

10-1-1989

Clergy Malpractice: The Cause of Action That Never Was

Steven A. Chase

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>



Part of the [Religion Law Commons](#)

Recommended Citation

Chase, Steven A. (1989) "Clergy Malpractice: The Cause of Action That Never Was," *North Carolina Central Law Review*: Vol. 18 : No. 2, Article 4.

Available at: <https://archives.law.nccu.edu/ncclr/vol18/iss2/4>

This Article is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact jbeeker@nccu.edu.

CLERGY MALPRACTICE: THE CAUSE OF ACTION THAT NEVER WAS

BY STEVEN A. CHASE*

I. INTRODUCTION

Between 1974 and 1979 Kenneth Nally was an active member of Grace Community Church in southern California. On numerous occasions Nally sought and received counseling, guidance, and disciplining from several of the Grace Community Church pastors. In April 1979, Nally, who had a history of depression, took his own life with a shotgun. On March 31, 1980, Nally's parents filed a complaint against Grace Community Church and four of its pastors.¹ The complaint alleged counts of "clergyman malpractice",² ordinary negligence in the religious counseling and guidance given Nally by church pastors, and outrageous conduct based on the content of religious counsel.³ The case, *Nally v. Grace Community Church of the Valley*,⁴ became the catalyst for dozens of "clergy malpractice"⁵ lawsuits across the country. One by one, however, these lawsuits resulted in findings of no malpractice liability for either church or pastor.

Today, nine years after the filing of *Nally*, not a single plaintiff has prevailed under the theory of clergy malpractice—not even Mr. and Mrs. Nally.⁶ Three reasons for the theory's failure are: conflicts with the free exercise clause; conflicts with the establishment clause; and the availabil-

* The author received his J.D. from Northwestern School of Law of Lewis and Clark College in 1989. Currently, he is an associate with Cosgrave, Vergeer & Kester, in Portland, Oregon. The author wishes to thank Cathy Chase for her support during his law school education.

1. *Nally v. Grace Community Church of the Valley*, No. 18668-B (L.A. County Super. Ct., Cal., filed Mar. 31, 1980).

2. The term "clergyman malpractice" is rumored to have been coined by someone in the insurance industry, possibly to generate sales of a new product—"clergyman malpractice insurance." Beecher, *Ministerial Malpractice*, LIBERTY MAGAZINE, Mar.-Apr. 1980, at 15. In the Spring of 1979, Church Mutual Insurance Company began offering malpractice coverage for the clergy. Marty, *Ministerial Malpractice*, 96 CHRISTIAN CENT. 511, 511 (1979).

3. *Nally*, No. 18668-B (L.A. County Super. Ct., Cal., filed Mar. 31, 1980).

4. 204 Cal. Rptr. 303, 304 (1984). Opinion deleted from Cal. App. 3d on direction of the California Supreme Court by order dated August 30, 1984, 157 Cal. App. 3d 940 (1984).

5. The term "clergy malpractice" is sometimes used loosely to refer to a broad range of liability theories that cover both intentional and negligent conduct. This paper, however, uses the term to refer only to professional negligence by the clergy. The focus of this paper is on the application of clergy malpractice theory in a clergy counseling context.

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

ity of alternative intentional tort theories. These three reasons support the conclusion that clergy malpractice is the cause of action that never was.

II. FREE EXERCISE CLAUSE

A. *A Balancing of Interests*

The free exercise clause forbids laws "prohibiting the free exercise" of religion.⁷ The threshold inquiry for determining when the free exercise clause applies to a counseling situation is whether or not the counseling is religious.⁸ If the counseling that allegedly caused a plaintiff distress is a "sincere"⁹ "part of the belief and practices" of a "religious group,"¹⁰ then the free exercise clause is applicable.

If the free exercise clause applies, the court must apply the two-prong balancing test enunciated by the United States Supreme Court in *Sherbert v. Verner*.¹¹ Under *Sherbert's* first prong, the party asserting the free exercise clause must show that the law in question poses a substantial burden on the exercise of his or her religious beliefs or practices.¹² Freedom to believe is absolute, but freedom to exercise that belief is not.¹³

7. U.S. Const. amend I. The fourteenth amendment renders the free exercise clause applicable to the states as well as to Congress. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

8. *United States v. Lee*, 455 U.S. 252, 256-57 (1982) (Old Order Amish member failed to withhold social security taxes from his employees); see generally, Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984).

9. Although the free exercise clause forbids inquiry as to the truth or falsity of asserted religious belief, it may sometimes be proper for a court to inquire as to whether the defendant is sincerely advocating a religious doctrine or falsely professing such beliefs for fraudulent purposes. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* § 17.11, at 1087-89 (3d ed. 1986), citing *Ballard v. United States*, 329 U.S. 187 (1946) (the purported religion was the "I Am" movement, founded by the Ballard family). See also *United States v. Seeger*, 380 U.S. 163 (1965) (the threshold question of whether a belief was "truly held" can be resolved by the courts).

10. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (discussing religious beliefs and practices).

11. 374 U.S. 398 (1963) (Seventh Day Adventists fired for refusal to work on Saturdays, her religion's day of rest). Prior to *Sherbert* the Supreme Court upheld regulations of religious conduct so long as the state acted pursuant to a non-religious purpose. See, e.g., *Reynolds v. United States*, 98 U.S. (8 Otto) 145 (1879), where the Court upheld a federal statute prohibiting polygamy. The majority indicated that Congress was free to prohibit the practice of polygamy despite its religious implications to members of the Mormon Church. *Id.* at 162-67. See also *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (state law requiring compulsory vaccinations upheld despite objections on religious grounds); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state statute providing that "no minor . . . sell, or offer for sale, upon the street or in other public places, any newspapers, magazines, periodicals. . ." was upheld despite objections by Jehovah's Witnesses that the free exercise clause protects their right to distribute religious literature); *Hill v. State*, 38 Ala. App. 404, 88 So. 2d 880 (1956) (law against "snakehandling" held not unconstitutional despite relationship to a religious practice).

12. *Sherbert*, 374 U.S. 398. For a discussion on the difficulty of defining "religion" and "religious beliefs" see Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163 (1977).

13. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (Jehovah's Witness who solicited contributions for the publication of purportedly religious literature was charged with violating anti-solicitation statute).

Under *Sherbert's* second prong, any substantial burden on religious practice will be deemed unconstitutional unless the practice poses "some substantial threat to public safety, peace or order."¹⁴ The following two United States Supreme Court cases illustrate the two-prong test.

In *Sherbert v. Verner*, Ms. Sherbert was disqualified by the South Carolina Employment Security Commission from receiving unemployment compensation benefits, solely because of her refusal to accept employment in which she would be required to work on Saturdays. Sherbert, a member of the Seventh Day Adventist Church, refused to work on Saturdays because of her religious beliefs. The Court concluded that if Sherbert was compelled to work on Saturdays her religious practices would be substantially burdened. The Court also concluded that if South Carolina allowed unemployment compensation to Seventh Day Adventists who refused to work Saturdays, South Carolina's welfare system would not be substantially threatened.¹⁵ Therefore, under the balancing test, Sherbert's disqualification would result in an unconstitutional burden on the free exercise of her religion.¹⁶

Nine years after *Sherbert*, the Supreme Court again exercised the opportunity to apply its two-prong balancing test. In *Wisconsin v. Yoder*,¹⁷ the Court invalidated Wisconsin's compulsory school attendance law (requiring school attendance until age 16) as applied to Old Order Amish families. Jonas Yoder and other members of the Conservative Amish Mennonite Church challenged the school-attendance law on grounds that the law was at odds with their religious practice of refusing to submit their children to a secular education beyond the eighth grade.¹⁸ The Court accepted Yoder's evidence as sufficient to show that the law in question posed a substantial burden on the exercise of Yoder's religious beliefs or practices.¹⁹ The Court then determined that, although the state does have an interest in universally educating all of its citizens, such an interest would not be substantially impaired by a compulsory school exemption for Amish children.²⁰ The Court made this determination based, in part, on evidence that nearly all Amish children continue to live within the noncontemporary Amish community throughout their lives.²¹ In sum, the law was unconstitutional as applied because one, the law imposed a substantial burden on the exercise of religious freedom and

14. 374 U.S. at 403.

15. *Id.* at 403-06.

16. *Id.*

17. 406 U.S. 205.

18. *Id.* at 216. The Old Order Amish daily life and religious practices stem from their response to their literal interpretation of the bible that they "be not conformed to this world." *Id.* "This command is fundamental to the Amish faith." *Id.*

19. *Id.* at 216-19.

20. *Id.* at 228-29.

21. *Id.* at 224.

two, the state failed to prove that the Amish religious practice at issue posed a substantial threat to public safety, peace, or order.

In summary, applying the balancing test of *Sherbert*, a clergy counselor who is sued for clergy malpractice can find sanctuary in the free exercise clause if he can convince the court that his conduct was an important part of a sincere religious practice,²² that a finding of malpractice liability will impose a substantial burden on the exercise of his religious practices, and that such burden is not outweighed by a compelling state interest.²³

B. *State Interest Increases in Proportion to the Culpability of Clergy Counselor's Conduct*

Historically, state and federal courts sitting on criminal cases have found state interest in enforcing criminal laws to be almost always compelling enough to justify imposition of a substantial burden on an individual or group's religious freedom.²⁴ Similarly, but to a lesser extent, state courts sitting on civil cases involving intentional tortious conduct have found state interest compelling enough to allow an injured plaintiff a remedy, despite the burden which is sometimes substantial on religious

22. In view of constitutional scholar Lawrence Tribe, "[a]ll that is 'arguably religious' should be considered religious in a Free Exercise analysis. . . ." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6, at 828-29 (1978). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14.6, at 1179-88 (2d ed. 1988). Numerous other commentators have criticized the mere suggestion that a court should draw a line between religious and psychological counseling by pastors. See, e.g., Ericsson, *Clergy Malpractice: Ramifications of a New Theory*, 16 VAL. U. L. REV. 163 (1981) (Mr. Ericsson is Special Counsel for the Center for Law and Religious Freedom of the Christian Legal Society, Washington D.C.); Funston, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W. L. REV. 507, 514-17 (1983) (the author considers the functions of the minister, psychiatrist, and psychologist as overlapping and impossible to separate). For a different view see Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 U. SAN FERN. VALLEY L. REV. 47, 57-59 (1981) (Bergman believes that a secular counseling function can be conceptually separate from the clergyman's ecclesiastic and purely religious functions).

23. Relevant to this inquiry is the importance of the state's interest (is it a "compelling" one?) and the extent to which the state's interest can be achieved using means that do not burden religious practices (least restrictive means are required). J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW*, § 17.8, at 1073 (3d ed. 1986).

24. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1879) (the Court upheld application of a federal law prohibiting polygamy to a Mormon whose religion required him to engage in that practice); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (the Court upheld application of a state law prohibiting the sale of merchandise in public places by minors to a nine year old child who was distributing religious literature. The Court found that the state's interest in the health and well-being of young people was compelling enough to justify the incidental burden on religion). Compare with *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (Even if a person makes a genuine claim that an illegal drug is central to his religious practice, a court will not grant that person an exemption to the state's criminal laws, where use of the drug is likely to cause a person to behave violently toward others. If, however, the drug's effects are dangerous solely to the taker, an exemption might be made on first amendment grounds. The court granted an exemption to American Indians using the drug peyote for purely religious purposes). For an in depth study on a criminal prosecution of religious practices, see I. R. RUBENSTEIN, *LAW ON CULTS* (1981).

freedom.²⁵ As of this writing, however, no court has allowed a recovery for a clergy counselor's negligent practice of his profession.²⁶ The variation in results among the three different kinds of conduct—criminal, intentional, and negligent—is explained by looking at each side of the *Sherbert* balancing scale. On the state interest side of the scale, the state interest becomes heavier as the clergy's conduct increases in culpability. This is so because a person has the ability to recognize and change intentional conduct (of moderate culpability) more easily than he can recognize and change negligent conduct (of low culpability). Negligent conduct is often too vague and uncertain to identify with precision, especially in a counseling context. Thus, the easier the conduct can be changed to conform to society's preferred standard, the greater deterrent effect any sanction, such as civil liability, will have. On the other hand, if the deterrent of civil liability does turn out to be effective, the result may very well be a "chilling" effect on the exercise of important religious practices. The threat of civil liability for engaging in the vague concept of negligent clergy counseling will intimidate clergy, many of whom are uninsured against such a loss, into not exercising their first amendment rights.²⁷ This risk of chilling the free exercise of religion adds weight to the clergy interest side of the scale. One other point worth mentioning is that the more culpable a clergy's conduct, the less likely it is an impor-

25. See, e.g., *Hester v. Barnett*, 723 S.W. 2d 544 (Mo. App. 1987), where plaintiff Harold Hester alleged that he, his wife and three children and been "bound together by love and affection" until defendant, the family's pastoral counselor, intentionally and maliciously set out to alienate plaintiff from his family's affections. Specifically, defendant was alleged to have encouraged Ms. Hester to leave her husband in exchange for the friendship of defendant's church. As a direct and proximate result of such tortious conduct, the couple's marriage allegedly suffered a loss of "love, care, companionship, consortium and trust." *Id.* at 554-55. The trial court sustained the pastor's motion to dismiss. *Id.* at 549.

The Missouri Court of Appeals reversed the dismissal on grounds that alienation of spousal affections is disruptive not only to personal felicity but also to the family relationship. This, the court held, is a substantial threat to public welfare and order which the law may redress, notwithstanding the free exercise clause. *Id.* at 555.

26. Clergy malpractice actions rarely reach the trial stage, as defendants' insurance carriers do not want to risk a precedent setting decision favoring liability. Burek, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPPERDINE L. REV. 137, 142 (1986).

27. The author is drawing an analogy from the doctrine of "overbreadth" that protects free speech and free expression from overbroad statutes infringing on fundamental rights in a manner that is not the least restrictive necessary to protect a compelling state interest. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88 (1940) (vague ordinance prohibiting the distribution of literature of any kind, under every sort of circulation, at any time, at any place, and in any manner, without a permit from the city manager was held invalid on its face, as a prior restraint on free speech).

Justice Marshall put the problem of overbreadth this way: An overbroad statute "hangs over [people's] heads like a sword of Damocles. . . . That this Court will ultimately vindicate [a person] if his speech is constitutionally protected is of little consequences—for the value of a sword of Damocles is that it hangs—not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (dissenting opinion). Marshall added that the focus of the overbreadth doctrine "is not on the individual actor before the court but on others who may forgo protected activity rather than run afoul of the statute's proscriptions." *Id.* at 229.

tant part of a sincere religious practice,²⁸ and even if the conduct is part of a sincere religious practice, defendant's religious organization is not likely to admit it.²⁹

In summary, the *Sherbert* two-prong balancing test requires a court addressing a claim for clergy malpractice to delve into relevant spiritual, sacramental, and doctrinal matters to determine the extent that an imposition of liability will burden religious freedom.³⁰ If the burden is substantial, the court will find the imposition of liability unconstitutional, unless there is a state interest compelling enough to justify the burden. When the clergy's conduct is merely negligent, a plaintiff will have an extremely difficult task in showing that the state has a compelling interest that justifies a substantial burden on religious freedom. Plaintiff's task is extremely difficult because clergy counseling is a practice that is deeply rooted and very important to most religions in this country. Imposition of liability runs the risk that the free exercise of clergy counseling will be chilled. Balanced against such a substantial burden on religious freedom is a low state interest; the state interest is low because a sanction for negligent conduct (malpractice) is likely to have more than a minor deterrent effect. If, however, the deterrent effect should turn out to be great—to the point of overkill—then any chilling effect on the free exercise of religion will weigh even more heavily against liability.³¹

28. Consider the following hypothetical: If a charlatan raises funds to construct a church and then diverts the donations for personal use, the charlatan, if accused of making false representations, will not be allowed to hide behind the free exercise clause, because such misrepresentations are clearly not part of the charlatan's beliefs and practices. See *United States v. Ballard*, 322 U.S. 78 (1944) (Jackson J. dissenting).

29. See, e.g., *Milla v. Tamayo*, 187 Cal. App. 3d 1453, 232 Cal. Rptr. 685 (1986) (a Roman Catholic Church that was sued on a theory of civil conspiracy denied that sexual intercourse between a counselor priest and a 16 year old parishioner and an alleged coverup by several priests and one Archbishop furthered the religious objectives of the employer church).

30. The author accepts the position expressed by Samuel E. Ericsson that it is impossible to draw a clean line between spiritual and psychological or psychiatric counseling by a clergy person. As Mr. Ericsson stated the problem: "[i]t is impossible to separate the 'cure of minds' from the 'cure of souls.'" Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U. L. REV. 163, 166 (1981).

31. For other discussions on how the free exercise clause clashes with the concept of subjecting a clergy counselor to malpractice liability, see Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U. L. REV. 163, 176-184 (1981); Burek, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPPERDINE L. REV. 137, 143-45 (1986); Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1, 32-34 (1986); Klee, *Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?*, 17 TOLEDO L. R. 209, 223-26 (1985); Funston, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, CAL. W. L. REV. 507, 534-42 (1983). For an article on the free exercise clause in general, see Pfeffer, *The Supremacy of Free Exercise* 61 GEO. L.J. 1115 (1973) (the free exercise clause is the "favored child" of the first amendment. *Id.* at 1142).

III. ESTABLISHMENT CLAUSE

The Question of Excessive Entanglement

The establishment clause forbids laws respecting the establishment of religion.³² Any law that is challenged under the establishment clause must pass a three-part test enunciated by the United States Supreme Court in *Lemon v. Kurtzman*.³³ If the law does not satisfy all of the following conditions it is invalid as an unconstitutional violation of the "wall of separation" between church and state:

1. The law must have a secular (nonreligious) purpose.
2. The primary effect of the law must neither advance nor inhibit religion.
3. The operation of the law must not foster excessive entanglement of government with religion.³⁴

When a court imposes a duty and establishes a standard of care in a clergy malpractice case, serious establishment clause problems arise. Several commentators present valid arguments as to why the imposition of a duty on clergy counselors violates the establishment clause.³⁵ This paper does not pursue that argument because there is an aspect of clergy malpractice that is more interesting and much more vexing. The more vexing issue arises when a court attempts to establish a standard of care for a clergy counselor defendant. The source of the conflict is the establishment clause, and the conflict is most commonly known as excessive church and state entanglement.

Malpractice is a specialized type of negligence that has reference to a particular standard of care which is undertaken by a given profession or trade.³⁶ Problems arise when a court seeks to impose either a secular or

32. U.S. CONST. amend. I. The fourteenth amendment renders the free exercise clause applicable to the states as well as to Congress. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

33. 403 U.S. 602 (1971) (the Court held that salary supplements for parochial school teachers was an unconstitutional entanglement between church and state). The first two prongs of the *Lemon* test are explained in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (Pennsylvania public schools' daily practice of reading from the Bible at beginning of school day held to be unconstitutional violation of establishment clause).

34. *Id.*

35. See, e.g., Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U. L. REV. 163 (1981) (Ericsson argues that a clergyperson has moral obligations to his or her parishioners that do not always rise to the level of a legal duty). See also Burek, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPPERDINE L. REV. 137, 148-150 (1986) ("[f]or purely pragmatic reasons it would be virtually impossible to impose a duty upon a minister, priest, or rabbi in terms of the performance of spiritual or ministerial functions." *Id.* at 149). For a contrary opinion, see Klee, *Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?* 17 TOLEDO L. R. 209 (1985) ("[t]he tort concept of clergy malpractice imposes a duty on the clergyman to recognize his own counseling limitations and refer those cases beyond the scope of his competence to counseling practitioners with more specialized training." *Id.* at 253).

36. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1, 78 (1986). The Restatement (Second) of Torts has this to say about the standard of care owed by a professional: "Unless he represents that he has greater or less

a denominationally specific standard of care on the clergy counselor. Courts encounter problems for the following reasons. First, because psychiatrists and psychologists receive education and training that is intensively specialized, the same level of competence and professional knowledge cannot be expected from a clergy person.³⁷ Second, many members of the clergy are knowledgeable about secular counseling models or practices but do not, because of religious beliefs, choose to follow such models or practices.³⁸ Third, because of the vast diversity within the religious community, any attempt to make a comparison of accepted religious techniques for the purpose of identifying an acceptable standard will fail.³⁹ The standard of care for psychiatry, for example, can be derived by comparing established therapies, noting the points of agreement or similarity in techniques or fundamental precepts. "Where the established schools of thought are relatively few, this might be accomplished with relative ease. In the religious milieu of pastoral counseling, where there are hundreds of varying theologies and doctrines, such analysis would be practically impossible. Thus, the diversity of religious belief systems could make it impossible to define a general standard with sufficient precision to measure conduct."⁴⁰ Fourth, even if a different standard of care could be imposed for each and every sect, a different standard within each sect would have to be imposed depending on whether the counselor was a bishop, priest, Pope, minister, nun, or Sunday school teacher. These different levels of ministry may carry different degrees of skill and learning, different functions, and different authority within the sect.⁴¹

skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." RESTATEMENT (SECOND) OF TORTS § 299A (1965). See also discussion in *Nally v. Grace Community Church of the Valley*, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (1987). The court of appeals held that one, nontherapist religious counselors have a duty to refer suicidal persons to those mental health professionals better authorized and equipped to deal with suicidal persons and two, the imposition of such a duty on pastoral counselors does not violate freedom of religion guarantees of the first amendment. On appeal to the California Supreme Court, the court reversed and held that, first amendment issues aside, the law of California imposes no "duty to refer" on pastoral nontherapist counselors. 47 Cal. 3d 278, 292-300, 763 P.2d 948, 956-61, 253 Cal. Rptr. 97, 105-10 (1988)

37. Bergman, *Is The Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V. L. REV. 47 (1981).

38. Burek, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPPERDINE L. REV. 137, 152 (1986).

39. Note, *Religious Counseling—Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide*, 1985 ARIZ. ST. L. J. 213, 235 (1985) (authored by M. Maureen Anders).

40. *Id.* In 1988, there were at least 155 separate religious bodies in the United States. *Consensus of Religious Groups in the U.S.*, in THE WORLD ALMANAC & BOOK OF FACTS 1989, at 590-91 (1988). One study reports that between 1965 and 1978 nearly 1,300 new cults appeared in the United States. Rudin, *The New Religious Cults and the Jewish Community*, 73 RELIG. EDUC. 350 (1978).

41. Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U. L. REV. 163, 170-71 (1981).

Establishing a standard of care for a clergy counselor would violate the second and third prongs of the *Lemon* test because the effect—clergy liability—would inhibit a deeply significant part of religious practice, and because judicial enforcement of a clergy counseling standard would entail pervasive monitoring of a religious activity by secular authorities, resulting in excessive church-state entanglement.⁴² One team of commentators summed up the problem this way:

In order to rule on a clergy malpractice claim, a court would be required to take 'expert' testimony, presumably from other clergymen of the same faith, as to whether the defendant acted in conformance with church teachings on clergy conduct. The defendants might very well counter with their own clergymen experts to explain why their interpretation of church teachings permits conduct of the sort in question. In addition to the utter repugnancy of clergymen testifying against clergymen on religious matters in a court of law, a court would be required to determine the correct interpretation of church dogma in order to determine the applicable standard of care. This is an inquiry which the First Amendment would clearly seem to forbid.⁴³

Although two courts have recognized the serious problems raised by the establishment clause in clergy malpractice cases, both courts dismissed the cause of action on other grounds.⁴⁴ The true effect of an es-

42. Klee, *Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?*, 17 TOLEDO L. REV. 209, 224 (1985). But cf. *Lemon*, 403 U.S. at 619 (discussing continuing state surveillance of parochial school teachers).

43. English & Dibert, *Punishing the Preacher*, 17 THE BRIEF 6, 10 (Summer 1988).

44. In *Hester v. Barnett*, 723 S.W. 2d 544 (1987), plaintiffs, husband and wife, brought an action against a Baptist minister for "ministerial malpractice." *Id.* at 554. Plaintiffs alleged that the minister who counseled them about child discipline problems owned a duty of care toward plaintiffs that arose out of the special counseling relationship. They further alleged that the minister breached his duty when he divulged confidential communications made during counseling to other members of the church. Specifically, the complaint alleged that the minister committed counseling malpractice in that he "acted contrary to ministerial ethics and against Missouri law. . . and against the standard of conduct imposed upon ministers of the gospel." *Id.* at 554.

The Missouri Court of Appeals identified the establishment clause issue as "whether pastoral counseling is so ineluctably a function of the particular religion that no one definition of its malpractice can evolve into a standard of professional performance, and is otherwise so purely sacerdotal a function, that it is both unfeasible as a theory of tort and not constitutionally permissible." *Id.* at 553. The court then avoided deciding the first amendment issue by affirming the trial court's dismissal of the malpractice claim on grounds that plaintiff failed to allege that defendant had a legal, as distinguished from moral, duty.

In *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), the Supreme Court of California had an excellent opportunity to establish landmark precedent concerning first amendment religious issues, but instead held that the trial court correctly granted defendants' nonsuit motion on grounds that defendants had no legal duty to prevent a suicide. 47 Cal. 3d 299-300. After the court stated that the case would not be decided on constitutional grounds, *id.* at 291, the majority took the liberty of discussing the constitutional question in dicta.

Even assuming that workable standards of care could be established in the present case, an additional difficulty arises in attempting to identify with precision those to whom the duty should apply. Because of the differing theological views espoused by the myriad of religions in our state and practices by church members, it would certainly be impractical, and quite possibly

establishment clause defense may not be the dismissal of a clergy malpractice claim on establishment clause grounds, but rather the defense may work to intimidate judges into dismissing the claim instead of confronting the vexing standard of care issue.⁴⁵

IV. INTENTIONAL TORT THEORIES

A. Introduction

Sections II and III above explain why first amendment concerns have consistently stifled attempts by plaintiffs' attorneys to develop a viable theory of clergy malpractice in a clergy counseling context. One very significant reason that courts are unwilling to expand tort liability in this area⁴⁶ is the availability of alternative theories of recovery; primarily intentional tort theories. Granted, intentional tort theories are not always available because of difficulties in proving requisite mental states; however, if the legal system occasionally leaves an injured plaintiff without redress, that harm to society is easily outweighed by the advantages of continued religious freedom, as protected by sturdy free exercise and establishment clauses.⁴⁷

unconstitutional, to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity.

Id. at 299.

Because California is a tort theory leader—see, e.g., *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (therapist held liable for failure to warn third person whom patient said he would kill); *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948) (court placed the burden of proof as to causation on two defendants who both, at the same time, shot in the direction of plaintiff. Plaintiff, struck by a single bullet, could not prove which defendant fired the bullet that hit him.)—a decision on the constitutional merits of the case would have had a significant impact on the viability of the theory of clergy malpractice in a counseling context.

45. In *Destefano v. Gabrian*, 729 P.2d 1018 (Colo. App. 1986), plaintiff-husband brought a negligence action against a Catholic Diocese, alleging that the diocese owed a continuing duty to him to reasonably train, interview, and supervise parish priests who do marriage counseling. Plaintiff also alleged that the diocese knew or should have known that a certain priest (Gabrian) had a history of indiscretions with vulnerable married women. Plaintiff further alleged that as a direct and proximate result of the conduct of the defendants, the priest and plaintiff's wife entered into an intimate relationship which contributed to the ultimate dissolution of the marriage between plaintiff and his wife. *Id.* at 1019.

The Colorado Court of Appeals held that plaintiff's allegations of negligence were insufficient and that defendant diocese's conduct was "not tortious and not actionable." No further explanation was given by the court. *Id.* at 1021. The court also held that plaintiff's claims against the priest for negligent counseling, outrageous conduct, and breach of fiduciary duty amounted to claims of alienation of affections, criminal conversion, and seduction, which were barred by Colorado's "heart balm statute." *Id.* (The Colorado Supreme Court subsequently reversed in part and affirmed in part. *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988). The subsequent decision is discussed *infra* in note 49).

46. For a contrary opinion on the unwillingness of courts to expand tort liability see Basil, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*, 19 RUTGERS L. J. 419 (1988).

47. The United States Supreme Court has held on numerous occasions that plaintiffs with meritorious suits must sometimes go without recovery so that important first amendment rights are safe-

Section IV below first discusses some advantages that intentional tort theories have over the clergy malpractice theory. The section then proceeds with illustrations of how several of the more successful intentional tort theories have been applied in specific cases involving clergy counselors.

B. *Advantages That Intentional Tort Theories Have Over The Clergy Malpractice Theory*

The intentional torts of a cleric are often actionable even though incidental to religion.⁴⁸ As a general rule, negligence (even when it is malpractice) is easier to prove than intentional tortious conduct. This general rule does not apply, however, when the wrongful conduct is committed by a clergy counselor. In that situation, the rule is clearly the converse. A plaintiff will have more success with intentional tort theories than with a clergy malpractice theory for three reasons. First, the state has a greater interest in providing an avenue of recovery for intentional torts because the sanction—civil liability—will have a greater deterrent effect. Second, intentional torts are more likely to be secular in nature, or at least not as central to a sincere religious practice. If the tortious conduct is purely secular in nature, then the free exercise and establishment clauses are inapplicable.⁴⁹ If the tortious conduct is religious in nature,

guarded. See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) (the Court held that plaintiff must bear the burden of showing the falsity of defendant's defamatory speech when plaintiff seeks damages against a media defendant for speech of public concern. *Id.* at 777). See also the defamation case of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). ("The First Amendment requires that we [the Court] protect some falsehood in order to protect speech that matters." *Id.* at 341).

48. See, e.g., *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 334-35, 341 A.2d 105, 107-08 (1975) (courts might have the authority to regulate areas of paramount state concern relating to maintenance of marriage and family relationships, despite church practice of "shunning" outsiders); *Handley v. Richards*, 518 So. 2d 682, 685 (Ala. 1987) ("Liability for such conduct [intentional torts of a cleric] does not clash with the free exercise clause of the First Amendment because conduct albeit promoted by religious belief is subject to regulation for the protection of society. That is the clear sense of *Cantwell v. State of Connecticut*, 310 U.S. 296, . . . (1940) at 303. . . ." *Handley* involved a wrongful death claim arising out of a suicide, allegedly caused by a minister's malpractice or "outrageous conduct" during counseling); *Meroni v. Holly Spirit Ass'n*, 125 Misc. 2d 1061, 1067, 480 N.Y.S.2d 706, 710 (1984) (allegations of intentional infliction of emotional distress and wrongful death as a result of "brainwashing").

For an interesting case where a minister testified that he never held the religious beliefs at issue to be true, see *In re The Bible Speaks*, 73 Bankr. 848 (D. Mass. 1987). In *In re The Bible Speaks*, an heiress who donated more than six million dollars to a church was allowed to recover her donations under the theory of undue influence. But see *Paul v. Watchtower Bible & Tract Soc. of New York*, 815 F.2d 875 (9th Cir. 1987) (the court held that Jehovah's Witnesses' practice of "shunning" former members is protected under the free exercise clause because one, the imposition of tort liability would pose a substantial burden on the Jehovah Witnesses' religious practice and two, the practice of shunning does not constitute a sufficient threat to the peace, safety, or morality of the community to warrant state intervention).

49. See *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), where plaintiff-husband brought an action against a Catholic priest and archdiocese alleging that plaintiff and his wife had consulted the

but not a central part of the defendant's religious practice, the burden on defendant's exercise of religion may not be substantial enough to meet the first prong of *Sherbert*—the substantial burden test; if *Sherbert's* first prong is not met, then the insubstantial burden on religion will not be unconstitutional. If the tortious conduct is only a marginally central part of defendant's religious practice, then the burden may barely be enough to meet *Sherbert's* first prong, but may not be enough under *Sherbert's* second prong—balancing of interests—to withstand a substantial state interest in protecting the public safety, peace, or order. Third, a court sitting on an intentional tort case does not have to walk on the proverbial thin ice of the establishment clause while sifting and sorting through religious doctrine in the hope of gleaning the appropriate standard of care to apply to a particular clergy defendant.⁵⁰

Of the intentional theories that have been asserted in actions against clergy counselors, three theories stand out as the most successful from the plaintiffs' perspective; these theories are alienation of affections, invasion of privacy, and intentional infliction of emotional distress. Each theory is defined and illustrated below. Other tort theories that have been asserted in actions against clergy counselors include defamation,⁵¹ tortious misrepresentation,⁵² and breach of a fiduciary duty.⁵³

priest for marriage counseling, and that the priest interfered with plaintiff's marital relationship by engaging in sexual relations with plaintiff's wife. Defendants asserted that the priest's conduct fell within the sincere practices and beliefs of the Catholic Church, and was, therefore, protected by the first amendment. *Id.* at 283. The Supreme Court of Colorado rejected defendants' first amendment defense on grounds that "every Catholic is well aware of the vow of celibacy required of a priest at the time of his ordination. . . . [S]exual activity by a priest is fundamentally antithetical to Catholic doctrine. As such, the conduct upon which [the claim] is premised is, by definition, not an expression of a sincerely held religious belief." *Id.* at 284.

In a case similar to *Destefano*, *Strock v. Presnell*, 38 Ohio St. 3d 207, 527 N.E.2d. 1235 (1988), plaintiff brought suit against a Lutheran minister and his church for damages caused when the minister allegedly engaged in an affair with plaintiff's former wife during the time plaintiff and his former wife were seeking marriage counseling from the minister. Defendants' asserted the first amendment free exercise clause as a shield to liability. Like the court in *Destefano*, the Supreme Court of Ohio rejected the defense on grounds that "it is clear that the alleged conduct was nonreligious in motivation—bizarre deviation from normal spiritual counseling practices of ministers in the Lutheran Church." 38 Ohio St. 3d at 210, 527 N.E.2d at 1238.

50. See *supra* note 41 and accompanying text.

51. See, e.g., *Hester v. Barnett*, 723 S.W. 544 (Mo. App. 1987) (plaintiff alleged that plaintiff's former pastor and counselor delivered sermons from the pulpit wherein the pastor wrongfully stated that plaintiff was a thief, arsonist, cheat and child abuser).

52. See, e.g., *Christofferson v. Church of Scientology*, 57 Or. App. 203, 644 P.2d 577 (1982), *rev. denied*, 293 Or. 456, 650 P.2d 928 (1982), *cert. denied* 459 U.S. 1206 (1983), *cert. denied* 459 U.S. 1227 (1983) (plaintiff alleged that the Church of Scientology falsely represented that the church's communications course "would provide more knowledge of the mind than is possessed by any psychologist or psychiatrist," that the church's "auditing program" would "increase I.Q. scores," "cure neuroses, criminality, insanity, psychosomatic ills, homosexuality and drug dependence," and that the study of the church's "dianetics" philosophy would "cure asthma, arthritis, rheumatism, ulcers, toothaches, pneumonia, colds, and color blindness." 57 Or. App. at 228, 644 P.2d at 593-594).

53. See, e.g., *Erickson v. Christenson*, 99 Or. App. 104, ___ P.2d ___ (1989). The court in *Erick-*

C. Alienation of Affections

The gist of the tort of "alienation of affections" is an interference with the marital relationship resulting in a change of one spouse's attitude toward the other spouse.⁵⁴ The tort, once recognized in all states except Louisiana,⁵⁵ is now actionable in only about half the states.⁵⁶ One of the main reasons for the abolition of the action is that it is particularly susceptible to abuse.⁵⁷ The necessary elements of an action for alienation of affections are:

- (1) an existing marital relationship; (2) an intent to alienate the spouse's affections by defendants' conduct; (3) an actual alienation of the spouse's affection; and (4) a causal connection between defendants' conduct and the alienation (proximate cause). With respect to the second element, actual, direct proof of an intent to alienate is not necessary. It is sufficient to prove that the natural and probable consequence of the defendant's acts was to alienate the affections of the spouse.⁵⁸

son treated plaintiff's claim for "breach of fiduciary duty" as a claim for the breach of a confidential relationship. 99 Or. App. at 106. Defendant Christenson characterized plaintiff's claim as a cause of action for clerical malpractice and argued that the claims should be dismissed because such an action requires the court to develop a community standard of care. Imposing such a standard, argued defendant, would involve examining the validity of religious beliefs and could interfere with access to clerical counseling—conduct by the court that violates both the free exercise and establishment clauses of the first amendment. *Id.* at 108. The Oregon Court of Appeals rejected defendant's characterization and allowed plaintiff to bring the claim along with a second claim for intentional infliction of emotional distress. *Id.*

54. KEETON, DOBBS, KEETON & OWEN, PROSSER AND KEETON ON TORTS § 124, at 918-19 (5th ed. 1984). The tort of alienation of affections has been expanded in some jurisdictions to cover the affections of one's child or parent. See Annotation, *Right of a Child or Parent to Recovery for Alienation of Other's Affection*, 60 A.L.R. 3d 931 (1974).

55. KEETON, DOBBS, KEETON & OWEN, PROSSER AND KEETON ON TORTS § 124, at 918 (5th ed. 1984). (Louisiana rejected the action in *Moulin v. Monteleone*, 165 La. 170, 115 So. 447 (1927).

56. The following statutes or judicial decisions abolish or severely limit actions for alienation of affections: ALA. CODE § 6-5-331 (1975); ARIZ. REV. STAT. ANN. § 25-341 (1973); CAL. CIV. CODE § 43.5 (West 1939); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. ANN. § 52-572b (1982); DEL. CODE ANN. tit. 10 § 3924 (1974); D.C. CODE ANN. § 16-923 (1981); FLA. STAT. ANN. § 771.01 (West 1945); GA. CODE ANN. § 51-1-17 (1979); IND. CODE ANN. § 34-4-4-1 (Burns 1974); ME. REV. STAT. ANN. tit. 19, § 167 (1973); MD. CTS. & JUD. PROC. CODE ANN. § 5-301 (1973); MICH. STAT. ANN. § 27A.2901 (1935); MINN. STAT. ANN. § 553.01 (West 1978); MONT. CODE ANN. § 27-1-601 (1987); NEV. REV. STAT. § 41.370 (19—); N.J. STAT. ANN. § 2A:23-1 (West 1935); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1977); OHIO REV. CODE ANN. § 2305.29 (Page 1978); OKLA. STAT. ANN. tit. 76, § 8.1 (West 1976); VT. STAT. ANN. tit. 15, § 1001 (1974); VA. CODE ANN. § 8.01-220 (1950); W. VA. CODE § 56-3-2a (1969); WIS. STAT. ANN. § 768.01 (1972); WYO. STAT. § 1-23-101 (1977); *Fundermann v. Michelson*, 304 N.W.2d 790 (Iowa 1981); *Wyman v. Wallace*, 94 Wash. 2d 99, 615 P.2d 452 (1980); and *O'Neil v. Schuckardt*, 112 Idaho 472, 733 P.2d 693 (1986).

57. See *Strock v. Presnell* 38 Ohio St. 3d 207, 213, 527 N.E.2d 1235, 1240 (1988) (the court held that actions for alienation of affections are not constitutionally protected "property interests" and thus, statute abolishing amatory actions does not violate due process. 33 Ohio St. 3d at 214, 527 N.E.2d at 1241).

58. *O'Neil v. Schuckardt*, 112 Idaho 472, 475, 733 P.2d 693, 696 (1986) (citing *Carrieri v. Bush*, 69 Wash. 2d 536, 419 P.2d 132, 136 (1966)). Washington has now judicially abolished the action of alienation of affections. *Wyman v. Wallace*, 94 Wash. 2d 99, 615 P.2d 452 (1980).

In the 1987 Missouri case of *Hester v. Barnett*,⁵⁹ plaintiff Harold Hester alleged that he, his wife and three children had been "bound together by love and affection" until defendant, the family's clergy counselor, intentionally and maliciously set out to alienate plaintiff from his family's affections. Specifically, defendant was alleged to have encouraged Ms. Hester to leave her husband in exchange for the friendship of defendant's church. As a direct and proximate result of such tortious conduct, the couple's marriage allegedly suffered a loss of "love, care, companionship, consortium and trust."⁶⁰ The trial court sustained a motion to dismiss by the clergy.⁶¹

On plaintiff's appeal, the Missouri Court of Appeals applied the balancing test of *Sherbert v. Verner*⁶² and concluded that alienation of spousal affections is disruptive not only to personal felicity, but also to the family relationship; therefore, because of the substantial threat to public welfare and order, the law may provide redress, notwithstanding the free exercise clause.⁶³

Another leading alienation of affection case is *Bear v. Reformed Menonite Church*.⁶⁴ Although the case does not arise out of a counseling context, *Bear* is worth addressing because of the court's articulate application of the constitutional principles enunciated in *Sherbert*.⁶⁵ In *Bear*, plaintiff Robert Bear had been excommunicated from defendant church for his criticism of the teachings and practices of both the church and its bishops.⁶⁶ As part of the excommunication, plaintiff's wife and children were "advised" or "encouraged" to "shun and boycott" plaintiff or suffer shunning themselves.⁶⁷ Plaintiff further alleged that his family life collapsed because his wife and children refused to speak to him or have any physical contact with him.⁶⁸

The issue on appeal to Supreme Court of Pennsylvania was whether the free exercise clause of the first amendment was a complete defense to the count for alienation of affections.⁶⁹ The court pointed out that the United States Supreme Court in *Sherbert* recognized as constitutional a certain degree of regulation over conduct done in furtherance of or pursuant to religious belief when such conduct poses "some substantial

59. 723 S.W.2d 544 (Mo. App. 1987).

60. *Id.* at 554-55.

61. *Id.* at 549.

62. 374 U.S. 398 (1963).

63. *Hester*, 723 S.W.2d at 555.

64. 462 Pa. 330, 341 A.2d 105 (1975).

65. 374 U.S. 398.

66. 462 Pa. at 332, 341 A.2d at 106.

67. *Id.* at 332-33, 341 A.2d at 106.

68. *Id.* at 333, 341 A.2d at 106.

69. *Id.* at 334, 341 A.2d at 107.

threat to public safety, peace or order.”⁷⁰ However, because this is a highly sensitive constitutional area “[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”⁷¹ The court went on to hold that the shunning practice of defendant church and its individual members “may be an excessive interference within areas of ‘paramount state concern,’ i.e., the maintenance of marriage and family relationships [and the] alienation of affection. . . .”⁷² The court concluded that plaintiff “placed sufficient ‘doubt’ that would entitle him to proceed with his action in order that he may attempt to prove the requisite elements that would entitle him to relief under *Sherbert*.”⁷³

D. *Invasion of Privacy*

The general tort category of “invasion of privacy” consists of four distinct causes of action; these actions are: one, appropriation of plaintiff’s name or likeness;⁷⁴ two, intrusion onto plaintiff’s solitude;⁷⁵ three, unreasonable public disclosure of private facts about plaintiff;⁷⁶ and four, placing plaintiff before the public eye in a false light.⁷⁷ The third kind of action—public disclosure of private facts—is the most relevant to a clergy counseling situation.

Professor William Prosser was of the view that the tort of public disclosure of private facts had three requirements. These three requirements are:

- (1) the disclosure of the private facts must be a public disclosure and not a private one; (2) the facts disclosed to the public must be private facts, and not public ones; and (3) the matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.⁷⁸

The Restatement (Second) of Torts adds a fourth requirement that the

70. *Id.* (citing *Sherbert*, 374 U.S. at 403).

71. 462 Pa. at 335, 341 A.2d at 107-108 (citing *Thomas v. Collins*, 323 U.S. 516 (1945)).

72. 462 Pa. at 334, 341 A.2d at 108 (the emphasis here was added by the author; the court itself emphasized the word “may” in a similar context. *Id.*).

73. *Id.* at 335, 341 A.3d at 108.

74. *See, e.g.*, *Ali v. Playgirl, Inc.* 447 F. Supp. 723 (S.D.N.Y. 1978) (former heavyweight champion, Muhammad Ali, sued *Playgirl* magazine for publishing a drawing that allegedly appropriated Ali’s likeness); *Carson v. Here’s Johnny Portable Toilets, Inc.* 698 F.2d 831 (6th Cir. 1983) (appropriation of celebrity’s “identity”).

75. RESTATEMENT (SECOND) OF TORTS § 652B (1965). *See, e.g.*, *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (celebrity harassed by “paparazzo” photographer).

76. RESTATEMENT (SECOND) OF TORTS § 652D (1965). *See, e.g.*, *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289 (Iowa 1979) (defendant disclosed fact that plaintiff was involuntarily sterilized).

77. RESTATEMENT (SECOND) OF TORTS § 652E (1965). *See, e.g.*, *Dean v. Guard Publishing Co.*, 88 Or. App. 192, 744 P.2d 1296 (1987) (plaintiff’s photograph appeared in a newspaper story on the opening of an alcohol rehabilitation center).

78. KEETON, DOBBS, KEETON & OWEN, PROSSER AND KEETON ON TORTS § 117, at 856-57 (5th ed. 1984).

public does not have a legitimate interest in having the information available.⁷⁹

In the 1986 Idaho case of *O'Neil v. Schuckardt*,⁸⁰ plaintiff Jerry O'Neil brought an action for alienation of affections and invasion of privacy against the Fatima Crusade (a fundamentalist sect of the Catholic Church), the church's leader Bishop Schuckardt, and individual members of the church. Plaintiff alleged that defendants convinced plaintiff's wife that her marriage to plaintiff was not valid in the eyes of God because plaintiff was not Catholic, and that she would be committing sin if she lived with plaintiff as husband and wife.⁸¹ Plaintiff further alleged that certain defendants told plaintiff's children that their father (plaintiff) was "not a true father or someone they could depend on," and that their father's religion was wrong.⁸² Plaintiff further alleged that church officials purposefully kept his family from seeing him by using lies and deceit.⁸³

At trial, a jury rendered a one million dollar verdict in favor of plaintiff and his children. The award included \$250,000 for alienation of plaintiff's wife's affections and invasion of their marital privacy, \$50,000 to each of the five children for invasion of their privacy, and \$500,000 in punitive damages. On defendants' motion, the trial judge granted a judgment n.o.v.⁸⁴

On appeal, the Supreme Court of Idaho affirmed the granting of the judgment n.o.v. as to the cause of action concerning alienation of affections, and reversed as to the invasion of privacy cause of action.⁸⁵ The Court remanded for determinations as to what portions of the \$250,000 verdict and \$500,000 punitive damage awards were awards based on the cause of action for invasion of privacy.⁸⁶ The judgment n.o.v. as to the cause of action for alienation of affections was affirmed because the court decided to judicially abolish the cause of action in Idaho.⁸⁷

As to the invasion of privacy action, the court briefly addressed the free exercise clause and concluded that the high measure of constitutional protection for proselytization does have limits, and that those limits were exceeded by defendant's interference with familial relationships (an area of paramount state concern).⁸⁸ The court hinted that defend-

79. RESTATEMENT (SECOND) OF TORTS § 652D, comment d (1965).

80. 112 Idaho 472, 733 P.2d 693 (1986).

81. 112 Idaho 473-74, 733 P.2d at 695.

82. *Id.* at 479, 733 P.2d at 700.

83. *Id.* at 473-74, 733 P.2d at 695.

84. *Id.* at 474-75, 733 P.2d at 695-696.

85. *Id.* at 475, 733 P.2d at 696.

86. *Id.* at 480, 733 P.2d at 701.

87. *Id.* at 477, 733 P.2d at 698.

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

ants' conduct was not motivated by sincere religious beliefs.⁸⁹ In other words, the imposition of liability for invading plaintiff's privacy did not pose a substantial burden on defendants' religious freedom.

In the 1987 Missouri case of *Hester v. Barnett*,⁹⁰ which is also discussed above under the subsection on alienation of affections, plaintiff Harold Hester had included in his complaint a count of invasion of privacy.⁹¹ the complaint specifically alleged that:

Defendant [clergyman] has intruded upon plaintiffs' solitude and seclusion by entering into plaintiffs' home under the disguise [sic] of helping them and their family through family counselling and assistance with the children's behavior problems when defendant's true motive was to harm plaintiffs and for which he would not have been permitted into their home had plaintiffs known defendant's true motive. Defendant has made public by reporting to School Authorities, Juvenile Authorities, Law Enforcement Authorities and the Hot Line for Child Abuse certain untrue accusations, more specifically stated in other Courts hereof for the intended purpose of disturbing the privacy of plaintiffs, subjecting them to intrusion by investigators, social workers, psychologists and law enforcement officers intruding upon their solitude and seclusion all to their damage as hereafter more set forth.⁹²

Plaintiff alleged that his complaint plead the essential elements of three invasion of privacy torts: (1) unreasonable intrusion upon plaintiff's solitude; (2) public disclosure of private facts about plaintiff; and (3) publicity that unreasonably places plaintiff in a false light before the public eye.⁹³ The court reviewed the pleadings as they applied to each invasion of privacy tort and concluded that plaintiff did make out a proper claim for unreasonable intrusion into his solitude, but did not make out proper claims for either public disclosure of private facts or "false light."⁹⁴ The public disclosure of private facts and "false light" claims were improper because where, as in *Hester*, the claim involves *untrue* statements about the plaintiff, the proper remedy is under the theory of defamation.⁹⁵ The claim for unreasonable intrusion into plaintiff's solitude was proper because:

Pastor Barnett gained access to the Hester home through the pretense as counselor to assist in the correction of the children's behavior, when the true motive was to harm the Hesters by the disclosure of the information obtained through that guile. These allegations, taken as true, describe a substantial interference with seclusion and of the kind decidedly offensive

89. *Id.* at 479, 733 P.2d at 700.

90. 723 S.W.2d 544 (Mo. Ct. App. 1987).

91. *Id.* at 562-63.

92. *Id.* at 562.

93. *Id.*

94. *Id.* at 562-63.

95. *Id.* at 563.

to a reasonable person.⁹⁶

The court addressed the free exercise clause with a single sentence. "Count V[for invasion of privacy] pleads injury to the Hesters from a course of intentionally tortious action by a minister, on an occasion only pretextually religious, but actually entirely secular, and hence not offensive to the free exercise clause."⁹⁷

The *Hester* and *O'Neil* decisions support the argument made at the beginning of this section that a plaintiff will have more success with intentional tort theories than with a clergy malpractice theory. In *Hester* and *O'Neil*, the courts recognized both a compelling state interest in protecting familial relationships, and the questionable sincerity of those who seek to intentionally tear apart family relationships in the name of religious practice. Hence, the free exercise clause was an easy hurdle for the *Hester* and *O'Neil* courts to jump over. In addition, the *Hester* and *O'Neil* courts were both able to allow an injured plaintiff a remedy without the need to step into the entanglement quagmire of the establishment clause. The entanglement quagmire is avoided in invasion of privacy cases because the standard of defendant's conduct is measured against that which would be highly offensive to "a reasonably person of ordinary sensibilities."⁹⁸ Under a clergy malpractice theory, the entanglement quagmire cannot be avoided because the standard of care is either a secular professional standard or a denominationally specific standard.⁹⁹ In either case, the court in a clergy malpractice case would be neck deep and sinking fast in entanglement problems.

E. *Intentional Infliction of Emotional Distress*

A plaintiff may recover under a theory of intentional infliction of emotional distress if he can show that these elements are met: one, defendant engaged in conduct that was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community"; two, at the time of defendant's conduct he intentionally or recklessly caused plaintiff severe emotional distress; three, plaintiff suffered extreme emotional distress; and four, defendant's conduct was a substantial factor in causing plaintiff's extreme emotional distress.¹⁰⁰

96. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652B comment d (1977)).

97. *Id.* at 563.

98. *See supra* note 77 and accompanying text.

99. *See supra* notes 36-41 and accompanying text.

100. RESTATEMENT (SECOND) OF TORTS § 46 and comments (1965). For the classic intentional infliction of emotional distress case see *Wilkinson v. Downton*, 2 Q.B.D. 57 (1897). Defendant amused himself by falsely telling a woman that her husband had been smashed up in an accident and that she should go at once with two pillows to fetch him home. The shock to the woman's nervous system resulted in serious and permanent physical consequences.

The tort of intentional infliction of emotional distress has been claimed in numerous cases involving alleged misconduct on the part of clergy persons, church officers, or other church members.¹⁰¹ Many of these cases involve interesting and bizarre facts.¹⁰² Below is a sampling.

In the 1984 New York case of *Meroni v. Holy Spirit Ass'n.*¹⁰³ plaintiff, Charles Meroni, Jr., as administrator of the estate of his late son Charles Thomas Meroni, brought an action for intentional infliction of emotional distress and wrongful death against The Holy Spirit Association for the Unification of World Christianity (Unification Church). Plaintiff alleged¹⁰⁴ that defendant, knowing that Charles Thomas was at the time emotionally disturbed, recruited Charles Thomas and subjected him to "highly programmed behavioral control techniques in a controlled environment thereby narrowing his attention and causing him to go into a trance. He was subjected to an intensive program of heavy and protracted exercises, intense fasting from foods and beverages, a program of chanting and related activities all intentionally designed by the Unification Church to take control of [Charles Thomas]."¹⁰⁵ Plaintiff further alleged that as a result of defendant's intensive "brainwashing" program, Charles Thomas suffered an emotional breakdown and, as a result, took his own life.¹⁰⁶

The Supreme Court of Westchester County, New York, addressed and

101. For an article devoted to this topic, see Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct be "Free Exercise"?* 84 MICH. L. REV. 1296 (1986) (authored by Lee W. Brooks).

102. For example, in the 1985 New Mexico case of *Roney v. Siri Singh Sahib Harbhajan Singh Yogi*, 103 N.M. 89, 703 P.2d 186 (N.M. Ct. App. 1985), plaintiff, Kathy Roney, brought an action against Siri Yogi, Siri Brotherhood, 3HO Foundation, and the 3HO Foundation of New Mexico. In her complaint plaintiff alleged that defendant's teachings held that women were inferior to men, and must be submissive to men. After plaintiff was indoctrinated with these teachings of "female submissiveness," Siri Yogi told her that plaintiff's "personal, spiritual and psychological . . . problems were centered in her ovaries, and that they therefore must be cut . . ." 103 N.M. at 90. Plaintiff further alleged that defendant's psychological tactics "rendered plaintiff incapable of understanding or perceiving the nature of what she was doing or its consequences, which deprived her of her free will." *Id.* Plaintiff also alleged that in obedience to specific directions from Siri Yogi, she had an operation known as laparoscopic tubal ligation. As a result of the operation, plaintiff claims she was made irreversibly sterile. *Id.*

The trial court dismissed the complaint on the sole ground that it was not filed under the statute of limitations. *Id.* On appeal, the New Mexico Court of Appeals held that the statute of limitations was tolled under doctrine of fraudulent concealment, and that on remand plaintiff's complaint must be reinstated. *Id.* at 91.

103. 125 Misc. 2d 1061, 480 N.Y.S.2d 706 (1984).

104. Charles Meroni, Jr. also brought a claim for intentional infliction of emotional distress on his own behalf. The claim was dismissed on grounds that plaintiff as a bystander of defendant's allegedly tortious acts failed to allege that defendant's conduct created an unreasonable risk of serious bodily injury or harm to plaintiff, or that there was a contemporaneous observation of serious physical injury or death inflicted on plaintiff's son in plaintiff's presence. 125 Misc. 2d at 1063-64, 480 N.Y.S.2d at 708.

105. 125 Misc. 2d at 1064-65, 480 N.Y.S.2d at 708-09.

106. *Id.* at 1062-63, 480 N.Y.S.2d at 707.

quickly dispensed with the constitutional issue by stating in part "[t]hat one performs a tort or commits a crime in the furtherance of a 'religious' activity or as part of a religious belief does not confer immunity upon such alleged wrongdoer."¹⁰⁷ Religious conduct, as distinguished from religious thought, remains subject to regulation for the protection of society.¹⁰⁸ Defendant's motion to dismiss plaintiff's claim for intentional infliction of emotional distress on behalf of decedent Charles Thomas was denied.¹⁰⁹ In the 1987 Alabama case of *Handley v. Richards*,¹¹⁰ plaintiff, Tommy Handley, as administrator for the estate of Bobby Handley, filed a claim against James Richards alleging that Richards, a pastoral marital counselor, engaged in outrageous conduct which resulted in Handley's suicide.¹¹¹ Handley and his wife, Brenda, had sought the counseling of Richards, their minister, because the couple was experiencing marital problems. Plaintiff claimed that during such period of counseling Richards became deeply involved in a sexual affair with Brenda. Plaintiff further claimed that "the emotional toll of [his] marital tribulation combined with the deceitful manner of the counseling by [Richards] caused [Handley] to take his own life. . . ."¹¹²

The Supreme Court of Alabama distinguished a claim for clergy malpractice from plaintiff's claim under the theory of intentional infliction of emotional distress, and stated that whether the theory of clergy malpractice in terms of negligent counseling and spiritual advice is even justiciable is an unresolved question.¹¹³ The court then recited the constitutional maxim derived from *Sherbert v. Verner*¹¹⁴ that *intentional* torts of a pastor are actionable "even though incident of religious practice and belief."¹¹⁵ Liability for [the intentional infliction of emotional distress] does not clash with the free exercise clause of the First Amendment because conduct albeit promoted by religious belief is subject to regulation for the protection of society."¹¹⁶ The court recognized that the road is paved for an actionable claim against a pastoral counselor, but then refused to take that road with plaintiff's facts. The court simply stated that "under the facts of this case plaintiff has failed to show that the minister was guilty of [the intentional infliction of emotional

107. *Id.* at 1067, 480 N.Y.S.2d at 710 (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)).

108. *Id.*

109. *Id.*

110. 518 So. 2d 682 (Ala. 1987).

111. *Id.* at 683.

112. *Id.*

113. *Id.* at 684-85.

114. 374 U.S. 398 (1963).

115. 518 So. 2d at 685 (quoting *Bear V. Reformed Mennonite Church*, 462 Pa. 330, 341, A.2d 105 (1975)).

116. 518 So. 2d at 685.

distress]."¹¹⁷

The *Handley* decision illustrates three important points: first, the theory of clergy malpractice, though the subject of numerous scholarly¹¹⁸ and "nonscholarly" writings,¹¹⁹ has yet to be adopted by any court in any published opinion in any state; second, the free exercise and establishment clauses will not generally bar recovery for intentional torts;¹²⁰ and three, in at least some jurisdictions, the relatively new tort of intentional infliction of emotional distress is still disfavored.¹²¹

117. *Id.* at 687.

118. See, e.g., Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163 (1981); Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. L. REV. 47 (1981); Funston, *Made out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W. L. REV. 507 (1983); Note, *Religious Counseling—Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide*, 1985 ARIZ. ST. L.J. 213 (authored by M. Maureen Anders); Klee, *Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?*, 17 U. TOL. L. REV. 209 (1985); Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct be "Free Exercise"?*, 84 MICH. L. REV. 1296 (1986) (authored by Lee W. Brooks); Burek, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPPERDINE L. REV. 137 (1986); Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. REV. 1 (1986); Basil, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*, 19 RUTGERS L.J. 419 (1988).

119. See, e.g., Blodgett, *Religion Liable for Counseling?* A.B.A.J., Aug. 1, 1988, at 30; McMenamin, *Clergy Malpractice*, 90 CASE & COMMENT, at 3 (Sept.-Oct. 1985).

120. 518 So. at 685. For another case on intentional infliction of emotional distress, see *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987). In the 1987 Missouri case, Hazel Hester (one of two plaintiffs; her husband was the other) alleged the following facts: one, defendant Barnett, an ordained minister of the Baptist Church had invited plaintiff and her husband to meet with him in a counseling relationship of trust and confidence, *id.* at 550; two, plaintiff was nervous and suffered frequent and severe attacks of depression, *id.* at 560; three, defendant divulged strict confidences obtained during counseling to members of defendant's church community, *id.* at 550; four, at the time defendant divulged these confidences he was aware of plaintiff's fragile psychological condition, *id.* at 560; five, defendant acted with malicious intent to cause plaintiff emotional distress, *id.*; and six, plaintiff was damaged as a result of defendant's conduct. *Id.* Although plaintiff apparently had facts sufficient to survive a motion to dismiss for failure to state a claim, plaintiff's attorney failed to draft the complaint so as to define his client's cause of action for intentional infliction of emotional distress in a "simple, concise and direct" manner. *Id.* at 561-62 (the court discusses form of pleadings rules). Hence, the claim was dismissed not for any factual deficiency or for any constitutional reason, but because the complaint did not comport with form of pleading rules. See also *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (holding that plaintiff's complaint against clergyman marriage counselor was sufficient to state a claim for outrageous conduct causing severe emotional distress. *Id.* at 286. Plaintiff had alleged that defendant took advantage of plaintiff's vulnerable emotional state to induce her to engage in adultery. *Id.* at 279).

121. "Notwithstanding early recognition of a cause of action in assault cases, the law has been slow to accept the interest in peace of mind as entitled to independent legal protection, even as against intentional invasions." KEETON, DOBBS, KEETON & OWEN, PROSSER AND KEETON ON TORTS § 12, at 54-55 (5th ed. 1984). In his book, CLERGY MALPRACTICE (1986), R.W. McMenamin predicts that "[a]ll religious figures and clergy personnel will be hearing more and more about the tort of outrageous conduct." *Id.* at 81.

In the 1985 Oregon case of *Christofferson v. Church of Scientology of Portland*, 57 Or. App. 203, 644 P.2d 577 (1982), rev. denied, 293 Or. 456, 650 P.2d 928 (1982), cert. denied, 459 U.S. 1206 (1983), cert. denied, 459 U.S. 1227 (1983), plaintiff, Julie Christofferson, brought an action against the Church of Scientology and others to recover under the tort theories of "outrageous conduct" and fraud. Plaintiff alleged that defendants engaged in outrageous conduct by scheming to gain control

V. CONCLUSION

Under present federal constitutional and state tort law, the theory of clergy malpractice has been, since its conception in 1979, and will continue to be of theoretical significance only. Plaintiffs asserting the theory of clergy malpractice will encounter acute first amendment problems be-

of her mind and force her into a life of servitude. 57 Or. App. at 205, 644 P.2d at 580. Then, when plaintiff disassociated herself from the organization (after her parents had her "deprogramed," *id.* at 209) she was allegedly threatened, humiliated, and intimidated in such a manner as to "cause her fear, anguish and mental distress." *Id.* at 224, 644 P.2d at 591.

The Oregon Court of Appeals (Gillette, J.) rejected plaintiff's claim and held as a matter of law that defendant's behavior was not actionable as outrageous conduct. *Id.* at 227, 644 P.2d at 22. The court summed up the judicial sentiment on outrageous conduct/emotional distress claims that still prevails in a number of states:

"Without necessarily suggesting that it could never be so, we note that it would be a rare case in which the bringing of a lawsuit would fit the definition of outrageous conduct. This tort has been reserved for 'intentional acts of a flagrant character under most unusual facts and circumstances'"

Id. at 224-225, 644 P.2d at 244-25, (citing *Melton v. Selen*, 282 Or. 731, 736, 580 P.2d 1019, 1022 (1978)).

In the famous California case of *Nally v. Grace Community Church of the Valley*, plaintiffs, whose son committed suicide, brought an action against Grace Community Church of the Valley and several church related counselors under the theories of clergy malpractice (negligence) and intentional infliction of emotional distress ("outrageous conduct"). *Nally v. Grace Community Church of the Valley*, No. 18668-B (L.A. County Super. Ct., Cal, filed Mar. 31, 1980). Plaintiff's alleged that each of the defendants (clergy counselors) engaged in extreme and outrageous conduct, either intentionally or recklessly knowing that plaintiff's son, Kenneth Nally, had suicidal tendencies and that defendants' conduct would increase the likelihood that Kenneth would take his own life. *Id.* Specifically, plaintiffs alleged that defendants exacerbated Kenneth's preexisting feelings of guilt, anxiety, and depression by ridiculing, disparaging, and denigrating the Catholic faith—the faith once embraced by Kenneth and still embraced by his parents. *Id.* In addition, plaintiffs alleged that defendants, aware of Kenneth's suicidal ideation, not only failed to refer him to a psychologist or psychiatrist, but instead discouraged him from seeing either. *Id.* The trial court dismissed plaintiffs' claim of intentional infliction of emotional distress on the grounds that the plaintiffs failed to establish a triable question of fact. 204 Cal. Rptr. 303, 311 (1984). The trial judge granted the defendants' motion for summary judgment and made the following comment from the bench: "Religion has nothing to do with this particular case, as I see it." *Id.* Plaintiffs' failure to allege facts sufficient to state a claim for intentional infliction of emotional distress, not the first amendment, was the primary reason for summary judgment.

The California Court of Appeals, 204 Cal. Rptr. 303 (1984) (known as *Nally I*), reversed summary judgement for defendants and remanded to the trial court. The California Supreme Court, by order dated August 30, 1984, depublished *Nally I*, 157 Cal. App. 3d 940 (1984) and deleted the opinion from Cal. App. 3d.

On remand, at the close of plaintiffs' evidence, the trial court granted defendant's motion for a nonsuit on all counts based on insufficient evidence. No. NCC18668B (L.A. County Super. Ct., Cal, May 24, 1985). The court of appeals reversed the nonsuit. 194 Cal. App. 3d 1147, 1183-89, 240 Cal. Rptr. 215, 237-40 (1987) (*Nally II*). The Supreme Court of California then granted review. — Cal. App. 3d —, 747 P.2d 527, 243 Cal. Rptr. 86 (1988).

In the November 1988 decision, the Supreme Court of California took less than one page to reverse the court of appeals and order entry of the judgment of the trial court on the count for intentional infliction of emotional distress. 47 Cal. 3d 278, 300-01, 763 P.2d 948, 961, 253 Cal. Rptr. 97, 110 (1988). The court briefly reviewed the elements of a cause of action for wrongful death based on intentional infliction of emotional distress and concluded that the trial court properly granted a nonsuit because plaintiffs "failed to alleged facts sufficient to show that defendant's conduct was outrageous and a substantial factor in [Kenneth's] suicide." 47 Cal. 3d at 301, 763 P.2d at —. The substantial factor requirement was not met. *Id.* at 300, 763 P.2d at —.

cause: one, clergy counseling is almost always a central part of defendant's religious practice; two, state interest in allowing liability for negligent clergy counseling is not compelling enough to burden defendant's religious practice; and three, a court steps into a church and state entanglement quagmire when it attempts to identify and apply a professional standard of care for the clergy counselor. Aside from constitutional reasons, courts are reluctant to extend malpractice law to clergy counselors because plaintiffs who suffer harm to redressable interests can frequently find relief under one or more of the intentional tort theories. The most frequently employed theories in clergy counseling cases are alienation of affections, invasion of privacy, and intentional infliction of emotional distress. Although courts and legislatures have trimmed back the availability of the alienation of affections theory, successful actions under invasion of privacy and intentional infliction of emotional distress theories are on the rise. The latter theory covers a broad range of conduct and is particularly appropriate to the clergy counseling situation where plaintiff is vulnerable and the confidant counselor knows of this vulnerability, and is in a position to take undue advantage of the trusting counselee. In addition to the three intentional torts mentioned above, fraud is another theory that has been used with success in a clergy counseling context. Therefore, there is a theory of clergy malpractice, but no cause of action; clergy malpractice is the cause of action that never was.

