Sexual Misconduct of Clergypersons with Congregants or Parishioners – Civil and Criminal Liabilities and Responsibilities

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There has been much media coverage in recent years focusing upon sexual misconduct of Roman Catholic priests with children and minors and the response of dioceses and the Vatican to pedophilia in the ranks of the priesthood.[3] The issue of clergyperson[4] sexual misconduct with congregants or parishioners, however, is not limited to any particular denomination or faith tradition. Moreover, clergyperson sexual misconduct extends beyond the abuse of children and

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[3] *See* Karen Ann Ballotta, *Losing Its Soul: How the Cipolla Case Limits the Catholic Church's Ability to Discipline Sexually Abusive Priests,* 43 EMORY L.J. 1431, 1435-37 (1994) (regarding media coverage of the Catholic Church's lack of discipline of its priests who have sexually abused minor children). *See also* Lisa M. Smith, *Lifting the Veil of Secrecy: Mandatory Child Abuse Reporting Statutes May Encourage the Catholic Church to Report Priests Who Molest Children,* 18 LAW & PSYCHOL. REV. 409, 409-10 (1994); Janice D. Villers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship,* 74 DENV. U. L. REV. 1, 16 n. 94 (1996).

[4] The term "clergyperson" will hereafter refer to all the principle leadership roles at the head of a congregation, synagogue or parish, e.g., ministers, rabbis, priests, imams, etc. Statutory definitions of "clergy" generally encompass these terms. *See* ARK. CODE ANN. § 9-11-802 (2008); CAL. PENAL CODE § 11165.7 (West Supp. 2008); COLO. REV. STAT. ANN. § 12-37.5-103 (West Supp. 2008); MICH. COMP. LAWS § 722.622 (LexisNexis 2005). The characterization of a person as a member of the clergy can itself be problematical because of the diversity of formal and functional roles within various faith traditions, ranging, e.g., in the Protestant tradition from clergy so designated by sanctioned ordination within a hierarchical structure to certain lay preachers who are self-appointed and not formally credentialed or ordained. As with all statutory materials, the interpretation of words depends on many factors, including legislative intent and history, definitional words, context, etc. The characterization of a person as a clergyperson can have an impact on assessing whether the counseling rendered by such a person may be characterized as secular in nature or as religious or spiritual in nature, or as having elements of each.

minors. Most segments of the larger faith community also have dealt with the issue of clergyperson sexual misconduct involving adults -- typically female adults -- who are congregants or parishioners. Such misconduct typically arises out of counseling relationships, but also may arise within the context of the clergyperson's non-counseling interactions with congregants or parishioners within a religious community.[5]

According to recent studies, clergyperson sexual misconduct is a growing problem across an array of faith traditions. Christianity, Judaism, Islam, Buddhism and Hinduism, as well as less prominent faith traditions, are affected by clergyperson sexual misconduct. To illustrate, one study of the Church of England has found that sixty-seven percent of clergypersons responding have known a colleague who has engaged in sexual misconduct with a congregant.[6] Another study has indicated that seventy percent of Southern Baptist ministers have known of other ministers who have engaged in sexual misconduct with a congregant.[7] American rabbis

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[5] *See* Eduardo Cruz, *When the Shepherd Preys of the Flock: Clergy Sexual Exploitation and the Search for Solutions,* 19 FLA. ST. U. L. REV. 499, 502 (1991); Janice D. Villiers: *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship,* 74 DENV. U. L. REV. 1, 1-2 (1996).

[6] Thaddeus Birchard, *Clergy Sexual Misconduct: Frequency and Causation,* 15 SEXUAL & RELATIONSHIP THERAPY 127, 135 (2000). *See also* Emily C. Short, *Torts: Praying for the Parish or Preying on the Parish? Clergy Sexual Misconduct and the Tort of Clergy Malpractice,* 57 OKLA. L. Rev. 183, 184 (2004).

[7] Gayle White, *Sexual Misconduct: Keeping Vigil: How Various Faiths Protect the Innocent in Their Flocks,* ATLANTA J. & CONST., Sept. 14, 2002, at B1. *See also* Emily C. Short, *Torts: Praying for the Parish or Preying on the Parish? Clergy Sexual Misconduct and the Tort of Clergy Malpractice,* 57 OKLA. L. Rev. 183, 185 (2004).

have been dismissed on account of sexual misconduct with congregants.[8] Buddhist religious leaders have been accused of sexual misconduct.[9]

No faith tradition or denomination can finesse the obligation to deal effectively with clergyperson sexual misconduct. Such misconduct is a breach of the fundamental basis of the relationship of a clergyperson with those who look to him or her to provide guidance and instruction in matters spiritual that are regarded as falling within the special expertise of the clergy. As such, clergypersons occupy a distinctive role as embodiments and interpreters of knowledge and discernment within a transcendent milieu of faith, morals, and higher matters, generally, that lie beyond the obvious and visible aspects of the human condition.

Despite the growing revelation of this problem among clergypersons and increased exposure in the media, it appears that most clergyperson sexual misconduct is not prosecuted.[10]

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[8] James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues,* 7 ST. THOMAS L. REV. 31, 43 (1994). *See also* Emily C. Short, *Torts: Praying for the Parish or Preying on the Parish? Clergy Sexual Misconduct and the Tort of Clergy Malpractice,* 57 OKLA. L. Rev. 183, 185-86 (2004).

[9] *Id.*

[10] There are many reasons why most sexual misconduct by clergypersons is not prosecuted. Prosecutions may not come to fruition on account of the unwillingness of a victim to advance a prosecution against the victim's priest, pastor, etc. *See* MARIE M. FORTUNE, REPORTING CHILD ABUSE: AN ETHICAL MANDATE FOR MINISTRY, IN ABUSE AND RELIGION: WHEN PRAYING ISN'T ENOUGH (Lexington Books 1998) confirming that often, due to the patriarchical nature of some churches, women's accusations of sexual abuse or misconduct are often discounted. Also as noted, relatively few jurisdictions penal codes specifically provide for criminal sanction in the case of a clergyperson engaged in counseling, seemingly the most common venue giving rise to clergyperson sexual misconduct. This not to suggest that a clergyperson cannot arguably be said to be implicitly included within the definition of, e.g., a "mental health professional" or the like, assuming statutory language or rules of construction do not preclude such an inclusion. Such terminology is used in many penal statutes dealing with sexual misconduct in the counseling relationship. *See* Jeffery A. Barker, *Professional – Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?,* 40 UCLA L. REV. 1275, 1317 n. 165 (1993) and Catherine S. Leffler, Note, *Sexual Conduct Within the Physician-Patient Relationship: A Statutory Framework for Disciplining this Breach of Fiduciary Duty,* 1 WIDENER L. SYMP. J. 501, 507 (1996) (One study indicates that victims of sexual misconduct report such misconduct in less than four percent of those cases). The reasons also include statutes of limitations, an important factor bearing upon the prosecution of clergyperson abuse given the embarrassment that

Many explanations are posited as to why. Most states, to be sure, do not have penal statutes that *specifically* criminalize sexual misconduct by clergypersons. Only thirteen states and the District of Columbia have penal statutes that, in at least some circumstances, support the criminal prosecution of clergypersons engaged in sexual misconduct with congregants or parishioners. These statutes, enacted by Arkansas, Connecticut, Delaware, Iowa, Kansas, Minnesota, Mississippi, New Mexico, North Dakota, Texas, South Dakota, Utah, Wisconsin and the District of Columbia[11] turn on various linguistic formulations, including, most commonly, the specification that the misconduct occur within the confines of the counseling relationship.[12] Only a handful of state penal statutes, to be discussed, address clergyperson sexual misconduct *outside* of the context of the counseling relationship.

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the victim may experience, as well as the congregational criticism and disdain that may follow an accusation against a clergyperson that may lead the victim to conceal the alleged wrong for a lengthy period until other accusations are ultimately made by other alleged victims. *See e.g.,* MINN. STAT. ANN. § 541.073 (West 2002), stating "[a]n action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse."

[11] *See, for example*, The following statutes refer to a perpetrator having a "position of authority" over the victim. ARK. CODE ANN. § 5-14-126 (Supp. 2007);TEX. PENAL CODE ANN. § 22.001 (Vernon Supp. 2008); ARK. CODE ANN. § 5-14-126 (Supp. 2007); N.M. STAT. ANN. § 30-9-10 (West Supp.2008); N.M. STAT. ANN. $ 30-9-12(A) (West 2003); ALASKA STAT. § 11.41.434-440 (2006); CAL PENAL CODE § 261 (West 2008); CONN. GEN. STAT. ANN. § 53a-71 (West 2007); Kansas, H.R. 2100, 2009 Leg. (Kan. 2009). The bill introduced into the Kansas House of Representatives, H.R. 2100, 2009 Leg. Sess. (Kan. 2009), would criminalize instances in which "the offender is a member of the clergy and is engaging in consensual sexual intercourse, lewd fondling or touching . . . acting as a member of the clergy carrying out the clergy member's pastoral duties." *See also* the following statutes that criminalize a sexual perpetrator but do not specifically incorporate the phrase "position of authority" into the statute. ALASKA STAT. § 08.86.204 (2008); ARIZ. REV. STAT. ANN. § 13-1418 (Supp. 2008); FLA. STAT. ANN. § 491.0112 (West 2001); COLO. REV. STAT. ANN. § 18-3-405.5 (West 2004); S.D. CODIFIED LAWS § 22-22-28 (2006); S.D. CODIFIED LAWS §22-22-27 (2006); IOWA CODE ANN. § 709.15 (West Supp. 2008); N.D. CENT. CODE § 12.1-20-06.1 (2005); WIS. STAT. ANN § 940.22 (West 2005); WIS. STAT. ANN. § 895.441 (West 2008).

[12] *See* Patricia J. Falk, *Rape and Fraud by Coercion,* 64 BROOK L. REV. 39 (1998*).* Each of the thirteen jurisdictions noted explicitly name clergypersons as falling within the ambit of the psychotherapy or counseling professionals encompassed by the statute. *See, for example,* Minn. Stat. ANN. § 148A.01 (West 2005), S.D. CODIFIED LAWS § 22-22-27 (2006), CONN. GEN. STAT. ANN. § 19A-600 (West Supp. 2008), UTAH CODE ANN. § 76-5-406 (2008), WIS. STAT. ANN. § 940.22 (West 2005).

The Principal Bases of Liability for Clergyperson Sexual Misconduct Involving Adults

This discussion does not focus upon the familiar instances of clergyperson sexual misconduct involving children or minors. The fundamental obligation of trust and care owed by an adult to a young person and the innocence and vulnerability of the underage and immature is well understood and accepted. The sexual abuse of children is uniformly criminalized[13] and its frequency is well documented. There is no special religiously-based constitutional free exercise prerogative that is recognized to enable a perpetrator to counter penal law sanctions against sexual misconduct involving children and minors. [14]

a. Civil Liability in Respect of Adult Congregants and Parishioners

The civil liability of clergypersons for sexual misconduct with adult congregants or parishioners (in the counseling context, often referred to as "clients") in the context of counseling relationships is well recognized. While the cause of action is sometimes couched as "clergy malpractice," the action is still one for professional malpractice seeking to hold a counselor liable for a breach of duty under the applicable secular standard of care[15] or for breach

[13] *See L.M. v. Karlson,* 646 N.W.2d 537, 543 (Minn. Ct. App. 2002) (reasoning that sexual abuse of children is a paramount concern because the children are so young, vulnerable, easily manipulated, and cannot communicate well). Civil liability for sexual misconduct with children generally lies in the tort law of assault and battery. *See Worcester Ins. Co. v. Fells Acres Day Sch., Inc.,* 558 N.E.2d 958, 963-64 (Mass. 1990); *Silveira v. Snatos,* 490 A.2d 969 (R.I. 1985).

[14] *See also Roman Catholic Diocese of Jackson v. Morrison,* 905 So.2d 1213, 1230 (Miss. 2005) (stating the Establishment Clause of the First Amendment did not deprive a state court of jurisdiction regarding a suit against a Catholic Diocese stemming from accusations of child sexual abuse. Further, a prosecution of such claims does not excessively entangle a court in ecclesiastical matters. The matter of the "entanglement doctrine" is discussed further herein).

[15] Some cases have held the standard of care for clergy is that a clergyperson should exercise the level of care and diligence that a reasonable clergyperson of a particular sect would exercise, given the specific education and training

of the fiduciary obligation owed by the counselor to a client.[16] The factors that characterize a fiduciary relationship -- trust, reliance, emotional intimacy and vulnerability -- that may arise between a counselor and a client, including the phenomena of transference and counter-transference,[17] are such that liability is imposed even if the sexual contact is facially consensual and imposed without regard to the wrongdoer incidentally occupying the role of a clergyperson.

Liability generally turns upon the following factors:

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offered or required by that sect. *See Destefano v. Grabrian*, 763 P.2d 275, 285 (Colo. 1988); *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1220 (Me. 2005). *But see People v. Bautista,* 77 Cal. Rptr. 2d 824 (Ct. App. 2008). (stating "a standard of care and its breach . . . [cannot] be established without judicial determinations as to the training, skill, and standards applicable to members of the clergy in a wide array of religions holding different beliefs and practices." This court expressed concern that applying uniform standards could restrict the free exercise of religion and "result in the establishment of judicially accepted religions.").

[16] *See* Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity* 2004 BYU L. REV. 1789, 1824 (2004). This article states "a fiduciary is a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking. A fiduciary has a duty to deal "with utmost good faith and solely for the benefit" of the beneficiary. A fiduciary's obligations to the beneficiary include, among other things, a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal impartially with beneficiaries." A person standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of the duty imposed by the relationship.

[17] *See Webb v. W. Va. Bd. of Med.,* 569 S.E.2d 225, 238 (W. Va. 2002). (stating that in a psychotherapist/counselor-patient relationship, "dependence arises, and may even be encouraged in many cases, from the psychiatrist-patient relationship - no matter how brief or supportive the relationship lasts. Such dependence results in extreme-vulnerability on the part of the patient."). *See also State v. Dutton,* No. C8-89-680, 1989 WL 77391, at *4 (Minn. Ct. App. 1989) (stating "the legislature has clearly set forth its intent that patients and former patients are to be protected from sexual encounters with their counselors or therapists. Further, "the unique psychotherapist-patient relationship gives rise to an emotional vulnerability irrespective of age, intelligence or education."). *See also St. Paul Fire & Marine Ins. Co. v. Love,* 459 N.W.2d 698 (Minn. 1990) (explaining that the phenomena of transference as "the process whereby the patient displaces on to the therapist feelings, attitudes and attributes which properly belong to a significant attachment figure of the past, usually a parent, and responds to the therapist accordingly. Transference is common in psychotherapy. The patient, required to reveal her innermost feelings and thoughts to the therapist, develops an intense, intimate relationship with her therapist and often 'falls in love' with him. The therapist must reject the patient's erotic overtures and explain to the patient the true origin of her feelings. A further phenomenon that may occur is counter-transference, when the therapist transfers his own problems to the patient. When a therapist finds that he is becoming personally involved with the patient, he must discontinue treatment and refer the patient to another therapist."). *See also* S. WALDRON-SKINNER, A DICTIONARY OF PSYCHOTHERAPY (1986). *See* Thomas L. Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference,* 45 NOTRE DAME L. REV. 197 (1970); *See also* C.G. JUNG & R.F.C. HULL, THE PSYCHOLOGY OF TRANSFERENCE (Princeton University Press 1969).

i. the existence of a concept of duty owed by the counselor to a client to provide a prescribed standard of care, and a determination that the duty has been breached; or

ii. the existence of a fiduciary relationship[18] between the counselor and a client which calls for the fiduciary (the counselor) to fully subordinate his or her interests to the interests of the client.[19] The issue in such cases principally focuses upon establishing the actual components of the conduct, i.e., the character of the sexual acts or contact alleged, from which a breach of fiduciary duty follows. In such a case, the relationship of trust -- involving trust, reliance, emotional intimacy and vulnerability -- that is recognized as necessarily characterizing a

[18] *Clancy v. King*, 954 A.2d 1092, 1113 (Md. 2008) (a fiduciary is "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior. As to thisthere has developed a tradition that is unbending and inveterate, only thus has the level of conduct of fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."). *See also In re Phillips,* 867 N.Y.S.2d 20 (N.Y. App. Div. 2008) (stating a fiduciary "is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. There has developed in respect of this a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions, only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.").

[19] *See Doe v. Evans,* 814 So.2d 370, 376 (Fla. 2002) (holding that the Establishment Clause did not bar parishioner's breach of a fiduciary duty claim against pastor and church based upon alleged sexual misconduct during marriage counseling between parishioner and pastor, where imposition of liability based upon a breach of fiduciary duty had a secular purpose and the primary effect of imposing liability neither advanced nor inhibited religion, and resolution of the dispute did not depend on an extensive inquiry by civil courts into religious law and polity or interpretation and resolution of religious doctrine."); *F.G. v. MacDonell,* 696 A.2d 697, 702 (N.J. 1997), *aff'g* 683 A.2d 1159 (N.J. 1996) (stating that courts can resolve claims that arise from an alleged violation of a fiduciary duty, that involve inappropriate sexual conduct by clergy, and that arise purely from secular counseling or conduct and are not defended upon a basis of sincerely held religious belief or practice); *Destefano v. Grabrian,* 763 P.2d 275, 283 (Colo. 1988) (reasoning that courts can resolve claims that arise from secular counseling).

secular counseling relationship is not meaningfully in question once the relationship is defined.[20]

Predicate Constitutional Issues Bearing Upon Liability for Sexual Misconduct in a Religious or Spiritually Based Counseling Context: More on the Entanglement Doctrine

When the counseling has a religious or spiritual dimension, the constitutional doctrine of "entanglement" can disable the courts from adjudicating liability unless the secular nature of the clergy relationship with the congregant or parishioner can be defined with reasonable sharpness, which is possible given the right facts in litigation.[21] Most often it is difficult, if not impossible, to untwine the secular aspects of counseling by a clergyperson from any religious or spiritual

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[20] *See Moses v. Diocese of Colo.,* 863 P.2d 310, 321 n.13 (Colo. 1993) (stating that a breach of fiduciary duty claim is actionable against a member of the clergy for a violation occurring during secular counseling); *F.G. v. MacDonell,* 696 A.2d 697, 702 (N.J. 1997), *aff'g* 683 A.2d 1159 (N.J. 1996) (stating that "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."); *Sanders v. Casa View Baptist Church,* 134 F.3d 331, 336-37 (5th Cir. 1998), aff'g 898 F. Supp 1169 (N.D. Tex. 1995) (upholding a "finding of breach of fiduciary duty against minister for sexual relations in the counseling setting, as he held himself out to possess qualifications of professional marital counselor," and stating "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.").

[21] *See Odenthal v. Minn. Conference of Seventh-Day Adventist,* 649 N.W.2d 426, 437 (Minn. 2002) (holding "adjudication of negligence claim brought against member of clergy by church member, based on neutral standards of conduct set forth in statutes governing conduct of unlicensed mental health practitioner, for alleged improprieties in counseling member's wife, did not require excessive entanglement with religion, so as to violate the First Amendment."); *Olson v. First Church of Nazarene,* 661 N.W.2d 254, 261-62 (Minn. Ct. App. 2003) (stating the Establishment Clause does not preclude the exercise of subject-matter jurisdiction when making a determination of an allegation which occurred during a counseling session which was secular in nature); *See also Doe v. Evans,* 814 So.2d 370, 373 (Fla. 2002); *Malicki v. Doe,* 814 So.2d 347, 354 (Fla. 2002) (holding "the First Amendment does not preclude a secular court from imposing liability against a church for harm caused to an adult and a child parishioner arising from the alleged sexual assault or battery by one of its clergy.").

components of the same interaction.[22] Only when a clergyperson functions as a counselor in a secular practice setting such that his or her religious identity and expression becomes both inconsequential and dormant does the counselor differentiate his or her identity as a secular therapist from his or her identity as a member of the clergy, thereby setting aside entanglement doctrine issues.

Under the Establishment Clause of the First Amendment of the United States Constitution and its judicial interpretations, any law that includes a "sect preference" is constitutionally infirm.[23] To determine whether a law that is religiously neutral violates the Establishment Clause, courts consider the "*Lemon* test."[24] This test requires that: (1) the law in question has a secular purpose; (2) the law must not have the primary effect of either advancing or inhibiting religion; and (3) the law must not result in an excessive entanglement between government and religion.[25] If a law fails on any of these three requirements, it is constitutionally invalidated. To be sure, the components of the *Lemon* test are linked and cannot be viewed in isolation. The United States Supreme Court often looks particularly at the *effect* of a statute to determine whether it creates an excessive entanglement between government and religion.[26] In

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[22] *See Westbrook v. Penley,* 231 S.W.3d 389, 396 (Tex. 2007) (noting "when a pastor who holds a professional counseling license and engages in marital counseling with a parishioner, the line between the secular and the religious may be difficult to draw."); *Destefano v. Grabrian,* 763 P.2d 275, 285 n.10 (Colo. 1988) (stating "family counseling and psychological counseling are two notable areas in which there is substantial overlap between the secular and religious aspects of a spiritual counselor's activities.").

[23] U.S. Const. amend. I. *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (7th ed., Thomson West 2004).

[24] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (7th ed., Thomson West 2004).

[25] *Lemon v. Kurtzman,* 403 U.S. 602, 615 (1971). *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (7th ed., Thomson West 2004).

[26] *Agostini v. Felton,* 521 U.S. 203, 233 (1997), *rev'g* 519 U.S. 1093 (1997).

examining the effect the Court examines the character and purpose of the institution benefited or inhibited.[27] The Court also scrutinizes the resulting relationship between the government and religious authority.[28]

Notwithstanding a holistic approach taken in considering the individual prongs of the *Lemon* test, the third prong of the *Lemon* test -- regarding whether the law creates excessive entanglement between government and religion -- is the component that principally governs whether a court will enjoy judicial competency to adjudicate civil liability under the previously described theories regarding clergyperson sexual misconduct in the counseling context or any other context involving a congregant or parishioner. This follows from the fact that the imposition of civil liability for sexual misconduct with a client by a mental health therapist, including a clergyperson engaged in counseling as a therapist, has a clear secular purpose of penalizing the misappropriation of a professional mental health counseling relationship for sexual gratification, and the primary effect of imposing liability is to protect the integrity of such counseling relationships and not to advance or inhibit religion.

In considering the applicability of the third prong, if the adjudication of civil liability by a court is accomplished pursuant to a theory that calls for the court to become, as a governmental entity, excessively entangled with the interpretation or specification of religious practice, standards or custom, the court is constitutionally disabled from going forward to adjudicate liability on the merits. In other words, if the issue is whether the religiously or spiritually based counseling aspects of the relationship between the clergyperson and the congregant or

[27] *Id. See also Waltz v. Tax Comm'n of City of N.Y.,* 397 U.S. 664, 674 (1970).

[28] *Agostini v. Felton,* 521 U.S. 203, 233 (1997), *rev'g* 519 U.S. 1093 (1997). *See also Lemon v. Kurtzman,* 403 U.S. 602, 615 (1971).

parishioner were or are a factor in the negation of the victim's ability to effectively consent, then the court is constitutionally impaired from examining or predicating liability upon such religious or spiritual components of the relationship.

To illustrate the doctrine's application in respect of civil theories of liability, one court has held that the "First Amendment bars claims of negligent hiring, negligent supervision, and outrageous conduct . . . [against an archdiocese] because such claims require inquiry into church policy and doctrine."[29] Such requirement of inquiry and the consequent possible direction of church policy and doctrine by the court are deemed as an excessive entanglement between a court as a governmental entity and a church as a religious institution.[30] Likewise, a court also has held that "the First Amendment bars breach of fiduciary duty claims against pastors due to excessive entanglement of the courts in religion if required to articulate a generalized standard of care for clergymen."[31] Thus, requiring courts to articulate or interpret church policy and doctrine in fashioning a malpractice standard for breach of a duty of care would impermissibly inject the courts into the inter-workings of a religious institution. Such excessive entanglement between government and religion which consequently violate the third prong of the *Lemon* test.[32]

Accordingly, there is a problematical constitutional dimension involved in recognizing claims of clergy malpractice in the context of counseling relationships with a congregant or a

[29] *Ayon v. Gourley,* 47 F. Supp. 2d 1246, 1249-50 (D. Colo. 1998), *aff'd on other grounds,* 185 F.3d 873 (10th Cir. 1999). Negligent hiring, negligent supervision and the tort of outrageous conduct are other theories, aside from the actions for breach of the duty of care (invoking a reasonable standard of care) or breach of fiduciary obligation that are advanced in clergyperson sexual misconduct cases in counseling contexts.

[30] *Id.*

[31] *Schmidt v. Bishop,* 779 F. Supp. 321 (S.D.N.Y. 1991).

[32] *Lemon v. Kurtzman,* 403 U.S. 602, 615 (1971).

parishioner, whether the action is premised upon a theory of breach of duty of care (as measured by a reasonable standard of care) or upon a theory of breach of a fiduciary duty.[33] Duty of care claims call for a determination of whether the alleged wrongdoer breached the duty to afford the victim the "reasonable standard of care" within the given profession, e.g., the reasonable standard of care for a secular therapist, or for an obstetrician, or for a certified public accountant. Because such an action against a clergyperson calls for a determination of a reasonable standard of care for a clergyperson rendering religious or spiritual guidance within a given religious tradition, the courts have generally declined to recognize such an action because of constitutional implications of the court applying civil law standards of reasonable care to counseling rendered within a spiritual venue.[34]

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[33] *Nally v. Grace Cmty. Church,* 763 P.2d *948* (Cal. 1988). This is a seminal case regarding clergy malpractice. This case rejects a claim for clergy malpractice; no court has allowed such a claim to present date. *See also* Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship,* 74 DENV. U. L. REV. 1 (1996). *See also* Richelle v. Roman Catholic Archbishop, 130 Cal. Rptr.2d 601, 608 (Cal. Ct. App. 2003) (holding an action for clergy malpractice cannot be reconciled with the First Amendment because a standard of care and its breach could not be established without judicial determinations as to the training, skill, and standards applicable to members of the clergy in a wide array of religions holding different beliefs and practices. Even if a reasonable standard could be devised, which is questionable, it could not be uniformly applied without restricting the free exercise rights of religious organizations which could not comply without compromising the doctrines of their faith). *See also Handley v. Richards,* 518 So.2d 682 (Ala. 1987) (one of many cases to reject clergy malpractice). *But see Doe v. Roman Catholic Diocese of Rochester,* 857 N.Y.S.2d 866 (N.Y. 2008) (recognizing the possibility of a breach of fiduciary duty action against clergy). *But see Olson v. First Church of Nazarene,* 661 N.W.2d 254, 261-62 (Minn. Ct. App. 2003) (stating the Establishment Clause does not preclude the exercise of subject-matter jurisdiction when making a determination of an allegation which occurred during a counseling session which was secular in nature); *Malicki v. Doe,* 814 So.2d 347, 354 (Fla. 2002) (in dealing with a physical tort, as opposed to a determination of a standard of care or as opposed to assessing the nature of breach of fiduciary duty, holding "the First Amendment does not preclude a secular court from imposing liability against a church for harm caused to an adult and a child parishioner arising from the alleged sexual assault or battery by one of its clergy.").

[34] *See Roman Catholic Diocese of Jackson v. Morrison,* 905 So.2d 1213, 1254 (Miss. 2005) (holding "any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion."). *See also Richelle L. v. Roman Catholic Archbishop,* 106 Cal. App.4th 257, 273-74 (Cal. Ct. App. 2003); *H.R.B. v. J.L.G.,* 913 S.W.2d 92, 98 (Mo. Ct. App.

Other courts have likewise declined relief in cases in which a claimant premised clergy liability for religious or spiritual counseling upon the concept of breach of a fiduciary obligation owed by a clergyperson to a congregant or parishioner.[35] In *Langford*,[36] the court noted the following elements of proof for establishment of a fiduciary relationship and the breach of duty that arises from such a relationship within a specific religious setting: the vulnerability of one party to the other which results in the empowerment of the stronger party by the weaker, which empowerment has been solicited or accepted by the stronger party, and prevents the weaker party from effectively protecting itself.[37] These cases involve the problematical analysis of whether the parties are in a fiduciary relationship, a fact sensitive inquiry that calls for an assessment of the

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1995) (holding "defining the scope of fiduciary duty owed persons by their clergy would require courts to define and express the standard of care followed by reasonable clergy of the particular faith involved, which in turn "would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. Such an approach would offend the First Amendment, the court concluded, because it would foster 'excessive entanglement' with religion.").

[35] *See Langford v. Roman Catholic Diocese of Brooklyn,* 677 N.Y.S.2d 436, 899-900 (N.Y. Sup. Ct. 1998, *aff'd* 705 N.Y.S.2d 661 (N.Y. App. Div. 2000) (stating "a fiduciary relationship is one in which (1) there is vulnerability of one party to the other which (2) results in the empowerment of the stronger party by the weaker which (3) empowerment has been solicited or accepted by the stronger party and (4) prevents the weaker party from effectively protecting itself."). *See also F.G. v. MacDonell,* 696 A.2d 697, 702-03 (N.J. 1997) (stating "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. Thus, without impinging on the First Amendment, courts can resolve a claim that a member of the clergy has committed sexually inappropriate conduct in the course of pastoral counseling.").

[36] *Langford v. Roman Catholic Diocese of Brooklyn,* 677 N.Y.S.2d 436, 899-900 (N.Y. Sup. Ct. 1998, *aff'd* 705 N.Y.S.2d 661 (N.Y. App. Div. 2000)).

[37] *Moses v. Diocese of Colo.,* 863 P.2d 310, 322 (Colo. 1993) (stating a "claim for breach of fiduciary duty … involves a party who used his superior position as a counselor, a bishop, and a final arbiter of problems with the clergy to the detriment of a vulnerable, dependent party."). *See also Langford v. Roman Catholic Diocese of Brooklyn,* 677 N.Y.S.2d 436 (N.Y. Sup. Ct. 1998) aff'd, 705 N.Y.S.2d 661 (N.Y. App. Div. 2000) (stating "four elements that we believe are essential to the establishment of a fiduciary relationship: 1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself."). *See also* Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle,* 1993 U. ILL. L. REV. 897, 922 (1993).

perceptions of the clergyperson or the congregant or parishioner (or both) of the character of the counseling relationship and that may involve the court in constitutionally impermissible prescriptions of the character of a religiously based counseling relationship.[38] Even if a fiduciary relationship is assumed, the standard of fiduciary care within a religious setting must be prescribed. Hence, in like manner to the difficulty of assessing a proper standard of care for counseling for clergy in a religious setting, the court will become impermissibly called upon to define the standard for breach of the fiduciary duty.[39]

Accordingly, the imposition of civil liability on clergy, whether the theory is breach of the duty of care or breach of fiduciary duty, inevitably calls for judicial determination of religious and spiritual issues that lie, at least for most courts, beyond the competency of the court[40] [41] Hence, if a clergyperson acting in his capacity as such and not as a secular counselor

[38] *Lowery v. Cook,* No. 20061086-CA, 2007 WL 772782, at *1 (Utah Ct. App. Mar. 15, 2007) (mem. op.) (stating "a claim for breach of fiduciary duty in an ecclesiastical setting is, in essence, a claim for clergy malpractice or would otherwise require excessive entanglement with religion, the claim is barred"). *See Langford v. Roman Catholic Diocese of Brooklyn,* 677 N.Y.S.2d 436 (M.Y. Sup. Ct. 1998) aff'd, 705 N.Y.S.2d 661 (M.Y. App. Div. 2000) (holding "a cause of action to recover damages for breach of fiduciary duty arising out of sexual relationship between a parishioner and a member of the clergy properly dismissed as it would require courts to venture into forbidden ecclesiastical terrain.").

[39] *Id.*

[40] *See Ayon v. Gourley,* 47 F. Supp. 2d 1246 (D. Colo. 1998) (holding that "a negligent hiring claim asserted against a Roman Catholic archdiocese by a plaintiff who was allegedly sexually abused by a priest was precluded, as requiring excessive entanglement with, and inquiry into, church policy and doctrine, in violation of the Free Exercise and Establishment clauses of the First Amendment. The court stated that the choice of individuals to serve as ministers is one of the most fundamental rights belonging to a religious institution and is one of the most important exercises of a church's freedom from government control. For the court to insert itself into the process by which priests are chosen would substantially burden the defendants' free exercise of a crucial power to control the future of the church and therefore constitute interference with the practice of their religion, the court determined. Also, the court said, it would cause excessive entanglement in church operations by fostering inappropriate government involvement, since the application of even general tort law principles to church procedures on the choice of priests would require an inquiry into present practices with an intent to pass on their reasonableness"). *But see*, *Doe v. Evans,* 814 So.2d 370 (Fla. 2002) (holding that "claims for negligent hiring and supervision and breach of fiduciary duty against a religious institution based upon alleged sexual misconduct

has sexual contact with a congregant or parishioner, by the estimation of most courts, any proposed basis for *civil* liability will be precluded by reason of the application of an entanglement analysis.

Criminal Liability of Clergy for Sexual Contact with Congregants or Parishioners

a. Unquestioned Bases of Liability

Children and minors

As earlier noted, state penal laws uniformly criminalize sexual contact[42] with children.[43] Because of the minor's incapacity to consent (especially considering such factors as trust,

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by one of its clergy with a parishioner in the course of an established marital counseling relationship" are not completely barred by the First Amendment, and are possible theories of liability. This court further held "we hold that the First Amendment does not provide a shield behind which a church may avoid liability for harm caused to a third party arising from the alleged sexual misconduct by one of its clergy members during the course of an established marital counseling relationship."). *See also Malicki v. Doe,* 814 So.2d 347, 365 (Fla. 2002) (holding that the "First Amendment cannot be used at initial pleading stage to bar claims founded on a religious institution's alleged negligence in failing to prevent harm from sexual assault on a minor or adult parishioner by one of its clergy.").

[41] These considerations would also apply to other torts alleged within a religious or secular context to the supervisory tort of negligent hiring or supervision because such theories potentially involve inquiry into ecclesiastical protocols apart from secular considerations, thus invoking jurisdictional limits on the courts in regard to intrusion into such matters. To be sure, such judicial inquiry may come into play in cases involving tort liability of religious organizations in cases in which the tortious behavior of the wrongdoer involves a child or another person deemed incapable of consent. As noted in this article, the state interest clearly outweighs the free exercise claims of the wrongdoer, and it likewise will outweigh the interests of the religious origination in asserting any jurisdictional impediments. *See* Cheryl B. Preston, *An Itty-Bitty Immunity and Its Consequences for the Church of Jesus Christ of Latter-Day Saints,* 2004 BYU L. REV. 1945 (2004) (depicts an analysis of theories of primary or derivative institutional civil liability). *See also Bear Valley Church of Christ v. DeBose,* 928 P.2d 1315 (Colo. 1996) (holding "priest inappropriately touched child during counseling"… and the "First Amendment provides no shield to Church or priest from tort liability."); *See also Rosado v. Bridgport Roman Catholic Diocesan Corp.,* 716 A.2d 967 (Conn. Super. Ct. 1998) (holding "church defendants not entitled to First Amendment protection for claim of negligent supervision regarding plaintiff's allegations that that priest sexually abused them as minors.").

[42] Note that "contact" as defined in the penal provisions generally specifically provides that the contact is for sexual arousal, gratification or abuse, etc. *See* COLO. REV. STAT. ANN. § 18-3-401 (West 2004); MICH. COM. LAWS SERV. § 750.520(a) (LexisNexis Supp. 2008); OHIO REV. CODE ANN. § 2907.01 (LexisNexis 2006).

reliance, emotional intimacy and vulnerability), the nature of the relationship between the perpetrator and the child victim is of no consequence in establishing criminal liability, except in cases in which the perpetrator's relationship to the minor is otherwise used to identify certain classes of perpetrators for the purposes of differential punishment.[44] Accordingly, the societal interest in safeguarding the welfare of children supersedes any claim that might be advanced by a clergyperson, as perverse as it may be, that the clergy's constitutional religious exercise prerogatives extend to sexual relations with children.[45]

Persons incapable of giving effective consent

In the same broad policy vein, aside from the cases involving the incapability of a child giving valid consent to a sexual act, all states likewise deem mentally disabled, unconscious or

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[43] There are other defined classes or persons whom, as with minors, are deemed to have no capacity to consent, such as the mentally disabled, an unconscious person or an intoxicated person. *See* N.Y. PENAL LAW § 130.00 (Consol. 2000 & Supp. 2008) ("Mentally disabled means a person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct."); *See also* R.I. GEN. LAWS § 11-37-1 (2002) ("Physically helpless means a person who is unconscious, asleep, or for any reason is physically unable to communicate unwillingness to an act. Mentally incapacitated means a person who is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or who is mentally unable to communicate unwillingness to engage in the act.").

[44] Some penal statutes regarding sexual conduct identify specific perpetrators, such as coaches, juvenile authorities, etc. for the purpose of differential punishment. *See* CONN. GEN. STAT. ANN. § 53a-71 (West 2007); ALASKA STAT. § 11.41.434-440 (2008). These statutes typically refer to such actors as being in a "position of authority" enabling them, by virtue of the trust, reliance, emotional intimacy and vulnerability involved in the character of the relationships, to potentially exercise undue influence over children or minors with whom they have unusually close association. This consideration of the effect of a "position of authority," albeit in a different context, will play a part in this discussion regarding clergyperson sexual misconduct outside of any counseling relationship with a congregant or parishioner.

[45] The following cases which involved minors have drawn the lion's share of the public and media attention. *See State v. Gauthe,* 731 So.2d 273 (La. 1998); *Schultz v. Roman Catholic Archdiocese of Newark,* 472 A.2d 531 (N.J. 1983); *See also* Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets the Civil Law,* 31 FORDHAM URB. L.J. 549 (2004).

intoxicated persons as incapable to render a valid consent, and all states criminalize various forms of sexual contact, including intentional intimate contact without the effective consent of the victim, [46] coerced or induced contact,[47] and sexual contact accomplished by fraud.[48] Also, even some consensual forms of sexual conduct are criminalized for public policy reasons, including incest and bigamy.[49]

Clergypersons rendering secular based counseling to congregants or parishioners

Consistent with the theory of imposing civil liability upon a therapist (or clergyperson) in a secular counseling context, and in acknowledgment of the elements of trust, confidence and emotional vulnerability that characterize a counseling relationship, nearly all state penal statute schemes, aside from applicable civil liability theories, also explicitly criminalize sexual acts or contacts between those who render secular counseling and their clientele.[50]

In the criminal context, the query in the case of a clergyperson having sexual contact with a congregant or parishioner is whether the characteristics of such a relationship that is recognized in dealing with a conclusively assumed vulnerable population – children and minors – can also

[46] Some state statutes render specific individuals as incapable of consenting to certain actions due to mental disorder or developmental or physical disability. *See* Cal. Penal Code §§ 261, 288a, (West 2008);ARIZ. REV. STAT. ANN. § 13-1401 (2001).

[47] Tex. Penal Code Ann. § 22.011 (Vernon Supp. 2008).

[48] N.H. Rev. Stat. Ann. § 632-A:2 (2008).

[49] See the discussion below regarding *Lawrence v. Texas* and the constitutional status of penal statutes criminalizing sodomy.

[50] *See Supra* note 9. ; *See also* numerous penal statutes specifically include clergy. *See* IOWA CODE ANN. § 709.15 (West Supp. 2008); N.D. CENT. CODE § 12.1-20-06.1 (2005); S.D. CODIFIED LAWS §22-22-27 (2006); TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 2008); WIS. STAT. ANN § 940.22 (West 2005); WIS. STAT. ANN. § 895.441 (West 2008); ARK CODE ANN. § 5-14-126 (Supp. 2007); N.M. STAT. ANN. § 30-9-10 (West Supp. 2008); Kansas, H.R. 2100, 2009 Leg. (Kan. 2009).

characterize a clergyperson's relationship with some adult congregants or parishioners, given appropriate circumstances surrounding the emotional content of the relationship.

The providers of secular counseling services are most typically referred to in the penal statutes as "psychotherapists," "psychologists" or "medical professionals." The statutes also may include language describing other providers (including clergypersons) of mental health services that fall well beyond the ambit of what is regarded as classical psychology, which has a fairly constrained definition.[51] Indeed, in the context of the criminal law, apart from the prosecutor's usual burden to establish the elements of the criminalized act, e.g., the nature the relationship, the sexual act or contact, etc., the statutory language development challenge is to accurately specify in a penal statute all the types of practitioners that render secular counseling, given that the meaning of "psychotherapy" extends well beyond the ambit of traditional practice by psychiatrists and psychologists.[52]

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[51] TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 2008). This Texas statute defines a "mental health services provider" as a "(F) psychologist offering psychological services as defined by Section 501.003, Occupations Code." (Section 501.003 states "(b) A person is engaged in the practice of psychology within the meaning of this chapter if the person: (1) represents the person to the public by a title or description of services that includes the word 'psychological,' 'psychologist,' or 'psychology'; (2) provides or offers to provide psychological services to individuals, groups, organizations, or the public; (3) is a psychologist or psychological associate employed as described by Section 501.004(a)(1) who offers or provides psychological services, other than lecture services, to the public for consideration separate from the salary that person receives for performing the person's regular duties; or (4) is employed as a psychologist or psychological associate by an organization that sells psychological services, other than lecture services, to the public for consideration.").

[52] American Psychiatric Association: Legal Sanctions for Mental Health Professional-Patient Sex Resource Document: http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/ResourceDocuments/199302.aspx (last visited April 17, 2009) (giving a definition of a "mental health professional," stating "there are many arguments in favor of including a broad range of mental health professionals within the ambit of the criminal statute. . . . Patients may not be aware of the discipline of their treating clinician; furthermore, they deserve protection from professional misconduct, regardless of the discipline of the offender. It is undesirable to characterize mental health professionals as "psychotherapists" or to confine a criminal statute to those practicing psychotherapy, as opposed to

If the relationship could be characterized as a secular based counseling relationship, the application of the penal laws criminalizing sexual contact by a clergyperson would generally not be hindered by the entanglement doctrine, which (unlike with civil liability actions) does not preclude enforcement of the public interest as expressed through the penal laws, irrespective of any asserted religious practice or motivation.

b. Less well established bases of liability

Sexual contact between legitimately consenting adults (in the absence of factors such as fraud, bigamy or incest) is not generally criminalized.[53] Hence, to criminalize a sexual contact relationship between a member of the clergy and a congregant or parishioner (again, most such cases involve an alleged victim who is an adult female), it would appear, as already discussed, that such behavior must rest upon a determination that, in like circumstances, outside the religious context in which the adults involved occupy the roles of clergy and congregant or

somatic treatments. It is not necessary to rely on transference and other psychological mechanisms to explain the special vulnerability of patients. While these concepts offer a valuable way of understanding and describing certain instances of sexual misconduct, the justification for criminal sanctions does not rest upon any particular theory of psychotherapy or the mode of practice of the mental health professional. The justification for criminalization is found in the high frequency of patients who are harmed as a consequence, and the morally repugnant nature of the exploitative behavior.").

[53] Formerly, however, in many jurisdictions, there was recognized tort liability for a form of sexually linked behavior characterized most frequently as "alienation of affection." *See Destefano v. Grabrian,* 763 P.2d 275, 279-80 (Colo. 1988) (Defining alienation of affection as an injury that consists of "loss of affection and consortium, including loss of society, companionship and aid. The action required on the part of a defendant in such a case is simply inducing the spouse of the plaintiff to leave, or, once having left, to remain separated from the plaintiff. The action necessarily involves intent to induce the spouse to separate." Such separation results in "loss of society, loss of services, pain, suffering and humiliation.").

parishioner, the sexual contact between the adults would also be criminalized, as in the case of a clergyperson rendering what is, in setting and contact, a solely secular form of therapy.[54]

Given this, and in the absence of a theory of penal liability that does not turn on a counseling relationship, if sexual contact between a clergyperson and a congregant or parishioner unfolds in a relationship in which no counseling of any sort occurs, or counseling is restricted solely to unadorned, purely theological advice ("e.g., this is an approach that you many consider in interpreting Scripture") or religiously related guidance (e.g., " this sort of choral anthem may be appropriate for the season of the Epiphany") without engaging the factors or traversing the limit that would extend the relationship to the level that encompasses an amalgam of relational

[54] What about the circumstance in which the nature of the counseling is mixed – both secular and faith based elements are found? As noted, it is difficult to untwine the secular from the religious or spiritually based components of counseling, however, the discussion of faith-based counseling herein and the recognized bases of civil and criminal liability arising from each assumes that the character of the counseling can be so described in whole or in part as with faith based or secular. The concurrency and convergence of secular and faith based values, morals and ethical thought is well recognized. Nonetheless, case law and experience in the interpretation of penal statutes dealing with spiritual and religious counseling appears to find such categorization to be accessible to a fact finder. *Sanders v. Casa View Baptist Church,* 134 F.3d 331, 334 (5th Cir. 1998), *aff'g* 898 F. Supp. 1169 (N.D. Tex. 1995) (stating "members of the clergy enjoy no constitutional protection for misconduct as professional marriage counselors simply because they may occasionally discuss scripture within the context of that relationship," and also noting "the First Amendment does not categorically insulate religious relationships from judicial scrutiny because to do so would impermissibly extend constitutional protection to the secular components of these relationships and place religious leaders in a preferred position in our society.").; *Westbrook v. Penley,* 231 S.W.3d 389, 403 (Tex. 2007), *rev'g,* 146 S.W.3d 220 (Tex.App. Fort Worth 2004) (reasoning that to successfully prove a court's handling of an alleged sexual misconduct by a clergy-person results in excessive entanglement, one must show the alleged misconduct was rooted in religious behavior). In a penal law setting, the entanglement doctrine appears to be engaged only if the accused clergyperson makes religious or spiritual artifacts such a part of the counseling that such artifacts are the inducement to sex with the congregant or parishioner; i.e., the counseling is not solely secular, but neither is its religious dimension restricted to unadorned, purely theological advice or religiously related guidance. To the extent that a court must determine whether such religious or spiritual artifacts in fact induced the victim and negated consent, it would appear that the court would be required to identify, characterize and determine the causal connection of the act to that which is religious or spiritual in nature. *Ehrens v. Lutheran Church-Mo. Synod.,* 269 F. Supp. 2d 328, 328-29 (S.D.N.Y. 2003) (mem. op.). (entanglement case)

factors that characterize a counseling relationship -- trust, reliance, emotional intimacy and vulnerability, or the phenomenon of transference -- criminal liability for the sexual contact does not arise. Moreover, when the counseling of a congregant or parishioner is mixed in character (both secular and religious), but the inducement to sex arises solely from spiritual, religious or theological advice or guidance, the entanglement doctrine may be invoked as a constitutional impediment to prosecution.

But is there a theory of abuse of positional authority that can premise criminal liability not on the secular counseling characteristics of the underlying relationship, but instead upon the reality of unequal positional power and influence between the parties linked with the emotional fragility or vulnerability of the victim? Such a penal statute offers the possibility of reaching clergyperson sexual misconduct with a congregant or parishioner beyond the secular counseling relationship. When the clergyperson does not use a secular counseling relationship as a conduit to sex, or when counseling is restricted solely to unadorned, purely theological advice (not relevant to any sexual relationship), there still ought be a means of reaching a sexually offending clergy member. Specifically, a clergy member who, by virtue of occupying a position of authority -- as perceived by the congregant or parishioner -- and by virtue of such a position having knowledge or notice of the emotional dependence or vulnerability of an adult congregant or parishioner, can take advantage of the position of authority and engage in sexual acts or contacts with the congregant or parishioner. A theory of abuse of positional authority would provide a viable basis for the imposition of criminal liability in such a circumstance by drawing upon positional authority and its characteristics to negate facial consent. Moreover, the theory, by eschewing focus any religious of faith based artifacts of the relationship, does not invite application of the constitutional impediment of the entanglement doctrine.

Further, the impropriety of clergyperson sexual contact in such circumstances arises not from a breach of professional duty of the clergyperson qua psychotherapist or counselor, and not from the duties of a clergyperson as a legitimate spiritual advisor, but rather from a misuse of the clergyperson's peculiar position of authority in a realm in which the guise of spiritual favor and discernment is employed to prey upon the emotionally vulnerable who are susceptible to inappropriate sexual manipulation. This basis of criminal liability for sexual contact is akin to the state statutory provisions (such as fraud, or in the case of children, their legal incapacity to consent) that criminalize sexual contact by obviating what appears to be the consent given to sexual contact. The phrase "position of authority" is used in certain current penal statutes to describe, usually in reference to those accused of sexual misconduct with a child or minor, a group of persons who are regarded as being in a position that calls for greater culpability, e.g., a grouping such as "teacher, coach, or juvenile authority."[55]

The theory of positional authority as a trigger for criminalization of sexual contact of a congregant or parishioner by a clergyperson appears viable, with the recent U.S. Supreme Court case of *Lawrence v. Texas*[56] rendering support. The United States Supreme Court held in *Lawrence* that a state may not generally criminalize sexual contact between consenting adults in the privacy of their home, given that such sexual conduct is a protected liberty right under the Due Process Clause of the Fourteenth Amendment. However, the Court implied that this general rule may not apply in cases where the consent is not legally effective, mentioning cases involving "minors," "persons who might be injured or coerced," or persons who are "situated in

[55] *See* ALASKA STAT. §§ 11.41.434-440 (2006); CAL PENAL CODE § 261 (West 2008); COLO. REV. STAT. § 18-3-401 (2008); CONN. GEN. STAT. ANN. § 53a-71 (West 2007).

[56] Lawrence v. Texas , 539 U.S. 558, 578 (2003), *rev'g,* 537 U.S. 1044 (2002).

relationships where consent might not easily be refused."[57] This latter phrase, people "situated in relationships where consent might not easily be refused" appears to be the catalyst for state legislators whom have drafted statutes criminalizing sexual misconduct by clergy outside of a counseling relationship that rely upon the concept of positional authority.[58]

[57] Id. at 560.

[58] The Court sometimes telegraphs its intent to do more than merely "test the water" as a predicate to further movement forward with the unfolding of time and experience. To be sure, the Court in these instances appears to be intent upon heightening the stakes in cultural debate. Few expected the Court in *Lawrence v. Texas* to decide the sodomy case as it did, and certainly not, as will be explained, on the broad jurisprudential grounds it employed. Accordingly, *Lawrence* raised a public policy firestorm. The Court appeared to be inviting an even more pointed cultural debate on the legitimacy and constitutionality of private adult consensual sexual practices that currently have either no legal recognition (such as same sex marriage) or are criminalized (such as adult prostitution and consensual incest). The facts of the case were as follows: in Houston, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where John Geddes Lawrence lived. The officers observed Lawrence and another man, Tyron Garner, engaging in a same-sex sodomy act. The two men were arrested, held in custody overnight, and charged and convicted before a justice of the peace. The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex." The Court took up this question: Does a state statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violate the Constitution's Due Process Clause? In an earlier 1986 case, *Bowers v. Hardwick,* 478 U.S. 186 (1986), *overruled by, Lawrence v. Texas,* 539 U.S. 558 (2003), the Court held that there was no "fundamental right" to engage in same-sex sodomy. Fundamental rights receive very deferential treatment in constitutional analysis when determining if a right can be restricted by governmental action. The narrow focus of the Court in *Bowers* was on the limited question of "is there a fundamental right to engage in an act of sodomy?" The Court answered "no." In *Lawrence*, the Court based its decision on a broad, encompassing rationale that went in a different direction. The Court could have refused to hear the case, allowing *Bowers* to remain the law. Furthermore, the Court could have taken up the case and struck down the law – which criminalized only same-sex sodomy and not heterosexual sodomy – with a very narrow holding under the Equal Protection Clause, reasoning that the law treated gays and lesbians differently than heterosexuals for the same sexual conduct. This would have sufficed to decide the case, but also would have left open the question of the constitutionality of sodomy statutes that criminalized both heterosexual as well as homosexual sodomy. Instead, the Court relied upon the broad Due Process Clause which extends not only to matters of procedure, but also to the protection of what the Court refers to "liberty" interests, which the Court has found innate in Due Process Clause and which formed the analytical framework for the recognition of the right to an abortion the 1973 *Roe v. Wade* decision. The following quote illustrates how Justice Anthony Kennedy, the author of the majority opinion in *Lawrence*, shifted the issue from a question of whether the right to engage in an act of sodomy is a fundamental right, the position rejected by the Court in *Bowers*, to a much broader question of whether the act is protected as a counterpart of a liberty interest to engage in a homosexual sexual relationship: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places . . . Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent

Crafting a Model Statute That Will Be Likely to Withstand Constitutional Invalidation or Statutory Ambiguity.

Outside the counseling relationship, the criminalization of sexual contact then must rest on the statutory language prescribing a relationship in which sexual contact occurs in a circumstance in which the victim is a person who is "situated in relationships where consent might not easily be refused." The statute should focus upon the position and authority of the actor and the consequent vulnerability or susceptibility of the alleged victim as the predicates for the sexual misconduct.

Proposed Model Statute

The following phraseology appears to be appropriate for a model statute, based upon the foregoing discussion and the policy, case law and constitutional issues that attach to the criminalization of sexual misconduct by a clergyperson with a congregant or parishioner. This statute is not presented as an exclusive articulation of the statutory language. Also, there are

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dimensions. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said is simply about the right to have sexual intercourse. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their own homes and their private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." Justice Scalia, in a burning dissent, opined that the decision will lead to the invalidation of "criminal laws against fornication, bigamy, adult incest, bestiality, and obscenity." The case unquestionably turns on a constitutional privacy right when the sexual activity is *intimate* in character, occurs within the context of an *intimate* relationship, and takes place in a *private* location such as a dwelling. Justice Kennedy also emphasized some limits of his majority opinion: "The present case does not involve minors. *It does not involve persons* who might be injured or coerced or *who are situated in relationships where consent might not easily be refused*. It does involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle (italics added)."

other sources of law that may be invoked to reach such misconduct, but these sources typically are ineffective for various reasons.[59]

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[59] While it may appear that it would be possible to hold a clergyperson criminally accountable for assault or battery upon a congregant or parishioner, consent of a victim (by words or conduct, express or implied) is recognized in most jurisdictions as a defense to prosecution. The criminal assault and battery statutes and developed law do not address whether an actor can give consent to the contact, but yet have that consent negated by reason of the character of the relationship with the alleged perpetrator. Achieving this end is the purpose of the proposed statute that relies upon the character of the relationship and the position of authority of the clergyperson, to impose criminal liability. Furthermore, criminal sanctions for criminal assault and battery are generally significantly less severe than are criminal sanctions for sexual assault. *See* TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 2008) (an offense under this section may be prosecuted as a Class C misdemeanor, or as a third degree felony); *But see* TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 2008) (an offense under this section may be prosecuted as either a first or second degree felony.); *See also* FLA. STAT. ANN. § 784.001 (West 2007) (a conviction of a simple assault in Florida carries the legal consequence of a second degree misdemeanor); *But see* FLA. STAT. ANN. § 794.001 (West 2007) (a conviction of a sexual battery in Florida may result in the legal penalty of a life felony or a capital felony); *See also* IND. CODE ANN. § 35-42-2-1 (West 2004) (a conviction of a battery in Indiana, without aggravating circumstances, results in a class B misdemeanor); *But see* IND. CODE ANN. § 35-42-4-8 (West 2004) (a conviction of a sexual battery in Indiana may result in either a class C or D felony); *See also* KY REV. STAT. ANN. § 508.030 (LexisNexis 2008) (a conviction of an assault in Kentucky may result in a class A misdemeanor); *But see* KY. REV. STAT. ANN. § 510.110 (LexisNexis 2008) (a conviction of sexual abuse (e.g., sexual assault) in Kentucky may result in a class D felony).

The federal Racketeer Influenced and Corrupt Organization (RICO) statutes, 18 U.S.C.A. §§ 1961-1968 (2000 & Supp. 2009), provide both criminal and civil remedies, but are ill-equipped to reach the sexual misconduct of a clergyperson in regard to a parishioner or congregant, given the elements of proof required, including proof of an "enterprise," and predicate acts in a "pattern of racketeering activity." See, however, *Miskovsky v. State,* 31 P.3d 1054, 1059 (Okla. Crim. App. 2001) for a state court RICO prosecution involving a distinctive set of facts bearing upon these statutory requirements.

The federal sexual harassment provisions, Title VII of the Civil Rights Act of 1964 and its corresponding regulations at 29 C.F.R. § 1604.11 (2008), are triggered by sexual misconduct, i.e., unwelcome sexual advances and harassing conduct of a sexual nature, but the act applies only to employers with 15 or more employees, is limited to the context of an employment relationship and focuses upon the aggrieved individual's work performance and the work environment. Moreover, only civil sanctions are provided. See *Bollard v. Cal. Province of the Coc'y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999).

The federal Violence Against Women Act, 42 U.S.C.A, § 13981 (2005) was enacted by Congress in 1994 and created federal domestic violence crimes, including interstate travel to commit domestic violence, to violate a protective order, or to stalk). The VAWA also established programs, policies and practices aimed at comprehensively engaging federal resources to address domestic violence, sexual assault, date-related violence and stalking. The VAWA requires in certain provisions that a violent crime be committed in the course of the proscribed conduct, or that bodily harm accrue to the victim and hence is not of special use in regard to criminalizing sexual misconduct of a clergyperson with a congregant or parishioner. A similar Iowa state law is prefaced upon the

A person commits an offense when . . .

The statute must reference to the jurisdiction's definition of sexual conduct that is subject to penal sanction. These provisions describing forms of sexual contact appear in a broad array of articulations and statutory structural schemes in the penal laws of the various jurisdictions. The operative provisions generally address: i. conduct involving the intentional, coerced or induced touching of intimate parts of the body of the victim by the perpetrator or by another person acting at the instance of the perpetrator; ii. the forced, coerced or induced touching of intimate parts of the body of the perpetrator or another person by the victim acting at the instance of the perpetrator; or iii. the forced, coerced or induced penetration of a bodily orifice (e.g., the vagina, the anus or the mouth), of the perpetrator, of another person, or of the complainant, by the perpetrator, by another person acting at the instance of the perpetrator, by the complainant, or by an object used by one of these parties. The penetration language is intended to encompass forced, coerced or induced acts of sexual intercourse, cunnilingus, fellatio, or anal intercourse, involving any intrusion, however slight, as well as other sexual conduct involving penetration by objects. The statutory language will typically address the nature of consent and related concepts such as force, coercion and inducement, mental impairment or incapacitation, physical helplessness,

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requirement that a felony be committed that constitutes a pattern or practice or scheme of conduct to engage in sexual conduct. In *Doe v. Hartz,* 134 F.3d 1339, 1342-43 (8th Cir. 1998), this provision was invoked, but only one act of sexual violence was alleged. Therefore, the court held that the accused priest could not be prosecuted for a felony under Iowa state law. Subsequently, the court held in this case VAWA did not apply. Some studies have suggested that when a pastor or other religious leader is having a sexual relationship with a congregant, he is usually having multiple sexual relationships with numerous congregants. *See* Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U.L. REV. 1, 14 n.87 (1996).

fraud, and other concepts bearing upon the character of consent, as well as many other concepts, including matters of age, relationship, and aggravating circumstances that bear upon the range of punishment for an act.[60] The language of a model statute addressing clergyperson sexual misconduct must be adapted in any particular jurisdiction to the overall structure of the jurisdiction's statutory scheme addressing sexual crimes.

"Psychotherapist" or "mental health professional" includes . . . minister, priest . . . etc.

For circumstances involving counseling, the statute should include clergypersons within the definition of "psychotherapist" or "mental health professional," or any other terminology used to define the actor in the case of prohibited sexual conduct within the context of a counseling relationship.

A sexual offense is without consent if the actor is a member of the clergy, and in such capacity is in a position of trust or authority over the victim and uses this position of trust or authority to exploit the victim's emotional dependency on the member of the clergy to engage in [the statutorily defined conduct constituting the offense; see above] with the victim.

This is the operative provision that would extend criminal liability to circumstances outside of the counseling relationship when a clergyperson engages in sexual misconduct with a congregant or parishioner. As earlier noted, only eleven states and the District of Columbia have penal statutes that, in at least some circumstances, support the criminal prosecution of clergypersons engaged in sexual misconduct with congregants or parishioners. Of these

[60] MINN. STAT. ANN. § 609.344 (West 2003), *invalidated by State v. Bussman,* 741 N.W.2d 79, 83 (Minn. 2007). (

jurisdictions, only two have language that is designed to criminalize such conduct by clergypersons outside of the counseling context.[61] A third, Kansas, has legislation pending regarding the extension of criminal liability to clergypersons in such circumstances. Note that the statute includes the notation that the conduct is without consent. This characterized the conduct as without consent even if the conduct appears facially to be consensual. The sexual conduct of clergypersons with congregants or parishioners that is criminalized by this language is deemed to be without consent by virtue of the relationship of the parties and the circumstances in which the sexual conduct occurs, as is the case with mental impairment or incapacitation, the physically helpless, etc.

This language is supported in the current case law by judicial interpretation of the Arkansas statute which provides that a person commits a sex crime if the person is a "member of the clergy and is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity (defined terms)."[62] The statute contemplates a clergyperson taking advantage of another person's (presumably a congregant or parishioner) emotional deference and parlaying that deference into a sexual encounter. The statute does not further describe what characterizes a "position of authority," but the elements of trust, reliance, emotional intimacy and vulnerability necessarily would be in play.

Unlike the case in which the entanglement doctrine comes into play to preclude an action for breach of the duty of care or breach of fiduciary duty when the counseling provided by the clergyperson to a congregant or parishioner is not indisputably secular in character, but instead,

[61] ARK. CODE ANN. § 5-14-126 (Supp. 2007). *See also* TEX. PENAL CODE ANN. § 22.001 (Vernon Supp. 2008). .

[62] ARK. CODE ANN. § 5-14-126 (Supp. 2007).

in whole or in part, is religiously or spiritually based, the language in the Arkansas statute is not likely to be deemed to excessively entangle government regulation with religion. The statute does not require: i. that the clergyperson be a spiritual or religious advisor to a congregant; ii. that the congregant be seeking spiritual advice or theological guidance from the clergyperson; or iii. that the operative relationship between a clergyperson and the congregant or parishioner that led to the sexual engagement pertain at all to religious or spiritual matters. Instead, the statute only requires a clergyperson be in a position of trust or authority over the victim and use that trust or authority to engage in prohibited sexual contact by taking advantage of the trust, reliance, emotional intimacy and vulnerability that arise between the actor and the victim by virtue of the relationship.

In focusing solely upon positional authority and not requiring that the prohibited conduct occur in the context of the clergyperson rendering spiritual or theological advice or otherwise acting in a pastoral capacity, the Arkansas statute deftly avoids the issue of entanglement. The statutes and pending legislation of the other jurisdictions that have criminalized clergyperson sexual contact with a congregant or parishioner outside of a counseling relationship inadvisably used phraseology that invites inquiry into whether the statute is criminalizing conduct in circumstances that call for the court to act beyond its competence, i.e., to invoke the entanglement doctrine. In Kansas, the proposed bill requires that a member of the clergy engaging in the prohibited sexual contact "[act] as a member of the clergy carrying out the clergy member's pastoral duties." The Texas statute requires that the actor be a clergyperson who is "exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual advisor." The emphasis in these formulations upon the need for the clergyperson to be discharging "pastoral duties" or acting as a "spiritual advisor" invites

inquiry into matters theological and spiritual that are beyond a court's competency and hence amenable to entanglement doctrine analysis. While statutes of other jurisdictions do not purport to reach sexual misconduct outside of the counseling relationship, they nonetheless fall over this same line and into the territory that invites entanglement doctrine application. The Delaware statute requires that the actor be engaged in "pastoral counseling."[63] The District of Columbus statute requires a professional relationship of trust combined with counseling "whether legal, spiritual, or otherwise."[64] The New Mexico statute requires the clergyperson to be "acting in his roles as a pastoral counselor."[65]

Hence, the statute must not reference the matter of the victim seeking or receiving spiritual or religious advice, aid or comfort, etc. from the clergyperson in an encounter or during the period of the criminalized conduct (or the analogous reference to the clergyperson acting in a pastoral capacity or as a spiritual advisor). The Minnesota statute is an example of the manner in which such language can lead to constitutional invalidation of such a penal statute under an entanglement doctrine analysis.[66] The relevant full text of the Minnesota statute provides that "a person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if the actor is or purports to be a member of the clergy, the complainant is not married to the actor, and the sexual penetration occurred during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private; or the sexual penetration occurred during a period of time in

[63] DEL. CODE ANN. tit. 11, § 761 (2007).

[64] D.C. CODE ANN. §§ 22-3015-16 (LexisNexis Supp. 2008).

[65] N.M. STAT. ANN. § 30-9-10 (West Supp. 2008).

[66] MINN. STAT. ANN. § 609.344 (West 2003), *invalidated by State v. Bussman,* 741 N.W.2d 79, 83 (Minn. 2007).

which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private."[67] Consistent with the concept that the statute is criminalizing conduct that is facially consensual, the statute specifically provides that consent by the complainant is not a defense.[68]

The Minnesota statute was held unconstitutional by a court reasoning that the provision violated the entanglement doctrine.[69] The statute was held to not have a secular purpose and to foster an excessive government entanglement with religion.[70] The court reasoned that an unmarried clergyperson who dated a congregant and had sexual contact would be guilty of the crime if the two were also discussing spiritual and religious matters on an ongoing basis.[71] Likewise, a parishioner who initiated and persistently pursued a sexual relationship with a member of the clergy would nevertheless be deemed to be incapable of effectively consenting to that relationship so long as the two discussed spiritual or religious issues, however disconnected with the sexual contact that discussion may have been.[72] The absence of secular standards to label or characterize the discussions as pertaining to religious or spiritual matters supported the court's conclusion that the statute tread into constitutionally illegitimate territory.[73] The Texas statute does no better than the Minnesota statute as a model for criminalizing sexual misconduct

[67] *Id.*

[68] *Id.*

[69] *State v. Bussmann,* 741 N.W.2d 79, 99-100 (Minn. 2007).

[70] *Bussman*, 741 N.W.2d at 88.

[71] *Id.* at 89.

[72] *Id.*

[73] *Id*. at 88.

of clergypersons with congregants or parishioners. This statute provides that sexual assault is without consent if "the actor is a clergyman who causes the other person to submit or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual advisor."[74] The language "in the clergyman's professional character as spiritual advisor"[75] may be deemed as excessive entanglement with religion, in like fashion to the entanglement issues attached to the Minnesota statute. Nevertheless, the Texas statute has not yet been challenged on constitutional grounds.

In an Arkansas case, *Talbert v. State,*[76] other objections were raised to the proposed language of position and authority. The Arkansas penal statute[77] provides that a person commits a sex crime if the person engages in a sexual criminal act and the actor is "a member of the clergy and is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity." The statute – notably using language that, unlike the Minnesota and Texas statutes did not reference the clergyperson engaging in the misconduct in circumstances in which pastoral duties were involved, including the rendering of religious or spiritual advice -- was alleged to be unconstitutional, not on entanglement grounds (apparently because of the adept use of language), but instead on substantive due process grounds, equal protection grounds, constitutional right to privacy

[74] TEX. PENAL CODE ANN. § 22.001 (Vernon Supp. 2008).

[75] *Id.*

[76] *Talbert v. State,* No. CR05-1279, 2006 Ark. LEXIS 446, at *8-11 (Ark. Ct. App. Sept. 21, 2006)(not designated for publication).

[77] ARK. CODE ANN. § 5-14-126 (Supp. 2007).

grounds and associational grounds. The defendant, a minister, was convicted under the statute for having used a position of trust and authority to have sexual intercourse with a congregant who had confided in him and for whom the defendant was "someone she could turn to for help." Against the contention based upon *Lawrence v. Texas* that the state cannot impede upon an adult's right to engage in private, consensual sex with other adults, the court answered that the statute in *Lawrence* criminalized consensual sex between adults when each participant freely consented to the relationship, in contrast to the inducement that the defendant employed in abuse of his position of trust and authority to entice the victim into having sexual intercourse with him. The court found no liberty interest attaching to abuse of such a position for the benefit of obtaining sexual favor.

The defendant also contended that the statute was constitutionally invalid under the Equal Protection Clause of the U.S. Constitution in that the statute singled out a specific sub-group, i.e., ministers and imposed a sanction upon them for engaging in consensual sex with other adults. The court applied a rational basis test[78] analysis in assessing this claim. Under a rational basis

[78] Equal protection analysis requires a "strict scrutiny" test of a legislative classification where a statutory or regulatory classification impermissibly interferes with the exercise of a fundamental right, which is one explicitly or implicitly guaranteed by the Constitution, *Sturgell v. Creasy,* 640 F.2d 843, 852 (6th Cir. 1981), or operates to the peculiar disadvantage of a suspect class. *Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 549 (1983), *rev'g*, 459 U.S. 819 (1982). A "suspect class" requiring the application of the strict scrutiny standard is one that is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976), rev'g, 421 U.S. 971 (1975). Also, a "suspect class" has been further characterized as one marked by immutable characteristics grounded in the accident of birth and resulting in a stigma of inferiority or second-class citizenship. *Darces v. Woods*, 35 Cal. 3d 871, 201 (1984), *rev'g,* 131 Cal. App. 3d 269 (Cal. Ct. App. 1982). To withstand the strict scrutiny test, the classification challenged must be necessary to promote a compelling state interest. Important or legitimate governmental interests are not sufficient to justify the classification. Furthermore, the means employed to promote the interest must be the least intrusive or restrictive available and must be necessary to achieve the compelling state interest. *Zablocki v. Redhail,* 434 U.S. 374 (1978), *aff'g,* 429 U.S. 1089 (1977); *see also In re Alien Children Educ. Litig.,* 501 F. Supp. 522 (S.D. Tex. 1980); *see also Georges v. Carney,* 546 F. Supp. 469 (N.D. Ill.), *aff'd,* 691 F.2d 297 (7th Cir. 1982). The burden is on the state to

establish that is has a compelling interest which justifies the law or classification as necessary to further the interest of the state. *Pederson v. Superior Court of L.A. County,* 105 Cal. App. 4th 931, 941 (Cal. App. Ct. 2003). Furthermore, the state must establish that there are no less restrictive or onerous alternatives available, and that the statute, or its classification, is precisely tailored or narrowly drawn to serve or advance the compelling government interest. *Qutb(Qutb is her last name) v. Strauss,* 11 F.3d 488, 492 (5th Cir. 1993). *See* 16B C.J.S. *Constitutional Law* §§ 1116-18 (2005).

The Court applied the strict scrutiny standard when a fundamental right was at issue in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), *aff'g,* 402 U.S. 994 (1971) in which the Court held that Amish children could not be bound by the compulsory education laws beyond past eighth grade because to do so would infringe upon their parents' fundamental right to freedom of religion. *Korematsu v. United* States, 323 U.S. 214 (1944) is a landmark case in which strict scrutiny was applied to a race-based classification. The Court held that the government's compelling interest in protecting against espionage by the internment of Japanese-American citizens in the Pacific Coast during World War II outweighed Korematsu's individual right to freedom. Further, the Court reasoned there was no less restrictive alternative to the internment scheme to protect against espionage.

Under an intermediate level of judicial scrutiny in the resolution of equal protection challenges, which is applicable to quasi-suspect classifications, a heightened scrutiny is required but not a scrutiny as intense as that applied in cases involving suspect classifications or fundamental rights. *Save Palisade Fruitlands v. Todd,* 279 F.3d 1204, 1209-10 (10th Cir. 2002); *see also Long v. 130 Mkt. St. Gift & Novelty of Johnstown,* 440 A.2d 517 (Pa. 1982). Under this analysis, the statutory classification must be substantially related to an important governmental objective. *Clark v. Jeter,* 486 U.S. 456, 461, *rev'g,* 484 U.S. 1003 (1988). If there is no substantial relationship between the challenged classification and its purported objective, this may indicate that the articulated objective is not the statute's true purpose and instead masks an impermissible classification. *Orr v. Orr,* 440 U.S. 268, 278-9 (1979), *rev'g,* 436 U.S. 924 (1978). *See* 16B C.J.S. *Constitutional Law* § 1119 (2005).

Craig v. Boren, 426 U.S. 190, *rev'g,* 423 U.S. 1047 (1976) is a landmark case in which the Court implemented the intermediate scrutiny test to test alleged gender-based discrimination. The state of Oklahoma had enacted a statute which prohibited the sale of "nonintoxicating" 3.2 percent beer to males under the age of 21, but allowed females over the age of 18 to purchase it. *Id.* The Court held that such gender classification made by the Oklahoma statute was impermissible because the statistics relied upon by the state were insufficient to show a substantial relationship between gender and the benefits intended to stem from the statutory classification based upon gender. The Court later added that to be valid, a gender-based classification requires "an exceedingly persuasive justification." *See Miss. Univ. for Women v. Hogan,* 458 U.S. 718 (1982), *aff'g,* 454 U.S. 962 (1981); *see also United States v. Virginia,* 518 U.S. 515 (1996), *rev'g,* 516 U.S. 910 (1995). In practice, this implies gender-based classifications are examined under a standard that nearly approaches strict scrutiny.

A classification which does not involve a fundamental right or a suspect class is examined under the relatively relaxed rational basis standard which requires only that the classification reasonably further, or be related to, a legitimate governmental purpose, objective, or interest. *Exxon Corp. v. Eagerton,* 462 U.S. 176, 195 (1983), *aff'g in part, Eagerton v. Exch. Oil & Gas. Corp.,* 404 So.2d 1 (Ala. 1981). The classification must be reasonable and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike. *Greenville Women's Clinic v. Comm'r,* 317 F.3d 357 (4th Cir. 2002). To pass muster under the equal protection analysis the legitimate stated purpose of the statutory classification need not be the main objective of the statute, or be readily ascertainable upon the face of the

analysis, the court found that there was a rational basis for the classification that held clergypersons accountable for a breach of a position of trust and authority leading to sexual relations with congregants or parishioners because clergypersons are held in high regard and esteem and, as with professional mental health providers, persons seek out clergypersons in time of need, being led to the clergyperson on account of reliance and trust in the ability of clergypersons to give needed and sound guidance and counsel.

The defendant also asserted that the statute violated his Equal Rights Amendment rights and right to privacy rights under the Arkansas Constitution. The court disposed of the Equal Rights Amendment state constitutional claim consistent with the U.S. Constitution Equal Protection analysis and on the privacy claim noted that there could be no right of privacy adhering to a relationship that was criminal in nature and that was used to obtain sex from emotionally vulnerable persons with disparate bargaining power. An assertion that the statute

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statute. *McGinnis v. Royster,* 410 U.S. 263, 271-72 (1973), *rev'g,* 405 U.S. 986 (1972); *See also State v. Knoefler,* 279 N.W.2d 658, 663 (N.D. 1979). *See* 16B C.J.S. *Constitutional Law* § 1120 (2005).

A classification is valid and will be upheld under this test if it is rationally related to a legitimate government interest or purpose. *Regan,* 641 U.S. at 549. If the classification is neither capricious nor arbitrary and rests on some reasonable consideration, difference, or policy, there is no denial of equal protection. *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County,* 488 U.S. 336, 344-45 (1989), *rev'g,* 485 U.S. 976 (1998). Conversely, a challenged classification scheme may be invalidated only if it is arbitrary or bears no rational relationship to a legitimate state purpose, or if the classification rests on grounds wholly irrelevant to the achievement of the state's objective, and if no set of facts can reasonably be conceived to justify it. *Clements v. Fashing,* 457 U.S. 957 (1982), *rev'g* 452 U.S. 904 (1981). A party challenging a statute or regulation must negate any reasonably conceivable justification for the classification in order to prove that the classification is wholly irrational. *Gusewelle v. City of Wood River,* 374 F.3d 569 (7th Cir. 2004). If no reasonably conceivable set of facts could establish a rational relationship between the act and a legitimate end of government, such an act will be struck down. *Colo. Soc'y of Cmty. & Institutional Psychologists, Inc. v. Lamm,* 741 P.2d 707 (Colo. 1987). *See* 16B C.J.S. *Constitutional Law* § 1120 (2005).

was unconstitutionally vague was rejected by the court on the observation that the defendant's conduct fell clearly within the purview of the statute, in regard to predicate relationship of trust and authority as well as in regard to describing the prohibited conduct.

The court found neither any argument made nor authority offered regarding how this freedom had been impaired by the penal statute. In any event, associational rights are for the mutual benefit of those in the relationship of association. In this case, the statute is aimed at protecting one who is emotionally vulnerable; the relationship involves parties in disparate positions of power vis a vis one another.