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I. INTRODUCTION

The Supreme Court of California in *Nally v. Grace Community Church of the Valley* (*Nally III*)[1] refused to impose on nontherapist counselors,[2] specifically pastoral counselors, a duty to refer suicide prone counselees to appropriate medical care. Despite a finding of no liability, *Nally III* retains significance as a footing on which future clergy malpractice cases may be based.[3] *Nally III* raised and left unresolved several controversial tort theory and public policy issues pertaining to the concept of clergy malpractice and consequently failed to foreclose future clergy malpractice liability in California. The first amendment issues inherent in pastoral counseling were not addressed by *Nally III*, but will be addressed in the last section of this note.

This note first provides the legal background from which *Nally III* evolved. Section two also sets forth the facts, the procedural development, and the reasoning behind the court's holding. Following the case discussion, section three analyzes *Nally III* and the theory of clergy malpractice in relation to 1) special relationships under California tort law, 2) judicially manageable standards of conduct for pastoral counseling and associated policies, and 3) consequences created by a duty to refer, including

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1. 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 109 S. Ct. 1644 (1989). Due to the case's complex procedural history, see *infra* notes 29-40 and accompanying text, the first court of appeal decision is hereinafter cited as *Nally I*; the second court of appeal decision is cited as *Nally II*, and the supreme court decision is cited as *Nally III*. As the Supreme Court of California depublished both *Nally I* and *Nally II*, pin point cites to the official reporters are not available and are thus cited only to the corresponding unofficial reporters.

2. The term "nontherapist counselor" as used throughout this note refers to counselors other than psychiatrists, clinical psychologists, or other licensed psychotherapists who counsel others concerning their spiritual and emotional problems. *Id.* at 283, 763 P.2d at 949-50, 253 Cal. Rptr. at 98-99.

3. Edward Barker, plaintiffs' attorney in all of *Nally*'s lower court proceedings stated that, whatever the outcome, the case at least demonstrates the clergy can be sued for malpractice. Ranii, *Clergy Malpractice-The Prayer for Relief*, NAT'L L.J., Mar. 4, 1985, at 32, col. 2.

first amendment rights of freedom of religion. The note concludes that as a matter of California tort law a duty to refer could legitimately be imposed on nontherapist counselors who counsel suicide prone individuals; however, the first amendment—especially the free exercise clause—may provide a legitimate defense to such a duty.

II. NALLY V. GRACE COMMUNITY CHURCH OF THE VALLEY

A. *Legal Background*

The filing of malpractice suits against psychotherapists began several decades ago.[4] A number of commentators have stated that clergy malpractice can be viewed as a natural evolution from the recent proliferation and success of malpractice claims against professionals.[5] Developments in the insurance industry have also helped create the tort of clergy malpractice. In 1979, several insurance companies predicted the appearance of clergy malpractice as a viable tort and began offering coverage. Then, in an effort to generate interest in its new product, the insurance industry fabricated a story about a clergyman who had been successfully sued.[6]

Neither California's legislature nor its courts have ever imposed a legal obligation on persons to take affirmative steps to prevent one not under hospital care from committing suicide.[7] *Nally v. Grace Community Church of the Valley*, filed in March of 1980, provided the California courts with their first opportunity to contribute to, or alternatively to hamper, the development of the theory of clergy malpractice.[8] The tort of clergy malpractice is directed at the cleric's professional misconduct.[9]

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4. *See, e.g.*, Tarasoff v. Regents of the Univ. of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (explaining the historical development of liability for professional malpractice as it pertains to psychiatrists).

5. *See, e.g.*, Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V.L. REV. 47, 47 (1981); Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W.L. REV. 507, 507 (1983) [hereinafter Comment, *Made Out of Whole Cloth?*]. *See also Nally II*, 240 Cal. Rptr 215, 225-226 (1987) (extending the duty of a licensed psychotherapist to take steps to prevent suicide among its patients to other nontherapist counselors).

6. Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163, 164 (1981) (citing LIBERTY MAGAZINE, Mar.-Apr. 1980, at 15-17).

7. *Nally III*, 47 Cal. 3d at 298, 763 P.2d at 959, 253 Cal. Rptr. at 108 (citations omitted).

8. *See, e.g.*, Comment, *Made Out of Whole Cloth?*, *supra* note 5, at 507 (referring to Nally v. Grace Community Church of the Valley as the first case of its kind).

9. Malpractice refers to the failure of a professional in rendering his services to exer-

Despite its various labels,[10] most commentators agree that the theory does not include intentional torts which are currently actionable against clergymen.[11] Rather, clergy malpractice pertains primarily to negligent pastoral counseling.[12] According to the California Court of Appeal, clergy malpractice liability can be found when 1) a clergyman fails to recognize the limits of his counseling expertise in treating suicidality, 2) the suicide prone parishioner is not referred to appropriate medical personnel, and 3) the parishioner subsequently commits suicide.[13]

B. Fact Summary

Nally's tragedy began in 1973 when he attended the University of California at Los Angeles (UCLA). During that time, Nally became depressed and "occasionally mentioned suicide to his friends."[14] In 1974, subsequent to his conversion from Catholicism to Protestantism, Nally began attending Grace Church. His conversion created ongoing contention between Nally and his family.[15]

After graduating from UCLA Nally attended, for one semester, a bible institute affiliated with Grace Church. In January 1978, he established a "discipling relationship"[16] with Pastor Rea with whom he discussed girlfriend and family problems.

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cise that degree of skill and learning normally applied by members of his profession in similar circumstances. RESTATEMENT (SECOND) OF TORTS § 299A (1965).

10. The theory has also been stated as "ministerial malpractice," "theological malpractice," "pastoral counseling liability," and "spiritual counseling malpractice." Comment, *Made Out of Whole Cloth?*, *supra* note 5, at 510-511 (citations omitted).

11. *See, e.g.*, Comment, *Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?*, 17 U. TOL. L. REV. 209, 212 (1985) [hereinafter Comment, *Bad News for the Good Samaritan*] (citing United States v. Ballard, 322 U.S. 78 (1944) (mail fraud) and other cases involving intentional torts committed by clergymen).

12. Comment, *Made Out of Whole Cloth?*, *supra* note 5, at 511.

13. *Nally II*, 240 Cal. Rptr. at 229-30.

14. *Nally III*, 47 Cal. 3d at 284, 763 P.2d at 950, 253 Cal. Rptr. at 99.

15. *Id.*

16. Grace Church provides counseling "through instruction, study, prayer and guidance, and through mentoring relationships called 'discipleships.'" *Id.* As of 1979 Grace Church "had approximately 30 counselors on its staff, serving a congregation of more than 10,000 persons." *Id.* Grace Church counselors offer their services to both members and large groups of non-members. They entertain ad hoc counseling sessions as well as regularly scheduled sessions arranged by an employed secretary. In addition to counseling, Grace Church pastors teach classes, publish books and sell tapes on the subject of counseling. They are taught and trained to treat numerous serious illnesses, one of which is suicide. *Id.* at 305-07, 763 P.2d at 964-65, 253 Cal. Rptr. at 113-14 (Kaufman, J., concurring).

The two met a total of five times. Nally then lost interest in "discipling".[17]

In February 1979, Nally's mother arranged for her son to see Dr. Milestone who prescribed a strong antidepressant drug, but did not refer Nally to a psychiatrist. A few weeks later, Nally visited briefly with Pastor Thomson during which time he told the pastor that he had considered suicide while attending UCLA. According to Thomson's testimony, Thomson did not believe that "Nally's 'intimation of suicide' gave rise to a 'serious enough likelihood where other help would be needed at [that] point.' "[18] On March 11, 1979, Nally again attempted suicide by taking an overdose of the antidepressant prescribed to him earlier.[19] Plaintiffs rushed him to the hospital. A hospital physician informed plaintiffs that because their son was still suicidal, she could not release him from the hospital until he had seen a psychiatrist.[20] Four days later, Dr. Hall, a psychiatrist, examined Nally and recommended psychiatric hospitalization. Meeting resistance from both Nally and his father, Dr. Hall agreed to release Nally for outpatient treatment, but warned Nally's father of a possible repeat suicide attempt.[21]

Nally stayed in Pastor MacArthur's home after his release, "because he did not want to return home."[22] MacArthur encouraged Nally to keep appointments with Dr. Hall; he also arranged for a visit with another physician who recommended immediate psychiatric hospitalization, which Nally rejected.[23] According to his girlfriend, Nally did not want help from psychiatrists because they were not Christians.[24]

Eleven days prior to his suicide, Nally met with Pastor

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17. Pastor Cory's friendship (developed while Nally was a student at UCLA), and the discipling sessions with Rea, constituted the extent of defendants' formal counseling activities prior to the Spring of 1979. *Id.* at 284, 763 P.2d at 950, 253 Cal. Rptr. at 99.

18. *Id.* at 285 n.3, 763 P.2d at 951, 253 Cal. Rptr. at 100.

19. *Id.* at 285, 763 P.2d at 951, 253 Cal. Rptr. at 100.

20. *Id.* Pastors Rea and MacArthur visited Nally in the hospital and encouraged him to cooperate with the staff psychiatrists. Nally "separately told both pastors that he was sorry he did not succeed in committing suicide." *Id.* at 285-86, 763 P.2d at 951, 253 Cal. Rptr. at 100. Rea and MacArthur apparently did not discuss Nally's death wish with anyone else because they assumed the entire hospital staff knew of his mental condition. *Id.* at 286, 763 P.2d at 951, 253 Cal. Rptr. at 100.

21. *Id.*

22. *Id.*

23. Mrs. Nally also strongly opposed such action, saying, "[h]e's not crazy." *Id.* at 286, 763 P.2d at 951-52, 253 Cal. Rptr. at 101.

24. *Nally I*, 204 Cal. Rptr. 303, 314 (1984).

Thomson. Thomson made an appointment for Nally to visit with a doctor, but did not refer Nally to a psychiatrist. Nally then moved back home. Two doctors examined Nally during the final week of his life. One of the doctors suggested to Nally that he admit himself to the hospital, but the doctor took no further action on the matter. At week's end, after a family disagreement, Nally left his parents' home claiming he was unloved.[25] Two days later, Nally killed himself.[26]

On March 31, 1980, the parents of Kenneth Nally (Nally) sued Grace Community Church (Grace Church) and four of its pastors, MacArthur, Thomson, Cory, and Rea (hereinafter defendants), for the wrongful death of their son.[27] The Nallys alleged " 'clergyman malpractice,' i.e., negligence and outrageous conduct in failing to prevent [their son's] suicide."[28] This note focuses on the count of negligence as it relates to a duty to prevent suicide by referring a suicide prone parishioner to a psychiatrist or other licensed psychotherapist.

C. Procedural Development

On October 2, 1981, the trial court granted defendants' motion for summary judgment.[29] Plaintiffs appealed.

The court of appeal (*Nally I*) reversed the summary judgment, but focused only on the third cause of action for wrongful death based on intentional infliction of emotional distress.[30] Defendants then petitioned the Supreme Court of California for review. That court denied review, depublished *Nally I*, and returned the case to the trial court.[31]

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25. *Id.* at 315.

26. *Nally III*, 47 Cal. 3d at 287, 763 P.2d at 952, 253 Cal. Rptr. at 101.

27. *Id.* at 283, 763 P.2d at 949, 253 Cal. Rptr. at 98.

28. *Id.*

29. *Nally I*, 204 Cal. Rptr. at 311. As mentioned earlier, the first court of appeal decision is cited as *Nally I*, the second court of appeal decision is designated as *Nally II*, and the supreme court decision is cited as *Nally III*. Specific citations to the official reporters are not available for either *Nally I* or *Nally II*. *See supra* note 1.

30. *Id.* at 309.

31. *Nally III*, 47 Cal. 3d at 289, 763 P.2d at 953, 253 Cal. Rptr. at 102.

On remand, Nally's parents proceeded on the theory of clergy malpractice. In granting defendants' nonsuit motion, the trial court noted that Nally had voluntarily sought defendants' counsel and that no compelling state interest existed to justify interfering with defendants' pastoral activities.[32]

The court of appeal (*Nally II*) again reversed.[33] The court held that nontherapist counselors, whether religious or secular, have a duty to refer suicidal persons to therapists qualified in suicide prevention.[34] The imposition of a duty of care on pastoral counselors, according to *Nally II*, does not impinge on first amendment rights of freedom of religion "because [of] the state's compelling interest in the preservation of life [which] justifies the narrowly tailored burden on religious expression imposed by such tort liability."[35] In contrast, the dissenting opinion asserted that the majority's decision compelled disclosures which the legislature, the proper body for such laws, had to date not required.[36]

The Supreme Court of California (*Nally III*) again reversed the court of appeal and affirmed the trial court's dismissal of plaintiffs' causes of action.[37] The court reasoned that neither the evidence introduced at trial nor well-established principles of tort law justified imposing a legal duty upon nontherapists to refer persons to licensed mental health professionals once suicide becomes a foreseeable risk.[38] Justice Kaufman, concurring in the result only, emphasized that defendants' asserted capacity to handle severe psychological disorders and the ongoing relationship they had with Nally produced enough dependance on Nally's part to place his psychological and ultimately his physical well being in their hands. Thus, Kaufman concluded that defendants had an affirmative duty to advise Nally to seek medical care,[39] but such a duty had not been breached in this case.[40]

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32. *Id.* at 289, 763 P.2d at 954, 253 Cal. Rptr. at 103.

33. *Nally II*, 240 Cal. Rptr. at 215.

34. *Id.* at 219.

35. *Nally III*, 47 Cal. 3d at 290, 763 P.2d at 954, 253 Cal. Rptr. at 103 (explaining *Nally II*'s holding).

36. *Id.* at 290-91, 763 P.2d at 954, 253 Cal. Rptr. at 103 (Cole, J., dissenting).

37. *Id.* at 300, 763 P.2d at 961, 253 Cal. Rptr. at 110.

38. *Id.* at 299-300, 763 P.2d at 960-61, 253 Cal. Rptr. at 109-10.

39. *Id.* at 310-13, 763 P.2d at 968-70, 253 Cal. Rptr. at 117-19 (Kaufman, J., concurring).

40. *Id.* at 314, 763 P.2d at 970, 253 Cal. Rptr. at 119 (Kaufman, J., concurring).

D. The California Supreme Court's Reasoning

In determining whether a duty of care should be created between defendants and Nally, the court analyzed and compared *Meier v. Ross General Hospital*[41] and *Vistica v. Presbyterian Hospital*.[42] These California cases imposed a duty to "take precautions to prevent suicide . . . where the suicidal person died while under the care and custody of hospital physicians who were aware of the patient's unstable mental condition."[43] *Nally III* reasoned that "[n]either case suggested extending the duty of care to personal or religious counseling relationships in which one person provided nonprofessional guidance to another seeking advice and the counselor had no control over the environment of the individual being counseled."[44] In contrast to *Vistica* and *Meier*, the court found the relationship in *Nally III* to be noncommercial, noncustodial and voluntary, and thus not a special relationship subject to any duty of care.[45]

The type of relationship in *Nally III* also affected the court's analysis of the connection between defendants' conduct and the resulting harm. This "connection" element constitutes one of several other factors used by California courts to determine whether to create a duty of care.[46] The court found the connection too tenuous to establish causation, primarily because five physicians and a psychiatrist had examined Nally after his

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41. 69 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968).

42. 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967).

43. *Nally III*, 47 Cal. 3d at 294, 763 P.2d at 956, 253 Cal. Rptr. at 105.

44. *Id.* at 294, 763 P.2d at 957, 253 Cal. Rptr. at 106.

45. *Id.* at 298, 763 P.2d at 960, 253 Cal. Rptr. at 109. Although the majority fails to define "commercial," "custodial," and "voluntary," their meaning may be understood in light of the respective factual contexts of *Nally III*, *Meier*, *Vistica* and Bellah v. Greenson, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978). It is evident that "commercial" means the existence of some type of contractual agreement between the parties which was absent in *Nally III*, but probably present in *Meier* and *Vistica* given the nature of the services rendered in those cases. "Custodial" indicates legal responsibility and/or physical custody; in both *Meier* and *Vistica*, for example, the patient was confined in a hospital psychiatric ward, whereas in *Bellah*, which distinguished *Meier* and *Vistica*, the patient was being treated on an out patient basis. *Nally III*, 47 Cal. 3d at 294-95, 763 P.2d at 957, 253 Cal. Rptr. at 105-06. *Cf.* Katona v. County of Los Angeles, 172 Cal. App. 3d 53, 59, 218 Cal. Rptr. 19, 22 (1985) (the court found no duty on the part of a mental hospital to control a patient's actions in order to prevent her suicide occurring after her unconditional release). Finally, in light of *Nally III*, "voluntary" indicates that the injured party willingly engaged in a relationship with defendant and was responsible for his own actions.

46. *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

suicide attempt and defendants had encouraged many such visits.[47]

Finally, *Nally III*'s majority looked at a number of policy concerns in determining whether a duty of care should be created. For instance, the court felt that "the indeterminate nature of liability the Court of Appeal impose[d] on nontherapist counselors could deter those most in need of help from seeking treatment out of fear that their private disclosures could subject them to involuntary commitment to psychiatric facilities."[48] In justifying its concern for the nontherapist seeking treatment, the court emphasized that the legislature preferred to leave access to pastoral counseling free from state imposed counseling standards by specifically exempting the clergy from licensing requirements affecting marriage, family, and child counselors, as well as from regulations applicable to psychologists.[49]

Assuming, arguendo, a duty to refer were imposed on nontherapists, *Nally III*'s majority doubted whether the " 'wrongs and injuries involved [would be] both comprehensible and assessable within the existing judicial framework.' "[50] According to the majority, "[s]uch a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity."[51] Even if judicially manageable standards of care could be established, *Nally III* struggled with the difficulty in identifying to whom the duty to refer should apply.[52] The *Nally III* court concluded in light of the foregoing reasons that plaintiffs had not met the threshold requirements for imposing on defendants a duty to take steps to prevent suicide.[53]

III. Case Analysis

The court in *Nally III* properly selected the question of

47. *Nally III*, 47 Cal. 3d at 296-97, 763 P.2d at 958-59, 253 Cal. Rptr. at 107-08.

48. *Id.* at 297, 763 P.2d at 959, 253 Cal. Rptr. at 108.

49. *Id.* at 298, 763 P.2d at 959-60, 253 Cal. Rptr. at 108-09.

50. *Id.* at 298, 763 P.2d at 960, 253 Cal. Rptr. at 109 (quoting Peter W. v. San Francisco Unified Sch. Dist., 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 860 (1976) (refusing to impose liability on school district for a graduated plaintiff's inability to read and write)) (other citation omitted).

51. *Nally III*, 47 Cal. 3d at 299, 763 P.2d at 960, 253 Cal. Rptr. at 109 (citations omitted).

52. *Id.*

53. *Id.*

duty as the threshold issue in the case.[54] Absent a special relationship giving rise to a duty to act, a person owes no legal duty under California tort law to control the actions of another.[55] *Nally III* implied that no special relationship should exist in noncommercial, noncustodial and voluntary relationships. This assertion, although correct in many cases, is overbroad and fails to foreclose future clergy malpractice liability. Special relationships have not been, nor should they be, strictly based on whether there was a contractual agreement, physical or legal custody, and/or the lack of voluntary action on the victim's part.[56] California precedent reveals that the courts have not consistently based their analysis either exclusively or even primarily on these factors.

A. Evaluation of Special Relationships In California

In establishing an affirmative duty to protect another, California courts have "traditionally looked to relationships where 'the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over plaintiff's welfare.' "[57] Analogous to the factor of dependency, the closeness of the connection between defendant's actions and the victim's harm also factors into the determination of whether there is enough causation to justify imposing a duty of care.[58] For example, in one case a court's reluctance to establish a duty of care stemmed in part from the projected difficulty in establishing causation based on the cir-

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54. A finding of negligence turns upon the existence of a duty to exercise care and its breach by the creation of an unreasonable risk of harm. *E.g.*, Mikialian v. Los Angeles, 79 Cal. App. 3d 150, 158, 144 Cal. Rptr. 794, 799 (1978) (without substantial evidence confirming the existence of a duty and a breach thereof, the trial court must grant defendant's motion for nonsuit).

55. *Nally III*, 47 Cal. 3d at 293, 763 P.2d at 956, 253 Cal. Rptr. at 105 (citations omitted). *See also* Williams v. State, 34 Cal. 3d 18, 23, 664 P.2d 137, 139, 192 Cal. Rptr. 233, 235 (1983); RESTATEMENT (SECOND) OF TORTS § 315 (1965).

56. *See supra* note 45 (defining "noncommercial," "noncustodial," and "voluntary" relationships).

57. *Nally III*, 47 Cal. 3d at 310, 763 P.2d at 968, 253 Cal. Rptr. at 105 (Kaufman, J., concurring) (quoting PROSSER & KEETON, THE LAW OF TORTS § 56, at 374 (5th ed. 1984)). *See generally* Posey v. State, 180 Cal. App. 3d 836, 844-46, 225 Cal. Rptr. 830, 834-36 (1986) (reviewing cases analyzing the extent to which defendant's actions induced reliance on plaintiff's part and thereby altered or added to the risk of harm).

58. *See, e.g.*, Davidson v. City of Westminster, 32 Cal. 3d 197, 203, 649 P.2d 894, 897, 185 Cal. Rptr. 252, 255 (1982); Rowland v. Christian, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

cumstances at hand if the duty were eventually imposed.[59] But this "connection factor" or threshold causation determination is not to be confused with the separate and independent "cause-in-fact" analysis normally used to find negligence once an established duty of care has been breached.[60] In sum, the more dependant the victim was upon the defendant (prior to the injury), the closer is the connection between defendant's actions and the resulting harm. Thus, the greater the probability the defendant contributed to, increased or changed the risk at hand and negligently prevented other assistance from being rendered.

For example, the California Supreme Court in *Mann v. State*,[61] found that by providing assistance with flashing red lights to a stranded motorist and then (after calling a tow truck) departing without warning and without placing protective flares around the troubled car, an officer's conduct "contributed to, increased, or changed" the risk[62] inherent in the circumstances at hand.[63] The court reasoned that the officer had lulled plaintiff "into a false sense of security" and "perhaps prevent[ed] other assistance from being sought."[64] Hence, the court found that a special relationship between the officer and plaintiff existed; the officer, therefore, had an affirmative duty to protect plaintiff.[65]

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59. *See, e.g.*, Bill v. Superior Court, 137 Cal. App. 3d 1002, 1013, 187 Cal. Rptr. 625, 632 (1982) (explaining *Davidson* as holding that police officers had no duty to warn a potential victim of an assailant under surveillance because the creation of such a duty "would raise difficult problems of causation and public policy.") (citation omitted).

60. Ironically, the majority itself confused the two concepts. *Nally III* recognized that *Nally II* created a new duty without any analysis of the connection factor, but its own analysis presupposed that a duty to refer already existed: the court found the connection between defendants and Nally's suicide "tenuous at best" in part because defendants had encouraged Nally to visit and cooperate with all doctors. *Nally III*, 47 Cal. 3d at 296-97, 763 P.2d at 958-59, 253 Cal. Rptr. at 107-08. This factual finding is relevant only insofar as to whether the duty was breached, rather than whether such a duty should be imposed. *Cf. id.* at 310 n.7, 763 P.2d at 967, 253 Cal. Rptr. at 107 (Kaufman, J., concurring).

61. 70 Cal. App. 3d 773, 139 Cal. Rptr. 82 (1977).

62. Moments after the officer left, a passing car sideswiped the stalled car injuring persons nearby. *Id.* at 777, 139 Cal. Rptr. at 84.

63. Davidson v. City of Westminster, 32 Cal. 3d 197, 208, 649 P.2d 894, 900, 185 Cal. Rptr. 252, 258 (1982) (explaining *Mann*'s rationale). *Mann* determined that while no special relationship existed between the California Highway Patrol and stranded motorists generally, once an officer chooses to investigate a motorist's troubles and has informed himself of foreseeable danger to the motorist from passing traffic, then a special relationship arises. *Mann*, 70 Cal. App. 3d at 780, 139 Cal. Rptr. at 86.

64. *Davidson*, 32 Cal. 3d at 208, 649 P.2d at 900, 185 Cal. Rptr. at 258 (explaining *Mann*'s rationale).

65. *Mann*, 70 Cal. App. 3d at 780, 139 Cal. Rptr. at 86.

Likewise, in *Davidson v. City of Westminster*,[66] the court had to decide whether the officers' ongoing supervision of a laundromat, in which several assaults had recently occurred, changed the risk of injury to a laundromat patron. *Davidson* reasoned there was a minimal connection between the officers' conduct and the resulting assault to the laundromat patron: the officers' visual identification of the likely assailant had been made from a distance; and, the victim was clearly unaware of the officers' presence and thus did not *depend* on them for protection.[67] According to the court, there was no reason to suspect the victim or assailant would have acted differently had the laundromat not been under surveillance. Consequently, no special relationship between the officers and the potential assailant arose in this case.[68]

Both *Mann* & *Davidson* evaluated the degree of a) plaintiff's dependency on defendant's actions and b) defendant's contribution to the risk of injury. In contrast to *Nally III*, neither *Mann* nor *Davidson* focused on whether the relationship was commercial, custodial and/or voluntary.[69] There was no contractual agreement between the parties in either case. Likewise, although there was supervision, plaintiffs in *Mann* and *Davidson* were not physically confined to defendant's premises—the main factor used in *Nally III* to distinguish *Vistica* and *Meier*;[70] nor were plaintiffs under legal custody. Lastly, plaintiff in *Mann* had voluntarily accepted the officer's help. It could be argued that given an officer's legal authority, the relationship in *Mann* may have been—to some extent—involuntary because the plaintiff may not have had much choice as a stranded motorist in accepting the officer's help. However, *Nally III*'s requirement of non-voluntary action in order for a special relationship to exist only makes sense if equated with the degree of control necessary to induce reliance; relationships evolve, and what may begin as a voluntary relationship might become involuntary at a later

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66. 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982).

67. *Id.* at 205, 208, 649 P.2d at 898, 900, 185 Cal. Rptr. at 256-57. *Cf. Nally III*, 47 Cal. 3d at 307, 763 P.2d at 965, 253 Cal. Rptr. at 114 (Kaufman, J., concurring) ("Nally was well aware of defendants' self-proclaimed proficiency at treating severe depression and suicidal symptoms.").

68. *Davidson*, 32 Cal. 3d at 208-09, 649 P.2d at 900, 185 Cal. Rptr. at 258. It should be noted that the rationale of *Mann* and *Davidson* applies to both private and public entities/employees. *See Mann*, 70 Cal. App. at 780 n.6, 139 Cal. Rptr. at 86.

69. *See supra* note 45 and accompanying text.

70. For *Nally III*'s analysis see *supra* text accompanying notes 41-45.

date.[71] As mentioned, *Mann* focused on whether the officer had *sufficient control* at the time of the accident to significantly contribute to the injury and thus justify creating a duty of care.

In *Nally III*, it is irrelevant that Nally voluntarily sought out defendants' counseling service if defendants thereafter exercised sufficient control over his welfare to significantly contribute to the risk that Nally would commit suicide. By limiting its analysis to a defendant's degree of "physical" control over the victim's environment, *Nally III* simply overlooks the importance and effect of "psychological" control in a relationship.[72] It is more than plausible that a pastor, whom parishioners normally revere, has the potential to negligently "lull a severely depressed parishioner into a false sense of security" by continuously promising spiritual healing in circumstances he knows are far beyond his competence.[73] Further, the pastor may assume others are aware of the parishioner's suicidal thoughts and thus neither refer nor encourage his counselee to seek psychiatric help.[74] And,

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71. *Cf.* PROSSER & KEETON, THE LAW OF TORTS § 39, at 254 (5th ed. 1984) (in determining the absence of voluntary action, it is obvious that the plaintiff is "seldom static" or "completely inactive"; instead, what is required is that "there be evidence removing the inference of his own responsibility."). *See also* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 458, 150 P.2d 436, 439 (1944) (absence of voluntary action in res ipsa loquitur case may be used to indicate that the defendant, rather than the victim, had control).

72. At this point it is imperative to distinguish Bellah v. Greenson's dictum. *See supra* note 45. *Bellah* stated that in an out-patient setting, a psychiatrist could not be found liable for failure to warn the family of a patient about his suicidal tendencies. *Bellah*, 81 Cal. App. 3d 614, 620, 146 Cal. Rptr. 535, 538 (1978). The court of appeal in *Nally II* pointed out two vital differences between *Bellah* and *Nally II*. First, unlike the psychotherapist-patient context, there was no statutory privilege in California protecting communications in the pastoral counseling context whose legislative policies had to be overcome in order to impose a duty to refer on Grace Church and its pastors. Second, the state had a greater interest in *Nally II* as compared with *Bellah* in imposing a duty to disclose a counselee's suicidal intentions; in *Bellah*, unlike *Nally II*, "the suicidal patient already was in the hands of someone authorized to administer medication and to initiate involuntary hospitalization." *Nally II*, 240 Cal. Rptr. at 228.

73. Clergy have committed intentional torts by inducing parishioners in their care to place their welfare at the hands of the minister. For example, in Handley v. Richards, 518 So. 2d 682, 686-87 (Ala. 1987), a minister invited the Hesters during family counseling to trust and confide in him while assuring the family its confidences would be kept completely confidential. The minister then defamed the plaintiffs in the community where they lived.

74. For instance, when Nally told Pastor Thomson he had attempted suicide at UCLA, Thomson did not believe this confession required other help at that point; and, when Pastors Rea and MacArthur visited Nally in the hospital, they remained silent about Nally's frustration at his failure to commit suicide because they figured the entire hospital staff knew of his mental condition. *See supra* notes 18, 20 and accompanying text. *Nally III*'s facts, however, cut both ways as defendants encouraged Nally on several occasions to seek medical care. *See, e.g., supra* text accompanying note 23.

the counselee may be so incompetent or mentally unstable that he is incapable of recognizing other available assistance and/or the lack of progress from his continual spiritual treatment.[75] Or, perhaps the pastor may simply not believe in the effectiveness of medical help and the parishioner is induced to believe the same.[76] In short, a pastor may not only create substantial reliance on his counseling, he may also prevent other assistance from being accepted and/or rendered.

In illustrating the potential that pastors have to induce parishioners to detrimentally rely on their counseling, the court of appeal in *Nally II* listed several similarities that often exist between nontherapist and therapist counselors. It pointed out that (1) like a therapist counselor, a nontherapist counselor usually holds himself out as competent to treat serious emotional problems; (2) the nontherapist, as the therapist, voluntarily undertakes the relationship; and (3) the counselee has the same dependance upon the counselor, whether a therapist or nontherapist.[77]

Nally III itself did not purport to "foreclose imposing liability on nontherapist counselors who hold themselves out as professionals for injuries related to their counseling activities."[78] Yet the majority determined that Grace Church did not have a professional or clinical counseling ministry.[79] This assertion necessarily minimizes the similarities between defendants and therapists such as those held liable in *Meier* and *Vistica*. By definition, however, counseling which requires a high level of training, whether spiritual or secular, qualifies as a profession. "Professional" can mean one who engages "in a particular pursuit,

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75. *Cf.* Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?*, 84 MICH. L. REV. 1296, 1320-21 (1986) [hereinafter Note, *Emotional Distress by Spiritual Counselors*] (discussing incompetence, youth and mental instability in the context of implied consent to religious governance).

76. For instance, according to Nally's girlfriend, Nally refused psychiatric help in March of 1979 because he did not consider psychiatrists to be Christians. *See supra* text accompanying note 24. There was no evidence, however, that defendants induced him to disregard medical help because of a belief in its ineffectiveness.

77. *Nally II*, 240 Cal. Rptr. at 225-26. *See also Nally III*, 47 Cal. 3d at 311, 763 P.2d at 968, 253 Cal. Rptr. at 117 (Kaufman, J., concurring) ("The relation of the nontherapist or pastoral counselor to his counselee contains elements of trust and dependence which closely resemble those that exist in the therapist-patient context."). *See supra* note 2 (defining therapist and nontherapist counselors).

78. *Nally III*, 47 Cal. 3d at 300 n.8, 763 P.2d at 961, 253 Cal. Rptr. at 110.

79. *Id.* at 284, 763 P.2d at 950, 253 Cal. Rptr. at 99.

study, or science for gain or livelihood" or "an occupation requiring a high level of training and proficiency."[80] In light of the degree of training provided by Grace Church and the extensive counseling activity engaged in by defendants, both of which are conveniently ignored by the majority,[81] defendants are arguably as qualified as "professionals" in the area of suicide. Of all the duties of a clergyman, spiritual counseling most nearly approximates an existent professional practice, and thus is "most accountable to minimum professional standards."[82]

Solely based on the degree of induced reliance,[83] the evidence in *Nally III* justifies imposing on defendants a minimal duty of care towards Nally and other similarly situated parishioners. As *Nally III*'s concurrence pointed out, "[w]hat was fatally *absent* from plaintiffs' case was not evidence of duty, but proof that defendants breached that duty."[84] Nonetheless, *Nally III* implies it may have found a duty to refer had Grace Church subjected its ministers to some form of clinical training. Accordingly, *Nally III* may be relegated to its particular factual context.[85]

Moreover, the defendants in other California clergy malpractice cases may not be as fortunate as Grace Church and its pastors. The concept of what constitutes a "special relationship" has been expanding: California tort law "appears to be heading toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence."[86] Notwithstanding

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80. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1811 (1971).

81. *See supra* note 16 (discussing numerous aspects of defendants' counseling program which the majority, for the most part, excluded from its fact summary).

82. Hester v. Barnett, 723 S.W.2d 544, 551 (Mo. Ct. App. 1987).

83. For other considerations used by California courts to determine whether to create a duty of care see *infra* subsections B and C.

84. *Nally III*, 47 Cal. 3d at 305, 763 P.2d at 964, 253 Cal. Rptr. at 113 (Kaufman, J., concurring) (emphasis in original).

85. Factually, *Nally III* was not the ideal case for testing the theory of clergy malpractice, as reasonable minds may differ on the amount of psychological control defendants had over Nally. Specifically, various doctors had seen Nally between 1973 and the date of his suicide, and as of 1978 Nally was no longer involved in an *active* "discipling relationship." *See supra* note 17 and accompanying text.

86. Mann v. State, 70 Cal. App. 3d 773, 780, 139 Cal. Rptr. 82, 86 (1977) (citing Tarasoff v. Regents of the Univ. of California, 17 Cal. 3d 425, 435 n.5, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976); RESTATEMENT (SECOND) OF TORTS § 314A, coms. a, b (1965); FLEMING, THE LAW OF TORTS at 143 (4th ed. 1971); PROSSER & KEETON, THE LAW OF TORTS § 56, at 339-40 (4th ed. 1971)). In the past, the reluctance to impose liability for nonfeasance arose from " 'the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue. . . .' " *Tarasoff*, 17 Cal. 3d at 435 n.5, 551 P.2d at 343, 131

this expansion, in order to establish a duty of care it must be both manageable and justified in light of all the interests of those affected by such duty.

B. Judicially Manageable Standards of Conduct For Pastoral Counseling and Associated Policies

In California, other factors in addition to those discussed in the foregoing section are taken into account in establishing a special relationship. As evidenced by *Nally III*'s opinion, a court should initially determine—as a matter of sound jurisprudence—the nature of such a duty and the corresponding context in which a breach of the duty arises when deciding whether to create a new legal duty. In rejecting *Nally II*'s proposed standard of care, *Nally III* spent little time discussing possible solutions to the policy problems associated with imposing a new legal duty on pastoral counselors.

1. The nature of the duty

Nally III's majority apparently could not determine exactly what the California Court of Appeal's loosely phrased obligation exacted from defendants.[87] *Nally II* made clear, however, that the obligation would have required more than encouraging a resistant counselee to consult with a therapist, as evidenced by its clearest statement on the issue: "the minimal standard of care a non-therapist owes to a counselee he diagnoses as suicidal is to take steps to place him in the hands of those to whom society has given the authority . . . to prevent the suicidal individual from . . . killing himself."[88] Nevertheless, except for the minor instances where it contradicts the religious belief of a given min-

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Cal. Rptr. at 23 (quoting PROSSER & KEETON, THE LAW OF TORTS § 56, at 341 (4th ed. 1971)). Rather than reject this common law, courts have expanded the list of special relationships "which will justify departure from that rule" and the practical difficulties associated with exceptions to it. *Tarasoff*, 17 Cal. 3d at 435 n.5, 551 P.2d at 343, 131 Cal. Rptr. at 23.

87. *See Nally III*, 47 Cal. 3d at 292, 763 P.2d at 955, 253 Cal. Rptr. at 104 (quoting the Court of Appeal's varying terminology in imposing a duty).

88. *Nally II*, 240 Cal. Rptr. at 227. Disclosure of a potential suicide to medical authorities might only be necessary in the event the counselee "resists" counsel to seek medical care. *See* Brief for Respondents at 11-12, Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988) (No. SOO2882) (interpreting *Nally II*'s duty to "effectively refer" as requiring that a pastor convey information to third parties only in cases where the counselee is resistant to appropriate medical care) (citations omitted).

ister, *Nally II*'s duty to refer is religiously neutral; had the duty to refer been imposed, it would not have included regulation of the content of defendants' counseling.[89] As *Nally II*'s majority stated,

> this court [has not] ruled the Church's counselors could be held negligent because they espoused the teachings of Moses and Jesus instead of Freud and Jung. Nor have we held a cause of action could be stated for negligently choosing the "wrong" scripture to answer the particular problems of a given suicidal counselee, when other passages or other forms of religious advice might have forestalled his death.[90]

Thus, the policy and constitutional concerns which would necessarily surface if a court had to articulate a standard of reasonable counseling in order to regulate the content of a defendant's counseling are of no concern in this case. But other concerns surface even with a religiously neutral duty of care.

2. *Possible standards of conduct*

Assuming the nature of a minister's duty to refer is not excessively difficult to perceive, a court would still need to address the more serious difficulties associated with determining the context in which a duty to refer and its subsequent breach would occur. Plaintiffs in *Nally III* argued that the duty to refer should arise "when the counselor knows that the counselee is likely to attempt suicide."[91] The inherent problem in establishing a standard to determine when a pastor should know that a counselee is suicidal centers on the fact, as discussed below, that not all pastors enjoy the same amount of parishioner contact or expertise in counseling. There are at least three ways in which a duty to refer could be assessable within a judicial framework.[92] The duty to refer and its breach may arise in light of "individual clergy training," a "reasonable man standard," or "standardized clinical training."

a. Individual clergy training. The duty to refer could arise

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89. *Nally III*, 47 Cal. 3d at 313, 763 P.2d at 970, 253 Cal. Rptr. at 119 (Kaufman, J., concurring); *Nally II*, 240 Cal. Rptr. at 236.

90. *Nally II*, 240 Cal. Rptr. at 236.

91. Brief for Appellants at 33, Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988) (No. SOO2882).

92. *Cf.* Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPPERDINE L. REV. 137 (1986) (discussing the validity of various standards of conduct for clergy malpractice).

according to the individual minister's respective clergy training.[93] Under this approach, a court would by necessity have to delve into the specific training program and theology[94] adhered to by the minister on trial to determine whether, based on the minister's training, he surpassed the limitations of his competence and should have foreseen the suicide.[95] The duty owed would also vary upon a pastoral counselor's ecclesiastical office and the training flowing therefrom,[96] as well as upon the extent and nature of the counseling given.[97]

Moreover, the court would have to decide whether more training either a) enables a pastor to minister to a mentally disturbed parishioner for a longer period of time before a referral should be made, or b) requires an earlier referral to a licensed therapist because the symptoms of suicidality should inherently be discovered sooner. This standard would inevitably force courts to weigh the amount of a defendant's spiritual training in relation to his secular training and compare it to the type of training other clergy have received.

In essence, as *Nally III* clearly expressed, judicial enforcement of a standard of care derived from the clergy's training would invariably require complex policy decisions, which is the

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93. *E.g.*, Comment, *Made Out of Whole Cloth?*, *supra* note 5, at 520; Note, *Religious Counseling-Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide*-Nally v. Grace Community Church, 157 Cal. App.3d 912, 204 Cal. Rptr. 303 (1984), 1985 ARIZ. ST. L.J. 213, 235.

94. *Nally III*'s comments on standards of care proposed by expert testimony at trial after remand of *Nally II* are illustrative: "[T]he suggested standards are vague and dependent on the personal predilections of the individual counselor or denomination, and not officially or formally adopted by any organized body of counselors." *Nally III*, 47 Cal. 3d at 289, 763 P.2d at 953, 253 Cal. Rptr. at 102. *Nally III* noted the trial court's refusal to allow a witness from the American Pastoral Association to testify about the standards of care imposed upon the association's members because the group had not been accepted by the general pastoral counseling community as experts in the field of pastoral counseling. *Id.* at 289 n.4, 763 P.2d at 953, 253 Cal. Rptr. at 102.

95. *See id.* at 312, 763 P.2d at 969, 253 Cal. Rptr. at 118 (Kaufman, J., concurring) ("The scope of the duty contemplated is commensurate with the nontherapist counselor's background and stated mission.").

96. Ericsson, *supra* note 6, at 170 (as an example, Ericsson referred to the Catholic Church which contains elders, priests, bishops, cardinals, nuns, fathers, and the Pope). *See also Nally III*, 47 Cal. 3d at 299, 763 P.2d at 960, 253 Cal. Rptr. at 109 ("an additional difficulty arises in attempting to identify with precision those to whom the duty should apply.").

97. A court would by necessity have to determine what qualifies as pastoral counseling. "Does it include the one time, five-minute emergency telephone call . . . from distressed individuals, members as well as nonmembers of [the pastor's] congregation? Does it include confessions?" Ericsson, *supra* note 6, at 169-70.

province of legislatures rather than the courts.[98] Although *Nally III* properly rejected a standard of care based on individual clergy training, it nevertheless failed to consider possible alternatives.[99]

b. Reasonable man standard. If pastoral counselors are not professionals, as *Nally* reasoned,[100] then the reasonable man standard should apply. Based on this standard, clergy malpractice would by definition no longer exist as a viable cause of action;[101] rather, liability could extend to any friend, coach, teacher, employer or parent who counseled a mentally disturbed individual and did not refer the individual to a therapist—assuming "a reasonable man" in the same circumstances would have done so. This standard could place blame unreasonably on counselors involved in "casual" or "extemporaneous" counseling activity if such counselors were subject to liability. In California, the moral blame attached to a defendant's conduct is a factor in determining whether a special relationship exists.[102]

Yet, given the general lack of knowledge with regard to the intangible nature of mental illnesses, it may be unreasonable for a casual counselor to recognize suicidality. In contrast to casual counselors, active counselors like those of Grace Church have at least had some exposure to the effectiveness and limits of counseling, whether it be religious or secular based. It is more likely that a reasonable person with such experience would in fact recognize suicidality and make an appropriate referral. Liability placed only on active counselors may not place blame "unreasonably."

On the other hand, even some active counselors may not have the capacity to recognize suicidality due to a lack of specialized training and/or exposure to suicide prone individuals. The main drawback of a reasonable man standard stems from

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98. *Nally III*, 47 Cal. 3d at 299, 763 P.2d at 960, 253 Cal. Rptr. at 109 (citing Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980)).

99. *Cf.* Hester v. Barnett, 723 S.W.2d 544, 553 (Mo. Ct. App. 1987) ("The question *[Nally I]* leaves unanswered is whether pastoral counseling is so ineluctably a function of the particular religion that no one definition of its malpractice can evolve into a standard of professional performance . . . .").

100. *See supra* note 79 and accompanying text.

101. The term "malpractice" is defined as "*professional misconduct.*" BLACK'S LAW DICTIONARY 864 (5th ed. 1979) (emphasis added).

102. *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968). *See also Nally III*, 47 Cal. 3d at 300, 763 P.2d at 961, 253 Cal. Rptr. at 110.

its overbreadth—all counseling activity, no matter how extensive or by whom, falls within its parameters. Courts would need to determine what is reasonable in a countless number of varying circumstances in which the distinction between active and casual counseling may have little significance. Although the objectivity under a reasonable man standard is much greater than a standard based on the individual's particular clergy training, the reasonable man standard may still be neither precise nor manageable.

c. Standardized clinical training. The most promising solution to the alleged lack of a workable standard of care in the pastoral counseling context is the requirement of a certain amount of standardized clinical training.[103] Commentators advocating the imposition of a standard of conduct analogous to the one applied to psychotherapists usually separate a cleric's "purely sarcedotal functions" such as prayer, partaking of the sacrament, or religious instruction from those which are "not unique to the clergyman," pastoral counseling belonging in the latter category.[104] Thus, the argument runs, why shouldn't pastors be judged by that same standard applied to any other counselor?

A requirement of standardized clinical training would in fact produce a uniform standard by which to measure the behavior of clergymen as well as better enable the clergyman to identify the symptoms associated with suicide. Also, a court's evaluation process would be limited to compliance with the standardized clinical training. No other complex policy decisions need be made. Notwithstanding these virtues, it may be argued that courts are not able to "reasonably review the training and competence of individual religious counselors, even if the counselors have obtained a degree in clinical psychology," because even "psychiatry has not [yet] clearly defined the skills, knowledge, and attitudes that the psychiatrist in training must demonstrate in order to be certified as competent . . . ."[105] For

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103. *See* Comment, *Bad News for the Good Samaritan*, *supra* note 11, at 247; Bernstein, *A Potential Peril of Pastoral Care: Malpractice*, 19 J. RELIGION & HEALTH 46, 48 (1980).

104. One commentator argues that the only difference between psychotherapists and pastoral counseling is one of orientation. Bernstein, *supra* note 103, at 50.

105. Comment, *Clergy Malpractice: Should Pennsylvania Recognize a Cause of Action for Improper Counseling by a Clergyman?*, 92 DICK. L. REV. 223, 229-30 (1987) [hereinafter Comment, *Clergy Malpractice*] (citing Ericsson, *supra* note 6, at 171). It is noteworthy that of the five physicians who examined Kenneth Nally only two recom-

purposes of clergy malpractice liability, however, the courts need only be concerned with the minister's ability to recognize suicidality's symptoms so that a referral can be made in appropriate circumstances. Even though the symptoms set forth by psychiatrists may not accurately predict suicide, the lack of precision does not necessarily affect the manageability of the standard of care.[106] The standard, based on the clinical training received, would be whether the pastoral counselor knew or should have known that suicide was a sufficient possibility to require a referral.[107]

Another potential problem with standardized clinical training is that it imposes a standard of care in one profession by reference to another; it thus arguably violates the well established tort doctrine that the profession of the defendant sets the standard by which he is to be judged.[108] Yet as previously discussed, the duty to refer, however it is imposed, would not regulate the content of pastoral counseling; that aspect would be judged, if at all, by the pastoral counseling profession itself. The duty to refer only requires that other professionals be made aware of a potential suicide.[109]

C. Consequences Created by a Duty to Refer and its Associated Standard of Conduct

So far, no monumental obstacle stands in the way of establishing a duty to refer. It is possible to develop a manageable standard of conduct which could effectively regulate when a duty to refer arises and when it is breached. Nonetheless, a duty to refer and the more manageable standards of conduct, the reasonable man and the standardized clinical training standards, produce certain ramifications which may violate both California tort law principles and constitutional law principles.

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mended psychiatric treatment. *See supra* text accompanying note 47.

106. *See* Tarasoff v. Regents of the Univ. of California, 17 Cal. 3d 425, 438, 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25 (1976) (as long as the therapist exercises the degree of skill and care ordinarily possessed by members of his profession, it is not required that he render a perfect performance in attempting to forecast when a patient presents a serious danger of violence).

107. *Nally III*, 47 Cal. 3d at 311, 763 P.2d at 968-69, 253 Cal. Rptr. at 118 (Kaufman, J., concurring).

108. RESTATEMENT (SECOND) OF TORTS § 299A (1965).

109. *See* Bergman, *supra* note 5, at 63-64 (analogizing the relationship of the clergyman and the therapist to that of the general practitioner and specialist where the former has a duty to refer the patient to the latter if the ailment is beyond his competence).

1. Counselor, counselee and community a balance of interests

California has abrogated the "Good Samaritan" rule in numerous scenarios in order to encourage private assistance efforts.[110] A duty to refer may chill pastoral counseling activity,[111] particularly under the reasonable man standard, by creating a threat of litigation, a fear of potential liability, as well as a loss of confidentiality between counselor and counselee.[112] Under California common law, the extent of the burden upon defendant and the consequences to the community of imposing a duty of due care with resulting liability for its breach, are factors to consider in determining the existence of a special relationship.[113]

On the other hand, several commentators have argued that "the imposition of liability, far from exerting a chilling effect, would enhance the clergyman-counselee relationship by giving the counselee a greater sense of security in the clergyman's competence and sincerity."[114] In addition, a workable standard of care may allow a duty to refer to overcome contrary policy arguments in light of the severity of suicide and the state's interest in preventing future harm[115]—especially if it could be shown that suicides are unreasonably frequent among parishioners who have received pastoral counseling. The aforementioned countervailing policies account for the lack of uniform opinion, exhibited both in *Nally I, II* and *III* as well as assorted commentaries, with respect to the potential liability of pastoral counselors. Without adequate statistical information on the effectiveness of

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110. *See Nally III*, 47 Cal. 3d at 298, 763 P.2d at 960, 253 Cal. Rptr. at 109 (citing as examples GOV'T. CODE § 50086 ("exempting from liability first aid volunteers summoned by authorities to assist in search or rescue operations"); HEALTH & SAF. CODE §§ 1799.100, 1799.102 ("exempting from liability nonprofessional persons giving cardiopulmonary resuscitation.")). The 'Good Samaritan' rule in California states that the volunteer who comes to the aid of another while under no duty to do so is "under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or b) the harm is suffered because of the other's reliance upon the undertaking." Williams v. State, 34 Cal. 3d 18, 23, 664 P.2d 137, 139, 192 Cal. Rptr. 233, 235-36 (1983) (citing RESTATEMENT (SECOND) OF TORTS § 323 (1965)).

111. *Nally III*, 47 Cal. 3d at 297, 763 P.2d at 959, 253 Cal. Rptr. at 108.

112. *See infra* notes 129-31 (discussing these "effects" in more detail).

113. *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

114. Comment, *Bad News for the Good Samaritan*, *supra* note 11, at 247 (citing Bergman, *supra* note 5, at 61-62).

115. *See* Davidson v. Westminster, 32 Cal. 3d 197, 203, 649 P.2d 894, 897, 185 Cal. Rptr. 252, 255 (1982) (the possibility of preventing future harm factors into determining whether a special relationship should exist).

pastoral counseling, a court is forced to balance these policies and render a decision based on its subjective intuition as to which ones are the most important.

Besides affecting the outcome under a tort analysis, this lack of statistical information may also provide the clergy with a constitutionally-based defense to clergy malpractice. If *pastoral* counseling falls within the scope of the first amendment, that balance of interests previously discussed would weigh heavily in favor of the individual's rights of freedom of religion. Consequently, the extent to which a duty to refer chills pastoral counseling, *i.e.*, interferes with the practice of religion, may become a crucial factor in establishing its validity.

2. *First amendment rights of freedom of religion*

In order "to have the protection of the Religious Clauses, the claims must be rooted in religious belief."[116] Pastoral counseling activity should qualify for first amendment protection; most scholars would agree that it is at least a hybrid process, combining secular techniques and learning with religious speech and conduct.[117] For many denominations pastoral counseling is central to their religious mission; it is inextricably entwined with ecclesiastical, spiritual, and doctrinal matters.[118]

a. The free exercise clause. Although the right to engage in pastoral counseling has never been squarely addressed as a first amendment issue, "the right to *free exercise* of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions . . . ."[119] Pastoral counseling is a religious function similar to those described in *McDaniel*; it is *conduct* rooted in or prompted by religious belief.[120] As opposed

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116. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

117. *E.g.*, Note, *Emotional Distress by Spiritual Counselors*, *supra* note 75, at 1297 n.6.

118. *See, e.g.*, Comment, *Bad News for the Good Samaritan*, *supra* note 11, at 218 (pastoral counseling is the application of religious insight to the common everyday problems parishioners face) (citations omitted); Comment, *Made Out of Whole Cloth?*, *supra* note 5, at 535 ("Pastoral counseling, for which ministers are accountable to religious bodies, and in which they seek to sanctify souls and bring persons into a relationship with God . . . may be considered arguably 'religious.' ").

119. McDaniel v. Paty, 435 U.S. 618, 626 (1978) (plurality opinion) (emphasis added) (citations omitted).

120. *See* Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 713 (1981).

to pure religious belief, religious conduct "remains subject to regulation for the protection of society."[121]

A number of Supreme Court decisions have set forth the same basic inquiry in determining when the free exercise clause[122] has been violated. The first step requires the party alleging an infringement to "show the coercive effect of the [government action] as it operates against him in the practice of his religion."[123] If the state action is shown to be coercive, the state must then "justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."[124]

Accordingly, the threshold question one must ask is whether a duty to refer is "coercive." A duty to refer may force the pastor to choose between continuing the counseling applicable to a suicide prone counselee and facing liability on the one hand, and abandoning one of his religious duties by referring the counselee to a psychiatrist, on the other hand.[125] Proponents of clergy malpractice would argue that a duty to refer is *only* coercive if incompatible with a denomination's particular religious beliefs.[126] However, in *Thomas v. Review Board of the Indiana Employment Secretary Division*, the United States Supreme Court made it clear that a burden on religion also arises whenever a government action creates substantial pressure to forego a religious practice.[127] *Thomas* sustained a free exercise clause challenge to the state's withholding of welfare benefits from a man who refused on religious grounds to work in a munitions shop, even though state law did not require the man to perform that particular type of work. The Court found that while the compul-

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121. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (citing Reynolds v. United States, 98 U.S. 145 (1878)).

122. U.S. CONST. amend. I, cl. 2.

123. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963). BLACK'S LAW DICTIONARY 234 (5th ed. 1979) defines "coercion," in part, as "[c]ompulsion; constraint."

124. *E.g.*, United States v. Lee, 455 U.S. 252, 257-58 (1982).

125. *Cf.* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (the State's disqualification of plaintiff "force[d] her to choose between following the precepts of her religion and forfeiting benefits . . . and abandoning one of the precepts of her religion in order to accept work.").

126. *See, e.g., Nally II*, 240 Cal. Rptr. at 232-33.

127. *Thomas*, 450 U.S. at 717. *See also* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it *unduly burdens* the free exercise of religion.") (emphasis added).

sion was indirect, the free exercise infringement was substantial enough to trigger the free exercise clause.[128]

The duty to refer would in many instances impose substantial pressure on the clergy to forego the counseling of mentally disturbed parishioners. As discussed under the previous subsection, a duty to refer would necessarily create a threat of litigation[129] as well as a fear of potential liability,[130] and undermine the confidentiality of the counseling relationship. Confidentiality is the hallmark of a pastoral-counselee relationship upon which the clergy depend for the effectiveness of their counseling.[131] Moreover, *Nally II*'s infringement on religion would not only discourage pastors from providing counseling,[132] but may also prevent suicide prone individuals from seeking it because of a risk of disclosure. Accordingly, both the pastor and the parishioner's free exercise rights of religion may be infringed upon by a duty to refer. In any event, the overall inhibition to pastoral counseling seems sufficiently coercive to trigger a free exercise infringement analysis with respect to a pastor who engages in religious counseling.

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128. *Thomas*, 450 U.S. at 718.

129. Comment, *Made Out of Whole Cloth?*, *supra* note 5, at 536, argues that the tort system based on fault is inherently coercive because "[t]he prospect of liability compels adherence to the [relevant] standard [of care] and restrains individual action." *See also* Comment, *Emotional Distress by Spiritual Counselors*, *supra* note 75, at 1309 (the threat of litigation may persuade some ministers to dilute their message to include the same basic secular doctrines already available from their secular counterparts).

130. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336 (1987) ("Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission."). Perhaps it could be argued that clergy malpractice insurance relieves the fear of liability; yet, a deep pocket like Church Mutual Insurance Company may persuade plaintiffs to overcome their reluctance to sue. *See* Carey, *Faith and the Law*, Wall St. J., Apr. 9, 1985, at 1, col. 1 (the inhibition to sue the clergy has left completely). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 80 (Supp. 1979) ("As the notion of what is religious expands . . . and as more diverse forms of religious consciousness emerge, the number of confrontations between religion and an increasingly pervasive state must grow.") (footnote omitted).

131. *See, e.g.*, Comment, *Clergy Malpractice*, *supra* note 105, at 236 (citing Bernstein, *supra* note 103, at 57). The importance of confidentiality in the pastoral-counselee context remains regardless of whether or not a state has enacted a statute embodying a clergy-penitent privilege protecting confessions or other similar disclosures.

132. Given the uncertainty in predicting suicidality and the imposition of a negligence standard (which is inherently imprecise), the chilling effect on the extent and content of pastoral counseling is likely to be substantial. *See* Brief for Amicus Curiae, Church of Jesus Christ of Latter-Day Saints, at 11, Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988) (No. SOO2882) [hereinafter Brief for Amicus Curiae].

Given that a duty to refer is coercive, the interest of the state in preserving the safety and well being of its citizens, in this case a counselee, must be sufficiently compelling to justify the burden on pastoral counselors.[133] *Nally II* found that government was firmly committed to the prevention of suicide, because like murder, it produces "the same result—the premature death of a healthy human being."[134] If a government's primary responsibility is the welfare of its citizens, a good argument can be made that suicide prevention overrides any interference or inconvenience a duty to refer may impose on the excercise of religion.[135]

But even if preventing suicide is a compelling enough interest to regulate pastoral counseling relationships, the means chosen must be necessary to effectuate that purpose.[136] Thus, referral by nontherapists to licensed therapists must reduce the number of suicides. Plaintiffs in *Nally II* provided no support for this assumption. Without evidence indicating otherwise, licensed "psychotherapists, on the whole, may be *less* effective at preventing suicide than their religious counterparts."[137] In fact, *Nally III* itself supports this assumption: "the licensed therapists who treated Nally were no more successful in preventing suicide than the pastors at Grace Church."[138] As amicus curiae pointed out, referral to licensed psychotherapists may even increase the number of suicides, rather than reduce them, as suicide prone individuals may refrain from confiding in pastors out of a fear of institutionalization, and in many cases be left with no one to turn to.[139] "The Joint Commission on Mental Illness and Health reported that in times of emotional or domestic trouble forty-two percent of individuals consult clergymen, twenty-nine percent seek help from physicians, eighteen percent consult psychiatrists or psychologists, and ten percent turned to

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133. *See supra* text accompanying note 124.

134. *Nally II*, 240 Cal. Rptr. at 234-35. *See also Nally III*, 47 Cal. 3d at 313, 763 P.2d at 970, 253 Cal. Rptr. at 119 (Kaufman, J., concurring) ("[S]ociety's interest in preserving the life of a would-be suicide is as profound as its interest in preserving life generally.").

135. *See Nally II*, 240 Cal. Rptr. at 229 (a duty to refer does not prohibit or prevent a pastoral counselor from continuing his counseling services to the parishioner, even if the parishioner is subsequently hospitalized pursuant to the referral).

136. *See supra* text accompanying note 124.

137. Brief for Amicus Curiae, *supra* note 132, at 15.

138. *Id.*

139. *Id.*

clinics or other social agencies."[140] As was the case with Nally, "these statistics reflect the view that the clergyman and family doctor are the first line of defense against mental illness."[141]

The California legislature has implicitly indicated in the state's penal code that there are less restrictive means available to the state to protect the safety and well being of its citizens.[142] California Penal Code section 401 makes it a crime in California to intentionally aid, advise or encourage another to commit suicide.[143] It seems apparent that "[c]urtailing *deliberate* conduct that aids and abets suicide is much more likely to reduce suicides than merely imposing liability for negligent . . . *failure* to take steps that *might* have prevented a suicide."[144] Effective enforcement of Section 401 of California's Penal Code in conjunction with potential liability for intentional torts would likely protect the state's interest[145] while creating a much smaller burden on the free exercise of religion.[146] Moreover, there are other less burdensome alternatives to a duty to refer which may be just as effective. State governments, for example, could promote volunteer cooperation between nontherapists and licensed therapists without creating a chilling effect on pastoral counseling. And, consultation networks could provide the clergyman and other nontherapist counselors with a vital lifeline to mental health resources to be used when the pastor feels overwhelmed or limited in his capacity to treat a disturbed parishioner.[147]

In short, plaintiffs in *Nally III* could not show that a duty to refer was essential to the state's interest in protecting the welfare of its citizens. In order for a duty to refer to survive the heightened judicial scrutiny demanded by the free exercise clause, favorable and reliable studies on the effectiveness of pastoral counseling as compared with psychiatric counseling would first need to be produced.

b. The establishment clause. A duty to refer in the context of pastoral counseling may also be attacked under the establish-

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140. Comment, *Bad News for the Good Samaritan*, *supra* note 11, at 219.

141. *Id.*

142. Brief for Amicus Curiae, *supra* note 132, at 16.

143. CAL. PENAL CODE § 401 (West 1988).

144. Brief for Amicus Curiae, *supra* note 132, at 16 (emphasis in original).

145. *Nally II* argued that section 401 evidenced California's "especially strong public commitment to suicide prevention." *Nally II*, 240 Cal. Rptr. at 235.

146. *See* Brief for Amicus Curiae, *supra* note 132, at 16.

147. *Cf.* Comment, *Bad News for the Good Samaritan*, *supra* note 11, at 221-22.

ment clause of the first amendment.[148] The United States Supreme Court set forth the meaning of the establishment clause in *Everson v. Board of Education*.[149] It stated, in part: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[150] In *Lemon v. Kurtzman*,[151] the Court enunciated the general test used in determining whether or not a governmental body has violated the establishment clause. In order for the action of a state to be upheld, 1) the purpose of the state action must be secular, 2) its primary effect must neither aid nor inhibit religion, and 3) it may not result in excessive entanglement with religion.[152] All three prongs must be satisfied and are thus analyzed separately.

Alone, *Nally II*'s duty to refer is religiously neutral,[153] and thus it has a secular purpose. This fact would not change if the duty to refer were managed based on standardized clinical training or pursuant to a reasonable man standard, since the evaluation process would be neutral under both of these standards (as compared with one based on individual clergy training). "*Lemon*'s 'purpose' requirement [only] aims at preventing the relevant governmental decisionmaker—in this case, Congress—from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters."[154] Hence, the first prong of *Lemon*'s analysis creates no visible obstacle to imposing a duty to refer on pastoral counselors.

Based on *Everson*[155] and *Lemon*'s second prong, the principal effect of the standard employed to regulate pastoral counseling must neither aid nor inhibit religion, or prefer one religion over another. If standardized clinical training were required, the cost incurred by denominations in acquiring the basic clinical training may impact small sects to a greater extent than the well established religions. The enforcement of a state created standard of care could also hinder the ability of a religious sect to

148. U.S. CONST. amend. I, cl. 1.

149. 330 U.S. 1 (1947), *reh'g denied*, 330 U.S. 855 (1947).

150. *Id.* at 15.

151. 403 U.S. 602 (1971).

152. *Id.* at 612-13.

153. *See supra* text accompanying notes 89-90.

154. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987).

155. *See supra* text accompanying note 149.

direct its training and the development of its clergy.[156] However, "[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced [or inhibited] religion through its own activities and influence."[157] The foregoing effects created by a duty to refer would be secondary and indirect, and arguably non-violative of *Lemon*'s second prong.[158]

As with *Lemon*'s first prong, the neutrality inherent in both a duty to refer and an accompanying reasonable man or standardized clinical training standard should satisfy *Lemon*'s third prong, that of no excessive entanglement with religion. In *Lemon*, for purposes of comparison, the court held that state inspection and evaluation of the *content* of a religious organization's school records is "fraught with the sort of entanglement that the Constitution forbids."[159] Nonetheless, it may be argued that even a standard neutral on its face still regulates pastoral counseling and affects the training of ministers, resulting in excessive church-state entanglement. In *Fowler v. Rhode Island*,[160] the Supreme Court declared, "it [is not] in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate or in any manner control sermons delivered at religious meetings."[161] Pastoral counseling is, like a sermon, religious instruction delivered to parishioners; the real difference between the two lies in the number of recipients.

However, the Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."[162] As the Court stated in a recent case, "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.' "[163] Entanglement be-

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156. Surman, *Supervising the Pastoral Counselor*, 1 J. SUPERVISION & TRAINING IN MINISTRY, 63, 64 (1978).

157. *Amos*, 483 U.S. at 337 (emphasis in original).

158. *See* Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970) ("[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and *active* involvement of the sovereign in religious activity.") (emphasis added).

159. *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971).

160. 345 U.S. 67 (1953).

161. *Id.* at 70. *See also Lemon*, 403 U.S. at 625.

162. Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 144-45 (1987) (footnote omitted).

163. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-

tween church and state is not as bothersome when it uniformly affects all religions, as would be the case if standardized clinical training were required or a duty to refer were subject to the reasonable man standard. Thus, unlike the free exercise clause, whether the establishment clause bars the creation of a duty of care in the pastoral context may depend in large part on what standard of conduct the courts would adopt to measure the breach of such a duty. Greater interference with religion is permitted under the establishment clause (as long as it is uniform);[164] it is therefore likely a free exercise infringement defense to a claim of clergy malpractice would have greater chances of success.

IV. CONCLUSION

Nally III could have sustained a duty to refer without offending California precedent if it were determined solely as a matter of induced reliance on the counseling of a minister who holds himself out as competent to treat suicidality. There are, however, policy problems and constitutional concerns associated with creating a duty to refer. It may be possible to devise a manageable standard of care to determine when the duty to refer and its subsequent breach would arise. But a reasonable man standard may be imprecise and unmanageable; and, the most promising standard of care, that of standardized clinical training, risks secularizing pastoral counseling. More importantly, regardless of the standard of conduct adopted, the possible chilling effect on counseling constitutes 1) a strong policy against the development of a theory of clergy malpractice and 2) a possible free exercise infringement. This "chilling effect" could be effectively countered through systematic studies proving the ineffectiveness of counseling with regard to suicide prone individuals. Such studies would buttress *Nally II*'s argument that a state's interest in preventing suicidality is compelling, as well as prove that a duty to refer was essential to its accomplishment. Without such evidence,[165] there are other less burdensome

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Day Saints v. Amos, 483 U.S. 327, 334 (1987) (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970)).

164. *See Walz*, 397 U.S. at 673. ("The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.").

165. Ironically, the necessary statistical information may never become available unless a duty of care is first imposed.

alternatives available to a state to prevent suicides, which may be as effective as a duty to refer.

In sum, because *Nally III*'s holding is in part fact specific and sustained by a rather broad but limited analysis, future California malpractice cases may be distinguished from *Nally III*. In those instances, the California Supreme Court may be forced to reach the first amendment issues inherent in pastoral counseling if it desires to successfully foreclose clergy malpractice liability. In this respect, the free exercise clause seems to provide more protection than the establishment clause.

Greg Slater