Clergy Malpractice: A Constitutional Approach

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NOTE

CLERGY MALPRACTICE: A CONSTITUTIONAL APPROACH

I. INTRODUCTION

Clergy malpractice—the subject sparks controversy among spiritual law givers as well as secular law makers. At the same time that academics observe the increasing number of tort suits alleging clergy malpractice, churches and pastors are banding together to quell the new army of litigants. Indeed, church organizations are even taking affirmative measures to protect themselves, including printing newsletters to warn of recent legal trends, establishing workshops to train clergy in ways of avoiding liability, and purchasing insurance to protect pastors, churches, and congregations from potential lawsuits.

The tort theory of clergy malpractice has expanded beyond its conceptual limits to become a convenient label for any cause of action against clergy. Courts already recognize that clergy are liable for negli-

2. See generally infra note 15 and accompanying text (discussing lawsuits alleging clergy malpractice).
3. See, e.g., Clergy Malpractice Alert (monthly newsletter for church leaders published by R. McMenamin of Portland, Oregon).
4. Many state bar associations offer clergy malpractice workshops for lawyers and clergymen. For example, the Fuller Theological Seminary sponsors a yearly clergy malpractice workshop in California; the University of South Carolina School of Law co-sponsors a “Clergy and the Law Seminar” with the Lutheran Theological Southern Seminary; and the University of Wisconsin co-sponsors a seminar entitled “The Clergy Malpractice Threat” with the Fox Valley Pastoral Counseling Center.
6. See, e.g., McMenamin, Civil Interference and Clerical Liability, 45 Jurist 275 (1985) (“clergy malpractice” often is used in describing broader fields of offenses and actions, including “child abuse, theft, poor teaching, [and] paternity”); Note, Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis, 19 Rutgers L.J. 419 (1988) (including intentional tort and invasion of privacy as part of 459
gence in secular activities,7 as well as for intentional torts.8 On the other hand, scholars generally agree that parishioners cannot sue clergy for negligently performing traditional sacraments, services and other purely sacerdotal acts such as funerals, baptisms, or weddings.9 To avoid creating redundant remedies, courts should not label currently recognized torts as clergy malpractice,10 but should limit application of this theory to ministerial11 counseling,12 as several courts already have recognized.13 Accordingly, this Note is limited to clergy liability for

clergy malpractice).


10. For the same reason, clergy malpractice also should not include nonreligious activities arising in the counseling context. See infra note 55 (sexual affair). Similarly, criminal acts by clergy counselors also should be excluded from the scope of clergy malpractice. See infra note 98 (religious sacrifice).

11. This note shall use “minister” and “clergy” synonymously. The terms are not limited to one particular sect or religion, but are intended to be a general label for every religious leader conducting spiritual counseling.

12. This note uses “‘spiritual counseling’ as a generic term for what is often referred to in the Jewish and Christian traditions as ‘pastoral care,’ that is, counseling conducted by a personal counselor who is vested with religious authority (a ‘spiritual counselor’) and whose counsel is actually or potentially derived from religious precepts.” Note, Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct be Free Exercise?, 84 Mich. L. Rev. 1296, 1297 n.3 (1986).

negligent counseling and does not examine other tort theories.14

The paradigm case15 for clergy malpractice is Nally v. Grace Community Church of the Valley.16 In Nally, Walter and Maria Nally sued a local church and four of its pastors, alleging that negligent counsel-
ing27 caused their twenty-four year old son to commit suicide.18

While a student at the University of California at Los Angeles (UCLA), Kenneth Nally converted from his family religion, Roman Ca-
tholicism, to Protestantism. Nally then began attending Grace Church. After graduating from UCLA in 1976, Nally attended the Biola College in La Mirada for one semester and enrolled in the Talbot Theological Seminary. An extention of Grace Church was located on the grounds of the seminary. Nally became a close friend of one of the church's pastors and frequently sought advice on problems with his girlfriend, as well as on problems of personal depression and family conflicts. In 1978, Nally entered into a "formal" counseling and discipleship program with another pastor at Grace Church, but quit after five sessions.

After breaking up with his girlfriend in December of 1978, Nally became despondent and told his mother he could no longer "cope" with life. She sent him to two general practitioners, who conducted chemical analyses and prescribed a strong anti-depressant drug. Nally's depression did not subside and in late February 1979 he spoke briefly with a pastor at Grace Church during a drop-in counseling session. A few weeks later, Nally attempted suicide by overdosing on the prescribed anti-depressant drug. Nally's parents rushed him to a hospital for treatment, but rejected a psychiatrist's pleadings to commit Nally to a psychiatric hospital. Over the next three weeks, Nally continued to see a psychiatrist, two other general practitioners and two mental health professionals. After Nally's girlfriend rejected his marriage proposal and after an argument with his family, Nally went to a friend's apartment and fatally shot himself.

After a four-week trial, the judge granted a nonsuit on the basis

20. Id.
21. Id.
22. Id.
23. Id. at 303, 253 Cal. Rptr. at 99-100.
24. Id. at 303, 253 Cal. Rptr. at 100.
25. Id.
26. Id.
27. Id. Nally's parents actually asked the attending physician to inform other persons that Nally was being treated for pneumonia rather than attempted suicide. The Nallys also rejected two attempts by their son's doctors to get consent for involuntary commitment. See id.
28. See id. at 303, 253 Cal. Rptr. at 100-01. One of the church's pastors arranged an appointment with one of the physicians and also encouraged Nally to see another psychiatrist. Id. In addition to Nally's original psychiatrist, Nally also saw a psychologist and a state registered psychologist's assistant. Id. None of these "counselors" were named as defendants, even though each failed to initiate involuntary commitment procedures.
29. Id. at 303, 253 Cal. Rptr. at 101.
30. After the complaint was entered, the trial court granted the defendant's motion
of the defendant’s first amendment defense. On appeal, a divided court rejected the defense, however, and recognized a new cause of action, “negligent failure to prevent suicide” by a non-therapist counselor, holding that when a special counseling relationship exists, the counselor has the duty to refer counselees to mental health professionals. Moreover, if the suicidal counselee resists psychiatric care, the referral duty may go beyond merely recommending that the counselee see a psychiatrist to notifying mental health authorities. In a sharp dissent, Justice Cole criticized the majority for creating the new tort. In addition to criticizing the vague standards established for the tort, Justice Cole asserted that the majority’s decision violated the first amendment because no compelling state interest justified its intrusion into the religious arena.

The California Supreme Court unanimously reversed the court of appeal’s decision. The supreme court, however, based its decision on tort principles and declined to address the constitutional issues. Five justices asserted that pastors have no legal duty to protect counselees under traditional tort principles: “[O]ne is ordinarily not liable for the actions of another . . . in the absence of a special relationship of custody or control.” Since the court was unwilling to recognize religious counseling as a “special relationship,” it found that the pastors had owed no legal duty to Nally or his parents. The court also noted that

for summary judgment. Id. at —, 763 P.2d at 953, 253 Cal. Rptr. at 102. On appeal, a divided panel reversed the summary judgment order on the basis of the third cause of action. Id. The California Supreme Court, however, while denying review, de-certified the court of appeal’s decision and remanded the case for trial. Id. 31. See id. at —, 763 P.2d at 954, 253 Cal. Rptr. at 103.
33. Id. at 227-29.
34. See id. at 243-49 (Cole, J., dissenting).
35. Id. at 245-46 (Cole, J., dissenting).
37. The court did note that even if “workable standards of care could be established . . . quite possibly [it would be] unconstitutional to impose a duty of care on pastoral counselors.” Id. at —, 763 P.2d at 960, 253 Cal. Rptr. at 109.
38. Id. at —, 763 P.2d at 956, 253 Cal. Rptr. at 105.
39. See id. at —, 763 P.2d at 956, 253 Cal. Rptr. at 105-07. Although two prior cases in California had held that a professional therapist has an affirmative duty to prevent foreseeable suicides by counselees, see Meier v. Ross Gen. Hosp., 69 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968); Vistica v. Presbyterian Hosp. & Medical Center, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967), the supreme court was unwilling to extend the rule to include nontherapists. The court noted that both cases involved a strictly supervised medical relationship in which the “defendants failed to take precautions to prevent the patient’s suicide even though the medical staff in charge of the pa-
imposing liability on nonprofessional counselors would thwart the important social policy of encouraging private counseling services. The court deferred to the legislature's wisdom in deciding that "access to the clergy for counseling should be free from state imposed counseling standards . . ." Justice Kaufman, in his concurrence, argued that while clergy owe a duty of care to counselees, the pastors in Nally had met the duty by referring Nally to other professionals.

Even though the court of appeal's decision in Nally ultimately was reversed, the decision signaled the beginning of clerical counseling malpractice suits and prompted extensive scholarly debate. Nevertheless, because of the unique nature of the cause of action, most writers have analyzed the tort conceptually and have only discussed the constitutional issues briefly. Accordingly, this note will deal exclusively with

tient's care knew that the patient was likely to attempt to take his own life." Nally, 47 Cal. 3d at ___, 763 P.2d at 956-57, 253 Cal. Rptr. at 105-06. Accordingly, the court limited these cases to professional psychiatric malpractice, concluding that no special relationship existed between Nally and the pastors. Id. at ___, 763 P.2d at 958, 253 Cal. Rptr. at 107.

The finding of no "special relationship" also insulates counselors from liability imposed under Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In Tarasoff a therapist was held to have a duty to warn third persons of potential attacks by counselees. Liability was imposed in Tarasoff because of the "special relationship" between the counselee and therapist. The Nally court, however, refused to recognize the existence of a special relationship between a clergy counselor and a counselee. Accordingly, in California, nontherapist pastoral counselors owe no legal duty to counselees or third persons connected to counselees.

40. See Nally, 47 Cal. 3d at ___, 763 P.2d at 959, 253 Cal. Rptr. at 108.
41. Id. at ___, 763 P.2d at 959-60, 253 Cal. Rptr. at 108-09.
42. Id. at ___, 763 P.2d at 967, 253 Cal. Rptr. at 116 (Kaufman, J., concurring).
43. See Esbeck, supra note 1, at 79 nn.480-81.
44. As may be expected, commentators vehemently disagree on the feasibility of applying professional malpractice concepts to clerical counseling. Although each article on clergy malpractice argues the issue differently, the arguments generally spring from two seminal articles discussing the application of malpractice concepts to counseling. Compare Ericsson, supra note 13, at 169-73 (contending that civil courts are unable to identify the scope and nature of counseling, to differentiate between duty owed based on training and level of ecclesiastical office, to set objective standards to review spiritual training, and to regulate the content of a counseling session) with Bergman, supra note 9, at 69-62 (arguing that duty for clerical counseling is defined by the state of the art of professional health care personnel, and clergy are, therefore, under the same duty as any other "professional counselor.").

The case law, however, uniformly has recognized the inherent difficulties of establishing workable tort standards for clergy malpractice. See supra cases cited note 15.
45. But see Comment, Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept, 19 Cal. W.L. Rev. 507 (1983) (arguing that liability for counseling is unconstitutional). Although this article presents a solid doctrinal defense, it provides only a limited analysis of several key constitutional issues and of the public policy considerations involved, and has, at least in part, been superseded by recent cases.
the constitutional implications of the tort of clergy malpractice under both the free exercise and establishment clauses of the first amendment.

II. CONSTITUTIONAL ANALYSIS

Protections guaranteed by the first amendment to the Constitution are foremost among our civil rights.\(^46\) Fundamental to this amendment is the freedom of religion provided by the establishment and free exercise clauses.\(^47\) Rarely, however, can an individual invoke both clauses in support of a religious position because of the inherent "conflict" between the concepts.\(^48\) In fact, the clauses frequently are pitted against each other, since free exercise claims of one religious group are often disavowed as establishments of religion by government or other religious denominations.\(^49\) Despite the paradoxical nature of the clauses, however, both protect religious autonomy: the establishment clause prevents government from sponsoring a favorite religion, and the free exercise clause prevents government from coercing an individual to violate his conscience or alter his beliefs.

Clergy malpractice presents a unique constitutional question because both clauses must be analyzed to determine the constitutionality of the tort.\(^50\) The government may violate the free exercise clause by

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46. See Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (first amendment freedoms are in preferred position among constitutional guarantees).

47. See U.S. Const. amend. I. ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."); see also Pfeffer, The Supremacy of Free Exercise, 61 Geo. L.J. 1115, 1142 (1973) (free exercise clause is the favored child of the first amendment).


49. Consider, for example, a school system in which one group of parents desires a time of prayer for children, and another group of parents opposes the idea. Although the parents urging the prayer time claim free exercise rights, the parents opposing the time of prayer claim it would be an establishment of state religion. See Engel v. Vitale, 370 U.S. 421 (1962) (prayer composed by school officials and voluntarily recited by students was unconstitutional establishment of religion); accord Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (officially sponsored Bible reading and recitation of Lord's Prayer unconstitutional establishment of religion); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1086 (1988) (parents tried unsuccessfully to invoke the free exercise clause to force local school board to remove textbooks they considered inimical to their religious beliefs).

50. Although dividing the constitutional arguments between the establishment and free exercise clauses helps to analyze the problem, the dichotomy represents a simplistic view of the issue. The issue of religious autonomy could be argued as an independent concept without the free exercise or establishment labels. Authorities in the first amendment area have recognized that the line between the establishment and free exercise
coercing clergy or by punishing them for following the dictates of their faith, or it may violate the establishment clause by becoming "entangled" with religion.

A. Does Clerical Counseling Constitute a Valid Religious Interest Under The First Amendment?

1. What are the limits of judicial inquiry into religious belief?

Obviously, an activity must be religious before the practitioner can invoke the protection of the first amendment. The Supreme Court, however, has struggled with formulating an appropriate definition of religion. As a result, instead of setting limits on religious beliefs, the Court generally defers to an individual's interpretation of his or her own religion in all cases except when the practice is "so bizarre, so clearly nonreligious in motivation as not to be entitled to protection."


51. See infra notes 100-69 and accompanying text (discussing possible violations of the free exercise clause).

52. See infra notes 170-208 and accompanying text (discussing possible violations of the establishment clause).

53. Although the religious interest threshold applies primarily to the free exercise clause, see, e.g., Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972) (Amish had to show compulsory school attendance at odds with fundamental tenants of religious beliefs before invoking the free exercise clause), this issue also is fundamental to any establishment clause analysis. See Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (primary effect of government action must be one neither advancing nor inhibiting religion). Of course, if the activity has nothing to do with religious dictates, the first amendment shield does not apply to religious leaders or groups.


Even in these unusual cases, the Court strictly construes judicial authority to inquire into the validity of any religious belief or practice.\textsuperscript{56} In United States v. Ballard\textsuperscript{57} the Supreme Court held that in civil cases courts cannot inquire into the truth or falsity of an individual's belief.\textsuperscript{68} In the majority opinion Justice Douglas eloquently declared:

Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . . If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. . . . [Some] religious views . . . might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.\textsuperscript{69}

Even though subsequent decisions recognize that in some cases individuals must prove that their religious beliefs and practices are sincerely held, the Court continues to avoid determining the validity of the belief.\textsuperscript{60}

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not be protected under this standard, lower courts suggest a few examples. In Strock v. Pressnell, 38 Ohio St. 3d 207, 527 N.E.2d 1235, 1238 (1988), the court held that a minister’s sexual affair with his counselee was “non-religious in motivation—a bizarre deviation from normal spiritual counseling practices of ministers . . . .” Therefore, the minister was not protected by the first amendment and was subject to civil liability.

It is foreseeable that some fringe religious sects might actually accept and condone sexual affairs with counselees as a common religious practice. But even if the practice were religious, the minister could still be punished if the conduct were criminal. See infra note 98 and accompanying text (religious activity violating criminal law not protected). Similarly, the minister could be punished if his conduct could be characterized as an intentional tort. See supra note 8.

\textsuperscript{56} See infra text accompanying notes 57-64.

\textsuperscript{57} 322 U.S. 78 (1944). The Ballards, founders of the “I Am” movement, claimed to have supernatural powers to heal incurable diseases. Part of their “ministry” involved soliciting financial support through the mail. Accordingly, they were indicted in federal district court for mail fraud. See id. at 79-80.

\textsuperscript{58} Id. at 86.

\textsuperscript{59} Id. at 86-87.

\textsuperscript{60} See Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972) (Amish had to prove sincerity of belief). The most significant “sincerity” cases arose from the Vietnam draft. To object to conscription, the court held that an individual had to prove the sincerity of his religious beliefs. See, e.g., Welsh v. United States, 398 U.S. 333 (1970) (plurality opinion); United States v. Seeger, 380 U.S. 163 (1965). But see Ballard, 322 U.S. at 93 (Jackson, J., dissenting) (civil court unable to determine sincerity of beliefs, since sincerity cannot be divorced from verity of doctrine); Ericsson, supra note 13, at 180 (arguing
Based on the principle of religious autonomy posited in Ballard, the Court has implemented additional restraints on inquiry into religion. In United States v. Lee, the Court reasoned that in civil cases courts cannot determine the centrality or importance of beliefs, since courts are not "arbiter of scriptural interpretation." The Court has even gone so far as to hold that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Nevertheless, individuals will have to prove that their beliefs are "rooted in religion" rather than philosophy, since "[a] way of life, however virtuous and admirable may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations . . . ." For this reason, as long as a belief is sincerely held, it does not have to be "fundamental" or believable to warrant full constitutional protection.

2. Is Clergy Counseling a Religious Activity?

Clearly, clergy perform some acts that are uniquely religious, and some acts that are wholly secular. Whether clerical counseling is inherently religious or primarily secular, however, is a matter of dispute. Many clergy believe that "pastoral counseling specifically involves the application of religious insights into day to day problems that the modern Court might adopt Jackson's view in light of the expanded definition of "religion" for free exercise purposes. The argument, however, may be moot since the court's sincerity test has shifted from a "test of what a person believes . . . [to a test of] whether one really believes it, a 'fervency test.'" Esbeck, supra note 50, at 397.

61. 455 U.S. 252 (1982) (objection by Amish to payment of social security tax on religious grounds).
63. Thomas, 450 U.S. at 714.
65. See supra text accompanying note 9.
66. See supra note 7 and accompanying text (discussing clergy's liability for non-religious activities).
67. Compare Ericsson, supra note 13, at 166-67 (cannot separate "cure of the minds" from "cure of the soul") with Bergman, supra note 9, at 57-59 (clergy counseling has become "secularized").
68. This Note assumes a religious viewpoint similar to that of the pastors' in the Nally case. See infra notes 87-89 and accompanying text. Regardless of the popularity of this viewpoint among religious counselors, it is nevertheless an appropriate starting point. First, it is impossible to give an accurate unified exposition of all religious counselors' beliefs and convictions. More importantly, any constitutional analysis of clergy malpractice should consider the most favorable constitutional case for the clergy. If, in spite of a pastor's sincerely held religious belief that all counseling is spiritual, a court concludes that spiritual counseling is not a constitutionally protected activity, then the fate of those pastors who disagree with the pastors in Nally would already be decided.
such as difficulties in marriage, parenthood, employment, and other relationships . . . . 

Accordingly, those who argue that counseling is religious accept the clergy's perception of counseling and contend that government cannot objectively determine the validity of the religious belief. On the other hand, those who argue that counseling is secular claim to look at the issue objectively by comparing counseling to psychotherapy. The former view, however, more accurately reflects the strict constitutional limits traditionally imposed on judicial inquiry into religious belief. If spiritual counseling is not considered religious, courts would be required to question the validity of a pastor's religious claim by attempting to separate the spiritual elements of the counseling from the purely psychological. Facing this type of situation in Christofferson v. Church of Scientology, the Oregon Court of Appeals stated that although some of the religious instruction appeared "more psychological than religious, [it could not] dissect the body of beliefs into individual components." Clearly, "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." Therefore, assuming members of the clergy can demonstrate their beliefs are sin-

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70. See Ericsson, supra note 13, at 183 (beyond civil court's authority to object to one system of religious belief even if the practice is out of step with accepted psychological custom).

71. See Bergman, supra note 9, at 59-62 (clergy's duty should be defined by state of the art in the psychiatric profession).

72. See supra notes 57-64 and accompanying text (courts cannot determine validity of a belief and cannot dissect a system of belief).

73. In addition to the constitutional problems with such an inquiry, a court would face great practical difficulties in making this distinction. Even expert psychologists are unwilling to tackle this problem. For example, when asked where spirituality left off and psychology began, one of the plaintiff's experts in the Nally case responded, "Well, I don't think Jesus Christ would touch that one. . . . There's no answer to such a question. They are intermingled." Nally v. Grace Community Church of the Valley, 240 Cal. Rptr. 215, 246 (Ct. App. 1987) (opinion deleted from official reporter after reversal), rev'd, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), cert. denied, 109 S. Ct. 1644 (1989).


75. Id. at 241, 644 P.2d at 601.

76. Fowler v. Rhode Island, 345 U.S. 67, 70 (1953). Those who reject this position generally are concerned for the interests of consumers because counselees are potentially vulnerable to "quacky" ideologies and gimmicks. Society, however, accepts great risks in giving such broad protections to destructive speech and unusual religions in order to maintain freedom for all. See generally 3 R. ROTUNDA, J. NOWAK & J. YOUNG, supra note 48, § 20.6 (discussing value of free speech).
cere, they should avoid liability by asserting a valid religious interest, regardless of secular evaluations of the counseling as nonreligious.77

Clergy who believe all counseling is inherently religious can propound cogent arguments to support their claims. Historically, pastoral counseling has been recognized as "the oldest form of psychotherapy,"78 being traced back to Biblical times.79 Thus, counseling parishioners on diverse matters has always been inextricably linked to traditional pastoral duties.

Many commentators attribute the birth of modern psychology to the pastoral counseling movement and argue that all counseling, whether given by a religious leader or secular psychologist, is spiritual in content.80 In fact the founders of modern psychology acknowledged the spiritual nature of counseling:

Freud directly acknowledged the essential similarity between psychoanalytic therapy and religious counseling by describing psychoanalysis as "pastoral work in the best sense of the words." He thus recognized in psychoanalysis what is true of all psychotherapy and counseling; namely that it is similar, and indeed a rival, to the long Christian tradition of confession and counseling.

. . . . Jung also was quite aware of the religious nature of psychotherapy . . . [as illustrated] when he writes: "patients force a psychotherapist into the role of priest, and expect and demand that he shall free them from distress. That is why we psychotherapists must occupy ourselves with problems which strictly speaking belong to the theologian."81

77. Of course, admitting that an activity is religious does not grant the actor an absolute shield from liability; the pastor must also prove the religious interest of the activity outweighs any countervailing societal interest. See infra note 106 and accompanying text (balancing process under the religion clauses). Accordingly, critics should focus on the balancing process and argue that state interests justify imposing a burden on religion, rather than merely dismissing a pastor's claim to religious freedom based on the critics' own objective evaluations of the activity.


80. See, e.g., J. Adams, The Christian Counselor's Manual 9 (1973). Adams argues that psychiatrists invade a sphere reserved for ministers, especially since the goal of both are identical—to change behavior, emotions, and character through value, attitude and behavioral change. He sees a psychiatrist as "part physician . . . and part secular priest . . . [who] serve[s] the host of persons who previously were counseled by ministers . . . ." Id. Accordingly, Adams suggests that psychiatrists should return to the practice of medicine and leave the spiritual guidance to ministers. Id. at 10.

81. Vitz, Psychology as Religion, in BAKER ENCYCLOPEDIA OF PSYCHOLOGY 932, 933-34 (D. Benner ed. 1985) (citations omitted); see also P. Vitz, Psychology as Religion: The Cult of Self-Worship (1977) (arguing that psychology has become a form of secular humanism based on self-worship); Szaaz, The Theology of Therapy: The Breach of
Consequently, even though psychologists and psychiatrists have “secularized” traditional pastoral counseling, clergy logically could view counseling as the spiritual application of religious doctrine.

The clergy’s strongest argument that counseling is spiritual, however, is not based in history or on admissions by secular mental health professionals. Instead, it is based on the clergy’s individual religious convictions. Some clergy believe that religion permeates and influences every part of a believer’s life and consequently reject any attempt to separate an individual’s “secular activities” from “sacred activities.” Such religious presuppositions naturally dictate a theocentric counseling philosophy. Several conclusions arguably flow from this philosophy. First, assuming a problem does not stem from an organic illness such as a chemical imbalance, it should have a spiritual solution, regardless of its nature. Second, a spiritual counselor seeks to help the counselee deal with everyday problems through confession of sin, prayer, and spiritual growth. Finally once a person re-establishes a relationship with God, the emotional problems, including depression, anxiety, and guilt, should be alleviated. Based on these spiritual convictions, pastors can logically and consistently claim that counseling is inherently religious.

Pastors in the Nally case taught “a thoroughly biblical message and world view, believing that the Bible is the divinely inspired Word of God containing the truths that must govern Christians in their relationship with the Almighty, with the world at large, and in their own personal lives.” Furthermore, the counselors employed Biblical instruction as well as prayer and guidance in counseling sessions. The pastors disclaimed any pretense of professional or clinical counseling, since the focus of the church’s counseling program was on a “spiritual . . . and a biblical level.” Arguably, such a counseling philosophy springs from religious conviction and constitutes a valid religious

the First Amendment Through the Medicalization of Morals, 5 N.Y.U. Rev. L. & Soc. Change 127 (1975) (arguing that liberty of modern Americans is threatened by propensity to seek comfort through submission to religious or secular institutions, which in terms of psychiatry generally are the same thing).

82. See J. Adams, supra note 80, at 11.

83. Since a pastor should not be treating physical disorders, the pastor should work closely with medical doctors in certain cases.

84. See J. Adams, supra note 80, at 9 (scriptures only specify three sources of personal problems: demonic activity, sin, and organic illness).

85. Id. at 115-37.

86. Id. at 348-52.


88. Id.

89. Id. n.3.
3. What is the Scope of Constitutional Protection?

Although the beliefs espoused by the pastors in Nally may seem extreme, such a perception does not diminish the constitutional protection granted to those who adhere to this religious philosophy. First amendment protection does not hinge on the truth or falsity or even the reasonableness of belief. As long as clergy establish that their counseling is grounded in their religion, they assert a valid religious interest.

Of course, outrageous conduct does not warrant the same constitutional protection as outrageous speech. In addition to the wholly non-religious acts for which a minister may be held liable, there may be a

90. Even though the court of appeals would have held the pastors liable, the court never questioned the validity or sincerity of their beliefs. See Nally, 240 Cal. Rptr. 215 (Ct. App. 1987) (opinion deleted from official reporter after reversal), rev'd, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), cert. denied, 109 S. Ct. 1644 (1989).

91. Some clergy criticized this religious approach. See J. Hielem, Pastoral or Christian Counseling 6-7 (1975) (criticizing J. Adams' structural approach). On the other hand, several noted secular scholars have partially embraced this counseling approach. See W. Glasser, Reality Therapy (1965); P. London, The Modes and Morals of Psychotherapy 153 (1964).

92. Since religious speech is entitled to the same protection as political speech, see Widmar v. Vincent, 454 U.S. 263 (1981), the outrageousness of the speech does not vitiate the first amendment protection accorded to it; cf. Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (outrageousness of lewd parody does not pierce first amendment shield). Similarly, any intentional tort claim against a pastor based on the content of the religious message (e.g., intentional infliction of emotional distress) faces a heavy presumption of invalidity. At the very least, a plaintiff would have to show constitutional malice by clear and convincing evidence under the standard established in New York Times v. Sullivan, 376 U.S. 254 (1964). See McNair v. Worldwide Church of God, 197 Cal. App. 3d 363, 242 Cal. Rptr. 823 (1987) (court applied New York Times constitutional malice standard when former church member sued pastors of church for defamation and intentional infliction of emotional distress); see generally, Note, First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress, 85 Colum. L. Rev. 1749 (1985) (tort liability used to regulate ideas goes to the essence of the first amendment).

93. See supra notes 53-64 and accompanying text.

94. Of course, those counselors who do not claim that certain counseling practices are religiously motivated are not constitutionally protected, even though the same practice would be covered if espoused as a religious belief, since religion depends on an individual's own perception. Id.

95. See infra notes 100-06 and accompanying text (discussing different levels of protection granted to beliefs as opposed to religious practices).

96. As established, a minister is liable for negligence in "secular" activities and for those intentional torts committed in a religious context but not motivated by a religious belief, such as a sexual affair with a counselee in a religious counseling session. See supra
narrow spectrum of religious conduct so bizarre as not to warrant first amendment protection. Criminal activities—such as religious sacrifices or mass congregational suicides—conducted in the name of religion may presumptively fall outside the scope of the first amendment. Nevertheless, the activities of the pastors in Nally did not rise to this level of outrageousness. Furthermore, if a classification is based on the content of the speech, as in pastoral counseling, pastors or religious institutions invoke the plenary protection of the first amendment. Thus, before recognizing clergy malpractice as a cause of action, courts must conclude that the tort passes constitutional muster under traditional free exercise clause and establishment clause analyses.

B. Free Exercise Clause

1. Distinction Between Religious Belief and Religious Practice

The first amendment of the Constitution provides that “Congress shall make no law ... prohibiting the free exercise [of religion].” Although couched in absolute terms, this constitutional guarantee has never been interpreted as creating an absolute shield for every religiously motivated act. Rather, the limits of religious freedom depend on

notes 7-8.

97. See supra note 55.

98. See Reynolds v. United States, 98 U.S. 145, 166 (1878) (stating in dicta that a religious sacrifice could not seriously be considered a protected religious practice). Rather than creating a per se category of invalid religious claims, modern courts probably would apply the standard balancing test. Nevertheless, since the interest in protecting life is so great, the religious interest would not be considered constitutionally significant.

Similarly, religious “counsel” instructing a counselee to kill another or to commit suicide would not be protected as an exercise of freedom of religion. The counselor would be an accessory to the crime and would be criminally liable, just as he would be civilly liable for any intentional tort. See generally Note, Criminal Liability for Assisting Suicide, 86 Colum. L. Rev. 348 (1986) (discussing criminal liability of persons who assist or encourage suicide). Thus, this note assumes that the counseling given will not violate criminal law or amount to an intentional tort. See supra notes 7-13.

99. See Paul v. Watchtower Bible & Tract Soc'y of New York, Inc., 819 F.2d 875, 880 (9th Cir.) (addressing a claim of intentional infliction of emotional distress against a pastor of a church, the court held that when the “imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred”), cert. denied, 484 U.S. 926 (1987); cf. Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (state tort law cannot circumvent first amendment).

100. U.S. Const. amend. I (generally referred to as the “free exercise clause). The free exercise clause was applied to the states through the fourteenth amendment in Meyer v. Nebraska, 262 U.S. 390 (1923) (ineral incorporation) and Cantwell v. Connecticut, 310 U.S. 296 (1940) (explicit incorporation).
whether governmental interference affects a religious belief or religious conduct. 101 “The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.” 102 Indeed, “the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.” 103 To avoid emasculating this right, however, the Supreme Court has consistently maintained strict criteria for reviewing government regulation of religious conduct. 104 Once individuals establish that government action burdens the practice of their religion, 105 the government must show that the regulation is the least restrictive means of accomplishing a compelling state interest. 106

2. Burden Imposed on Free Exercise by Tort Liability

Before the government is required to justify its action, individuals must prove the proposed regulation burdens their religious practices. 107 The government action must coerce individuals to act contrary to their beliefs rather than merely offend their religious sensibilities. 108 “Never

101. See Cantwell, 310 U.S. at 303-04.
102. Id.
104. This paper assumes without argument that spiritual counseling constitutes religious conduct rather than mere belief. But see McDaniel v. Paty, 435 U.S. 618, 631 n.2 (1978) (Brennan, J., concurring) (“[A] sharp distinction cannot be made between religious beliefs and religiously motivated action . . . .”); Speiser v. Randall, 357 U.S. 513, 536 (1958) (Douglas, J., concurring) (“There can be no true freedom of mind if thoughts are secure only when they are pent up.”); Cantwell v. Connecticut, 310 U.S. 286, 303-04 (1940) (court distinguished conduct from religious communications).
105. The test assumes the practice is based on religious dictates and not mere philosophical preferences. See supra notes 53-64 and accompanying text.
107. This constitutional threshold has been required since first explicitly stated in Abington School District v. Schempp, 374 U.S. 203 (1963), in which the Court held that one claiming the burden to one’s religious practices must show the coercive effect of the government action. Id. at 223.
108. See Lyng v. Northwest Indian Cemetery Protective Ass’n, 485 U.S. 439, 453 (1988). This distinction is grounded in sound public policy. If the government were re-
has the Court interpreted the First Amendment to require the Government itself to behave in ways that the individual believes will further his or her spiritual development . . ."109 Thus, "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from government."110 Individuals can only invoke the protection of the free exercise clause to avoid two types of governmental activity: governmental dictates that compel citizens to violate their religious beliefs;111 and governmental regulations that indirectly coerce persons, or at least penalize them for holding to their religious tenets.112 Thus, clergy must prove that tort liability for spiritual counseling will directly or indirectly burden their religious beliefs or practices in order to escape liability.

Clergy may be able to show several specific areas in which tort liability would burden their religious practices. For example, liability could undercut religious autonomy by establishing a de facto orthodoxy that punishes ministers for failing to conform to accepted state standards. Clergy would therefore be held liable for malpractice for failing to instruct counselees in certain areas and not avoiding others.113 But the first amendment protects "both the right to speak and the right to refrain from speaking at all. A system which secures the right to proselytize religious . . . causes must also guarantee the concomitant right to decline to foster such concepts."114 By promoting

required to act so as to avoid offending an individual's religious or moral standards, the government would be powerless. Individuals should not be able to dictate the action of the majority. On the other hand, the government should be prevented from dictating an individual's religious beliefs. Thus, any government action against such beliefs must be analyzed under the free exercise clause.

112. E.g., Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (state violated Seventh Day Adventist's free exercise rights by denying unemployment compensation benefits to individuals who refused to work on Sabbath); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981) (denial of unemployment benefits to Jehovah's Witness who refused to work in munitions factory on basis of religion held unconstitutional); Sherbert, 374 U.S. 398 (unconstitutional to deny unemployment benefits to individual because of individual's refusal to work on Sabbath).
114. Wooley v. Maynard, 430 U.S. 705, 714-15 (1977); see also West Virginia Bd. of
religious orthodoxy, clergy malpractice inevitably would curtail the church's right to choose which doctrines to implement.116

Beyond the impact on freedom of religious practice, religious autonomy could be restricted in other ways. Quite possibly, clergy could be forced to accept and practice an ideological viewpoint that "they find morally objectionable."118 For example, the minimum standards for clergy malpractice as articulated in Nally would require clergy to refer suicidal counselees to mental health professionals.117 One of the pastors in Nally, however, believed he should not refer counselees to secular psychotherapists because of the psychotherapist's "world view."118 No doubt, this pastor believed he should protect his parishioners "from counsel that may undermine their faith," since he may not have been able to find a professional counselor "supportive of the doctrinal stance of the church. . . . [No legal duty should] require clergy to refer their troubled members to professionals who may, in fact, be hostile to the members' faith."119

Moreover, the establishment of a comprehensive standard of care most likely would require ministers to participate in a minimum amount of training and to utilize established testing and diagnostic programs.120 If a pastor believed that certain psychological tests were based on nonreligious philosophies, any attempt to force the pastor to use those tests could "burden" the pastor's religious practices.121

The burdens that clergy malpractice would place on religious autonomy could chill spiritual counseling activity. Just as medical doctors are limiting their practice because of the fear and cost of the medical malpractice crisis,122 clergy would be motivated to limit counseling services as well. A minister would be required "to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be convinced

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115. Cf. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) (state's practice of providing teachers for parochial schools, necessitating that the state provide controlling surveillance of the teachers so that they separated their secular teaching from religious beliefs, involved excessive entanglement between church and state).

116. Wooley, 430 U.S. at 715 (New Hampshire could not require drivers to display motto, "Live Free or Die," on license tags if drivers found the slogan objectionable on religious grounds).

117. See Nally, 240 Cal. Rptr. 215 (opinion deleted from official reporter after reversal), rev'd, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97, cert. denied, 109 S. Ct. 1644.

118. Nally, 240 Cal. Rptr. at 245 n.6 (Cole, J., dissenting).

119. Ericsson, supra note 13, at 175.

120. See Bergman, supra note 9, at 59-60.

121. See supra notes 82-86 and accompanying text.

that a judge would not understand its religious tenets and sense of mission. Thus, the threat of litigation could color every pastoral counseling situation.

Liability for negligent counseling may require some counselors to discontinue pastoral counseling altogether. Ideally, the possibility of litigation should not discourage pastors. Nevertheless, some may be forced out of counseling because of the potential costs. Even if suits were meritless, clergy, who generally live on modest budgets, could not afford costly legal battles. Although malpractice insurance would reduce a pastor's financial exposure, some counselors might object to obtaining coverage because of the potential conflict of interest with the clergy-penitent privilege.

Even for those counselors who would choose to face the malpractice risks, the threat of litigation would inevitably affect the counseling relationship. Risk of liability could cause some counselors to "avoid moral confrontation" in order to "steer far wider of the unlawful zone." Thus, when a parishioner might be in the greatest need of honest evaluation, a pastor would be tempted to respond with innocuous advice in order to avoid conflict.

Such liability would also tend to erect barriers between counselors and counselees. Because ministers, like other counselors, are ethically bound to preserve the confidences of counseling relationships, coun-


125. For example, in Nally the litigation lasted almost nine years and included a Motion for Summary Judgment, a four week trial, three appellate judgments and an application for certiorari to the Supreme Court. See supra note 30 and accompanying text.

126. See Note, Clergy Malpractice: Making Clergy Accountable to a Lower Power, 14 PEPPERDINE L. REV. 137, 154 (1988) (arguing insurance inexpensive and highly cost effective). The author notes that "[i]n 1984, $300,000.00 worth of liability coverage cost the average members of the clergy about $25.00 per year. . . . [T]he reason the premium was so low was that the insurer does not expect to pay any verdicts. The real expense would be only in the area of legal fees associated with providing a defense." Id. at 154 n.99 (citations omitted). But see Brief of Amicus Curiae, National Council of Churches at 46 n.6, Nally, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (giving example of church that was forced to consider terminating its counseling program after insurance rates increased to $12,400 per year to cover the counseling ministry).

127. See infra notes 130-32 and accompanying text.

128. See Note, supra note 12, at 1309.

129. Speiser v. Randall, 357 U.S. 513, 526 (1958) (when free speech is involved, due process requires the state to prove that the defendant engaged in criminal speech); First Unitarian Church v. County of Los Angeles, 357 U.S. 545 (1958) (adapting Speiser to religious context).
sees trust their spiritual counselors. If, however, clergy members were held liable for malpractice, a pastor would be required to refer any suicidal or "dangerous" counselees to mental-health professionals. Thus, a counselor would face conflicting duties: a legal duty to refer the counselee, and an ethical duty to remain silent. Resolution of this conflict might pressure a member of the clergy to disclose confidential discussions to the counselee's family or others. Further, potential disclosure could cause the counselee to withdraw and distrust the counselor, especially if the counselee had come to the minister to avoid the stigma often associated with seeing mental health professionals. The risk of depression, alienation or even suicide might even increase if the counselee chose not to see the minister out of fear that the minister would reveal the counselee's problem to a third party. Thus, the threat of liability for clergy malpractice could affect every aspect of the counseling relationship and could chill efforts to aid those in need of guidance.

Clergy malpractice has an inherently coercive effect on spiritual counseling. While tort liability will not prohibit the free exercise of any religious practice, tort liability for spiritual counselors would deter religious exercise just as subsequent punishment effectively deters free speech. As the Supreme Court stated in Thomas v. Review Board:

Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith, or where it denies such a benefit


131. Ministers may also be forced to break a confidence in order to cooperate with insurance companies if any suit were ever filed. See Ericsson, supra note 13, at 174. But see Note, supra note 126, at 155. The author of the student note asserts this contention is specious, since privilege is legally waived at institution of lawsuit. The author, however, ignores the possibility that a minister might feel ethically obligated to remain silent despite the legal waiver of the privilege.

132. See Ericsson, supra note 13, at 174.

133. The Nally case supports this conclusion. Nally's parents sought to avoid the stigma of their son having been to a psychiatrist and especially a mental hospital. See supra note 27; see also infra notes 160-62 and accompanying text (many distressed people who will see a minister for counseling will not go to a psychiatrist).

because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.\footnote{135}

The burden placed on religious practice by the tort of clergy malpractice, while possibly indirect, is "nonehethless substantial," and closely tracks the rule of Thomas and an established line of Supreme Court cases recognizing that the government may not punish an individual forced to leave his job for religious reasons by denying unemployment benefits.\footnote{136} Thus, the practical effect of liability for spiritual counseling is that clergy are penalized for adhering to religious beliefs that do not measure up to a government-approved standard of conduct.\footnote{137}

3. Government Interest in Clergy Malpractice

Assuming clergy malpractice burdens religious practice, the government must show a compelling state interest to justify imposing liability.\footnote{138} Although the Supreme Court has found a compelling interest in several recent free exercise cases,\footnote{139} the standard historically has been difficult to meet in light of the requirement that the regulation be the least restrictive means of achieving the goal.\footnote{140} Furthermore, if the regulation does not provide a solution, or if there is a competing governmental interest that can best be addressed in the absence of regulation, the original governmental interest may not be deemed


\footnote{136} See \textit{supra} note 112 (detailing employment benefit cases).

\footnote{137} Cf. Paul v. Watchtower Bible & Tract Soc'y, 819 F.2d 875, 881 (9th Cir.) ("Imposing tort liability for shunning on the Church or its members would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings."), \textit{cert. denied}, 484 U.S. 926 (1987).

\footnote{138} At least one commentator believes that Thomas, 450 U.S. 707, marked a shift in the Supreme Court's free exercise test. Instead of balancing the burden with the asserted interest, the commentator suggests that the Court now simply looks to see if the government has a compelling interest, regardless of the extent of the religious burden. See Seeburger, \textit{Public Policy Against Religion: Doubting Thomas}, 11 PEPPERDINE L. REV. 311 (1984). Nevertheless, other treatise writers believe that Thomas is merely an extension of Yoder. See R. ROTUNDA, J. NOWAK & J. YOUNG, \textit{supra} note 48, § 21.8, at 406. The distinction, however, should be irrelevant with respect to clergy malpractice actions, since under either interpretation, the government interest may not be compelling in light of the social benefit of spiritual counseling. See \textit{infra} notes 160-68.


\footnote{140} See \textit{supra} note 106.
compelling.\footnote{141} Proponents of tort liability for negligent counseling identify several important governmental interests in regulating counseling relationships. First, the state has an important interest in preventing suicides among mentally disturbed individuals, including those who seek out pastoral counseling.\footnote{142} In addition to the moral and social concerns, society has a strong economic interest in saving lives and promoting individual well-being, since many persons who commit suicide leave a dependent family behind. Liability also would protect the public from fringe religions and fraudulent schemes.\footnote{143} Finally, liability would protect innocent third persons, such as a counselee’s spouse, from meddling and divisive clergy.\footnote{144} These concerns support the government’s interest in assuring counselor competency.

Undeniably, the government has a compelling interest in saving lives.\footnote{145} The government does not, however, have a compelling interest in adopting every policy that purports to support the legitimate goal of

\footnote{141} See Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (state must prove exemption for religious acts actually creates impediment to government goal); see also People v. Woody, 61 Cal. 2d 716, 724, 394 P.2d 813, 819, 40 Cal. Rptr. 69, 75 (1964) (‘‘[T]he state’s showing of ‘compelling interest’ cannot lie in untested assertions.’’); cf. Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 562 (1976) (state interest in imposing “gag order” on press covering a criminal trial must be evaluated both in light of other measures mitigating the effect of publicity as well as the effectiveness of a restraining order in preventing the threatened danger).


\footnote{143} See Bergman, supra note 9, at 56; see also Roney v. Yogi, 103 N.M. 89, 703 P.2d 156 (Ct. App.) (plaintiff sought spiritual guidance from cult leader who advised her to undergo thirty day fast and then have her ovaries removed to solve her psychological problems), cert. quashed, 103 N.M. 62, 702 P.2d 1007 (1985); Christofferson v. Church of Scientology, 57 Or. App. 203, 644 P.2d 577 (1982) (religious counselor fraudulently promised to raise intelligence level of counselee), cert. denied, 459 U.S. 1206, cert. denied, 459 U.S. 1227 (1983).

\footnote{144} See, e.g., Hester v. Barnett, 723 S.W.2d 544 (Mo. Ct. App. 1987) (counselee alleged minister defamed family, divulged counseling communications to church elders, and alienated their children from parents and community).

\footnote{145} The “snakehandler” cases, originating from state regulations preventing the handling of poisonous snakes despite a certain religious sect’s practices, represent examples of the government’s interest in preserving life at the expense of religious practice. See, e.g., Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); State v. Massey, 229 N.C. 734, 51 S.E.2d 179, appeal dismissed sub nom. Bunn v. North Carolina, 336 U.S. 942 (1949); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948); Kirk v. Commonwealth, 186 Va. 839, 44 S.E.2d 409 (1947).
preserving life or promoting mental health.\textsuperscript{146} Unless the policy actually solves the problem, the government interest in pursuing the policy will not justify burdening religion.\textsuperscript{147}

For example, tort liability for spiritual counselors will do little to prevent suicides. First, spiritual counselors rarely deal with suicidal persons.\textsuperscript{148} On those rare occasions, however, significant doubt exists as to whether a psychotherapist can provide more efficacious counseling than can a minister. Empirical studies confirm that mental health professionals cannot accurately predict who will commit suicide or adequately provide treatment for those considered to be at risk.\textsuperscript{149} Therefore, in light of the limited success of mental health professionals, the alternate approach of spiritual counseling may be preferable in some cases.\textsuperscript{150} Second, even if members of the clergy were required to notify mental health professionals of suicidal counselees, actual commitment of the counselee would be unlikely. For example, in Nally the parents refused to commit their son, even at the request of his psychiatrist.\textsuperscript{151} Furthermore, the psychiatrist declined to invoke involuntary commitment procedures to avoid alienating Nally.\textsuperscript{152} Consequently, any legally imposed duty to refer counselees will not necessarily accomplish the governmental goal of preserving life without also requiring "mandatory

\textsuperscript{146} Some courts have questioned the importance of the state interest in protecting the public from intangible emotional harm resulting from another's religious practices or beliefs. See, e.g., Paul v. Watchtower Bible & Tract Soc'y, 819 F.2d 875 (9th Cir.) (shunning case), cert. denied, 484 U.S. 929 (1987); see also United States v. Ballard, 322 U.S. 78, 94-95 (1944) (Jackson, J., dissenting) (state had little interest in harm on the mental or spiritual level); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (religious practice only caused intangible emotional harm and thus did not pose a "clear and present menace to public peace and order").

\textsuperscript{147} See supra note 141 and accompanying text.

\textsuperscript{148} See D. Switzer, The Minister As Crisis Counselor 35 (1974) (collecting studies indicating that more than 50\% of all pastoral counselors never deal with suicidal counselees and the remaining counselors deal with very few).

\textsuperscript{149} See Pokorny, Prediction of Suicide In Psychiatric Patients, 40 ARCH. GEN. PSYCHIATRY 249 (1983) (explaining study of 4,800 patients, which concluded that identification of particular persons who will commit suicide is not currently feasible).

\textsuperscript{150} See Murphy, On Suicide Prevention and Prediction, 40 ARCH. GEN. PSYCHIATRY 343, 344 (1983) (Since suicide cannot be predicted with certainty, counseling "efforts must be designed to relieve the substrate of despair that is the proximate basis for most suicides. If we are successful in relieving that despair, our accomplishment is considerable."); cf. Nally v. Grace Community Church of the Valley, 240 Cal. Rptr. 215 (Ct. App. 1987) (opinion deleted from official reporter after reversal) (Cole, J. dissenting) (cataloging California statutory authorities which recognize right of mentally disturbed persons to rely on spiritual healing rather than medical or psychiatric treatment), rev'd, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988) cert. denied, 109 S. Ct. 1644 (1989).


\textsuperscript{152} Id. at 22, n.7.
involuntary confinement of all potentially suicidally inclined persons, as a result, the limited success of such drastic measures probably does not outweigh the heavy burden placed on the free expression of religious beliefs.

The other asserted state interests also fail to justify burdening religious freedom. While fringe groups will inevitably proffer imprudent religious counsel to vulnerable individuals, the nature of the first amendment requires that our society grant protection to unpopular and even deleterious ideas to preserve freedom for all. Furthermore, liability would not significantly add to protections against consumer fraud, since legislatures already prevent ministers from holding themselves out as mental health professionals unless they are actually so licensed. Additionally, since the vast majority of spiritual counselees are parishioners rather than members of the general public, the state interest is further reduced. Finally, a minister is already liable for intentional torts. Thus, there are adequate protections against reprehensible social acts, as well as against interference with the family unit.


154. Nally, 240 Cal. Rptr. at 246 n.8 (Cole, J., dissenting) (arguing that California sometimes subordinates interest in citizens’ lives to religious principles); see also Northrup v. Superior Court, 192 Cal. App. 3d 276, 237 Cal. Rptr. 255 (1987) (court followed state statute and allowed religious sect, whose religion precluded referrals to physicians, to continue to use unlicensed midwives, even though during the course of three child births two infants were stillborn).

155. See infra note 76.

156. See infra notes 165-69 and accompanying text (discussing statutory exemptions for ministers from licensure requirements).

Rabbi Bergman contends that with “mail order” ordination, liability is necessary to protect the public. Bergman, supra note 9, at 55-56. State legislatures, however, have already determined that ministers need not meet licensing requirements as long as they do not hold themselves out as professionals, thus decreasing the likelihood of consumer fraud. See infra notes 165-69 and accompanying text.

On the other hand, if a minister chooses to become a mental health care professional, which includes state certification, he cannot avoid liability as a professional. In such a case, the minister’s religious interest is not reduced, but the state’s interest in protecting the public dramatically increases, since the minister would be in a position to hold himself out to the public as approved by the state.

157. Balanced against religious interests, the state’s interest is strongest when the regulation protects citizens unassociated with the religion and weakest when the regulation affects relations within the religious sect. See Note, supra note 12, at 1310-22 (discussing various government interests with regard to member and non-member plaintiffs).

158. See supra note 8 and accompanying text.

159. In those jurisdictions which have abolished a tort of alienation of affections,
Finally, the important societal benefits provided by spiritual counseling may offset any harm caused by an irresponsible member of the clergy. In counseling, clergy have several distinct advantages over licensed therapists: counselees generally know the pastor-counselor before counseling begins, enhancing the likelihood that the counseling relationship will be built on friendship and trust; counselees view the minister without the stigma associated with seeing a psychologist, allowing the counselor to avoid any fears the counselee may have about psychiatry; counselees feel they can more easily approach clergy with menial problems, giving the counselor the unique opportunity to prevent small problems from growing; and counselees usually can seek help from clergy twenty-four hours a day without financial cost, encouraging counselees to ask for help. As a result, people tend to seek out members of the clergy over mental health professionals. This natural tendency is encouraged by the burgeoning mental health crisis and shrinking government appropriations for counseling centers. Thus, the benefits of any policy that discourages spiritual counselors, such as liability for clergy malpractice, should be weighed carefully against the loss of such services to the community. Indeed, the very policies that support Good Samaritan laws encouraging voluntary and private aid argue against holding clerical counselors liable for

however, the family may have no legal recourse against a minister who disrupts spousal relationships. Nevertheless, courts may still grant protection based on freedom of religion. See Radecki v. Schuckhardt, 50 Ohio App. 2d 92, 361 N.E.2d 543 (1976) (in absence of improper motives, religious groups can express relevant views, even if they tend to cause disharmony); Bradesku v. Antion, 21 Ohio App. 2d 67, 255 N.E.2d 286 (1969) (constitutionally protected right to espouse religious views cannot be basis for claim of alienation of affections). But see Carrieri v. Bush, 69 Wash. 2d 536, 419 P.2d 132 (1966) (first amendment does not give minister right to interfere with family relationships).

160. See D. SWITZER, supra note 148, at 23; R. CAPLAN, HELPING THE HELPERS TO HELP; MENTAL HEALTH CONSULTATION TO AID CLERGYMEN IN PASTORAL WORK 19-24 (1972).

161. See Note, Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?, 17 U. Tol. L. Rev. 209, 219-21 (1985). The note cites a government study which concluded that "in times of emotional or domestic trouble approximately forty-two percent of individuals consult clergymen, twenty-nine percent seek help from physicians, eighteen percent consult psychiatrists or psychologists, and ten percent turn to clinics or other social agencies." Id. at 219 (citation omitted).

162. See D. SWITZER, supra note 148, at 33. The author notes: "In proportion to the total population and to the number of persons in need, there is a decreasing percentage of psychiatrists, clinical psychologists and psychiatric social workers and nurses. . . . At least a partial answer to the increasing mental health needs is the clergy." Id.

163. Good Samaritan statutes bar the imposition of ordinary negligence liability on one who aids another in an emergency. See, e.g., CAL. GOV'T. CODE § 50086 (West 1983) (exempting from liability first aid volunteers summoned by authorities to assist in search or rescue operations); CAL. HEALTH & SAFETY CODE, § 1799.102 (West Supp. 1989) (exempting from liability nonprofessional persons giving cardiopulmonary resuscitation).
malpractice.164

Many state legislatures have accepted this reasoning and have exempted religious counselors from professional licensing requirements.165 Although not conclusive, these exemption statutes represent strong evidence that these legislatures, as policy-making bodies, have already balanced the competing societal interest and decided in favor of the clergy.166 Thus, "the Legislature[s] have[ve] recognized that access to the clergy for counseling should be free from state imposed counseling standards, and that 'the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations.'"167 Although courts sometimes are forced into the role of policymaker, when the legislature has spoken on an issue courts must defer to the legislature's pronouncements. In terms of counseling, legislatures have had the opportunity to impose liability. Instead of equating spiritual counselors with secular psychologists, however, legislatures chose to grant an explicit exemption. Accordingly, "[a]ny argument that these competing interests should be reweighed is

165. E.g., CAL. BUS. & PROF. CODE § 2908 (West Supp. 1989) (ordained clergy may do "work of psychological nature ... provided they do not hold themselves out ... as licensed to practice psychology"); DEL. CODE ANN. tit. 24, § 3004(3) (1987) (professional counselor regulations do not apply to any type of "religious activity of any nature whatsoever."); KY. REV. STAT. ANN. § 319.015(6) (Michie/Bobbs-Merrill Supp. 1988) (clergy's ministerial activities not included as practice of psychology provided clergy does not hold himself out as psychologist); MO. ANN. STAT. § 337.505(6) (Vernon 1989) (licensing exemption for religious counselors); N.Y. MENTAL HYG. LAW § 31.02(a)(3)(iii) (McKinney 1988) (no operating certificate required for pastoral counselors); OHIO REV. CODE ANN. § 4767.16(D) (Anderson 1987) (religious counselors exempt from professional counseling regulations); OKLA. STAT. ANN. tit 59, § 1353(a) (West 1989) (licensing requirements do not apply to "pastoral counselors, doing work of psychological nature consistent with their training"); S.C. CODE ANN. § 40-55-90(a) (Law. Co-op. 1986) (regulations for psychologists do not apply to "clergymen ... doing work of a psychological nature consistent with their training").
166. Cf. Northrup v. Superior Court, 192 Cal. App. 3d 276, 237 Cal. Rptr. 255 (1987). In Northrup the California Court of Appeal reversed a criminal prosecution of two members of the Church of the First Born. Since the religion does not allow the use of any medical professionals, the defendants acted as midwives to help in childbirth. After two of three children delivered were stillborn, the state prosecuted the defendants for practicing medicine without a license. The appeals court dismissed the charges, however, on the ground that the midwives asserted a valid religious exemption to the licensing statute even though the midwives were practicing medicine. Thus, in applying the statute, the court deferred to the legislature's determination that "in the licensing context, the state's interests [in preserving life] are subservient to its citizen's religious beliefs," Id. at 283, 237 Cal. Rptr. at 259.
one best addressed to the Legislature, not the courts.\textsuperscript{168}

Furthermore, the statutory exemptions also show that the public interest can be protected by a less restrictive means than tort liability. The statutes generally allow the licensing boards to exempt only those who "do not state or imply that they are licensed to practice psychology."\textsuperscript{169} Thus, these legislatures have implemented a sound method of preventing fraud on the government and on the consumer while preserving the autonomy of spiritual counselors. In light of this alternative, tort liability cannot be considered essential to protect the public from spiritual counselors. Tort liability, however, could harm the public interest by chilling spiritual counseling. Thus, there is no overriding government interest to justify burdening religion. The free exercise clause therefore should be recognized as a defense to suits alleging negligent counseling when clergy are involved.

\section*{C. The Establishment Clause}

Assuming the government could identify some state interest that outweighs the burden on religious freedom, the establishment clause\textsuperscript{170} may still bar liability for negligent religious counseling. Without considering competing interests, the establishment clause further protects personal liberty by prohibiting any government regulation that advances or inhibits religion.\textsuperscript{171} Indeed, "[i]f there is any fixed star in our

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\item \textsuperscript{168} \textit{Northrup}, 192 Cal. App. 3d at 283, 237 Cal. Rptr. at 259.
\item \textsuperscript{170} U.S. Const. amend. I. The part of the first amendment known as the establishment clause provides: "Congress shall make no law respecting an establishment of religion . . . ." The establishment clause was first applied to the states via the fourteenth amendment in Everson v. Board of Education, 330 U.S. 1 (1947).
\item \textsuperscript{171} See \textit{Lemon} v. \textit{Kurtzman}, 403 U.S. 692, 612-13 (1971).
\item The court of appeal in \textit{Nally} held that the establishment clause did not apply to clergy malpractice actions because it was limited to instances "when a government policy has the effect of promoting religion." \textit{Nally} v. Grace Community Church of the Valley, 240 Cal. Rptr. 215, 230 (Ct. App. 1987) (opinion deleted from official reporter after reversal), rev'd, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), cert. denied, 109 S. Ct. 1644 (1989); see also Note, \textit{supra} note 6, at 424 n.16 (arguing that establishment clause only protects public from imposition of state supported religion). The court of appeal's interpretation in \textit{Nally}, however, ignores established case law. See \textit{Edwards} v. \textit{Aguillard}, 482 U.S. 578, 616-17 (1987) (Scalia, J., dissenting) (citing cases in which the court has described the establishment clause as covering state action that advanced religion or tended "to 'disprove,' 'inhibit,' or evince 'hostility' toward religion"); \textit{NLRB} v. \textit{Catholic Bishop}, 440 U.S. 490 (1979) (rejecting NLRB's claim to jurisdiction over lay faculty members at a religious school on statutory and establishment grounds); \textit{Walz} v. \textit{Tax Comm'n}, 397 U.S. 664 (1970) (rejecting taxation of churches on establishment grounds);
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constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion . . . or force citizens to confess by word or act their faith therein. 172 As a result, "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church . . . [and] [n]either can force . . . a person . . . to profess a belief or disbelief in any religion."

Conflicts between religion and government, however, never appear as clear cut as this basic constitutional doctrine. As a result, the Supreme Court in Lemon v. Kurtzman, 174 developed an analytical framework for establishment cases, which it has frequently and consistently applied for almost twenty years: 176 "[f]irst, the . . . [government action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the . . . [action] must not foster 'an excessive government entanglement with religion.' 176 Thus, any attempt to hold clergy liable for malpractice must pass each establishment threshold to pass first amendment scrutiny.

1. Secular Purpose

Under the first prong of the Lemmon test, the government must

see also 3 R. Rotunda, J. Nowak & J. Young, supra note 48, § 17.16 (government interference in religious organization may violate establishment clause if the action inhibits religion or creates excessive entanglement with the religious organization); Esbeck, supra note 50, at 379 ("[T]he establishment clause filters out improper involvement travelling in either direction.").

175. See Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987) ("The Lemon test has been applied in all cases since its adoption in 1971, except in Marsh v. Chambers, 463 U.S. 783 (1983), where the Court . . . based its conclusion . . . on the historical acceptance of the practice." (parallel citations omitted)).

Parts of the Lemon test, however, have been strongly criticized by at least five justices. See County of Allegheny v. ACLU, 109 S. Ct. 3086, 3134 (1989) (Kennedy, J., dissenting) (questioning the effectiveness of the Lemon test, Justice Kennedy noted that "[s]ubstantial revision of our establishment clause doctrine may be in order . . . ."); Edwards, 482 U.S. at 636-40 (Scalia, J., dissenting) (arguing the purpose prong of the Lemon test should be abolished); Wallace v. Jaffree, 472 U.S. 38, 68-69 (1984) (O'Conner, J., concurring) ("standards announced in Lemon should be re-examined and refined"); Id. at 112 (Renquist, J., dissenting) (court should discard Lemon test entirely); Roemer v. Board of Pub. Works, 426 U.S. 736, 767-69 (1976) (White, J., concurring) (Lemon standard provides unnecessary and superfluous tests).
176. Lemon, 403 U.S. at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (citation omitted)).
prove the regulation is based on a secular purpose. Conceivably, a court could impose liability on a spiritual counselor to punish a particular sect. A court is far more likely, however, to impose liability to advance a secular purpose. Under the secular purpose prong of the test, government interference will be invalidated only when there is no secular purpose and "there [is] no question that the statute or activity was motivated wholly by religious considerations." Accordingly, the Supreme Court has found a violation of the secular purpose prong in only four establishment cases, and probably would not find such a violation if a court held a member of the clergy liable for malpractice.

2. Primary Effect

Under the second prong of the Lemon test, the government must prove the primary effect of the regulation neither advances nor inhibits religion. To violate the effect prong of the test, however, the consequences of a regulation only need to be significant or substantial, rather than merely remote, indirect or incidental.

Applying this principle to clergy malpractice, a court must evaluate the effect of liability on religion. In making this application, a court could find that the primary effect of imposing tort liability would be to inhibit religion, even though other state interests were being served. Clearly, religion would be substantially inhibited if a court used malpractice liability to restrain religious instruction that it considered damaging to counselees. Moreover, if courts were to establish a secular standard of care, they would in effect be elevating psychology over

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177. See supra notes 142-59 and accompanying text (discussing possible state interest in regulating spiritual counseling).


180. See Walz v. Tax Comm'n, 397 U.S. 664, 674-79 (1970) (tax exemption effects only indirect benefit to church); McGowan v. Maryland, 366 U.S. 420, 450 (1961) (Sunday closing laws valid even when they incidentally give aid to religion). Thus the Court has dispelled any notion that the word primary means first in order of development. Although Justice Clark appeared to apply a strict definition of "primary" in the first formulation of the test in Abington School District v. Schempp, 374 U.S. 203 (1963), the Supreme Court has construed the "primary effect" requirement significantly looser in subsequent establishment cases. See L. Manning, THE LAW OF CHURCH-STATE RELATIONS 139 (1980).

religion. This application of a secular standard of care to pastoral counseling would implicate significant first amendment issues and could substantially burden religion. Finally, because liability may not serve the purported interest, the primary result of clergy malpractice liability would be a burden on religious autonomy and a decline in spiritual counseling activities.

The Supreme Court, however, has traditionally invoked the primary effect prong of the Lemon test to stop government action that advances religion, rather than to forbid action that hinders religion. A court could thus conclude that exempting clergy from liability would tend to establish religion, but that liability would treat religion neutrally by dealing with clergy in the same manner as other nonprofessional counselors. This argument, however, misconceives the purpose and nature of the freedom of religion. Under the first amendment, "the government may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause." Furthermore, "[t]here is ample room under the Establish-
ment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.""\(^{167}\)

Moreover, exemption from liability for clerical counselors may be required under the establishment clause to avoid a greater establishment conflict. For example, in *Walz v. Tax Commission*,\(^ {168}\) the Court held that even though a property tax exemption for churches showed some governmental preference for religion, exemptions resulted in less involvement than taxation would require.\(^ {169}\) Thus, the minimal accommodation of religion involved in granting an exemption had the primary effect of avoiding excessive governmental entanglement, a greater establishment problem. The Court's reasoning in *Walz* similarly applies to issues surrounding the imposition of liability for clergy malpractice. Although exemption from tort liability for spiritual counselors would benefit religion, it would prevent a greater establishment problem by avoiding the coercion and entanglement that results from governmental interference. An exemption from tort liability would not advance religion,\(^ {160}\) but liability might inhibit spiritual counseling activity.

3. Government Entanglement

Although the existence of any one of the three elements of the *Lemon* test creates an establishment of religion, the entanglement requirement remains the heart of the test. Indeed, "[t]he objective [of the establishment clause] is to prevent . . . the intrusion of either [state or religion] into the precincts of the other."\(^ {191}\) The principle is obvious: "government must avoid any involvement with religious societies that may touch upon the matters central to their religious identity and mission."\(^ {192}\) As a result, the test is violated by a showing of actual or even a material risk of entanglement.\(^ {193}\)

Nevertheless, the entanglement element requires a balancing of

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\(^{167}\) Id. at 313-14.

\(^{168}\) *Amos*, 483 U.S. at 334 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).


\(^{169}\) Id. at 674-76.

\(^{190}\) In addition to meeting the "primary effect" test, tort immunity for spiritual counselors would also pass muster under the other prongs of the *Lemon* test. First, there is a strong secular purpose supporting immunity. See *supra* notes 160-68 and accompanying text (social benefits of clerical counseling). Second, immunity would not create excessive entanglement because the government would not be involved at all with the counselors. On the other hand, liability may well create excessive entanglement. See infra notes 191-208 and accompanying text.


\(^{192}\) Esbeck, *supra* note 49, at 381.

\(^{193}\) Id.
competing interests rather than serving as an absolute threshold. Accordingly, the Supreme Court has identified at least three factors to examine in addressing an entanglement issue:

[First], [i]f the religious organization is "pervasively religious," it is unlikely that the governmental contact is permissible. Second, . . . [i]f the regulation provides the public official with sufficient discretion to trespass upon sectarian concerns, the involvement is likely prohibited. Third, . . . [i]f that relationship is one requiring continued surveillance by public officials, the entanglement is likely excessive. 194

Under these principles, the establishment clause may bar governmental intervention or judicial oversight into matters of a religious organization's prayer practices, 195 preaching, 196 faith, 197 doctrine, 198 internal administration, 199 and discipline. 200

Tort liability for clergy malpractice would inevitably collide with these principles. First a church's counseling ministry is pervasively religious. 201 Second, liability would give courts the discretion to judge the validity of sectarian concerns. Third, the imposition of liability would require courts to actually establish standards of appropriate conduct for counselors and content of counseling. 202 Thus, imposition of tort liability probably would require courts to evaluate the substantive cor-

194. Id. at 383-84 (footnote omitted) (detailing the three primary factors to which the Supreme Court has directed attention).

195. See Engle v. Vitale, 370 U.S. 420, 435 (1962) (Court struck down mandatory school prayer, stating that religion should be left "to the people themselves and those the people choose to look to for religious guidance.").


198. See Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church, 393 U.S. 440, 451-52 (1968) (property dispute between two churches beyond scope of courts, since civil courts are prohibited from interpreting or weighing church doctrine).

199. See NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979) (NLRB cannot condemn church employment practices, since governmental review would "involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to [its] school's religious mission").

200. See Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (court could not decide which bishop should lead organization because civil courts are prohibited from delving into matters of discipline, faith, internal organization, or ecclesiastical rules, custom or law).

201. See supra notes 65-90 and accompanying text.

rectness of religious doctrines and teachings. Yet the Supreme Court has established that civil courts are not competent "to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." Spiritual counseling can be considered a private sermon tailored to the needs of an individual. Furthermore, even if counseling could be distinguished from other religious instruction, the principle that government should not prescribe the content of religious communications should still apply. The same constitutional principles also safeguard religious doctrine from governmental interference. Nevertheless, tort liability for spiritual counseling would allow the government to affect instruction and doctrine.

Clergy malpractice also could interfere with the church's internal administrative procedures. To provide any meaningful protection for the public, courts would have to establish the training standards that churches would have to require of their pastors, as well as the conduct that would be expected of spiritual counselors. Any oversight of religious organizations by government, however, could create establishment problems. Even though the interaction might only involve secular concerns, "under our [constitutional] system . . . government is to be entirely excluded from the area of religious instruction . . . ."

Clearly, as a result of imposing liability for clergy malpractice, the government could become entangled in church affairs.

In summary, tort liability for negligent counseling could create an establishment of religion. Even though liability for clergy malpractice might spring from a secular purpose, the primary effect of the tort could inhibit religious practices and could lead to excessive governmental entanglement with religion. Thus, tort liability for counseling does not satisfy the Lemon test, and under establishment clause jurisprudence, government action that fails any prong of the test is unconstitutional.

III. Conclusion

The concept of clergy malpractice presents complex and trouble-

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204. See J. ADAMS, supra note 80, at 65-77.
205. See supra note 198.
206. See supra text accompanying notes 117 & 120 (discussing minimum standards of conduct).
208. See Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (recognizing that clear violation of one prong of the test was sufficient to create establishment without examining other two elements).
some questions of constitutional law. Like many undecided constitutional issues, no one can completely reconcile the conflicting body of case law; no one can thoroughly analyze the issue without acknowledging that the arguments posited by each side are persuasive; and no one can predict with certainty how the Supreme Court ultimately will rule. Nevertheless, in evaluating the constitutional implications of spiritual counseling liability, this note suggests that the first amendment may bar the cause of action.

The Constitution prevents courts from determining the truth or falsity of a belief and from dissecting any system of belief. Accordingly, courts should accept a pastor's sincerely held belief that counseling is an inherently religious activity. Under free exercise analysis, tort liability would burden the religious practices of spiritual counselors. Despite the state interest in regulating counseling, any potential damage resulting from pastoral counseling may not justify burdening religion.

Clergy malpractice may also create an establishment of religion. Although a valid secular purpose exists, the primary effect of liability may be to inhibit religious practices and excessively entangle the government in religious affairs. No doubt, spiritual counselors will administer a certain amount of "mental and spiritual poison . . . But that is precisely the thing the Constitution put beyond the reach of the prosecutor, . . . [and that is] the price of freedom of religion . . . ."209

Constitutional impunity for negligent counseling, however, would not exempt clergy from existing theories of liability. Liability for intentional torts remains a potent weapon in a lawyer's arsenal to guarantee that any outrageous conduct will be punished. Furthermore, criminal sanctions protect society from members of the clergy who engage in destructive conduct. No reasonable person would contend that a minister who sexually abuses children or commits a religious sacrifice should be insulated from punishment, even if the action was religiously motivated. The content of spiritual advice, however, raises a different constitutional issue, and, as a result, negligent spiritual counseling should not be the basis for a tort recovery.

Constitutional impunity for negligent counseling also should not discourage clergy from maintaining the highest counseling standards possible. Religious leaders generally regard themselves as responsible to a higher power and believe that higher power has placed the counsees in their care. Furthermore, the counselors usually feel a sense of responsibility to the counsees, who have placed their trust in the counselors' advice.210 Finally, spiritual and ethical duties require pas-

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210. Additionally, there is now an American Association of Pastoral Counselors, which may hold a member-pastor accountable to the organization's ethical code just as a
tors to accept instruction, both spiritual and secular, to become competent counselors fully apprised of potential problems.

Unfortunately, some counselors will not live up to these ethical standards. But there will be others who, despite their compliance, could still be sued under the theory of clergy malpractice. Just as in Nally, a minister could competently advise a counselee to seek additional help and still face liability for the religious content of the counsel and for failing to place a counselee in the hands of a professional. Such content-based liability could not be avoided with the highest ethical standards. Thus, a minister could be held liable for unpopular religious instruction, a result which is antithetical to first amendment values. Impunity, however, would protect this constitutional interest. Undoubtedly, some self-serving counselors will use the constitutional shield as a sword to take advantage of the freedom. But even accepting the potential abuse, a balancing of societal interests suggests that clergy should not be held liable for negligent counseling. More importantly, the Constitution demands it.

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