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# STUDENT ARTICLE

## “BLESS ME FATHER, FOR I AM ABOUT TO SIN . . .”: SHOULD CLERGY COUNSELORS HAVE A DUTY TO PROTECT THIRD PARTIES?

Terry Wuester Milne\*

### I. INTRODUCTION

When a young mother confides in her minister that she abuses her baby while her husband is away, must the minister notify the husband or call a child abuse hotline? When a man who believes his wife is “cheating” calls his priest to tell him that he plans to kill his wife, must the priest take any action? If a member of an unorthodox religion which advocates “free love” among members tells his spiritual counselor that he has contracted AIDS, must the counselor warn other adherents?

In the well known case of *Tarasoff v. Regents of the University of California*<sup>1</sup> (*Tarasoff*), the Supreme Court of California held that in similar situations a legally enforceable affirmative duty could be imposed upon psychotherapists. The first *Tarasoff* decision<sup>2</sup> (*Tarasoff* I) held that the relationship between a psychotherapist and patient imposed a duty upon the therapist to *warn* a potential victim of danger.<sup>3</sup> Two years later, however, the court issued a superseding opinion<sup>4</sup> which modified the initial holding and imposed a duty upon therapists to use reasonable

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1. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (en banc).

2. 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974) (en banc), *vacated*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (en banc).

3. *Id.* at \_\_\_, 529 P.2d at 561, 118 Cal. Rptr. at 137.

4. *Tarasoff*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (en banc).

care to protect third parties from danger posed by a patient.<sup>5</sup>

*Tarasoff* has already generated volumes of legal analysis.<sup>6</sup> The decision has been distinguished,<sup>7</sup> extended,<sup>8</sup> and explained.<sup>9</sup> However, the potential for imposing a similar duty upon members of the clergy, who function as counselors, has not been thoroughly explored.<sup>10</sup> No pub-

5. *Id.* at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25.

6. The nationwide attention which this case has received is remarkable considering the fact that the majority of states have not yet had an opportunity to decide whether their therapists will be subject to a *Tarasoff* duty. Various fact situations make it difficult to determine how many states have addressed the *Tarasoff* issue, but between 1976 and 1986, approximately 10 states made such determinations. See *infra* notes 7-9.

7. *Thompson v. County of Alameda*, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980) (no duty to warn where county released juvenile delinquent who killed child within 24 hours of release because juvenile had made only nonspecific threats of harm toward nonspecific victims); *Bellah v. Greenson*, 73 Cal. App. 3d 911, 141 Cal. Rptr. 92 (1977) (psychiatrists not liable for failing to warn parents that daughter who killed herself had threatened suicide), *modified*, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978); *Shaw v. Glickman*, 45 Md. App. 718, 415 A.2d 625 (1980) (psychiatrists treating members of love triangle incurred no liability for failing to warn one member when no threat was revealed to therapist and such a warning would have violated doctor-patient privilege). See also *Hawkins v. King County, Dep't of Rehabilitation Serv.*, 24 Wash. App. 338, 602 P.2d 361 (1979) (attorney, who was unaware of client's propensities, owed no duty to warn where client posed no threat to specific identifiable person).

8. *Jablonski v. United States*, 712 F.2d 391 (9th Cir. 1983) (psychiatric patient threatened victim directly, but apparently never made specific threats directed at victim during counseling; court nonetheless held that therapists failed to protect a potential victim); *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185 (D. Neb. 1980) ("foreseeable violence" is not limited to identified, specific victims, but may involve a class of persons at risk); *Hedlund v. Superior Court*, 34 Cal. 3d 695, 669 P.2d 41, 194 Cal. Rptr. 805 (1983) (liability extended to provide recovery for injuries to young child of threatened victim on basis that when patient makes threat to victim, injury to victim's child is also foreseeable); *Bradley Center v. Wessner*, 250 Ga. 199, 296 S.E.2d 693 (1982) (person in voluntary commitment program received unrestricted weekend pass, left hospital, and shot wife and her lover; court recognized therapist's duty to control a voluntarily committed patient if therapist foresees patient will harm others); *McIntosh v. Milano*, 168 N.J. Super. 466, 403 A.2d 500 (1979) (*Tarasoff* type duty discussed in context of practitioners and physicians); *Peterson v. State*, 100 Wash. 2d 421, —, 671 P.2d 230, 237 (1983) (psychiatrist who released in-patient held liable on basis that therapist "incurred a duty to take reasonable precautions to protect anyone who might foreseeably be endangered by [the patient's] drug-related mental problems"). See also *Sands, The Attorney's Affirmative Duty to Warn Foreseeable Victims of a Client's Intended Violent Assault*, 21 TORT & INS. L.J. 355 (1986); *Steinbach, AIDS ON CAMPUS: Emerging Issues for College and University Administrators*, 16 N.A.C.U.A. 113, 119-20 (1986).

9. See *Stone, The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976); *Givelber, Bowers, & Blitch, Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443. See also *Comment, Psychotherapists' Duty to Warn: Ten Years After Tarasoff*, 15 GOLDEN GATE UNIV. L. REV. 271 (1985) (proposing a model statutory duty to protect); *Schopp & Quattrocchi, Tarasoff, the Doctrine of Special Relationships and the Psychotherapist's Duty to Warn*, 12 J. PSYCHIATRY & L. 13 (1984); *Comment, From Tarasoff to Bradley: Courts Struggle to Apply the Duty to Control Mental Patients*, 14 CUM. L. REV. 165 (1984); *Comment, The Dangerous Patient Exception and the Duty to Warn: Creation of a Dangerous Precedent?*, 9 U.C.D. L. REV. 549 (1976).

10. The focus of this article is upon information learned while the clergyperson is engaged in "counseling" as opposed to formal "confession." See *infra* note 13. It has been suggested that "[a] clergyman should, like the psychiatrist in *Tarasoff*, be required to disclose confidential communications when harm to innocent parties is threatened and imminent." *Yellin, The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 144 (1983).

lished opinions have yet examined this issue.<sup>11</sup> One may predict, however, that courts will be confronted with the issue of such an extension given the combination of an increasingly litigious society and the fact that many persons no longer have qualms about suing members of the clergy.<sup>12</sup>

If courts were confronted with the issue of whether to extend a duty to protect third parties to clergy counselors, the court's analysis would most likely focus on the common law background of affirmative duties, the facts of the *Tarasoff* case, and the rationale followed by the *Tarasoff* court in its construction of the therapist's duty to protect potential victims. In light of these factors and because of the significant difficulties which arise out of *Tarasoff* as they might apply to clergy counselors,<sup>13</sup> an affirmative duty to protect or warn third parties should not be extended to clergy counselors.

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11. *But see* Sands, *supra* note 8, at 368-69 & nn.75-77 (citing *Neufang v. Aetna Casualty & Surety*, No. 81-08118-CS, Fla. Cir. Ct., Broward County (filed Apr. 29, 1981)) where a Baptist minister was sued for failing to take action to warn, protect, or otherwise prevent a counselee from causing injury to the plaintiff counselee's wife. The court granted the defendant's motion for summary judgment on the basis that the counselee's violent nature was open, obvious, and known to the counselee's wife.

12. *See* McMenamain, *Clergy Malpractice*, 90 CASE & COM., Sept.-Oct. 1985, at 3; L. GUMPER, LEGAL ISSUES IN THE PRACTICE OF MINISTRY 14 (1981).

13. Clergy counseling occurs when a person voluntarily discusses personal life concerns with his or her recognized spiritual advisor. Participation in such counseling is generally neither a requirement of one's faith nor an aspect of worship itself. Thus, counseling should be distinguished from such practices as formal "confessions" and other sacramental practices or rituals on the basis that the latter, while voluntary, are considered to be aspects of the practice of one's faith.

The term "clergy counselor" refers primarily to those who engage in a recognized spiritual leadership capacity on a full-time, professional basis. Therefore, this discussion does not necessarily encompass persons who may informally represent their faith in part-time and volunteer leadership positions as Sunday school teachers, deacons, or elders.

Throughout this article, it must be remembered that individual members of the clergy differ in vast respects, partly because fundamental tenets differ from faith to faith. In addition, various personal factors such as socio-economic background, educational attainment, and approaches to counseling vary widely, both from one faith to another, and frequently even within one well-recognized denomination.

The content of counseling given by clergy varies widely according to the beliefs of the parties engaged in the process. While most clergy counselors emphasize spiritual needs of their counselee, in practice, clergy counseling also encompasses discussion of a wide variety of physical and emotional problems. Issues relating to the *content* of counsel given by the clergyperson are not addressed in this article, but were raised in *Nally v. Grace Community Church*, 157 Cal. App. 3d 912, *withdrawn*, 204 Cal. Rptr. 303 (1984). In that case, the parents of a young man, who committed suicide after extensive counseling by the staff of Grace Church, sued the minister and the church on the basis of clergy negligence and outrageous conduct. A motion for summary judgment was granted in favor of the defendants, but the case eventually went to the California Supreme Court, which refused to issue a written opinion. *See* McMenamain, *Clergy Malpractice*, 90 CASE & COM., Sept.-Oct. 1985, at 3, 6.

## II. THE DUTY ESTABLISHED IN *TARASOFF*

### A. *Common Law Background*

At early common law, imposition of liability for failure to warn a third party was virtually unknown<sup>14</sup> because legal duty was based upon a distinction between "action" and "inaction."<sup>15</sup> Action or "misfeasance" by a party constituted active misconduct which created positive injury to another for which the law recognized liability. In contrast, inaction or "nonfeasance" was passive, and a mere failure to take affirmative steps to protect another from harm supported no liability.<sup>16</sup> The rationale supporting this distinction lay "in the fact that by 'misfeasance' the defendant . . . created a new risk of harm to the plaintiff, while by 'nonfeasance' [the defendant] . . . at least made [the plaintiff's] situation no worse, [the defendant] . . . merely failed to benefit him by interfering in his affairs."<sup>17</sup>

The misfeasance-nonfeasance distinction continues to provide much of the basis of tort law today, as evidenced in the Restatement of Torts. Specifically, the general rule of nonliability for nonfeasance is stated in section 314: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."<sup>18</sup>

However, exceptions to this doctrine have been recognized. In a limited number of situations, courts have recognized certain special relationships between individuals when custom, public sentiment, or views of social policy<sup>19</sup> have dictated recognition of an affirmative duty to act. Special relationships have been recognized when either potential or actual economic advantage to one party exists which justifies the imposition of an affirmative obligation.<sup>20</sup> The Restatement lists certain "special relationships" which support various affirmative duties such as the relationship between (1) a carrier and passenger,<sup>21</sup> (2) an innkeeper and guest,<sup>22</sup> (3) a possessor of property and invitee,<sup>23</sup> and (4) one who takes

14. "[C]ourts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing even though another might suffer harm because of his omission to act." W. PROSSER & R. KEETON, *THE LAW OF TORTS* 373 (5th ed. 1984) [hereinafter PROSSER & KEETON].

15. *Id.*; see also *Tarasoff*, 17 Cal. 3d at 436 n.5, 551 P.2d at 343 n.5, 131 Cal. Rptr. at 23 n.5.

16. See PROSSER & KEETON, *supra* note 14, at 338-39.

17. PROSSER & KEETON, *supra* note 14, at 373.

18. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

19. See PROSSER & KEETON, *supra* note 14, at 374.

20. *Id.* (citing McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272 (1949)).

21. RESTATEMENT (SECOND) OF TORTS, § 314A(1) (1965).

22. *Id.* at § 314A(2).

23. *Id.* at § 314A(3).

control of another and one who is controlled.<sup>24</sup> The Restatement comment to this section indicates that the list is not intended to be exclusive, but to provide examples only. The comment further acknowledges that tort law is in a state of flux and may in fact be progressing toward a "recognition of the duty to aid or protect in any relation of dependence or of mutual dependence."<sup>25</sup>

Despite the Restatement's prediction of an increasing recognition of duty, many courts have been reluctant to impose affirmative duties because of the myriad social policy implications of such changes.<sup>26</sup> For a variety of such reasons, liability for failure to act has been infrequently imposed outside these recognized relationships. Therefore, the enumerated list above has formed the standard in this area of American law for decades. Accordingly, it is little wonder that the novel duty first recognized in *Tarasoff* came as a shock to the legal community.

### B. *The Tarasoff Decision*

In 1969, Mr. Prosenjit Poddar, an international student, received counseling from a staff psychologist employed at the University of California Berkeley Hospital.<sup>27</sup> During the course of therapy, Poddar discussed his unrequited love and expressed fantasies of harming, or perhaps even killing, a woman who had rejected his advances. Although he never mentioned Ms. Tarasoff by name, it was clear that she was his intended victim based on identifying references made by Poddar.<sup>28</sup>

Immediately after this particular appointment, the psychologist reported the statements to two of his superiors, who were psychiatrists. A joint decision was made to notify the campus police of Poddar's propensities and to enlist their help in effecting an emergency commitment under a new state commitment statute.<sup>29</sup> The police successfully located Poddar, but after talking with him, concluded that he was "rational." They released him upon his promise to stay away from Ms. Tarasoff.

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24. *Id.* at § 314A(4).

25. *Id.* at § 314A comment b.

26. Three states, Vermont, Minnesota, and Rhode Island, have criminal statutes which impose a general duty, under limited conditions, to rescue another in peril. PROSSER & KEETON, *supra* note 14, at 375 n.21. For a historical and comparative discussion of criminal provisions for failure to rescue, see Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630 (1967).

27. *Tarasoff*, 17 Cal. 3d at 431, 551 P.2d at 339, 131 Cal. Rptr. at 19.

28. *Id.* at 433, 551 P.2d at 341, 131 Cal. Rptr. at 21.

29. The Lanterman-Petris-Short Act, CAL. WELF. & INST. CODE §§ 5000-5550 (West 1984). At the time of the therapists' decision to pursue Poddar, the statute had been in effect for only two months.

When the psychiatric staff, which made the original decision to enlist the help of police, learned that Poddar had been released, they conferred with the director of psychiatry at the hospital. The director, also a psychiatrist, specifically ordered that no further action be taken to pursue Poddar.<sup>30</sup> Poddar did not return for psychological treatment. Two months later, after Ms. Tarasoff returned to California from an extended vacation, Poddar murdered her.

Ms. Tarasoff's parents originally brought an action to recover for their daughter's death against three parties: the campus police, the therapists involved in Poddar's case, and the therapists' employer, the Regents of the University of California. The complaint essentially predicated liability on two grounds: the defendants' failure to warn Ms. Tarasoff or others who likely would have apprised her of the danger, and their failure to bring about Poddar's formal commitment.<sup>31</sup> All defendants responded by asserting absence of a special duty of care to Ms. Tarasoff and asserting immunity from suit under the California Tort Claims Act.<sup>32</sup> The California Superior Court sustained the defendants' demurrers which led to the appeal to the California Supreme Court.

The supreme court made two initial findings concerning the plaintiffs' pleaded cause of action. First, noting that the plaintiffs had not pleaded any "relationship between Poddar and the police defendants which would impose upon them any duty to Tatiana [Tarasoff],"<sup>33</sup> the court upheld the demurrer of the campus police. Second, the court held that the therapists could claim immunity for their failure to have Poddar committed.<sup>34</sup> However, the court also noted that no specific statutory provision shielded the therapists, or the Regents as their employer, from liability for failing to warn Ms. Tarasoff, or those likely to contact her, of the imminent danger.<sup>35</sup> Thus, the court laid the groundwork which would allow it to find liability under a newly recognized duty.

The court did acknowledge the general common law rule that a person has neither a duty to control the conduct of another nor to warn those endangered by another's act.<sup>36</sup> However, the decision then mentioned sections 315-320 of the Restatement of Torts, which address the

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30. *Tarasoff*, 17 Cal. 3d at 433, 551 P.2d at 341, 131 Cal. Rptr. at 21.

31. *Id.* at 433-34, 551 P.2d at 341-42, 131 Cal. Rptr. at 22.

32. *Id.* at 432, 551 P.2d at 340, 131 Cal. Rptr. at 20.

33. *Id.*

34. *Id.* The therapists' immunity was based on the fact that they were public employees. Their failure to confine Poddar was a decision protected by statute. *Id.*

35. *Id.*

36. *Id.* at 436, 551 P.2d at 343, 131 Cal. Rptr. at 23.

duty to control actions of another, and noted that certain "special relationship[s]" invoke well-recognized exceptions to the general rule.<sup>37</sup> Specifically, the court found that the patient-therapist relationship was sufficient to support affirmative duties for the benefit of third persons.<sup>38</sup> To support that holding, the court looked to cases which recognized that a physician has a "duty to exercise reasonable care to protect others against dangers emanating from [his] patient's illness."<sup>39</sup> As further support, the court quoted a law review article which stated that a psychotherapist, by entering into a doctor-patient relationship, becomes sufficiently involved to assume responsibility for the safety of not only the patient himself, but also of any third person whom the doctor knows to be threatened by the patient.<sup>40</sup>

The court then addressed two key arguments advanced by the therapist defendants. The therapists' first contention, supported by an amicus curiae brief from the American Psychiatric Association, claimed that imposition of a duty to protect third persons was impracticable because therapists generally lack the ability to accurately predict whether a patient will become violent.<sup>41</sup> The court responded by analogizing a therapist to a general physician who must regularly make predictions on the basis of a diagnosis. However, the court did note that the applicable standard of care would not require a therapist to make an accurate prediction in every case because the standard requires only that a therapist exercise the reasonable degree of care ordinarily possessed and exercised by other therapists under similar circumstances.<sup>42</sup> The court considered the possibility of inaccurate or unnecessary warnings, but concluded that the risk that "unnecessary warning may be given is a reasonable price to

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37. *Id.*

38. *Id.* at n.6.

39. *Id.* at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24.

40. *Id.* at 438, 551 P.2d at 344, 131 Cal. Rptr. at 24 (quoting Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1030 (1974)).

41. *Tarasoff*, 17 Cal. 3d at 437-38, 551 P.2d at 344, 131 Cal. Rptr. at 24. Amici briefs, representing several professional societies, presented numerous articles which indicated that "therapists, in the present state of the art, are unable reliably to predict violent acts; their forecasts . . . tend consistently to overpredict violence, and indeed are more often wrong than right." *Id.* Justice Mosk, in a separate opinion, cited *People v. Burnick*, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975) in which the California Supreme Court itself had previously held that psychotherapists' predictions of violence were unreliable in the context of commitment proceedings for sex offenders. *Tarasoff*, 17 Cal. 3d at 451, 551 P.2d at 353, 131 Cal. Rptr. at 33 (Mosk, J., concurring and dissenting). Note, however, that in *Tarasoff*, the defendant therapists *had* accurately predicted the dangerousness of Mr. Poddar. Thus, the "inability to predict dangerousness" argument was irrelevant in that case.

42. *Tarasoff*, 17 Cal. 3d at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25.

pay for the lives of possible victims that may be saved.”<sup>43</sup>

Secondly, the defendants argued that requiring a therapist to warn others would necessitate disclosure of confidential communications,<sup>44</sup> thus potentially chilling effective psychotherapy. Understandably, a patient may be reluctant to confide in or to trust a therapist if the patient knows that the therapist is obligated to disclose to others certain aspects of the conversation.<sup>45</sup> In addition, one who is initially considering therapy may be entirely dissuaded from seeking help because of similar qualms over mandatory disclosure. If such persons go untreated, the end result may be that truly dangerous persons would not obtain help. The court responded to that line of argument by weighing those concerns against the public interest in safety from violent assault. The court concluded that the newly established duty must prevail.<sup>46</sup>

In support of the court's policy balancing, which heavily favored public safety, it cited section 1024 of the California Evidence Code.<sup>47</sup> The section, which is an exception to the general psychotherapist-patient evidentiary privilege, provides that a therapist *may* testify concerning details of therapist-patient communications, notwithstanding the usual privilege, when the therapist has reasonable cause to believe that the patient is dangerous. While the evidentiary provision does not mandate an affirmative duty to disclose, the court felt that it provided a reliable indication of the legislative policy regarding the balance between confidentiality and public safety.<sup>48</sup> Thus, the court concluded that “the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.”<sup>49</sup>

*Tarasoff* held that “once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that dan-

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43. *Id.* at 440-41, 551 P.2d at 346, 131 Cal. Rptr. at 26.

44. *Id.* at 441-43, 551 P.2d at 346-47, 131 Cal. Rptr. at 26-27.

45. *Id.* at 441, 551 P.2d at 346, 131 Cal. Rptr. at 26 (citing *In re Lifschutz*, 2 Cal. 3d 415, 431-34, 467 P.2d 557, 567-69, 85 Cal. Rptr. 829, 839-41 (1970)).

46. *Tarasoff*, 17 Cal. 3d at 443, 551 P.2d at 347, 131 Cal. Rptr. at 27.

47. *Id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27. See *infra* note 75 for the text of this statute.

48. *Tarasoff*, 17 Cal. 3d at 441-42, 551 P.2d at 346-47, 131 Cal. Rptr. at 26-27.

49. *Id.* at 443, 551 P.2d at 347, 131 Cal. Rptr. at 27.

ger.”<sup>50</sup> As previously indicated, discharge of this duty does not necessarily require that the therapist warn the victim. The court, however, provided little guidance as to what is required to fulfill this duty, and stated merely that the “discharge of this duty of care will necessarily vary with the facts of each case.”<sup>51</sup>

### III. APPLYING *TARASOFF* TO A POTENTIAL CLERGY “DUTY TO PROTECT”

#### A. *Difficulties Concerning the Lack of Clergy Control over a Counselee*

Although it is clear that *Tarasoff* recognizes a duty to protect based upon the “special relationship” between a patient and a therapist, the opinion does not provide a cogent explanation of why this particular relationship is “special.” The court based its opinion on the fact that psychiatrists and psychologists exercise “control” over their patients.<sup>52</sup> However, close analysis of *Tarasoff* reveals that the “control” rationale articulated was inappropriately applied to the facts of that case because the psychotherapists had virtually no control over their patient. Thus, although the court was able to articulate a rationale in support of its determination that a patient-therapist relationship is special, this rationale was inapplicable to the very facts of *Tarasoff*. A “control” rationale is even less applicable to clergy counseling.

The court in *Tarasoff* stated that it followed a line of cases that if “the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct,”<sup>53</sup> then a duty is created, citing Restatement section 315.<sup>54</sup> The opinion then noted four sections of the Restatement which illustrate other generally recognized “special relationships.”<sup>55</sup> In these relationships, the very fact that one person is in a position to exercise control over the actions of another is the basis of the imposition of the duty. Parents, for example, are under a duty to control their child and to prevent the child from intentionally harming another.<sup>56</sup> An em-

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50. *Id.* at 440, 551 P.2d at 345, 131 Cal. Rptr. at 25.

51. *Id.*

52. *Id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.

53. *Id.*

54. RESTATEMENT (SECOND) OF TORTS § 315 (1965). This section does describe a recognized duty to control conduct of a third person, but neither the text nor the accompanying comments provide assistance in recognizing the existence of a special relationship in a given factual situation.

55. *Tarasoff*, 17 Cal. 3d at 436, 551 P.2d at 343, 131 Cal. Rptr. at 23.

56. RESTATEMENT (SECOND) OF TORTS § 316 (1965).

ployer, in many circumstances, must prevent an employee from harming others, even while the employee is acting outside the scope of employment.<sup>57</sup> One who is in possession of land has a similar duty to protect licensees upon his land from danger imposed by third parties if the possessor has the ability to control the third person.<sup>58</sup> Additionally, "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."<sup>59</sup>

Although *Tarasoff* does not expressly draw parallels between these sections and the therapist-patient relationship, the decision makes an implicit assumption that a psychotherapist has at least some measure of control over a patient. This "control" was the basis articulated by the court for a duty to a third person who may be harmed by the patient.

The opinion made no attempt to define the nature or degree of control which it assumed the therapists possessed, nor did it delineate the amount of control which might be necessary in other cases to support such a duty. This omission has been criticized by commentators as a serious oversight.<sup>60</sup> Specifically, *Tarasoff* does not distinguish between in-patient and out-patient psychotherapy. In in-patient therapy (commitment), imposition of a duty based upon control is logical because therapists and other mental health workers routinely exercise actual control over such patients.<sup>61</sup> In fact, the majority of cases cited in *Tarasoff* as supporting the duty to control involved such situations.<sup>62</sup>

*Tarasoff* itself, however, involved a voluntary out-patient who was not subject to his therapist's control. A major problem with the holding in this situation is that a therapist who is confronted with a potentially dangerous out-patient has few options to exert "control" over the patient. If the patient is not receptive to the suggestion of voluntary commitment, the only alternative which allows direct control is initiation of involuntary commitment proceedings.<sup>63</sup>

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57. *Id.* at § 317.

58. *Id.* at § 318.

59. *Id.* at § 319.

60. See, e.g., Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358, 365-66 (1976).

61. See, e.g., *Bradley Center v. Wessner*, 250 Ga. 199, 296 S.E.2d 693 (1982).

62. See, e.g., *Semler v. Psychiatric Inst.*, 538 F.2d 121 (4th Cir.), cert. denied, 429 U.S. 827 (1976); *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956); *Vistica v. Presbyterian Hosp. & Medical Center*, 67 Cal. 2d 465, 469, 432 P.2d 193, 196, 62 Cal. Rptr. 577, 580 (1967). See also Stone, *supra* note 60, at 365.

63. Statutes governing this procedure vary widely. Many states make provisions for short-term

Involuntary commitment is a difficult, time-consuming process which few mental health professionals, except licensed psychiatrists, can instigate. Even if commitment is achieved, a significant time gap may exist between the time the therapist decides that an individual is dangerous and the patient's actual commitment. If a therapist has little or no ability to control a patient, it is fundamentally unjust to impute control for the purpose of imposing liability.

It is even more difficult to support a special relationship based upon a "duty to control" in the typical clergy counselor-counselee situation. For example, if the counselee has never before met the clergyperson, clearly there is no pre-existing relationship to support a duty to control. However, even if the counselee and counselor have had some prior relationship, for example, where the counselee is a parishioner of the clergyperson, such a relationship hardly establishes a basis of control.<sup>64</sup>

During a counseling session, a clergyperson functions in many respects like a therapist dealing with an out-patient. Like the therapist, the clergy counselor exercises no direct control over the counselee. Although many clergy openly invoke divine assistance which may bring into play forces beyond both the counselor and counselee, it is difficult to argue that the counselor *personally* exerts direct control over the counselee. If a counselee manifests genuine signs of dangerous behavior, the clergyperson, like the therapist, may suggest voluntary commitment. If the counselee agrees, the counselor may exercise limited control based only upon the counselee's consent to be transported to a commitment facility. If, on the other hand, the counselee refuses a suggestion of voluntary commitment, the clergyperson has little more than psychological power of suggestion over a counselee.

Thus, a court that proceeded to extend a *Tarasoff*-type duty to clergy counselors would face a difficult task. The common law establishes, in effect, a presumption of no liability in the absence of a special relationship. If a court attempted to establish a special relationship based on the "control" rationale established in *Tarasoff*, it would be required to address the incongruities of *Tarasoff*.<sup>65</sup> Even assuming that a

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immediate commitment upon a limited showing of the patient's dangerous behavior. See, e.g., Lanterman-Petris-Short Act, CAL. WELF. & INST. CODE §§ 5000-5550 (West 1984). However, the Supreme Court held in *Addington v. Texas*, 441 U.S. 418 (1979) that the standard of proof required in long-term civil commitment proceedings is proof by clear and convincing evidence. See also *Annot.*, 97 A.L.R.3d 780 (1980).

64. If, however, a counselee is also an employee of the religious institution and functions under the supervision of the clergyperson, a duty to control is more logically imposed.

65. However, one cannot overlook the fact that *Tarasoff* was a policy-based decision. Given

court could somehow reconcile the facts of *Tarasoff* with the rationale followed therein, the control rationale would be inapplicable to the clergy-counselor relationship absent true power to control a counselee.

B. *Difficulties Concerning Confidentiality and Privileged Communications*

In *Tarasoff*, the defendants argued that imposing an affirmative duty upon the therapist to warn or protect the intended victim required the therapist to reveal at least a portion of the patient's communication to some third person. This required revelation is diametrically opposed to the common belief that a psychotherapist is ethically and legally bound to keep all professional counseling matters confidential. Nonetheless, the court in *Tarasoff* found that this interest in confidentiality was outweighed by concerns for "public safety."<sup>66</sup>

The defendants in *Tarasoff* presented extensive supporting briefs from the American Psychiatric Association and other professional societies.<sup>67</sup> The fundamental thrust of their argument was that confidentiality forms the very essence of effective therapy.<sup>68</sup> Moreover, confidentiality is essential for the benefit of the individual patient. When a patient believes that comments to the therapist will be held in confidence, "[i]t sets the stage for an exchange of thought, word and action at the emotional level."<sup>69</sup> When a patient trusts the therapist, a foundation for "transference" is created. "[T]he essence of much of psychotherapy is the learning of trust in the external world by the formation of a trusting relationship with the therapist."<sup>70</sup> This relationship between the patient and therapist becomes "the model for trust in the external world and ultimately in the self."<sup>71</sup>

When confidentiality fosters healing and transformation in individual patients, society as a whole benefits in several ways. Most obvious, of course, is that for every potentially dangerous person helped, the threat of harm to others is reduced. In addition, successful therapy also benefits

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the *Tarasoff* court's extreme concern with public safety, it is conceivable that a court might construct or extend an affirmative duty to clergy on a similar "public policy" basis by simply omitting discussion of the foundation of the duty.

66. *Tarasoff*, 17 Cal. 3d at 442-43, 551 P.2d at 347, 131 Cal. Rptr. at 27.

67. *Id.* at 437-38, 551 P.2d at 344-45, 131 Cal. Rptr. at 24-25.

68. *Id.* at 440-41, 551 P.2d at 346-47, 131 Cal. Rptr. at 26-27.

69. Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1041 n.68 (1974) (citing D. DAWIDOFF, *THE MALPRACTICE OF PSYCHIATRISTS* 44 (1973)).

70. *Id.*

71. *Id.*

society as a whole by providing examples which may serve to encourage others to confront their own problems.

The societal expectation of confidentiality in the therapist-patient relationship has led to statutory recognition of a testimonial privilege in this area. Legislatures in many states have enacted a "therapist-patient privilege" which serves to prevent a court from compelling a therapist to testify in judicial proceedings concerning communications which the patient has made to the therapist.<sup>72</sup> The policy behind this privilege was clearly stated in *Taylor v. United States*:<sup>73</sup>

The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.<sup>74</sup>

Nonetheless, this privilege has not been deemed absolute in all states. At the time of *Tarasoff*, the California Legislature had adopted a "dangerous patient exception" to the privilege.<sup>75</sup> The exception defeats the privilege if a therapist determines that a patient is dangerous to himself or to others.<sup>76</sup>

The *Tarasoff* opinion looked to this exception as indicative of general "public policy" when a dangerous person is involved. Thus,

72. See, e.g., CAL. EVID. CODE § 1014 (West Supp. 1986).

Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

- (a) The holder of the privilege
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

*Id.*

73. 222 F.2d 398 (D.C. Cir. 1955).

74. *Id.* at 401 (quoting M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 272 (1952)).

75. The statute has not been amended:

There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

CAL. EVID. CODE § 1024 (West 1966).

76. *Id.*

although recognizing the benefits of confidentiality, the court held that when a threat of danger to the public exists, confidentiality is expendable.<sup>77</sup> Although the court indicated in a footnote<sup>78</sup> that it was not actually equating the exception with the duty, the court did in fact use a limited testimonial exception to create a pervasive affirmative duty. This result, however, is squarely at odds with the claim that psychotherapy is based upon confidentiality and contradicts other general policies supporting confidentiality.

Various studies have debated the effect which *Tarasoff* has had and will continue to have upon both the practice of therapy and the public perception of therapy.<sup>79</sup> Study results have been used to argue, on the one hand, that although therapists laud the benefits of absolute confidentiality, many therapists in practice have no difficulty revealing patient communications when genuine danger is detected.<sup>80</sup> On the other hand, it has been contended that some "conscientious" therapists are refusing, out of self-interest, to treat patients who could present liability problems.<sup>81</sup> The truth is, of course, that imposition of a duty affects different counselors in different ways. The net societal gain or loss resulting from a duty to protect will be a continuing source of debate as courts and legislatures examine the possibility of accepting *Tarasoff* and its rationale.

Any requirement which infringes upon a clergyperson's ability to guarantee unfettered confidentiality requires compelling justification. Many of the concerns which clergy could be expected to raise are similar to those raised by therapists.<sup>82</sup> However, the clergy counseling situation

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77. *Tarasoff*, 17 Cal. 3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27. See also Sands, *The Attorney's Affirmative Duty to Warn Foreseeable Victims of a Client's Intended Violent Assault*, 21 TORT & INS. L.J. 355 (1986).

Although there are important differences between the professions, an attorney's duty of confidentiality to a client is similar to that of the psychotherapist's duty to a patient. Thus, the failure of the defendant-psychotherapists in *Tarasoff* to convince the court of the necessity of absolute confidentiality to insure proper treatment would likely fail should a defendant-attorney make a similar argument.

*Id.* at 357.

The statement is especially true in light of the future-crime exception to the attorney-client privilege and the intent to commit a crime exception to the general mandate of attorney confidentiality. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

78. *Tarasoff*, 17 Cal. 3d at 441 n.13, 551 P.2d at 347 n.13, 131 Cal. Rptr. at 27 n.13.

79. See, e.g., Givelber, Bowers, & Blicht, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443; *infra* notes 80-81.

80. See Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 179-84 (1978).

81. See Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358, 372 (1976).

82. See Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV.

presents unique concerns due to the religious nature of the clergyperson's work. In a discussion of confidentiality issues, a court would have to consider these unique concerns in addition to the policies and principles raised in *Tarasoff*.

For example, no widely recognized Canons of Ethics exist to which members of the clergy subscribe. No licensing board sets minimum standards or attempts to assure competency in the profession. Thus, no readily recognized statements are available on which to base general standards applicable to all members of the clergy. Despite these vast differences, American clergy are often considered as a homogeneous segment of society. Moreover, perhaps the most universal trait attributed to the members of this fungible office is an ability and "duty" *not* to share confidential communications revealed to them while they are engaged in their professional capacity.

Most clergy who perform counseling would probably agree with the American Psychiatric Association's amicus brief concerning the vital role of confidentiality in the counseling relationship.<sup>83</sup> Much of the information learned by the clergyperson in a counseling setting is similar to information learned by a psychologist or psychiatrist in a therapy session. Moreover, because religious leaders are typically held to a high and idealistic sociological standard, special pressure may exist for the clergyperson to fulfill expectations of confidentiality, even apart from the clergyperson's own spiritual values. Thus, both society as a whole and the majority of American clergy place significant importance upon the clergyperson's duty to maintain confidentiality.

As in the case of therapists, this widely held belief that clergypersons must keep professional matters confidential has contributed to the creation of a specific testimonial privilege. The "priest-penitent" privilege, statutorily enacted in some form in forty-nine states,<sup>84</sup> operates to prevent a party from summoning a clergyperson to testify concerning the content of certain types of communications received in the clergyperson's

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163, 174 (1981) (making the familiar argument that if a duty to disclose were imposed upon the clergy, counselees would not be as candid and effective clergy counseling would be hindered).

83. See *supra* notes 67-71 and accompanying text. See also Menendez, *Clergy Confidential*, 39 *CHURCH & STATE* 128, 131 (1986) (quoting the Rev. Dean Kelley, longtime religious liberty specialist for the National Council of Churches: "It's a long-settled principle that the cure of souls is more important to society than the conviction of a few defendants, however serious the offense.").

84. A collection of these statutes can be found in both W. TIEMANN & J. BUSH, *THE RIGHT TO SILENCE* 207 app. (1983) and L. GUMPER, *LEGAL ISSUES IN THE PRACTICE OF MINISTRY* 61 app. A (1981).

professional capacity.<sup>85</sup>

Initially, the privilege was understood to apply only to communications received in *confession*.<sup>86</sup> However, modern statutes have defined the term confession in various ways.<sup>87</sup> Thus, the issue of whether privileged protection presently extends beyond purely confessional and penitential communications is critical in determining the degree to which clergy counseling communications, many of which are not penitential, are statutorily protected.<sup>88</sup> When deciding whether communications received during *counseling* should be protected, a court may examine the applicable clergy-penitent statutory provision. Whether it speaks in narrow terms of confessions only, or more broadly in terms of confidential

85. The Supreme Court has stated in dicta that "The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." *Trammel v. United States*, 445 U.S. 40, 51 (1980). *See also* Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 KY. L.J. 377, 408 (1974) ("The priest-penitent privilege may be justified on the ground that compelling the disclosure of religious confidence affronts human dignity and invades personal privacy.").

86. L. GUMPER, *LEGAL ISSUES IN THE PRACTICE OF MINISTRY* 34-35 (1981).

The forerunner of the modern day clergy-penitent privilege was the Seal of Confession in the Roman Catholic church. The Seal was a firm tenet of canon law well before the Norman Conquest of England, and penalties for the violating priest were severe. The Seal understandably found enforcement in the King's Court because the Court was staffed by leading churchmen. Canon and common law were intertwined. However, no such privilege existed at common or parliamentary law at the time of the American Revolution, and with a limited exception, there is today no clergy-penitent privilege apart from statute.

*Id.*

87. *See, e.g., In re Verplank*, 329 F. Supp. 433 (C.D. Cal. 1971) (viewed the application of the attorney-client privilege to the attorney's nonprofessional staff as similar to the ordained minister and the minister's *counseling* staff and held that "draft counseling services" rendered by ordained minister/chaplain were performed within the course of his function as a clergyperson and thus information received in sessions was privileged); *Boyles v. Cora*, 232 Iowa 822, 6 N.W.2d 401 (1942) (construed statute covering counselors to include observations as well as communications); *Commonwealth v. Zezima*, 365 Mass. 238, 310 N.E.2d 590 (1974) (extended privilege beyond "communications" to include "other acts by which ideas may be transmitted"), *rev'd on other grounds*, 443 N.E.2d 1282 (1982); *cf. Simrin v. Simrin*, 233 Cal. App. 2d 90, 43 Cal. Rptr. 376 (1965) (in a divorce modification proceeding, court refused to hold that the privilege protected conversations between husband and wife and rabbi, who acted as marriage counselor; however, court held that the parties were bound to an express agreement they had made that communications of the spouses to the rabbi would be confidential and that neither party would call him as a witness); *Buuck v. Kruckeberg*, 121 Ind. App. 262, 95 N.E.2d 304 (1950) (prejudicial error to strike minister's testimony regarding his observations of a counselee's emotional state where the counselee's soundness of mind was in issue).

Several states have adopted statutes dealing with the privilege. *See, e.g., ALA. CODE* § 12-21-166(b) (Supp. 1986) (extends privilege if the communication is sought to (1) make a confession, (2) seek spiritual counsel or comfort, or (3) enlist help or advice in connection with a marital problem); *D.C. CODE ANN.* § 14-309 (1981) (privilege extends to any information confidentially communicated for a religious counseling purpose; however, the clergyperson may testify by express consent of the person making the communication, except when the disclosure of information is in violation of the clergyperson's sacred trust).

88. L. GUMPER, *LEGAL ISSUES IN THE PRACTICE OF MINISTRY* 37 (1981). *See also*, Annot., 71 A.L.R.3d 794 (1976) (discussing privileged communications to clergy in general).

and counseling communications generally, will be germane to, but not necessarily determinative of, the court's holding.<sup>89</sup>

The development of the clergy-penitent privilege highlights some of the unique concerns which would arise if a clergyperson were required to disclose confidential matters. Before the enactment of priest-penitent statutes, attorneys were hesitant to subpoena members of the clergy because clergy were traditionally reluctant to testify concerning matters discussed in confession or counseling.<sup>90</sup> If a member of the clergy was subpoenaed and then refused to testify, the court was forced to order sanctions. The prospect of having a clergyperson, a "pillar of the community," placed in jail for upholding cherished religious beliefs contributed to recognition of the privilege in many states.<sup>91</sup>

When enacting the clergy-penitent privilege, some legislatures considered that *compelling* a clergyperson to testify might infringe upon the clergyperson's first amendment rights. In these states, the privilege has been deemed to belong not only to the penitent, but also to the clergyperson.<sup>92</sup> Unlike other privileges, which normally belong solely to the client,<sup>93</sup> in these states, even if the penitent waives the privilege, the clergyperson may still refuse to testify. Where it has been held that the privilege belongs to the penitent alone,<sup>94</sup> and where the penitent waives it, the clergyperson could be required to testify or face sanctions. Nonetheless, in forty-nine states, the very fact of the existence of privilege statutes reflects a general expectation of confidentiality in such matters. In addition to this general expectation, in those states which hold that the privilege belongs to both the clergyperson and the penitent, the privilege appears to evidence a dual intent to protect not only the societal expecta-

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89. See L. GUMPER, *LEGAL ISSUES IN THE PRACTICE OF MINISTRY* 37-38 (1981).

90. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 110 (1983). See also Menendez, *Clergy Confidential*, 39 CHURCH & STATE 128, 129-31 (1986) (explaining clergy refusal to reveal confessional secrets in courts).

91. See Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 110-12 (1983).

92. See, e.g., *supra* note 87; ALA. CODE § 12-21-166(b) (Supp. 1986). But see Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 112 (1983), indicating that first amendment concerns may not always be accorded much weight.

93. Because privileges are generally designed to protect the client's interest, they are normally viewed as belonging to the client. 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §§ 2290-91 (McNaughton rev. 1961). Compare this, however, to the work product privilege which is designed to protect both the client's interests and the interests of the attorney, and which courts have held belongs jointly to the attorney and the client and may be raised by either. See M. LARKIN, *FEDERAL TESTIMONIAL PRIVILEGES* § 11.03-.05 (1986); S. STONE, R. LIEBMAN, *TESTIMONIAL PRIVILEGES* § 2.04 (1983).

94. See, e.g., LA. REV. STAT. ANN. § 15:478 (West 1981). Most states do not specifically address *who* owns the privilege.

tions of confidentiality, but also constitutional rights of the clergyperson.<sup>95</sup>

In *Tarasoff*, the court first examined the therapist-patient privilege and determined that the policy of the privilege was inconsistent with a duty to protect prospective victims. The court then proceeded to examine the statutory exception to the privilege. Based on the rationale of this exception, the court determined that invoking an affirmative duty was appropriate. Similarly, in the context of the clergy-penitent privilege, the existence of a privilege is inconsistent with a duty to protect. Inroads into these privileges, however, may be viewed by courts to support a duty to protect. For example, the failure to specifically exclude clergy from general duties of disclosure might provide a source for the counter policy a court might seek.<sup>96</sup> Alternatively, a narrow construction of the privilege could also provide the basis for refusal to find that a policy of confidentiality outweighs other concerns.

First amendment rights of the clergyperson, however, mandate greater recognition of confidentiality in clergy counseling relationships than the court afforded in therapist relationships. As the Supreme Court has noted, "fundamental principles of conscience and religious duty may sometimes override the demands of the secular state."<sup>97</sup> The first amendment religion clauses, which were enacted to protect religious freedom<sup>98</sup> and to ensure the separation of church and state,<sup>99</sup> contain two distinct mandates. The establishment clause, which will not be discussed here, directs that "Congress shall make no law respecting an establishment of religion . . . ."<sup>100</sup> The free exercise clause mandates that "[Congress shall make no law] prohibiting the free exercise [of religion]."<sup>101</sup> The free ex-

95. Cf. Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V.L. REV. 47 (1981) (discussing the first amendment's failure to shield clergy from malpractice suits).

96. One seeking to impose a duty upon clergy might rely upon statutory duties which many states impose upon *all persons* to report suspected child abuse. While the clergy are specifically exempt from this duty in some states, there are approximately 35 states in which it appears that clergy, as well as all other persons, are subject to this duty to report. See Menendez, *Clergy Confidential*, 39 CHURCH & STATE 128, 131 (1986).

97. *Gillette v. United States*, 401 U.S. 437, 445 (1971) (exemption for those who oppose participation in war applies only to those who oppose all war and not those who oppose participation in a particular war).

98. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 812-19 (1978); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 1030, 1053 (2d ed. 1983).

99. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 812-19 (1978); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 1030 (2d ed. 1983). See also *Abington School Dist. v. Schempp*, 374 U.S. 203, 222-23 (1963).

100. U.S. CONST. amend. I.

101. *Id.*

ercise clause could be of significant assistance to the clergy counselor who believes that a duty to protect, which requires revealing confidential communications, contravenes his or her religious tenets.

An individual bringing a first amendment claim bears the initial burden of satisfying the court that the government action in question interferes with a sincerely held religious belief.<sup>102</sup> If the clergyperson adheres to a tenet<sup>103</sup> mandating confidentiality, this test will be relatively easy to satisfy.<sup>104</sup> However, if the counselor has merely a personal or professional preference for confidentiality and can base this preference upon no particular belief, it may be more difficult to meet this threshold requirement.<sup>105</sup>

Once the clergyperson successfully meets the "sincerity" test, the burden shifts to the government to demonstrate a "compelling necessity" for the law in issue.<sup>106</sup> In deference to religious liberty, if a less restrictive alternative to the offensive law exists, it must be adopted.<sup>107</sup> Assuming that the government makes a "compelling necessity" argument, the court must then balance the respective interests.<sup>108</sup> As a part of this balancing process, the court will consider the adverse effects that recognition of the free exercise claim might have upon the fulfillment of

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102. *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972) (state requirement that all children attend public school until age 16 interfered with Amish beliefs where exposure of Amish teens to "secular teaching" directly conflicted with sect's teachings); *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963) (unemployed Seventh-Day Adventist made showing that denial of unemployment benefits due to refusal to work on Saturdays on religious grounds interfered with religious beliefs).

103. As long as a belief is sincerely held by the individual, the belief need not necessarily be a recognized tenet or teaching of one's church or sect. *Lewis v. Califano*, 616 F.2d 73, 81 (3d Cir. 1980).

104. Parties often stipulate the sincerity of the religious proponent. *See, e.g., Varga v. United States*, 467 F. Supp. 1113, 1115 (D. Md. 1979), *aff'd*, 618 F.2d 106 (4th Cir. 1980); *Johnson v. Motor Vehicle Div.*, 593 P.2d 1363, 1364 (Colo.), *cert. denied*, 444 U.S. 885 (1979); *see also Note, Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 355 (1980).

105. *See, e.g., Gillette v. United States*, 401 U.S. 437 (1971) (conscientious-objector must be opposed to all wars, not just "unjust" wars; a belief based on the soldier's humanist approach to religion). *But see M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE* 78-79 (1968) (the very determination of whether an individual's belief is a "fundamental principle" of their faith involves judicial inquiry into religious doctrine, a traditionally forbidden subject).

106. *Yoder*, 406 U.S. at 213-15, 221-29; *Sherbert*, 374 U.S. at 406-09.

107. *See Sherbert*, 374 U.S. at 407.

108. *Shetreet, Exemptions and Privileges on Grounds of Religion and Conscience*, 62 KY. L.J. 377, 398 (1974).

[T]he degree of interference with the free exercise of religion is usually higher in cases of direct conflict [choice between abandoning religious principles or facing criminal prosecution] than in cases of indirect conflict [choice between following religious principles and suffering economic or other loss], and this should be considered as a factor in the process of striking a balance between the state and individual interests.

*Id.*

governmental objectives.<sup>109</sup>

Because cases in this area have been fact intensive and not necessarily consistent, an unsettled area of constitutional law has resulted,<sup>110</sup> providing little substantive guidance for the parties or the courts.<sup>111</sup> Generally, however, risks to public health and safety are weighed heavily.<sup>112</sup> On the other hand, if a law requires an individual to take *affirmative* action in contravention of his or her beliefs,<sup>113</sup> as opposed to a law which merely proscribes desired action,<sup>114</sup> courts have been reluctant to outweigh free exercise claims.

When faced with the issue of extending *Tarasoff* to the clergy, a court will have to confront and weigh difficult arguments surrounding confidentiality and privilege issues. On one hand, it may be argued that absolute confidentiality is impractical when viewed in light of public safety concerns, and that a threat to the safety of an identified person

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109. See *United States v. Lee*, 455 U.S. 252, 259 (1982) (refusal to exempt Amish employer from social security tax and employer's contributions). The idea had been previously considered in *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

110. Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 350-51 (1980).

111. Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330 (1969); see also Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 KY. L.J. 377, 398 (1974).

112. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (interest in public health required vaccination notwithstanding contravention of religious belief); *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971) (public policy against use and trafficking of drugs outweighed defendant's claim that possession and use of heroin, marijuana, and peyote were an essential aspect of Black Muslim ritual), *cert. denied*, 404 U.S. 1020 (1979); *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W. D. Wash. 1967) (upheld judge's right to order blood transfusion for child despite fact that the transfusions were in violation of parents' religious beliefs). *But see People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (en banc) (California Supreme Court created an exemption from laws prohibiting the use of peyote in religious ceremony by American Indians).

113. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish children cannot be required to attend school until reaching age 16 if contravenes teaching of their faith); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (individual cannot be required to salute flag in contravention of beliefs); *In re Jenison*, 125 N.W.2d 588 (Minn. 1963) (court reversed its previous decision upon remand from the Supreme Court, 375 U.S. 14 (1963) and held that an individual may not be required to serve on a jury where her religion required that she "not judge her fellow man"). See also provisions for conscientious objectors at 50 U.S.C. app. § 456(j) (1981): "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Cf. Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969): "[T]here are very few positive acts which the state compels by the threat of criminal penalties without according individuals alternative options. These duties of positive action consist of military service, jury duty, the payment of taxes, and a few others." *Id.* at 346. Although failure to follow a duty which required a clergyperson to reveal confidential communications would subject the clergyperson primarily to civil penalties, the principle at stake is similar.

114. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878) (forbidding polygamy notwithstanding Mormon belief); *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975) (forbidding snake handling by religious adherents on public nuisance theory), *cert. denied*, 424 U.S. 954 (1976).

should outweigh a general policy of confidentiality.<sup>115</sup> On the other hand, it may be argued that clergy counseling functions best and provides the best societal protection and effectiveness when a clergyperson can give to his counselee an absolute assurance of confidentiality. Additionally, the clergyperson's first amendment rights are not jeopardized when the counselor can assure complete confidentiality.

### C. *Difficulties Concerning Destruction of Clergy Discretion in Counseling*

Legal recognition of a clergy "duty to protect" would result in a number of negative consequences in the practice of counseling. Therefore, a duty requiring that the clergyperson must reveal confidences in an effort to ensure protection of a threatened person should not be imposed without first weighing carefully the practical effect that such a duty would have on a clergyperson's counseling discretion.

The desire to impose a legal "duty to protect" upon the clergy seems to presuppose that in the absence of an imposition, clergypersons would never take steps to protect threatened victims. This is a naive assumption. Most clergy members routinely handle delicate and sensitive matters and frequently make decisions which require the ability to weigh the consequences of their actions. If a clergy counselor determines that the benefit of maintaining confidentiality is outweighed by a threat to an-

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115. See Menendez, *Clergy Confidential*, 39 CHURCH & STATE 128 (1986):

[Mr. Leo] Pfeffer [Professor of Constitutional Law, Long Island University, and Special Counsel, American Jewish Congress] suggested two exceptions he believes should apply to the confidentiality principle. If the clergy member receives information 'about an evil that is not yet complete and can be stopped, the privilege should not apply.' This would include, in his judgment, continuing child abuse.

Secondly, Pfeffer favors exposure if information revealed only in confession leads to injustice or compounds injustice. If an innocent person is in prison or scheduled for state execution and a priest discovers through the confessional that someone else committed the crime, Pfeffer believes the privilege should be abrogated.

*Id.* at 131.

Although Mr. Pfeffer's comments were made in the narrow context of "confessional" statements, his comments are relevant to discussion of the broader counseling context. Insofar as he is advocating the removal of the privilege from confessional communications, enabling the clergyperson to testify or disclose information received in confession *at the clergyperson's discretion*, his points are well taken. If, however, he is advocating removal of the privilege so that the clergyperson may be *required* to testify against the penitent, he seems to ignore the clergyperson's first amendment rights.

In addition, the extremely subjective nature of the determination of whether an "evil is complete" or whether it "can be stopped" is a major problem which Mr. Pfeffer has not addressed. See *infra* notes 127-29 and accompanying text discussing the subjective nature of both clergy counseling and psychotherapy. See also *infra* notes 119-22 and accompanying text advocating allowing the clergy to exercise discretion concerning counseling options, rather than being compelled by a court, which will of necessity be unfamiliar with the counselee's situation, to reveal communications.

other's safety, most clergy will take necessary steps to notify either the victim or the appropriate authorities.<sup>116</sup>

Currently, when a clergy counselor determines that a particular individual has the intent and ability to harm another, the counselor has several options. The counselor may be able to engage the individual in discussion and "talk him out of it." He may remain with the individual or direct a staff member to remain with the person hoping that the constant presence of another person will dissuade the individual. Alternatively, the counselor may attempt some combination of immediate action and long-term counseling. Under these options, it is unlikely that the counselee will feel betrayed or will desire to terminate the counseling.

At times, however, many clergypersons will feel the need to contact an appropriate authority or to warn the victim directly, in spite of the counselee's anticipated reaction. In these circumstances, it is likely that the counselee will react with anger at the presumed "betrayal" which has occurred, and termination of that particular counseling relationship may result.

The point, however, is not whether these situations arise in clergy counseling. Rather, the point is that the determination as to *which cases* the clergyperson should reveal confidential matters should be made by the clergyperson, and not by a court in an after the fact review. If the clergyperson believes that the benefits of long-term counseling outweigh the short-term crisis, he or she should not be forced to sacrifice the counseling relationship, but should be allowed to determine which situations are appropriate to take "protective action" and which are appropriate to "monitor and counsel further."

It may seem, at first glance, that to allow the clergyperson such discretion runs counter to general concerns of public safety.<sup>117</sup> However, allowing clergypersons to continue to make such determinations according to their experience and their ability will actually serve to better ensure public safety in the majority of cases.

If a duty to "protect" was extended to the clergy, clergy counselors would have to take actions which might contravene their personal deter-

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116. See, e.g., *Mullen v. United States*, 263 F.2d 275 (1958), where a Lutheran minister revealed the confession of a mother who chained her children when she left them. Of course, a few clergypersons will maintain that the threat to a victim will *never* outweigh the benefit of confidentiality. However, persons with such absolute standards are unlikely to be convinced of the necessity to reveal confidential communications by the threat of legal liability for failure to protect.

117. This concern stems largely from the fact that the law is uncomfortable with expectations which cannot be legally enforced.

mination of what is in the best interests of all concerned.<sup>118</sup> Specifically, when a clergyperson determined that a counselee posed a threat to an identified victim, that clergyperson would be *required* to take some action to "protect" the potential victim.<sup>119</sup> Although *Tarasoff* does not specifically dictate what actions are necessary to fulfill a duty to protect,<sup>120</sup> a clergyperson who either called the police or warned the victim in an appropriate situation, would probably escape liability even if the counselee later committed the threatened act. In this type of situation, although the clergyperson escapes liability, the victim may still have been harmed and the ex-counselee rarely will have been helped. In fact, if the counselee reacts in anger and terminates the counseling relationship, the possibility of future help by the clergyperson is also eliminated.

Thus, although the goal of imposing a "duty to protect" upon clergy is to protect third persons, the effect will frequently be detrimental to the counselee. In addition, no assurance exists that a potential victim, once warned, can do anything to protect himself from harm,<sup>121</sup> even if he does receive some measure of police protection. It takes little imagination to envision the consequences which may result when an already potentially dangerous counselee becomes enraged by a clergyperson's perceived betrayal.

#### D. *Difficulties in Determining and Applying a Standard of Care*

In *Tarasoff*, the court held that a therapist had a duty to protect which could be imposed at the point where a "reasonable therapist" would determine that a potential victim was endangered.<sup>122</sup> As noted above, this holding has been criticized extensively.<sup>123</sup> However, even if one accepts that the "reasonable psychiatrist" standard enunciated in *Tarasoff* is workable, a comparable standard in the clergy context would

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118. This argument was raised in the context of therapists in Givelber, Bowers, & Blitch, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443, 470-72.

119. Presumably every clergyperson believes that he or she is a reasonable person. Therefore, if a duty to protect existed, all clergy would have to take action when they individually and subjectively believed that a counselee was dangerous.

120. *Tarasoff*, 17 Cal. 3d at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25. "While the discharge of this duty of care will necessarily vary with the facts of each case, in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances." *Id.* (footnote omitted).

121. Mills, *Expanding the Duties to Protect Third Parties from Violent Acts*, in LEGAL EN-CROACHMENT ON PSYCHIATRIC PRACTICE 61, 64 (1985).

122. *Tarasoff*, 17 Cal. 3d at 440, 551 P.2d at 345, 131 Cal. Rptr. at 25.

123. See, e.g., *supra* note 60 and accompanying text.

be unworkable because of difficulties in formulating a "reasonable clergy-person standard."

In *Tarasoff*, the court articulated the "reasonable therapist" standard by analogy to the well-known "reasonable physician standard."<sup>124</sup> However, the court overlooked significant aspects of the practice of psychiatry which make it difficult to determine a "reasonable psychiatrist" standard. For example, diagnosis in psychiatry is not analogous to diagnosis in general medicine. Few simple tests, such as blood tests or x-rays used in general medicine, are similarly determinative of the psychiatric patient's condition.<sup>125</sup> Instead, a psychiatrist's diagnosis in large part is based upon the doctor's experience in talking with and observing a particular patient. Thus, psychiatry itself lacks much of the certainty, objectivity, and scientific reliability of general medicine.<sup>126</sup> Moreover, when psychiatrists, who are trained to deal specifically with human behavior, acknowledge their inability to predict dangerous behavior; it makes little sense to expect clergy, who most likely have less behavioral training than therapists, to accurately make such predictions.

Because of varying beliefs and counseling practices of American clergy, no single standard exists which could be applicable to all clergy.<sup>127</sup> What is promulgated by one faith may be completely unreasonable in another. No licensing requirements<sup>128</sup> or recognized volun-

124. *Tarasoff*, 17 Cal. 3d at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25. Admittedly, the goal of both medicine and psychiatry is to diagnose and to cure, but the methods of diagnosis and manner of treatment differ significantly.

125. Schopp & Quattrocchi, *Tarasoff, The Doctrine of Special Relationships and the Psychotherapist's Duty to Warn*, 12 J. PSYCHIATRY & L. 13 (1984):

This situation stands in stark contrast to that of the physician who may be expected to accurately predict the probability of infection because it is the disease, which his training enables him to diagnose, which is the source of the danger. However, when dealing with psychological dysfunction, it is the person, not the disorder, who is dangerous and violence has not been associated with any particular diagnosis by scientific explanation, or even by close statistical correlation.

*Id.* at 32 (footnote omitted).

126. In addition, the court in *Tarasoff* required that the "reasonable psychiatrist" not only diagnose present condition, but also predict future dangerous behavior. *Tarasoff*, 17 Cal. 3d at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25. This determination can be made with even less certainty; hence, the basis for liability becomes attenuated. The *Tarasoff* court, therefore, set the "reasonable therapist" standard outside the claimed abilities of the profession.

127. See W. TIEMANN & J. BUSH, *THE RIGHT TO SILENCE* 171 (1983).

128. Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN. FERN. V.L. REV. 47, 51 (1981).

The difficulty of establishing the definable limits of church-state separation is reflected in the statutory exemption of clergy from government regulation or licensing. Were the state to require licensing of the clergy, it would, on one hand, have to establish criteria of eligibility which would necessitate the state's involvement in doctrinal and theological matters clearly forbidden by the first amendment, one purpose of which was to free religious institutions from domination or interference by the state. The United States Supreme

tary associations exist which encompass even the majority of clergypersons in the United States. Even if one could articulate standards which might be applicable to Judeo-Christian religious leaders, this standard would likely be inapplicable to persons such as Christian Science practitioners, self-proclaimed gurus, and other leaders who hold beliefs outside the mainstream of American religion.

One possible solution is to hold a clergyperson to the standard of a "reasonable clergyperson of *that* faith." However, this suggestion is impractical. Such a determination presupposes that it is possible to characterize a clergyperson as a member of a definite category. Although characterization is possible in many cases, many non-orthodox religions are unique and may have arisen out of the leader's desire to escape the doctrines and practices of organized and recognized religions. It would be impossible to hold this type of leader to the standards of the particular faith if the leader practiced a unique religion and was the only leader in the "denomination."

Furthermore, even leaders who are members of recognized faiths should not necessarily be held by the courts to the doctrinal standards of their faith. Admittedly, in some faiths and denominations, the beliefs of the religion are published as dogma and it is relatively easy to determine the essential beliefs of the leaders.<sup>129</sup> However, in other religious groups, the individual church or religious group may follow a variation of the recognized dogma of their faith, so that even various local units may differ in the exercise of the same faith.

Additional problems prevent use of a "reasonable clergyperson of that faith" standard. The Supreme Court has consistently refused to hear cases which center upon the content of religious doctrine.<sup>130</sup> Thus,

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Court, in a number of decisions, has recognized the sacrosanct nature of theological doctrine and the exclusive right of the religious authorities to determine it. On the other hand, licensing by the state, even without fixed eligibility criteria, would have the state place its imprimatur on religion and put it in the business of legitimizing anyone who claimed to be a qualified clergyman.

*Id.* (footnote omitted).

See also CAL. BUS. & PROF. CODE § 4980 (West Supp. 1986) which provides for licensing of marriage, family, child, and domestic counselors. However, these provisions "shall not apply to any priest, rabbi, or minister of the gospel of any religious denomination when performing counseling services as part of his or her pastoral or professional duties . . ." *Id.* at § 4980.01.

129. This tends to be the case in many "mainstream" religions, such as Catholicism and Judaism. In such faiths, a standard of that faith could theoretically be articulated. However, a court could be expected to decline consideration of whether a clergyperson met the appropriate standards of his faith. See *infra* note 130.

130. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

a court could be expected to decline consideration of an issue which required determination of whether the counselor met the promulgated standard of his own faith.

Grave difficulties exist in defining *any* standard to measure whether a clergyperson should be legally subject to a duty to protect.<sup>131</sup> In another area of law, the very fact that a standard could not be defined contributed significantly to the court's refusal to recognize a cause of action. In *Peter W. v. San Francisco Unified School District*,<sup>132</sup> a high school "graduate" alleged that the negligence of the school district deprived him of basic academic skills. The Superior Court of California noted that educators themselves cannot agree on what constitutes good teaching.<sup>133</sup> Thus, the court declined to formulate any standard and refused to recognize the plaintiff's claim because the profession at large was and is plagued by contradictory norms.

Even assuming a court could ignore the significant practical difficulties inherent in *creating* a standard applicable to clergy, the court would face overwhelming problems in *applying* any sort of standard to impose liability in clergy counseling situations. Any clergy liability suit could be expected to raise the familiar problem of professionals refusing to testify "against" each other in regard to the appropriate standard of care. Assuming that a standard of care could somehow be established by testimony of other clergy, it would be exceedingly difficult to obtain clergy testimony when the potential clergy witness did not personally observe the counselee. In addition, clergy exercise various approaches to counseling. Thus, it is unlikely that a clergyperson witness, even if she herself would have made an attempt to warn the potential victim, would testify that a defendant clergyperson did not meet a standard of reasonableness. Finally, many clergy are concerned with protecting their "neutral" reputation in the community. In light of their occupation as spiritual leaders, their concern deserves consideration.

Additionally, deciding when a clergyperson had enough information

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131. "There can be no general principles upon which a court might judge the clergy's performance of his or her duty to predict possible actions." W. TIEMANN & J. BUSH, *THE RIGHT TO SILENCE* 171 (1983).

132. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

133. *Id.*

Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught . . . We find in this situation no conceivable 'workability of a rule of care' against which defendants' alleged conduct may be measured . . .

*Id.* at 824, 825, 131 Cal. Rptr. at 860-61 (citation omitted).

upon which to act to protect the victim must be established after the fact. Obviously, one cannot assume that the counselee told the clergyperson of his intentions merely because the counselee talked to a clergyperson.<sup>134</sup> Obtaining proof of what transpired between the clergyperson and the counselee imposes difficulties because in practice, many clergypersons have incomplete or non-existent records of the content of counseling sessions. This lack of complete records may stem from a number of factors. First, clergy counseling does not always take place in an office setting. It may be inconvenient for a clergyperson to take notes while visiting a person in a jail or hospital. Further, the vast majority of clergy do not charge their counsees for services. Thus, the clergyperson has no need to maintain records for billing purposes. In some situations, such as a church office staffed by volunteers, it may actually be advantageous to *not* maintain records in the interest of the counselee's privacy.

The extreme diversity of clergy counseling practices from one faith to another makes it impossible to define a widely applicable standard of care. In addition, problems of proof are complicated by the fact that clergy are not ordinarily required to keep records of their counseling. In light of the fact that courts have, in other contexts, refused to impose liability if defining a standard proved too difficult,<sup>135</sup> a court examining this issue should refuse to extend a *Tarasoff* duty to clergy counselors.

#### IV. CONCLUSION

No resolution to this issue will protect every party in every case. However, the current system, by which clergy counselors are free to use their discretion in making decisions if there is a potentially dangerous counselee involved, is preferred. The clergy, not the judiciary, has the first-hand experience to make the best decision in the majority of cases.

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134. This presumption would increase the possibility of false suits and would be devastating to the reputations of the clergy involved.

135. See *supra* note 132 and accompanying text.

