

2001

## Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy

Zanita E. Fenton

Follow this and additional works at: [https://repository.law.miami.edu/fac\\_articles](https://repository.law.miami.edu/fac_articles)

 Part of the [First Amendment Commons](#), and the [Law and Society Commons](#)

---

# FAITH IN JUSTICE: FIDUCIARIES, MALPRACTICE & SEXUAL ABUSE BY CLERGY

Zanita E. Fenton\*

INTRODUCTION	45
I. CHOOSING THE TORT DOCTRINE	54
A. <i>Malpractice</i>	55
B. <i>Breach of Fiduciary Duty</i>	58
II. CHURCH AND STATE	67
A. <i>Free Exercise</i>	68
B. <i>Establishment Clause</i>	75
C. <i>Sexual Harassment, Sexual Misconduct—A Comparison</i>	81
D. <i>Families and Faith</i>	85
E. <i>Breach of Fiduciary Duty—A Neutral Application</i>	88
F. <i>Institutional Liability</i>	91
CONCLUSION	94

## INTRODUCTION

Sexual abuse is denounced by society. Sexual predators<sup>1</sup> feed upon the vulnerabilities of the weakest in society.<sup>2</sup> These predators can operate in any social classification or situation,<sup>3</sup> including those developed and

---

\* Assistant Professor of Law, Wayne State University Law School; J.D., Harvard Law School, 1993; A.B., Princeton University, 1990. I appreciate the encouragement and insightful comments of colleagues generous with their time: Janet Findlater, Maurice Kelman, Jessica Litman, Joan Mahoney, Lawrence Mann, Robert Sedler and Jonathan Weinberg.

1. See CANDACE R. BENYEI, UNDERSTANDING CLERGY MISCONDUCT IN RELIGIOUS SYSTEMS: SCAPEGOATING, FAMILY SECRETS, AND THE ABUSE OF POWER 65–70 (1998) (identifying five broad types of sexual predators: pedophiles, persons with other paraphilias, sexual addicts, predators, and situational abusers); see also Stephen B. Levine et al., *Professionals Who Sexually Offend: Evaluation Procedures and Preliminary Findings*, 20 J. SEX & MARITAL THERAPY 288 (1994) (stating that in a study including a preponderance of male clergy, professionals who sexually offend are most often diagnosed with paraphilia and sexual compulsivity and addictive behavior).
2. “[A]ll sexual misconduct occurs because a differential exists between the perpetrator and victim, whether or not the situation is one of harassment or one of outright abuse. This power imbalance may be one of status, vested authority, hierarchy, age, gender, or physical strength.” BENYEI, *supra* note 1, at 65.
3. See Barbara K. Schwartz, *Characteristics and Typologies of Sex Offenders, in THE SEX OFFENDER: CORRECTIONS, TREATMENT AND LEGAL PRACTICE* 3–6—3–21 (Barbara K. Schwartz & Henry R. Cellini eds., 1995); GORDON C. NAGAYAMA-HALL,

nurtured by religious institutions.<sup>4</sup> Addressing the problem of sexual misconduct by clerics<sup>5</sup> within religious institutions has complications in addition to those within general society. However, it is not surprising that general complications arise from the overall fabric of society and a long history of subordination of those in weak positions. Sexual misconduct by clergy is an instance of this perpetual dynamic. The difficulties specific to addressing sexual abuse within religious institutions stem from the constitutional restrictions on the manner and intensity with which the state may interact with religion and religious organizations.<sup>6</sup>

The claims of sexual misconduct or abuse<sup>7</sup> by clergy<sup>8</sup> asserted by

THEORY-BASED ASSESSMENT, TREATMENT, AND PREVENTION OF SEXUAL AGGRESSION 3 (1996) ("Often the perpetrators are pillars of society, including clergy, police, teachers, and physicians.").

4. See generally BENYEL, *supra* note 1.
5. Clergy, cleric and pastor are used more or less interchangeably. In this article, these terms are intended to mean persons "who by ordination, licensing, or other form of entitlement, as recognized and practiced by the religious group or sect with whom the person is affiliated, is empowered to provide pastoral care and counseling to group members and others seeking such guidance." John F. Wagner Jr., Annotation, *Cause of Action for Clergy Malpractice*, 75 A.L.R.4th 751 (1989) (citing *Seeing a Mirror Dimly? Clergy Malpractice as a Cause of Action: Nally v. Grace Community Church*, 15 CAP. U. L. REV. 349 (1986)). In no way are these terms intended to be exclusive to any one religion, denomination or sect as the problem of clergy sexual misconduct is not isolated or limited to any particular religion or sect.

The sexual misconduct of spiritual leaders is not confined to any one denomination or religious faith. North American Christians, Jews, Buddhists, Sufis, and Hindus have all experienced boundary violations of this sort in their families of faith. Partially this is the result of personal psychology combined with authoritarian forms of social structuring. . . . *Always, however, sexual misconduct is a rupture of the covenant of trust between clergyperson and congregant.*

- BENYEL, *supra* note 1, at 59 (emphasis added).
6. U.S. CONST. amend. I; see also *infra* Part III.
7. Ann-Janine Morey, *Blaming Women for the Sexually Abusive Male Pastor*, *The Christian Century*, Oct. 5, 1988, at 866 ("[A] male pastor's sexual advances toward a woman that occur while he performs his professional duties are better understood as 'sexual abuse,' [which] . . . assumes that a person has used personal, social or physical power to coerce sexual intimacy."); see also Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 3 (1996); Pamela Cooper-White, *Soul Stealing: Power Relations in Pastoral Sexual Abuse*, *The Christian Century*, February 20, 1991, at 196 (identifying pastor/parishioner sexual relations as "sexual abuse" because of the power and control inherent to the relationship).
8. The underlying premise in this article is a male clergy and female victim. This reflects the "vast preponderance of these cases." Cooper-White, *supra* note 7, at 197; NA-

adult<sup>9</sup> members of religious congregations generally have been dealt with under theories of clergy malpractice. Clergy malpractice first received measurable scholarly attention with the case of *Nally v. Grace*,<sup>10</sup> where the cause of action initially appeared.<sup>11</sup> In *Nally*, the parents of a

GAYAMA-HALL, *supra* note 3, at 11. That is not to suggest that sexual abuse by a same-gendered adult does not also constitute an actionable breach of fiduciary duty and warrant protection of the entrusting party, regardless of sexual orientation. See generally Walter H. Bera, *Betrayal: Clergy Sexual Abuse and Male Survivors*, in BREACH OF TRUST: SEXUAL EXPLOITATION BY HEALTH CARE PROFESSIONALS AND CLERGY 91 (John C. Gonsiorek ed., 1995) (discussing male victims in cluster sexual abuse by a clergymember).

9. While we readily have sympathy and understanding for child victims of sexual abuse, adults are often presumed to have caused their own victimization as observers choose denial and reinterpretation of the cause and harms in order to reinforce "people's belief in a just world." See P. Susan Penfold, *Why Did You Keep Going for So Long? Issues for Survivors of Long-Term, Sexually Abusive "Helping" Relationships*, 24 J. SEX ED. & THERAPY 244, 244-45 (1999).

"Most states automatically consider fifteen-year-olds too immature to consent to sex, though a few might not be. In the same way, patients are best treated as incapable of giving valid, adequately informed consent to sex with their therapists, though in rare cases they might not be." STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 223 (1998). However, does not *any* permissible atmosphere enable abuse of both children and adults? Would not enforcement as to adults also help ensure better protections for children and young adults? What of children who appear to be adults, adults who appear to be children, or children on the brink of adulthood? Consider the abuse that starts during childhood and proceeds into adulthood. *E.g.*, *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991) (plaintiff alleged that cleric initiated sexual contact when she was twelve and continued to do so through adulthood); *Erickson v. Christenson*, 781 P.2d 383 (Or. App. 1989) (explaining cleric's abuse of parishioner started when parishioner was thirteen and lasted until she was approximately thirty years of age); see also Schwartz, *supra* note 3, at 3-25 (explaining that FBI typology for pedophiles includes the "morally indiscriminate," someone who chooses their victims based on "vulnerability and opportunity and only coincidentally because they are children"). There should not be two different standards for children and adult victims. Prevention requires consistency.

10. *Nally v. Grace Cmty. Church of the Valley*, 240 Cal. Rptr. 215 (1987).
11. See, e.g., John H. Arnold, *Clergy Sexual Malpractice*, 8 U. FLA. J.L. & PUB. POL'Y 25 (1996); Martin R. Bartel, *Clergy Malpractice After Nally: "Touch Not My Anointed, and to My Prophets Do No Harm"* 35 VILL. L. REV. 535 (1990); Samuel E. Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U. L. REV. 163 (1981); Carl H. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1 (1986); Constance Frisby Fain, *Clergy Malpractice: Liability for Negligent Counseling and Sexual Misconduct*, 12 MISS. C. L. REV. 97 (1991); Sue Ganske Graziano, *Clergy Malpractice*, 12 WHITTIER L. REV. 349 (1991); Randall K. Hanson, *Clergy Malpractice: Suing Ministers, Pastors, and Priests for Ungodly Counseling*, 39 DRAKE L. REV. 597 (1989-90); James T. O'Reilly & JoAnn M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult*

twenty-four-year-old man brought a wrongful death action after their son committed suicide. They alleged clergy malpractice, negligence, and outrageous conduct<sup>12</sup> against the church and its pastor, who was in a counseling relationship with their son. *Nally* focused primarily on the negligent failure to prevent suicide.<sup>13</sup> There were no allegations of sexual abuse in *Nally*. Nonetheless, claims for sexual misconduct have since been discussed under the rubric of clergy malpractice.

The controversy surrounding clergy malpractice heightened with the cases of *F.G. v. MacDonell*<sup>14</sup> and *Sanders v. Casa View Baptist Church*.<sup>15</sup> These cases permitted claims for breach of fiduciary duty and

*Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31 (1994); Mark A. Anthony, Comment, *Through the Narrow Door: An Examination of Possible Criteria for a Clergy Malpractice Action*, 15 U. DAYTON L. REV. 493 (1990); Robert J. Basil, Note, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*, 19 RUTGERS L. J. 419 (1988); Lee W. Brooks, Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be 'Free Exercise'?*, 84 MICH. L. REV. 1296 (1986); Margaret Ann Burton, Comment, *Nally v. Grace Community Church: Is There a Future for Clergy Malpractice Claims?*, 37 SANTA CLARA L. REV. 467 (1997); Michael J. Fiorillo, Comment, *Clergy Malpractice: Should Pennsylvania Recognize a Cause of Action for Improper Counseling by a Clergyman?*, 92 DICK. L. REV. 223 (1987); C. Eric Funston, Note, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W. L. REV. 507 (1983); James K. Lehman, Note, *Clergy Malpractice: A Constitutional Approach*, 41 S.C. L. REV. 459 (1990); C. Grace McCaffrey, Note, *Nally v. Grace Community Church of the Valley: Clergy Malpractice—A Threat to Both Liberty and Life*, 11 PACE L. REV. 137 (1990); Kelly Beers Rouse, Note, *Clergy Malpractice Claims: A New Problem for Religious Organizations*, 16 N. KY. L. REV. 383 (1989); Greg Slater, Note, *Nally v. Grace Community Church of the Valley: Absolution for Clergy Malpractice?*, 1989 BYU L. REV. 913 (1989); Mark Taylor, Note, *Nally v. Grace Community Church: The Future of Clergy Malpractice Under Content-Based Analysis*, 1990 UTAH L. REV. 661 (1990).

12. While the trial court granted summary judgment for defendants on all counts, *Nally*, 240 Cal. Rptr. at 221–22, the decision was reversed on appeal. Plaintiffs appealed from the nonsuit motion granted in the second trial. In the second appeal, the California Court of Appeals rejected the view that it had ever recognized a cause of action for clergy malpractice: “In our view this case has little or nothing to say about the liability of clergymen for the negligent performance of their ordinary ministerial duties or even their counseling duties except when they enter into a counseling relationship with suicidal individuals.” *Id.* at 219.
13. *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948, 955 (Cal. 1998).
14. 696 A.2d 697, 702 (N.J. 1997) (determining that “[t]he First Amendment does not insulate a member of the clergy from actions for breach of fiduciary duty arising out of sexual misconduct”).
15. 134 F.3d 331, 336 (5th Cir. 1998) (determining that the Free Exercise Clause does not protect the actions of a cleric who engaged in sexual relations with two separate women in counseling relationships with him, and who breached his fiduciary duties and committed professional malpractice as a marriage counselor).

professional malpractice, respectively, in circumstances involving alleged sexual misconduct in a counseling relationship with a cleric.<sup>16</sup> In *F.G.*, the plaintiff alleged that Rev. MacDonell, who was married at the time, “engaged in sexual behavior with [her] inappropriate to and in violation of [their year-long counseling relationship].”<sup>17</sup> The court determined that “the First Amendment does not insulate a member of the clergy from actions for breach of fiduciary duty arising out of sexual misconduct that occurs during a time when the clergy member is providing counseling to a parishioner.”<sup>18</sup> The Court further determined that breach of fiduciary duty claims can be resolved in this context. The Court added that, “[b]ut for MacDonell’s status as a clergyman, his conduct was unrelated to religious doctrine.”<sup>19</sup>

In *Sanders*, two separate plaintiffs claimed that their minister, while providing marriage counseling to each, “encourag[ed] and consummat[ed] a sexual relationship with each plaintiff.”<sup>20</sup> Each plaintiff had initiated counseling upon the minister’s invitation after he had “represented that he was qualified by education and experience to provide marriage counseling.”<sup>21</sup> At trial, the jury found that even though the minister sometimes discussed scripture in the counseling sessions, the counseling he provided was “essentially secular” in nature.<sup>22</sup> The court determined that the First Amendment was not implicated “because the duties underlying the plaintiffs’ claims for malpractice by a marriage counselor and breach of fiduciary duties [were] not derived

---

16. For scholarly discussions of *F.G.* and *Sanders*, see, for example, Paul A. Clark, *Clergy Malpractice After F.G. v. MacDonell and Sanders v. Casa View Baptist Church*, 22 AM. J. TRIAL ADVOC. 229 (1998); Julie Johnson, *The Sanctuary Crumbles: The Future of Clergy Malpractice in Michigan*, 74 U. DET. MERCY L. REV. 493 (1997); Yanet Perez, *Survey: Constitutional Law—Free Exercise Clause—Claim of Sexually Inappropriate Conduct by Clergyman During the Course of Pastoral Counseling, in Breach of the Clergyman’s Fiduciary Duty Owed Parishioner, Could Be Resolved by the Courts Without Becoming Entangled in the Clergyman’s Free Exercise of Religion—F.G. v. MacDonell*, 28 SETON HALL L. REV. 712 (1997); Melissa A. Provost, *Surveys: First Amendment—Free Exercise Clause—Cleric Who Engaged in Sexual Acts While Providing Pastoral Counseling to a Parishioner Can Be Held Liable for Breach of Fiduciary Duty—F.G. v. MacDonell*, 8 SETON HALL CONST. L.J. 625 (1998); Lindsey Rosen, *Recent Decision: Constitutional Law—In Bad Faith: Breach of Fiduciary Duty by the Clergy—F.G. v. MacDonell*, 71 TEMPLE L. REV. 743 (1998); Villiers, *supra* note 7.

17. *F.G.*, 696 A.2d at 700.

18. *F.G.*, 696 A.2d at 702.

19. *F.G.*, 696 A.2d at 566.

20. *Sanders*, 134 F.3d at 334.

21. *Sanders*, 134 F.3d at 334.

22. *Sanders*, 134 F.3d at 334.

from religious doctrine.”<sup>23</sup> The court stated that “the constitutional guarantee of *religious* freedom cannot be construed to protect *secular* beliefs and behavior, even when they comprise part of an otherwise religious relationship between a minister and a member of his or her congregation. To hold otherwise would impermissibly place a religious leader in a preferred position in our society.”<sup>24</sup>

Although these cases rejected attacks based on the First Amendment, the more recent cases of *Teadt v. Lutheran Church Missouri Synod*<sup>25</sup> and *Langford v. Roman Catholic Diocese*<sup>26</sup> refused to permit any form of redress, stating First Amendment rationales. The courts in both cases chose not to distinguish between the cause of action for breach of fiduciary duty and that for clergy malpractice; furthermore, it was determined that either cause of action would impermissibly entangle courts in religious matters.<sup>27</sup>

In *Teadt*, the minister initially took the role of pastoral counselor to help the plaintiff cope with several personal difficulties, including surgery on her lower back.<sup>28</sup> At some later point during the counseling relationship, the minister engaged in a sexual relationship with the plaintiff.<sup>29</sup> While the minister disputed the continuation of the relationship, plaintiff contended that he “became involved in her life to the extent that his financial and emotional assistance to her was in exchange for sexual relations.”<sup>30</sup> The court determined that “plaintiff’s allegations that [the pastor] misused his superior position as her pastor and counselor in order to achieve a sexual relationship with her also reveal that the gist of plaintiff’s action is in fact clergy malpractice,”<sup>31</sup> and such claim would require defining a standard of care which would embroil courts in religious practice and belief.<sup>32</sup>

In *Langford*, the defendant monsignor began counseling plaintiff when she was diagnosed with multiple sclerosis and “looked to God for direction.”<sup>33</sup> Plaintiff believed her subsequent remission from her illness

---

23. *Sanders*, 134 F.3d at 337.

24. *Sanders*, 134 F.3d at 337 (citing *cf. County of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989) (“[I]nterpreting the First Amendment to preclude the state from favoring religion over nonreligion.”)).

25. 603 N.W.2d 816 (Mich. Ct. App. 1999).

26. 705 N.Y.S.2d 661 (App. Div. 2000).

27. See *Teadt*, 603 N.W.2d at 823 (citing *Langford*, 677 N.Y.S.2d at 439).

28. *Teadt*, 603 N.W.2d at 818.

29. *Teadt*, 603 N.W.2d at 818.

30. *Teadt*, 603 N.W.2d at 818.

31. *Teadt*, 603 N.W.2d at 822.

32. *Teadt*, 603 N.W.2d at 822. See discussion *infra* pp. 35–72 and accompanying text.

33. *Langford v. Roman Catholic Diocese*, 705 N.Y.S.2d 661, 662 (App. Div. 2000).

was due to the monsignor's prayers.<sup>34</sup> The counseling relationship evolved into a sexual one to which plaintiff acquiesced to avoid the loss of "her spiritual link and her 'best friend.'"<sup>35</sup> Deciding that the gravamen of the claim for breach of fiduciary duty was in fact one for clergy malpractice, the judge refused adjudication of the matter as the claim, characterized as either breach of fiduciary duty or clergy malpractice, would entangle the court in "forbidden ecclesiastical terrain."<sup>36</sup>

Several other courts have addressed the issue of clergy malpractice, none explicitly recognizing it as a cause of action.<sup>37</sup> Among these courts, there is a split of authority regarding whether these actions are permissible under the First Amendment.<sup>38</sup> The outcomes by the respective jurisdictions are dependent on whether the court characterizes the claim as one for breach of fiduciary duty or for malpractice.<sup>39</sup>

The constitutional tradition of avoiding governmental interference with the practice of religion and simultaneous abhorrence for the establishment of state religion is an important consideration.<sup>40</sup> However, the social objectives of minimizing, if not eliminating, sexually predatory

---

34. *Langford*, 705 N.Y.S.2d at 662.

35. *Langford*, 705 N.Y.S.2d at 662.

36. *Langford*, 705 N.Y.S.2d at 662.

37. *See, e.g.*, *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994); *Isely v. Capuchin Province*, 880 F. Supp. 1138 (E.D. Mich. 1995); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991); *F.G. v. MacDonell*, 696 A.2d 697 (N.J. 1997) (deciding that clergy malpractice was an inappropriate form of relief for sexual misconduct); *Moses v. Diocese of Colo.*, 863 P.2d 310 (Colo. 1993); *Schieffer v. Catholic Archdiocese*, 508 N.W.2d 907 (Neb. 1993); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (en banc); *Strock v. Pressnell*, 527 N.E.2d 1235 (Ohio 1988); *Handley v. Richards*, 518 So. 2d 682 (Ala. 1987); *Amato v. Greenquist*, 679 N.E.2d 446 (Ill. App. Ct. 1997); *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987); *see also Doe v. Roman Catholic Diocese*, 862 S.W.2d 338 (Mo. 1993) (en banc); *Bladen v. First Presbyterian Church of Sallisaw*, 857 P.2d 789 (Okla. 1993); *Fontaine v. Roman Catholic Church of Archdiocese*, 625 So. 2d 548 (La. Ct. App. 1993); *Jones v. Trane*, 591 N.Y.S.2d 927 (Sup. Ct. 1992); *E.J.M. v. Archdiocese of Phila.*, 622 A.2d 1388 (Pa. Super. Ct. 1993). *But see Sanders v. Casa View Baptist Church*, 134 F.3d 331 (5th Cir. 1998) (characterizing the action as one for professional malpractice for marital counseling); *Strock*, 527 N.E.2d at 1245 (Sweeney, J., dissenting) ("[A] marriage counselor who engages in sexual relations with the spouse of a client seeking professional guidance may be answerable in damages for malpractice."); *see also Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948, 960 (Cal. 1988) ("[I]t would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors.").

38. *See* discussion *infra* Part II.

39. *See* discussion *infra* Part I.

40. *See* U.S. CONST. amend. I.



conduct is also very important, both as a general proposition and in the context of church and state interaction.<sup>41</sup>

Each person's right to believe as he wishes and to practice that belief according to the dictates of his conscience *so long as he does not violate the personal rights of others*, is fundamental to our system.<sup>42</sup>

When we examine the prohibition of sexual misconduct in the context of religious institutions, there is no clash of objectives.<sup>43</sup> If the cause of action for sexual misconduct were properly conceptualized as a malpractice claim, there may be First Amendment problems; however, the First Amendment challenges should ultimately fail because malpractice is not the proper claim, as will be demonstrated in this article.

Courts' reticence in adjudicating matters where religion is even superficially involved has permitted predators partial, if not total, shelter from laws that ought to deter and limit their activities.<sup>44</sup> It has also

- 
41. See Esbeck, *supra* note 11, at 10 ("Unless citizens exercise their freedom responsibly out of self-restraint, the coercive power of the state cannot recede into the background.").
  42. Rayburn v. Gen. Conference of Seventh-Day Adventists, 722 F.2d 1164, 1167 (4th Cir. 1985) (citing Sherbert v. Verner, 374 U.S. 398 (1963)) (emphasis added).
  43. The assumption here is of traditional major religions in society today and does not, nor could not, contemplate all potential beliefs or belief systems that may be in conflict with general social norms, mores or laws. However, though not generally regarded as tenets of major modern-day religions, emphasis on sex in religion is far from unheard of, including phallic worship in early cults. See J. GORDON MELTON, MAGIC, WITCHCRAFT, AND PAGANISM: A BIBLIOGRAPHY 71 (1982) (citing examples such as the Temple of Eulis founded in 1875 by Paschal Beverly Randolph, and the karezza technique originating in the Oneida colony founded by John Humphrey Noyes).
  44. The United States has a long tradition of regulating sexual activity. See RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS (1996) (containing a compendium of the nation's sex laws, including descriptions of laws concerning public nudity and indecency, fornication, adultery, incest, bigamy, prostitution and rape). For a more analytic discussion, see DONALD E. J. MACNAMARA AND EDWARD SAGARIN, SEX, CRIME AND THE LAW (1977). However, some courts cite the criminal law as a reason not to recognize a cause of action in tort. See, e.g., Schmidt v. Bishop, 779 F. Supp. 321, 326 (S.D.N.Y. 1991) (stating as a reason not to impose breach of fiduciary duty the "general duty to refrain from violating the penal laws stated"); Roppolo v. Moore, 644 So. 2d 206, 208 (La. Ct. App. 1994) (citing lack of criminal prohibitions as reason for not holding priest accountable). Nonetheless, at least one purpose of the tort system is to act as a means of deterrence, supplementing the criminal law system in this effect. The criminal law does not address every situation of moral culpability, nor could it. In addition, with the higher evidentiary standard and burdens of proof, all culpable actors are not necessarily held

meant that complete protections for victims of sexual abuse are not available for those who are victimized in religious settings. By denying these claims under the guise of constitutional prohibition, the constitutional mandate intended to protect religion may be helping to establish the church as a safe haven for malfeasors and thereby keep encouraging them to gravitate to it.<sup>45</sup> This consequence is aided, in part, by religious institutions themselves, through an institutional "instinct" of self-protection.<sup>46</sup> Through a sense of institutional prerogative rooted in tradition, religious institutions assert First Amendment claims, even where undesired results, both socially, and perhaps, spiritually, occur.

---

accountable under the criminal justice system. Finally, the tort system is better equipped to provide compensation and redress directly to victims of impermissible conduct.

45. That is, a rational actor, who is predisposed to sexual misfeasance, would choose to act in the confines of an institution where first amendment considerations will shield him from responsibility. Preliminary findings of social science research indicate there is at least some truth to this proposition. Some even suggest the problem is unknowable because of hiding and silencing of the problem. *See infra* note 209.

For an overview of the problem and a collection of statistics regarding clergy sexual misconduct in the various sects, see O'Reilly & Strasser, *supra* note 11, at 31–36; Villiers, *supra* note 7, at 15 n.89; MARIE M. FORTUNE, IS NOTHING SACRED?: THE STORY OF A PASTOR, THE WOMAN HE SEXUALLY ABUSED, AND THE CONGREGATION HE NEARLY DESTROYED 82 (1999) ("We have no current data that reveals the extent of this problem within the religious community. . . . However, there is no reason to assume that the incidence among clergypersons is any less frequent than the estimated 10–15% for other counseling professions."); Schwartz, *supra* note 3, at 3–4 ("[A]pproximately 10% of clergy (mostly males) have been engaged in sexual malfeasance.") (quoting L. REDINGER, MINISTRY AND SEXUALITY: CASES, COUNSELING AND CARE 279 (1990)). Much evidence is anecdotal and does not often come to court. Those that do tend to be against the traditional religions, not new and alternative religions. *See* ELIZABETH PUTTICK, WOMEN IN NEW RELIGIONS: IN SEARCH OF COMMUNITY, SEXUALITY AND SPIRITUAL POWER 50–55 (1997) (describing the most infamous stories of sexual abuse by clergy).

46. All institutions want to avoid the costs of liability. However, given the stated purposes and basic tenets of many religions, prevention of sexual misconduct and the attendant psychological harm to the parishioner and congregation should also be a goal. Avoiding responsibility may be a matter of credibility for many religions. *See* FORTUNE, *supra* note 45, at 91:

Sexual contact by pastors and pastoral counselors in professional relationships is a serious credibility issue for the church today. The unwillingness of the church, by and large, to acknowledge this problem and to address it directly results in a loss of credibility with its people. Hence some people perceive the church, rightly or wrongly, as acting first to protect its own (i.e., the pastors who act unethically in their pastoral role) from the consequences of their behavior.

This article argues that perpetrators of sexual misconduct should not be granted refuge from the potential consequences of their actions by mere affiliation with a religious institution. Part I of this article examines the theories of malpractice and breach of fiduciary duty, and determines the appropriate cause of action for sexual misconduct and ascertains their capacities to withstand First Amendment scrutiny. Determining the cause of action is essential to the evaluation of the potential constitutional challenges. Part II demonstrates that sexual misconduct by clergy is well outside First Amendment constraints. It examines both the Free Exercise and Establishment Clauses, and evaluates the approaches of courts to the situation of clergy sexual misconduct. Part II then compares the judicial treatment of sexual harassment by clergy under Title VII as guidance for treatment of sexual misconduct by clergy. This Part also discusses a general theory of state intervention in the affairs of religious organizations. This article concludes with an application of the appropriate cause of action under tort law within First Amendment constraints.

## I. CHOOSING THE TORT DOCTRINE

Courts addressing a cause of action for clergy sexual misconduct have discussed the matter as either an action for breach of fiduciary duty<sup>47</sup> or as clergy malpractice.<sup>48</sup> Many of these courts suggest that the two causes of action are in fact identical and should therefore be treated

---

47. *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169, 1176 (N.D. Tex. 1995); *F.G. v. MacDonell*, 696 A.2d 697, 700 (N.J. 1997); *Moses v. Diocese of Colo.*, 863 P.2d 310, 323 (Colo. 1993); *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988); *Erickson v. Christenson*, 781 P.2d 383, 386 (Or. Ct. App. 1989) (rejecting specifically that breach of fiduciary duty and clerical malpractice are the same cause of action). Courts have recognized claims against clergymen for fraud, *United States v. Ballard*, 322 U.S. 78, 88 (1944); sexual assault, *Mutual Serv. Cas. Ins. Co. v. Puhl*, 354 N.W.2d 900, 901 (Minn. Ct. App. 1984); sexual harassment, intentional infliction of emotional distress, and defamation, *Guinn v. Church of Christ*, 775 P.2d 766, 785-86 (Okla. 1989); unlawful imprisonment, *Whitaker v. Sandford*, 85 A.399, 399 (Me. 1912); and alienation of affections, *Hester v. Barnett*, 723 S.W.2d 544, 555 (Mo. Ct. App. 1987). *But see* *Schmidt v. Bishop*, 779 F. Supp. 321, 326 (S.D.N.Y. 1991); *Bladen v. First Presbyterian Church*, 857 P.2d 789, 796 (Okla. 1993); *Schieffer v. Catholic Archdiocese*, 508 N.W.2d 907, 912 (Neb. 1993); *Strock v. Presnell*, 527 N.E.2d 1235, 1243 (Ohio 1988); *Teadt v. St. Johns Evangelical Church*, 603 N.W.2d 816, 823 (Mich. Ct. App. 1999).

48. *See supra* note 37.

the same,<sup>49</sup> that is, impermissible under the First Amendment because they inquire into religious beliefs and practices.<sup>50</sup> These courts do not recognize the possibility of applying these doctrines in a neutral manner because of the need for a relevant standard of care.<sup>51</sup> When the courts focus first on the incidental involvement of religion rather than focusing on the factual nature of the claim and *whether* it is related to the practice of religion, application of First Amendment principles is almost inevitable.<sup>52</sup>

The problem of distinguishing malpractice and breach of fiduciary duty arises because the two actions have been treated as more or less fungible and as actions to impose when no other action fits. The perceived ill-defined status of these actions adds to the discomfort in applying them in religious contexts.

### A. Malpractice

When defined as a requirement to exercise the skill and knowledge of members of the profession,<sup>53</sup> an action for malpractice is incompatible with the separation of church and state.<sup>54</sup> In a general sense, clergy malpractice has been defined as an action intended to remedy error in

49. See, e.g., *Dausch v. Rykse*, 52 F.3d 1425, 1429 (7th Cir. 1994) (“[T]he allegation of fiduciary duty was simply an elliptical way to state a clergy malpractice claim . . .”); *Bladen*, 857 P.2d at 796 “[Plaintiff’s] fiduciary duty claim is merely another way of alleging that the defendant grossly abused his pastoral role, that is, that he engaged in *malpractice*.”). But see *Destefano*, 763 P.2d at 284–85 (distinguishing breach of fiduciary duty for sexual misconduct and malpractice for negligently performing counseling duties); *Langford v. Roman Catholic Diocese*, 705 N.Y.S.2d 661 (App. Div. 2000) (“[A]ny breach of [defendant’s] fiduciary duties can only be construed as clergy malpractice, since it would clearly require a determination concerning [defendant’s] duties as a member of the clergy offering religious counseling to the plaintiff.”); *Teadt*, 603 N.W.2d at 822 (“[P]laintiff’s allegations that [the cleric] misused his superior position as her pastor and counselor in order to achieve a sexual relationship with her also reveal that the gist of plaintiff’s action is in fact clergy malpractice.”).

50. The worry is that such a standard would require courts to identify the beliefs and practices of the relevant religion and assess the clergy member’s conduct. See *Dausch*, 52 F.3d at 1432; *Schmidt*, 779 F. Supp. at 328; *Bladen*, 857 P.2d at 797; *Destefano*, 763 P.2d at 290 (Quinn, C.J., specially concurring); *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948, 960 (Cal. 1988); *Hester*, 723 S.W.2d at 553.

51. See, e.g., *Strock*, 527 N.E.2d at 1239. See *infra* note 157 and accompanying text.

52. See *infra* pp. 37–40.

53. Restatement (Second) of Torts § 229A (1965).

54. See Esbeck, *supra* note 11, at 6.

pastoral counsel or advice.<sup>55</sup> It is not simply a theory of ordinary negligence, but one directed at the cleric's professional activity. Where it is necessary to examine standards of the profession of bona fide religious counseling to establish the breach, the claim should not be permitted.<sup>56</sup> Thus, as in the case of *Nally v. Grace* or similar situations,<sup>57</sup> inquiry into religious doctrine or standards of religious counseling are inappropriate.<sup>58</sup>

55. See Funston, *supra* note 11, at 511.

56. See *infra* note 136.

57. *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948 (Cal. 1988); see also *Ropolo v. Moore*, 644 So.2d 206 (La. App. 1994) (explaining allegations of adulterous affair with priest prior to suicide of plaintiff's wife does not justify inquiry into the practices, conduct or duties of cleric).

58. Courts may not assess the validity of religious belief or practice. *United States v. Ballard*, 322 U.S. 78, 86–88 (1944); see also Esbeck, *supra* note 11, at 7 (“[A] balance must be struck between the needs of the religious community and the protection of citizens from tortious injury, even when these individuals voluntarily connected themselves with the church they now wish to sue.”).

Some commentators have suggested possible “standards of care” to be applied to general clergy malpractice claims: 1) a secular standard. This standard employs the position that pastoral counseling is separable from other more obviously religious functions. See Burton, *supra* note 11, at 472; Lawrence M. Burek, Note, *Clergy Malpractice: Making Clergy Accountable To A Lower Power*, 14 PEPP. L. REV. 137, 152 (1986); Funston, *supra* note 11, at 514–17; Villiers, *supra* note 7, at 49–52; 2) a state of the art standard. This standard urges that current secular psychological principles and trends be applied. Burton, *supra* note 11, at 472; Ben Zion Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V. L. REV. 47, 59 (1981); Burek, *supra*, at 153–54; 3) a denominationally specific standard of care. See Funston, *supra* note 11, at 517–20. This standard of care would be specific to members of a particular sect and the training within that community. See Burton, *supra* note 11, at 472–73; Burek, *supra* note 58, at 152–53; Funston, *supra* note 11, at 520–24; 4) a neutral standard of care. To the extent a clergy member holds himself out to be competent in counseling, he should be held to the duty imposed upon skilled counselors. Burek, *supra*, at 150; Burton, *supra* note 11, at 473.

These standards are ultimately inapplicable to spiritual counseling because the nature of the counseling cannot be separated into secular and spiritual. The basis for many of these standards is either analogy or direct borrowing from the psychotherapy professions. Of borrowing standards from mental health professions, Esbeck points out that “both in theory and in practice, however, the ‘cure of minds’ and the ‘healing of souls’ does not segment so neatly.” *Supra* note 11, at 83 (citing S. ERICSSON, *CLERGY MALPRACTICE: AN ILLEGAL THEORY* 165–66, 171–72 (1986)). This is because attempts to fashion a standard of care, generally or denominationally specific, would necessitate inquiry into religious standards, practices and beliefs. See Esbeck, *supra* note 11, at 83 (discussing difficulty with standards of care choices). However, where the cleric holds himself out to be skilled and experienced in counseling and asserts that he has psychological training, he should be held to the secular standards of care for the profession and for professional malpractice. See *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169 (N.D. Tex. 1995); *Mullen v. Horton*, 700 A.2d 1377 (Conn. App. 1997).

In *Nally*, only purely spiritual counsel and advice regarding matters of orthodoxy and religious tenets were offered. *Nally* is distinguishable from a situation where a cleric exploits the confidential information and vulnerabilities of a parishioner for personal satisfaction and gratification. Sexual abuse is not spiritual counseling. It is neither merely careless nor irresponsible. It is the use of a counseling position, under the guise of church authority, to exploit another. It therefore need not be analyzed as counseling or under the general rubrics of clergy malpractice.

Malpractice is an action based in either contract, implied or express, or a consensual and fiduciary relationship.<sup>59</sup> The composition and formation of malpractice are not dissimilar to breach of fiduciary duty.<sup>60</sup> However, professional malpractice is broader than breach of fiduciary duty in that the relevant standard of care arises from the profession, not just the independent relationship. In malpractice, courts are guided by a standard forged and espoused by the profession over time. Conversely, in breach of fiduciary duty, courts scrutinize an interpersonal relationship where a specific duty to act for the benefit of another exists.<sup>61</sup> Nonetheless, though malpractice is per se negligence, there is no cause of action for malpractice if there are no damages to the entrusting party.<sup>62</sup> In most

---

59. 61 Am. Jur. 2d § 200 (discussing medical malpractice); *Doe v. Roe*, 681 N.E.2d 640, 649 (Ill. App. Ct. 1997) (explaining that “included within the rubric of legal malpractice are claims grounded in breach of contract, negligence, and breach of fiduciary duty”); see also *Burns v. Hanson*, 734 A.2d 964, 970 (Conn. 1999) (discussing the elements of medical malpractice); *Preble v. Young, M.D.*, 999 S.W.2d 153, 155 (Tex. Ct. App. 1999) (concerning medical malpractice); *Klemme v. Best*, 941 S.W.2d 493, 495–96 (Mo. 1997) (discussing legal malpractice as a cause of action separate from breach of fiduciary duty and citing *Donohue v. Shughart, Thomas & Kilroy*, 900 S.W.2d 624, 626 (Mo. 1995) (en banc)).

60. See *infra* pp. 22–45.

61. See *Joyce v. Garnas*, 983 P.2d 369 (Mont. 1999) (citing *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1290 (Utah Ct. App. 1996)) (“Legal malpractice based on negligence concerns violations of standard of care; whereas, legal malpractice based on breach of fiduciary duty concerns violations of a standard of conduct.”); see also *Moses v. Diocese of Colo.*, 863 P.2d 310, 321 n.13 (Colo. 1993) (explaining that the fundamental difference between breach of fiduciary duty and clergy malpractice is “the former is a breach of trust and does not require a professional standard of care, while the latter is an action for negligence based on a professional relationship and a professional standard of care”).

62. Malpractice relies on specific standards of care below which the practitioner should not fall, but the claim is only effective if it has affected an individual with whom the professional has a relationship and responsibility. Merely breaching professional standards is not actionable without a claimant. Thus, the distinction is more semantic than real.

cases, one might say that breach of fiduciary duty is a necessary component of malpractice.<sup>63</sup>

However, it is also possible to have a cause of action for malpractice without a cause of action for breach of fiduciary duty because it is not necessarily a breach of fiduciary duty if the person in the fiduciary position has not served his own interest in contravention of the other's, and without damages to the entrusting party.<sup>64</sup> Thus, it is possible to act in the client's best interest while nonetheless breaching the customs of other professionals in the field. Additionally, it is possible to abuse the interests of the entrusting party without breaching professional standards, constituting breach of fiduciary duty alone. For example, a priest, engaged in the counsel of a parishioner, who sells an entrusted, valuable family heirloom of that parishioner, has breached a fiduciary duty. In this situation, the parishioner should be entitled to rely on the trust engendered in the relationship.

Since breach of fiduciary duty, as a general matter, is a subset and component of malpractice, when the same operative facts support the actions for malpractice and breach of fiduciary duty, the two claims are identical.<sup>65</sup> Therefore, malpractice as the cause of action for sexual misconduct in a counseling relationship should be considered permissible, but only to the extent that it reflects breach of fiduciary duty.

### *B. Breach of Fiduciary Duty*

The courts regard a trusting relationship as most worthy of protection: "No Part of the jurisdiction of the Court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other." This "principle of humanity" exists for the "preservation of mankind" and is to be guarded with a

---

63. A fiduciary duty exists as a matter of law between a professional and his client; therefore, any professional malpractice claim includes a breach of fiduciary duty. *See Calhoun v. Rane*, 599 N.E.2d 1318, 1321 (Ill. App. Ct. 1992).

64. *Gerdes v. Estate of Cush*, 953 F.2d 201, 204-05 (5th Cir. 1992); *Resolution Trust Corp. v. Accardo*, 1994 WL 151081, at \*4 (E.D. La. Apr. 6, 1994) (discussing legal malpractice); *Fed. Sav. & Loan Ins. Corp. v. Shelton*, 789 F. Supp. 1360, 1366 (M.D. La. 1992).

65. *See Majumdar v. Lurie*, 653 N.E.2d 915, 920 (Ill. App. Ct. 1995).

“jealousy almost invincible.” It is necessarily “an inflexible rule, and must be applied inexorably.”<sup>66</sup>

Breach of fiduciary duty is rarely discussed in depth or defined.<sup>67</sup> Fiduciary duties originated in equity.<sup>68</sup> They may be defined only broadly, with the ability to conform to almost any situation. Breach of fiduciary duty has been considered to be based in breach of contract,<sup>69</sup> negligence, breach of trust,<sup>70</sup> corporate law,<sup>71</sup> and fraud.<sup>72</sup> Early in its development, “fiduciary theory provided a remedy when injustice would otherwise result.”<sup>73</sup> Originally, fiduciaries were only trustees and banks.<sup>74</sup>

66. Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 285 (1989) (citations omitted).

67. See Roy Ryden Anderson & Walter W. Steele, Jr., *Ethics and the Law of Contract Juxtaposed: A Jaundiced View of Professional Responsibility Considerations in the Attorney-Client Relationship*, 4 GEO. J. LEGAL ETHICS 791, 792 n.14 (1991) (“Although the concept of fiduciary relationship is well established in the law, it is surprising that one finds little judicial discussion defining the relationship or discussing its etiology and parameters.”); see also Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879 (1985) (“Applicable in a variety of contexts, and apparently developed through a jurisprudence of analogy rather than principle, the fiduciary constraint on a party’s discretion to pursue self-interest resists tidy categorization.”).

68. DeMott, *supra* note 67, at 880–81; L. S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69, 70 (1962).

69. See Anderson & Steele, *supra* note 67, at 792; DeMott, *supra* note 67, at 879–80 (discussing the ways contract principles have been used to describe fiduciary obligations).

70. See Sealy, *supra* note 68, at 71–72 (“The word fiduciary . . . was adopted to describe these situations which fell short of the now strictly-defined trust.”).

71. See DeMott, *supra* note 67, at 915–24.

72. Both malpractice and its subset, breach of fiduciary duty, arose in part from forms of contract and trust. See Restatement (Second) of Torts § 874 cmt. a (1979); BOGERT, TRUSTS AND TRUSTEES 2d § 481 (1978); Restatement (Second) of Trusts §§ 170, 174 (1979); Restatement, Contracts § 472, cmt. c (1932). The blurry line between contract and tort is often noted. In 1974, Professor Gilmore suggested that “[c]ontract is being reabsorbed in the mainstream of tort.” and that the similarity between tort and contract damages was leaving no “viable distinction between liability in contract and liability in tort.” GRANT GILMORE, *THE DEATH OF CONTRACT* 87, 88 (1974). To the extent we view the operation of contract law as more neutral, it is perhaps a false distinction. See generally Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897 (discussing the evolution of fiduciary law as a combination of contract and tort).

73. STEPHEN B. BISBING, ET AL., *SEXUAL ABUSE BY PROFESSIONALS: A LEGAL GUIDE* 11 (1995).

74. See Anderson & Steele, *supra* note 67, at 792 (“Historically, certain personal and professional relationships, such as trustee and beneficiary, corporate director and the corporate entity, and attorney and client, have been treated as fiduciary in nature.”)



The law of fiduciary relationships then developed by analogy to laws governing trustees' administration of estates and trusts.<sup>75</sup> The term later broadened to include more than trusts,<sup>76</sup> to include physician and patient and even minister and parishioner.<sup>77</sup> It has been extended so far as to cover informal relationships.<sup>78</sup>

Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The rule

---

The traditional categories for fiduciaries are generally regarded as trustee to beneficiary, guardian to ward, agent to principal, attorney to client, executor to legatees, partner to partner, corporate directors and officers to the corporation and shareholders, receiver to the court and the distributees and bailee to bailor; *see also* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 795-96 (1983); Austin Scott, *The Fiduciary Principle*, 317 CAL. L. REV. 539, 541 (1949).

75. BISBING, *supra* note 73, at 5 (citing *Duke of Beaufort v. Berty*, 1 O. Wms. 703, 704-05 (1721) (holding guardians of infant to be trustees)); *see also* *Klemme v. Best*, 941 S.W.2d 493, 495-96 (Mo. 1997) (comparing breach of fiduciary duty to constructive fraud and citing *Johnson v. Smith's Administrator*, 27 Mo. 591, 592-93 (Mo. 1859) and *Swon v. Huddleston*, 282 S.W.2d 18, 25-26 (Mo. 1955)); *Anderson & Steele, supra* note 67, at 793; Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking—Some Theoretical Perspectives*, 80 Nw. U. L. REV. 1 (1985).
76. *See* BISBING, *supra* note 73, at 30 (discussing "fiduciary at law" status compared to fiduciary in fact). Likening "fiduciary at law" to malpractice, courts have found fiduciary relationships between doctors and other health care professionals, including psychiatrists and psychotherapists and their patients. *See, e.g.,* *Estate of McRae*, 522 So. 2d 731 (Miss. 1988) (finding physician-patient relationship fiduciary); *Mazza v. Huffaker*, 300 S.E.2d 833 (N.C. 1983) (finding psychiatrist-patient relationship fiduciary); *Hodge v. Shea*, 168 S.E.2d 82 (S.C. 1969) (finding psychiatrist-patient relationship fiduciary); *In re Corse's Estate*, 182 N.Y.S.2d 514 (1958) (finding nurse-patient relationship fiduciary). Janice Villiers suggests the clergy/counselor relationship should be deemed fiduciary at law because of the nature of the relationship, the power imbalance between the parties, and the paucity of alternatives for the trusting party. Villiers, *supra* note 7, at 42.
77. *See* *Guill v. Wolpert*, 218 N.W.2d 224, 228 (Neb. 1974); *In re Harderode's Estate*, 148 N.W. 774, 777 (Mich. 1914); *Anderson & Steele, supra* note 67, at 792 (citing *Ross v. Conway*, 28 P. 178 (Kan. 1892)); *see also* *Sally, supra* note 68, at 79 (citing explicitly the priest-devotee relationship as included in several categories of fiduciary relationship); *Flannigan, supra* note 66, at 298 (including confessor/penitent within the category of fiduciary relationships).
78. While there may be some minor theoretical differences between the categories of fiduciary, confidential, special and unconventional fiduciary relationships, I do not find the distinctions significant or useful and treat them as synonymous. *See* *Scallen, supra* note 72, at 906 n.31; Neil S.B. Schaumann, *The Lender as Unconventional Fiduciary*, 23 SETON HALL L. REV. 21 (1992).

embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another. Such a relationship might be found to exist, in appropriate circumstances, between close friends or even where confidence is based upon prior business dealings.<sup>79</sup>

---

79. *Penato v. George*, 383 N.Y.S.2d 900, 904–05 (1976) (citations omitted); *see also Sanders*, 898 F. Supp. at 1176; *State ex rel. Harris v. Gautier*, 147 So. 240, 242 (Fla. 1933) (“The term ‘fiduciary or confidential relations’ is a very broad one, and embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in or relies upon another.”); *Higgins v. Chicago Title & Trust Co.*, 143 N.E. 482, 484 (Ill. 1924) (“A fiduciary relation, however, is not limited to cases of trustee and cestui que trust, guardian and ward, attorney and client, or other recognized legal relations, but it exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence is immaterial. It may be moral, social, domestic, or merely personal. If the confidence in fact exists, is reposed by the one party and accepted by the other, the relation is fiduciary, and equity will regard dealings between the parties according to the rules which apply to such relation.”); *Eldridge v. May*, 150 A. 378, 379 (Me. 1930) (“The term ‘fiduciary or confidential relation,’ . . . is a very broad one. It embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The relations and duties involved in it . . . may be moral, social, domestic, or merely personal.”); *Warsofsky v. Sherman*, 93 N.E.2d 612, 615 (Mass. 1950); *Adams v. Moore*, 385 S.E.2d 799, 801 (N.C. Ct. App. 1989) (“[A] fiduciary relationship can be found to exist anytime one person reposes a special confidence in another.”); *Di Maio v. State*, 517 N.Y.S.2d 675, 678 (Ct. Cl. 1987) (“[A] fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another, and embraces both technical fiduciary relations and those informal relations which exist when one man trusts in and relies upon another.”); *BISBING*, *supra* note 73, at 4 (“Our thesis is that fiduciary duties should be imposed with respect to *all* dealings—professional, financial, and personal—between patients or clients and certain professionals whose special skills induce the trust and reliance of patients and clients.”); *BISBING*, *supra* note 73, at 11 (“Fiduciary law did not limit itself to any restricted formal relationships.”); *DeMott*, *supra* note 67, at 891–92; *Scallen*, *supra* note 72, at 905:

The characterization of these [fiduciary] relationships as “traditional” ignores the unequivocal fact that fiduciary law is a product of many centuries of development . . . [L]abeling anything as “traditional” has unfortunate consequences, for the primary means of answering the question whether an individual is a fiduciary is through analogizing the case at hand to a “traditional” fiduciary.

Doubtless, there are many familiar and well recognized forms of fiduciary relationships such as attorney and client, trustee and beneficiary, physician and patient, business partners, promoters or directors and a corporation, and employer and employee. The relationship is not confined, however, to these and similar situations, for the circumstances which may create a

Fiduciary relationships have been found between family members,<sup>80</sup> unmarried cohabitants,<sup>81</sup> and business associates.<sup>82</sup>

Fiduciary duty is very fact specific to the relationship,<sup>83</sup> not necessarily categorically defined,<sup>84</sup> and is dependent on the power imbalance, trust bestowed, and on the injustice that would result without its application.<sup>85</sup> Fiduciary relationships are based on the "actual placing of trust and confidence in fact by one party in another and a great disparity of position and influence between the parties to the relation."<sup>86</sup> Because the relationship encourages the divulging of intimate and personal information, an inherently higher degree of trust is what makes it possible for the fiduciary to gain an advantage at the beneficiary's expense. Therefore, a fiduciary "is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is the standard of behavior."<sup>87</sup> "A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation."<sup>88</sup> Once the fiduciary relationship

---

fiduciary relationship are so varied that it would be unwise to attempt the formulation of any comprehensive definition that could be uniformly applied in every case.

(citations omitted.)

80. *See, e.g.*, *Swenson v. Wintercorn*, 234 N.E.2d 91, 97 (Ill. App. Ct. 1968) (finding fiduciary relationship between niece and aging aunt); *Ruebsamen v. Maddocks*, 340 A.2d 31, 35–36 (Me. 1975) (finding fiduciary relationship between plaintiffs (wife and her father) and defendant (husband)); *Ohio Cas. Ins. Co. v. Mallison*, 354 P.2d 800, 802 (Or. 1960) (noting that the parental duty to protect a child's interests is of a "fiducial character" and that "a parent is the natural guardian of his child . . . [and a] guardian stands in a fiduciary relation to his ward").
81. *See, e.g.*, *Sullivan v. Rooney*, 533 N.E.2d 1372, 1374 (Mass. 1989).
82. *See, e.g.*, *Cann v. Barry*, 199 N.E. 905, 906–07 (Mass. 1936).
83. *BISBING, supra* note 73, at 125; *DeMott, supra* note 67, at 879 ("Recognition that the law of fiduciary obligation is situation-specific should be the starting point for any further analysis.").
84. "Fiduciary at law" evolved to impose fiduciary responsibilities on certain categories automatically. *See SEALY, supra* note 68, at 70–72; *BISBING, supra* note 73, at 8–16.
85. *BISBING, supra* note 73, at 28.
86. *Ruebsamen v. Maddocks*, 340 A.2d 31, 35 (Me. 1975) (noting that status as fiduciary is defined by external expectations); *see also FLANNIGAN, supra* note 66, at 302–03 (discussing the "dominating influence" of one person over another as characteristic of the fiduciary relationship and the imprecise nature of the definition).
87. *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928); *see also DEMOTT, supra* note 67, at 882 ("The fiduciary's duties go beyond mere fairness and honesty; they oblige him to act to further the beneficiary's best interests. The fiduciary must avoid acts that put his interests in conflict with the beneficiary's.").
88. *RESTATEMENT (SECOND) OF TRUSTS* § 2 cmt. b (1957).

or professional context is established, the obligation extends not only to that context, but also to other transactions between the parties.<sup>89</sup>

“The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position.”<sup>90</sup> A significant differential in power between the parties conditions the potential for exploitation.<sup>91</sup> Other factors relevant in the existence of a fiduciary relationship are whether one party is accustomed to guidance by the other; whether one party has superior knowledge or knows that the other relies upon him; and whether there is evidence that one party was dominated by the other.<sup>92</sup> Eileen Scallen has analyzed courts’ willingness to extend fiduciary duties through various means, such as:

- (1) dependence or vulnerability by one party on the other, that
- (2) results in power being conferred on the other,
- (3) such that the entrusting party is not able to protect itself effectively, . . . and

---

89. 61 Am. Jur. 2d § 165 (“The peculiar duty of good faith and fair dealing of the physician with the patient, which arises out of the relation of trust and confidence which exists between them, does not extend only to the professional obligation of the physician to his patient, but extends also to other transactions between patient and physician.”).

90. *F.G. v. MacDonell*, 696 A.2d 697, 703–04 (N.J. 1997).

91. *See, e.g., F.G.*, 696 A.2d at 700 (noting that the pastor, aware of the congregant’s vulnerability, nonetheless induced her to engage in a sexual relationship).

92. Gregory B. Westfall, Note, “*But I Know it When I See It: A Practical Framework for Analysis and Argument of Informal Fiduciary Relationships*,” 23 TEX. TECH. L. REV. 835, 850 (1992) (discussing Texas law, and attempting to provide an analytic framework for the existence of fiduciary relationships); *see also Corcoran v. Land O’Lakes, Inc.*, 39 F. Supp. 2d 1139, 1154 (N.D. Iowa 1999); *Oeltjenbrun v. CSA Investors, Inc.*, 3 F. Supp. 2d 1024, 1053 (N.D. Iowa 1998); *Economy Roofing & Insulating v. Zumaris*, 538 N.W.2d 641, 647 (Iowa 1995); BENYEI, *supra* note 1, at 62 (“[S]exual abuse always implies a power differential between the abused and the abuser, the victim and the victimizer.”); Cooper-White, *supra* note 7, at 196 (arguing “such intimate relating is *always* an unethical boundary violation and that it is *always* the pastor’s responsibility to maintain appropriate boundaries”); FORTUNE, *supra* note 45, at 81 (“[S]exual contact by pastors or pastoral counselors with parishioners or clients within a professional relationship is a violation of professional ethics that not only undercuts an effective pastoral relationship but, also, is exploitative and abusive.”); Rev. Marie M. Fortune, *Is Nothing Sacred? When Sex Invades the Pastoral Relationship, in BREACH OF TRUST: SEXUAL EXPLOITATION BY HEALTH CARE PROFESSIONALS AND CLERGY* 29, 32–34 (John C. Gonsiorek ed., 1995).

- (4) this entrustment has been solicited or accepted by the party on which the fiduciary obligation is imposed.<sup>93</sup>

Because of the status and presumed spiritual and worldly expertise of the clergy, a congregant commonly experiences positive feelings towards the cleric or holds him in high esteem without his having earned that esteem.<sup>94</sup> Sexual exploitation at the time of transference, or “the projection of feelings, thoughts and wishes onto [a counselor], who has come to represent some person from the patient’s past,”<sup>95</sup> can occur in any relationship, not just within that of psychotherapist-patient,<sup>96</sup> and is outside the scope of pastoral counseling.<sup>97</sup> Even though clerics may not be trained to handle transference, nonetheless, they are or should be aware of *some* emotional consequences to such actions. At the least, objectivity in the counseling task would be compromised. And, regardless of how the relationship originated, fear of reprisals, both spiritual and secular, would be ever-present if the relationship ended.<sup>98</sup> The possibility of transference, combined with the act of seeking help and counsel

93. Scallen, *supra* note 72, at 922 (arriving at this flexible framework by analyzing case law and critiquing other theories of fiduciary relations); *see also* Demott, *supra* note 67, at 915 (developing an instrumental theory: “the fiduciary obligation is a device that enables the law to respond to a range of situations in which, for a variety of reasons, one person’s discretion ought to be controlled because of characteristics of that person’s relationship with another”).

94. *See* BISBING, *supra* note 73, at 24.

95. STEDMAN’S MEDICAL DICTIONARY 1473 (5th ed. 1982).

96. *See* Shirley Feldman-Summers, *Sexual Contact in Fiduciary Relationships*, in *SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS* 193, 202 (Glen O. Gabbard ed., 1989):

Although transference is most often discussed in the context of psychotherapy, theorists such as Becker . . . and Brenner, reason that it can occur with any suitable target. . . . All that is required is an authority figure who bears at least a symbolic resemblance to the actual or idealized other about whom the client/patient/student has unconscious fantasies or unresolved conflicts.

97. *See* Funston, *supra* note 11, at 520 (defining the treatment of transference as an unconscious conflict, as opposed to a conflict of religious doctrine or belief); *see also* *Bladen v. First Presbyterian Church*, 857 P.2d 789 (Okla. 1993) (explaining transference phenomenon generally relevant only to therapist-patient relationships where treatment is predicated upon its handling).

98. Even though it is not appropriate to borrow standards of care from the psychotherapy profession, much of their forms of conduct and prohibitions are relevant. “Other psychotherapists have access to consultation on difficult situations, but many ministers do not ever seek expert guidance in the matter of treating the women of their congregations.” Samuel L. Bradshaw, M.D., *Ministers in Trouble: A Study of 140 Cases Evaluated at the Menninger Foundation*, 31 J. PASTORAL CARE 230, 238 (1997) (explaining results from one of the few empirical studies on ministers, evaluating 140 Protestant ministers between 1964 and 1972).

bespeaks a certain level of vulnerability on the part of the congregant.<sup>99</sup> Use of personal information to prey on a congregant's vulnerability in order to seduce<sup>100</sup> them is a breach of fiduciary trust.<sup>101</sup> Preying on the

---

99. See BISBING, *supra* note 73, at 20; see also Linda M. Jorgenson, *Sexual Boundary Violations: The Role of Legal Prohibitions*, 24 J. SEX ED. & THERAPY 226, 227–28 (1999) (identifying the presenting problem, one-sided revelations, idealization of the counselor, and the stress of the process as factors creating the vulnerability of the counselee).

100. Some courts have compared claims for sexual misconduct to the amatory or "heart balm" actions. None have regarded the abolition of the amatory torts as precluding a cause of action for sexual misconduct. See, e.g., *Destefano v. Grabrian*, 763 P.2d 275, 282 (Colo. 1988) (en banc); see also *Esbeck, supra* note 11, at 89 (pointing out that states may choose to abolish such claims, but it is not required by the First Amendment); *Strock v. Pressnell*, 527 N.E.2d 1235, 1240–44 (Ohio 1988) (holding that a claim which includes elements of abolished actions does not preclude the claim); *Goldberg v. Musim*, 427 P.2d 698, 701 (Colo. 1967); *Teadt v. Lutheran Church Mo. Synod*, 603 N.W.2d 816, 821 (Mich. Ct. App. 1999) (determining that claim of "seduction" was not essence of plaintiff's breach of fiduciary duty claim, but then refusing to find a fiduciary relationship); *Gasper v. Lighthouse, Inc.*, 533 A.2d 1358, 1360 (Md. App. 1987); *Cotton v. Kambly*, 300 N.W.2d 627, 628 (Mich. Ct. App. 1980).

More interesting than the assertion that the abolition of the amatory torts precludes causes of action for sexual misconduct is that the continued existence of the amatory torts likely would not have been viewed to be in contravention of the First Amendment; it is only when women were entitled to bring claims on their own behalf for wrongs done to themselves that redress has been substantially denied. See *Lund v. Caple*, 675 P.2d 226, 231 (Wash. 1984); *Wyman v. Wallace*, 615 P.2d 452, 455 (Wash. 1980); *Bladen*, 857 P.2d at 796–97.

In searching for the appropriate cause of action, it is only surprising that solicitation was not asserted. One plaintiff suggested that a cleric's "financial and emotional assistance to her was in exchange for sexual relations." *Teadt*, 603 N.W.2d at 818.

101. Cf. *F.G. v. MacDonell*, 696 A.2d 697, 700 (N.J. 1997) (explaining that fiduciary is "a special duty of care not to engage in unethical and harmful behavior towards [the plaintiff]") (quoting plaintiff's brief); *Tante v. Herring*, 453 S.E.2d 686, 687–88 (Ga. 1994) ("Tante was a fiduciary with regard to the confidential information provided him by his client just as he would have been a fiduciary with regard to money or other property entrusted to him by a client."); *Doe v. Roe*, 781 N.E.2d 640, 650 (Ill. Ct. App. 1997) ("[A]n attorney simply cannot use information obtained in the representation of a client to entice her into a sexual relationship that she otherwise would not have engaged in and then claim that the relationship is purely personal or that he has not breached his fiduciary duty."). In this context, the breach is that much more egregious when false theology is used for its coercive power. See, e.g., *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 414 (2d Cir. 1999) (describing where cleric induced boy to perform fellatio on him by telling him that the act was a way to receive holy communion); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991) (alleging Bishop invoked God as supporting his conduct); *Teadt*, 603 N.W.2d at 822; *Langford v. Roman Catholic Diocese*, 705 N.Y.S.2d 661, 663 (App. Div. 2000) (explaining that after telling his parishioner

vulnerabilities of someone for whom there is a fiduciary relationship is only for the benefit of the predator.

Consent does not operate as a valid defense in such situations. That society regards sexual relationships as private and beyond state regulation<sup>102</sup> is irrelevant to whether the fiduciary duty has been breached.<sup>103</sup> However, the consensual nature of the association is part of what defines a fiduciary relationship. Establishment of a fiduciary relationship renders implied consent legally impossible.<sup>104</sup> It is worth pointing out that consent between equals in an intimate context is qualitatively different from consent to sexual contact between fiduciary parties.<sup>105</sup> Once it is established that breach of fiduciary duty is the appropriate cause of action for clergy sexual misconduct, whether independently or as a single component of malpractice, it must be shown that breach of fiduciary duty can be applied in a neutral manner.

While the clergy malpractice claim may require the development of a "reasonable clergy" standard, the fiduciary duty claim does not necessarily require such an inquiry inasmuch as the standard to which a fiduciary is held is not that of a 'professional.' In other words, rather than being restricted to

---

that the vow of celibacy only prevented sexual intercourse, clergyman told her that only his prayers were keeping her well and preventing her multiple sclerosis from recurring); *cf.* SCHULHOFER, *supra* note 9, at 219 ("The easiest cases to condemn are those in which the doctor gets the patient's consent by claiming that sexual contact will serve a useful role in therapy.").

102. See *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965). *But see* *Bowers v. Hardwick*, 478 U.S. 186 (1986).
103. Consent is considered a defense only to intentional torts. See, e.g., *Schieffer v. Catholic Archdiocese*, 508 N.W.2d 907, 910–11 (Neb. 1993) (discussing consent as a defense to intentional infliction of emotional distress). Though the act of sexual intercourse may be intentional, the use of personal information to coerce or prey on the vulnerabilities of another comes under the rubric of negligence, to which consent should not be considered a defense.
104. *Cf.* SCHULHOFER, *supra* note 9, at 219 ("A sexual liaison between the patient and therapist can arise in a variety of ways, but virtually all of them involve serious defects in the patient's consent."); see also *infra* Part II.D.
105. See *Fortune*, *supra* note 92, at 32 ("Frequently, however, the parishioner/client has sought pastoral care during a time of crisis and is very vulnerable."); *cf.* Jacqueline Bouhoutsos et al., *Sexual Intimacy Between Psychotherapists and Patients*, 14 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 185, 185 (1983) ("Seductiveness of the patient is irrelevant, as therapist-patient sexuality is analogous to parent-child sexuality. By that analogue, sexual intimacy between patient and therapist is not viewed as a consensual act between adults."). *But see* *Schieffer*, 508 N.W.2d at 910–11.

consideration of standard of care to be followed by clergy persons or other religious entities, a court or jury can, in some circumstances measure a religious organization's or official's conduct by preexisting secular standards of care to which all fiduciaries are held.<sup>106</sup>

The first step in dealing with the constitutional and other legal issues is understanding that the issue is not an ecclesiastic one.<sup>107</sup> Certainly sexual activity, and especially misconduct, are not products of religious belief.<sup>108</sup> Characterizing the claim from its factual basis is essential. Otherwise, the essence of the claim and the justice sought is obscured in the mire of First Amendment jurisprudence.

## II. CHURCH AND STATE

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.<sup>109</sup>

The Free Exercise and Establishment Clauses are intended to address different aspects of religious practice. Nonetheless, the religion clauses of the First Amendment are often confused or discussed simultaneously, as they are in some of the clergy sexual misconduct cases. Some courts have found jurisdiction lacking because adjudication would require interpreting church doctrine or deciding religious matters using an Establishment Clause analysis. These courts express concern over

---

106. *Martinelli*, 10 F. Supp. 2d at 146.

107. *Langford*, 705 N.Y.S.2d at 666 (Miller, J., dissenting) ("While a claim of clergy malpractice may require a court to examine ecclesiastical doctrine, a claim of breach of fiduciary duty raises secular issues, which can be adjudicated using neutral principles of law.") (citations omitted); *Smith v. Raleigh Dist. of N.C. Conference of United Methodist Church*, 63 F. Supp. 2d 694, 713-14 (E.D.N.C. 1999) ("[A] court must consider the nature of a particular dispute involving a religious defendant to determine whether the First Amendment bars its exercise of jurisdiction over that dispute."); *see also Bell v. Presbyterian Church*, 126 F.3d 328, 331 (4th Cir. 1997) (stating that a court must determine whether the dispute "is an ecclesiastical one about 'discipline, faith, internal organization, or ecclesiastical rule, custom or law,' . . . or whether it is a case in which [it] should hold religious organizations liable in civil courts for 'purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization' ") (citations omitted).

108. *See supra* note 43.

109. U.S. CONST. amend. I.



excessive entanglement with church doctrine.<sup>110</sup> Even so, Free Exercise seems to be at the heart of courts' analyses in these cases.

This confusion potentially stems from two separate causes. First, the Free Exercise cases address both the absolute prohibition of religious conduct and the interference by the state with matters of church government. The rhetoric of avoiding interference with Free Exercise is very similar to that of avoiding "entanglement" in Establishment Clause analyses. So, despite the different purposes underlying the separate Clauses, this rhetorical short-hand has been applied in both analyses.<sup>111</sup> Second, courts' insistence on addressing the factual claims as ones for malpractice necessitates a constitutional inquiry. With the proper conceptualization of the cause of action appropriate to the factual situation of sexual abuse, such an inquiry is unnecessary.

### A. Free Exercise

With the decision in *Employment Division v. Smith*,<sup>112</sup> it is clear that the state may prohibit conduct through generally applicable laws as long as such prohibitions are not specifically directed at religious practice.<sup>113</sup> First Amendment exemption from a neutral law of general applicability cannot be sought "on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."<sup>114</sup> The objective of preventing sexual misconduct and exploitation is not directed, nor should it be directed, at any one religion or only at religion.

*Smith* was controversial for its narrow view of Free Exercise, in that "neutral, generally applicable laws" were said to be exempt from constitutional scrutiny, even when they prohibit or substantially burden

---

110. See, e.g., *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991); cf. *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 99 (Mo. Ct. App. 1995) (explaining religion was foundation of plaintiff's relationship with the defendant); *Isley v. Capuchin Province*, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995) (stating that "any inquiry into the decision of who should be permitted to become or remain a priest necessarily would involve prohibited excessive entanglement with religion").

111. It is also possible that because no valid assertion of belief is likely to be asserted in these claims, precluding the need to determine free exercise, *infra* note 142, judges have analyzed the issue under the Establishment Clause to protect mainstream, traditional churches from liability.

112. 494 U.S. 872 (1990).

113. *Smith*, 494 U.S. at 877-78; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

114. *Smith*, 494 U.S. at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

religious freedom.<sup>115</sup> In addition, the Congressional enactment of the Religious Freedom Restoration Act (RFRA)<sup>116</sup> heightened any such controversy. Notwithstanding the controversial divide between Congress in enacting the RFRA and the Supreme Court in overruling its application to the states in *City of Boerne v. Flores*,<sup>117</sup> it is not a substantial burden to address the harms resulting from clergy sexual misconduct. Protecting the vulnerable in our society from predatory conduct is surely a valid justification for government or state action. Indeed, interpretations of the Constitution that prevent causes of action for sexual misconduct on Free Exercise grounds makes a mockery of valid practices based upon sincerely held beliefs.<sup>118</sup>

The Free Exercise Clause is intended to protect religious freedom<sup>119</sup> but has never been interpreted as an absolute protection.<sup>120</sup> *Smith* was

115. See Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997) (critiquing *Smith*, 494 U.S. 872); see also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering Division of Employment v. Smith, A Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U. L. REV. 388 (1991).

116. 42 U.S.C. §§ 2000bb-2000bb4 (1994).

117. 521 U.S. 507 (1997); see generally McConnell, *supra* note 115.

118. Ironically, the Constitution has been interpreted to allow the prohibition of consensual relations that are the essence of sincerely held religious belief and that have no demonstrably deleterious effect on society. *Reynolds v. United States*, 98 U.S. 145 (1878) (denying Mormons an exemption from federal law prohibiting polygamy); cf. *Smith*, 494 U.S. 872 (denying exemption for the sacramental use of peyote); see generally Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy As a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295 (1998). It has also been interpreted to allow sexual abuse to occur under some interpretations of the First Amendment. *Supra* pp. 35-42.

119. For Supreme Court cases supporting the principle that churches should be able to decide matters of church government, faith, and doctrine for themselves, see *Serbian Eastern Orthodox Diocese for the United States & Canada v. Milivojevic*, 426 U.S. 696, 708-15 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 446-49 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 107 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929); *Watson v. Jones*, 80 U.S. 679, 728-29 (1871) [hereinafter "the Kedroff line of cases"]; see also *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985) (citing *Kedroff*); *E.E.O.C. v. Catholic Univ.*, 83 F.3d 455, 460 (D.C. Cir. 1996) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-33 (1993) and *Kedroff*).

120. See, e.g., *Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp. 2d 694, 702 (E.D.N.C. 1999) ("While the Free Exercise clause protects religious beliefs and a church's management of its internal affairs, it does not uniformly sanction all religious conduct, nor does it protect all actions taken within the

substantially premised on the distinction between belief and conduct.<sup>121</sup> The most broadly stated and widely cited statement concerning the practical functioning of this constitutional mandate comes from *Cantwell v. Connecticut*:

[Free Exercise] embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.<sup>122</sup>

The division between belief and conduct<sup>123</sup> is justified because even though some practices are the product of sincere religious

context of a religious environment.”); see also *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (“[E]ven when the action [prompted by religious beliefs] is in accord with one’s religious convictions, [it] is not totally free from legislative restrictions.”) (citations omitted); *Cantwell v. Conn.*, 310 U.S. 296, 304 (1940) (“Conduct remains subject to regulation for the protection of society.”).

121. *Employment Div. v. Smith*, 494 U.S. 872, 877–79 (1990).

122. *Cantwell*, 310 U.S. at 303–04.

123. The history behind the writing of the Free Exercise Clause is instructive in its interpretation, dividing belief and practice, speech and conduct:

The history of religious persecution gives the answer. Religion needed specific protection because it was subject to attack from a separate quarter. It was often claimed that one was a heretic and guilty of blasphemy because he failed to conform in mere belief or in support of prevailing institutions and theology. It was to assure religious teaching as much freedom as secular discussion, rather than to assure it greater license, that led to its separate statement.

*Douglas v. Jeannette*, 319 U.S. 157, 179 (1943) (Jackson, J., concurring in the result in this case and dissenting in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)) (emphasis added). Dissenting in *Murdock*, Justice Robert Jackson nonetheless shared his majority’s view that secular speech and religious speech enjoy a constitutional parity of protection. He offered the explanation above for why the authors of the First Amendment saw fit to spell out a protection for religious expression that is fully conferred by the general guarantee of freedom of speech. See also *Smith*, 63 F. Supp. 2d at 702 (“While the Free Exercise clause protects religious beliefs and a church’s management of its internal affairs, it does not uniformly sanction all religious conduct, nor does it protect all actions taken within the context of a religious environment.”). “What properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns.” Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994). For an in-depth discussion of the history behind the religion clauses, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989).

motivation,<sup>124</sup> there are those deemed so baneful that the state cannot be indifferent to them. In such cases, free exercise “can not [sic] let any group ride rough-shod over others simply because their ‘consciences’ tell them to do so.”<sup>125</sup> To the extent we differentiate speech and conduct, we accord speech the greater protections.<sup>126</sup> Even then, not all kinds of speech are protected, not even under the guise of religion.<sup>127</sup> Surely the First Amendment does not shield inappropriate sexual conduct, most especially misconduct, coercion, or exploitation, even within a religious setting, from the consequences of tort law.<sup>128</sup>

*Jones v. Wolf*<sup>129</sup> was the first case to espouse the standard of “neutral principles of law” for resolving disputes involving religion or religious institutions. This standard acknowledges that avoidance of all interactions of the state with religion is impractical and that, under the First Amendment, states need not automatically accord deference to religious authority, even where there is no doctrinal controversy.

The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. . . . It thereby promises to free civil courts

124. For example, polygamy is considered an expression of deep seated religious convictions for which there is an affirmative duty in order to avoid condemnation by God. For this reason, some argue that the division between belief and conduct is wrong and should not be a distinction. See Harmer-Dionne, *supra* note 118, at 1325; see also Eisgruber & Sager, *supra* note 123; Marci A. Hamilton, *The Beliefs/Conduct Paradigm in the Supreme Court’s Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 770 (1993) (describing the Supreme Court’s vision of the religious experience as one involving faith, not action). But see Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same Sex-Marriage*, 75 N.C. L. REV. 1501, 1618–19 (1997) (suggesting that the relationship between marriage and a free democratic government justify same-sex marriage while invalidating polygamy).

125. *Douglas*, 319 U.S. at 179.

126. See generally FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

127. *Cantwell*, 310 U.S. at 306 (“Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.”); see also Esbeck, *supra* note 11, at 7 (“[Religious organizations’] activities, as opposed to beliefs, therefore, cannot be totally autonomous from the state when it comes to matters of high order, such as health, safety, and public peace.”).

128. See *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125, 1134–35 (D. Mass. 1982) (“[T]he free exercise clause of the First Amendment would not immunize it from all common law causes of action alleging tortious activity.”) (citing *Turner v. Unification Church*, 473 F. Supp. 367, 371 (D.R.I. 1978)).

129. 443 U.S. 595 (1979).

completely from entanglement in questions of religious doctrine, polity, and practice.<sup>130</sup>

In *Jones*, which resolved a property dispute between newly divided factions of a religious community, the Georgia courts were permitted to use consideration of deeds, state statutes or other neutral principles of law to resolve the dispute.<sup>131</sup>

Only ecclesiastical or theological questions<sup>132</sup> or questions which challenge the formal judgments of hierarchical church tribunals<sup>133</sup> are beyond the reach of civil determinations regarding the First Amendment. In the matters of employment<sup>134</sup> and education in religious settings,<sup>135</sup> questions of theology are essential and generally considered part of religious governance<sup>136</sup> and beyond evaluation by courts. None-

130. *Jones*, 443 U.S. at 603.

131. *Jones*, 443 U.S. at 602. The Court there said: "There can be little doubt about the general authority of civil courts to resolve this question. The State has an obvious and legitimate interest in the peaceful resolution of [civil] disputes, and in providing a civil forum where [they] can be determined conclusively." *Id.* (citing *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969)) (discussing property dispute between religious factions). *But see supra* note 119.

132. *Presbyterian Church*, 393 U.S. at 449.

133. *Serbian Eastern Orthodox Diocese for the United States & Canada v. Milivojevic*, 426 U.S. 696, 733 (1976) (Rehnquist, J., dissenting) (stating that the Kedroff line of cases reinforces the rule that "the government may not displace the free religious choices of its citizens by placing its weight behind a particular religious belief"). However, the Kedroff line of cases "do[es] not involve the court's exercise of jurisdiction in cases involving *neutral statutes of general application*," but rather "involve[s] the validity of state statutes specifically designed to address religious conflicts and the propriety of judicial review of a church's faithfulness to its own internal regulations." *Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp. 2d 694, 709 (1994).

134. *See, e.g., Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) ("[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."); *Serbian Eastern Orthodox Diocese*, 426 U.S. 696. *But see Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 471 (1993) (concerning the circulation of false information relevant to employment, "[t]he First Amendment does not shield employment decisions made by religious organizations from civil court review, however, where the employment decisions do not implicate religious beliefs, procedures, or law").

135. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. 490, 506 (1979) (holding that schools operated by church to teach both secular and religious subjects are not within the jurisdiction granted by the National Labor Relations Act); *Dlaikan v. Roodbeen*, 522 N.W.2d 719, 720 (Mich. Cr. App. 1994) (holding that refusal of admission essentially involves ecclesiastic policies).

136. *See Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952) (stating that the Free Exercise Clause protects the ability of religious

theless, even in these areas, courts have been willing to resolve disputes. In other matters, generally considered purely secular, but nonetheless having an impact on the practice of religion, the state has enforced laws. Courts have adjudicated matters of property disputes,<sup>137</sup> breach of contract,<sup>138</sup> educational funding,<sup>139</sup> employment disputes<sup>140</sup> and sexual harassment,<sup>141</sup> all involving religious institutions.

Courts need not dwell on matters of faith and doctrine because the abuse of the power within the relationship necessary for the realization of sexual abuse is unlikely to be the product of serious religious belief or doctrine that would be compromised by the exercise of jurisdiction.<sup>142</sup>

---

organizations “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine”); *Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 363 U.S. 190, 191 (1960).

137. *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Carnes v. Smith*, 222 S.E.2d 322, 328 (Ga. 1976) (awarding church property to United Methodist Church on the basis of express trust provisions in favor of the general church found in the United Methodist Church’s Book of Discipline); *see also* *Watson v. Jones*, 80 U.S. 679, 727 (1871) (“[W]henver the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.”). However, as noted in *Kedroff*, while *Watson* “contains a reference to the relations of church and state under our system of laws, [it] was decided without depending upon prohibition of state interference with the free exercise of religion.” *Kedroff*, 344 U.S. at 115.
138. *See, e.g.*, *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360–61 (D.C. Cir. 1990) (allowing breach of contract action by minister against church indicating that the claim would not necessarily require an impermissible inquiry into religious doctrine).
139. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 120 S. Ct. 2530 (2000).
140. *See, e.g.*, *De Marco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993).
141. *See infra* note 187.
142. *See, e.g.*, *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988) (“If the alleged conduct of [the cleric] was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion, we would have to resolve a difficult first amendment issue.”); *see also* *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (stating that for a violation to exist, a coercive effect on the practice of religion must be demonstrated); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[T]o have the protection of the Religion Clauses the claims must be rooted in religious belief.”); *Smith*, 63 F. Supp. 2d at 712 (noting that Methodist Church defendants did not suggest that the church condones sexual harassment in any way).

The court must first determine “whether [an application of a particular law] and the First Amendment necessarily collide in this case.” *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) (discussing the application of Title VII). This view is obviously based on the basic tenets of the five major world religions. *See also supra* note 43.

Even when the issue is one squarely within religious belief and practice, the courts have upheld complete prohibitions on conduct in a variety of contexts. Courts have adjudicated matters of conduct specific to a particular religion, including civil identification,<sup>143</sup> the wearing of religious garb,<sup>144</sup> solicitation of new adherents,<sup>145</sup> war,<sup>146</sup> the sacramental use of controlled substances,<sup>147</sup> polygamy,<sup>148</sup> snake handling<sup>149</sup> and faith healing.<sup>150</sup> Once the court determines the nature of the dispute involving a religious defendant is a secular one,<sup>151</sup> the court can resolve the dispute through neutral principles of law.<sup>152</sup> Sexual exploitation is a secular matter that surely can be resolved using neutral principles of law.

---

Paradoxically, it is the victim's beliefs that created the vulnerability to which she was subject, not that of the church or cleric:

But often because of the image of charismatic spiritual power that these men have asserted and fostered, the women's terror is akin to actually being cursed or damned. Sometimes this kind of threat is made explicit by the abuser. Its power is clearly demonic in nature and intensity—victims fear that their very souls will be stolen.

Cooper-White, *supra* note 7, at 199.

143. *See* *United States v. Lee*, 455 U.S. 252, 261 (1982) (upholding law requiring Amish to violate the tenets of their faith by participating in the social security system).
144. *See* *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (upholding military dress regulations that forbade the wearing of yarmulkes).
145. *See* *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655–56 (1981) (upholding prohibition of peripatetic solicitation by members of Hare Krishna sect practicing ritual “Sankirtan” on state fair grounds as an impartially applied restriction).
146. *See* *Gillette v. United States*, 401 U.S. 437, 462–63 (1971) (upholding government's right to compel conscientious objectors to make war despite religious character of their objections).
147. *See* *Employment Div. v. Smith*, 494 U.S. 872 (1990).
148. *Reynolds v. United States*, 98 U.S. 145 (1879).
149. *Lawson v. Commonwealth*, 164 S.W.2d 972 (Ky. App. 1942); *State ex rel. Swan v. Pack*, 527 S.W.2d 99 (Tenn. 1975).
150. *See, e.g., Jacobson v. Mass.*, 197 U.S. 11, 38 (1905) (upholding law compelling vaccination of children for communicable diseases and requiring emergency medical treatment over parent's religious objections); *Walker v. Superior Court*, 763 P.2d 852, 873 (Cal. 1988) (permitting prosecution for involuntary manslaughter and felony child endangerment of Christian Scientist parents who withheld conventional medical treatment from critically ill child).
151. *Bell v. Presbyterian Church*, 126 F.3d 328, 331 (4th Cir. 1997) (citing *General Council Fin. and Adm'n of the United Methodist Church v. Superior Ct. of Cal.*, 439 U.S. 1355, 1373 (1978)).
152. *Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp. 2d 714 (E.D.N.C. 1999); *see also City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (“[N]eutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.”); *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995); *Employment Div. v.*

### B. Establishment Clause

The Establishment Clause, in contrast to the Free Exercise Clause, is intended to prohibit the state from promoting or otherwise aiding religion, or from favoring one religion over another.<sup>153</sup> As long as neutral principles can be applied, as in the Free Exercise analysis, the question of the state promoting any religion should not be an issue. Holding clerics and their institutions responsible for their sexual misconduct through general tort law is not in violation of the Establishment Clause. In fact, non-application of tort principles where they might otherwise apply may be more like Establishment, creating an exception for religion.<sup>154</sup> Because the Establishment Clause deals squarely with the promotion of religion, these cases of sexual misconduct by clerics are more appropriately examined under the Free Exercise Clause and its doctrines. Perhaps because Free Exercise is not a credibly asserted issue,<sup>155</sup> courts addressing sexual misconduct by clergy instead choose to address the Establishment Clause in order to avoid adjudication of the unseemly matter.

When courts address the matter of clerical sexual misconduct they tend to address it perfunctorily, stating out of hand that determinations

---

Smith, 494 U.S. 872, 879 (1990) (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes . . . .’”) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (applying a strict approach of “compelling state interest”); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466 (D.C. Cir. 1996) (citing *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1358 (D.C. Cir. 1990)); *Smith*, 63 F. Supp. 2d at 714–15; *F.G. v. MacDonell*, 696 A.2d 697, 702 (N.J. 1997) (citing *Elmora Hebrew Ctr. Inc. v. Fishman*, 593 A.2d 725 (N.J. 1991)); *Welter v. Seton Hall Univ.*, 608 A.2d 206 (N.J. 1992).

153. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1946) (holding that such language prohibits a state or the federal government from setting up a church; passing laws which aid one, or all, religions; giving preference to one religion; or forcing belief or disbelief in any religion).

154. See Shawna Meyer Eikenberry, Note, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 *IND. L.J.* 269, 284–85 (1998); see also *Smith*, 63 F. Supp. 2d at 716 n.18 (citing Eikenberry, *supra* note 154); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir. 1998) (“[T]he constitutional guarantee of religious freedom cannot have construed to protect *secular* beliefs and behavior, even when they compromise part of an otherwise religious relationship between a minister and a member of his or her congregation. To hold otherwise would impermissibly place a religious leader in a preferred position in our society.”).

155. See *supra* note 142 and accompanying text.



in this area would require assessments of religious beliefs. Without giving clear reasons for their assessment or analyzing the specific conduct, courts have made broad assertions about the nature of religious counseling and have insisted that the appropriate cause of action is malpractice. A common argument made by these courts is that they would have to assess religious beliefs in order to determine whether the cleric breached the appropriate standard of conduct. Relying on *Lemon v. Kurtzman*,<sup>156</sup> the case of *Schmidt v. Bishop* provided the most commonly cited reasons for not adjudicating plaintiffs' claims for sexual misconduct in a counseling relationship:

It would be impossible for a court or jury to adjudicate a typical case of clergy malpractice, without first ascertaining whether the cleric . . . performed within the level of expertise expected of a similar professional (the hypothetical "reasonably prudent . . . pastor"), following his calling, or practicing his profession within the community. See Restatement (Second) of Torts § 299A. As the California Supreme Court has held in *Nally v. Grace Community Church of the Valley*: "Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of a particular denomination or ecclesiastical teachings of the religious entity."<sup>157</sup>

Despite the pronouncement by these courts, what is not clear is whether enforcing common law prohibitions against sexual misconduct necessitates such evaluations. These opinions are not useful in determining the accuracy of this trend and perhaps reflect the difficulty of sifting through the constitutional questions in this factual situation.

---

156. 403 U.S. 602 (1971).

157. 779 F. Supp. 321, 327 (S.D.N.Y. 1991) (quoting *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948, 960 (Cal. 1988) and relying on *Lemon*, 403 U.S. at 614–15). See *Dausch v. Rykse*, 52 F.3d 1425, 1431 n.3 (7th Cir. 1994); *Roppolo v. Moore*, 644 So. 2d 206 (La. Ct. App. 1994); *Jones v. Trane*, 591 N.Y.S.2d 927, 929 (1992). See also *Sanders v. Baucum*, 929 F. Supp. 1028, 1037 (N.D. Tex. 1996); *Doe v. Evans*, 718 So. 2d 286, 288 (Fla. Dist. Ct. App. 1988); *Teadt v. Lutheran Church Mo. Synod*, 603 N.W.2d 816, 822 (Mich. Ct. App. 1999); *Langford v. Roman Catholic Diocese*, 705 N.Y.S.2d 661, 662 (App. Div. 2000); *Strock v. Pressnell*, 527 N.E.2d 1235, 1239 (Ohio 1988).

Under the *Lemon* three-part test,<sup>158</sup> entanglement is measured by “‘character and purposes’ of the institution affected, the nature of the benefit or burden imposed, and the ‘resulting . . . authority.’”<sup>159</sup> Religious institutions and their congregations would benefit<sup>160</sup> from the vigorous use of tort law to ferret out and deter sexual predators from their midst. The burden would be no greater than that imposed on any other individual who, or institution that, participates in a lawful and functional society.<sup>161</sup>

The *Lemon* test may be perceived as slightly more problematic with the application of tort law, as it has not completely succumbed to codification as have other areas of the law. Nevertheless, statutes are often based upon the common law and interpreted through its extensive use.<sup>162</sup> In the context of sexual misconduct by a clergy member, the question would be whether tort law and tort principles are neutral and whether they could be applied as such in a religious context. The application of tort law also may be viewed as generally problematic because it tends to be based more on broad principles and standards of

158. The three-part test described in *Lemon* says:

- (1) the statute must have a secular purpose;
- (2) the principal or primary effect of the statute must be one that neither advances nor inhibits religion; and
- (3) the statute must not foster an excessive government entanglement with religion.

*Lemon*, 403 U.S. at 612–13. In the context of clergy sexual misconduct, the first two prongs are most easily met when: (1) the state has an interest in allowing private actions to aid in the prevention and redress of wrongs from certain conduct, such as sexual abuse; (2) there would only be a neutral effect on religion as preventing sexual abuse and exploitation is a general social goal. The third prong of the test is perhaps the most difficult to assess.

159. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1170 (4th Cir. 1985) (citing *Lemon*, 403 U.S. at 614–15); see also *Agostini v. Felton*, 521 U.S. 203, 232 (1997) (explaining that “the factors [the Court] use[s] to assess whether an entanglement is ‘excessive’ [for purposes of the third prong] are similar to the factors [it] use[s] to examine ‘effect’ [for purposes of the second]”); *Bollard v. Soc’y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999) (citing *Lemon*).

160. See *supra* note 46.

161. *Prince v. Mass.*, 321 U.S. 158, 177 (1944) (Jackson, J., dissenting) (“[T]he limits [of free exercise] begin to operate whenever [religious] activities begin to affect or collide with liberties of others or of the public.”).

162. Four states have specifically codified prohibitions of sexual exploitation by therapists that may be interpreted to include clergy. See CAL. CIV. CODE § 43.93 (West 2000); MINN. STAT. § 148A.01 (West 1999); TEX. CIV. PRAC. & REM. CODE § 81.0001 (Vernon 1999); WIS. STAT. § 895.70 (West 2000). Two states have explicitly exempted clergy and spiritual or religious counseling from similar statutes. See 740 ILL. COMP. STAT. 140/1 (West 1999); N.C. GEN. STAT. § 90-21.41 (1998).

care than bright-line rules. Neutral laws may be applied in controversies involving religion.<sup>163</sup> However, because tort law is more policy-oriented, based primarily on broad principles and standards of care, its neutral application may be suspect in the application of some tort doctrines.<sup>164</sup> “Neutrality” may, in fact, be more difficult to achieve because of the nature of standards of care essential in many torts,<sup>165</sup> including malpractice and breach of fiduciary duty. Nonetheless, a case can be made that standards of care are, in their conceptualization, neutral.<sup>166</sup>

163. *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595 (1979).

164. Intentional torts in the context of religion have not been problematic. *See, e.g.*, *Galton v. House of Good Shepherd*, 122 N.W. 631 (Mich. 1909) (false imprisonment claim); *Conway v. Carpenter*, 30 N.Y.S. 315 (1894) (claim for assault and battery by pastor forcibly ejected by congregation). As in strict liability, no standards of care are required for intentional torts, which may account for the difference in perception. Nonetheless, negligence causes of action have been recognized in religious contexts as well. In fact, cases recognizing an action for negligent supervision of ministers for inappropriate sexual behavior include *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 10 F. Supp. 2d 138 (D. Conn. 1998); *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66 (D. Conn. 1995); *Moses v. Diocese of Colo.*, 863 P.2d 310 (Colo. 1993).

165. *See, e.g.*, *Hester v. Barnett*, 723 S.W.2d 544, 553 (Mo. Ct. App. 1987) (citation omitted):

[A] theory of malpractice is defined in terms of the duty to act with that degree of skill and learning ordinarily used in the same or similar circumstances by members of that profession. . . . It is a theory of tort, therefore, which presupposes that every cleric owes the same duty of care, whatever the religious order which granted ordination, or the cleric serves, or the beliefs espoused. It is a theory of tort, moreover, which inevitably involves the court in a judgment of the competence, training, methods and content of the pastoral function in order to determine whether the cleric breached the duty. . . . Thus, the question . . . is 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 is both unfeasible as a theory of tort and not constitutionally permissible.

*See also* BISBING, *supra* note 73, at 281–82. *But see* *Smith v. O’Connell*, 986 F. Supp. 73, 78 (D.R.I. 1997) (“Here, there is no indication that the reasonably prudent person standard established by tort law and the requirements of Roman Catholic doctrine are incompatible.”).

166. Certainly, the development of tort law was independent of religious considerations and in no instance is directed at religion or religious doctrines. *See* *Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp. 614, 715 (E.D.N.C. 1999); *see also* Oliver Wendell Holmes, *The Common Law*, in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 109, 154 (Sheldon M. Novick, ed. 1995) (discussing the intention of the reasonable person as a “general” standard of conduct “which every one may fairly expect and demand from every other”). Traditional tort doctrine is approached from an objective rather than subjective perspective, adding to

Carl Esbeck demonstrates the constitutional problems with certain tort claims against the church, yet categorically exempts “seduction and child molestation.”<sup>167</sup> “Because no credible argument can be made that such conduct is even ‘arguably religious,’ or caused by the promptings of spiritual duty, these torts are not shielded by protestations of religious liberty.”<sup>168</sup> Since such activity is not, and should not be, considered spiritual or a matter of religious doctrine, First Amendment concerns need not be applied.<sup>169</sup>

By allowing such claims, there is no judicial entanglement whatsoever in the relationship between diocese and priest or in other spiritual matters, and the church can hardly be expected to maintain that its priests are supposed to conduct themselves in this manner toward parishioners as a matter of religious doctrine and practice.<sup>170</sup>

In addition, professional standards are not established wholly and independently by customs of the profession. Ethics of any profession in the first instance comply with the law and with general social mores.<sup>171</sup>

its neutral stance. See generally Fleming James, Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 Mo. L. REV. 1 (1951). Very few variations in personal characteristics are accounted. Just as we do not take account of mature age, gender or race, nor should we account for religious belief, nor evaluate it in applying standards of care. See Holmes, *supra*, at 170 (“[T]he law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men.”).

167. Esbeck, *supra* note 11, at 87.

168. Esbeck, *supra* note 11, at 87 (“Few would have the hardihood to claim first amendment immunity in defense of a suit charging a rabbi, priest, or pastor with sexual improprieties involving others connected with the church.”).

169. See Esbeck, *supra* note 11, at 88 (“But in the case of sexual seduction or child molestation, the standards of care in the law of torts need not depend upon or look to the duties of priests as defined by the diocese.”); see also Destefano v. Grabrian, 763 P.2d 275, 284 (Colo. 1988) (“When the alleged wrongdoing of a cleric clearly falls outside the beliefs and doctrine of his religion, he cannot avail himself of the protection afforded by the first amendment.”); Freeman v. Arpaio, 125 F.3d 732, 736 (9th Cir. 1997) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)) (“In order to establish a free exercise violation [plaintiff] must show the defendants burdened the practice of his religion, by preventing him from engaging in conduct mandated by his faith, without any justification reasonably related to legitimate . . . interests.”).

170. Esbeck, *supra* note 11, at 89.

171. General ethics in some religious organizations includes avoidance of sexual contact with clients. See Gary Richard Schoener, *Employer/Supervisor Liability and Risk Management: An Administrator's View*, in BREACH OF TRUST: SEXUAL EXPLOITATION BY HEALTH CARE PROFESSIONALS AND CLERGY 300–03, 310 (John C. Gonsiorek ed.,

The state has always felt free to regulate sexual conduct, and even more so *misconduct*, regardless of particularized religious beliefs.<sup>172</sup>

At the least, tort law is neutral to the extent that it is designed neither to suppress religious practices nor selectively to burden religiously inspired conduct.<sup>173</sup> In fact, it is clear that tort doctrines have evolved without regard to religious practices and are uniformly applicable whether or not the conduct is religiously inspired.<sup>174</sup>

Where evaluating the conduct of individuals<sup>175</sup> within a religious institution and the general governance of such an institution would give rise to serious constitutional questions,<sup>176</sup> courts must not avoid those questions by mechanical refusal to apply laws applicable in other contexts.<sup>177</sup>

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, . . . and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause.<sup>178</sup>

---

1995) (detailing manuals, guidebooks and videotapes for boundary violation training sponsored by religious groups); *cf.* *McDaniel v. Gile*, 281 Cal. Rptr. 242 (1991) (finding attorney responsible for professional malpractice for withholding legal services to gain sexual favors).

172. Regulation includes that of marriage, adultery, fornication, homosexual sodomy, among others. *See* Posner, *supra* note 44; MacNamara, *supra* note 44.
173. *Cf.* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (finding ordinance was motivated by desire to suppress religious practices of particular religion).
174. *See, e.g.*, *Smith v. O'Connell*, 986 F. Supp. 73 (D.R.I. 1997)
175. *See* *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 714, 715 (1981) (holding that claims "so bizarre, so clearly nonreligious in motivation" should be denied free exercise).
176. *See* *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).
177. *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1141 (D. Mass. 1982) (citing *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1165 n.3 (D.C. Cir. 1967) ("Although the process of sifting secular from religious claims may not be easy, *Founding Church of Scientology v. United States* found that endeavor possible.") (citations omitted); *see also* *Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp. 2d 694, 700-01 (choosing to review the application of Title VII to church-minister employment relationship and citing *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985)).
178. *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (citing *Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988)).

There is nothing simple about sexual misconduct by clergy. The complexity of such issues, however, does not justify the reflexive application of the First Amendment to avoid the difficult exercise of separating conduct from belief and the religious from the secular.<sup>179</sup>

Too many of the courts addressing sexual abuse by clergy rely on *Lemon* to refuse adjudication. It is doubtful that *Lemon* was ever intended to be interpreted so broadly. Recent Supreme Court opinions, *Agostini v. Felton*<sup>180</sup> and *Mitchell v. Helms*,<sup>181</sup> have narrowed *Lemon* and interpreted its application as limited. *Mitchell* noted that *Agostini* “recast [*Lemon*’s] entanglement inquiry as simply one criterion relevant to determining a statute’s effect,”<sup>182</sup> making the relevant test essentially a narrow one of purpose and effect.<sup>183</sup> These readings of the Establishment Clause should dispel any remaining doubt that this constitutional safeguard is not an issue in the adjudication of sexual misconduct. Adjudicating matters of sexual abuse by clergy “neither results in religious indoctrination by the government nor defines its recipients by reference to religion.”<sup>184</sup>

### C. Sexual Harassment, Sexual Misconduct—A Comparison

Claims for sexual harassment against clerics and their institutions have been permitted under Title VII. The comparisons between sexual harassment and sexual abuse or misconduct are, perhaps, obvious.

Sexual harassment is probably less well understood than sexual abuse. Both imply a victim and a victimizer. Sexual harassment contains the intent or threat inherent in inappropriate sexual activity, without the explicit act, and creates an environment that is anxiety-producing, offensive, or hostile. Sexual abuse is an overt action of an inappropriately

---

179. See BISBING, *supra* note 73, at 279 (“The reluctance to tackle the constitutional issues necessary to define a standard of care for clergy counseling appears to be the primary stumbling block to successfully stating a cause of action for judicial recognition of clergy malpractice.”).

180. 521 U.S. 203 (1997).

181. 120 S. Ct. 2530 (2000).

182. *Mitchell*, 120 S. Ct. at 2532 (addressing state funding of parochial schools).

183. *Mitchell*, 120 S. Ct. at 2532.

184. *Mitchell*, 120 S. Ct. at 2540.

sexual nature perpetrated by a person of superior position, status, age, or physical power upon another.<sup>185</sup>

Thus, judicial treatment of sexual harassment at religious institutions is instructive for judicial treatment of clergy sexual abuse.<sup>186</sup> A parishioner or member of the general public whom the institution serves should be accorded at least the same protection as an employee who works within the institution. Sexual harassment claims are “unrelated to pastoral qualifications or issues of church doctrine,”<sup>187</sup> and are therefore unrelated to First Amendment claims of free exercise or establishment. Nor does evaluation of sexual misconduct impinge on core religious beliefs. “Evaluation of whether a hostile work environment exists does not impinge on core religious beliefs such that either the free exercise of religion is affected or there is threat of excessive government entanglement.”<sup>188</sup>

Several federal circuit courts “exempt[] the selection of clergy from Title VII and similar statutes and, as a consequence, preclude[] civil courts from adjudicating employment discrimination suits by ministers

185. BENYEL, *supra* note 1, at 60.

186. *See, e.g.,* Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 710, 717 (E.D.N.C. 1999) (holding that judicial review of employee’s Title VII claims does not violate the church’s free exercise rights nor does it violate the Establishment Clause); *see also* Joanne C. Brant, “*Our Shield Belongs to the Lord*”: Religious Employers and a Constitutional Right to Discriminate, 21 HASTINGS CONST. L.Q. 275, 303–09 (1994).

187. Black v. Snyder, 471 N.W.2d 715, 721 (1991); *see also* Bollard v. Cal. Province of the Soc’y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999) (“[T]he defendant church is neither exercising its constitutionally protected prerogative to choose its ministers nor embracing the behavior at issue as a constitutionally protected religious practice.”); *Smith*, 63 F. Supp. 2d 694; Himaka v. Buddhist Churches of Am., 917 F. Supp. 698 (N.D. Cal. 1995) (granting motion for summary judgment on sexual harassment claims, while dismissing retaliation claim for excessive entanglement in violation of the First Amendment); Nigrelli v. Catholic Bishop, No. 84C5564, 1991 WL 36712, at \*4 (N.D. Ill. Mar. 15, 1991) (holding that “there was no doubt that . . . the court need not inquire into the doctrines and religious goals of the Catholic Church [or] of the [parochial] school” to determine whether the plaintiff was sexually harassed by her immediate supervisor, pastor of the parish). *But see* Van Osdol v. Vogt, 908 P.2d 1122 (Colo. 1996) (en banc) (holding that the First Amendment precludes Title VII claims).

188. Van Osdol, 908 P.2d at 1135 (Mullarkey, J., concurring); *see also* Black v. Snyder, 471 N.W.2d 715, 720–21 (Minn. App. 1991) (finding that the minister’s “sexual harassment claim [was] unrelated to pastoral qualifications or issues of church doctrine”).

against the church or religious institution employing them.”<sup>189</sup> Consistent with pre-Title VII constitutional interpretations, suits in which ministers or those performing ministerial functions challenge the employment decisions of religious institutions are barred by the First Amendment.<sup>190</sup> Even under Title VII, employment decisions continue to be part of church governance, not for review by secular courts.<sup>191</sup> This does not, however, preclude review of sexual harassment claims.

In addition, courts have applied this rule to claims brought by lay employees of religious institutions whose “primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship,”<sup>192</sup> but not where the employees do not perform essentially religious functions.<sup>193</sup> The second application of this rule demonstrates that the exception is not based on status, but rather on the function or conduct of the individual. For consistency, if we do not permit lay employees who perform religious functions to sue for discrimination, we

189. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461 (D.C. Cir. 1996); *see also* *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990) (dismissing age discrimination case); *Powell v. Stafford*, 859 F. Supp. 1343 (D. Col. 1994) (dismissing claim under ADEA against catholic high school); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (dismissing age and gender discrimination claims against church-affiliated hospital).
190. Cases supporting the “church-minister” or “ministerial” exception include *Combs v. Central Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999); *EEOC v. Roman Catholic Diocese*, 48 F. Supp. 2d 505 (E.D.N.C. 1999) (finding that ministerial exception applies to minister's sex discrimination claim); *Catholic Univ.*, 83 F.3d 455; *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1972); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991); *Rayburn*, 772 F.2d at 1169; *Bell v. Presbyterian Church*, 126 F.3d 328, 331 (4th Cir. 1997); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952).
191. *See* *Kedroff*, 344 U.S. at 116 (stating that the Free Exercise Clause protects the ability of religious organizations “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine”); *Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 363 U.S. 190, 191 (1960).
192. *Smith*, 63 F. Supp. 2d at 704; *see also* *Rayburn*, 772 F.2d at 1169; *Catholic Univ.*, 83 F.3d at 463; *Young*, 21 F.3d at 186.
193. *See, e.g.*, *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1370 (9th Cir. 1982) (“[D]uties of the teachers at [the school] do not fulfill the function of a minister.”); *EEOC v. Pacific Press Publ'g Ass'n*, 676 F.2d 1272, 1278 (9th Cir. 1982) (“[A]n editorial secretary . . . did not fulfill the function of a minister, nor was her employment at the Press the type of critically sensitive position within the church that McClure sought to protect.”).



should not permit ministers to avoid suit for conduct of general prohibition,<sup>194</sup> especially sexual abuse.

In the final analysis, courts considering claims for sexual harassment “cannot agree that [they] are required to defer to religious authority in resolving [such] claims where no issue of doctrinal controversy is involved and where the dispute between the parties is not ecclesiastical.”<sup>195</sup> In addition, “mere ‘hypothetical concerns,’ and the ‘bare potential’ that an employment discrimination inquiry would impact religious beliefs ‘does not warrant precluding the application’ of the law to religious employers.”<sup>196</sup> The same should be true for claims alleging sexual misconduct, whether as malpractice or as breach of fiduciary duty.<sup>197</sup> The statutory prohibition of Title VII should not be considered more neutral than that of the common law.<sup>198</sup> Sexual misconduct does not involve ecclesiastical matters, and suggestions that courts would become embroiled in church doctrine by examining such conduct are erroneous.

194. *Cf. Smith*, 63 F. Supp. 2d at 709–10 (“[C]ourts that have exercised and declined jurisdiction over Title VII cases involving religious institutions have based their respective decisions on the degree to which resolving the issues raised by a plaintiff’s claims would require intrusion into the spiritual functions of the religious institution at issue.”); *Rayburn*, 772 F.2d at 1171 (“Of course churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church’s spiritual functions.”).

195. *Smith*, 63 F. Supp. 2d at 715 (citing *Jones v. Wolf*, 443 U.S. 595, 605 (1979); *Gen. Council on Fin. & Adm’n of the United Methodist Church v. Superior Ct. of Cal.*, 439 U.S. 1355, 1373 (1978); *Bell*, 126 F.3d at 331; *see also Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335–36 (5th Cir. 1998):

The First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protection to the secular components of these religious relationships. . . . Instead the Free Exercise Clause protects religious relationships . . . primarily by preventing the judicial resolution of ecclesiastical disputes turning on matters of “religious doctrine or practice.”

196. *Starkman v. Evans*, 18 F. Supp. 2d 630, 633 (E.D. La. 1998) (quoting *EEOC v. Miss. Coll.*, 626 F.2d 477, 487 (5th Cir. 1980) (holding that ADA claim by minister not automatically in violation of establishment clause).

197. *See supra* Part I.

198. This is so in part because statutes are generally founded on principle substantially formed through the common law, and in part because Title VII was intended to supplement other causes of action, not supercede them. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

differential in sexual misconduct is comparable to that in rape or domestic abuse.<sup>206</sup> Indeed, clergy sexual abuse is not about sex per se, but rather about power and control.<sup>207</sup> The outcomes in these situations are also analogous in that blame tends to be placed upon the victim.<sup>208</sup> These situations are tacitly accepted and permitted to continue by the silence.<sup>209</sup> Nonetheless, the emotional toll is imposed not only on the

relative or minister) and a person who is vulnerable to and trusting of that power (a child or counselee). Victims often feel responsible for the abuser's activity and so are bound in secrecy by a double burden of guilt and shame. Even if the victim does speak up, she or he may not be believed.

206. See generally Cooper-White, *supra* note 7 (comparing the power dynamics in pastoral sexual abuse to that in rape and domestic abuse). Also note the Center for the Prevention of Sexual and Domestic Violence has been addressing the issue of sexual abuse by clergy since 1983. See Fortune, *supra* note 92, at 34.

Victim-blaming and the misconceptions about the continuation of the sexual abuse (i.e., "why didn't you just leave") is also comparable to the dynamic surrounding domestic abuse. See Penfold, *supra* note 9, at 244–45. Such breaches in trust might especially be likened to the emotional and psychological harm precipitated by marital rape. See also *supra* note 8.

207. See Cooper-White, *supra* note 7, at 196 ("As with rape, a pastor's sexual or romantic involvement with a parishioner is not primarily a matter of sex or sexuality but of power and control.").

208. BENYEI, *supra* note 1, at 85–100 (discussing scapegoating within the situation or community); Penfold, *supra* note 9, at 245 ("Our society has a long tradition of victim-blaming which allows us to attribute responsibility to, ignore, or distance ourselves from victims.") (citation omitted); see generally Fortune, *supra* note 45, at 81–83; Villiers, *supra* note 7, at 8; Cooper-White, *supra* note 7, at 199 (noting how women are blamed for their own sexual abuse in much the same way they are blamed for their own rapes, their own physical abuse or blamed for raising the abusive son).

209. See BENYEI, *supra* note 1, at 101–19; BISBING, *supra* note 73, at 254–55; Morey, *supra* note 7, at 866; cf. Zanita E. Fenton, *Mirrored Silence: Reflections on Judicial Complicity in Private Violence*, 78 OR. L. REV. 995 (1999) (discussing the ways in which the victims of domestic abuse are silenced, compounding the violence inflicted upon them).

This is not unlike how external situations of abuse are treated within religious institutions. See, e.g., Cooper-White, *supra* note 7, at 196; Marie M. Fortune, *Betrayal of the Pastoral Relationship: Sexual Contact By Pastors and Pastoral Counselors, in PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT AND PREVENTION* 81, 82 (Gary Richard Schoener et al. eds., 1989); Puttick, *supra* note 45, at 103–06 (discussing the misogyny inherent in most religions); Villiers, *supra* note 7, at 4; see also Schoener, *supra* note 70, at 16–17 ("It seems that a certain critical level of visibility is necessary before either the profession itself or the community attempts to intervene in a major fashion to prevent or remedy sexual misconduct with clients. . . . We have tried . . . self-regulation in concert with ethics—and it has not solved the problem. . . . Now it is time for new initiatives.").

### *D. Families and Faith*

While religious communities are indeed communities,<sup>199</sup> they are not independent or self-contained. They are also part of larger communities and society. "Even beyond being a community, congregations most often see themselves as a family, which is a particular sort of community."<sup>200</sup> It is not uncommon for these communities to be referred to as "families of faith."<sup>201</sup> Families are imperfect. Religious communities are also imperfect. The analogy is further supported by the different spheres in which we consider various conduct, likening church activity to conduct in the private sphere.<sup>202</sup> Conceptually, freedom of association and belief are principally private matters.<sup>203</sup> To the extent we accept this analogy, sexual misconduct between clergy and congregant is obviously malevolent.

The emotional and psychological harm is easily likened to that precipitated by breaches of trust between family members.<sup>204</sup> A comparison of such conduct to incest is not uncommon.<sup>205</sup> The abuse of the power

199. "Churches and other religious organizations are among the mediating structures in a culture, occupying the space between the individual and government, and serving as loci of responsibility, commitment, and identity for many people." Esbeck, *supra* note 11, at 11 (citing P. BERGER & R. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 1-8 (1977)).
200. BENYEL, *supra* note 1, at 12 (includes discussion of family system analogy, loyalty, patterns of power relationships, marriage metaphor, and tendencies to toleration of abuse); *see also* Cooper-White, *supra* note 7, at 196.
201. *See, e.g.*, FORTUNE, *supra* note 45, at 87. This analogy is supported further by the common use of "brother," "sister" and especially "father" within many religious communities.
202. *See* Eisgruber & Sager, *supra* note 123, at 1311-12 (depicting certain associations as "private" in character, including religious affiliations); *see also* text accompanying notes 211-216.
203. Eisgruber & Sager, *supra* note 123, at 1311-12 (placing associations that constitute communities (like religious associations) in the private sphere).
204. *See* BISBING, *supra* note 73, at 272-73; MARIE FORTUNE, *KEEPING THE FAITH: QUESTIONS AND ANSWERS FOR THE ABUSED WOMAN* 45 (1987).
205. *See, e.g.*, Villiers, *supra* note 7, at 8-10; *see also* BISBING, *supra* note 73, at 267; Ellen T. Luepker, *Sexual Exploitation of Clients by Therapists: Parallels with Parent-Child Incest*, in *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS* 73 (Gary Richard Schoener et al. eds., 1989); Penfold, *supra* note 9, at 244 ("Because of the parent-like dimensions of the professional's relationship with the client, sexual abuse of an adult has some parallels with incest and may have severe and long-lasting effects."); Morey, *supra* note 7, at 866:

Sexual abuse by pastors exhibits the same dynamic as incestuous abuse, which takes place within the context of an intimate relationship (family, church, counseling) between an authoritative and powerful person (a

survivor of the abuse, but it also has a profound effect on the congregation as a community.<sup>210</sup>

Judicial treatment of religion mirrors in many ways the historical treatment of the family. Ideologically, the institution of family was regarded as part of the private sphere, a domain into which the state should not interfere.<sup>211</sup> Thus, the doctrine of familial privacy, or the non-intervention model, of dealing with family matters was the preferred approach.<sup>212</sup> Criticism of a husband's right to physically "chastise" his wife was traditionally discounted in ways that protected male power, permitting violence against women in the home.<sup>213</sup> Comparatively, religion is an area in which the state should not interfere.<sup>214</sup> In addition, women's experiences in the church, the scant attention to their concerns and their general role within church structures combine to form an environment where clergy sexual misconduct can flourish.<sup>215</sup> Despite this ideological bulwark respecting family matters, it has gradually been recognized that there are indeed areas where intervention by the state is appropriate, and even necessary, meaning that treatment of family has evolved to include an interventionist model.<sup>216</sup> Given many of the sexual

210. See generally Nancy Myer Hopkins, *The Uses and Limitations of Various Models for Understanding Clergy Sexual Misconduct: The Impact on the Congregation*, 24 J. SEX EDUC. & THERAPY 268 (1999).

211. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498–1504 (1983).

212. See Olsen, *supra* note 211; Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 976 (1991) ("The law claims to be absent in the private sphere and has historically refused to intervene in ongoing family relations."); see also Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REFORM 933, 951–53 (pointing out that the dichotomy between intervention and non-intervention is a false one and that outcomes are a matter of state choices).

213. Reva B. Siegle, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2123 (1996) (demonstrating inertia allowed continued family violence through deference to privacy).

214. See, e.g., *Teadt v. Lutheran Church Mo. Synod*, 603 N.W.2d 816, 823 (Mich. App. 1999) ("[W]e hesitate to allow a cause of action for breach of fiduciary duty in the context of interpersonal relationships.").

215. Villiers, *supra* note 7, at 5 ("The patriarchal structure of the church plays a key role in the problem of the failure to recognize clergy misconduct as a viable cause [of] action, because patriarchal views are integrated in the legal process, to the detriment of women.").

216. See, e.g., Schneider, *supra* note 212, at 983–85. Child protection and general health and safety are also reasons for state intervention. At the conjunction of family and religion, courts have been resistant to criminal prosecution of faith-healers for non-use of contemporary medicine to help their children. See generally Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and Effect of Faith*

misconduct cases discussed thus far, it is apparent that courts prefer not to “interfere” with or even protect and support the personal rights of women. This discussion is intended to help courts change their treatment of sexual abuse within religious contexts. It is time for courts to recognize in more meaningful ways that the First Amendment does not protect religious adherents against social wrongs.

### *E. Breach of Fiduciary Duty—A Neutral Application*

Despite the standards of care inherent in negligence, it is still possible to apply tort doctrine in a neutral manner.<sup>217</sup> The court in *F.G. v. MacDonell*<sup>218</sup> found that breach of fiduciary duty was a neutral principle of law that is capable of being applied without implicating religious doctrine.<sup>219</sup> Indeed, the requisite standard of care in breach of fiduciary duty is neither general nor dependent upon the specifics of any religion or its practices,<sup>220</sup> but is a standard specific to the relationship.<sup>221</sup> That

*Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. Rev. 43 (1994); *supra* note 150.

217. *See supra* pp. 57–59.

218. 696 A.2d 697, 702 (N.J. 1997).

219. *F.G.*, 696 A.2d at 702; *see also* *Moses v. Diocese of Colo.*, 863 P.2d 310, 323 (Colo. 1993); *Erickson v. Christenson*, 781 P.2d 383, 386 (Or. Ct. App. 1989); *Lightman v. Flaum*, 687 N.Y.S.2d 562 (Sup. Ct. 1999) (using neutral principles of law to sustain a claim for breach of fiduciary duty by congregant against rabbis).

220. *Doe v. Hartz*, 52 F. Supp. 1027, 1061 (N.D. Iowa 1999) (“[A] fiduciary duty is not imposed according to ‘professional standards’ of any profession or vocation. It is instead imposed by circumstances in which one party ‘is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship.’”) (quoting *Oeltjenbrun v. CSA Inv., Inc.*, 3 F. Supp. 2d 1024, 1053 (N.D. Iowa 1998)); *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1151 (E.D. Mich. 1995) (stating that negligent supervision claim not barred by First Amendment because “‘neutral’ principles of law can be applied without determining underlying questions of church law and policies”); *Moses*, 863 P.2d at 320–21 (stating that First Amendment does not bar claims for negligent hiring or supervision or breach of fiduciary duty because deciding such claims does “not require interpreting or weighing church doctrine and neutral principles of law can be applied”); *cf.* *Smith v. O’Connell*, 986 F. Supp. 73, 81 (D.R.I. 1997) (“[T]he plaintiffs’ core claim, namely, that the hierarchy defendants failed to take appropriate action to prevent the alleged sexual assaults, is governed by neutral tort law principles of general application.”).

221. *Doe*, 52 F. Supp. at 1061–62 (“Thus, whether a fiduciary relationship exists depends upon factual circumstances, not upon professional standards of conduct for the average reasonable member of the clergy.”) (citing *Doe v. Evans*, 718 So. 2d 286, 291 (Fla. Dist. Ct. App. 1998)); *F.G.*, 696 A.2d at 702–04; *Moses*, 863 P.2d at 321 n.13; *see also* *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988). Existence of duty is

the relationship is one that involves an authority or adherent of a religion is relevant only to the nature of the power differential in establishing the fiduciary character of the relationship. The counseling relationship and any power differential is the basis for understanding the kind of harm these torts address.

Courts need not evaluate the beliefs and practices of the fiduciary or his employer to determine if there has been a breach of trust in the relationship. Regardless of what the church claims are its canonical standards for the proper behavior of priests, the civil law can say that sexual seduction of a counselee is not even "arguably religious," that it is wrongful and thus punishable in tort.<sup>222</sup> Even were it part of church doctrine, it could still be adjudicated under *Employment Division v. Smith*.<sup>223</sup>

The fiduciary relationship in the context of clergy sexual misconduct can be established in two ways: the counselor/counselee relationship or the clergy/congregant relationship. The former should be the focus with the latter being an important qualifier,<sup>224</sup> as the existence of the counseling relationship with the cleric is enough to establish the fiduciary relationship.<sup>225</sup> The clergy/congregant relationship should be a qualifier because of the expectations created by the position that should operate in a manner analogous to equitable estoppel. In general, priests hold themselves out to be "asexual." Consulting a clergyman is viewed as "safe," like seeking advice from a brother or father.<sup>226</sup> The latter

a question of law, while its breach is one of fact. See *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169, 1175 (N.D. Tex. 1995).

222. Esbeck, *supra* note 11, at 87.

223. 494 U.S. 872 (1990); see also *supra* Part I.A.

224. Villiers, *supra* note 7, at 9 ("Trust in a clergy member makes the parishioner more vulnerable and less likely to report the wrongdoer.").

225. See *Sanders*, 898 F. Supp. at 1176 ("[The cleric's] duty would be created by his undertaking to counsel them."); *F.G.*, 696 A.2d at 704 ("Establishing a fiduciary duty essentially requires proof that a parishioner trusted and sought counseling from the pastor. A violation of that trust constitutes a breach of the duty."); *Erickson v. Christenson*, 781 P.2d 383, 386 (Or. Ct. App. 1989) ("[P]laintiff's claim . . . is not premised on the mere fact that Christenson is a pastor, but on the fact that, because he was *plaintiff's* pastor and counselor, a special relationship of trust and confidence developed.").

226. See *supra* notes 200–01 and accompanying text (discussing analogy of family to religious community); cf. 61 Am. Jur. 2d *Physicians, Surgeons, etc.* § 202 (1981) ("The duty of a physician or surgeon to bring skill and care to the amelioration of the condition of his patient does not arise from contract, but has its foundation in *public considerations* which are inseparable from the nature and exercise of his calling; it is predicated by the law on the relation which exists between physician and patient,

should generally not be the focus of state concerns,<sup>227</sup> as it is wholly possible that a priest and parishioner may have a truly consensual sexual relationship.<sup>228</sup> However, with the clergy/congregant relationship, there is still an imbalance of power, and it is imaginable that there might be breaches of trust within group situations and to multiple parties.<sup>229</sup> Because breach of fiduciary duty is relationship specific, understanding it as the appropriate cause of action eliminates the need to distinguish between religions. The religion itself need not condemn the conduct for the abuse of power to be demonstrated within the relationship.

The preceding might be characterized as a "bright-line" approach. First, establish the existence of a counseling relationship with the cleric.<sup>230</sup> If the relationship is one that became sexual during the course of counseling,<sup>231</sup> there has been a breach. Breach is taking advantage of the power differential for personal gratification.<sup>232</sup> Once the plaintiff establishes the fiduciary relationship, there should be a rebuttable presumption that the cleric, in the dominant position in the relationship, is

which . . . is the result of a consensual transaction . . . and the existence of which is a question of fact." (emphasis added).

227. See *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1060 (N.D. Iowa 1999) (pointing out that more than just the relationship is required; some form of confidence or trust must be reposed).
228. See, e.g., *Strock v. Presnell*, 527 N.E.2d 1235, 1243 (Ohio 1988) (refusing to apply breach of fiduciary duty to a consensual sexual relationship); *Hertel v. Sullivan*, 633 N.E.2d 36 (Ill. App. Ct. 1994); see also, Karen Lebacqz, *Pastor-Parishioner Sexuality: An Ethical Analysis*, EXPLOR. (Spring 1998) (arguing that it may be legitimate for single pastors to fall in love with single parishioners, while still cautioning of the complex power dynamic involved).
229. It is easy to imagine the traditional, mainstream religions making proposals for prevention. However, alternative situations should not be dismissed. The history of religion in America has witnessed religions organized in ways quite different from the traditional. We often label these organizations "cults."
230. See, e.g., *Moses v. Diocese of Colo.*, 863 P.2d 310, 321 (Colo. 1993); see also Flannigan, *supra* note 66, at 321 (proposing a three part analysis of fiduciary relationships, the first of which is to ask whether or not a trusting relationship existed).
231. This should include sexual abuse in places other than in the place of counsel as it is hard to delineate the relationship and the exploitation. In addition, any truly consensual relationship would not commence until the counseling relationship has been properly terminated. See generally BISBING, *supra* note 73, at 727-62.
232. See Morey, *supra* note 7, at 869 ("The professional is *always* responsible; sex with a client is never okay.") (citing *Sex, Power, and the Family of God*, Christianity and Crisis, February 16, 1987, at 47). See also Flannigan, *supra* note 66, at 321 (proposing a three part analysis of fiduciary relationships, the second of which is to ask whether what the person did was inconsistent with the maintenance of the trusting relationship).

responsible.<sup>233</sup> Thus, in both *Teadt*<sup>234</sup> and *Langford*,<sup>235</sup> a jury should have been permitted to evaluate evidence of the relationship and the alleged breach of trust.

### *F. Institutional Liability*

Up to this point, this article has focused on the individual liability of the cleric for his own actions. An essential point to consider is from where the responsibility of the religious organization should arise. One of the goals of tort law must be to place responsibility where the harm can best be prevented. To the extent religious institutions have the ability to control or guide its clerics within its institutional setting, it should do so and be accountable. "The protection of society requires that religious organizations be held accountable for injuries they cause to third persons."<sup>236</sup>

As with the other areas of "clergy malpractice," courts are not uniform in whether sexual misconduct by a cleric within the context of an

233. *Cf. Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 417, 423, 428 (2d Cir. 1999) (indicating that once a fiduciary relationship is established, the burden would shift to the fiduciary to prove non-breach); *In re Hartelrodes's Will*, 148 N.W. 774, 777 (Mich. 1914):

There are certain cases in which the law indulges in the presumption that undue influence has been used, as where a patient makes a will in favor of his physician, a client in favor of his lawyer, or a sick person in favor of a priest or spiritual adviser, whether for his own personal advantage, or for the advantage of some interest which he is a representative.

*Guill v. Wolpert*, 218 N.W.2d 224, 234 (Neb. 1974) (stating that once the fiduciary relationship is established by plaintiff, the defendant has "the burden of going forward with the evidence to show that it is not tainted with undue influence") (citing *Conry v. Langdon*, 146 N.W.2d 782 (Neb. 1966)); *Ross v. Conway*, 92 Cal. 632, 635 (Cal. 1892) ("[I]n every such transaction between persons standing in [a fiduciary relationship] the law will presume that he who held an influence over the other exercised it unduly to his own advantage."); *Barbara A. v. John G.*, 193 Cal. Rptr. 422, 432 (Cal. App. 1 Dist. 1983) ("If such a [confidential] relationship were established, respondent would then have the burden of proving that the consent was informed and freely given . . . or, in the alternative, that her reliance was unjustified.")

234. *Teadt v. Lutheran Church Mo. Synod*, 603 N.W.2d 816, 822 (Mich. App. 1999).

235. *Langford v. Roman Catholic Diocese*, 705 N.Y.S.2d 661 (App. Div. 2000).

236. *Konkle v. Henson*, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996); *see also Doe v. Hartz*, 52 F. Supp. 1027, 1073 (N.D. Iowa 1999) (reading *Godar* as sufficient support for negligent supervision claim, noting that "because of [his] employment [as a priest], an employee may pose a threat of injury to members of the public") (citing *Godar v. Edwards*, 588 N.W.2d 701, 709 (Iowa 1999)).



institutionally-sponsored counseling relationship is something for which the institution can be held responsible. Most courts categorically hold that sexual activity is purely personal and does not advance the purposes of the institution in any way that would allow respondeat superior to be imposed:<sup>237</sup> “When a priest has sexual intercourse with a parishioner it is not part of the priest’s duties nor customary within the business of the church.”<sup>238</sup>

The rationale behind this position is a point of major inconsistency in some cases and in this overall area. Some of the same courts that assert sexual misconduct is not part of church business, and is therefore outside the scope of the priest’s ministerial duties, nonetheless refuse to impose responsibility on the cleric because there would be an impermissible inquiry into beliefs and practices of his religion.<sup>239</sup> Other courts refuse to impose liability on the cleric for impermissible inquiry into religious practice, and then also do not hold the institution responsible for something for which the individual will not be held responsible, even where there is direct knowledge of such conduct imputed to the institution.<sup>240</sup>

As in the case of tort responsibility of clerics for sexual misconduct, the responsibility of the religious institution can be evaluated without

237. *Moses v. Diocese of Colo.*, 863 P.2d 310, 330 (Colo. 1993) (en banc); *Destefano v. Grabrian*, 763 P.2d 275, 287 (Colo. 1988) (en banc); *Tichenor v. Roman Catholic Church of the Archdiocese*, 32 F.3d 953, 959 (5th Cir. 1994); *Fearing v. Bucher*, 936 P.2d 1023, 1026 (Or. Ct. App. 1997); *Konkle*, 672 N.E.2d at 456; *Dausch v. Ryske*, 52 F.3d 1425, 1428 (7th Cir. 1994) (“[T]he church defendants could not be held vicariously liable for actions done by Rykse solely for his own benefit and not as part of his ministerial duties.”); *Teadt*, 603 N.W.2d at 818 (pointing out that clerics’ sexual conduct was in no way “related to or condoned by church doctrine”).

Resistance to imposition of respondeat superior has also been encountered in other counseling relationships. See *Cosgrove v. Lawrence*, 520 A.2d 844, 847 (N.J. Super. Ct. Law. Div. 1986) (stating that sexual relations with a client were never intended to be part of social work therapy); *Andrews v. United States*, 732 F.2d 366, 370 (4th Cir. 1984) (stating that physician’s assistant’s sexual relationship with patient based on assurance of its therapeutic value was found to further only employee’s interests and therefore could not be basis for vicarious liability). But see *Simmons v. United States*, 805 F.2d 1363, 1369 (9th Cir. 1986) (stating that social worker’s sexual contact with patient falls within scope of employment).

238. *Destefano*, 763 P.2d at 287.

239. See, e.g., *Dausch* 52 F.3d at 1428; *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 97, 98 (Mo. Ct. App. 1995).

Ironically, courts have determined that any sexual misconduct is generally outside the scope of employment. Is this not also an evaluation of religious belief by the court’s or an imposition of one individual’s?

240. See *Teadt*, 603 N.W.2d at 824.

inquiry into religious practice or belief.<sup>241</sup> If such conduct is known or knowable, or if ratification has been made, the institution should be accountable.<sup>242</sup> Again, comparing the application of Title VII to employment discrimination, the standard for responsibility is knowledge through use of formal complaint structures or actual knowledge.<sup>243</sup> Just as fiduciary relations should not be premised on the clergy/parishioner relationship alone, but primarily on the counseling relationship, institutional responsibility should not be premised on its status alone.<sup>244</sup> They should be held responsible for their own conduct (or failure to act) through theories of direct responsibility, based on the knowledge of the institution,<sup>245</sup> even if responsibility is not imposed on theories of agency

241. See *supra* Parts I.A. and I.B.

242. See, e.g., *Moses*, 863 P.2d at 321–23 (basing liability on institution's own actions and knowledge); *Destefano*, 763 P.2d at 287–88 (“[T]he master may subject himself to liability . . . by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others.”) (citing Restatement (Second) of Torts § 317, cmt. c (1965)); *Debose v. Bear Valley Church of Christ*, 890 P.2d 214, 230 (Colo. Ct. App. 1994) (“An employer may ratify the unauthorized act of its employee, i.e., an act not within the scope of employment, and thereby become obligated to the same extent as if the principal had originally authorized the act.”) (citations omitted).

243. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 70–72 (1986).

244. See *infra* note 249. But see *Bishop v. Schmidt*, 779 F. Supp. 321, 327 (S.D.N.Y. 1991) (“*Respondeat superior* is founded on agency, and the agency relationship, if there were any, was that of pastor, or clergy.”)

245. See *Moses*, 863 P.2d at 323–29 (finding negligent hiring and supervision when Diocese had specific knowledge of harmful behavior but took no action to remedy); *Jones v. Trane*, 591 N.Y.S.2d 927, 932 (1992):

[T]hat a religious body must be held free from any responsibility for wholly predictable and foreseeable injurious consequences of personnel decisions, although such decisions incorporate no theological or dogmatic tenets—would go beyond First Amendment protection and cloak such bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded.

See also *Faragher v. City of Boca*, 524 U.S. 775, 807–09 (1998); *Dees v. Johnson Controls World Servs. Inc.*, 168 F.3d 417, 421 (11th Cir. 1999) (holding that under theory of direct liability “[t]he harassment can be ascribed to the employer’s negligence when the employer knew or should have known about the harassment and failed to take remedial action”); *Simmons v. United States*, 805 F.2d 1363, 1369 (9th Cir. 1986) (stating that counselor’s supervisor knew of sexual contact, but took no action regarding it); *Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp. 2d 694, 710 (E.D.N.C. 1999) (“An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct but failed to stop it. Negligence sets a minimum standard for employer liability under Title VII.”) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409,

or respondeat superior.<sup>246</sup> An institution that commissions or condones counseling activities by its clerics should also supervise such activities. Though it may not be one of the sanctioned activities, sexual misconduct is foreseeable in a counseling relationship and may be prevented through proper supervision.<sup>247</sup>

### CONCLUSION

Sexual predators, while also in the general population, should not be granted refuge by mere affiliation with religious institutions. To the extent that our government is charged with governing society, and religious congregations are part of society, those congregations should benefit from the protections of the state and be subject to its prohibitions.<sup>248</sup>

Common law prohibitions of sexual misconduct by fiduciaries and professionals should be considered a generally applicable law. Exceptions for religious institutions counter common sense and social expectations imbedded in the fiduciary/professional relationship. Any

427 (2d Cir. 1999) (holding institution liable for knowledge of pattern of abuse and potential for harm to others); *Gibson v. Brewer*, 952 S.W.2d 239, 248 (Mo. 1997) (en banc); *Byrd v. Faber*, 565 N.E.2d 584, 590 (Ohio 1991) (“[E]ven the most liberal construction of the First Amendment will not protect a religious organization’s decision to hire someone who it knows is likely to commit criminal or tortious acts.”).

246. It is possible to interpret the doctrine of respondeat superior in a way that such conduct would be the responsibility of the employer. Once the counseling function is authorized or allowed, mishandling of transference and sexual abuse is foreseeable. *See supra* notes 95–98. If the action is foreseeable within the scope of responsibilities, then it ought to be considered within the scope of employment and actionable. *See, e.g.*, *Erickson v. Christenson*, 781 P.2d 383, 386–87 (Or. Ct. App. 1989) (indicating that foreseeability of harm is an important aspect of institutional liability).

When the servant is doing or attempting to do the very thing which he was directed to do, the master is liable, though the servant’s method of doing it be wholly unauthorized or forbidden . . . . That the servant disobeyed the orders of the master is never a sufficient defense. It must be shown further that he ceased to act for the master and in the course of his employment.

*Mullen v. Horton*, 700 A.2d 1377, 1380 (Conn. App. 1997) (citing *Son v. Hartford Ice Cream Co.*, 129 A. 778 (Conn. 1925)); *see also Erickson*, 781 P.2d at 386 n.3 (“Because the alleged wrongful act was improper performance of pastoral counseling duties, whether it occurred within the scope of employment is a factual issue.”).

247. *See Nancy A. Bridges, The Role of Supervision in Managing Intense Affect and Constructing Boundaries in Therapeutic Relationships*, 24 J. SEX EDUC. & THERAPY 218 (1999) (suggesting supervisory models to prevent boundary violations).
248. *See BENYEL, supra* note 1, at 145–66.

such exception would allow the First Amendment to be used as a pre-textual shield to protect otherwise prohibited conduct.<sup>249</sup>

At the least, courts should grant these plaintiffs the access and opportunity to demonstrate their claim.<sup>250</sup> Even without the First Amendment barriers constructed by the courts, these types of actions against fiduciaries are in a state of evolution<sup>251</sup> and are very difficult in any context.<sup>252</sup> Proof and the meeting of standards and statutes of limitation, independent of the church and state issues, remain complex and difficult. Cases not within religious contexts are regularly dismissed.<sup>253</sup>

249. See *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 n.3 (8th Cir. 1991); see also *F.G. v. MacDonell*, 696 A.2d 697, 702 (N.J. 1997) ("The First Amendment does not insulate a member of the clergy from actions for breach of fiduciary duty arising out of sexual misconduct that occurs during a time when the clergy member is providing counseling to a parishioner."); *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988) ("Members of the clergy cannot, in all circumstances, use the shield of the first amendment as protection and as a basis for immunity from civil suit."); *Langford v. Roman Catholic Diocese*, 705 N.Y.S.2d 661, 663 (App. Div. 2000) (Miller, J., dissenting) ("[A]ny attempt to define the duty of care owed by a member of the clergy to a parishioner fosters 'excessive entanglement with religion' . . . [and] will establish appellate precedent shielding from civil judicial examination even the most flagrant clerical misconduct perpetuated upon vulnerable parishioners, children as well as adults."). The Supreme Court in *Reynolds* makes perhaps the most appropriate statement: to disallow the claims of breach of fiduciary duty for sexual misconduct "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Reynolds v. United States*, 98 U.S. 145, 167 (1879).
250. See *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1062 (N.D. Iowa 1999) ("[T]his court cannot find that breach-of-fiduciary-duty claims against members of the clergy are barred *ab initio*. Rather, the question . . . is whether facts giving rise to a fiduciary relationship and consequent duties have been alleged."); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1135 (D. Mass. 1982) ("Causes of action based upon some proscribed conduct may, thus, withstand a motion to dismiss even if the alleged wrongdoer acts upon a religious belief or is organized for a religious purpose."); *Langford*, 705 N.Y.S.2d at 663 (Miller, J., dissenting) ("Clearly no examination of church doctrine is required in order for the plaintiff's claims against her priest to be heard.").
251. See *BISBING*, *supra* note 73, at 32 ("Courts . . . are more hesitant to apply fiduciary principals to physicians' and attorneys' personal dealings (sex), even when evidence of injustice has been presented.").
252. In other professional contexts, successful causes of action are difficult. See generally *BISBING*, *supra* note 73; see also *BISBING*, *supra* note 73, at 32. Because of the power imbalance, professionals should not be permitted to prey upon their clients/patients. The case for holding clergy responsible for sexual misconduct is even more compelling as a counseling relationship is often involved.
253. See, e.g., *Jennings v. Friedman*, No. 88-6046, 1989 U.S. App. LEXIS 7352, at \*5 (6th Cir. May 25, 1989) ("The critical inquiry . . . [is] whether a physician engaged in sexual

Even when the counselor is a psychologist, it is not easy to evaluate such claims. Only since 1975 have such causes of action been recognized as against a psychiatrist,<sup>254</sup> with other areas to follow later still.<sup>255</sup> But for the misapplication of First Amendment law, the focus of this article might otherwise have been to demonstrate the reasons why the use of fiduciary law to prevent such sexual exploitation and wrongs is so necessary.

There are concerns that allowing this cause of action, whether delivered as clergy malpractice or breach of fiduciary duty, will suddenly open the flood gates to other intrusions upon religion;<sup>256</sup> these concerns are empty. However, concerns of deep-pocket targeting may be warranted, but unavoidable.<sup>257</sup> The history of allowing these causes of action demonstrates that this and any other cause of action in the future will be staunchly circumscribed. Nonetheless, this article only addresses sexual misconduct within a counseling relationship. Admittedly, other areas may follow from the analyses in this article, but only where it makes sense and there is a secular justification.<sup>258</sup> ❀

---

relations with a patient under the guise of rendering professional services.”); *Atienza v. Taub*, 239 Cal. Rptr. 454, 457 (Ct. App. 1987) (finding unhappy affair insufficient to make out cause of action for professional negligence); *Jacobsen v. Muller*, 352 S.E.2d 604, 607 (Ga. Ct. App. 1986) (affirming dismissal of professional malpractice claim against job counselor for sexual misconduct); *Suppressed v. Suppressed*, 565 N.E.2d 101, 106 (Ill. App. Ct. 1990) (declining to apply fiduciary principles to an attorney’s personal dealings with a client); *Odegard v. Finne*, 500 N.W.2d 140, 143 (Minn. Ct. App. 1993) (applying the reasoning of *Atienza* to a claim of medical malpractice based on a failed romantic relationship).

254. *Roy v. Hartogs*, 366 N.Y.S.2d 297, 298 (Civ. Ct. 1975) (addressing allegations that a psychiatrist convinced his patient to have sex with him as a necessary part of treatment).
255. See, e.g., *Horak v. Biris*, 474 N.E.2d 13, 17 (Ill. App. Ct. 1985) (recognizing cause of action for malpractice against social worker who had sexual relations with wife of couple who had come to him for marital counseling); *Barbara A. v. John G.*, 193 Cal Rptr. 422, 426–27 (Ct. App. 1983) (recognizing cause of action for deceit and battery against attorney who impregnated client after representing such occurrence as an impossibility).
256. See, e.g., *Schmidt v. Bishop*, 779 F. Supp. 321, 328 (S.D.N.Y. 1991).
257. See generally *O’Reilly & Strasser*, *supra* note 11. Unfortunately, this drawback is one general to the legal system.
258. Use of personal information to commit fraud or abuse of funds are obvious examples. See, e.g., *United States v. Ballard*, 322 U.S. 78, 95 (1994) (Jackson, J., dissenting) (suggesting the hypothetical scenario of false representation by a charlatan to raise funds for the construction of a church but diverts donation to personal use); see also *ESBECK*, *supra* note 11, at 33.