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CLERGYMAN MALPRACTICE: RAMIFICATIONS OF A NEW THEORY

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> Perhaps more than any other branch of the law, the law of torts is a battleground of social theory.[1]

INTRODUCTION

This article will examine the implications of a recently introduced legal theory known as "clergyman malpractice". This new theory is so inextricably entwined with ecclesiastical, spiritual, and doctrinal matters that the judicial system cannot competently deal with it, nor can it constitutionally do so.

Part I of this article briefly examines the theory of clergyman malpractice in light of key elements of a cause of action for negligence. Part II reviews some ancillary consequences of the theory, including its impact on the doctrine of the priest-penitent privilege and the imposition of a duty to refer. Part III examines certain statutory exemptions. Part IV addresses some constitutional issues raised by the theory.

It is not suggested that the law provide special or favored treatment for the religious community in the area of torts or that the now generally discarded concept of charitable immunity be resurrected. The religious community should not expect special treatment in cases where the conduct in question has little or nothing to do with its religious or spiritual mission. Thus, liability arising out of traditional theories of personal injury, false imprisonment, battery, assault, or duties arising out of property ownership should not differ simply because the defendant happens to be a religious organization or a clergyman.

One question addressed is whether "clergyman malpractice" is simply another legal theory against a profession, akin to theories of legal malpractice in the field of law and medical malpractice in the field of medicine. It will be shown, however, that it is the uniqueness of the "service rendered" by the religious community to those

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1. W. PROSSER, LAW OF TORTS 14 (1964).

who seek counsel from it that sets this new theory apart from other seemingly related torts.

It should also be noted that although moral and legal obligations often coincide, they are separate and distinct and must be treated as such. Moral obligations do not always rise to the level of a legal duty. Thus, a clergyman has many duties *qua* clergyman to his parishioners. However, to the extent that these duties flow from a religious and spiritual mission, it is not the proper function of the state to act as the enforcer of those duties through the courts.

In the fall of 1979, a story made the rounds in the insurance and religious media that a clergyman had been sued and held liable in a "clergyman malpractice" case. The story was initiated by the insurance industry, apparently to generate interest in a new product known as "clergyman malpractice insurance".[2]

In March 1980, a much-publicized suit was brought in Burbank, California, by the parents of Ken Nally, a 24-year-old seminary student who committed suicide in 1979.[3] The Nallys sued Grace Community Church, the largest Protestant congregation in Los Angeles County, its pastor, and staff, alleging in three counts clergyman malpractice, negligence, and outrageous conduct. In a media blitz accompanying the filing of the lawsuit, plaintiffs' counsel indicated that this was the first case of its kind in California.[4]

In the first count, the parents alleged that the pastor and staff had counseled their son to read the Bible, pray, listen to taped sermons, and counsel with church counselors. They alleged that the defendants were aware that their son was depressed and had suicidal tendencies and was in need of professional psychiatric and psychological care. Notwithstanding such knowledge, plaintiffs alleged that the church and its staff discouraged and effectively prevented their son from seeking professional help outside the church.

In the second count, the complaint alleged that the defendants were negligent in the training, selection, and hiring of its "lay spiri-

2. LIBERTY MAGAZINE, Mar.-Apr. 1980, at 15-17.

3. Nally v. Grace Community Church of the Valley, No. NCC 18668-B (L.A. County Super. Ct., Cal., filed Mar. 31, 1980). On Oct. 2, 1981, summary judgment was granted as to all defendants on all counts by Judge Thomas J. Murphy, Superior Court of Los Angeles County, in Burbank, California. In addition, the court ordered the plaintiffs to reimburse the defendants for their costs. No appeal has been filed as of the time of this publication.

4. Sacramento Union, May 6, 1980, at A7. Subsequent research has shown that it appears to be the first such case anywhere.

tual counselors". The count additionally alleged that these counselors were unavailable when Nally requested counseling.

The third count alleged that the defendants ridiculed, disparaged, and denigrated the Catholic religion, and faith and belief of the decedent's parents, and that this exacerbated Nally's pre-existing feelings of guilt, anxiety, and depression. It was further alleged that defendants effectively required the decedent to spend time in isolation, thereby preventing him from contacting or consulting with persons not affiliated with the church and that this proximately caused the young man to take his own life.

Defendants' lengthy demurrer to the complaint was denied on the grounds that certain conduct inferred in the complaint, namely the charge that Nally had been effectively prevented from obtaining professional help, fell within the parameters of tort law.

Deposition testimony showed that the young man was seen by at least eight physicians, psychologists, and psychiatrists in the few months prior to his death. In fact, Grace Church, its staff, and members repeatedly encouraged Nally to keep his appointments with the professionals and even made some of the appointments for him. A number of these professionals, along with other members of the church and staff, recommended psychiatric hospitalization to the young man, but to no avail. The testimony also indicated that the same recommendations were made to the parents.

I. SOME THRESHOLD PROBLEMS OF DEFINITION

The traditional elements necessary to state a cause of action in negligence have been summarily stated by Professor Prosser.[5] Although negligence is simply one kind of conduct, a cause of action founded upon negligence from which liability will follow requires

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

2. A failure on his part to conform to the standard required. These two elements go to make up what the courts usually have called negligence; but the term quite frequently is applied to the second alone. Thus, it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.

3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause", or "proximate cause".

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

PROSSER, *supra* note 1, at 146.

more than conduct. There must be a legally recognizable duty and a breach of that duty causally connected to the subsequent injury resulting in actual damage. This article will not review the new malpractice theory in light of each of these elements, but rather will deal primarily with the concept of duty and some of the problems of proof related thereto.

In examining the concept of duty, there exists a threshold issue of defining the nature of the conduct underlying the theory. The better label for the conduct may in fact be "spiritual counseling malpractice" where the dispute focuses on counseling rendered by a member of the clergy in meeting the spiritual, emotional, and religious needs of the counselee.

The difficulty facing the courts in constructing a duty in these cases is amplified by the confusion and lack of definition as to what falls within the parameters of spiritual as opposed to psychological or psychiatric counseling. What is the nature of the problem plaguing the counselee? Is it "poor mental health" or "poor moral health"? And how shall a court determine, as a matter of law, whether a counselee's problem is "sin" related or its psychological equivalent? How can one draw the line and where should it be drawn?

It is impossible to separate the "cure of minds" from the "cure of souls." An unstated and patently invalid assumption of spiritual counseling malpractice is that clean lines exist delineating the realm of religion from the realm of psychology and psychiatry. For nearly 2,000 years pastors, priests, rabbis, and other spiritual counselors in churches have been providing the balm for those suffering from depression, guilt, and anxiety.

Attempts to delineate the functions of a clergyman as counselor from those of psychiatrists or psychologists—as if one is religion and the other is medicine—has been rebutted by leading psychiatrists and psychologists, including the "founding fathers" of modern psychiatry, Sigmund Freud and Carl Jung.

> Now they [the courts!] view reading the Talmud or the Bible as a matter of religion, but reading Freud or Spock as a matter of mental health. Thus we have transformed the cure of souls into the cure of minds, and our prohibitions against clerical coercion into our prescriptions for clinical coercion.
>
> In short, I contend that we now classify many medical acts as scientific when, in fact, they are moral, and

that *we classify many psychiatric acts as medical when, in fact, they are religious*. These opinions, which may seem strange or even outlandish today, are actually the opinions of the "founding fathers" of modern psychiatry.

Toward the end of his life, Sigmund Freud asserted, "I have assumed . . . that psychoanalysis is not a specialized branch of medicine. I cannot see how it is possible to dispute this." His reason for so classifying psychoanalysis was "[t]he case of analysis differs from that of [a specialized branch of medicine]. . . . [T]he only subject-matter of psychoanalysis is the mental processes of human beings and it is only in human beings that it can be studied."

If psychoanalysis is not a branch of medicine, what is it a branch of? According to Freud, *it is a branch of religion*:

> "[T]he words, '*secular pastoral worker*,' might well serve as a general formula for describing the function [of] the analyst. . . . We do not seek to bring [the patient] relief by receiving him into the catholic, protestant or socialist community. We seek rather to enrich him from his own internal sources. . . . Such activity as this is *pastoral work* in the best sense of the words."

Carl Jung, the co-architect of modern psychiatry, was even more emphatic in rejecting the medical pretensions of psychotherapy (and psychiatry), and in *reiterating the essentially religious character of soul-curing*:

> "[In] most cases the sufferer consults the doctor in the first place, because he supposes himself to be physically ill. . . . That is why patients force the psycho-therapist into *the role of a priest*, and expect and demand of him that he shall free them from their distress. *That is why we psychotherapists must occupy ourselves with problems which, strictly speaking, belong to the theologian.*"

. . . .

Moreover, we now face a serious problem concerning classification not in just one crucial area, but in two. Our forebearers went astray in categorizing some people—blacks, as non-persons; but *at least they recognized religion when they saw it, and demarcated ecclesiastical*

> *from secular institutions* and interventions correctly and wisely.
>
> We go astray in categorizing some people—mental patients—as non-persons; and *we no longer recognize* religion when we see it, demarcating medical from moral institutions and interventions incorrectly and stupidly.[6]

Renowned psychiatrist, Karl Menninger, founder of the Menninger Clinic, believes that mental health and moral health are identical and that the recognition of the reality of "sin" offers to the suffering, struggling anxious world a real hope.[7] O. Hobart Mowrer, a noted research psychologist who has served as the president of the American Psychologist Association, challenged the entire field of psychiatry, declaring it a failure, and sought to refute its fundamental Freudian presuppositions.[8]

In spite of the anti-religious prejudice of modern psychology, even a prominent psychologist like Mowrer appreciates the psychological necessity of accepting sin:

> For several decades we psychologists looked upon the whole matter of sin and moral accountability as a great incubus and acclaimed our liberation from it as epoch-making. But at length we have discovered that to be "free" in this sense, i.e. to have the excuse of being "sick" rather than sinful, is to court the danger of also becoming lost. This danger is, I believe, betokened by the widespread interest in Existentialism which we are presently witnessing. In becoming amoral, ethically neutral, and "free", we have cut the very roots of our being; lost our deepest sense of self-hood and identity; and with neurotics themselves, find ourselves asking: "Who am I?"[9]

The great benefit of the doctrine of sin is that it reintroduces responsibility for one's own behavior, responsibility for changing as well as giving meaning to the human condition. Mowrer describes the benefits from the acceptance of sin:

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6. Szasz, *The Theology of Therapy: The Breach of the First Amendment Through the Medicalization of Morals*, 5 N.Y.U. REV. L. & SOC. CHANGE 127, 133-35 (1975) (emphasis added).

7. K. MENNINGER, WHATEVER BECAME OF SIN? (1972).

8. O. MOWRER, THE CRISES IN PSYCHIATRY AND RELIGION 60 (1961).

9. Mowrer, *Sin, the Lesser of Two Evils*, 15 AM. PSYCHOLOGIST 301 (1960).

> [R]ecovery (constructive change, redemption) is most assuredly attained, not by helping a person reject and rise above his sins, but by helping him *accept them*. This is the paradox which we have not at all understood and which is the very crux of the problem. Just so long as a person lives under the shadow of real, unacknowledged, and unexpiated guilt, he *cannot* (if he has any character at all) "accept himself"; and all *our* efforts to reassure and accept him will avail nothing. He will continue to hate himself and to suffer the inevitable consequences of self-hatred. But the moment he (with or without 'assistance') begins to accept his guilt and sinfulness, the possibility of radical reformation opens up; and with this, the individual may legitimately, though not without pain and effort, pass from deep, pervasive self-rejection and self-torture to a new freedom, of self-respect and peace.[10]

The difficulty of attempting to categorize psychiatry and psychology as separate from the religious and spiritual realms is further reflected in *Psychology as Religion: The Cult of Self-Worship*.[11] The thesis of the book is that "psychology as religion" exists in great strength throughout the United States and that this "religion" is hostile to most religions.[12] In fact, in many instances "psychology as religion is deeply anti-Christian."[13]

In counseling malpractice cases, the issue facing the courts may thus become one of choosing between competing religious dogmas. While the courts do deal with issues beyond their own expertise and discipline, those issues are empirical in nature. The issues raised in clergyman counseling cases are not empirical, but religious. They are not conducive to judicial review because they lack objective standards.

A second problem facing the courts under the spiritual counseling theory will be to identify the scope and nature of church-related counseling. As a matter of law, what constitutes spiritual guidance and counseling? Does it include the one time, five-minute emergency telephone call that pastors and counselors may receive in the course of their day from distressed individuals, members as well as non-

10. *Id.* at 304 (emphasis added).
11. P. VITZ, PSYCHOLOGY AS RELIGION: THE CULT OF SELF-WORSHIP (1977).
12. *Id.* at 10.
13. *Id.*

members of their congregations? Does it include confessions? Or is "spiritual counseling" limited to formal office visits where a pastor or other counselor counsels, notebook in hand, at a scheduled time, on a regular basis, over a long period of time? In the *Nally* case, the complaint alleged that the church staff failed to make themselves available to the counselee when he requested their counsel and guidance. The courts will thus be called upon to determine the scope of a church's duty to be available to counselees.

The issue of availability of church-related counseling in turn raises other issues, including some doctrinal judgment calls. For example, in His parable of the Good Samaritan, Christ made it imperative that Christians show mercy to all those in need who may come across their path.[14] Thus, many churches and counselors may not feel that they have the option of other professionals to select and screen their counselees, determining the availability of their services on such factors as ability to pay, office hours, or scheduling.

However, Scripture teaches that Christians should not waste time on those who are unruly, undisciplined, and repeatedly reject counsel.[15] Can the courts avoid second-guessing decisions by churches as to whether they should have been more or less available to counselees in any given case? Will the duty to be available be the same for all churches and counseling ministries? Or will the duty depend upon such variables as the size of the congregation and the staff trained for counseling?

A third area in which the courts must become involved is determining whether the duty owed to a counselee would be any different depending upon the counselor's ecclesiastical office and the authority or function flowing from such office. All religions identify various positions, offices, or titles reflecting a person's authority and service. For example, the Roman Catholic Church has nuns, mother superiors, brothers, fathers, priests, bishops, cardinals, and the Pope. Protestants identify ministers such as evangelists, pastors, elders, deacons, deaconesses, youth ministers, and Sunday school teachers. Other religions have their apostles, prophets, rabbis, vicars, divine masters, seers, and even presidents.

The relationship a counselee has with a counselor may depend upon the nature and function of the office of the counselor. Arguably, the various offices of a given faith are not to be treated legally

14. *Luke* 10:25-37.
15. *See, e.g.*, 2 *Thessalonians* 3:14-15.

alike in counseling cases, any more than all those in the medical profession are treated alike in medical malpractice cases where it makes a difference whether the person is a nurse, surgeon, orderly, anesthesiologist, or laboratory technician.[16]

Fourth, as in other "professional" malpractice, the courts must review the training and competence of individual counselors.[17] This will present the court with a host of new problems. Shall the review be limited to the training received in secular institutions on secular subjects, such as psychology, psychiatry, and mental health counseling? Would a degree in clinical psychology from an accredited university provide the desired training?

> To date psychiatry has not clearly defined the skills, knowledge, and attitudes that the psychiatrists in training must demonstrate in order to be certified as competent. It is our belief that the profession can no longer avoid beginning the difficult, often emotional task of specifying of what a psychiatrist should know and be able to do.[18]

If the professional "jury" is still out on what secular professionals should know and be able to do in the area of counseling, what standards should the court look to when faced with the issue of the competence and training of church counselors? Shall a counselor's library be reviewed to see which books are used in counseling individuals? If the Bible is the primary source used in spiritual counseling, shall the court determine the depth of training in Scriptures that the counselor has had, and whether the training was adequate to deal with the specific nature of the counselee's problem?

Aside from secular training, a Christian counselor's competence may depend upon many "spiritual" qualifications such as the counselor's spiritual gifts and his or her spiritual maturity. The Bible indicates that spiritual counseling is the work of the Holy Spirit and that effective counseling cannot be done apart from Him.[19] The Spirit endows each believer with a spiritual gift or gifts, some of which may have a direct bearing on the counselor's ability and effective-

16. For example, compare the standards of care set out in CALIFORNIA JURY INSTRUCTIONS—CIVIL: BOOK OF APPROVED JURY INSTRUCTIONS, (6th rev. ed. 1977) 6.00 *Duty of Physician and Surgeon*; 6.01 *Duty of Specialist*; 6.25 *Duty of a Nurse*.

17. *Id.*

18. Weinstein & Russell, *Competency Based Psychiatric Education*, 133 AM. J. PSYCH. 935 (1976).

19. J. ADAMS, COMPETENT TO COUNSEL Ch. 3 (1972). *See also John* 14:16, 17.

ness.[20] Might someone with a number of key spiritual gifts, such as wisdom, knowledge, or exhortation be held to a higher standard of care (akin to a specialist) than other spiritual counselors who may have been endowed with fewer, if any, of these specific gifts? There is no doubt that all religions consider spiritual maturity a significant factor in evaluating a counselor's competence. A secular court, however, may decide to apply purely secular criteria, such as that of clinical psychology, and dismiss the religious standard as irrelevant and inapplicable.

A fifth area facing the court relates to the content of the counsel given by the clergyman or church counselor. For example, the *Nally* complaint alleged that the counselors at the church told Nally to read the Bible, pray, listen to taped sermons, and other church counselors while, on the other hand, they allegedly dissuaded and discouraged him from seeking professional psychiatric or psychological help. As a practical matter, wholly apart from the constitutional prohibitions, the courts are not equipped to evaluate the content of the counsel provided by a church to those individuals who voluntarily embrace the doctrinal stance of the church.[21]

It is inevitable that in making the courts the battleground for evaluating the content of the counseling, two inherently inconsistent world views will clash. The secular humanist proponents will echo the views set forth, for example, in the Humanist Manifesto that:

> Traditional theism, especially in the prayer-hearing God, assumed to love and care for persons, to hear and understand their prayers, and to be able to do something about them, is an unproved and outmoded faith. Salvationism, based on mere affirmation, still appears as harmful, diverting people with false hopes of heaven hereafter. Reasonable minds look to other means for survival.[22]

The opposite world view, of course, is that of the religious community as seen in the Christian belief in a personal God, who cares and

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20. *See, e.g., Ephesians* 4:7-13; *Romans* 12:3-8; 1 *Corinthians* 12:1-11.

21. Research has failed to disclose a single case where the content of the counsel given by a psychiatrist or a psychologist was the issue. There have been a few cases where hospitals, jails, and psychiatrists have been held liable for negligence in the care granted a patient or prisoner in their custody. Visticia v. Presbyterian Hosp. & Med. Center, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967) (plaintiffs' decedent admitted to psychiatric ward of hospital under the care of a psychiatrist and jumps from window killing self); *see also* Meier v. Ross Gen. Hosp., 69 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968).

22. Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH. L. REV. 1, 35 (1978).

answers prayer and has spoken through His Word—the Holy Scripture.

Thus, the theory of spiritual counseling malpractice or clergyman malpractice raises mind-boggling implications considering what the judicial system is being asked to do. Further, it is clear that clergyman malpractice is not akin to other professional malpractice concepts.

II. ANCILLARY CONSEQUENCES

Historically, the law has recognized certain types of communications as being privileged from disclosure, including communications between a clergyman and penitent.[23] This privilege recognizes the great need in society that individuals may confess matters to a clergyman free from the fear that the matter will ever be disclosed to others. The California Supreme Court has held that the clergyman-penitent privilege is absolute. In *In re Lifschutz*,[24] the court dealt with the issue of the constitutionality of the clergyman-penitent privilege. The defendant, a psychiatrist, contended that the privilege was unconstitutional since it distinguished between clergymen and psychiatrists/psychotherapists. The court noted that the clergyman-penitent privilege fostered a "sanctuary for the disclosure of emotional distresses," adding:

> Realistically, the statutory privilege must be recognized as basically an explicit accommodation by the secular state to strongly held religious tenets of a large segment of its citizenry. As the Law Revision Commission Comment accompanying the adoption of California's current privilege explains: "At least one underlying reason seems to be that *the law will not compel a clergyman to violate—nor punish him for refusing to violate—the tenets of his church which require him to maintain secrecy as to confidential statements made to him in the course of his religious duties.*" Wigmore, in his treatise, similarly relates the purpose of the privilege in a question and answer format: "Does the penitential relation deserve recognition and countenance? In a state where toleration of religion exists by law, and where a substantial part of the community professes a religion practicing a confes-

23. *See, e.g.*, CAL. EVID. CODE §§ 1030-34 (West 1966).
24. 2 Cal. 3rd 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

sional system, this question must be answered in the affirmative."[25]

A clergyman should not be placed in a position where he would be punished for refusing to violate the confidentiality of the penitent's communication. If the courts adopt the theory of spiritual counseling malpractice, clergymen will feel pressured to disclose to the family or others the contents of discussions with a counselee with the understanding that confidentiality will be honored. Often a counselee desires to protect his own reputation, as well as that of his family and others, in discussing a problem with his clergyman. If the courts impose on the clergy a duty to disclose, a counselee might not be as candid. As a practical matter, effective counseling by the clergy would be seriously hampered.

Some might assert that churches can always buy counseling malpractice insurance if they want to fulfill their mission to be Good Samaritans to those with spiritual and emotional problems. However, the argument for spiritual counseling malpractice insurance overlooks the implications this has for the clergyman-penitent privilege. It is well settled that an insured has a duty to cooperate with the insurer in defending a lawsuit.[26] Without such cooperation and assistance, the insurer is severely handicapped and may in some instances be absolutely precluded from advancing any defense. In a case where the penitent/counselee is not available to testify, the defense may hinge on a clergyman disclosing confidential communications. If the clergyman refuses to make such a disclosure, he might be held to have violated the duty to cooperate with the insurer and thereby release the insurer from his obligation to defend the suit. Thus, malpractice insurance may not be an effective protection.

In addition to the problems raised by the inferred duty to disclose contents of confidential communications, the theory of spiritual counseling malpractice also raises by inference a duty on the part of the clergyman to refer the most difficult problem counselees to professional specialists, such as psychiatrists, psychologists, and other mental health workers. In the medical field, for instance, there is a duty on the part of a physician or surgeon who is a general practitioner to refer his patient to a specialist or recommend the assis-

25. *Id.* at ____, 467 P.2d at 565, 85 Cal. Rptr. at 837 (emphasis added) (citations omitted).

26. Valladao v. Firemen's Fund Indemnity Co., 13 Cal. 2d 322, 328-29, 89 P.2d 643, 646 (1939).

tance of a specialist if, under the circumstances, a reasonably careful and skillful general practitioner would do so.[27] However, the nature of pastoral counseling may bar the creation of any such duty. In the Christian religion, for example, the role of a pastor is often described as that of a shepherd, caring for his troubled, discouraged, and fearful flock.[28] The pastor is under a mandate to protect those in his care from counsel that might undermine their faith.[29] In any given case, there may not be a professional psychiatrist, psychologist, or other mental health worker who is supportive of the doctrinal stance of the church. It would seem untenable that a legal duty would be created forcing such churches and their clergy to refer their troubled members to professionals who may, in fact, be hostile to the members' faith.[30]

The propriety of imposing on the clergy a duty to refer leads to the question of whether the courts should create a reciprocal legal duty on the part of mental health professionals, such as psychiatrists and psychologists, to refer to clergymen *all* spiritual cases—the simple as well as the serious—with a consequent liability for failing to refer their patients to the "proper" clergyman in the event of a suicide? Should the moral model take a backseat to the medical model in couseling?

III. LEGISLATIVE EXEMPTIONS AND SOME CONSTITUTIONAL IMPLICATIONS

The practical ramifications of developing criteria by which the courts will judge the qualifications, competence, and content of counseling by a clergyman are far-reaching. States such as California have chosen not to establish statutory criteria by which to evaluate the competence of those who counsel under the auspices of their church or synagogue. In fact, several California statutes expressly exempt such counselors from licensing requirements. For example,

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27. *See, e.g.*, note 16, at 6.04 *Duty to Refer to Specialist.*

28. *See Psalm* 23; *John* 10:1-29; *John* 21:15-17.

29. *See, e.g., Psalm* 1; 2 *Timothy* 4:1-4; *Titus* 1.

30. One might also question the wisdom of placing pastors, priests, rabbis, and other spiritual counselors under a legal duty to refer any of their flock to the "professionals" since the unfortunate fact is that the highest rate of suicide is found among physicians. Moreover, the suicide rate is significantly higher among psychiatrists than among those of any of the other sixteen specialty groups listed by the American Medical Association as part of the medical profession. BULLETIN OF SUICIDOLOGY 5 (Dec. 1968), *cited by* J. ADAMS, COMPETENT TO COUNSEL 21 (1972). In fact, no less than seven of Freud's early disciples died by suicide. Perr, *Suicide Responsibility of Hospital and Psychiatrist*, 9 CLEV.-MAR. L. REV. 427, 433 (1960).

provisions governing the licensing of medical professionals in California, state that the act shall not be construed so as to "regulate, prohibit, or apply to any kind of treatment of prayer, nor interfere in any way with the practice of religion."[31]

Similar language is found in the law governing licensing of psychiatrists and psychiatric technicians that provides that the act "does not prohibit the provisions of services regulated herein, with or without compensation or personal profit, when done by the tenets of any well recognized church or denomination. . . ."[32] Another example of the exemption of these counselors from state defined criteria is found in the licensing of marriage, family, child, and domestic counselors, which provides that the act "shall not apply to any priest, rabbi, or minister of the gospel of any religious denomination when performing counseling services as part of his pastoral or professional duties."[33] However, the law does not define what "counseling services" entail.

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

IV. CONSTITUTIONAL ISSUES

Judicial review of counseling by clergymen will inevitably draw the courts into the dangerous ground of evaluating the truth or error of the counseling given. As indicated in Part I, the courts are not equipped as a practical matter to deal with the issues in this arena, and it is questionable whether they are constitutionally permitted to render the kind of decisions called for in these types of cases.

The most significant decision by the United States Supreme Court on this issue is *United States v. Ballard*.[34] *Ballard* involved the "I Am" movement, founded by Guy and Edna Ballard and their son, Donald. The Ballards were indicted and convicted in federal district court for using, and conspiring to use, the mails to defraud.

31. CAL. BUS. & PROF. CODE § 2146 (West 1974).
32. *Id.* at § 4508.
33. *Id.* at § 17800.1.
34. 322 U.S. 78 (1944).

The Ballards represented that they could, by virtue of supernatural powers, cure persons of diseases normally classified as curable, as well as heal those with diseases ordinarily classified by the medical profession as incurable. The Ballards further represented that they had in fact cured hundreds of persons afflicted with these diseases and ailments.

The trial court instructed the jury that they were not permitted to decide whether any of the religious claims made by the Ballards were actually true. The central question for the jury was whether the Ballards honestly and in good faith believed their claims to be true.[35]

The Ninth Circuit Court of Appeals reversed the conviction and granted a new trial on the grounds that restricting the issue to that of good faith was error.[36] The Supreme Court granted *certiorari* and reversed the Ninth Circuit holding that the trial court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of the Ballards.[37]

Writing for the majority, Justice Douglas stated that the first amendment forbids the courts to examine the truth or verity of religious representations.

> The First Amendment has a dual aspect. It not only "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship" but also "safeguards the free exercise of the chosen form of religion." . . . "Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. . . . It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean

35. *Id.* at 81.
36. *Id.* at 82.
37. *Id.* at 83.

> that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.[38]

The analysis by Justice Douglas would apply with equal force to clergyman malpractice cases. The fact that *Ballard* involved criminal fraud, rather than a civil action, should make no difference. In either case, the first amendment protects the communication of beliefs that cannot be proved and that "might seem incredible, if not preposterous, to most people." Thus, under *Ballard*, the only issue for the secular courts would be a determination of whether the asserted religious belief was sincerely held.

Justice Jackson, in dissent, would have gone even further than the majority by also withholding from the jury the question of whether the Ballards honestly believed their religious claims to be true. He would have dismissed all of the charges and "have done

38. *Id.* at 86-87 (citations omitted).

with this business of judicially examining other peoples' faiths."[39] Justice Jackson found it difficult to reconcile the majority's conclusion with traditional religious freedoms on four grounds. First, as a matter of either practice or philosophy, he could not see how the Court could separate an issue as to what is believed from considerations as to what is believable. He asked, "How can the government prove these persons know something to be false which it cannot prove to be false?"[40]

Second, he observed that any inquiry into intellectual honesty in religion raises profound psychological problems. In quoting William James, he noted that it is religious experience, not theology or ceremony, that keeps religion going:

> If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways.[41]

Justice Jackson also noted that religious liberty includes the right to communicate such experiences to others and presents juries with an impossible task of separating dreams from real happenings.

> Such experiences, like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those whose field of consciousness does not include religious insight. When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him.[42]

Third, all religious representation is based on some element of faith.

> All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. The appeal in such matters is to a very different plane of credulity than is invoked by representations of secular fact in commerce. Some who pro-

39. *Id.* at 93.
40. *Id.*
41. *Id.*
42. *Id.*

> fess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's Fables.[43]

A fourth observation was that the chief wrong committed by false prophets is not to be measured in financial terms, but is on the mental and spiritual plane.

> There are those who hunger and thirst after higher values which they feel wanting in their humdrum lives. They live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support. When they are deluded and then disillusioned, cynicism and confusion follow. The wrong of these things, as I see it, is not in the money the victims part with half as much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.
>
> Prosecutions of this character easily could degenerate into religious persecution. I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes. But that is not this case, which reaches into wholly dangerous ground.[44]

Although the majority was not willing to go along with Justice Jackson's proposal to do away with the "business of judicially examining other peoples' faith," the Supreme Court may be more inclined to do so today in view of the broadening of the traditional definition of religion.[45] The early definition of "religion" centered on theism, but in the latter half of the twentieth century there has been a shift away from that position, as the court has broadened the definition of what is "religion" for free exercise purposes.[46]

The Court's redefinition of "religious belief" came primarily in a series of cases involving conscientious objectors. In 1933, the

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43. *Id.* at 94.

44. *Id.* at 94-95.

45. *See* notes 59-64 *infra* and accompanying text.

46. *Compare* Davis v. Beason 133 U.S. 333, 342 (1890) *and* Cantwell v. Connecticut, 310 U.S. 296 (1940) *with* United States v. Seeger, 380 U.S. 163, 176 (1965) *and* Welsh v. United States, 398 U.S. 333, 344 (1970).

Court upheld the conviction of an alien under an act that required aliens applying for naturalization to take an oath affirming a willingness to bear arms, regardless of their opinions or beliefs.[47] Justice Hughes stated in his dissent that:

> The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. . . . One cannot speak of religious liberty, with proper appreciation of its essential and historical significance, without assuming the existence of a belief in supreme allegiance to the will of God.[48]

This traditional definition was set aside in *United States v. Seeger*,[49] where the Court reversed two of three convictions under the Universal Military Training and Service Act. The Court held that the test of "religious" belief within the meaning of the Act was whether it was a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those who admittedly qualify for the exemption."[50] In *Seeger*, the Court noted that while it could not examine the truth of a belief, the threshold question of whether it was "truly held" could be resolved by the courts.[51]

The status of the conscientious objector was extended further in *Welsh v. United States* to include the realm of "religious belief" by "all those whose consciences spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[52] Thus, in the context of counseling malpractice cases, the only issue that the courts could properly review is whether the counsel of the counselor was indeed a belief held in good faith.

The Supreme Court has also examined first amendment rights in determining whether a tort has been committed. In *New York Times Co. v. Sullivan*,[53] a public official sought to recover damages for a defamatory falsehood published in the New York Times, relating to his official conduct. In reversing the Alabama courts' decisions, the Supreme Court held that the Alabama courts failed to

47. United States v. MacIntosh, 283 U.S. 605 (1931).
48. *Id.* at 633-34.
49. United States v. Seeger, 380 U.S. 163 (1965).
50. *Id.*
51. *Id.*
52. 398 U.S. 333, 344 (1970).
53. 376 U.S. 255 (1964).

safeguard the first amendment freedoms of speech and press.[54] The Court then imposed a burden of proving that the "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ."[55] The Court stated that the first amendment protects erroneous speech about public officials, which might otherwise be defamation if it referred to private citizens, because of the need for "breathing space" for the freedom of expression to survive.[56]

By analogy, the free exercise clause, which has been called the "favored child of the First Amendment,"[57] should receive similar safeguards. The "actual malice" standard may be an even more rigid standard than the "sincerity" test of *Ballard*. Arguably, the protection offered spiritual counselors should be greater than the protection given the press in their coverage of public officials since the public official would not have control over the publicity generated by the media. In counseling cases, however, it is the counselee who voluntarily seeks out the counseling of the clergyman and is free to accept or reject the counseling given.

Arguably, counseling by religious groups and clergy that is shown to be malicious should not receive first amendment protection. A narrow "actual malice" test may avoid first amendment obstacles. The failure of a clergyman to embrace either the views or "treatment" preferred by the vast majority of professionals would not render him liable unless "actual malice" was proven.

This approach would be consistent with the most recent Supreme Court decision on the protection offered individuals whose point of view differs from the majority in the moral or religious sphere. In *Wooley v. Maynard*,[58] the Supreme Court held that a Jehovah's Witness could not be punished by the State of New Hampshire for covering up the state motto "live free or die" on his automobile license plates—a motto that he considered repugnant to his moral, religious, and political beliefs. Chief Justice Burger, writing for the Court, noted that the individual was forced to express "an ideological point of view" he could not accept.[59]

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54. *Id.* at 264.
55. *Id.* at 279-80.
56. *Id.* at 271-72.
57. Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1122 (1973).
58. 430 U.S. 705 (1977).
59. *Id.*

> The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.[60]

Inevitably, there will be times when the counsel given by a clergyman of one sect will appear to be "morally objectionable" and even "repugnant" to the moral and religious beliefs of the majority. It is when the courts undertake the task of selecting one system of belief for preferred treatment that the first amendment is violated.

In *Rosicrucian Fellowship v. Rosicrucian Nonsectarian Church*[61] the California Supreme Court provided a helpful summary of the types of ecclesiastical matters that the courts should avoid:

> "The courts of the land are not concerned with mere polemic discussions, and cannot coerce the performance of obligations of a spiritual character, or adopt a judicial standard for theological orthodoxy, or determine the abstract truth of religious doctrines, or adjudicate whether a certain person is a Catholic in good standing, or settle mere questions of faith or doctrine, or make changes in the liturgy, or dictate the policy of a church in the seating of the sexes, or the playing of instrumental music, or decide who the rightful leader of a church ought to be, or enjoin a clergyman from striking the complainant's name from his register of communicants, or enforce the religious right of a member to partake of the Lord's Supper." . . . It is also settled principle that: "It is perfectly clear that, whatever church relationship is maintained in the United States is not a matter of status. It is based, not on residence, or birth, or compulsion, but on voluntary consent. It rests on faith, 'primarily, faith in God and his teachings; secondarily, faith in and reliance upon each other.' It is 'one of contract,' and is therefore exactly what the parties to it make it and nothing more. A person who joins a church covenants expressly or impliedly that in consideration of the benefits which result from such a union he will submit to its control and be governed by its laws, usages and customs whether they are of an ecclesiastical or temporal character to which laws, usages, and

60. *Id.* at 716.

61. 39 Cal. 2d 121, 245 P.2d 481 (1952).

> customs he assents as to so many stipulations of a contract."[62]

Clearly, counseling offered by clergymen touches on a number of these areas.

CONCLUSION

The law of torts has been the battleground for social theory. Each new theory raises far more questions than answers and the theory of clergyman malpractice is no exception. Since clergyman malpractice inevitably deals with doctrinal, ecclesiastical, and spiritual issues, judicial review will force the courts into dangerous territory. Thus, with the possible exception of the instance where "actual malice" on the part of the counselor is alleged to exist, it seems clear that the first amendment will bar the introduction of this theory into the legal arena.

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62. *Id.* at 131-32, 245 P.2d at 487-88 (citation omitted).