

PROTECTING THE FLOCK FROM THE SHEPHERD: A DUTY OF CARE AND LICENSING REQUIREMENT FOR CLERGY COUNSELORS

Counseling pervades our society.¹ Increased drug use, divorce, and personal stress have forced more and more people to seek solace in counseling. In 1957, one out of seven Americans went to secular and religious counselors, and by 1976 that number had increased to one out of every four Americans.² As more and more individuals take advantage of counseling services, researchers have identified the destructive effects that careless or reckless counseling can have on counselees.³ Courts, too, have recognized these destructive effects and granted counselees legal redress from the negligent and intentional wrongs of secular therapists under various legal theories.⁴ Moreover, counselees are now petitioning the courts to impose the same liability on the largest group of counselors in the country: the clergy.⁵

¹ See Siegel, *Laws That Help When Therapists Do Harm*, STUDENT LAWYER, Dec., 1988, at 33, 34; see also W.A. CLEBSCH & C.R. JAEKLE, *THE TRADITION OF PASTORAL CARE* 10 (M. Jacobs ed. 1964) (defines "pastoral care" as helping acts done by Christian persons to heal, sustain, guide, and reconcile troubled persons whose troubles arise in the context of ultimate meanings and concerns.)

Webster's Ninth New Collegiate Dictionary provides a more secular definition of counseling: "[P]rofessional guidance of the individual by utilizing psychological methods esp. in collecting case history data, using various techniques of the personal interview, and testing interests and aptitudes." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 297 (1983).

This note defines "counseling" broadly as conversations or a series of conversations between a concerned individual or group and a competent carer who uses one or several of certain religious or scientific disciplines, all with helping intent. C.W. BRISTER, *THE PROMISE OF COUNSELING* 3 (1978).

² H. CLINEBELL, *BASIC TYPES OF PASTORAL CARE & COUNSELING* 47 (1984). The author also notes that, while the percentage of people seeking help from professional therapists increased from 27 to 49 percent, the percentage of those who sought help from the clergy declined slightly from 42 to 39 percent. *Id.* at 47-48.

³ See Bergin & Lambert, *The Evaluation of Therapeutic Outcomes*, in *HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE* 139, 180 (1978).

⁴ See, e.g., *Cotton v. Kambly*, 101 Mich. App. 537, 538, 30 N.W.2d 627, 629 (1980) (psychiatrist engaging in sexual relationship with patient held liable for malpractice); *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 431, 551 P.2d 334, 340, 131 Cal. Rptr. 14, 20 (1976) (psychiatrist failing to warn third party of dangerous patient held liable for negligence).

⁵ See, e.g., *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, —, 763 P.2d 948, 952, 253 Cal. Rptr. 97, 101 (1988); *Stock v. Pressnell*, 38 Ohio St. 3d 207, 208, 527 N.E.2d 1235, 1236 (1988).

Traditionally, a society's religious representatives have provided moral and emotional support for individuals.⁶ Over the last twenty centuries in Judeo-Christian culture, the clergy has helped developing, struggling people cope with a broad range of personal and interpersonal conflicts.⁷ Clergy members often refer to their counseling as the "cure of souls," emphasizing the attention they give to the spiritual wholeness of their counselees.⁸ Although recently clergy counselors have augmented their focus on faith and spirit with some of the basic techniques used by secular counselors, clergy counselors retain their spiritual emphasis and continue to provide their traditional counseling services.⁹

Psychiatry, with its focus on a biologically-based understanding of mental illness, began in the sixteenth century and slowly established its claim to care for the emotional problems of people in the seventeenth, eighteenth, and nineteenth centuries.¹⁰ Secular counseling, as it exists today in the United States, grew out of Freud's psychoanalytic theory and the vocational-guidance, mental health, and child-study movements.¹¹ Like religious counselors, secular counselors attempt to help troubled individuals through a variety of personal problems.¹² Secular counselors tend to focus more on the counselee's realization of potential than on his or her spiritual wholeness, but they share the same basic goal with religious counselors: to heal and guide.¹³

As the demand for secular counselors grew, states moved to protect their citizens from the destructive effects of untrained counseling by instituting licensing regulations.¹⁴ Licensing requirements

⁶ See S. STRONG & C. CLAIBORN, *CHANGE THROUGH INTERACTION* 2-9 (1982).

⁷ McAllister, *Psychiatry and Religion: Yesterday and Today*, in *PSYCHIATRY, MINISTRY, & PASTORAL COUNSELING* 24-25 (A.W. Sipe & C.J. Rowe ed. 1984); E.B. HOLIFIELD, *A HISTORY OF PASTORAL CARE IN AMERICA* 15 (1983).

⁸ See W.A. CLEBSCH & C.R. JAEKLE, *supra* note 1, at 10. Some scholars, however, assert that the distinction between the cure of souls and treatment of the mind is impossible to make. E.g., Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163 (1981).

⁹ Estadt, *Pastoral Counseling: Today and Tomorrow*, in *PSYCHIATRY, MINISTRY & PASTORAL COUNSELING* 41 (A.W. Sipe & C.J. Rowe ed. 1984); H. CLINEBELL, *supra* note 2, at 47-48.

¹⁰ See generally McAllister, *supra* note 7, at 24-31.

¹¹ Estadt, *supra* note 9, at 41-42.

¹² Super, *Transition: From Vocational Guidance to Counseling Psychology*, in *COUNSELING: READINGS IN THEORY & PRACTICE* 9 (1962). The author states that counselors help their counsees cope with adjustments ranging from severe depression to career choice.

¹³ See Bloomfield, *Religion and Psychotherapy — Friends or Foes?*, in *FAITH OR FEAR?* 71 (Jacobs ed. 1987).

¹⁴ See generally Siegel, *supra* note 1, at 37.

are not uniform, but most states require that secular counselors have a graduate level of education in one of the many health care disciplines in order to ensure a certain level of skill.¹⁵ These regulations recognize the damage that uneducated counselors can cause their counselees; nevertheless, all these statutes exempt clergy counselors from licensing.¹⁶

Courts have recognized this need for protection from the potentially negative outcomes of counseling by holding secular counselors liable for their intentional and negligent torts.¹⁷ The counselor-counselee's special relationship creates a duty of care that the counselor owes the counselee.¹⁸ Violations of this duty to treat a counselee according to the profession's standards may result in liability.¹⁹

In contrast, the doctrine of charitable tort immunity and a general societal deference to the clergy protected churches and their counselors from liability for their intentional torts.²⁰ But as the doctrine of charitable tort immunity has eroded nationally, courts have begun to recognize several claims against the clergy for intentional torts occurring within the counseling context. Those claims include defamation,²¹ fraud,²² intentional infliction of emotional distress,²³ alienation of affections,²⁴ invasion of privacy,²⁵ outrageous conduct,²⁶ and tortious interference with contract.²⁷

So far, however, courts have declined to extend the malpractice liability found against secular counselors to religious counselors. In 1988, the California Supreme Court in *Nally v. Grace Community Church of the Valley* rejected a plaintiff's claim of clergy malpractice

¹⁵ See *id.*

¹⁶ See Siegel, *supra* note 1, at 37. Although the clergy is the largest group of counselors in the nation, no state requires them to be licensed. Although psychologists and psychiatrists must be licensed in all states, other therapists, such as social workers and marital counselors, are only subject to unevenly-applied licensing and regulation from state to state.

¹⁷ See, e.g., *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1983); *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 431, 551 P.2d 334, 340, 131 Cal. Rptr. 14, 20 (1976).

¹⁸ *Tarasoff*, 17 Cal. 3d at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.

¹⁹ See *id.* at 437, 439, 551 P.2d at 344, 345, 345-46, 131 Cal. Rptr. at 25, 27.

²⁰ See RESTATEMENT (SECOND) OF TORTS § 895E comment a (1979); PROSSER & KEETON ON THE LAW OF TORTS 1069-70 (1984).

²¹ *Hester v. Barnett*, 723 S.W.2d 544, 556 (Mo. Ct. App. 1987).

²² *Strock v. Pressnell*, 38 Ohio St. 3d 207, 216, 527 N.E.2d 1235, 1243-44 (1988).

²³ *Hester*, 723 S.W.2d at 560.

²⁴ *O'Neil v. Schuckardt*, 112 Idaho 472, 475, 733 P.2d 693, 696 (1986); *Hester*, 723 S.W.2d at 554.

²⁵ *O'Neil*, 112 Idaho at 478-79, 733 P.2d at 699-700; *Hester*, 723 S.W.2d at 563.

²⁶ See *Handley v. Richards*, 518 So. 2d 682, 687 (Ala. 1988).

²⁷ *Hester*, 723 S.W.2d at 564.

asserted against clergy counselors who had counseled the plaintiffs' decedent son prior to his suicide.²⁸ The court reasoned that in this case the defendant counselors owed no duty of care to the decedent because no special relationship sufficient to create such a duty existed between the counselors and the decedent.²⁹ Thus, no court has held that religious counselors owe the same duty of care to their counselees as psychiatrists owe to their patients.

Those opposed to courts extending negligence liability to clergy counselors claim that the first two clauses of the first amendment of the United States Constitution prohibit such liability.³⁰ The first amendment's first clause, the "establishment" clause, prohibits the state from inhibiting or promoting any one religion.³¹ The second clause, or "free exercise" clause, secures for citizens the absolute right to believe whatever they want and the limited right to practice those beliefs as long as they do not infringe on a compelling state interest.³² Thus, imposing liability on the clergy for negligent counseling is unconstitutional if it either promotes or prohibits religion, limits religious belief, or restricts religious conduct without a countervailing governmental interest.³³

This note explores the issues resulting from the interaction among counseling, the clergy, and the Constitution. Section I examines briefly the importance of counseling, the functions counseling provides, and the extent and character of religious and secular counselors' involvement in counseling.³⁴ Section II considers the constitutional protections available to clergy counselors.³⁵ Section III presents the negligence and intentional tort liability that secular and religious counselors are subject to.³⁶ Section IV concludes that, because the state has an overwhelming interest in protecting individuals from the harmful effects of negligent counseling, courts must hold clergy counselors to some duty of care.³⁷ Therefore, this note proposes a comparatively low standard of care, reinforced through a licensing requirement, which aims to provide protection

²⁸ See *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, 290, 763 P.2d 948, 960, 253 Cal. Rptr. 97, 109 (1988).

²⁹ *Id.* at _____, 763 P.2d at 958, 253 Cal. Rptr. at 107.

³⁰ See *Hester*, 723 S.W.2d at 553.

³¹ U.S. CONST. amend. I, cl.1.

³² U.S. CONST. amend. I, cl. 2; *Cantwell v. Connecticut*, 310 U.S. 303-04 (1940).

³³ See *Cantwell*, 310 U.S. at 304.

³⁴ See *infra* notes 39-80 and accompanying text.

³⁵ See *infra* notes 81-130 and accompanying text.

³⁶ See *infra* notes 131-83 and accompanying text.

³⁷ See *infra* notes 184-223 and accompanying text.

for clergy counselees without violating the Constitution, regardless of counselors' denominations.³⁸

I. COUNSELING

From 1957 to 1976, the percentage of Americans who sought counseling for their personal problems from both secular and religious counselors almost doubled.³⁹ As a result, in recent years communities have established a national network of mental health care centers to accommodate individuals seeking help for a wide range of problems.⁴⁰ Undoubtedly, the social chaos and personal stress of our times help account for the increased demand for counselors.⁴¹ Just as assuredly, this demand will continue to increase as long as those pressures do.

Commentators describe counseling as the art of change and healing through personal interaction.⁴² Through positive communication, counselors seek to aid the counselee in strengthening relationships with others, developing greater direction and purpose, and relieving distressing feelings and disabilities.⁴³ The goal of modern individual counseling, as counseling developed from psychoanalytic and vocational guidance theories, is to help counselees with all types of life adjustments.⁴⁴ Clergy counseling, in comparison, emphasizes particular religious teachings to help the counselee with

³⁸ *Id.*

³⁹ H. CLINEBELL, *supra* note 2, at 47-48. The author cites a study revealing a 31 percent decrease in consultation of physicians, a 12 percent increase in consultation of psychiatrists and psychologists, and a 10 percent increase in consultation of other mental health professionals.

A national survey done in 1969 indicates that one out of four Americans felt the need for help from some kind of counselor, and that one in seven actually sought that help. Estadt, *supra* note 9, at 40 (citing P. Kim & F. Van Tatchnove, *The Utilizability of the Pastoral Counseling Response Scale (PCRS)*, J. PASTORAL CARE 81, 98 (1981)).

⁴⁰ H. CLINEBELL, *supra* note 2, at 47. The increase in the number of books and periodic literature published on the subject of counseling also illustrates the tremendous growth in the area. J. F. MCGOWAN & L. D. SMITH, *COUNSELING: READINGS IN THEORY AND PRACTICE* v (1962).

⁴¹ H. CLINEBELL, *supra* note 2, at 46.

⁴² *E.g.*, S. STRONG & C. CLAIBORN, *supra* note 6, at 1.

⁴³ *Id.* Communication can occur between the counselor and the counselee alone or in a group. Because of its increased dynamics, group therapy may have more powerful effects on the counselee, whether positive or negative, than individual therapy. *Id.* Still, research suggests that group therapy outcomes are similar to outcomes in individual therapy, probably because of the difficulty the therapist will have in getting the group to function cohesively and therapeutically. *Id.* at 191-92.

⁴⁴ Super, *supra* note 12, at 9.

those life adjustments.⁴⁵ Both clergy and secular counseling, however, focus on helping and guiding troubled individuals as they struggle through a range of personal problems.⁴⁶

Counseling experts, whether religious or secular, recognize several common elements necessary to heal and guide the counselee.⁴⁷ Experts agree that the counselor-counselee relationship is the single most important factor in successful therapy.⁴⁸ Within that relationship, it is essential that the counselor be capable and trained adequately to be understanding, objective, neutral, empathetic, and to express integrity.⁴⁹ Both secular and religious counselors must use these skills within the counseling relationship if therapy is to be effective.⁵⁰

In general, both secular and religious counselors seek the same result: helping people with their personal deficiencies and interpersonal conflicts through curative techniques such as listening, understanding, and empathizing. Secular forms of therapy such as psychoanalysis, clinical psychology, and counseling psychology, tend to focus on "realization of potential," "better adjustment," and "individuation."⁵¹ Although the numerous schools of secular therapy

⁴⁵ Estadt, *supra* note 9, at 41-42.

⁴⁶ McAllister, *supra* note 7, at 24-25.

Psychologist Elias H. Porter describes at least five different attitudes counselors express in their attempts to help their counsees. First, a counselor can be evaluative, by expressing his or her own value judgment of the subject. Second, a counselor can be interpretive, by explaining the "why" of the counselee's behavior. Third, a counselor can be supportive, by reassuring the counselee. Fourth, a counselor can be probing, by pushing the counselee for further communication. Fifth, a counselor can be understanding, by expressing empathy for the counselee's troubles. Porter also asserts that a counselor can be advising, by suggesting actions to help the counselee solve his or her problem. H. CLINEBELL, *supra* note 2 at 93. *Id.*

⁴⁷ See Bloomfield, *supra* note 13, at 71.

⁴⁸ Marmor, *Psychotherapy: Basic Principles*, in *PSYCHIATRY, MINISTRY, & PASTORAL COUNSELING* 52 (A.W. Sipe & C.J. Rowe ed. 1984).

⁴⁹ *Id.* at 53-54. To accomplish these basic goals within the counseling relationship, several specific skills are necessary. Careful listening and observing of non-verbal signals is essential. See H. CLINEBELL, *supra* note 2, at 93-94. The counselor must also have the skill to understand the issues and dynamics of the problems raised. *Id.* at 94. Effective counselors also use their skills to show sympathy and understanding through verbal responses, eye contact, or body expression. Confronting, exploring, encouraging to talk, and inviting clarification are also common techniques experts consider necessary to establish and execute a healing relationship. See *id.* at 93.

Marmor suggests that, in addition to the counselor-counselee relationship, emotional release, cognitive learning, conditioning, identification, suggestion, and reality testing are elements necessary and common to all successful helping of a counselee. Marmor, *supra* note 48, at 52.

⁵⁰ See Estadt, *supra* note 9, at 41.

⁵¹ See Bloomfield, *supra* note 13, at 71. Clinical psychology is typically concerned with diagnosing the nature and extent of psychopathology, abnormalities of normal people, ad-

differ greatly in their specific styles and goals, many therapies do not consider any theological or existential dimension in their approaches.⁵² Some secular therapists, however, do emphasize values. But often those values vary from one counselor to the next.⁵³

Religious counselors, by contrast, attempt to attend simultaneously to the psycho-social and the spiritual dimensions in human problems.⁵⁴ Clergy counseling, more than secular counseling, specifies behavioral norms, answers specific theological questions, and develops the counselee's faith, spirit, and relationship with God.⁵⁵ Christian clergy refer to this focus on spiritual wholeness as the "cure of souls."⁵⁶ Moreover, they see this concentration on the theological as the essential and distinctive function of religious counseling.⁵⁷ The counseling clergy increasingly try to integrate the knowledge and teachings of secular therapies with theology without sacrificing their special focus on the spiritual.⁵⁸ The religious counselor's goal is to learn and use what secular therapies have to offer, along with the teachings of his or her faith, in order to help counselees with their problems.⁵⁹

Both secular and religious counselors are bound by professional ethics codes to keep certain counselee communications confidential.⁶⁰ In two thirds of the states, psychiatrists are also bound by

justment difficulties, and maladaptive tendencies. Clinical psychology also is concerned with acceptance and understanding of these tendencies in an effort to modify them. *Super*, *supra* note 12, at 10. Counseling psychology, in contrast, is concerned with the normalities even of abnormal persons, locating and building on personal resources and adaptive abilities in order to assist the counselee in making better use of them. *Id.* at 10.

⁵² Bloomfield, *supra* note 13, at 71; Marmor, *supra* note 48, at 52.

⁵³ Bloomfield, *supra* note 13, at 71.

⁵⁴ H. CLINEBELL, *supra* note 2, at 103.

⁵⁵ *Id.*, at 104, 105.

⁵⁶ See W. A. CLEBSCH & C. R. JAEKLE, *supra* note 1, at 10.

⁵⁷ H. CLINEBELL, *supra* note 2, at 103.

⁵⁸ Estadt, *supra* note 9, at 41. Some scholars feel that it is dangerous to encourage clergy counselors to receive training in secular counseling techniques. These commentators fear that emphasis on secular techniques will lead the clergy to neglect the spiritual needs of their counselees. *Id.*; see also H. MALONY, T. NEEDHAM, & S. SOUTHWARD, CLERGY MALPRACTICE 18 (1986). See generally A. GODIN, THE PASTOR AS COUNSELOR 7-11 (B. Phillips trans. 1965) (a discussion of the *pro* and *contra* arguments over whether the clergy's traditional counseling role has lost its identity to psychotherapy); H. CLINEBELL, *supra* note 2, at 105-06, (an excellent summary of this problem facing clergy counselors.)

⁵⁹ Estadt, *supra* note 9, at 41.

⁶⁰ See AMERICAN ASS'N OF PASTORAL COUNSELORS CODE OF ETHICS § III (Am. Ass'n of Pastoral Counselors 1981); AMERICAN PSYCHOLOGICAL ASS'N ETHICAL PRINCIPLES OF PSYCHOLOGISTS § 5 (The Am. Psychological Ass'n 1981). See generally Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V.L. REV. 47, 64-65 (1981).

statutes that make physician-patient communications privileged.⁶¹ Similar statutes cover patient-psychologist communications.⁶² The only corresponding statutory privileges that cover the clergy are restricted to the priest-penitent relationship.⁶³ The privilege applies only to communications made in confessing sin, and not to communications of other types.⁶⁴ More than two thirds of the jurisdictions have such statutes.⁶⁵

The confidentiality duty varies slightly from state to state, but both secular and religious counselors generally are bound to keep all counselor-counselee communications confidential unless doing so would endanger specific third parties, or unless the counselee consents to disclosure.⁶⁶ The policy underlying the tradition of confidentiality is to encourage communication, for without communication the counselor could not do an effective job.⁶⁷ Therefore, states have codified this basic duty to keep counselee communications confidential.

Confidentiality encourages the communication necessary to achieve the goal of counseling: actual healing. Although early researchers were not convinced that various counseling techniques had any positive effect, now they agree that some people benefit considerably from their therapy experience.⁶⁸ Experts attribute the discrepancy between the modestly positive results of earlier outcome studies and the more favorable results of later ones to the fact that the subsequent studies involved more experienced and competent therapists.⁶⁹ Positive therapeutic outcomes are closely associated

⁶¹ 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 820 (1961).

⁶² *Id.* at 532-33 (listing state statutes).

⁶³ *Id.* at 876 (citing judicial decisions from eight states).

⁶⁴ *Id.* at 876-77.

⁶⁵ *Id.* at 873 (listing state statutes).

⁶⁶ Bergman, *supra* note 60, at 64; see e.g., CAL. EVID. CODE §§ 1030-34 (West 1968); AMERICAN ASSOCIATION OF PASTORAL COUNSELORS CODE OF ETHICS, III E & F; AMERICAN PSYCHOLOGICAL ASSOCIATION ETHICAL PRINCIPLES OF PSYCHOLOGISTS, 5. See *infra* notes 138-41 and accompanying text for a discussion of *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). See also Oates, *Keeping Confidences in Pastoral Counseling*, in AN INTRODUCTION TO PASTORAL COUNSELING 87-95 (1959), for a full discussion of the particular confidentiality issues facing clergy counselors.

⁶⁷ See generally, MALONY, NEEDHAM, & SOUTHARD, *supra* note 58, at 110-22, for a discussion of the historical development of, and specific guidelines for, honoring the clergy-penitent privilege.

⁶⁸ Bergin & Lambert, *supra* note 3, at 139-40.

⁶⁹ *Id.* at 80; see also P. MERENDA & J. ROTHNEY, *Evaluating the Effects of Counseling — Eight Years After*, in COUNSELING: READINGS IN THEORY AND PRACTICE 545 (1962) (study that shows favorable adult attitudes and behaviors resulted from counseling of high school students); D. CAMPBELL, *THE RESULTS OF COUNSELING: TWENTY-FIVE YEARS LATER* 107 (1965) (findings of increased academic performance among college students who received counseling).

with well-trained counselors. The more stable and skilled the counselor, the more effective the therapy.⁷⁰ Thus, counseling works — especially when the counselor is competent.

Conversely, inexperienced or careless counseling may not only be ineffective, it may be destructive to the counselee. Counseling can exacerbate a counselee's existing problems or create new ones.⁷¹ The negative result of counseling, described as "deterioration effect," is a serious problem in psychotherapy that is reported in group, individual, family, and marital counseling.⁷² The causes of deterioration are not all known, but researchers believe that the therapist's style, skills and attitudes, personality traits, and unconscious motivations can cause negative counseling outcomes.⁷³ Furthermore, therapists with less training and experience are more likely to induce deterioration.⁷⁴ Thus, therapy has powerful consequences. The goal is health, but the result can be harm if counselors lack skill or care.⁷⁵

To further the goal of health, licensure for psychiatrists and psychologists is mandatory in all states.⁷⁶ Licensing for counseling psychologists, for example, is supported by the American Psychological Association's graduate program accreditation requirements.⁷⁷ The accreditation process establishes guidelines for the training of counselors designed to secure a high level of performance, integrity, and quality.⁷⁸ The accreditation process ensures that counseling psychologists receive training from qualified faculty, in quality facilities, through a balanced curriculum.⁷⁹ No state, however, requires clergy members to attain any particular level of skill in order to practice as counselors.⁸⁰

⁷⁰ Bergin, *supra* note 3, at 180.

⁷¹ *Id.*

⁷² *Id.* at 152, 154, 158, 161. Psychologists refer to the counselees who emerge from such therapy as "casualties." One example of a casualty resulting from the therapy group of an aggressive, confrontational leader was a subject who was told cryptically by the leader that she was "on the verge of schizophrenia." She was also attacked by other members of the group. She became obsessed with the leader's remark, and after eight months she still did not feel she had regained the stability she enjoyed before the therapy began. *Id.* at 161.

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 162.

⁷⁶ *See* Siegel, *supra* note 1, at 37. To the detriment of consumers, in many states licensing of other therapists is often nonexistent, spotty, or not uniform.

⁷⁷ AMERICAN PSYCHOLOGICAL ASSOCIATION, ACCREDITATION HANDBOOK i (1986).

⁷⁸ *Id.*

⁷⁹ *See id.*

⁸⁰ Siegel, *supra* note 1, at 37.

Both pastoral and secular counselors seek to help troubled individuals cope with a range of problems. Furthermore, both try to meet the growing demand for mental and spiritual help. Traditionally, clergy counselors have focused on spiritual care for the counselee, and they are conscious of the importance of retaining the spiritual aspect of their therapy. Yet, clergy counselors are also learning and using skills and knowledge developed by psychologists and other mental health professionals. Such continued education, some counselors argue, is necessary in order for both secular and religious counselors to avoid subjecting their counselees to the harmful effects of untrained or careless therapy.

II. FIRST AMENDMENT PROTECTIONS FOR CLERGY COUNSELORS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof
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The Constitution's framers intended, through the "establishment" and "free exercise" clauses, to allow individuals to worship as they pleased without government intervention.⁸² The establishment clause prohibits the government from aiding or formally es-

⁸¹ U.S. CONST. amend. 1. The Supreme Court has held that both clauses are incorporated in the due process clause of the fourteenth amendment and therefore apply to the states. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (establishment clause incorporated); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (free exercise clause incorporated).

⁸² See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1158-66 (2d ed. 1988). In *Everson v. Board of Education*, the Court discussed the historical forces underlying the development of the religion clauses of the first amendment. 330 U.S. 1, 8 (1947). The Court noted that many of the early United States settlers fled the persecution of laws that required them to support and attend government-sponsored churches. But colonial laws, authorized by charters from the English crown, established churches that all were required to attend. *Id.* The colonial charters also imposed taxes to build and maintain churches. Thus, colonists found themselves facing in America the persecution which many had sought refuge from in the first place. This experience led colonists to the conclusion that individual religious freedom could best be accomplished under a government restricted from taxing, supporting, or otherwise assisting religion, as well as restricted from interfering with the religious beliefs of individuals or groups. *Id.* See also J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW*, 1031-33 (3d ed. 1986). The authors make the point that this popular history of the purposes behind the first amendment is not so simple and clear. They note that, because the first amendment was initially only a limitation on the federal government, its inclusion in the Constitution could be read as an attempt by the states to affirm their sovereignty over the subject. In support of that point, they offer the evidence that close ties between church and state existed in the states long after the revolution, and that, even after established churches had ended in the states, aid to religious entities continued. For example, the authors note, religious teachers used public schools frequently, and many states exempted churches from taxes.

establishing a religion.⁸³ The free exercise clause prohibits the government from proscribing any religious beliefs and requires the government to accommodate, to some extent, the practice of those beliefs.⁸⁴ Together both clauses secure individuals' religious freedom.

For either clause to apply, courts first must determine that the activity or belief promoted or prohibited is in fact religious.⁸⁵ Courts have yet to settle on one approach to defining "religion."⁸⁶ The United States Supreme Court considers the determination of what is a "religious" belief or practice a difficult and delicate task with which the judiciary is ill-equipped to deal.⁸⁷ To merit first amendment protection, the Court has held a belief need not be acceptable, logical, consistent, or comprehensible to others. The Court has noted, however, that there are claims so bizarre and clearly non-religious in motivation that they do not qualify for protection. The Court has also excluded from protection personal philosophical beliefs.⁸⁸ Thus, the beliefs and activities that qualify as "religious," and therefore worthy of first amendment review, are not infinite.⁸⁹

There is a natural antagonism between the command not to establish or aid religion and the command not to interfere with its practice.⁹⁰ The free exercise clause and the establishment clause, therefore, would conflict if read strictly. As an example, the United States Supreme Court explained that a soldier in the United States Army could complain that the government's failure to provide a chaplain to facilitate worship on the army base is a governmental infringement of that soldier's right to the free exercise of his religious beliefs. Yet, to provide the funds for a chaplain to be stationed at the base would be a violation of the establishment clause's proscription from aiding the practice of religion.⁹¹ Thus, the two clauses naturally conflict when applied strictly.

⁸³ *Id.* at 1033.

⁸⁴ *Id.* at 1067.

⁸⁵ See J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 82, at 1074-75.

⁸⁶ L. TRIBE, *supra* note 82, at 1243.

⁸⁷ *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 714, 715 (1981).

⁸⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

⁸⁹ The definition of religion may also depend on whether the establishment clause or free exercise clause applies to the claim. The United States District Court for the District of Arizona explained that when considering establishment clause cases the Court looks to the majority's concept of the term religion, and when considering free exercise clause cases it looks to the minority's. *Sheldon v. Fannin*, 221 F. Supp. 766, 774-75 (D. Ariz. 1963).

⁹⁰ J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 82, at 1031.

⁹¹ *Abington School Dist. v. Schempp*, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting).

Therefore, courts frequently have to choose between competing values in religion cases. This tension requires that the government attempt to achieve only secular goals, and to do so in a religiously neutral manner. Still, situations arise in which the government has no choice but incidentally to help or hinder religious practice.⁹² To reconcile these conflicts, the Court has developed a separate test for each clause to determine when the government involvement in religion has exceeded neutrality and achieved unconstitutionality.⁹³

A. *The Establishment Clause*

The establishment clause prohibits federal and state governments from sponsoring, aiding, or formally establishing religion.⁹⁴ This clause prohibits the government both from granting aid to any religion and from showing a preference for religion over non-religion.⁹⁵ The government cannot completely avoid aiding religion in some manner, however, without violating the free exercise clause: if the government excepts a certain religion from a law because the law burdens the free exercise of that religion, that exception may also be seen as an aid to that religion.⁹⁶ The Court has tried to preserve freedom of religion while avoiding any semblance of established religion.⁹⁷ To accomplish this, the Court employs a three-part test to determine whether such incidental aid to religion is permissible.⁹⁸

The United States Supreme Court first fully articulated this three-part test in 1971 in *Lemon v. Kurtzman*.⁹⁹ In *Lemon*, the Court invalidated Pennsylvania and Rhode Island statutes that subsidized parochial school education. According to the Court, those statutes violated the establishment clause by excessively entangling the state with religion.¹⁰⁰ In *Lemon*, the Court reviewed the constitutionality

⁹² J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 82, at 1031.

⁹³ *Id.*

⁹⁴ *Id.* at 1033.

⁹⁵ *Id.*

⁹⁶ *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972).

⁹⁷ *Walz v. Tax Comm'n*, 397 U.S. 664, 672 (1970).

⁹⁸ J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 82, at 1033. Professor Nowak gives police and fire protection for churches as an example of this incidental aid. Withholding such protections would burden churches greatly, possibly in violation of the free exercise clause. But granting those protections aids the churches.

⁹⁹ 403 U.S. 602, 612-13 (1971).

¹⁰⁰ *Id.* at 619, 620, 615. *Cf. also* *Everson v. Bd. of Educ.*, 330 U.S. 1, 11, 14 (1947) (listing specific government activities considered violative of the establishment clause.) Prior to *Lemon*,

of two state programs.¹⁰¹ In Rhode Island, the state paid a fifteen percent salary supplement to teachers of secular subjects in private, parochial schools in which the expenditure-per-pupil was below that in public schools. Pennsylvania's program reimbursed non-public, parochial schools for the part of teacher salaries and instructional materials used in secular subjects.

Finding both state programs invalid, the Court determined that, although the programs may have had a secular purpose, they both fostered excessive entanglement between church and state.¹⁰² Examining the degree of entanglement, the Court started with the character and purpose of the institutions benefiting from the two programs and found that the schools were integral parts of the Catholic church.¹⁰³ The schools' atmosphere was religious; therefore, the Court noted, religion might be advanced even unintentionally in the secular courses. Next, the Court determined that the danger of entanglement was enhanced by the particular form of aid that the state provided. Because the aid went to teachers, not facilities or materials such as bus service or lunches, the Court reasoned that excessive regulation would be required to ensure neutrality in the classroom.¹⁰⁴ Finally, the Court determined that a great number of restrictions, and a monitoring program to enforce them, would be necessary to ensure that the subsidies were not aiding religion. The Court found that the result would be a complex, ongoing relationship between church and state. Therefore, the Court concluded, the programs would require excessive entanglement between church and state, violating the establishment clause.¹⁰⁵

the Court used the "secular purpose and primary effect" test to rule that school programs of voluntary Bible reading violated the establishment clause because their effect was to aid the advancement of religion. *Abington School Dist. v. Schempp*, 374 U.S. 203, 222, 223 (1963).

Then, in 1970, the Court upheld a state law exempting the property and income of religious groups from state taxes. In so holding, the Court added "excessive government entanglement" to "purpose" and "effect" as factors to be considered in reviewing whether government was not maintaining its separation from religion. *Walz*, 397 U.S. at 674. The *Walz* Court reasoned that the long history of these exemptions showed no danger of entanglement of church and state and no religious purpose or effect. *Id.* at 680.

¹⁰¹ *Lemon*, 403 U.S. at 606.

¹⁰² *Id.* at 607, 624-25.

¹⁰³ *Id.* at 616.

¹⁰⁴ *Id.* at 616-17.

¹⁰⁵ *Id.* at 619, 620. The majority also emphasized the fact that such aid programs would cause an undue amount of political division along religious lines and that the establishment clause was meant to eliminate such divisiveness. *Id.* at 622. But the Court did not clarify

In reviewing the constitutionality of these two statutes, the Court set forth a three-pronged test to determine whether the state action constituted promotion of religion in violation of the establishment clause.¹⁰⁶ According to the Court, for a state action to satisfy the test, it must have a secular purpose; its primary effect must be neither the advancement nor inhibition of religion; and it must not create an excessive entanglement between government and religion.

The *Lemon* Court further stated that, in order to determine whether the degree of entanglement was "excessive," a court must consider three more factors: the character and purpose of the institution benefited; the nature of the aid; and the resulting relationship between government and religious authorities.¹⁰⁷ A court could safeguard the goal of government neutrality in religion, the Court held, only after considering these three factors.¹⁰⁸

B. *The Free Exercise Clause*

The free exercise clause grants individuals and groups the freedom to believe and practice whatever religion they choose. The clause embraces two concepts: freedom to believe and freedom to act.¹⁰⁹ The protection of belief is absolute; the protection of conduct remains subject to regulation for the safety of society.¹¹⁰ Accordingly, the Court has determined that the state may not inquire into the truth or falsity of a particular religious belief, but may require that belief to be sincerely held.¹¹¹ Furthermore, although the state may restrict religious conduct, the burden on that conduct must be incidental, and the state must justify that burden with a compelling interest.¹¹²

In 1943, the United States Supreme Court confirmed the absolute protection from regulation of belief in *United States v. Ballard*, holding that courts could not examine the truth or falsity of a

whether elimination of political divisiveness was the *reason* for applying the *Lemon* test, an *additional element* of that test, or a wholly *different test*. See *id.* at 622-23.

¹⁰⁶ *Id.* at 612-13.

¹⁰⁷ *Id.* at 615.

¹⁰⁸ See *id.* at 620.

¹⁰⁹ *Cantwell*, 310 U.S. at 303.

¹¹⁰ *Id.* at 303-04.

¹¹¹ *Welsh v. United States*, 398 U.S. 333, 339 (1970); *United States v. Seeger*, 380 U.S. 163, 185 (1965); *United States v. Ballard*, 322 U.S. 78, 86 (1943).

¹¹² *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

claimant's belief.¹¹³ In *Ballard*, the defendants were charged with fraudulently soliciting donations for their faith-healing church.¹¹⁴ The defendants claimed that they were divine messengers of "Saint Germain" and teachers of the "I am" movement. They also asserted that they possessed powers to cure even medically incurable diseases. The indictment charged that the defendants knew these claims were false and had made them to collect money from their followers to keep for themselves. The trial court did not instruct the jury to determine whether the defendants' representations were true or false. The Ninth Circuit Court of Appeals reversed the defendants' convictions on the grounds that the state never proved that at least some of the defendants' claims were false.

The Supreme Court reversed, holding that the free exercise clause prohibits state inquiry into the truth or falsity of an individual's religious beliefs.¹¹⁵ In so holding, the Supreme Court reasoned that freedom of religious belief is basic to a society of free people. Part of that religious freedom, the Court stated, is to believe what one cannot prove. No religious freedom would remain, the Court determined, if people were compelled to prove the verity of their religious views. The Court asserted that otherwise the result would be essentially a heresy trial, something the framers sought to eliminate with the free exercise clause.¹¹⁶ Therefore, the Court con-

¹¹³ See 322 U.S. at 86. The basic rule asserting the absolute protection of belief is outlined in *Reynolds v. United States*, 98 U.S. 145 (1879).

¹¹⁴ 322 U.S. at 79.

¹¹⁵ *Id.* at 83, 88.

¹¹⁶ See *id.* at 86. In his dissent, Justice Jackson pointed out that, if the Court prohibited the examination of the truth and falsity of a belief, it must also prohibit the examination of the sincerity of that belief. He doubted that the former could be done without inquiry into the latter. *Id.* at 92-93. He also contended that such a psychological determination, and the necessary inquiry into the degree of sincerity, were beyond the powers of a trier of fact. See *id.* at 93.

The majority never directly addressed the question of sincerity. The Court has held, however, that it is necessary and within the power of the Court to determine initially whether a person holds a belief sincerely. *United States v. Seeger*, 380 U.S. 163, 185 (1965).

The United States District Court for the Eastern District of New York made such an initial determination in *Stevens v. Berger*, 428 F. Supp. 896, 899 (E.D.N.Y. 1977). The *Stevens* court, however, did not establish any guidelines for determining the sincerity of a religious belief. In *Stevens*, welfare recipients objected to a law requiring them to furnish the social security numbers of their children. They asserted that, according to their religious belief, obtaining social security numbers would jeopardize the children's chances of entering heaven. *Id.* at 897. The court laid out two threshold requirements: first, that the conviction is sincerely held, and second, that it is theological, not secular. *Id.* at 899. Although the *Stevens* court enunciated no guidelines to determine sincerity, it relied on a factual determination from the record that the defendants truly believed what they said they did. See *id.* at 901-05.

cluded that the government cannot inquire into the truth or falsity of a religious belief without violating the free exercise clause.

Nevertheless, the free exercise clause does not completely prevent courts from determining whether a belief or practice is in fact religious, and thereby deserving of constitutional protection.¹¹⁷ Thus, in 1971 in *Wisconsin v. Yoder*, the United States Supreme Court held that a compulsory education law violated Amish Church members' free exercise rights.¹¹⁸ In *Yoder*, a Wisconsin statute required citizens to send their children to either public or private school until the children reached age sixteen. Three Amish parents refused to send their children to school past the eighth grade. The parents asserted that the compulsory education statute violated their free exercise rights because formal education past the eighth grade conflicted with their central beliefs in de-emphasizing competitiveness, worldly influence, and material success.¹¹⁹

Before making a decision on these free exercise claims, the Court first had to determine whether the parents' refusal to send their children to school was based on religious beliefs.¹²⁰ This determination was necessary, the Court stated, because the free exercise clause does not protect personal, philosophical values; a way of life does not merit protection from state regulation if it is based on secular considerations. The Court considered several factors important in ruling that the beliefs were religious, not secular. First, the Court determined that the beliefs were shared by an organized group and based on theocratic principles interpreted from religious literature. Second, the Court found that these beliefs which pervaded and regulated the church members' lives had existed for a substantial period of time.¹²¹ Thus, the free exercise clause does not prohibit the Court from examining a person's or group's beliefs to the extent necessary to define those beliefs as religious or secular. If the belief is secular, the free exercise clause does not protect it.

If a court determines that a person's belief is in fact religious and sincerely held, that belief is absolutely protected from regulation.¹²² Conduct based on that belief, however, is not.¹²³ Giving free

¹¹⁷ *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 713-14 (1981).

¹¹⁸ 406 U.S. 205, 207 (1972).

¹¹⁹ *Id.* at 210.

¹²⁰ *Id.* at 215.

¹²¹ *Id.* at 216-17.

¹²² *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

¹²³ *Id.*

reign to religious activities would ultimately endanger other members of society by exempting religious actors from all laws.¹²⁴ Therefore, to determine the constitutionality of a regulation of religious practice, the Court has balanced the burden imposed on religious activity against the state interest in imposing that burden.¹²⁵ This balance allows the government to burden substantially the exercise of religious beliefs if that burden is necessary to achieve, and outweighed by, a compelling state interest.¹²⁶

In 1962 in *Sherbert v. Verner*, the United States Supreme Court employed a two-part balancing test to conclude that South Carolina could not deny a Seventh-day Adventist state unemployment benefits because her religious beliefs prohibited her from working on Saturdays.¹²⁷ In *Sherbert*, a member of the Seventh-day Adventist Church was fired by her employer because she refused to work on Saturday, the Sabbath Day of her faith. The state rejected her claim for unemployment compensation under the South Carolina Unemployment Compensation Act because she failed to accept available Saturday work.

The Court held that the state's denial of compensation violated her free exercise rights. The Court reasoned that the disqualification from unemployment benefits imposed a substantial burden on the free exercise of the claimant's religion because the ruling forced her to choose between her religion and her job.¹²⁸ The Court then found that no compelling state interest justified this substantial infringement because the state presented no evidence that the statute prevented fraudulent unemployment compensation claims. Further, the Court determined that the state failed to demonstrate that no alternative forms of regulation would combat abuses of the unemployment system without infringing on first amendment rights.

Thus, the Court established a two-part test. To strike down a state action as violative of the free exercise clause, the Court held, a claimant must show first that the action substantially burdens the

¹²⁴ See L. TRIBE, *supra* note 82, at 1243-44.

¹²⁵ J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 82, at 1069.

¹²⁶ *Id.* at 1069, 1079. The Court does not distinguish between direct and indirect burdens on religious conduct. *Id.* at 1068. As long as the burden is substantial, the Court will balance it against the state's interest in regulation. A burden is considered substantial when it forces an individual to forego his or her particular religious conduct. Coercion was first seen as a separate element for the claimant to prove, but now regulation is deemed coercive as long as the claimant proves the burden is substantial.

¹²⁷ 374 U.S. 398, 399-400, 403, 409 (1963).

¹²⁸ *Id.* at 404.

practice of his or her religion. If such a burden exists, the Court will then balance the government interest in regulation against the burden on free exercise rights. Even if the government interest justifies infringing on religious practice, the state action will be unconstitutional unless the burden is no greater than necessary to promote the government interest.¹²⁹

According to the Supreme Court, a state has a compelling interest in protecting the health, safety, and welfare of society.¹³⁰ Therefore, once such an interest has been found, it will satisfy the second prong of the *Sherbert* test as long as the state shows that its regulation is no more restrictive than necessary to accomplish the state's goal.

In light of the *Sherbert* and *Lemon* tests, the Court makes three inquiries to determine whether a state action is valid under the religion clauses of the first amendment. First, the conduct or belief to be restricted must be religious. Second, the regulation may not formally establish a religion, and may only provide aid to religions if the purpose and primary effect of the aid is secular and the action does not excessively entangle the government with religion. Third, the state action may not restrict an individual's beliefs at all, and may only substantially infringe on his or her practice of those beliefs if the state interest is compelling and there are no less restrictive alternative means of furthering that interest.

III. TORT LAW AND COUNSELING: THE DUTY OF CARE REQUIREMENT

Secular counselors may be held liable for their intentional¹³¹ and negligent torts that occur within the counseling context.¹³² A psychiatrist enjoys a special relationship with his or her patient that creates a duty of care.¹³³ This duty includes preventing the patient from harming him or herself or others.¹³⁴ In contrast, clergy counselors may be liable for intentional torts committed against their

¹²⁹ *Id.* at 403. The Court also mentioned, in dicta, that governmental action that *intends* to restrict religious conduct violates the free exercise clause without the necessity of balancing the interests of the state and the individual or group.

¹³⁰ *Id.* at 1083.

¹³¹ See, e.g., *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986); *Cotton v. Kambly*, 101 Mich. App. 537, 542, 300 N.W.2d 627, 629 (1980).

¹³² See, e.g., *Bellah v. Greenson*, 81 Cal. App. 3d 614, 620, 146 Cal. Rptr. 535, 539 (1978).

¹³³ *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 431, 131 Cal. Rptr. 14, 20, 551 P.2d 334, 340 (1976); see also *Bellah*, 81 Cal. 3d at 620, 146 Cal. Rptr. at 539.

¹³⁴ *Id.*

counselees, but not for negligent counseling.¹³⁵ Although the free exercise clause does not protect clergy counselors from liability for their intentional torts, courts have yet to determine whether negligent clergy counseling deserves constitutional protection.¹³⁶ Instead, one court has held that a clergy counselor owes no duty of care to his or her counselees because he or she has no special relationship with those counselees.¹³⁷

Secular therapists owe a duty of care to their patients. In 1976 in *Tarasoff v. Regents of University of California*, the Supreme Court of California held that a psychologist who knew or should have known that his patient presented a danger of violence to another person incurred, through his relationship with the patient, a duty to use reasonable care to protect the intended victim.¹³⁸ In *Tarasoff*, Prosenjit Poddar was a voluntary outpatient receiving therapy at a hospital. He informed his therapist that he intended to kill his ex-girlfriend, Tatiana Tarasoff, when she returned to California. The therapist directed campus police to confine Poddar but then allowed his release without warning Tarasoff or her parents of the danger. Poddar killed Tarasoff shortly after her return.

In holding the therapist liable for negligent failure to protect the victim, the court first noted that liability does not exist unless

¹³⁵ See, e.g., *Hester v. Barnett*, 723 S.W.2d 544, 564 (Mo. Ct. App. 1987). For both secular and religious counselors, courts base liability on the fundamental tort concepts of intent and duty. Under tort theory, an act is intentional if done for the purpose of causing the harm or with the actor's knowledge that his or her action is substantially certain to produce the harm. *Garratt v. Dailey*, 46 Wash. 2d 197, 200, 279 P.2d 1091, 1093 (1955). Four elements determine liability for negligence: duty, breach, causation, and harm. Duty is the most important of these four elements; if the actor owes no duty, then he or she is not liable even if the other three elements are proven. Duty is essentially a question of whether the relationship between the actor and the victim gives rise to a legal obligation that the actor owes the injured person. *Moning v. Alfano*, 400 Mich. 425, 438-39, 254 N.W.2d 759, 765 (1977). Courts will find a duty where reasonable people would recognize it and agree that it exists. PROSSER & KEETON, *supra* note 20, at 359. Changes in society lead to the constant recognition of new duties, and courts will look at a number of factors to determine whether a duty does or should exist. Common factors courts consider include the foreseeability of harm to the plaintiff, the closeness of connection between defendant's conduct and the injury suffered, the moral blame, the policy of preventing future harm, the availability of insurance, and the burden on defendant and society of imposing a duty. A duty can also be assumed by a defendant as a result of his or her special relationship with a plaintiff. RESTATEMENT (SECOND) OF TORTS §§ 315-320 (1965). The ensuing duty may be either to protect the plaintiff or to control his or her conduct and thus protect third parties. *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 431, 131 Cal. Rptr. 14, 20, 551 P.2d 334, 340 (1976); see also RESTATEMENT (SECOND) OF TORTS § 320.

¹³⁶ *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, _____, 763 P.2d 948, 950, 253 Cal. Rptr. 97, 99 (1988) (*Nally III*).

¹³⁷ *Id.* at _____, 763 P.2d at 953-54, 955, 253 Cal. Rptr. at 102-03, 104.

¹³⁸ 17 Cal. 3d at 431, 131 Cal. Rptr. at 20, 551 P.2d at 340.

the therapist owes a duty of care to the victim.¹³⁹ The court asserted that legal duties are not static, sacrosanct facts; they are merely expressions of the policy considerations that lead courts to rule that a particular plaintiff's interests deserve legal protection from the defendant's conduct. Further, the court stated, the harm's foreseeability is the most important of a number of those considerations that a court weighs in determining whether to establish a duty in a particular case.

Even when the harm is foreseeable, the court noted, the duty to control another's conduct or warn a third person of such conduct exists only if the defendant bears some special relationship to either the dangerous person or the potential victim.¹⁴⁰ The relationship between a therapist and his or her patient, according to the court, is one such special relationship sufficient to create a duty. The court also stated that this duty requires the therapist to take whatever steps are reasonably necessary under the circumstances to protect the patient's victim.¹⁴¹ Thus, the court held, by entering into this relationship with the patient, the therapist becomes sufficiently involved to assume a duty of reasonable care to protect, by warning or other reasonable means, any third person whom the doctor knows or should know is threatened by the patient.

A psychiatrist treating an outpatient also has the requisite special relationship with that patient to owe him or her a duty of care. Thus, in 1978 in *Bellah v. Greenson*, the California Court of Appeal held that a psychiatrist treating a suicidal woman as an outpatient, with knowledge of the patient's suicidal disposition, had a duty to take measures to prevent the patient's suicide.¹⁴² In *Bellah*, a psychiatrist was treating Tammy Bellah for an unspecified period of time before she killed herself by taking an overdose of pills. While she was under his care, the psychiatrist concluded that she was suicidal.

The court first noted that the special relationship between a psychiatrist and an inpatient creates a duty on both the hospital and the treating psychiatrist to take preventative measures when suicide is likely.¹⁴³ The *Bellah* court then reasoned that the relationship

¹³⁹ *Id.* at 433, 131 Cal. Rptr. at 22, 551 P.2d at 342.

¹⁴⁰ *Id.* at 435, 131 Cal. Rptr. at 23, 551 P.2d at 343. *But see* *Davis v. Lhim*, 124 Mich. App. 291, 300, 335 N.W.2d 481, 487 (1983) (foreseeability alone, without specific relationship, can be sufficient to create liability).

¹⁴¹ *Id.* at 431, 131 Cal. Rptr. at 20, 551 P.2d at 340.

¹⁴² 81 Cal. App. 3d 614, 620, 146 Cal. Rptr. 535, 538 (1978).

¹⁴³ *Id.* at 619, 146 Cal. Rptr. at 538. *See also* *Meier v. Ross Gen. Hosp.*, 69 Cal. 2d 420,

between the doctor and his patient was sufficient to create a duty, whether the patient lived in or out of the hospital.¹⁴⁴ The court further stated that the duty was different when the patient was not hospitalized, but that this duty still required the doctor with knowledge of the likelihood of suicide to take preventative steps consonant with good medical practice. Just what those precautionary measures should be, the court noted, was a question of fact to be determined at trial.¹⁴⁵

The *Bellah* court was careful not to extend the duty to require that the psychiatrist warn the girl's parents of her suicidal tendencies. The court distinguished the case from *Tarasoff* on the grounds that *Tarasoff* involved harm to a third party, not self-inflicted harm.¹⁴⁶ The *Bellah* court reasoned that confidentiality is so important to the counselor-counselee relationship that only when the risk of harm is to others should it be breached. Thus, courts consider the psychiatrist-patient relationship sufficient to impose a duty on the psychiatrist to the patient. That duty does not, however, include warning third parties of potential self-inflicted harm by the patient.

Like secular counselors, clergy counselors have been held liable for intentional wrongs committed within the counseling relationship. For example, in 1987 in *Hester v. Barnett*, the Missouri Court of Appeals held that a minister who counseled a family, and then revealed confidences and spread lies about that family, was liable for those intentional torts.¹⁴⁷ In *Hester*, a Baptist minister met with

424, 71 Cal. Rptr. 903, 907, 445 P.2d 519, 524 (1968) (physician and hospital liable in wrongful death action for failing to lock windows to prevent suicidal patient from jumping out); *Vistica v. Presbyterian Hosp.*, 67 Cal. 2d 465, 469, 62 Cal. Rptr. 577, 579-80, 432 P.2d 193, 196 (1967) (hospital liable in wrongful death action for not taking reasonable steps to prevent suicidal girl from jumping out of open window in hospital ward).

¹⁴⁴ *Bellah*, 81 Cal. App. 3d at 620, 146 Cal. Rptr. at 538.

¹⁴⁵ *Id.* at 620, 146 Cal. Rptr. at 538-39.

¹⁴⁶ *Id.* at 621, 146 Cal. Rptr. at 539.

¹⁴⁷ 723 S.W.2d 544, 564 (Mo. Ct. App. 1987). The *Hester* court upheld claims for spousal alienation of affections, defamation, tortious interference with contract, invasion of privacy, and intentional infliction of emotional distress. See also *Handley v. Richards*, 518 So. 2d 682, 687 (Ala. 1987), *reh'g denied*, 518 So. 2d 682 (Ala. 1988) (outrageous conduct upheld as a cause of action, but not properly pleaded against minister having sexual affair with family counselee); *O'Neil v. Schuckardt*, 112 Idaho 472, 479, 733 P.2d 693, 700 (1986) (invasion of privacy upheld against clergy counselor for separating family); *Bear v. Mennonite Church*, 462 Pa. 330, 335, 341 A.2d 105, 108 (1975) (alienation of affections upheld against clergy counselors and church for ordering wife and family to shun plaintiff); *Carrieri v. Bush*, 69 Wash. 2d 536, 544, 419 P.2d 132, 136-37 (1966) (alienation of affections upheld against clergy counselor for making reckless recommendations of family separation to counselees). But see *Strock v. Pressnell*, 38 Ohio St. 3d 207, 210, 527 N.E.2d 1235, 1238 (1988) (alienation of affections and criminal conversation abolished by statute and rejected against clergy family counselor for engaging in sexual affair with counselee's wife).

the parents of a family and invited them to confide in him.¹⁴⁸ After the parents admitted that they had disciplinary problems with their children, the minister offered his family counseling services as a solution. The minister then not only divulged these confidences, but also used every opportunity, in print and from the pulpit, to defame the parents, falsely accusing them of physically and emotionally abusing their children. The minister also harrassed the Hesters' children and employees.

In upholding the Hesters' claim for defamation, the court ruled that the free exercise clause only protects religious — not secular — belief and conduct.¹⁴⁹ The court reasoned that the minister's statements, although delivered in the milieu of religious practice, were not in good faith religious; his secular purpose was to injure the Hesters' reputations.¹⁵⁰ The court held that the free exercise clause does not protect such conduct.¹⁵¹ Thus, clergy counselors can be held liable for intentionally harming their counselees, because that intentional misconduct is secular and therefore not protected by the free exercise clause.

Other courts have found that, even when the conduct in question is in fact religious, not secular, clergy counselors may be liable for their intentional torts. For example, in 1986 in *O'Neil v. Schuckardt*, the Supreme Court of Idaho held members of a religious group liable for invading a man's privacy, despite the existence of

¹⁴⁸ *Hester*, 723 S.W.2d at 550.

¹⁴⁹ *Id.* at 559. The court did not find a cause of action for "Ministerial Malpractice" here because the facts of the case did not permit the plaintiff to allege breach of a professional duty, but rather the simple duty of care the law imposes on everyone to avoid harming others. *Id.* at 554.

¹⁵⁰ *Id.* at 559. The court, in finding a cause of action for alienation of affections, noted that even conduct that can be characterized as religious may be subject to governmental regulation if it poses some substantial threat to public safety, peace, or order. The court reasoned that intentional interference with the family relationship is exactly the kind of threat to public safety and order that the law may redress. *Id.* at 555.

¹⁵¹ *Id.*; see also *Strock v. Pressnell*, 38 Ohio St. 3d 207, 209, 527 N.E.2d 1235, 1237 (1988). In *Strock*, the Ohio Supreme Court held that the first amendment does not protect a clergy counselor who engaged in sexual activities with the wife of a couple he was counseling. *Id.* at 208, 527 N.E.2d at 1236. In *Strock*, the defendant was a minister and a counselor who held himself out to the public as trained and able to provide marital counseling. A couple experiencing marital problems went to him for counseling. During the final three weeks of a two-month counseling relationship, the counselor had a sexual affair with one of his counselees: the plaintiff's wife. Reasoning that the counselor's conduct was a clear deviation from the normal spiritual counseling practices of the Lutheran Church, the court held that his actions fell outside the scope of the first amendment. Thus, despite the delicacy with which the courts determine the legitimacy of religious beliefs and practices, some intentional tort activity is so clearly non-religious that it does not warrant free exercise protection. *Id.* at 210, 527 N.E.2d at 1238.

constitutional protections.¹⁵² In *O'Neil*, members of the fundamentalist sect Fatima Crusade kept a woman from meeting with her husband, mistreated her children, and misled both husband and wife about the status of their marriage.¹⁵³ The court declared that there are limits to the free exercise of religion.¹⁵⁴ The court ruled that, despite his religious purpose, a minister does not have license to invade a marriage deliberately.¹⁵⁵ Good faith and reasonableness, according to the court, are the essential elements of the qualified free exercise privilege that religious counselors enjoy. The court held, then, that a religious counselor may be liable for intentional disruption of a family because that conduct exceeds the scope of free exercise protections.

Thus, clergy counselors are liable for their intentional torts, regardless of their first amendment right to free exercise of religion. In finding liability, courts may hold that the conduct is secular, and therefore undeserving of protection: the Constitution does not protect a clergy counselor's conduct that is clearly unrelated to religious principles. Courts may also hold clergy counselors liable for intentional wrongs even if the wrongful conduct is prompted by religious beliefs. In those cases, the interest in protecting individuals from malicious conduct outweighs a counselor's right to exercise his or her beliefs freely.

No court, however, has held clergy counselors liable for negligent counseling. For example, in 1987 in *Handley v. Richards*, the Supreme Court of Alabama, relying heavily on *Hester v. Barnett*, held that where recognized intentional tort theories are available to provide redress to a plaintiff there is no need to create the redundant remedy of "clergy malpractice."¹⁵⁶ In *Handley*, a couple with marital troubles sought help from their minister. As the counseling proceeded, the minister began a sexual affair with the wife, and she began divorce proceedings against her husband. The husband then killed himself. The administrator of the husband's estate brought a wrongful death action, alleging that the minister's malpractice or outrageous conduct during counseling were the proximate causes of the husband's suicide.¹⁵⁷

¹⁵² 112 Idaho 472, 475, 733 P.2d 693, 696 (1986).

¹⁵³ *Id.* at 474, 733 P.2d at 695.

¹⁵⁴ *Id.* at 478-79, 733 P.2d at 699-700.

¹⁵⁵ *Id.* at 475, 733 P.2d at 696.

¹⁵⁶ 518 So. 2d 682, 685 (Ala. 1987); see also *Strock v. Pressnell*, 38 Ohio St. 3d 207, 212, 527 N.E.2d 1235, 1239 (1988).

¹⁵⁷ 518 So.2d at 683.

In rejecting the claim for "clergy malpractice," the court noted that malpractice is the violation of a professional standard of care: the failure to use the degree of skill and learning ordinarily used by members of the profession under similar circumstances.¹⁵⁸ Thus, the court reasoned, malpractice redresses a different wrong from ordinary negligence and intentional tort theories. The court then determined that, in order to be a viable remedy, clergy malpractice must address incidents of the clergy counseling relationship not already actionable. The court reasoned that, even assuming the existence of a professional duty, the conduct complained of only amounted to a violation of the general duty not to harm others intentionally.¹⁵⁹ Thus, the court held that when other tort theories are available to redress alleged wrongs, the tort of clergy malpractice is not a viable remedy.

One court, however, has gone beyond this narrow holding that a clergy counselor is not liable for negligence when his or her conduct may be classified as intentional. In 1988, the Supreme Court of California held that clergy counselors are not liable for negligent counseling.¹⁶⁰ In *Nally v. Grace Community Church of the Valley (Nally III)*, the court ruled that there is no special relationship between clergy counselors and their counselees, and therefore the counselors owe the counselees no duty of care.¹⁶¹ In 1973, Kenneth Nally, decedent son of the plaintiffs, became depressed. He converted to Protestantism and became actively involved in the Grace Community Church of the Valley between 1974 and 1979.¹⁶² The Church employed approximately fifty pastoral counselors who offered formal and informal counseling services to over ten thousand people in the congregation and a large number of non-members. Their counseling was essentially religious in nature, and the defendant pastoral counselors held themselves out as competent to treat a full range of mental illnesses, including suicidal tendencies.¹⁶³

¹⁵⁸ *Id.* at 684-85.

¹⁵⁹ *Id.* at 686.

¹⁶⁰ *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, —, 763 P.2d 948, 960, 253 Cal. Rptr. 97, 109-10 (1988).

¹⁶¹ *Id.* at —, 763 P.2d at 953-54, 955, 253 Cal. Rptr. at 102-03, 104. In *Nally II*, the majority of the California Court of Appeal held that a clergy counselor who has held himself out as competent to treat serious emotional problems, and who voluntarily established a counseling relationship with an emotionally disturbed person, has a duty to take appropriate precautions should that counselee exhibit suicidal tendencies. 194 Cal. App. 3d 1147, —, 240 Cal. Rptr. 215, 226 (1987), *rev'd*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988).

¹⁶² *Id.* at —, 763 P.2d at 950, 253 Cal. Rptr. at 99.

¹⁶³ *Id.* at —, 763 P.2d at 950, 965, 253 Cal. Rptr. at 99, 114.

Kenneth Nally was aware of this self-proclaimed proficiency, and affirmatively sought informal and formal counseling from the defendants.¹⁶⁴ He made his suicidal thoughts known to defendant counselors as he established a strong relationship with defendant Pastor Cory in 1974 and a "discipling relationship" with defendant Pastor Rea in 1978. As he became increasingly despondent, Nally met with Pastor Rea five times in 1978 to discuss his troubles.

In 1979, Nally's mother sent him to two physicians, one of whom prescribed an antidepressant drug, but neither of whom referred Nally to a psychiatrist. Soon after, Nally met formally with defendant Pastor Thomson and mentioned his thoughts of suicide. In March 1979, Nally tried to kill himself with an overdose of his antidepressant. When defendant Pastors Rea and MacArthur visited Kenneth Nally in the hospital, he told them both separately that he was sorry he had not succeeded in killing himself. The Pastors did not mention this to anyone on the hospital staff. After a psychiatrist examined Nally, he was released for outpatient treatment.

Upon release, Nally chose to stay with Pastor MacArthur, who, after many discussions with Nally, advised him to keep his psychiatric appointments and consult a physician. Nally saw the physician, whose recommendation for involuntary commitment was rejected by Nally's father. Kenneth then had two additional counseling sessions with Pastor Thomson, in which they discussed suicide. Nally saw two more physicians, and then Pastor Thomson gave him the name of a psychologist to see. Nally kept his appointment with the psychologist and made vague arrangements for therapy, but later that week, after a family argument, he shot and killed himself.¹⁶⁵

Nally's parents sued Grace Community Church and Pastors Rea, Thomson, Cory, and MacArthur for their son's wrongful death. The Nallys brought suit on three counts: "clergyman malpractice," outrageous conduct, and negligence. The trial court granted summary judgment for the defendants, and the California Court of Appeal reversed and remanded. On remand, the trial court granted the defendants' nonsuit motion.¹⁶⁶ The Court of Appeal in *Nally II* reversed again. In stating a cause of action for clergy counselors' negligent failure to prevent suicide, the court held that both religious and secular counselors have a duty to refer suicidal people to psychiatrists or psychologists qualified to prevent

¹⁶⁴ *Id.* at _____, 763 P.2d at 950, 253 Cal. Rptr. at 99.

¹⁶⁵ *Id.* at _____, 763 P.2d at 952, 253 Cal. Rptr. at 101.

¹⁶⁶ *Id.* at _____, 763 P.2d at 953, 253 Cal. Rptr. at 102.

suicides.¹⁶⁷ Analogizing to the *Bellah* court's finding of a special relationship between a psychiatrist and his patient, the *Nally II* court ruled that a clergy counselor's special relationship with his or her counselee created that duty to refer. Imposing a negligence standard of care on clergy counselors did not impinge on their free exercise rights, the court concluded, because the state's compelling interest in the preservation of life justified the narrowly tailored burden on religious conduct imposed by tort liability.

Reversing the court of appeal, the Supreme Court of California ruled only on tort grounds, not constitutional issues.¹⁶⁸ The *Nally III* court held that clergy counselors have no duty to refer their suicidal counselees to professional therapists.¹⁶⁹ In reaching that decision, the court determined that no special relationship existed between Nally and his counselors. First the court ruled that no analogous special relationship existed between secular therapists and their patients.¹⁷⁰ Accordingly, the court explained that *Bellah* was a simple malpractice claim in which the psychiatrist's duty stemmed from his professional position, and not from a special relationship with his patient.¹⁷¹ As a result, the *Nally III* court stated that the psychiatrist-outpatient relationship, in and of itself, was not special. Therefore, the court ruled, Nally's clergy counselors were not liable for negligence because they did not have a special relationship with Nally that created a duty of care.

Not only did the court conclude that there was no precedent for the existence of a duty of care in this case, but it also ruled that none should be created.¹⁷² In so holding, the court examined several factors that may warrant the creation of a duty of care even where no special relationship is found.¹⁷³ According to the court, the availability of insurance and the foreseeability of the harm argued for the creation of a duty in this case.¹⁷⁴ The court, however, deter-

¹⁶⁷ *Id.* at _____. 763 P.2d at 954, 253 Cal. Rptr. at 103.

¹⁶⁸ *Id.* at _____. 763 P.2d at 953, 253 Cal. Rptr. at 102.

¹⁶⁹ *Nally III*, 47 Cal. 3d at _____. 763 P.2d at 958, 253 Cal. Rptr. at 107.

¹⁷⁰ *Id.* at _____. 763 P.2d at 956, 253 Cal. Rptr. at 105.

¹⁷¹ *Id.* at _____. 763 P.2d at 958, 253 Cal. Rptr. at 107.

¹⁷² *Id.* at _____. 763 P.2d at 960-61, 253 Cal. Rptr. at 109-10.

¹⁷³ *Id.* The court listed the following factors to consider in deciding whether to create an unrecognized special relationship: the foreseeability of the harm, the degree of certainty that the plaintiff suffered an injury, the closeness of the connection between the defendant's conduct and the injury, the moral blameworthiness of defendants, the policy of preventing future harm, the burden on the defendant and the community if liability is imposed, and the availability of insurance for the defendants.

¹⁷⁴ *Id.* at _____. 763 P.2d at 959, 960, 253 Cal. Rptr. at 108, 109. The court stated that

mined that the lack of a causal connection between the counseling and the suicide and public policy outweighed the first two factors and tipped the scale against creating a duty of care.¹⁷⁵

First, the court noted that the causal connection between the defendants' failure to refer Nally to a qualified professional and Nally's death, despite their knowledge of his thoughts of suicide, was "tenuous at best."¹⁷⁶ In making this determination, the court examined four groups of facts. The court found that Nally was examined by five physicians and one psychiatrist after his attempted suicide. The court then found that his counselors arranged some of these visits and encouraged Nally to cooperate with the doctors involved. The court also determined that the treating physician warned Nally's parents, upon their son's release from the hospital, that Kenneth remained suicidal and should see a psychiatrist. Finally, the court explained, Nally's parents rejected advice that Kenneth should be institutionalized. From these facts the court concluded that there was no causal connection between the defendants' actions and Nally's death. Therefore, the court ruled that there was less reason to create a duty of care in this case.

The court also emphasized that imposing a duty of care on Nally's clergy counselors would be contrary to several stated public policies. Counseling in general would suffer, the court declared, because people in need of help would be reluctant to seek it if they knew the counselor had a duty to commit them to psychiatric facilities.¹⁷⁷ Furthermore, the court stated, neither the legislature nor the courts had ever imposed a duty to take steps to prevent suicide. According to the court, imposing the duty here would contravene a legislative intent to exempt the clergy from licensing requirements and to encourage private assistance efforts.¹⁷⁸

"[m]ere foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm." *Id.* at —, 763 P.2d at 959, 253 Cal. Rptr. at 108.

The court mentioned briefly the existence of "clergyman malpractice" insurance designed to cover churches for damages caused by the counseling of pastors, but also noted that the value of such insurance is unknown because so few cases of this type have been filed against the pastors. *Id.* at —, 763 P.2d at 960, 253 Cal. Rptr. at 109; see also Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?* 84 MICH. L. REV. 1296, 1300 n.12 (1986).

¹⁷⁵ *Nally III*, 47 Cal. 3d at —, 763 P.2d at 959, 960, 253 Cal. Rptr. at 108, 109.

¹⁷⁶ *Id.* at —, 763 P.2d at 958, 253 Cal. Rptr. at 107.

¹⁷⁷ *Id.* at —, 763 P.2d at 959, 253 Cal. Rptr. at 108.

¹⁷⁸ *Id.* at —, 763 P.2d at 959-60, 253 Cal. Rptr. at 108-09. The court interpreted the fact that clergy counselors are not mentioned in statutes requiring the licensing of marriage, family, domestic, and child counselors as a specific mandate that no such regulation

Finally, the court emphasized that negligent clergy counseling would be difficult for the judiciary to assess. Even if it could develop workable standards of care to assess negligent clergy counseling and to identify those to whom the duty should apply, the court noted, the differing theological views of many counselors would make it impractical to create such a duty.¹⁷⁹ These policy concerns, the court stated, in addition to its finding that no special relationship existed between Nally and his counselors, led to its not imposing a duty on clergy counselors to take reasonable steps to prevent a counselee's suicide.¹⁸⁰

In a strong concurrence, Justice Kaufman asserted that there was clear evidence of a legal duty in this case, but no convincing evidence that such duty had been breached or that the breach proximately caused Nally's death.¹⁸¹ He stated that a special relationship existed, which led to a duty to recognize the limits of counselor competence, once symptoms such as suicidal traits were recognized, and advise the counselee to seek competent professional medical help.¹⁸² Justice Kaufman reasoned that such a minimal duty would not deter those in need of help from seeking it because no confidence need be violated. He also noted that the free exercise clause would not prohibit such a duty because the burden would not restrict one's belief, would be minimal, and would be outweighed by a strong government interest in preserving the lives of

of clergy counseling should exist. *Id.* The court also looked to the exemption from liability of first aid volunteers and non-professionals performing CPR, and the abrogation of the "Good Samaritan" rule, as indications that courts should not hold the clergy liable for counseling negligently. According to the court, these acts manifest the legislative policy that holding people in non-custodial, noncommercial, voluntary relationships liable would discourage the giving of this type of aid. *Id.* at _____, 763 P.2d at 960, 253 Cal. Rptr. at 109.

¹⁷⁹ *Id.* at _____, 763 P.2d at 960, 253 Cal. Rptr. at 109. Here the majority makes its only mention of the constitutionality of holding clergy counselors liable in negligence: imposing a duty would be "quite possibly unconstitutional."

¹⁸⁰ *Id.* The majority also noted in its conclusion that its opinion did not foreclose imposing liability on non-therapist counselors who hold themselves out as professionals, for injuries resulting from the counseling. *Id.* at _____, 763 P.2d at 961 n.8, 253 Cal. Rptr. at 110 n.8.

¹⁸¹ *Id.* at _____, 763 P.2d at 964, 253 Cal. Rptr. at 113 (Kaufman, J., concurring).

¹⁸² *Id.* at _____, 763 P.2d at 967-68, 253 Cal. Rptr. at 116-17 (Kaufman, J., concurring).

This duty is more specific than that suggested by the court of appeal in *Nally II* and rejected by the California Supreme Court in *Nally III*. See *Nally v. Grace Community Church of the Valley*, 194 Cal. App. 3d 1147, _____, 240 Cal. Rptr. 215, 226 (1987), *rev'd*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988). In *Nally II*, the majority concluded that the clergy counselor's duty, once he has diagnosed a counselee as suicidal, is to place the counselee in the hands of a professional who is best equipped to save the counselee from suicide. *Id.* at _____, 240 Cal. Rptr. at 229. The court did not elaborate on or define the phrase "place him in the hands of . . ." See *id.* at _____, 240 Cal. Rptr. at 227.

would-be suicide victims.¹⁸³ The counselors had met their duty in this case, he concluded, because they repeatedly had urged Nally to seek professional psychiatric help.

In sum, both clergy and professional counselors may be held liable for intentional torts committed in the counseling context. Psychiatrists also are required to take measures to prevent patients from foreseeably harming themselves or others. Yet, based on public policy and the lack of a special relationship between counselor and counselee, no court has imposed a similar duty of care on clergy counselors.

IV. PROTECTING THE PUBLIC FROM NEGLIGENT CLERGY COUNSELING

Clergy counselors should be subject to liability for negligent counseling. They also should be licensed to ensure their competence. Neither the imposition of a duty of care nor a licensing requirement would violate the first amendment. Furthermore, public policy and recognized tort doctrines support establishing a minimally burdensome duty of care and a licensing requirement.

Courts should require that clergy counselors who hold themselves out as competent to deal with serious emotional illness be capable of understanding basic psychological problems. Clergy counselors should also be able to identify these troubles in their counselees and recognize when they, as counselors, are no longer competent to treat those counselees. Once clergy counselors have identified a counselee's problem and found it beyond their level of competence, courts should require them to refer that counselee to a professional therapist. This duty to refer would require clergy counselors only to try to persuade — not to force — a counselee to contact a professional therapist for treatment. Such a duty of care would be a minimal burden for clergy counselors.

A basic licensing requirement would ensure that clergy counselors could meet this duty of care. Licensing should merely require that clergy counselors receive enough training to become competent to meet the above duty. Licensing thus should require only that clergy counselors acquire, through any of a number of available educational programs, enough understanding of mental health to be able to identify mental disorders, and realize when and how to get a counselee to a professional therapist. Such a licensing require-

¹⁸³ *Id.* at _____, 763 P.2d at 969–70, 253 Cal. Rptr. at 118–19 (Kaufman, J., concurring).

ment would not be overly burdensome on clergy counselors who hold themselves out as competent to treat serious mental problems, and it would reinforce the above duty of care.

Moreover, requiring that certain clergy members be licensed to conduct counseling and holding them to a minimum duty of care do not present formidable constitutional problems.¹⁸⁴ The minimum duty of care outlined above violates neither the free exercise nor the establishment clauses of the first amendment. Although freedom not to have one's religious belief regulated in any way is absolute, the conduct based on that belief is not afforded such protection.¹⁸⁵ Because clergy counseling constitutes religious conduct, not belief, the proposed duty must not infringe on the qualified constitutional right to freedom of religious conduct. In *Sherbert v. Verner*, the Supreme Court established a two-part balancing test to determine whether a state is permissibly regulating religious conduct.¹⁸⁶ In *Sherbert*, the Court held that, if a state action substantially burdens religious practice, then that burden must be outweighed by a compelling state interest that is the least restrictive alternative means of furthering that interest.¹⁸⁷

Under the *Sherbert* test, imposing negligence liability on clergy counselors would not violate the free exercise clause. First, the above duty would not impose a substantial burden on religion.¹⁸⁸ The proposed duty is not as substantial as the infringement found in *Sherbert*. There the Court ruled that the burden on a Seventh Day Adventist's religious practice was indirect but substantial because the state statute put pressure on her to forego that practice — to

¹⁸⁴ As a threshold determination, courts could arguably view counseling as a secular activity that does not receive the benefits of the free exercise or establishment clauses. This view is supported by the recent growth of the secular counselor into the position formerly dominated by the clergy and the increased use by the clergy of the methods and understanding of therapy researched and used by mental health professionals. These facts indicate that counseling has become a more secular discipline. This approach to divert constitutional protection, however, is unlikely to be successful. As practiced by most clergy counselors, counseling is still based on the spiritual.

Moreover, counseling historically has been the clergy's function. In addition, courts may find it difficult and even unconstitutional to separate the secular from the spiritual elements in the content of counsel. Finally, inquiring into the nature of the counseling in an attempt to identify and separate the religious from the secular could create free exercise problems. See *Hester v. Barnett*, 723 S.W.2d 544, 550 (Mo. Ct. App. 1987).

¹⁸⁵ *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

¹⁸⁶ *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

¹⁸⁷ *Id.*

¹⁸⁸ *Nally v. Grace Community Church of the Valley*, 47 Cal.3d 278, —, 763 P.2d 948, 970, 253 Cal. Rptr. 97, 119 (1988) (Kaufman, J., concurring).

choose between her job and her religion. The Court determined that the result was the equivalent of a monetary fine.¹⁸⁹

The duty of care suggested here is not the equivalent of a fine on clergy counselors, nor does it force them to modify or forego their religious practice. The suggested standard of care would simply require certain clergy counselors — those who hold themselves out as competent to treat serious mental illnesses — to possess enough knowledge of major mental illnesses to be able to identify them. Then clergy counselors would merely need to recognize when they no longer had the knowledge to treat those illnesses and to know to whom to refer the counselees. As both the majority in *Nally II* and the concurrence in *Nally III* agreed, a duty of care does not prevent clergy counselors from expressing their religious views in an effort to aid their counselees.¹⁹⁰ The duty proposed does not expose clergy counselors to liability for refusing to counsel contrary to their beliefs or for counseling in conformity with them; it merely exposes them to liability for failing to meet a standard of care independent of the content of their counsel.¹⁹¹ Thus, the duty would burden religious practice only minimally.

In *Nally II*, the court conceded that there is one limited instance in which the burden on religious practice would be more substantial: when a clergy counselor holds a religious belief that it is wrong for a counselee to be treated by a professional therapist.¹⁹² Such a burden is similar to that found in *Sherbert* because that clergy counselor would be forced to choose between his or her belief and financial liability. Even in such a rare case, the *Nally II* court concluded, a duty of care is not unconstitutional as a matter of law: it is an issue of fact whether a particular clergy counselor's religion actually prohibits such referrals.¹⁹³ Therefore, the proposed duty imposes a substantial burden on religion only when a counselor's belief prevents him or her from meeting that duty and when he or she can prove that at trial.

Yet even if referral is proven to be contrary to a sincerely-held religious belief, a state has a compelling interest in the mental health of its citizens that outweighs the corresponding burden on a reli-

¹⁸⁹ *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

¹⁹⁰ *Nally III*, 47 Cal. 3d at _____, 763 P.2d at 969, 253 Cal. Rptr. at 118 (1988) (Kaufman, J., concurring); *Nally II*, 194 Cal. App. 3d at _____, 240 Cal. Rptr. at 233.

¹⁹¹ *Nally III*, 47 Cal. 3d at _____, 763 P.2d at 969, 253 Cal. Rptr. at 118 (1988) (Kaufman, J., concurring); *Nally II*, 194 Cal. App. 3d at _____, 240 Cal. Rptr. at 234.

¹⁹² *Nally II*, 194 Cal. App. 3d at _____, 240 Cal. Rptr. at 234.

¹⁹³ *Id.*

religious counselor. The *Sherbert* Court ruled that the substantial infringement on religious conduct in that case was not outweighed by the state's interest in preventing unscrupulous claimants from filing fraudulent claims of religious objection to Saturday work.¹⁹⁴

The severe harm that negligent counseling can cause is certainly a more compelling state interest. The demand for counseling is growing. More and more Americans seek counseling from secular and religious sources for their many problems. Research now reveals that counseling can provide the positive healing that these individuals seek. Research also reveals, however, that unskilled and careless counseling can severely harm those who need its help. If a counselor is untrained or negligent, the counsel he or she engages in may not only be ineffective, but it may also exacerbate the counsellee's existing mental problems. Because religious counselors constitute the largest group of counselors in the country, the compelling state interest in preventing such harm cannot be accomplished without holding those counselors responsible for their negligence. As the concurrence in *Nally III* and the majority in *Nally II* both asserted, society's interest in preventing a would-be suicide is as profound as its interest in preserving life itself.¹⁹⁵ Therefore, the state interest in imposing negligence liability on religious counselors could not be more compelling; it outweighs any burden on religious conduct even in the unlikely case that such a burden is substantial.

Moreover, there is no less restrictive alternative that will accomplish this compelling goal. In fact, the *Nally II* majority ruled that a duty to refer that was even more exacting than the one proposed here was not only narrowly tailored, but was also the very minimum required to achieve the state's interest.¹⁹⁶ Such a narrow duty of care, the court noted, was far less restrictive than a ban on all religious counseling of suicidal people or a requirement that the religious counseling given be the best possible to prevent suicide. Therefore, under the *Sherbert* test, holding clergy counselors to the proposed standard of care does not violate the free exercise protection of religious conduct because the standard is minimally burdensome, supported by a compelling state interest, and narrowly tailored.

One court has suggested that imposing negligence liability on clergy counselors will ultimately result in state restriction of religious

¹⁹⁴ 374 U.S. 398, 407 (1963).

¹⁹⁵ *Id.*; *Nally II*, 194 Cal. App. 3d at _____, 24 Cal. Rptr. at 234, 235.

¹⁹⁶ *Nally II*, 194 Cal. App. 3d at _____, 24 Cal. Rptr. at 236.

belief, something the Court has forbidden as a violation of the free exercise clause. In *Hester v. Barnett*, the Missouri Court of Appeals ruled that clergy counselors are not liable for negligent counseling when a court characterizes their actions as intentional torts.¹⁹⁷ In dicta, the *Hester* court noted that negligence liability may implicate the freedom-to-believe aspect of the free exercise clause.¹⁹⁸ Holding clergy counselors to a duty to use the degree of skill exhibited by ordinary members of that profession, the court explained, would involve courts in judging the methods, training, and content of various types of religious counseling to determine what the "ordinary" member of each would be. The court reasoned that this inquiry, in turn, might result in an evaluation of the religious beliefs of different counselors.

The *Hester* court's dicta, however, does not apply to the standard of care suggested here. The general negligence duty proposed would only require courts to determine whether a clergy counselor held him or herself out as competent, in fact recognized a mental disorder, and referred the counselee to a professional therapist. It would not require courts to compare a particular clergy counselor to the ordinary member of his or her profession. Therefore, no inquiry into the beliefs of a particular counselor would be necessary to determine whether his or her beliefs matched those of the ordinary clergy counselor. Consequently, neither the free exercise clause's absolute protection from the regulation of religious belief nor its qualified prohibition on the restriction of religious conduct shield clergy counselors from the proposed minimally burdensome regulation.

Furthermore, the establishment clause does not prevent the imposition of a duty of care on religious counselors. In *Lemon v. Kurtzman*, the Supreme Court presented a three-prong test to determine whether a state action is unconstitutional under the establishment clause.¹⁹⁹ Reviewing the constitutionality of two statutes that attempted to subsidize parochial school education, the *Lemon* Court determined that the establishment clause prohibits the government from any regulation that has a religious purpose, results primarily in the advancement or inhibition of religion, or excessively entangles the state with religion.

¹⁹⁷ *Hester v. Barnett*, 723 S.W.2d 544, 553-54 (Mo. Ct. App. 1987).

¹⁹⁸ *Id.* at 553.

¹⁹⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Holding church counselors to the proposed standard of care passes the *Lemon* test because the purpose is secular, the primary effect is not advancement or inhibition of religion, and excessive entanglement does not result.²⁰⁰ The purpose of imposing a duty of care is to protect counselees from the destructive effects of negligent therapy. This is a secular, not a religious goal. The *Nally II* court agreed that a standard of care serves not only a secular purpose, but a compelling one.²⁰¹ The *Nally III* concurrence also concluded that the purpose was religiously neutral.²⁰² Therefore, the imposition of the suggested duty of care passes the first prong of the *Lemon* test.

The primary effect of imposing the suggested duty is to decrease the risk of suicide and "deterioration effect" in counselees. As the above discussion of a duty's burden on the free exercise of religion indicates, the effect of establishing this duty is not to restrict the religious content of clergy counseling; religious counselors would be held to a standard that does not implicate the substance of counseling. Because the duty requires only that a clergy counselor recognize his or her limitations as a counselor and advise the counselee to seek professional help, the primary effect would be to improve professional care for seriously troubled counselees — not to restrict counselors' religious conduct.

Finally, the duty would not excessively entangle the state in the affairs of the church. In *Lemon*, two states' statutes provided supplements and reimbursements to parochial schools for the costs of secular educational materials, including teachers' salaries. To calculate the amount of money to allocate to each school, the states were required to distinguish between secular and religious subjects and materials, to monitor courses' contents, and to examine church schools' financial records. These determinations, the court held, resulted in excessive entanglement because they forced the states to establish a complex, ongoing surveillance of church schools.²⁰³

Unlike *Lemon*, requiring that clergy counselors meet a standard of care would not excessively entangle the church with the state.²⁰⁴ The suggested standard of care does not result in the same degree of entanglement because it does not require any state examination

²⁰⁰ *Nally II*, 194 Cal. App. 3d at _____, 240 Cal. Rptr. at 230-31.

²⁰¹ *Nally II*, 194 Cal. App. 3d at _____, 240 Cal. Rptr. at 231.

²⁰² *Nally III*, 47 Cal. 3d at _____, 763 P.2d at 970, 253 Cal. Rptr. at 119 (1988) (Kaufman, J., concurring).

²⁰³ 403 U.S. 602, 619 (1971).

²⁰⁴ See *id.* at 616.

of financial records or determination of the difference between secular and religious counseling content. In addition, imposing a duty of care does not require continuous, or even temporary, monitoring of clergy counselors. The state need only be involved in religious affairs to the extent that courts must evaluate evidence before them to determine whether a clergy counselor in fact recognized a serious mental disorder, found him or herself not competent to treat it, and referred the counselee to a professional therapist.²⁰⁵ Consequently, state involvement with churches is not as complex and ongoing as that in *Lemon*. The court in *Nally II* agreed that the narrowly tailored nature of a duty of care like the one suggested here was further evidence that the state would not have to monitor religious organizations.²⁰⁶ Thus, applying the *Lemon* test, the above duty of care would not violate the first amendment's establishment clause.

The proposed licensing that reinforces the above duty by requiring basic education in mental health from any one of a wide variety of programs is constitutional also. Licensing does not violate the freedom-to-believe aspect of the free exercise clause or the proscription on state inquiry into the truth or falsity of an individual's belief. The suggested licensing requirement ensures that clergy counselors who proclaim competence to treat serious mental illnesses can at least identify those illnesses and their symptoms. It does not constrict the content of clergy counsel by directing a clergy counselor to adopt or abandon a particular religious belief. Similarly, because licensing does not inquire into the content of counsel, no evaluation of the truth or falsity of a clergy counselor's beliefs is necessary during the licensing process. Therefore, the free exercise clause's absolute protection from regulation of religious belief does not block the imposition of the proposed licensing requirement.

Nor would this licensing requirement violate the first amendment's qualified right to freedom of religious conduct. Under the *Sherbert* test, the burden of licensing on clergy counselors would not be substantial if framed as suggested here. The number of clergy affected by licensing would be limited to those who hold themselves out as competent to treat serious mental illness. In addition, the education requirement would be minimal, so a wide range of programs in mental health would qualify. Unlike the burden in *Lemon*,

²⁰⁵ See *Nally II* 194 Cal. App. 3d at _____, 240 Cal. Rptr. at 230-31.

²⁰⁶ *Id.* at _____, 240 Cal. Rptr. at 231.

licensing would not force a clergy member to choose between religious counseling and his or her livelihood, or amount to a similarly severe financial penalty. Therefore, the burden on clergy counselors would not be substantial.

Yet, if courts considered the burden substantial, the licensing requirement would still pass the *Sherbert* test because the state interest in protecting counselees from the destructive effects of negligent counseling is compelling. It outweighs the clergy counselor's right to practice his or her religious beliefs without restriction. In *Sherbert*, the state interest did not outweigh the substantial burden on religious practice because that interest was merely to minimize fraudulent unemployment claims. In contrast, the state's goal in implementing a licensing requirement is to protect the mental health, and, indeed, lives of counselees. The actual, and often severe, harm that research has identified as resulting from negligent or untrained counseling has elevated the state interest in protecting counselees from such counseling. As a result, the state's interest outweighs even a substantial burden on religious practice.

Furthermore, if licensing statutes allowed clergy counselors to select from a range of training programs, there would be no less intrusive way to ensure clergy counselor competence. Licensing limited to counselors professing their competence to treat all forms of mental illness, and requiring them only to acquire a minimal level of education, does not restrict clergy counseling any more than necessary to achieve the compelling state interest. Therefore, the licensing requirement presented here would not violate the free exercise clause's limited protection of religious conduct.

Moreover, requiring clergy counselors to meet a minimum educational requirement if they hold themselves out as competent to treat serious mental illness does not violate the establishment clause under the *Lemon* test. Licensing has a secular purpose and a primary effect that does not promote or inhibit religion. In addition, it does not excessively entangle the state with religion.²⁰⁷ The purpose of licensing, like that of the suggested duty of care, is secular: to protect the growing number of people who seek help from the serious harm that negligent counseling can cause. The purpose is not to support or undermine religious practice.

The primary effect of licensing would be an increase in the number of skilled counselors, not the promotion or inhibition of

²⁰⁷ See *Lemon*, 403 U.S. at 612-13.

religion. Certainly a requirement that clergy counselors be licensed in no sense tends to promote religion. Granted, a licensing requirement inhibits religion more than a duty of care; there will be a slightly greater burden on clergy counselors who want to counsel people with serious psychological problems. Nevertheless, this slight burden's effect is ameliorated by several factors. The educational requirement is minimal and therefore relatively easy to satisfy. Researchers have found that training has a measurable positive effect on counseling outcomes. Furthermore, many clergy counselors recognize that it is in their own and their counselees' best interests to obtain as much training as possible. Therefore, because the proposed educational requirement is lenient, positive outcomes are documented, and many religious counselors have recognized the need for increased training, the primary effect of a licensing requirement would be better counseling, not the inhibition of religion.

Finally, licensing certain clergy counselors would not excessively entangle the state with religion. Although it would to some extent involve the state in religious matters, that involvement does not reach the entanglement level that the Court described in *Lemon*. In *Lemon*, the states had to assess and continue to monitor the content of courses and materials and the financial records of church schools. Licensing will not require a similar ongoing relationship between church and state. No initial or continuing examination of churches' or clergy counselors' financial records would be necessary to license those counselors. In addition, once the state makes the initial determination that a clergy counselor has acquired the necessary level of education, the state's involvement with that counselor ends.

Moreover, state licensing of certain clergy counselors is unlike the excessive entanglement of *Lemon* because licensing does not require the state to evaluate the content of each clergy counselor's counsel. In *Lemon*, the statutes forced states to determine, with individualized scrutiny, whether course materials and content were secular or religious in nature. In contrast, licensing does not necessitate distinguishing between religious and secular counseling. The state simply has to process applications by matching the education a particular clergy counselor has received to a list of courses and programs that the state has found to provide the minimal mental health education required. In fact, state administration of a licensing program would be involved primarily with determining which educational programs provide that requisite level of training. Thus, a minimal licensing requirement does not result in an excessively entangled relationship between church and state because licensing

would not require ongoing surveillance of religious activities, or state determination of what constitutes religious versus secular counseling.

The proposals in this note also conform to the recognized tort principle that a special relationship between a therapist and patient creates a duty of care that the former owes the latter, especially when the counselor holds him or herself out as competent to treat a counselee with severe psychological problems. Yet one court's decision is contrary to this principle.²⁰⁸ Because that decision neglects the reasoning underlying analogous duties and misconstrues the absence of a causal connection, it is poorly conceived. In *Nally III*, the California Supreme Court held that a clergy counselor does not owe a duty of care to his or her counselees because no special relationship exists between counselor and counselee.²⁰⁹ In so holding, the *Nally III* court distinguished *Tarasoff v. Regents of University of California* on the basis of the precise duty at issue in that case. *Tarasoff* involved a psychiatrist's duty to protect others from a patient, not to prevent a patient from harming himself. The *Nally III* court also distinguished *Bellah v. Greenson*, explaining that the psychiatrist in *Bellah* was liable for malpractice, not for violating a duty of care based on his special relationship with his patient.²¹⁰ Thus, the *Nally III* court found no precedent for the precise duty of care pleaded by the Nallys.

The *Nally III* court, however, ignored the reasoning essential to the holdings in both *Bellah* and *Tarasoff*. In *Tarasoff*, the specific duty was to protect third parties, but the basis for that duty was the special relationship that the court held to exist between therapist and patient.²¹¹ Furthermore, the *Bellah* court declared that the special relationship between a psychiatrist and his or her patient is clearly recognized by the law.²¹² Thus, both courts agreed that a special relationship exists between psychiatrist and patient, and that it forms the basis for the creation of duties of care.

Furthermore, the duty of care proposed here conforms to this accepted tort principle. As the concurrence in *Nally III* noted, the basis for the special relationship between therapist and patient is

²⁰⁸ See generally *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988).

²⁰⁹ *Nally III*, 47 Cal. 3d at —, 763 P.2d at 960, 253 Cal. Rptr. at 109–10 (1988).

²¹⁰ *Id.* at —, 763 P.2d at 958, 253 Cal. Rptr. at 107.

²¹¹ *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 435, 131 Cal. Rptr. 14, 24, 551 P.2d 334, 345 (1976).

²¹² *Bellah v. Greenson*, 81 Cal. App. 3d 614, 620, 146 Cal. Rptr. 535, 538 (1978).

the patient's vulnerability and dependence on the therapist. In the relationship between clergy counselors who profess competence to treat mental illness and their counselees, the concurrence asserted, counselees are both vulnerable and dependent.²¹³ Therefore, an analogous special relationship exists between certain clergy counselors and their counselees, and that relationship should create the analogous suggested duty of care. Yet the *Nally III* court's decision disregarded this reasoning. After finding no precedent for the exact duty asserted by the Nallys, the court overlooked the special relationship between therapist and patient that was the basis of prior courts' decisions. Consequently, the court was wrong to conclude that clergy counselors have no special relationship with their counselees and therefore owe them no duty of care.

The *Nally III* court also erred in its consideration of the causation element in that case.²¹⁴ After the majority determined that no duty of care existed, it ruled that none should be created. In reaching that conclusion, the court relied almost exclusively on the lack of causal connection between the clergy counselors' actions and Kenneth Nally's death. Tenuous causation, the court determined, was good enough reason not to create a duty of care. As the concurrence explained, the majority was correct to find that the counselors did not proximately cause Nally's death but incorrect to conclude that a lack of causation precludes the imposition of a duty.²¹⁵ The fact that Nally's counselors tried to help him by encouraging him to seek psychiatric treatment, the concurrence reasoned, indicated that they met their duty of care — not that they never had one.²¹⁶ Thus, the majority mistakenly ruled that it should create no duty, rather than rule that a duty based on a special relationship existed and had been met.

In determining whether to create a duty of care, the majority in *Nally III* also examined the public policy issues behind imposing such a duty on clergy counselors. The court concluded that even a minimal duty imposed on the clergy would have a "chilling effect" on both counselors and counselees.²¹⁷ The court reasoned that those who need counseling the most would be reluctant to seek it out of fear that their confidential discussions with a clergy counselor would

²¹³ *Nally III*, 47 Cal. 3d at _____, 763 P.2d at 968, 253 Cal. Rptr. at 117.

²¹⁴ See *id.* at _____, 763 P.2d at 958, 253 Cal. Rptr. at 107.

²¹⁵ *Id.* at _____, 763 P.2d at 967, n.7, 253 Cal. Rptr. at 116, n.7.

²¹⁶ *Id.* at _____, 763 P.2d at 964, 253 Cal. Rptr. at 113 (Kaufman, J., concurring).

²¹⁷ See *id.* at _____, 763 P.2d at 959, 253 Cal. Rptr. at 108; see also Ericsson, *Clergy Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163, 174 (1981).

lead to involuntary commitment to a psychiatric institution. The *Nally III* court also determined that holding clergy members liable for negligent counseling would discourage "private assistance efforts."²¹⁸

Despite the *Nally III* court's fears, the duty of care and licensing proposed here would not have a chilling effect on clergy counselors, their counselees, or "band-aid" counselors because they require no confidentiality breaches, grant no power to commit counselees involuntarily, and do not apply to the private assistance efforts mentioned by the *Nally III* majority. The suggested duty is to advise and persuade a counselee to seek the help of a professional therapist. It does not require the counselor to notify third parties of a counselee's condition. Therefore, the duty and licensing do not force disclosure and thereby discourage counselees from communicating with clergy counselors in the first place.²¹⁹

In addition, the fear of involuntary commitment is unlikely to deter people from seeking help from clergy counselors. Counselees are already subject to involuntary commitment in limited situations. The suggested duty to refer does not increase the possibility of commitment; that power is not given to clergy counselors. Therefore, the possibility of involuntary commitment is no greater than it already is for those seeking help from secular counselors. Moreover, the statistics indicate that such a fear has yet to deter people from seeking secular therapy.²²⁰

Nor would the duty or licensing proposed deter clergy counselors from continuing to help their counselees. The clergy have spent over twenty centuries devoted to counseling. They feel acutely aware that they have a moral obligation to help troubled individuals with their psychological and spiritual problems.²²¹ In addition, the licensing and duty of care proposed here would not restrict clergy counselors from using their spiritual training to help their counselees or force counselors to undergo prohibitively rigorous training. Because the counselee would receive better treatment, and the counselor would be minimally burdened, the duty of care and licensing suggested would not deter the clergy from maintaining their commitment to helping their counselees.

²¹⁸ See *Nally III*, 47 Cal. 3d at —, 763 P.2d at 959, 253 Cal. Rptr. at 108.

²¹⁹ See *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 441, 131 Cal. Rptr. 14, 27, 551 P.2d 334, 347 (1976).

²²⁰ See generally H. CLINEBELL, *supra* note 2, at 47-48.

²²¹ *Id.* at 47.

Finally, the licensing and duty suggested here would not discourage less formal, stop-gap forms of counseling. The duty and licensing would only apply to those counselors who establish a special relationship with their counselees by holding themselves out as competent to treat those counselees' serious emotional problems. The proposed duty and licensing requirement do not expose counseling hot lines and other such services to liability because those forms of counseling do not create the requisite special relationship.²²² In sum, because the duty and licensing would not force confidentiality breaches, increase the chances of involuntary commitment, or discourage private assistance efforts, the duty and licensing suggested will not keep people from seeking counseling or prevent the clergy from providing it.

Although it did not find or create a duty of care on any of the above tort principles, in dicta the *Nally III* court did indicate that it would support the duty proposed in this note. In a brief footnote, the majority asserted that a clergy counselor who held him or herself out as a professional thereby acquired a duty of care.²²³ The majority did not explain why the facts of the case did not trigger this duty. In his disagreement, Judge Kaufman was more forthcoming. The concurrence stated that the facts were sufficient to establish such a duty, considering that the ministers themselves had engaged in formal counseling and had written a guide to religious counseling, which proclaimed their proficiency in treating any type of emotional problem. In fact, Nally was aware of the defendant's assertions because he had read that guide and taken a course in counseling from one of the defendants. Thus, the facts indicated that the defendants had held themselves out as professional therapists. Even though the court concluded without explanation that the defendants had not done so, it did recognize that, on different facts, the very duty suggested here should be established. This too indicates that the proposed standard of care conforms to recognized tort doctrine.²²⁴

Thus, the duty of care suggested in this note conforms to established tort principle better than the holding in *Nally III* does. The *Nally III* court failed to recognize that a duty existed in that case because the established special relationship between therapist

²²² See *Nally III*, 47 Cal. 3d at _____, 763 P.2d at 969, 253 Cal. Rptr. at 118 (Kaufman, J., concurring).

²²³ *Id.* at _____, 763 P.2d at 961 n.8, 253 Cal. Rptr. at 110 n.8.

²²⁴ *Id.* at _____, 763 P.2d at 969, 253 Cal. Rptr. at 118 (Kaufman, J., concurring).

and patient is closely analogous to that between clergy counselor and counselee. Moreover, the court resisted creating a duty based on its misinterpretation of tenuous causation and superficial examination of public policy. Finally, in dicta, the court itself recognized that a duty such as the one proposed here did not contravene accepted tort doctrine.

V. CONCLUSION

Neither tort doctrine nor the first amendment prevents courts from holding members of the clergy liable for negligent counseling. Furthermore, the public interest in preventing the serious harm that untrained and negligent counseling can cause has increased as our society relies more and more on the curative force of counseling. This public policy supports imposing a duty of care on clergy counselors. In order not to violate the first amendment, recognized tort doctrines, or the public interest in not deterring the clergy from counseling, courts should require religious counselors who profess expertise in mental health to do three things. Courts should require them to identify symptoms of mental illness, recognize the limits of their competence to treat counselees who have those symptoms, and, when they reach those limits, to advise counselees to seek professional medical treatment. In addition, the Constitution allows, and public interest dictates, that states establish licensing for clergy counselors that reinforce the above duty by requiring those counselors to learn the basics of mental health, and when and how to refer. With licensing and a duty of care, counselees will be safer, and clergy counselors will be more successful at the cure of souls.

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