

5-1-1990

## Through the Narrow Door: An Examination of Possible Criteria for a Clergy Malpractice Action

Mark A. Anthony  
*University of Dayton*

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Anthony, Mark A. (1990) "Through the Narrow Door: An Examination of Possible Criteria for a Clergy Malpractice Action," *University of Dayton Law Review*: Vol. 15: No. 3, Article 6.  
Available at: <https://ecommons.udayton.edu/udlr/vol15/iss3/6>

This Comment is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact [mschlange1@udayton.edu](mailto:mschlange1@udayton.edu), [ecommons@udayton.edu](mailto:ecommons@udayton.edu).

# THROUGH THE NARROW DOOR: AN EXAMINATION OF POSSIBLE CRITERIA FOR A CLERGY MALPRACTICE ACTION

## I. INTRODUCTION

"Come in through the narrow door."<sup>1</sup> This advice, attributed to Jesus of Nazareth in the *Gospel of Luke*, may well serve as good counsel for someone contemplating a claim of "clergy malpractice" in litigation.<sup>2</sup> While clergy malpractice claims have regularly surfaced over the last decade,<sup>3</sup> it has been difficult to find an acceptable rationale for this tort. Plaintiffs attempting to prove professional malpractice liability for counseling performed by a cleric<sup>4</sup> have consistently failed.<sup>5</sup>

One reason for this failure has been the tendency of plaintiffs to include intentional tort allegations in the pleadings along with the

---

1. *Luke* 13:24. The context of this saying focuses on the need to concentrate one's focus and efforts on the desired goal of "entering salvation." See, e.g. Stuhlmüller, *JEROME BIBLICAL COMMENTARY*, at 147 (1968). There is an analogous need to present clergy malpractice claims in a configuration of facts and legal arguments that avoid simple identification with already existing tort claims and do not run afoul of the first amendment's freedom of religion clauses if there is to be any hope of achieving the desired goal of judicial acceptance.

2. "Clergy" or "clerical" malpractice is the term which will be used throughout this comment for the proposed tort under consideration. Other titles such as ministerial malpractice and pastoral counseling liability have also been suggested. For a more complete listing, see Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W.L. REV. 507, 510-11 (1983).

3. Since 1980, at least ten such claims have reached trial across the nation. Of these, the issue has reached the supreme courts of Alabama, California, Colorado and Ohio. See *Handley v. Richards*, 518 So.2d 682 (Ala. 1988); *Nally v. Grace Community Church*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 109 S. Ct. 1644 (interim ed. 1989); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988); *Strock v. Pressnell*, 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988).

4. Most commentators, both male and female, have used the term "clergyman," despite its non-inclusive nature, in an effort to reflect denominational neutrality. "Clergyperson" is rejected by these commentators as too awkward. However, the author of this comment does not find clergyman to be much less awkward. The preferred term in this comment will be "cleric." Whatever denominational aspects this term may conjure in the mind of the reader are a small price to pay in order to show respect to the growing number of women in the ordained ministries of many denominations.

A cleric, for this comment's purposes, is any person ordained or otherwise set apart by a church or religious sect to function as an agent or official representative of that church or sect and who presents himself or herself to the public as a representative of the church or sect capable and willing to help them with their personal or spiritual problems. Such a definition is designed to exclude lay ministers who work for a church or sect but whose primary relationship is that of employee or volunteer, and not as permanent ministers.

5. See *infra* notes 37-77 and accompanying text.

clergy malpractice cause of action.<sup>6</sup> The presence of alternative claims implies that the clergy malpractice claim adds nothing new to the cause of action. The clergy malpractice claim can be easily avoided or dismissed by the court.<sup>7</sup> This "shotgun approach," as it was described by one commentator,<sup>8</sup> tends to keep the concept of clergy malpractice unfocused, giving the courts the impression that it is nothing more than a catch-all phrase for causes of action that already exist.<sup>9</sup> To date, no case has advanced to trial where the plaintiff has claimed clergy malpractice as the sole allegation in a complaint. Therefore, it is still uncertain just how narrow the door is that would successfully open a new pathway for a claimant seeking relief based solely on a clergy malpractice claim. The plaintiff must maneuver between the already actionable tort claims that might be brought against clerics (notwithstanding their religious vocation) and the prohibition against judicial intervention into the religiously motivated actions of clerics found in the first amendment's establishment and free exercise clauses.<sup>10</sup> These first amendment clauses form the basis for freedom of religion and restrict governmental interference in matters of theology and religious practice.<sup>11</sup>

These dual restrictions of presently available tort actions and constitutional protections might be construed as eliminating any practical need for recognizing a tort of clergy malpractice. This comment argues that there is a need for a clergy malpractice tort. The comment initially considers the type of cases where plaintiffs have attempted to prove clergy malpractice in a tort action. Then, it considers possible constitutional barriers to imposing liability on clerics. The analysis section investigates the weaknesses of prior clergy malpractice claims, discusses what might constitute "pure clergy malpractice" and suggests a "three ring test" for evaluating whether or not grounds for a clergy malpractice claim exist. This comment contends that there are circumstances in which it is proper to allow a claim of "pure clergy malpractice" based on the methods used by, and the denomination and training of, particular clerics. Finally, it addresses whether clerics who are not trained as

---

6. See e.g., *Hester v. Barnett*, 723 S.W.2d 544, 550 (Mo. Ct. App. 1987)(alleging claims for alienation of affections, defamation, intentional infliction of emotional distress, invasion of privacy, and tortious interference with contract).

7. The courts have found alternative theories of law on which to base their decisions, thus avoiding the implications of the clergy malpractice claims. See, e.g., *Strock v. Pressnell*, 38 Ohio St. 3d 207, 212, 527 N.E.2d 1235, 1239 (1988)(finding that the clergy malpractice action was synonymous with "amatory actions" such as alienation of affections.).

8. See Comment, *supra* note 2, at 511.

9. *Id.*; see also *Hester*, 723 S.W.2d at 554.

10. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or the free exercise thereof."

11. See *infra* notes 78-108 and accompanying text.

counselors have, at minimum, a "duty to refer" persons who may need psychological treatment to a professional in the mental health field.

## II. BACKGROUND

### *A. Historical Interrelation Between Secular and Sectarian Expression*

For most of America's colonial and national history there has been an accepted intermingling of religious life, including sectarian expression, and official governmental policy. A type of social presumption that linked religion and public institutions, which can perhaps be described as "Pan-Protestantism,"<sup>12</sup> existed as a given in this nation well into the twentieth century.<sup>13</sup> This attitude led the United States Supreme Court in 1844 to conclude that reading the Bible in a privately-funded school does not violate the express directive of the school's founder that education provided there be completely secular.<sup>14</sup> The Court stated that teaching morality from the New Testament did not support or establish any particular sect because the Christian scriptures were the clearest expression of morality available.<sup>15</sup> However, some courts have refused to involve themselves in matters of intra-denominational conflicts.<sup>16</sup> Unlike England, where the monarch serves as head of both state and church,<sup>17</sup> the federal and state constitutions of the United States prohibit government action from establishing a religion and require that the courts refrain from arbitrating purely ecclesiastical matters.<sup>18</sup>

The counsel and advice clerics provide to their congregation fall within this sphere of ecclesiastical activity.<sup>19</sup> Prior to the development of secular counseling techniques in the nineteenth and twentieth centu-

---

12. This term is used to denote the religious, ethical, societal and political commonality in the United States that found root in the tenets of Protestant Christianity, such as the democratization of religious communities, salvation experiences based on internal conversion and personal choice, minimal use of ritual and rite and mistrust of structural authority. It was manifested in the general equating of "Christian" with "Protestant" and "American" with "Christian".

13. For an excellent essay on this issue, especially as it affected public education, see, Veltri, *Nativism and Nonpreferentialism: A Historical Critique of the Current Church and State Theme*, 13 U. DAYTON L. REV. 229 (1988).

14. *Vidal v. Mayor of Philadelphia*, 43 U.S. (2 How.) 127 (1844).

15. *Id.* at 200.

16. See *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church*, 393 U.S. 440 (1968); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

17. See *Bland v. Archdeacon of Cheltenham*, [1971] 1 All E.R. 1012 (Ct. of Arches).

18. *Watson*, 80 U.S. at 728 ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.").

19. See, Note, *Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise*, 17 U. TOL. L. REV. 209, 214-15 (1985) (traditional pastoral counseling described as healing, sustaining, guiding and reconciling are all "religious" activities by their nature).

ries, clerics assisted individuals with personal and family problems by utilizing their position as a moral and spiritual authority.<sup>20</sup> Most people found solace and hope for improved conditions and attitudes within the embrace of religious faith.<sup>21</sup> Sigmund Freud and Carl Jung acknowledged that the nature of their psychological counseling theories was directly related to religion.<sup>22</sup> In time, though, psychology matured into a discipline distinct in method and orientation from religion. "The mind" came within the sphere of science while "the soul" was left to religion.<sup>23</sup>

For many years, psychological counseling was shielded from the threat of legal action based on a theory of malpractice. Medical malpractice<sup>24</sup> was restricted to fields such as surgery and physical therapy. Psychological malpractice has been actionable only since the watershed case of *Tarasoff v. Regents of the University of California*<sup>25</sup> was decided fifteen years ago. The California Supreme Court held that a therapist has a duty to warn a third party who has been threatened by someone in the therapist's care.<sup>26</sup> In *Tarasoff*, psychological therapists employed by the Cowell Memorial Hospital of the University of California at Berkeley did not notify Ms. Tatiana Tarasoff that Prosenjit Poddar, then under the care of Doctor Lawrence Moore, had threatened to kill her.<sup>27</sup> Doctor Moore had the campus police briefly detain Poddar; after his release, Poddar killed Tarasoff.<sup>28</sup> Because Tarasoff had not been a patient of the defendants, the defendant physi-

20. *Id.*

21. *Id.* It is precisely the nature of the four traditional counseling functions of healing, sustaining, guiding and reconciling that they support and succor, provide hope and recovery from difficulty. No other social unit, with the exception of the immediate family, was available to give such help. *Id.*

22. See Szasz, *The Theology of Therapy: The Breach of the First Amendment Through the Medicalization of Morals*, 5 N.Y.U. REV. L. & SOC. CHANGE 127, 134 (1975) (documenting Freud and Jung's views concerning secular counseling and its links to religious thought).

23. Such a distinction replaces the more traditional tripartite structure of the mind that originated in classical times and which was used by St. Augustine in his work, *The Trinity*. See 45 ST. AUGUSTINE, THE FATHERS OF THE CHURCH: THE TRINITY (1963). St. Augustine conceived of this "three part mind" as a reflection of the Trinity's structure of Father, Son and Spirit. *Id.* at 506. Later Christian tradition developed by St. Thomas Aquinas envisioned the mind as composed of the elements of Reason, Will and Emotion. 11 T. AQUINAS, SUMMA THEOLOGICA 145-235 (Blackfriars ed. 1970). Freud's division of the human mind into Id, Ego, and Superego is similar to the traditional forms.

24. Malpractice is defined as a "[f]ailure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services. . . ." BLACK'S LAW DICTIONARY 959 (6th ed. 1990).

25. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

26. *Id.* at 446, 551 P.2d at 351, 131 Cal. Rptr. at 31.

27. *Id.* at 430, 551 P.2d at 339, 131 Cal. Rptr. at 19.

28. *Id.*

cians contended that they did not owe her a duty to warn her of any threats.<sup>29</sup> The defense also argued that an action of medical malpractice for psychological health care professionals was untenable because there is a high degree of uncertainty in psychological care. A substantial risk exists that a counselor might warn someone of possible harm who is not in any actual danger, causing that person unneeded anxiety.<sup>30</sup> The court, however, rejected these arguments, stating that a strong public interest for providing people with protection from harm outweighs the possibility of anxiety based on a mistaken diagnosis.<sup>31</sup> The court also rejected any contention that the doctor-patient relationship's confidentiality should be more highly valued than the peril to human life.<sup>32</sup> The court's reasoning provided the foundation for a malpractice action of a limited scope against professional therapists.<sup>33</sup>

Clerics, however, have not been considered liable for malpractice in the same way as secular counselors.<sup>34</sup> In fact, in the past, clerics have been specifically exempted from legislation regulating secular counseling activities.<sup>35</sup> Such exemptions were granted because the free exercise clause of the United States Constitution is assumed to afford clerics the greatest possible latitude in advising and counseling their congregations as part of their ministerial activity.<sup>36</sup> Their dealings with the personal problems of their communicants is considered to be "spiritual" in nature and constitutionally protected by virtue of their religious content.

### *B. Overview of Previous Clergy Malpractice Claims*

The first major challenge to the above supposition occurred in Cal-

---

29. *Id.* at 433, 551 P.2d at 342, 131 Cal. Rptr. at 21.

30. *Id.* at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24.

31. *Id.* at 440, 551 P.2d at 346, 131 Cal. Rptr. at 26.

32. *Id.* at 442, 551 P.2d at 346, 131 Cal. Rptr. at 27.

33. *Id.* at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.

34. See *infra* notes 37-77 and accompanying text for an overview of such malpractice claims.

35. Exclusionary legislation had been used as a primary argument against a clergy malpractice claim. For example, COLO. REV. STAT § 12-43-114 (10) (1985) (repealed 1988) provided:

Nothing in this article shall restrict a duly ordained minister, priest, or rabbi from carrying out his ministerial responsibilities while functioning in his ministerial capacity within a recognized religious organization and serving the spiritual needs of its constituency, provided he does not hold himself out to the public by any title or description incorporating the words 'psychologist', 'psychological', 'psychology', or other term implying training, experience, or expertise in psychology.

36. See *United States v. Ballard*, 322 U.S. 78 (1944). In *Ballard*, Justice Douglas stated: "[t]he religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect." *Id.* at 87.

ifornia in 1980 in *Nally v. Grace Community Church*.<sup>37</sup> A suit was filed by the parents of Kenneth Nally, who had committed suicide at the age of twenty-four.<sup>38</sup> Nally had been under the spiritual guidance of the pastors of Grace Community Church and had discussed his personal problems with them on several occasions.<sup>39</sup> Nally spoke with two of the pastors on a fairly informal basis and had also entered into a "discipling relationship"<sup>40</sup> with another pastor which lasted for only five sessions.<sup>41</sup> Nally was hospitalized after a suicide attempt in March of 1979, in the midst of the counseling sessions.<sup>42</sup> The senior pastor at Grace Community Church suggested Nally seek psychological help and recommended a physician and several therapists.<sup>43</sup> Nally's parents rejected the advice of a physician recommended by the pastor that Nally be involuntarily placed in a psychiatric hospital and Nally refused to voluntarily enter an institution.<sup>44</sup> Eleven days before committing suicide, Nally asked one of the church's pastors during a counseling session whether a Christian who committed suicide would still be saved.<sup>45</sup> The pastor said yes but cautioned that it would be wrong to think in such terms.<sup>46</sup> Nally saw two more doctors in his last week of life but he would not agree to treatment from either physician.<sup>47</sup> After a family fight and a rejected marriage proposal, Nally went to a friend's apartment and shot himself.<sup>48</sup>

Kenneth Nally's parents filed suit against the Grace Community Church and its pastors, alleging wrongful death under alternative theories of clergy malpractice, negligence in the training of the church's counselors and ministers and outrageous conduct on the part of the pastors and counselors.<sup>49</sup> The court of appeals ruled that all counselors who did not have a professional license, both religious and secular, had

---

37. 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 109 S. Ct. 1644 (interim ed. 1989).

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

39. *Id.* at 284, 763 P.2d at 950, 253 Cal. Rptr. at 100. These problems included a breakup with his girlfriend and family tensions, some of which stemmed from Kenneth's rejection of his parents' Catholicism. *Id.* at 284, 763 P.2d at 950, 253 Cal. Rptr. at 99.

40. *Id.* at 284, 763 P.2d at 950, 253 Cal. Rptr. at 100. From the context of the supreme court's opinion, a discipling relationship would seem to be one in which a pastor or church minister serves as a mentor to a member of the church in an ongoing, formal way. The term itself is probably a term of art used at Grace Community Church.

41. *Id.*

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

43. *Id.* at 286, 763 P.2d at 951, 253 Cal. Rptr. at 101.

44. *Id.* at 286, 763 P.2d at 951-52, 253 Cal. Rptr. at 101.

45. *Id.* at 286, 763 P.2d at 952, 253 Cal. Rptr. at 101.

46. *Id.*

47. *Id.* at 287, 763 P.2d at 952, 253 Cal. Rptr. at 101-02.

48. *Id.*

49. *Id.*

a duty to refer suicidal persons to a psychiatrist or psychologist qualified to prevent suicide.<sup>50</sup> The California Supreme Court, finding no grounds for a "duty to refer," reversed the court of appeals.<sup>51</sup>

Clergy malpractice based on harm resulting from a cleric's improper sexual relationship with someone who was receiving marriage counseling from the cleric was alleged in *Stock v. Pressnell*.<sup>52</sup> The husband of a woman intimately involved with the minister who was counseling her filed suit against the minister and his church.<sup>53</sup> The trial court granted the defendants' motion to dismiss for the plaintiff's failure to state an actionable claim.<sup>54</sup> The court of appeals upheld the dismissal on all counts except for one based on the infliction of emotional distress.<sup>55</sup> The clergy malpractice claim was dismissed because the defendants' alleged acts were within the scope of established tort law and it was unnecessary to recognize a new cause of action to remedy any wrong committed by the defendants.<sup>56</sup>

Justice Sweeney strongly dissented to the *Stock* majority's refusal to recognize a clergy malpractice claim.<sup>57</sup> The dissent is the only judicial expression to date that supports the concept of malpractice in cases of sexual impropriety between cleric counselors and counselees.<sup>58</sup> The dissent insisted that sexual relationships between counselors and those seeking their help are not acceptable by the standards of secular counseling any more than they are by religious denominations. An action

50. *Id.* at 290, 763 P.2d at 954, 253 Cal. Rptr. at 103.

51. *Id.* at 300, 763 P.2d at 961, 253 Cal. Rptr. at 110. The supreme court determined that a duty to refer required the existence of a duty to care, a special relationship between the counselor and counselee akin to that of a doctor-patient relationship, a connection between the defendant's actions and the harm incurred by the counseled, the foreseeability of that harm, the availability of insurance and the public policy interest in the free exercise of religion. *Id.* at 292-99, 763 P.2d at 956-60, 253 Cal. Rptr. at 105-10.

Such a duty to refer has been espoused by one commentator. See, Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 U. SAN FERN. V. L. REV. 47 (1981). Bergman states:

[S]hould the clergyman, who holds himself and his services to the community as a counselor competent to deal with emotional problems, not be subject to some minimal level of competence in the art or science of therapeutic counseling, as determined or gauged by the state of the science or art? May the clergyman practice his counseling with the total disregard of the scientific advances made in that area?

*Id. But, see* Ericsson, *Clergy Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163 (1981) (actions against the clergy possible only in cases of actual malice). "

52. 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988).

53. *Id.* at 208, 527 N.E.2d at 1236. Other claims were brought for breach of fiduciary duty, fraud, misrepresentation, nondisclosure and intentional infliction of emotional distress. *Id.*

54. *Id.*

55. *Id.* at 209, 527 N.E.2d at 1237.

56. *Id.* at 212, 527 N.E.2d at 1239.

57. *Id.* at 217, 527 N.E.2d at 1244 (Sweeney, J. dissenting).

58. *Id.* at 218, 527 N.E.2d at 1245 (Sweeney, J. dissenting).



for malpractice is not based on a counselor's religious or secular status, but on "the behavior of the practitioner."<sup>59</sup> In fact, the dissent considers the term "clergy malpractice" to be a misnomer because the counselor's behavior, not any clerical status, is the reason for the malpractice action.<sup>60</sup> For this reason it could be argued that the dissent supports the application of professional malpractice standards to clerics without supporting a separate tort claim of clergy malpractice. However, the practical effect would be the same for clerics.

In a similar case, *Destefano v. Grabrian*,<sup>61</sup> a Catholic priest entered into an adulterous relationship with a female counselee. The counselee's husband filed a complaint against the priest, the diocese and his wife claiming professional negligence, intentional infliction of emotional distress and breach of a fiduciary duty.<sup>62</sup> His wife later joined his action, cross claiming negligence, breach of a fiduciary duty and outrageous conduct.<sup>63</sup> The diocese and Father Grabrian's defense rested on the first amendment's protection of the free exercise of religion in that the actions in question took place as part of the "performance of pastoral duties by a Catholic priest."<sup>64</sup> The defendants also argued that the state legislature had specifically elected to exclude religious ministers, priests or rabbis from the penalties imposed on licensed marriage counselors who engage in sexual relations with their clients.<sup>65</sup>

The *Destefano* court rejected Father Grabrian's free exercise defense because he was obviously not acting within the scope of his employment as a Catholic priest when he had an affair with a married woman.<sup>66</sup> The court favored the Oregon Appeals Court's reasoning in *Christofferson v. Church of Scientology*,<sup>67</sup> which stated "[i]n the spiritual counseling context, the free exercise clause is relevant only if the defendant can show that the conduct that allegedly caused plaintiff's distress was in fact 'part of the beliefs and practices' of the religious group."<sup>68</sup> Nevertheless, the court rejected the claim of clergy malpractice, stating that there was clear legislative intent to exclude the clergy in all cases from malpractice actions, although the legislature's ration-

---

59. *Id.* at 218, 527 N.E.2d at 1244.

60. *Id.*

61. 763 P.2d 275 (Colo. 1988).

62. *Id.* at 278. The court equated the professional negligence claim with one of clergy malpractice. *Id.* at 285.

63. *Id.* at 279.

64. *Id.* at 283.

65. *Id.* at 285-86. See *supra* note 35 and accompanying text.

66. 763 P.2d at 284.

67. 57 Or. App. 203, 644 P.2d 577 (1982), *cert. denied*, 459 U.S. 1206 (1983).

68. *Id.* at 245, 644 P.2d at 604.

ale for such an exclusion was not at all clear from the statute or the court's discussion.<sup>69</sup>

A third type of clergy malpractice case involves a cleric's actions that cause emotional distress without an element of sexual impropriety or physical harm. In *Hester v. Barnett*,<sup>70</sup> a Missouri couple alleged several tort theories against a minister, including ministerial malpractice.<sup>71</sup> The plaintiffs were approached by a man who represented himself as a Baptist minister and offered to provide them with family counseling.<sup>72</sup> Since he assured them that what they told him would be kept in the strictest confidence, the Hesters confided in him concerning their difficulties with their children.<sup>73</sup> Then, the pastor allegedly caused the Hesters' harm by speaking to others about the family's problems, ridiculing the parents from the pulpit, trying to turn the children against their parents, providing false accusations to the Hot Line for Child Abuse concerning the treatment of the children and attempting to destroy the family's business by driving away their employees.<sup>74</sup>

The trial court dismissed the couple's claims for "failure to state causes of action upon which relief may be granted."<sup>75</sup> The court of appeals reinstated some of the claims, but upheld the dismissal of the clergy malpractice action.<sup>76</sup> The court reasoned that, after the already-actionable tort aspects of the plaintiffs' claims were removed from the issue, the only basis for a malpractice claim was the ethical duty of a pastor not to discuss with others what he is told in confidence. The court determined that this ethical duty was not actionable by itself.<sup>77</sup>

### C. Constitutional Considerations

The free exercise of religion clause has more of a direct impact on the question of clergy malpractice than the establishment clause.<sup>78</sup> It is important to understand the Supreme Court's interpretation of the free exercise clause because the courts that have faced a clergy malpractice claim have generally raised constitutional issues in the context of the free exercise clause.<sup>79</sup>

---

69. *Destefano*, 763 P.2d at 285-86.

70. 723 S.W.2d 544 (Mo. Ct. App. 1987).

71. *Id.* at 550. The other counts were for alienation of affections, defamation, intentional infliction of emotional distress, invasion of privacy and tortious interference with contract. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 549.

76. *Id.* at 564.

77. *Id.* at 554.

78. The free exercise clause will most likely be used as a defense by clerics sued under an action of clergy malpractice. See, e.g., *Destefano*, 763 P.2d at 283.

79. *Id.*

The United States Supreme Court first addressed the issue of a defense of a religious practice based on the free exercise clause in *Reynolds v. United States*.<sup>80</sup> The case involved the Mormons' claim that their right to freely engage in polygamous relationships as a religious practice was protected by the first amendment despite state and federal prohibitions of the lifestyle.<sup>81</sup> Polygamy was an established tenet of the Mormon faith at that time.<sup>82</sup> The Supreme Court held that the government has the right to outlaw the practice of polygamy, notwithstanding its basis in religious belief, because the state can control any action "in violation of social duties or subversive of good order."<sup>83</sup> This holding was the first articulation of what became known as the "belief-action" distinction which differentiated between an absolute right to profess any religious belief and the qualified right to act on those beliefs.<sup>84</sup>

The holding implied a potential chilling of the actual protection for religious exercise afforded by the free exercise of religion clause; this implication was limited in a pair of cases decided during the 1940s. In these cases, the Court held that the ability of the state to control and restrict religious activity, and indeed all first amendment rights, is not absolute.<sup>85</sup> In *Cantwell v. Connecticut*,<sup>86</sup> the Court stated that "[in] every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."<sup>87</sup> The Court tightened the states' power to regulate religious activity even more in *West Virginia State Board of Education v. Barnette*<sup>88</sup> by holding that "[first amendment rights] are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."<sup>89</sup>

The right to the free exercise of religion falls within the strict scrutiny protective framework that protects other first amendment guarantees.<sup>90</sup> In 1987, the United States Supreme Court, in *McDaniel v. Paty*,<sup>91</sup> held that the right to the free exercise of religion prohibits the state from denying clerics rights that they would have if they were

---

80. 98 U.S. 145 (1878).

81. *Id.* at 161-62.

82. *Id.* at 161.

83. *Id.* at 164.

84. *Id.* at 166.

85. See *infra* text accompanying notes 86-89.

86. 310 U.S. 296 (1940).

87. *Id.* at 304.

88. 319 U.S. 624 (1943).

89. *Id.* at 639.

90. *Barnette*, 319 U.S. at 639; *Cantwell*, 310 U.S. at 303-04.

91. 435 U.S. 618 (1978).

not in the clergy.<sup>92</sup> The Court ruled that Tennessee could not restrict clerics from serving in the state legislature and constitutional conventions; the state had impermissibly relied on the clerics' status as reason for the prohibition.<sup>93</sup> The Court's decision was not based on the theory of "an absolute bar on interference with religious beliefs."<sup>94</sup> Denial of the right to be a representative in a government body solely because a person is a cleric, without a showing that there is a strong government interest in establishing such a prohibition, is not acceptable.<sup>95</sup> Justice Brennan stated the proposition even more emphatically in his concurrence: "[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges, or benefits."<sup>96</sup>

However, the application of the strict scrutiny standard to questions of free exercise of religion was recently restricted by the Supreme Court in *Employment Division, Department of Human Resources v. Smith*.<sup>97</sup> Two employees of a private drug rehabilitation organization were fired because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church.<sup>98</sup> Their unemployment applications were denied under an Oregon state law which disqualifies employees' discharged for work-related misconduct.<sup>99</sup> The state court of appeals held that the denials violated the former employees' first amendment free exercise rights.<sup>100</sup> The Court held that a state may bar activity that incidentally adversely affects a person's exercise of religious conduct as long as the law does not specifically target that conduct in its religious nature and the law is constitutional when applied to those who may engage in such conduct for non-religious purposes.<sup>101</sup> The Court also held that the use of the "compelling governmental interest" test, or strict scrutiny standard,<sup>102</sup> is inappropriate in free exercise issues unless the question concerns unemployment compensation evaluation rules<sup>103</sup> or it is linked to some other first amendment issue.<sup>104</sup> Justice O'Connor's concurrence takes the majority to task for abandoning the strict scrutiny standard in free

---

92. *Id.* at 628-29.

93. *Id.* at 627.

94. *Id.*

95. *Id.* at 638.

96. *Id.* at 639.

97. 110 S. Ct. 1595 (interim ed. 1990).

98. *Id.* at 1597.

99. *Id.* at 1598.

100. *Id.*

101. *Id.* at 1600.

102. *Id.* at 1603.

103. *Id.* at 1603.

104. *Id.* at 1604.

exercise cases, as does the dissent.<sup>105</sup>

It is unclear what effect *Smith* will have on the issue of clergy malpractice. The impact may be minimal if the holding of *Smith* is restricted to matters involving criminal law violations since clergy malpractice claims are civil.<sup>106</sup> It is also possible, however, that the *Smith* holding will greatly weaken the theory that the state may not infringe the exercise of personal religious beliefs without a showing of a "grave and immediate danger"<sup>107</sup> from the exercise of that belief. In any case, *Smith* would not seem to affect the Court's former holding that the state may not separate the clergy in a class based on clerical status alone, at least when such separation will lead to the restriction of the rights of members of the clergy and perhaps even when the separation inures to their benefit.<sup>108</sup>

### III. ANALYSIS

#### A. Weaknesses of Prior Claims of Clergy Malpractice

As the courts have indicated, to be successful a claimant needs to show how a clergy malpractice claim differs from existing intentional tort and negligence claims.<sup>109</sup> The claimant must also show that the claim does not offend the first amendment's free exercise of religion clause or the establishment of religion prohibition.<sup>110</sup> The failure of previous claimants to have their clergy malpractice claim accepted demonstrates the difficulty of proving the uniqueness and necessity of a new action of clergy malpractice.

*Hester v. Barnett*<sup>111</sup> is an excellent example of the plaintiff choosing to place clergy malpractice among other torts.<sup>112</sup> The pastor's actions were actionable through other, traditional tort theories accepted under Missouri law.<sup>113</sup> The presence of the clergy malpractice claim was superfluous. The same allegations could have been brought against the pastor had he not been a minister but an obnoxious next-door

---

105. *Id.* at 1607 (O'Connor, J., concurring) ("To reach its sweeping result, however, the Court must . . . disregard our consistent application of free exercise doctrine."). The dissent's argument is very similar to that of Justice O'Connor. *Id.* at 1616 (Blackmun, J., dissenting).

106. *Id.* at 1603. However, the Court also speaks of the enforceability of "prohibitions of socially harmful conduct" which could easily include a malpractice question. *Id.*

107. *Barnette*, 319 U.S. at 639.

108. See *McDaniel*, 435 U.S. at 628-29.

109. See e.g., *Strock v. Pressnell*, 38 Ohio St. 3d 207, 212, 527 N.E.2d 1235, 1239 (1988) (holding clergy malpractice not actionable unless cleric's behavior "falls outside the scope of other recognized torts").

110. U.S. CONST. amend. I; see also Ericsson, *supra* note 51, at 177-79; Comment, *supra* note 2, at 525-42.

111. 723 S.W.2d 544 (Mo. Ct. App. 1987).

112. *Id.* at 551.

113. *Id.*

neighbor.<sup>114</sup> The separate tort for clergy malpractice in this case only expressed the contention that there is a heightened ethical duty involved and that the minister's actions are that much worse because of his calling. In effect, the Hesters sought to turn Barnett's ethical and moral duties as a "minister of the gospel"<sup>115</sup> into a legal duty to be moral.

In *Strock v. Pressnell*,<sup>116</sup> the Ohio Supreme Court was relieved not to have to address the "vexatious questions that arise in this area" because Strock's claims fell "within the realm of intentional tort law, i.e., amatory actions."<sup>117</sup> While the *Strock* dissent takes the majority to task for not accepting the rationale of the clergy malpractice claim,<sup>118</sup> it is clearly the case in every suit discussed in this comment that the association of intentional torts with clergy malpractice inevitably harms the latter.

Other clergy malpractice claims have run afoul of the free exercise clause. For example, in *Nally v. Grace Community Church*,<sup>119</sup> the counts of outrageous conduct were centered on Grace Community Church's position concerning Catholicism and its view of suicide's effect on salvation.<sup>120</sup> The first charge was that the church ridiculed and rejected the authentic Christian nature of Nally's former Catholicism and this deepened his depression.<sup>121</sup> The second claim was that the church's teaching that suicide did not affect salvation increased the likelihood that Nally would choose that option.<sup>122</sup> Both of these positions represent important elements of the faith of the members and pastors of the church. They are an articulation of the church's views on what constitutes authentic Christian belief and the nature of personal salvation. Thus, these positions are completely protected from any judicial consideration of their potential outrageousness by the free exercise clause.<sup>123</sup>

### B. "Pure Clergy Malpractice"

The predilection of claimants to rely on intentional tort claims has

114. *Id.*

115. *Id.* at 554. This is the term used in the Hesters' complaint and so is set off in quotation marks here.

116. 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988).

117. *Id.* at 211-12, 527 N.E.2d at 1239.

118. *Id.* at 217-18, 527 N.E.2d at 1244-45 (Sweeney, J., dissenting).

119. 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 109 S. Ct. 1644 (interim ed. 1989).

120. *Id.*

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

122. *Id.*

123. *Strock*, 38 Ohio St. 3d at 211, 527 N.E.2d at 1239.

obscured the essential nature of the new cause of action that the claimants are espousing, that of malpractice.<sup>124</sup> An examination of how the concept of malpractice might be applied to clerics engaged in counseling is necessary if the boundaries of clergy malpractice are to be clarified without resorting to other tort claims. This identification of "pure clergy malpractice" will necessitate the differentiation of secular and pastoral counseling. A "three ring test" is proposed to determine when clerical counseling might have passed beyond a purely religious activity into a primarily secular activity.

The nature of malpractice raises some immediate problems when applied to the unique position of clerics. First, a claim of malpractice assumes that the profession in question has a standard of "skill and learning" that applies to all members of the class.<sup>125</sup> This is clearly not the case with clerics. Each denomination has its own courses of study, each varying greatly in terms of the degree offered and the subject matter covered. Various denominations use different methods to teach their candidates about the theory and methods of secular counseling.<sup>126</sup> It is not even necessary for clerics of some faiths to attend a seminary or obtain special instruction.<sup>127</sup> Likewise, the description of "the average, prudent, reputable member of the profession," a standard established in malpractice, is not easily adapted to clerics.<sup>128</sup> Beyond the issue of education, the theological, liturgical and ethical demands and beliefs of each denomination make any attempt to describe an average member of the clergy futile.<sup>129</sup>

These difficulties in identifying a standard would seem to be ame-

---

124. See *supra* note 24 and accompanying text.

125. *Id.*

126. For example, the Athenaeum of Ohio, the Roman Catholic seminary for the Archdiocese of Cincinnati, offers a Master of Arts Degree in Pastoral Counseling which includes required courses such as "Theories of Personality" and "Psychopathology and Assessment," along with electives such as "Jungian Psychology and Pastoral Care" and "Existential Psychology." The purpose of the program is "to assist individuals in becoming knowledgeable and competent practitioners of the counseling ministry" and "to enable candidates to achieve a personal synthesis of theological understandings of ministry and contemporary counseling theory and practice." THE ATHENAEUM OF OHIO, 1988-1990 CATALOG 43-45.

By contrast, Trinity Lutheran Seminary in Columbus, Ohio, offers "ministry courses" that are a part of the preparation for a Master in Divinity of Theological Studies. These studies do not have a strong psychological background. TRINITY LUTHERAN SEMINARY, 1988-90 CATALOG. Much the same is true at the United Theological Seminary in Dayton, Ohio, which serves the United Methodist Church. UNITED THEOLOGICAL SEMINARY, 1988-90 ACADEMIC CATALOG.

127. For instance, groups such as the Amish and the Salvation Army do not have clergy as such. In the Mormon Church, all males are ordained to the priesthood at the age of twelve.

128. See *supra* note 24 and accompanying text.

129. Finding a common denominator between a Catholic priest, an independent evangelical Protestant minister, an Orthodox rabbi, a Black Muslim minister and a Native American shaman, even in terms of professional ethical standards, would aptly illustrate the point.

nable to only two responses — either assume that a duty to refer psychologically sick persons for professional help is not barred by the Constitution's protection of the freedom to exercise religion as a person sees fit, or decide that there is no constitutionally permissible malpractice standard applicable to the counseling activities of clerics. The first option considers the state's interest in the preservation of life and health to be great enough to override the first amendment rights of the religious counselor.<sup>130</sup> The second option conceives the right of free exercise of religion to outweigh the interests of the state in regulating counseling by clerics.<sup>131</sup>

However, these options focus on the religious nature of the counselor, not on the individual counselor's actions in a particular situation. Both theories rest on the presumption that counseling by clerics is *per se* religious counseling. Often, "pastoral counseling" is distinguished from "secular counseling" by the clerical status of the counselor, the position of religious faith in the process and the primary objective of bringing people closer to God, as well as healing their minds.<sup>132</sup> This distinction assumes that any counseling by clerics or religiously oriented non-therapist counselors will be indelibly pastoral in nature and will use techniques and methods that are purely religious in nature for ends so closely bound to their faith that the counseling must be deemed a religious activity with a religious end. If this were true, such counseling would fall under the umbrella of the first amendment.

But such a characterization is flawed. It emphasizes the cleric as a member of a class without reference to his specific conduct. The characterization is the type of classification that was attacked by the Supreme Court in *McDaniel v. Paty*.<sup>133</sup> It also fails to take into account the circumstances of each claim.

Clerics are not one-dimensional personalities. Often their educational background is in areas other than theology, with an expertise in some other field equaling or surpassing that of their non-clerical colleagues. A cleric who has education and experience in one of the secular counseling theories and who uses such techniques in counseling another is not acting in the same capacity as a member of the clergy who counsels a person using purely "biblical principles" or other theological tenets.

---

130. Bergman, *supra* note 51, at 66.

131. Ericsson, *supra* note 51, at 176.

132. See Comment, *supra* note 2, at 516 n.53 (quoting A. GODIN, THE PASTOR AS COUNSELOR 22 (1965)).

133. 435 U.S. 618 (1978); see *supra* text accompanying notes 91-96.



### C. The "Three Ring" Test

By placing the proper emphasis on who is doing the counseling and the actual use of secular techniques, a central core of characteristics can be defined where clergy malpractice should be actionable. This can be visualized as three overlapping rings that share a common space in the center. The three rings would represent different areas: denomination, personal expertise and actual utilization of technique.

The denominational ring is important because a malpractice suit can only be brought against a professional who is acting in the scope of his profession or employment.<sup>134</sup> A cleric who is a member of a denomination which doubts or rejects the teachings and methods of the secular counseling movement cannot, in the scope of his employment, use such techniques when counseling.<sup>135</sup> However, membership in a denomination which does accept the validity of secular counseling theory and method is not sufficient by itself to hold a cleric liable for malpractice for counseling activities. The denominational ring is basically exclusionary in function; it separates those clerics who, within their theology, accept secular counseling methods from those whose theology reject such methods.

The second ring includes clerics who are members of denominations that accept the validity of secular counseling. Those clerics who have little or no personal expertise with the techniques and methods of secular counseling will not be able to employ the techniques during counseling. Consequently, only clerics who have personal expertise to use recognized secular counseling methods and who belong to a denomination that accepts such methods would be potentially liable for clergy malpractice.

The third ring represents the cleric's utilization of secular counseling skills. A cleric who is a member of a denomination that accepts secular counseling and has the knowledge and expertise to use such methods will not always use them when counseling a person having difficulties. That cleric may handle a particular problem by referring only to scriptures or discussing prayer as a means of dealing with the problem. Since the cleric in this instance is not utilizing the skills of the secular counselor, he does not fall within the intersection of the three rings. Therefore, the cleric can not be liable for a malpractice claim

---

134. "Scope of his employment" was an important distinction made by the *Destefano* court and must be so in any discussion of clergy malpractice. As the *Destefano* court notes, any activity of a cleric which occurs outside the scope of employment does not receive first amendment protection. *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988).

135. The determination of such a question would not be barred by the *Ballard* prohibition against judging theological validity, since the reasonableness of the tenet would not be in question, but simply the existence of the tenet.

arising from the counseling.

The denominational ring of the test may be objected to because it requires an inquiry into the beliefs of a particular faith; this inquiry may be an unconstitutional foray into religion by the state. However, the prohibition against state analysis of religious belief has always been discussed in the context of one member of a denomination seeking to act against another from the same group or against the denomination itself.<sup>136</sup> The state should not determine which party is more orthodox. But the denominational test is not an attempt to gauge the orthodoxy or the reasonableness of a belief; it is simply an investigation of whether a generally accepted belief on the issue of secular counseling exists in a particular denomination. Unless it can be shown that there is a clear rejection of such methods by an authoritative body of the denomination, then the assumption must be that the methods of secular counseling are accepted. The burden would be on the defendant cleric to show that he or she is part of a tradition that rejects secular counseling methods.

The "three ring" test would allow pure clergy malpractice claims against only those clerics who are members of a denomination that accepts the validity of the methods, have personal expertise in those methods and actually use those methods in the counseling under question. Clerics who meet these three criteria should be held to the same professional standard as their licensed, secular counterparts, especially in cases where the counselor engages in sexual relations with a counselee.<sup>137</sup>

#### D. "Duty to Refer"

The issue arises whether clerics who are not trained in secular counseling techniques and cannot be charged with malpractice can still be held to a standard of care which includes a "duty to refer" a person to a trained psychological counselor for treatment. One commentator answers affirmatively<sup>138</sup> but, as the preceding section suggests, not even a duty to refer can be imposed on clerics who belong to a denomination that refuses to accept the validity of secular counseling on theological grounds.<sup>139</sup> Clerics who belong to denominations that accept such methods, but who personally have no expertise in them, would not be

---

136. See *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church*, 393 U.S. 440 (1968); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

137. See, e.g., *Strock*, 38 Ohio St. 3d at 207, 527 N.E.2d at 1235; *Destefano*, 763 P.2d at 275.

138. Bergman, *supra* note 51, at 64.

139. *Hester v. Barnett*, 723 S.W.2d 544, 551 (Mo. Ct. App. 1987).

subject to a duty to refer.<sup>140</sup> While it has been suggested that these clerics should be legally bound to refer,<sup>141</sup> there is nonetheless a severe constitutional problem with imposing such a duty. It would be, in effect, a legal duty imposed on these clerics solely because of their religious affiliation. The only connection between the clerics and the responsibility would be the denomination. Almost certainly, such a distinction would be considered an affront to free exercise of religion.<sup>142</sup>

#### IV. CONCLUSION

Lawsuits alleging clergy malpractice have appeared during the last decade, but the claims have been unsuccessful because they are ill-defined and indistinguishable from traditional intentional tort and negligence actions. Further, courts have held that these claims may run afoul of the first amendment.<sup>143</sup> However, it is possible to apply a "pure clergy malpractice" standard to clerics who belong to denominations that accept the methods of secular counseling, have personal expertise in them and use those methods in a particular case. Those clerics who belong to traditions that do not accept secular counseling methods as valid cannot be held to such a standard. A "duty to refer" cannot be constitutionally imposed on clerics who are not personally experienced and capable in the field of secular counseling. In short, a malpractice claim cannot be brought against clerics on the basis of their clerical position alone,<sup>144</sup> but must be linked to the type of professional skill that makes the act of counseling analogous to secular counselors. Indeed, a narrow door, but one that nonetheless can be opened.

Mark A. Anthony

---

140. Such clerics would be protected by the free exercise clause.

141. Bergman, *supra* note 51 at 64; *Strock*, 38 Ohio St. 3d at 220, 527 N.E.2d at 1245.

142. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871).

143. See, e.g., *Nally v. Grace Community Church*, 47 Cal. 3d 278, 299, 763 P.2d 948, 960, 253 Cal. Rptr. 97, 107 (1988), *cert. denied*, 109 S. Ct. 1644 (interim ed. 1989); *Destefano v. Grabrian*, 763 P.2d 275, 283 (Colo. 1988). *But see*, *Dept. of Human Resources v. Smith*, 110 S. Ct. 1595 (interim ed. 1990) (possible weakening of the standard by which free exercise defenses could be abrogated).

144. *McDaniel v. Paty*, 435 U.S. 618, 627 (1978).