" type claim of *Nally*. Funston, *supra* note 1, at 516. Sexual misconduct by the clergy, however, seems to be clearly severable from the religious milieu in which such abuse can occur.

There is increasing evidence that stronger spousal abuse laws have contributed to reduced incidents of domestic violence, suggesting that allowing actions for clergy malpractice could have a similar effect on the pastor-congregant dynamic. Delapane, *supra* at 180.

321. *See* Christofferson v. Church of Scientology, 644 P.2d 577 (Or. Ct. App. 1982). The Oregon Court of Appeals reasoned that beliefs could not be dissected into individual components. The court noted:

> Statements made by religious bodies must be viewed in the light of the doctrines of that religion. Courts may not sift through the teachings of a religion and pick out individual statements for scrutiny, deciding whether each standing alone is religious. . . . Although certain of the theories espoused by Scientology appear to be more psychological than religious, we cannot dissect the body of beliefs into individual components.

Id. at 600-01.

denomination-specific standard;[322] however, the disadvantage of this standard is that it would require courts to examine religious doctrine and tenets, which would contravene the First Amendment.[323]

This argument fails every logical, moral and philosophical scrutiny. Certain behaviors, including sleeping with a woman who has come to a cleric for counseling, simply fall outside the realm of any religious tenet. The Free Exercise Clause is a defense only if the defendant's conduct is religious.[324] Engaging in a sexual relationship with a parishioner who seeks counseling is undoubtedly not. Despite this, many clergy and their churches have asserted First Amendment defenses in sexual misconduct cases, and courts have agreed that First Amendment rights are implicated.[325]

b. *Role of the Establishment and Free Exercise Clauses*

The First Amendment's two clauses referring to religion serve a single value—that of the individual's freedom of religious beliefs and practices.[326] The Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[327] The Free Exercise Clause prevents the government from curbing the individual's religious freedom.[328] On the other hand, the Establishment

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322. Funston, *supra* note 1, at 523 (noting that such a denominational standard would invite the type of inquiry deemed unconstitutional in Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969)).

323. *Id.* at 524.

324. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). "[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief." *Id.* The Yoder Court held that the First and Fourteenth Amendments prevented the state from compelling the respondents to send their children to high school until they reached sixteen. *Id.* at 234.

325. *See, e.g.*, Schmidt v. Bishop, 779 F. Supp. 321, 327-28 (S.D.N.Y. 1991); Destefano v. Grabrian, 763 P.2d 275, 284 (Colo. 1988).

326. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2, at 1157 (2d ed. 1988), (citing Everson v. Board of Education, 330 U.S. 1, 12 (1947)) (noting that the natural result of government-established religions was the persecution of religious dissenters).

327. U.S. CONST. amend. I.

328. The Supreme Court's decision in *Sherbert v. Verner* provided the high water mark for the protection of the free exercise of religion. 374 U.S. 398 (1963). In that case, the Court established a "compelling interest" test to justify governmental burdens on the free exercise of religion. *Sherbert*, 374 U.S. at 403. Under this test, government action that substantially burdened a person's exercise of religion could only be justified if it were in furtherance of a compelling governmental interest, and was the least restrictive means of furthering that interest. *Id.* at 406-07. Hence, in that case, a state unemployment compensation scheme that required claimants to be available for work from Monday to Saturday violated the free exercise rights of a Sabbatarian. *Id.* at 410.

However, in more recent years, the Court has moved away from such a deferential standard. In a recent case, the Court enunciated a new standard, providing that as long as the laws are religiously neutral and of general applicability, the incidental impact on one's exercise of religion is constitutionally permissible. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 884-85 (1990). Therefore, the violation of a criminal law forbidding the use of peyote could be validly used to deny unemployment benefits under the Oregon compensation scheme, despite the fact that the claimants used the peyote in their religious ceremonies. *Id.* at 1606.

Congress re-established the less deferential "compelling interest" standard of *Sherbert* in Free Exercise Clause cases by creating a cause of action under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994). The Religious Freedom Restoration Act did not purport to alter Establishment Clause jurisprudence. *Id.* § 2000bb-4.

Clause prevents the government from aiding a particular religion.[329] The government cannot inhibit an individual's choice of religion, or aid religion in general.[330] The amendment thus requires the state to maintain a distance from the organized church. Although individual freedom is the single value identified with the First Amendment, the two clauses are at odds with each other, requiring accommodation and balance.[331] This balance is accomplished when the government seeks to achieve only secular goals, and does so in a religion-neutral way.[332] Although the right of religious liberty has been restricted on occasion,[333] this country has a strong jurisprudential history of maintaining the wall between church and state.[334] There is mutual societal

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329. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 17.1, at 1223 (5th ed. 1995).

330. *Id.*

331. *Id.* at 1218-19.

332. *Id.*

333. *See infra* note 351 and accompanying text.

334. *See* Watson v. Jones, 80 U.S. 679 (1871) (standing for the broad principle of absolute judicial deference to the internal disputes of religious institutions). Where the right of property ownership in the civil court is dependent on the question of church doctrine, discipline, ecclesiastical law, rule, custom, or church government:

> [T]he rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our systems of laws . . . is, that, whenever [such questions] have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Id. at 727. The dispute arose over the ownership of local church property in Louisville, Kentucky, after the General Assembly called for its members in local congregations who believed that slavery was a divine right to "repent and forsake these sins." *Id.* at 691. The minority faction in the local church argued that the resolution of the General Assembly was a departure from the doctrine held when the local church joined the General Assembly. *Id.* The minority espoused the theory that the General Assembly held an interest in the property of the local church, subject to an implied trust in favor of the doctrine which existed when they joined. *Id.* at 693. Any departure from that doctrine was a breach of trust, and was a forfeiture by the General Assembly of the interest in the local church property. *Id.* This case, however, was decided not on constitutional grounds, but on a common law view of separation of church and state, in marked contrast to the British standard under which the court must determine the true standard of faith in an organization and determine which of the contending parties support that standard. *Id.* at 726. In addition, it was decided before the Fourteenth Amendment made the First Amendment applicable to the states. Three general rules were established by the majority for the civil courts' resolution of internal ecclesiastical disputes. When property is given to a congregation with stipulations as to its use, if use for that specific purpose is discontinued, the civil courts could order the property returned. *Id.* at 722. When property is given for the general use of an independent religious group, the group decides, by majority decision or another method previously established, use of the property. *Id.* at 721. Finally, when property is acquired by a group which constitutes a larger organization, the civil courts must defer to the decision of the ecclesiastical court. *Id.* at 727. *See also* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (discussing the limitations imposed on civil courts in awarding church property based on the church doctrine); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) (discussing unconstitutionality of transfer of property in limiting free exercise of religion).

This doctrine of total judicial deference to churches was somewhat tempered 100 years later when the Court established a "neutral principles of laws" approach. Jones v. Wolf, 443 U.S. 595, 602 (1979). In *Jones*, the Court resolved the issue of whether civil courts, consistent with the First and Fourteenth Amendments, could resolve an issue involving church property under neutral principles, or whether they must defer to the decision of the hierarchical church tribunal. *Id.* at 597. The lower court determined that *Jones* did not preclude an analysis based on "neutral principles of law," and the court could legitimately examine documents such as deeds, state trust statutes, and the corporate charter of the local church in order to determine whether there was language creating a trust in favor of the regional body. *Id.* at 600. The Supreme Court remanded the

benefit to institutional separation—the church cannot use the state and civil courts to achieve its sectarian purposes, and the state cannot interfere within the church's sphere of competence.[335]

The Free Exercise Clause operates when the cleric has a sincerely held religious belief, and the government action has a coercive effect against his practice of religion. There cannot be a 'truth test' as to one's faith, and the objective evidence of the sincerity of the belief has been described as a fervency test.[336] If the presence of the cleric is incidental, and his religious beliefs are not central to the dispute, the Free Exercise Clause is not implicated.[337] Cases of clergy sexual misconduct form the paradigm for the application of this principle.

The Establishment Clause, on the other hand, may be implicated in a negligent hiring, retention, or supervision claim if the court has to examine and assess the employment policies and practices of the religious organization, and these policies are imbued with religious tenets.[338] The Supreme Court in

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case, noting that although the First Amendment "prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice," a state may adopt an approach for settling property disputes "so long as it involves no consideration of doctrinal matter, whether the ritual and liturgy of worship, or the tenets of faith." *Id.* at 602. The neutral-principles approach met this criterion, as "it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organizations and polity. [It] . . . relies exclusively on objective, well-established concepts of trust and property law. . . . It therefore promises to free civil courts completely from entanglement in questions of religious doctrine, polity and practice." *Id.* at 602-03.

335. *See* Esbeck, *supra* note 11, at 12. "Next to the family, religious organizations comprise the largest single group of societal institutions that generate, mold and propagate those shared norms essential to a reasonably cohesive society capable of self-government." *Id.*

336. *Id.* at 32.

337. TRIBE, *supra* note 326, at 1185. Professor Tribe emphasizes that there are contexts in which religiously neutral actions by the government should not warrant constitutional consideration unless the neutral government action is a pretext for interference with religion:

> Just as the First Amendment's free speech clause is not even implicated in the arrest of a newscaster for speeding, or in the closure of a bookstore for violation of a health regulation, so the free exercise clause is not implicated in the imprisonment of a member of clergy for embezzlement, or in the closure of a church as a fire hazard.

Id. See also United States v. Seeger, 380 U.S. 163 (1965) (discussing the constitutional right to be a conscientious objector to war for religious reasons and what constitutes a religious belief within that exception); United States v. Ballard, 322 U.S. 78 (1944) (discussing religious beliefs as a constitutional basis to prevent indictment).

Only claims that are "so bizarre, so clearly nonreligious in motivation" will be denied First Amendment protection. Thomas v. Review Bd., 450 U.S. 707, 715 (1981). While the Court held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment Protection," sexual misconduct by clergy clearly falls within the first category of conduct—"clearly nonreligious in motivation." *Id.* at 714.

338. Byrd v. Faber, 565 N.E.2d 584, 590 (Ohio 1991). For cases finding a constitutional barrier against negligent hiring and/or supervision claims, see Isely v Capuchin Province, 880 F. Supp. 1138 (E.D. Mich. 1995) (dismissing claim of negligent hiring); Gibson v. Brewer, No. WD 50238, 1996 WL 93511 (Mo. Ct. App. 1996); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995). *But cf.* Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993), *cert. denied,* 114 S. Ct. 2153 (1994) (refusing to grant churches immunity for being sued in civil actions for negligent hiring and supervision); Destefano v. Grabrian, 763 P.2d 275, 287-88 (Colo. 1988) ("[W]e hold that [the diocese that] knows or should have known that [a clergyman's] conduct would subject third parties to an unreasonable risk of harm may be directly liable to third parties for harm proximately caused by his conduct."); Jones v. Trane, 591 N.Y.S.2d 927, 930-31 (N.Y. Sup. Ct. 1992) ("'[E]ven the most liberal construction of the First Amendment will not protect a religious organization's decision to hire someone who it knows is likely to commit criminal or

Serbian Eastern Orthodox Diocese v. Milivojevich,[339] in addition to discussing a church property dispute, determined whether a secular tribunal could review a church tribunal's defrockment of a bishop. The Supreme Court found that in a matter of internal church discipline, when the highest clerical tribunal has spoken, a detailed review was impermissible under the First and Fourteenth Amendments.[340]

c. *First Amendment Inapplicable*

A broad reading of *Serbian Orthodox Diocese* suggests that cases involving clergy sexual misconduct would have no place in the secular courts if a hierarchical church tribunal has made a decision. Some commentators[341] and courts[342] argue that the First Amendment bars all clergy malpractice actions because governmental interference in religion is prohibited.[343] This argument is flawed in several respects. The general view is that "government violates the Establishment Clause only if its actions are born of a religious intent, or if they exert primarily religious effects, or if they create excessive church-state entanglement."[344] Courts do not violate the Establishment Clause when they try a minister for crimes or entertain a priest's action for breach of contract. The Establishment Clause does not imply that clergy can never be present in a civil court of law. It insulates a priest or minister only when he engages in conduct related to religion.[345] Sleeping with his counselees does

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tortious acts.'") (quoting *Byrd*, 565 N.E.2d at 590); Erickson v. Christenson, 781 P.2d 383, 386 (Or. Ct. App. 1989) ("[P]laintiff's claim for outrageous conduct is not premised on [the] mere fact that Christenson is a pastor, but on the fact that, because he was plaintiff's pastor and counselor, a special relationship of trust and confidences developed.").

339. 426 U.S. 696 (1976).

340. *Milivojevich*, 426 U.S. at 718. Writing for the majority, Justice Brennan stated:

> In short, the [Constitution] permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Id. at 724-25.

341. *See* Ericsson, *Clergyman Malpractice*, *supra* note 1, at 176; O'Reilly & Strasser, *supra* note 207, at 55.

342. *See* Nally v. Grace Community Church of the Valley, 763 P.2d 948, 960 (Cal. 1988), *cert. denied*, 490 U.S. 1007 (1989); Bladen v. First Presbyterian Church, 857 P.2d 789 (Okla. 1993).

343. U.S. CONST. amend. I. The Free Exercise and Establishment Clauses have been incorporated through the Fourteenth Amendment and made applicable to the states by the Court's decisions in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), and Everson v. Board of Educ., 330 U.S. 1, 8 (1947), respectively. The Supreme Court has consistently held that the Free Exercise and Establishment Clauses represent fundamental aspects of liberty and must be protected from state and federal interference. *Cantwell*, 310 U.S. at 903. In a case involving mail fraud, the Ballards claimed they could cure diseases through supernatural gifts. United States v. Ballard, 322 U.S. 78, 80-81 (1944). The Court stated that the First Amendment prevented the courts from examining the truth of the religious representations made by the Ballards. *Id.* at 86.

344. TRIBE, *supra* note 326, at 1187. The excessive entanglement test was established in Lemon v. Kurtzman, 403 U.S. 602 (1971), although some have argued that recent First Amendment jurisprudence shows less reliance on the *Lemon* test. *See* Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?* 70 NOTRE DAME L. REV. 581, 583 (1995).

345. *See, e.g.*, Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 109 (1952). If subversive ac-

not fit that description. Sexual battery during religious or secular counseling, is simply not a religious activity that should trigger the First Amendment when courts try to curtail such activity.[346] In cases like *Nally* where the content of the counseling is in question, clergy should be accorded First Amendment protection, but this should not extend to sexual misconduct cases.[347]

In *Byrd v. Faber*[348] the court was concerned that an inquiry into whether a religious organization had exercised due care in hiring would require examination of employment policies and practices, which would be "infused with the religious tenets of the particular sect involved. If the state becomes involved in assessing the adequacy of these standards, serious entanglement problems may arise under the First Amendment."[349] This court was overly protective of the church, setting up heightened pleading requirements for plaintiffs to avoid summary judgment, while acknowledging that if a religious organization hired someone with a history of criminal or tortious behavior, the First Amendment would not protect the religious organization from liability.[350] These fears are unfounded. There is no need for a court to inquire into whether a member of the clergy engaging in such behavior acted in conformance with church teachings on clergy conduct, or to call expert witnesses; the court can declare, as a matter of law, that a clergy engaged in a sexual liaison with a counselee has breached a fiduciary duty owed to the counselee.

If some religious group were to claim that sexual activity was a sacramental rite, and that intercourse with twelve-year-old vestal virgins were an integral aspect of that rite, the state would have a compelling interest in protecting its citizens and would not run afoul of the Free Exercise Clause in regulating such conduct.[351]

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tion "should actually be attempted by a cleric, neither his robe nor his pulpit would be a defense." *Id.*; *see also* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (holding that the respondent's religious motivation for using the drug peyote did not place the respondents beyond the reach of a criminal statute that was not specifically directed at their religious practice, and that was concededly constitutional as applied to those who used the drug for other reasons).

346. *See* Esbeck, *supra* note 11, at 88 ("Regardless of what the church claims are its canonical standards for the proper behavior of priests, the civil law can say that sexual seduction of a counselee is not even 'arguably religious,' that it is wrongful and thus punishable in tort.").

347. *Nally*, 763 P.2d at 960.

348. 565 N.E.2d 584 (Ohio 1991).

349. *Byrd*, 565 N.E.2d at 590; *see also* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (holding that constitutional prohibitions prevent civil courts' intervention in ecclesiastical affairs, and that even an arbitrary decision of a church hierarchical body would be off limits to the civil courts if it would involve any review of religious doctrine and practice); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (Wis. 1995), *cert. denied*, 116 S. Ct. 920 (1996) (holding that plaintiff's claim for negligent hiring, supervision or retention of priest who allegedly coerced her to have sexual relations with him was barred by the First Amendment, because a determination of competence as a Catholic priest would require interpretation of church canons and internal church policies and practices).

350. *Byrd*, 565 N.E.2d at 590.

351. Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (holding that statute which prohibited polygamy was constitutional, and religious belief did not excuse adherence to law since "[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself"); *see also* United States v. Lee, 455 U.S. 252, 261 (1982) (holding that an Amish employer was obligated to pay

Statutory rape laws and a public policy of protecting the health and welfare of the citizenry in general, and minors in particular, would justify using the state's police powers to curb this "religious" sexual activity. Courts have intervened in cases involving the employment of minors by religious organizations finding that the application of the child labor laws and other aspects of the Fair Labor Standards Act (FLSA) did not violate the Free Exercise and Establishment Clauses of the First Amendment.[352] The courts also reject these First Amendment arguments in cases involving the minimum wage and equal pay provisions of the FLSA, as well as state workers' compensation laws.[353] These examples demonstrate that mere potential for entanglement with religion is not always a shield for the religious employer. When the potential victims are women whose judgment has been clouded by a combination of factors, the state is justified in intervening. The state allows women to recover for malpractice when their psychologists have sex with them, and it should intervene on the same grounds here.

The First Amendment does not apply exclusively to clergy. Theoretically, in cases against psychologists, psychiatrists, or therapists—where the courts clearly have jurisdiction—the defendants could also hide under the Free Exercise umbrella by asserting that the sex furthered a "sincerely held religious belief."[354] Exempting clergy as a class without examining whether the "contested conduct is in fact religious in character"[355] addresses the problem with a sword, when a scalpel would be adequate. The First Amendment requires the identical standard for secular counselors and clergy engaged in counseling. The emphasis should be on the behavior, not the religious or secular status of the offender.

Some courts have recognized the fallacy in providing First Amendment protection for clerics who have sex with their counselees when the Free Exercise Clause protects only religious beliefs or practices:

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social security taxes despite his religious convictions); Prince v. Massachusetts, 321 U.S. 145, 158 (1944) (holding mother not constitutionally protected from application of child labor laws); Braunfield v. Brown, 366 U.S. 599, 609-10 (1961) (upholding validity of Sunday closing laws). The First Amendment has never been considered to confer a right to engage in activity threatening the public safety, peace, or order, no matter how religiously motivated the behavior is. The freedom to believe is not synonymous with the freedom to act. *Smith*, 494 U.S. at 879-90.

352. Brock v. Wendell's Woodwork, Inc., 867 F.2d 196, 198 (4th Cir. 1989); *see also* Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (holding it proper to extend FLSA to religious foundation). *See generally* David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27, 51 (1992) (discussing decisions of the Supreme Court which have favored the religious employer at the expense of the employee). Professor Gregory asserts:

> As the Burger and now Rehnquist Court matured, this activist, pro-institutional, statist jurisprudence became increasingly inimical to the severely debilitated First Amendment and Title VII rights of religious employees, provisions which theoretically were designed to promote free exercise of religion and to protect employees against unlawful employment discrimination on the basis of religion.

Id. at 28-29 (citations omitted).

353. South Ridge Baptist Church v. Industrial Comm'n, 911 F.2d 1203, 1211 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 754 (1991).

354. Strock v. Pressnell, 527 N.E.2d 1235, 1237 (Ohio 1988).

355. *Id.*

> Notwithstanding the due deference that we are required to give in determining the legitimacy of religious beliefs or practices, we cannot accept the premise that the sexual activities in which Pressnell is alleged to have participated are protected by the Free Exercise Clause. Indeed it is clear that the alleged conduct was nonreligious in motivation — a bizarre deviation from normal spiritual counseling practices of ministers in the Lutheran Church. Therefore, since Pressnell's alleged conduct falls outside the scope of First Amendment protections, he may be subject to liability for injuries arising from his tortious conduct.[356]

Despite this declaration, the court rejected each of the plaintiff's causes of action.

Sometimes, the injection of the First Amendment in these state tort claims arguably violates the basic rule of judicial decision making—that a court should not consider constitutional issues unless such a decision is essential.[357] Despite this rule, courts, in their eagerness to dismiss these actions, decide them on First Amendment grounds.[358]

d. *Neutral Principles Paradigm*

Clergy sexual malpractice actions could also be decided under "neutral principles of law" that do not implicate the First Amendment. The Supreme Court determined in *Jones v. Wolf*[359] that as long as the civil courts remained free of entanglement in questions of "religious doctrine, polity and

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356. *Id.* at 1238; *see also* Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988), where the court noted that:

> [While] marital counseling by a cleric presents difficult questions because it often incorporates both religious counseling and secular counseling . . . [i]n the spiritual counseling context, the free exercise clause is relevant only if the defendant can show that the conduct that allegedly caused the plaintiff's distress was in fact 'part of the belief and practices' of the religious group . . . [when, however,] the alleged wrongdoing of a cleric clearly falls outside the beliefs and doctrine of his religion, he cannot avail himself of the protection afforded by the [F]irst [A]mendment.

Id. at 283-84. However, other courts have claimed that the Free Exercise Clause is implicated in this type of action. *See* Dausch v. Rykse, 52 F.3d 1425, 1428 (7th Cir. 1994). In *Dausch*, the Seventh Circuit relied on the district court in finding that

> Illinois does not recognize a claim for clergy malpractice. . . . [C]ourts that have considered but rejected such a claim have recognized the free exercise implications of any such recognition. . . . [S]uch free exercise considerations would not be relevant if Rykse's conduct was not part of the belief and practices of his church. . . . [T]he district court concluded that Mrs. Dausch had failed to allege adequately that Rykse's psychological counseling was not part of the church's religious beliefs and practices. As a result, concluded the court, the free exercise clause of the First Amendment was implicated and Mrs. Dausch failed to state a valid claim.

Id. at 1428.

357. Harmon v. Brucker, 355 U.S. 579, 581 (1958) (considering a non-constitutional issue before a constitutional issue pursuant to the Court's "duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case").

358. *See, e.g.*, Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 794 (Wis. 1995) (Abrahamson, J., dissenting).

359. 443 U.S. 595 (1979).

practice,"[360] they could decide questions of ownership of church property. The civil court might have to scrutinize religious documents—e.g., a constitution—but if this examination relied on secular terms, rather than religious precepts, it would pass First Amendment muster. The court concluded that "[o]n balance, . . . the promise of non-entanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application."[361] The Supreme Court again prohibited excessive entanglement, but affirmed the use of neutral principles in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church.*[362]

Is a woman less valuable to our society than property? If the Supreme Court has allowed this compromise in situations involving property, *a fortiori,* it should be available in the more important issues of the health and welfare of citizens. Public policy considerations which allow state courts to intervene in property disputes should allow such intervention in matters involving clergy malpractice.[363] Clergy malpractice involves abuse of power and sexual abuse, and the courts can apply the neutral principles for resolving these disputes. Such principles can be adopted from analogous situations involving other

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360. *Jones*, 443 U.S. at 603.

361. *Id.* at 604.

362. 393 U.S. 440 (1969). In deciding a property dispute, the Supreme Court held that the Free Exercise and Establishment Clauses of the First Amendment forbid any application of a departure-from-doctrine rule. *Mary Elizabeth*, 393 U.S. at 450. The Georgia Supreme Court had determined that the Presbyterian Church-U.S.A. substantially departed from established Presbyterian doctrine and awarded the property in dispute to the local members and ministers who had withdrawn from the main organization. Presbyterian Church v. Eastern Heights Presbyterian Church, 159 S.E.2d 690 (Ga. 1968). The Supreme Court stated that in resolving civil disputes involving churches, secular authorities may not engage "in the forbidden process of interpreting and weighing church doctrine." *Mary Elizabeth*, 393 U.S. at 451. The court rejected the departure-from-doctrine rule, saying it "can play *no* role in any future judicial proceedings." *Id.* at 450 (emphasis added).

363. An appellate court in Illinois reversed a trial court's dismissal of an action against a Baptist minister and the church on First Amendment grounds. The appellate court used neutral principles analysis:

> We cannot conclude from plaintiffs' complaint that their cause of action against First Baptist Church of Energy will infringe upon, or place a burden upon, the church's freedom to exercise its religion. Inquiring into whether the church was negligent in its failure to protect plaintiffs from the sexual misconduct of its minister may not call into question the church's religious beliefs or practices or subject them to analysis or scrutiny. . . . [T]he minister's sexual misconduct was not rooted in the church's religious beliefs and was outside the boundaries of the church's ecclesiastical beliefs and practices.

Bivin v. Wright, 656 N.E.2d 1121, 1124 (Ill. App. Ct. 1995).

In a case of first impression in the New Jersey courts, an intermediate appellate court reversed the trial court's dismissal of a clergy malpractice claim, articulating a neutral principles model for the resolution of clergy malpractice claims:

> [O]ne test to determine whether a cause of action against a cleric is cognizable in civil courts is whether adjudication of the claim requires an evaluation of dogma or ritual, or other matters of purely ecclesiastical concern. In the present case it is unlikely that defendants will assert that sex with a counselee by a pastoral counselor is sanctioned by or somehow involves tenets of the Episcopalian church, or would otherwise create an entanglement with religious beliefs or rituals of First Amendment concern.

F.G. v. McDonell, 677 A.2d 258, 262-63. (N.J. 1996).

helping professionals. The mere existence of a clerical collar should not prevent their application.

Right-thinking judges are concerned about doctrinal entanglement in religious values: "[W]hereas the other forms of entanglement involve government in the *apparatus* of religion, doctrinal entanglement involves government in religion's very *spirit*, in its decision on core matters of belief and ritual."[364] But the sex that underlies clergy malpractice has no relationship to the beliefs or rituals of established religions, and courts and legislatures addressing it would not be entangling themselves in matters of belief or ritual. No religious truths are implicated, unless the defendants were to claim a religious experience in the sexual contact.[365] Even so, whether these views are sincerely held could be questioned.[366]

e. *Sexual Activity As Conduct, Not Content*

Courts have consistently held that sexual relationships between a secular therapist and a patient constitute malpractice.[367] The courts have permitted recovery for emotional distress and other damages.[368] Despite the acknowledgment by the founders of modern psychology, Freud and Jung, of the debt owed to the church and the similarity between secular and religious counseling,[369] the courts have resisted liability for clergy who engage in similar behavior with their parishioners during counseling. Some courts, however, have recognized that a court can apply a secular standard to clergy when the conduct is secular and tortious.[370]

If a woman is sexually abused by a cleric, goes to the church government which then begins an investigation, resulting in charges and an ecclesiastical trial at which the clergy is exonerated, is the woman precluded from seeking a

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364. TRIBE, *supra* note 326, at 1231 (citing to the Supreme Court's assertion in Watson v. Jones, 80 U.S. 679 (1871), that such entanglement "would lead to the total subversion of . . . religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed").

365. The Supreme Court decided that no judge or jury could decide whether the claims of a religious experience by defendants in a mail fraud case were true, although they could determine whether the defendants' beliefs were sincerely held. United States v. Ballard, 322 U.S. 78, 86-87 (1944).

366. *Id.*

367. *See* American Home Assurance Co. v. Stone, 61 F.3d 1321, 1324 (7th Cir. 1995); McNicholes v. Subotnik, 12 F.3d 105, 109-10 (8th Cir. 1993); Simmons v. United States, 805 F.2d 1363, 1369 (9th Cir. 1986); Andrews v. United States, 732 F.2d 366, 368-69 (4th Cir. 1984).

368. Cruz, *supra* note 4, at 503 & n.30 (citing Simmons v. United States, 805 F.2d 1363, 1364 (9th Cir. 1986) (health service counselor); Richard H. v. Larry D., 243 Cal. Rptr. 807, 808-09 (Cal. Ct. App. 1988) (psychiatrist); Horak v. Biris, 474 N.E.2d 13, 18 (Ill. App. Ct. 1985) (social worker); Lenhard v. Butler, 745 S.W.2d 101, 104 (Tex. Ct. App. 1988) (psychologist)); *see also* Corgan v. Muehling, 574 N.E.2d 602 (Ill. 1991) (holding that damages for negligent infliction of emotional distress caused by sexual misconduct of psychologist not subject to the "zone of danger" rule; the damages are recoverable as an element of malpractice).

369. P. C. Vitz, *Psychology As Religion*, *in* BAKER ENCYCLOPEDIA OF PSYCHOLOGY 932, 933-34 (David G. Benner ed., 1985).

370. *See* Moses v. Diocese of Colorado, 863 P.2d 310, 320 (Colo. 1993), *cert. denied*, 114 S.Ct. 2153 (1994); Sanders v. Casa View Baptist Church, 898 F. Supp 1169, 1174 (N.D. Tex. 1995).

civil remedy? On the other hand, if the church determines that some disciplinary action is required, does the cleric have a recourse in the secular courts? If either party argues that the church did not follow its own rules, can the civil courts intervene?

The Supreme Court held in *Serbian Orthodox Diocese* that civil courts cannot make a determination after the highest ecclesiastical tribunal of a hierarchical church has spoken.[371] Analysis of whether the church's action is consistent with canonical church laws and regulations would entail inquiry into the procedures that ecclesiastical law requires the church to follow, which is forbidden by the First Amendment.[372] The Supreme Court asserts that "it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria."[373] Notwithstanding plaintiff complaints that the decision was arbitrary or there was lack of due process, the ecclesiastical decisions of church tribunals are not appealable in the civil courts.[374] This deference to the First Amendment exceeds the original intent of either the Free Exercise or the Establishment Clauses. The Supreme Court has condoned a level of immunity for hierarchical churches' decision-making which extends beyond its own guideline, whether the inquiry is "at the core of ecclesiastical concern."[375]

A hypothetical illustrates the difficulties and potential injustice inherent in this approach. A priest employed "at will" by a church organization which owns several nursing homes is assigned to one of these nursing homes. A nurse's aide refuses to bring patients from her floor to a service led by the priest. He complains to her superior in writing. She immediately lodges a sexual harassment complaint against him, alleging that he gave her unwanted gifts and made advances toward her. Within days the priest is summoned by personnel and told to accept a suspension or resign. He is not given charges in writing, not allowed to have legal counsel present, or face his accuser, as required by the diocesan procedures. He accepts the suspension, while protesting his innocence, then consults with legal counsel. In response to rumors concerning his suspension, he circulates a memo to his fellow employees informing them of the reason for his absence. He is summarily dismissed. The organization has failed, in every respect, to follow its own procedures. Should this priest have recourse in the civil court if the ecclesiastical courts fail him? If he were not a priest, despite his "at-will" status which suggests that he can be fired without cause, courts should find that the policies and procedures in an employee handbook set certain minimal guidelines to be followed.[376] The priest was fired for alleged sexual

371. *Serbian E. Orthodox Diocese*, 426 U.S. at 708.

372. *Id.* at 713.

373. *Id.* at 714-15.

374. *Id.* at 713.

375. *Id.* at 717.

376. Some courts have found that an employee handbook may create a unilateral contract when (1) the handbook is sufficiently definite in its terms to create an offer to the employee; (2) the handbook has been communicated to and accepted by the employee; and (3) the employee, by continuing to work, has provided the necessary consideration. Yockey v. Iowa, 540 N.W.2d 418,

harassment; presumably, without the sexual harassment accusation, he would still be employed. If the core of the concern is the sexual harassment, not an ecclesiastical concern, the priest, as well as his accuser, should be entitled to due process. If the church is unwilling to provide due process, the courthouse door should not be closed. The court's approach is too indulgent of the church, with too little concern for the parties harmed.

The Supreme Court in *Serbian Orthodox Diocese* stated that "it would be unconstitutional for state tribunals to question a church's suspension or expulsion of a member for defying the church's hierarchy and challenging the church's authority through civil litigation."[377] In cases involving sexual misconduct, because the challenge is not based on an "ecclesiastical concern"[378] regarding the cleric's religious beliefs, or the doctrine of the church, the challenge should be heard by the civil courts. When clergy are involved, some courts have taken a "hands off" approach.[379] It appears that the churches themselves, or the state legislatures, are left to effect needed change.

C. *Education*

Education of clergy may be the first line of defense in deterring sexual abuse within the counseling relationship. The prevalence of this form of abuse indicates that an ostrich-like reaction will further exacerbate the problem. Courses in the psycho-sexual dynamics of the counseling relationship and human sexuality should be included in every seminary. If celibacy is required of the clergy, counseling in coping with the demands of this choice is required. Proactive measures in training all clergy is essential. Other approaches are necessary once the sexual contact has occurred. For clergy who are not sexual predators, but merely succumb to bad judgment, recognition of the warning signs and a procedure for referral or otherwise terminating the counseling relationship is advisable. In order to heal both the clergy and the congregation, the church has to be willing to discuss sex and sexuality and the role power plays in sexual abuse. If the church responds sympathetically to the victim, rather than adversarially, the victims are less likely to seek civil remedies.

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422 (Iowa 1995); *see also* Sowards v. Norbar, Inc., 605 N.E.2d 468 (Ohio Ct. App. 1992) (holding employee handbooks or oral representations may change "at will" employment); Shelton v. Oscar Mayer Foods Corp., 459 S.E.2d 851 (S.C. Ct. App. 1995) (holding that an employee handbook created a jury issue on existence of employment contract); Sanchez v. Life Care Ctrs. of America, Inc., 855 P.2d 1256 (Wyo. 1993) (holding that an employer's right to discharge may be changed by an employee handbook).

377. *Serbian E. Orthodox Diocese*, 426 U.S. at 720. For a description of the disciplinary measures in hierarchical, representative, and congregational churches, see Esbeck, *supra* note 11, at 63-76.

378. *Serbian E. Orthodox Diocese*, 426 U.S. at 717.

379. *See supra* Part III.B.

CONCLUSION

In addition to actions taken by churches, the legislature is best suited to fashion a remedy for the growing number of people sexually abused by clergy during counseling. A "bright line" prohibition of such behavior, tailored to the specific evil to be remedied, will protect counselees while avoiding the pitfalls encountered when the courts attempted to handle the problem. Churches should support such legislation because it will ultimately inure to their benefit. The courts can also provide remedies. Viewing the clergy as having a fiduciary duty to protect the counselee can provide the basis for a higher standard of care—one to act in the best interest of the counselee. The cleric and parishioner share a very special relationship—one that is similar to the professional relationship between psychiatrist, psychologist, or social worker and patient. This relationship is one of trust and respect—for the professional achievements of the cleric, as well as for the cleric's spirituality. Consequently, it may be argued that a fiduciary duty is created between the clergy and parishioners. The law recognizes that the existence of a fiduciary relationship can be used to establish a legal duty. This duty is frequently found in malpractice suits against medical professionals, based on the fiduciary relationship between doctor and patient. Within the relationship between clergy and parishioner, this supplies the first prong in the elements necessary for establishing negligence.

Reports of sexual abuse by clergy weaken faith in the church as an institution. The churches' past response to reports suggested more interest in protecting "members of the club" (the clergy) than in healing the victims of abuse. The church hierarchy, the accused clergy, the accuser, and the congregation conspire to keep the secret, even after it has been revealed. This act does not empower the victim, or future potential victims. Imposing a duty to disclose on churches when clergy seek transfers within the denomination will protect future victims. Openness in handling these accusations—genuine ones as well as false—will inevitably lead to greater respect for church leaders, and can serve as a "witness" by strengthening the spiritual family of the church and bringing more people to the faith.