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FIDUCIARIES IN PRIEST'S CLOTHING: CLERGY SEXUAL ABUSE AND FIDUCIARY DUTIES

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ABSTRACT—This Note argues that clergypersons who offer religious guidance are fiduciaries in some limited circumstances and therefore liable for sexual contact that occurs between them and congregants. This Note will argue that clergypersons are most properly deemed fiduciaries through a fact-based definitional approach. As such, this Note departs from previous arguments that clergypersons are fiduciaries because they provide services analogous to secular counselors. Prospective fiduciary relationships involving clergy should be analyzed using a distinct conceptual account of fiduciary relationships rather than an analogical analysis based on apparent similarities between a clergyperson and other fiduciaries. Such an approach is preferable to the argument by analogy because it can better explain why clergypersons who offer no formal mental health counseling, but only religious guidance, are nevertheless fiduciaries.

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"Beware of false prophets, who come to you in sheep's clothing but inwardly are ravenous wolves. You will know them by their fruits."
—Matthew 7:15–16[†]

INTRODUCTION

Consider the following scenario[1]: Jane is a student attending a small liberal arts college. It is the first time she has lived away from her family, and she has been feeling lonely, insecure, and anxious. Unsure where to turn, Jane seeks guidance at the campus ministry center, where she meets a young, charismatic priest[2] who offers her spiritual direction.[3] Jane, a devout Christian, decides this would be better than visiting a secular counselor, so Jane and the priest begin meeting regularly. In these meetings, Jane shares

[†] *Matthew* 7:15–16.

[1] This scenario is based on recent allegations made by an adult student against a Catholic priest at Steubenville University and those made by a former nun against the internationally renowned Jesuit-artist Father Marko Runpik. *See* Christine Rousselle, *TOR Priest Allegation Shows Challenge to Resolve 'Boundary' Cases*, PILLAR (May 6, 2022, 5:35 PM), https://www.pillarcatholic.com/tor-priest-allegation-shows-difficulty/ [https://perma.cc/3TNH-CDJU]; Diane Montagna, *'Descent into Hell': An Alleged Rupnik Victim Speaks Out*, PILLAR (Dec. 19, 2022, 3:06 PM), https://www.pillarcatholic.com/p/descent-into-hell-an-alleged-rupnik-victim-speaks-out [https://perma.cc/5P5H-YTZN]. I have also based the example on the cases that are discussed below.

[2] For this scenario, I have chosen to use a priest. Throughout the rest of the paper, I will use the terms "pastor" and "clergyperson" interchangeably. By these terms, I mean any religious leader of any faith tradition in whom authority, influence, or expertise in religious matters are vested. I use the gender neutral "clergypersons." Although the offender is typically a man, this is not to say that there are not abusive female religious leaders as well.

[3] Spiritual direction is a type of religious guidance focused on deepening and nourishing the spiritual life of another. In some traditions, this can involve regular meetings, discussing important life decisions, obedience in certain matters, and the confession of sins. It is usually done in private, one-on-one settings.

her intimate feelings, discloses traumatic experiences from her past, and confesses her sins. The priest suggests ways she can improve her prayer life and grow closer to God. The priest claims that prayer and spiritual exercises will help improve her relationships and allow her to better deal with her trauma. Jane begins to feel very close to the priest and starts to see him as a mentor and friend.

One day, during a spiritual direction session, the priest makes a sexual advance to Jane. She recoils and the priest apologizes, telling her that he has strong romantic feelings for her and mistakenly believed she felt the same. He assures her it will not happen again. Jane accepts the apology and continues spiritual direction, not wanting to lose him as a friend and confidant. However, a few weeks later, the priest again tries to initiate sexual contact. Jane, confused and vulnerable, does not resist, and they have sex. Afterwards, Jane is racked with guilt and feels terrible for having an "affair" with her priest. Despite this, she continues to see him for spiritual direction. Their sexual relationship also continues. The priest assures Jane that sex is an appropriate expression of God's love and that God approves of their sexual activity. Despite these assurances, Jane begins suffering from even more severe emotional distress. Only when she starts seeing a professional therapist does she realize how abusive and inappropriate the priest's conduct is.

Jane's experience is not uncommon. An estimated 3.1% of adult women who regularly attend religious services have been the object of sexual advances by a religious leader.[4] Adult victims of clergy sex abuse suffer serious psychological and relational harms that can require years of therapy to overcome.[5] However, accusations made by adult victims are often met with skepticism from fellow congregants and governing church bodies, which can cause further harm.[6] Furthermore, the institutions where the abuse takes place seldom acknowledge the problem and are slow to respond

[4] Mark Chaves & Diana Garland, *The Prevalence of Clergy Sexual Advances Toward Adults in Their Congregations*, 48 J. FOR SCI. STUDY RELIGION 817, 820 (2009).

[5] *See* Stephen Edward de Weger, *Unchaste Celibates: Clergy Sexual Misconduct Against Adults—Expressions, Definitions, and Harms*, 13 RELIGIONS 393, 407 (2022); Diana Garland, *Don't Call It an Affair: Understanding and Preventing Clergy Sexual Misconduct with Adults*, *in* CLERGY SEXUAL ABUSE: SOCIAL SCIENCE PERSPECTIVES 118, 127 (Claire M. Renzetti & Sandra Yocum eds., 2013); Katherine van Wormer & Lois Berns, *The Impact of Priest Sexual Abuse: Female Survivors' Narratives*, 19 AFFILIA 53, 53 (2004).

[6] *See* Stephen Edward de Weger, *Insincerity, Secrecy, Neutralisation, Harm: Reporting Clergy Sexual Misconduct Against Adults—A Survivor-Based Analysis*, 13 RELIGIONS 309, 329 (2022); Garland, *supra* note 5, at 127.

to it.[7] When victims do come forward, abusers sometimes hide behind the pretext of consensual sexual activity and call their abuse "affairs" or "boundary violations."[8] Even if deemed credible, adult victims of clergy sexual abuse have had mixed success when seeking legal redress. Although thirteen states impose criminal liability on clergypersons who have sex with patients in psychotherapy contexts,[9] abusers often escape both criminal and civil liability due to the ambiguities in their roles and the religious nature of the relationships.[10]

Adult victims who attempt to hold their abusers or their abusers' employers accountable in tort have trouble finding viable causes of action. Because intentional torts are inadequate and there is no tort of "clergy

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[7] *See* Garland, *supra* note 5, at 127 ("Congregational and denominational bodies have been slow to respond to reports of clergy sexual abuse, often blaming the victims and being more concerned about taking self-protective stances to avoid legal or moral responsibility . . . . [C]ongregations often discredit and blame the offended."). Only in 2021 did the Catholic Church—still dealing with the fallout of its child sex abuse scandals—make the sexual abuse of vulnerable adults a canonical crime. This move was likely done in response to the revelations that the former Archbishop of Washington, Theodore E. McCarrick, had abused adult seminarians. Jason Horowitz, *Pope Widens Church Law to Target Sexual Abuse of Adults by Priests and Laity*, N.Y. TIMES (June 1, 2021), https://www.nytimes.com/2021/06/01/world/europe/vatican-priests-sexual-abuse.html [https://perma.cc/2RX7-44BG]. For more on abuse of adults in the Catholic context and criticisms of the idea of "vulnerable" victims, see Stephen E. de Weger & Jodi Death, *Clergy Sexual Misconduct Against Adults in the Roman Catholic Church: The Misuse of Professional and Spiritual Power in the Sexual Abuse of Adults*, 30 J. FOR ACAD. STUDY RELIGION 227, 246 (2017), which concludes that, in cases of clergy sexual misconduct against adults, both "power and vulnerability are intrinsic to the perpetration of sexual misconduct." Abusive and inappropriate sexual relationships between clergy and adult congregants transcend denominational boundaries and occur in various faith traditions. For example, in one survey conducted among clergy within the Church of England, 24% of respondents reported engaging in conduct they felt was sexually inappropriate, and 67% reported knowing a colleague who had. Thaddeus Birchard, *Clergy Sexual Misconduct: Frequency and Causation*, 15 SEXUAL & RELATIONSHIP THERAPY 127, 135 (2000).

[8] *See, e.g.*, Rousselle, *supra* note 1 ("[The accused priest] acknowledged a 'boundary violation' . . . ."); *Lawsuit Alleges Serial Assault by CFR Franciscan*, PILLAR (July 7, 2022, 7:00 AM), https://www.pillarcatholic.com/lawsuit-alleges-serial-assault-by/ [https://perma.cc/6C75-DVD6] (reporting on an accused priest's claims that the sexual contact between him and a spiritual directee was consensual).

[9] Bradley Toben & Kris Helge, *Clergyperson Sexual Misconduct with Congregants or Parishioners: Past Attempts to Impose Civil and Criminal Liabilities and a Proposed Criminal Law to Increase the Likelihood of Criminal Punishment of Perpetrators*, *in* CLERGY SEXUAL ABUSE, *supra* note 5, at 144, 147; *see, e.g.*, UTAH CODE ANN. § 76-5-406(2)(*l*) (defining sexual acts as nonconsensual when "the actor is a health professional or religious counselor, the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested"); WIS. STAT. ANN. § 940.22(1)(i), (2) (classifying sexual contact between a therapist and a patient as a felony and defining therapist as including a "member of the clergy or other person, whether or not licensed or certified by the state, who performs or purports to perform psychotherapy").

[10] *See* Toben & Helge, *supra* note 9, at 150–52 (outlining the various legal impediments to civil and criminal actions against abusive clergypersons).

malpractice," many victims have tried to rely on breach of fiduciary duty claims to seek damages from their abusers. They argue that clergypersons—as professionals similar to therapists, doctors, or lawyers—owe them duties of care and loyalty, making any sexual activity that occurs a civil wrong. However, courts disagree about whether such claims are permissible under the First Amendment's Free Exercise and Establishment Clauses given the religious significance of these relationships. Some courts are skeptical that absent formal licensing as a mental health professional a clergyperson can qualify as a fiduciary.

Professors Zanita E. Fenton and Janice D. Villiers have both argued that clergypersons can be fiduciaries when they engage in behavior *analogous* to other fiduciaries. They contend that clergypersons who offer pastoral counseling should be deemed fiduciaries and, therefore, can be held liable for inappropriate sexual contact with counselees.[11] They have argued that the First Amendment's Free Exercise Clause should not shield pastoral counselors who are affiliated with religious organizations or occupy religious roles from liability for tortious sexual misconduct.[12] Both Professors Fenton and Villiers argue that since clergy provide quasi-counseling services which are sufficiently analogous to secular mental health services, the imposition of fiduciary duties can pass constitutional muster.[13]

This Note departs from Professors Fenton's and Villiers's arguments by analogy, while agreeing with its conclusion that clergypersons who offer religious guidance are fiduciaries in some limited circumstances. Rather, this Note argues that clergypersons are most properly deemed fiduciaries through a fact-based definitional approach. Courts should evaluate prospective fiduciary relationships involving clergy by employing a distinct conceptual definition of fiduciary relationships rather than by analyzing these relationships based on apparent similarities between a clergyperson and mental health counselors.

This definitional approach is preferable to the analogical approach for three reasons. First, it does not obscure the important differences between mental health treatment and religious guidance. Second, it avoids making the issue of liability depend entirely on whether a judge or jury agrees with the controversial premise that a clergyperson is like a mental health counselor. Third, it better explains why clergypersons who offer no formal mental

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[11] Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 88–91 (2001); Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 37–63 (1996).

[12] Fenton, *supra* note 11, at 81; Villiers, *supra* note 11, at 56–57.

[13] Fenton, *supra* note 11, at 89; Villiers, *supra* note 11, at 64.

health counseling, but only religious guidance[14] (as in the above scenario), are nevertheless fiduciaries. Thus, it does not allow abusive clergypersons to exploit ambiguities between secular mental health services and religious guidance to avoid liability.[15]

This Note will be divided into three Parts. Part I explains the difficulties that adult victims have had in identifying a cause of action for clergy sexual misconduct and why a breach of fiduciary duty is a viable and attractive claim. Part I also discusses the nature of fiduciary relationships, how they are identified, and their unique characteristics. Part II outlines four different approaches U.S. courts have adopted when adjudicating breach of fiduciary duty claims against clergypersons. Part III argues that clergypersons who only provide religious guidance can be deemed fiduciaries in some limited circumstances and that a fact-based definitional method is the most effective way to analyze these relationships. This Note concludes by addressing potential objections and offers preliminary responses.

Although similar accusations of sexual abuse have been made against Buddhist leaders,[16] Imams,[17] Rabbis,[18] and even practitioners of Chinese folk religion,[19] this Note will largely focus on the Christian context. The scope is limited to this context for two reasons: First, the vast majority of religiously affiliated Americans identify as Christian.[20] Second, most of the cases discussed herein involve Christian-affiliated clergy.

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[14] I will use "religious guidance" to mean those relationships whereby the advice, guidance, or direction is offered on matters that are primarily, if not exclusively, spiritual or religious. As mentioned above, it is not often clear what courts or commentators mean by "pastoral counseling." I will tentatively suggest it is a more formal type of guidance where a clergyperson treats or discusses mental health or relationship issues with a focus on biblical or spiritual methods or ends.

[15] For an example of an unsuccessful attempt to take advantage of these blurred distinctions, see *Sheikh v. Doe*, No. 05-19-01329-CV, 2021 WL 2947663, at *3 (Tex. App. June 30, 2021), where the court stated: "The evidence in the record is legally and factually sufficient to show that Sheikh provided mental health services, including counseling, to Doe, and Doe was his patient . . . . In making this determination, we reject Sheikh's argument that he provided Doe with only religious guidance."

[16] *See, e.g.*, Andy Newman, *The 'King' of Shambhala Buddhism Is Undone by Abuse Report*, N.Y. TIMES (July 11, 2018), https://www.nytimes.com/2018/07/11/nyregion/shambhala-sexual-misconduct.html [https://perma.cc/YZT5-N39F].

[17] *See, e.g.*, Matt Apuzzo, *Sexual Abuse Allegations Against Imam Stir Rifts in Insular Illinois Community*, N.Y. TIMES (Feb. 14, 2015), https://www.nytimes.com/2015/02/16/us/sexual-assault-suit-against-illinois-imam-highlights-a-communitys-divisions.html [https://perma.cc/JV52-YMAZ].

[18] *See, e.g.*, *Jerusalem Rabbi Charged with Raping Followers, Claiming It Would Cleanse Their Sins*, TIMES ISR. (June 6, 2022, 7:03 PM), https://www.timesofisrael.com/rabbi-charged-with-raping-followers-claiming-it-would-cleanse-their-sins/ [https://perma.cc/A9P9-C6ZM].

[19] *See, e.g.*, Jianlin Chen, *Lying About God (and Love?) to Get Laid: The Case Study of Criminalizing Sex Under Religious False Pretense in Hong Kong*, 51 CORNELL INT'L L.J. 553, 570 (2018).

[20] Gregory A. Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, PEW RSCH. CTR. (Dec. 14, 2021), https://www.pewresearch.org/religion/2021/12/14/about-three-in-ten-u-s-adults-

I. FIDUCIARY RELATIONSHIPS AND CLERGY MISCONDUCT

In the Christian New Testament, Saint Paul of Tarsus outlines the qualifications befitting someone aspiring to serve the early Christian communities.[21] They must be "above reproach . . . temperate, sensible, respectable, hospitable . . . not violent but gentle, [and] not quarrelsome."[22] Elsewhere, Saint Paul writes that "it is required of stewards that they be found *trustworthy*."[23]

To trust another person is to risk the possibility that such trust might be betrayed.[24] A betrayal of trust can cause serious economic, psychological, and emotional harms. In some business and financial contexts, a betrayal of trust is legally actionable. However, such legal recourse is not always available to adult victims of clergy sexual abuse. Abusive clergypersons routinely prey upon the trust engendered by their institutional authority, their theological expertise, and the religious faith of and confidence of their congregants. However, courts are divided about whether such a betrayal amounts to a civil wrong.

This Part will briefly explore the limitations courts have imposed on civil actions brought by adult victims against sexually abusive clergypersons. First, it details the inadequacies of various causes of actions and why victims now rely on breach of fiduciary duty claims. Second, this Part provides the necessary background on fiduciary law to set up Part II's discussion of different judicial approaches to breach of fiduciary claims against clergypersons.

A. Why Fiduciary Duties?

Adult victims of clergy sexual abuse often have difficulty finding a viable cause of action that can increase the likelihood of recovery while also avoiding "excessive entanglement" with the free exercise of religion.[25]

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are-now-religiously-unaffiliated/ [https://perma.cc/3ZBB-6D2U] ("Self-identified Christians . . . make up 63% of the adult population.").

[21] *See* 1 *Timothy* 3:1–4.

[22] *Id.*

[23] 1 *Corinthians* 4:1–2 (emphasis added).

[24] *See* Annette Baier, *Trust and Antitrust*, 96 ETHICS 231, 234–35 (1986). According to some philosophers, trust is differentiated from other moral psychological attitudes like reliance by the fact that it can be betrayed. *See* Johnny Brennan, *Recognition Trust*, 178 PHIL. STUD. 3799, 3801 (2021).

[25] The idea of "excessive entanglement" is primarily associated with the three-prong test from *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). Recently, the Supreme Court overruled *Lemon*'s endorsement test. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022) ("In place of *Lemon* and the *endorsement* test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understands.'" (emphasis added) (citations omitted)). However, the Court was

Courts are more responsive to First Amendment defenses in lawsuits brought by adults than those involving child victims of clergy abuse.[26] The reason for this is twofold. First, since both victim and abuser are above the age of consent, there is an appearance of legal propriety. And second, the fact that someone happens to be a member of the clergy does not make the sexual activity inherently suspect, even if that person is supposed to be celibate. To treat clergypersons differently solely on account of their clergy status implicates numerous First Amendment concerns.[27]

Sexual abuse of adults by clergy occupies an uncomfortable middle position: it is not usually criminalized by statutes, as is the case when a minor is involved—and clergy are not subject to the same professional regulation as, for example, lawyers or doctors. So, while few would disagree that sex between a doctor and his or her patient—or a lawyer and his or her client—is inappropriate and exposes the professional to civil and even criminal liability, the situation with clergy is more nuanced. Unlike lawyers and doctors, there are no regulatory boards of clergypersons nor standardized requirements to occupy pastoral roles—rather, there are extremely diverse and conflicting views between denominations and faith traditions about the role and responsibilities a faith-leader should occupy vis-à-vis his or her flock.

silent as to *Lemon*'s entanglement test. This Note uses the language of "entanglement" as this is the language used in the cases discussed in Part II. A fuller discussion of *Kennedy*'s effect (if any) on the application of fiduciary duties to clergypersons would go beyond the scope of this Note. With that said, it seems doubtful that *Kennedy* could be read to support the types of interventions courts are hesitant to make in the cases discussed in Part II. In this sense, the idea of entanglement seems alive in spirit even if dead in letter. For more on "entanglement" and its history, see Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701 (2020).

[26] Sexual contact between an adult clergyperson and a minor is criminal per se, and therefore, there are few First Amendment arguments available for defendants in this context. In these cases, courts are not asked to interpret religious doctrine, or evaluate the religious beliefs of the minor. *See* JAMES T. O'REILLY & MARGARET S.P. CHALMERS, THE CLERGY SEX ABUSE CRISIS AND THE LEGAL RESPONSES 93 (2014).

[27] *See, e.g.*, McDaniel v. Paty, 435 U.S. 618, 643 n.* (1978) (Stewart, J., concurring) (holding that a state statute barring clergy from public office on account of their status as clergy violates the First Amendment because it "penalized an individual for his religious status").

Other than in cases of well-established and respected secular professions such as medicine,[28] law,[29] psychotherapy,[30] and teaching,[31] there are few professions in which noncriminal consensual sex is given a second glance. Even though we all might agree that it is certainly *creepy* that a fitness instructor may use his position to obtain dates and have sex with those he coaches, few would say he should be liable in tort solely on that account. Whether one thinks that clergypersons should be civilly liable for having inappropriate sexual relationships likely depends on whether one sees such figures closer to the predatory lawyer or the creepy fitness instructor.[32]

Some have argued that clergypersons do belong in the same category as other professionals and, therefore, should be liable for malpractice when they engage in inappropriate sexual activity with congregants.[33] However, courts have consistently rejected any clergy-specific standard of care and have universally rejected the tort of clergy malpractice. The seminal case involving an allegation of clergy malpractice is *Nally v. Grace Community Church*.[34] In that case, the plaintiff was not an adult victim of sexual abuse, but the family of a twenty-four-year-old who had committed suicide.[35] The parents of the deceased filed a wrongful death action against their son's church and its pastors, alleging clergy malpractice for "negligence and outrageous conduct in failing to prevent the suicide."[36] The court concluded that determining a standard of care for clergy operating in their capacity as pastoral counselors—who are otherwise not licensed to provide mental

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[28] CODE OF MED. ETHICS § 9.1.1 (AM. MED. ASS'N 2016) ("Romantic or sexual interactions between physicians and patients that occur concurrently with the patient physician relationship are unethical.").

[29] MODEL RULES OF PRO. CONDUCT r. 1.8(j) (AM. BAR ASS'N 2020) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.").

[30] ETHICAL PRINCIPLES OF PSYCHS. & CODE OF CONDUCT § 10.05 (AM. PSYCH. ASS'N 2003), https://www.apa.org/ethics/code/ethics-code-2017.pdf [https://perma.cc/9HKE-SNC7] ("Psychologists do not engage in sexual intimacies with current therapy clients/patients.").

[31] MODEL CODE OF ETHICS FOR EDUCATORS princ. III(A)(8) (NAT'L ASS'N OF STATE DIR. OF TCHR. EDUC. & CERTIFICATION 2023), https://cdn.ymaws.com/www.nasdtec.net/resource/resmgr/mcee/mcee_2nd_edition_july_2023.d.pdf [https://perma.cc/L4VU-BZEG] ("The professional educator respects the rights and dignity of all students by . . . [a]cknowledging there are no circumstances that allow for educators to engage in romantic or sexual relationships with students.").

[32] I thank Kenni Zellner for this example.

[33] *See, e.g.*, Emily C. Short, Note, *Torts: Praying for the Parish or Preying on the Parish? Clergy Sexual Misconduct and the Tort of Clergy Malpractice*, 57 OKLA. L. REV. 183, 224 (2004) ("[T]he tort of clergy malpractice would establish a standardized method of recovery."). Malpractice is a type of negligence "on the part of a professional." *Malpractice*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[34] 763 P.2d 948 (Cal. 1988), *cert. denied*, 490 U.S. 1007 (1989).

[35] *Id.* at 949.

[36] *Id.*

health services—would "quite possibly" be unconstitutional.[37] The court attributed the impracticability of imposing a duty of care on pastoral counselors on "differing theological views espoused by the myriad of religions in [the] state."[38] Furthermore, the court found that "[s]uch a duty would necessarily be intertwined with the religious philosophy of the particular denomination."[39]

No state court has since departed from the reasoning of *Nally* and accepted clergy malpractice as a viable cause of action.[40] Courts agree that defining such a standard could "embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions with widely varying beliefs," a constitutionally impermissible practice under the First Amendment's Free Exercise Clause.[41]

Absent a clergy-specific cause of action, other adult victims tend to seek redress on other tort theories that do not require any inquiry into the religious foundations of the relationship. For instance, sexual abuse by clergy often meets the elements of battery—intentional harmful or offensive contact with another person—because sexual misconduct usually involves some form of nonconsensual touching.[42] In these cases, the religious status of the clergyperson is irrelevant; all that matters is that there was intentional and offensive contact.[43] However, the appearance of the plaintiff's consent to

[37] *Id.* at 955–56, 960. According to trial testimony, the church only offered spiritual and biblical counseling, and did not hold themselves out as professional, medical, or psychiatric counselors. The court also noted that the state legislature exempted clergy from licensing requirements applicable to marriage, family, child, and domestic counselors and from the statutes regulating psychologists. Based on this, the court concluded that "the Legislature has recognized that access to the clergy for counseling should be free from state-imposed counseling standards, and that 'the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations.'" *Id.* at 959–60 (quoting Samuel E. Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U. L. REV. 163, 176 (1981)).

[38] *Id.* at 960.

[39] *Id.*

[40] *See* O'REILLY & CHALMERS, *supra* note 26, at 99–100; *see also* Dausch v. Rykse, 52 F.3d 1425, 1432 (7th Cir. 1994) (Ripple, J., concurring in part and dissenting in part) ("Indeed, a cause of action for clergy malpractice has been rejected uniformly by the states that have considered it.").

[41] F.G. v. MacDonell, 696 A.2d 697, 703 (N.J. 1997); *accord* Strock v. Pressnell, 527 N.E.2d 1235, 1239 (Ohio 1988) ("[I]f a legal duty is imposed on clergy to perform or not to perform in a particular way, will this clash with the religious beliefs of some faiths and thus violate the Free Exercise Clause of the First Amendment to the United States Constitution?").

[42] *See* RESTATEMENT (SECOND) OF TORTS § 13 (AM. L. INST. 1965).

[43] This is an easier case to make if sexual contact has in fact occurred and the victim did not consent to the contact. Furthermore, this cause of action avoids any First Amendment issues because the court is not expected to interpret or consider the religious beliefs or practices of either party, or interpret religious doctrines, as sexual touching is rarely an expression of religious practice.

sexual activity often complicates the allegation of battery.[44] Courts presumptively consider sexual activity as facially consensual due to the age of the victim and absent some understanding that consent was compromised; it may not always be seen as a result of intentional manipulation, grooming, or force. Abusers, although aware that their behavior may be *morally* wrong, may not even be conscious that it is *legally* wrong. Both abuser and victim often subjectively frame the conduct as a "boundary violation" or "affair."[45]

Courts rarely accept other tort claims, such as negligent and intentional infliction of emotional distress, given the difficulty posed by the religious context.[46] Whether sexual contact between a clergyperson and parishioner is "outrageous" will largely depend on one's views about what constitutes appropriate conduct between a clergyperson and his parishioners and the religious nature of the relationship.[47] The results of these inquiries can lead to dismissal by courts.[48]

Consequently, pleading breaches of fiduciary duties against abusive clergypersons as an alternative route to recovery has become an attractive option to victims. Breach of fiduciary duty claims involve fact-intensive inquiries that can help lead to recovery and allow victims to bring the harm they experienced to light. Additionally, as Professor Villiers notes, there are many aspects of the clergy relationship that imbue it with similar risks found in comparable secular relationships associated with fiduciary duties: the power imbalance, the vulnerability of the congregants, and the dependence that can be created.[49] This makes it a viable cause of action for those who

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[44] Another issue is that intentional torts limit vicarious liability as employers are not usually liable for the intentional torts of employees. Although there have been exceptions in the context of clergy sexual abuse of minors, this is not a common approach. For more on vicarious liability for the intentional conduct of clergy, see Patrick Hornbeck, Respondeat Superior *Vicarious Liability for Clergy Sexual Abuse: Four Approaches*, 68 BUFF. L. REV. 975, 978 (2020), which outlines four approaches to vicarious liability in the context of clergy sexual abuse and advocates for the adoption of the so-called "close connection" test.

[45] Such language is often adopted by abusers and even the victims themselves. *See* Rousselle, *supra* note 1; Margaret Kennedy, *Sexual Abuse of Women by Priests and Ministers to Whom They Go for Pastoral Care and Support*, 11 FEMINIST THEOLOGY 226, 228 (2003).

[46] *See* Short, *supra* note 33, at 183, 193–94.

[47] Additionally, it is not always clear that the behavior of the clergyperson is motivated by an intent to cause such emotional distress. *Id.*

[48] *See, e.g.*, Schieffer v. Cath. Archdiocese, 508 N.W.2d 907, 910–11 (Neb. 1993) ("There are several reasons why the plaintiff's alleged claim for intentional infliction of emotional distress was subject to demurrer. What is involved in this case is conduct between consenting adults. There is no allegation that the defendant used force or fraud to accomplish his sexual relations with the plaintiff . . . .").

[49] Villiers, *supra* note 11, at 43. Professor Tamar Frankel also notes that there are clear religious and moral roots to fiduciary duties. The notion of one acting as a selfless steward for the benefit of others has clear religious overtones that remain salient in Abrahamic societies. TAMAR FRANKEL, FIDUCIARY LAW 89–90 (2011).

were abused by clergy in intimate pastoral settings. Furthermore, since this cause of action is not based on determining a professional standard but depends solely on a situational and interpersonal inquiry into the nature of the relationship, it can avoid the First Amendment issues that plague the claims of clergy malpractice.

Before discussing how courts have addressed these fiduciary duty claims, the Note will outline features of fiduciary relationships generally, how they are identified, and the aspects of these relationships that make them distinct from other legal relationships.

B. Identification of Fiduciary Relationships and the Duty of Loyalty

A breach of fiduciary duty claim requires establishing the existence of a fiduciary relationship and a breach of the attaching fiduciary duties, namely the duties of care and loyalty.[50] In cases involving clergy sexual abuse of adults, the main issue is determining whether a fiduciary relationship existed between the parties. This subsection will briefly explore the ways courts find fiduciary relationships and the unique nature of fiduciary duties, namely the duty of loyalty.

Fiduciary relationships exist in a variety of personal, professional, service, and commercial contexts.[51] The traditional fiduciary relationships include the following: trustee–beneficiary, agent–principal, partner–partner, director–corporation, attorney–client, and physician–patient.[52] However, as Professor Tamar Frankel notes, the principles underlying fiduciary law are ancient and elements exist in the Hebrew Bible, the New Testament, and Roman law.[53] Although only specific personal and professional relationships were historically treated as fiduciaries, the formal designation of a person as a fiduciary is not the exclusive measure of whether that person is in fact a fiduciary.[54] Moreover, "[t]he process of recognizing new fiduciary relationships is ongoing" given its fact-sensitive basis.[55]

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[50] Paul B. Miller, *The Identification of Fiduciary Relationships*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 366, 368 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) ("Fiduciary duties are premised on the formation of a recognized fiduciary relationship."). *But see* James Edelman, *When Do Fiduciary Duties Arise?*, 126 LAW Q. REV. 302, 302 (2010) (disagreeing with Miller's analytical framework and instead proposing the priority of duties over relationships).

[51] Miller, *supra* note 50, at 367.

[52] FRANKEL, *supra* note 49, at 42.

[53] *See id.* at 83–92. For an example of fiduciary logic in the New Testament, see *Luke* 16:12, which asks: "And if you have not been faithful with what belongs to another, who will give you what is your own?"

[54] Ruiz v. Cont'l Cas. Co., 400 F.3d 986, 990 (7th Cir. 2005).

[55] FRANKEL, *supra* note 49, at 53.

Courts tend to find fiduciary relationships either based on the *status* of one of the parties or through a fact-based, ad hoc inquiry.[56] In the first instance, status-based fiduciary relationships depend on some form of authoritative declaration that a relationship is a fiduciary relationship, be it either a legislative or judicial declaration.[57] Commonly recognized fiduciaries by status include agents, trustees, directors, and professionals like lawyers and doctors.[58] Because these statuses are widely recognized as fiduciaries, the inquiry largely focuses on whether the alleged tortfeasor did in fact occupy such a status.

In the second instance, factual circumstances of the relationship may establish a fiduciary relationship.[59] Under this fact-based approach, a commonly recognized fiduciary status is not required to qualify as a fiduciary relationship.[60] The fact-based approach introduces more complexity into the analysis.[61] This is because there are two separate factual analyses: analogical or definitional.[62] Analogical reasoning aims to "identify common characteristics" between a recognized fiduciary relationship and the one under scrutiny.[63] It focuses on similarities and does articulate the nature of fiduciary relationships in general terms.[64] As Professor Paul B. Miller notes, the focus here is on *likeness*.[65] This method of analysis suffers from numerous limitations because it works with "indistinct impressions" of fiduciary relationships and often reflects and extends legal convention.[66]

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[56] Daniel B. Kelly, *Fiduciary Principles in Fact-Based Fiduciary Relationships*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 50, at 2, 3.

[57] Miller, *supra* note 50, at 371.

[58] *Id.*

[59] *Id.* at 373.

[60] *See* Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992) ("[F]iduciary duties are sometimes imposed on an ad hoc basis."). This distinction is a bit confusing; after all, a lawyer could be seen as a status-based fiduciary, but to determine whether or not she owed someone fiduciary duties will depend on factual determinations about her relationship with another person. The point here is that not all fiduciary duties derive from a person's professional status. Instead, the status depends on the circumstances and context of a relationship. For example, a broker or financial advisor is not always a categorical fiduciary relationship, but courts are sometimes willing to find that a fiduciary relationship exists between financial advisors and those they advise. Compare this to a lawyer and her client. In these cases, a professional relationship creates a fiduciary relationship. The reason for this distinction lies in the more general difference between rules and standards. That a lawyer is a fiduciary is a rule, and that sometimes a financial advisor is a fiduciary is based on a standard.

[61] Miller, *supra* note 50, at 373.

[62] *See id.* at 375–80.

[63] *Id.* at 375 (emphasis omitted).

[64] *Id.* at 377.

[65] *Id.*

[66] *Id.*

By contrast, a fact-based definitional approach starts with a *distinct* conception of fiduciary relationships in general and then uses this conception to analyze the relationship in question.[67] Employing a top-down inquiry, this approach starts with a generalized and conventional notion of fiduciary relationships abstracted from the various instantiations of such relationships and scrutinizes the relationship through that definition. This definitional fact-based identification method provides important benefits. First, it allows courts to better evaluate alleged fiduciary relationships. This is because prior fiduciary relationships do not constrain the analysis by setting the material terms. Second, it makes what is implicit in the analogical and status-based analyses explicit. Third, and most important for present purposes, this approach provides a "sound basis for evaluating claims for de novo attribution of fiduciary status."[68]

The definitional fact-based analysis does, however, provide its own set of difficulties. The main difficulty is establishing a universally sufficient definition of fiduciary relationships for prospective use. Courts that have ventured to define such relationships do not always agree on what is essential to a fiduciary relationship. For instance, some stress discretion and dependency, while others emphasize power dynamics and unequal terms.[69] Private law scholars also highlight different aspects of fiduciary relationships. According to Professor Miller, a fiduciary relationship arises "upon the fiduciary's undertaking of a mandate under which he receives discretionary legal powers to be exercised for other-regarding purposes."[70] Alternatively, Professor D. Gordon Smith argues that a fiduciary relationship forms "when one party (the 'fiduciary') acts on behalf of another party (the 'beneficiary') while exercising discretion with respect to a critical resource belonging to the beneficiary."[71]

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[67] *Id.*

[68] *Id.* at 380.

[69] *See, e.g.*, United States v. Chestman, 947 F.2d 551, 569 (2d Cir. 1991) ("A fiduciary relationship involves discretionary authority and dependency . . . . [T]he beneficiary of the relation may entrust the fiduciary with custody over property of one sort or another."); Amendola v. Bayer, 907 F.2d 760, 763 (7th Cir. 1990) (defining a fiduciary relationship as one that entails "trust and confidence"); *In re* Daisy Sys. Corp., 97 F.3d 1171, 1177 (9th Cir. 1996) ("[T]he parties [to a fiduciary relationship] do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.").

[70] Miller, *supra* note 50, at 379; *see also* Paul B. Miller, *The Fiduciary Relationship*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63, 69 (Andrew S. Gold & Paul B. Miller eds., 2014).

[71] D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402 (2002) (emphases omitted). For yet another account of fiduciary relationships, see Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 1000 (2017) (emphasis omitted), which argues that "[f]iduciary duties apply whenever a party has been entrusted with power over another's legal or practical interests."

Despite these different definitions, fiduciary relationships contain a distinct normative and conceptual core. Professor Frankel offers the following definition of fiduciary relationships that brings out this conceptual core.[72] First, people in fiduciary roles offer socially beneficial services that require some form of expertise, such as healing, teaching, legal services, asset management, and religious services. Second, the fiduciary must be entrusted with property or power in order to offer these services. Third, this entrustment poses risks that the fiduciary will not be trustworthy and may misuse the entrusted power or not perform the promised services adequately. And fourth, there is a likelihood that the receiving party will fail to protect themselves from the risks involved in the relationship and the market is not efficient in protecting parties from such risks.[73] This definition captures many of the above conceptions of fiduciary duty: a relationship of trust, discretionary power over a person's legally recognized interests, and the risk of harm when such power is misused in violation of such trust.

To identify a fiduciary relationship is, in its simplest terms, to identify a relationship of trust wherein the betrayal of that trust demands legal recourse. Trust is the "most important aspect of fiduciary relationships" and often includes confiding secrets.[74] On account of this relationship, a fiduciary "is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[75] In other words, a fiduciary must act in the best interests of a person on whose behalf they have been empowered to act. To act against the best interests of a beneficiary violates the most significant duty in fiduciary relationships: the duty of loyalty.[76] It is the duty of loyalty that makes fiduciary duties unique and distinct. This duty is complex and involves various sub-duties that are *prescriptive*—acting in good faith and in the best interests of the beneficiary—or *proscriptive*—forbidding seeking self-interested pursuits in conflict with the beneficiary's interests or acting in the interests of third parties whose interests are in conflict with the beneficiary.[77]

While a relationship between a clergyperson and a congregant would appear on its face to be a relationship involving trust, discretionary power,

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[72] FRANKEL, *supra* note 49, at 6.

[73] *Id.*

[74] *Id.* at 7.

[75] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

[76] Andrew S. Gold, *The Fiduciary Duty of Loyalty*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 50, at 384, 386 ("Loyalty is central to fiduciary law—it is part of what gives the field its distinctive qualities.").

[77] *See id.* at 387–91.

and the risk of harm (especially in the event of sexual conduct), courts are divided on whether clergypersons can be liable for a breach of fiduciary duty for sexual misconduct with an adult parishioner.[78] Even those who, in theory, recognize recovery in such cases disagree in practice about the circumstances under which clergypersons are fiduciaries.

The next Part will outline the different approaches taken by federal and state courts when adjudicating breach of fiduciary claims brought against clergypersons who have engaged in sexual misconduct with adult victims.[79]

II. CLERGYPERSONS AS FIDUCIARIES: FOUR APPROACHES

There are four main approaches in U.S. jurisprudence when it comes to imposing fiduciary duties on clergypersons: (1) the "no fiduciary duty" approach; (2) the professional "two hats" approach; (3) the "counseling" approach; and (4) the "something more" approach. These approaches reflect a spectrum of attitudes regarding the degree to which fiduciary principles apply in clergy–congregant relationships that are not traditionally recognized as fiduciary and whether such extensions are prohibited or limited by the First Amendment's Free Exercise Clause.

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[78] One issue that warrants further discussion is which fiduciary duty is breached in these contexts: a duty of care or a duty of loyalty. A duty of care is essentially a negligence standard and thereby involves some of the major concerns involved with a malpractice standard: determining what standard of care a reasonable similar fiduciary owes. Thus, whether someone considers the breach involved in sexual misconduct as a breach of the duty of care or the duty of loyalty likely has important implications for its permissibility under the First Amendment. I believe that the duty of loyalty is the better theory of breach in these contexts because it encapsulates what is most problematic about the misconduct: that the trust of the entrustor has been intentionally taken advantage of to the personal benefit and satisfaction of the person who owed them a duty to act in their best interest. The theory of breach in these circumstances is beyond the scope of this Note which is primarily focused on the fiduciary status of clergypersons.

[79] In this Note, I have focused primarily on claims brought by the victims of sexual abuse against offending clergypersons. However, claims have also been brought by the partners of those with whom a clergyperson has had sexual contact. This usually occurs when that clergyperson has offered marriage counseling to couples and then had sex with one partner. *See, e.g.*, Bailey v. Faulkner, 940 So. 2d 247, 253 (Ala. 2006) (holding that plaintiff's claims for negligence and emotional damages due to sexual misconduct between pastor and his ex-wife were amatory torts and forbidden by statute); Strock v. Pressnell, 527 N.E.2d 1235, 1239–40 (Ohio 1988) (finding the claim brought by a husband against a clergyperson was in essence an amatory tort and, therefore, abolished by statute). Plaintiffs also have asserted breach of fiduciary duty claims against clergy for more than just sexual misconduct. Plaintiffs have alleged that disclosures of confidential information and inducement to sell property as breaches of fiduciary duty. *See, e.g.*, Adams v. Moore, 385 S.E.2d 799, 801 (N.C. Ct. App. 1989) (finding preacher violated fiduciary duty by using position and influence to obtain deed to parishioner's home); Koster v. Harvest Bible Chapel–Quad Cities, 959 N.W.2d 680, 682 (Iowa 2021) (holding that summary judgment was properly granted to pastor who was sued for breach of fiduciary duty for divulging information learned at group marriage discussions).

A. The "No Fiduciary Duty" Approach

Many courts have held that clergypersons cannot be found liable for a breach of fiduciary duty when a pastoral relationship has developed into a sexual relationship, because no fiduciary relationship exists between a clergyperson and a congregant. Courts have found that this claim is impermissible for two reasons. First, it is a veiled way to essentially plead malpractice, and second, imposing a fiduciary duty on a clergyperson would require an unconstitutional entanglement with religion.

The case of *Schmidt v. Bishop* illustrates the first malpractice rationale. There, the plaintiff alleged that her pastor initiated sexual contact after beginning a counseling relationship with her.[80] The defendant-pastor allegedly "invoked God as supporting the conduct in which he allegedly engaged, and informed her that 'the relationship was special and acceptable in the eyes of the Lord' and that 'it was not something [she could] share with others . . . .'"[81] The counseling relationship continued for over ten years and only ended after the plaintiff sought psychotherapy and came to understand that she had been abused by her pastor.[82] The district court, however, dismissed Schmidt's claim for breach of fiduciary duty on the grounds that defining the scope of fiduciary duty owed by clergy would involve the same "constitutional difficulties encountered in articulating the generalized standard of care for a clergyman" and therefore such a claim was "merely another way of alleging that the defendant . . . engaged in *malpractice*."[83]

Some courts find that the imposition of fiduciary duties is inappropriate even if they recognize that the claim for malpractice and fiduciary duties are distinct. In *Langford v. Roman Catholic Diocese of Brooklyn*, the plaintiff sought guidance from her priest following a serious medical diagnosis.[84] The priest began visiting her multiple times a week and during these visits allegedly emphasized the mystical and esoteric nature of his power to cure her, which encouraged her dependence on him. The plaintiff alleged that because of this dependence, she did not want to anger him and so did not resist his sexual advances.[85] The court found the breach of fiduciary duty

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[80] Schmidt v. Bishop, 779 F. Supp. 321, 324 (S.D.N.Y. 1991).

[81] *Id.* (alterations in original).

[82] *Id.*

[83] *Id.* at 326; *see also* Teadt v. Lutheran Church, 603 N.W.2d 816, 822 (Mich. Ct. App. 1999) ("[P]laintiff's allegations that Garbisch misused his superior position as her pastor and counselor in order to achieve a sexual relationship with her also reveal that the gist of plaintiff's action is in fact clergy malpractice."); *Strock*, 527 N.E.2d at 1243 (stating that a claim for breach of fiduciary duty is essentially a claim for negligence).

[84] 677 N.Y.S.2d 436, 437 (Sup. Ct. 1998).

[85] *Id.*

claim could not be maintained against the priest because the issue could not be framed in secular terms.[86]

It reasoned that though fiduciary law is a religiously neutral rule, there must be "neutral *facts* to which to apply those rules."[87] As such, the court found an "insurmountable difficulty" for the plaintiff: she could not show the existence of a fiduciary relationship without resorting to religious facts and so the claim could not pass constitutional muster.[88] Furthermore, the court emphasized that to strip the relationship of all the religious elements would leave the plaintiff with only the amatory tort of seduction, which is no longer recognized.[89]

Setting aside the unimaginative and limited framing of the issue, the *Langford* court essentially reasoned that, in the absence of a well-recognized status-based fiduciary relationship, determining the existence of a fiduciary relationship would require an ad hoc, fact-intensive inquiry into the circumstances of the relationship.[90] The court then suggested that a jury could only make this determination by evaluating whether the subjective religious beliefs of the plaintiff and the religious status of the priest were sufficient for the requisite vulnerability and dependence of the fiduciary relationship.[91] And since these facts were about religious matter, they were therefore not "neutral," and a jury could not be expected to apply the law to them without excessive entanglement in the free exercise of religion.[92]

Here emerges the tension discussed above of distinguishing sex that is creepy and inappropriate from sex that violates a person's rights. The courts referenced above seemed unsure whether a clergyperson is more like a professional offering services or more like the creepy fitness instructor. This is clear from the *Langford* court's conclusion that absent the religious nuance, all that occurred was seduction, which does not give rise to a legally recognized claim. Whether those courts believe that the harm involved in

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[86] *Id.* at 439.

[87] *Id.* (emphasis added); *see also* Schieffer v. Cath. Archdiocese, 508 N.W.2d 907, 912 (Neb. 1993) (rejecting fiduciary duty claims against clergy members on the reasoning that the claim was best characterized as a malpractice claim) (citing *Schmidt*, 779 F. Supp. at 326).

[88] *Langford*, 677 N.Y.S.2d at 439 ("In order to consider the validity of plaintiff's claims of dependency and vulnerability, the jury would have to weigh and evaluate, *inter alia*, the legitimacy of plaintiff's beliefs, the tenets of the faith insofar as they reflect upon a priest's ability to act as God's emissary and the nature of the healing powers of the church.").

[89] *Id.*

[90] *Id.* ("Here, in order for plaintiff's cause of action to meet constitutional muster, the jury would have to be able to determine that a fiduciary relationship existed and premise this finding on neutral facts.").

[91] *Id.* ("To instruct a jury on such matters is to venture into forbidden ecclesiastical terrain.").

[92] *Id.*

these cases rises to the same levels as the harm that occurs in doctor–patient relationships is not clear.

There are at least two ways to understand these holdings. First, the courts could be saying that clergypersons cannot be found to be fiduciaries in *any circumstance* since a determination of the character of the relationship would involve too much entanglement with the religious beliefs and practices of a particular church. Under this reading, regardless of what a clergyperson does, if the relationship has sufficiently religious elements, the court will be unwilling to find any fiduciary duties. Second, the courts could be saying that clergypersons cannot be fiduciaries qua clergypersons—that if the relationship was primarily religious and not something else, then there can be no fiduciary duties imposed on these relationships. It is not entirely clear which concern has primarily dictated this judicial approach. However, it is noteworthy that neither clergyperson in the above cases was a professional or held himself out as being a professional; they solely occupied religious roles. This brings us to the next approach.

B. The "Two Hats" Approach

Under the "two hats" approach,[93] a court will allow a claim for breach of fiduciary duty against a clergyperson if the clergyperson wears two hats—that is, occupies a role that is sufficiently secular so that the religious aspect of the relationship becomes "incidental."[94] For example, if a clergyperson is a licensed professional or holds themselves out as such, then there is something secular upon which a fiduciary relationship can be established. This approach is, in essence, a subspecies of the "no fiduciary duty" approach discussed above. Clergypersons are not fiduciaries solely on account of their clerical or religious status but on account of a different, nonreligious status. Here, the courts are much more willing to impose fiduciary duties and look beyond First Amendment concerns because there are sufficient secular and nonreligious facts at play that circumvent the constitutional worries in those cases where there are no sufficient "secular" activities.

For example, in *Sanders v. Casa View Baptist Church*, one of the plaintiffs—a congregant at the church—claimed that the defendant-pastor breached his fiduciary duties as a marriage counselor by encouraging and

[93] I borrowed this terminology from the dissent in *F.G. v. MacDonell*, 696 A.2d 697, 707 (N.J. 1997) (O'Hern, J., dissenting) (emphasis added), which states: "Of course, there are clerics who wear *two hats*. To assess the conduct of a cleric moonlighting as a TV repair person establishes no state religion. There are even clerics who are licensed as attorneys, physicians, or psychological therapists."

[94] Teadt v. Lutheran Church, 603 N.W.2d 816, 823 (Mich. Ct. App. 1999) (quoting Amato v. Greenquist, 679 N.E.2d 446, 454 (Ill. App. Ct. 1997)).

subsequently initiating a sexual relationship with her.[95] On appeal, the defendant-pastor argued that the First Amendment precluded judicial review of his misconduct because it occurred in a religious counseling relationship that was not "purely secular."[96] The pastor argued that the fact "he occasionally discussed scripture in his counseling sessions . . . demonstrated that the counseling he provided was not purely secular."[97] The court disagreed and held that the pastor was not entitled to summary judgment on First Amendment grounds.[98] The court reasoned that the First Amendment protection of religious freedom does not extend to secular behavior even when such behavior "comprise[s] part of an otherwise religious relationship."[99] This extension, the court argued, would "place a religious leader in a preferred position in our society."[100]

The court found that the minor infusion of religious discussion in what was otherwise a secular and professional marriage counseling relationship was not enough to give the behavior constitutional protection.[101] The fact that the defendant "held himself out as possessing the education and experience of a professional marriage counselor" provided the jury with relevant secular and professional standards that were distinct and separate from religious doctrine.[102]

Under the "two hats" approach, clergypersons can therefore be a fiduciary only if they occupy a separate professional role in which fiduciary duties are owed. Therefore, to be liable as a fiduciary, a clergyperson must offer additional professional services that are not solely "under the aegis of his church,"[103] hold himself out as such a professional, or be subject to professional standards.[104] Courts that adopt this approach rely on the presence of a secular "hat" (i.e., a secular role played by a clergyperson) to

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95 134 F.3d 331, 333–34 (5th Cir. 1998).

96 *Id.* at 335.

97 *Id.*

98 *Id.* at 338.

99 *Id.* at 336.

100 *Id.*

101 *Id.* at 336–37.

102 *Id.* at 337.

103 See *Lann v. Davis*, 793 So. 2d 463, 466 (La. Ct. App. 2001), for the full quote: "A pastor who provides counseling services usually does so under the aegis of his church, and is not subjected to the same standards as a state-licensed psychiatrist or social worker."

104 *See* Dausch v. Rykse, 52 F.3d 1425, 1430, 1432–33 (7th Cir. 1994) (Coffey, J., concurring) (allowing a claim that a clergyperson had the "duty to possess and apply the skill and knowledge of a reasonably well qualified person providing psychological counseling" because he "held himself out to be providing the services of a psychological counselor"); Destefano v. Grabrian, 763 P.2d 275, 284 (Colo. 1988) ("We have no difficulty in finding that Grabrian, as a marriage counselor to Robert and Edna, owed a fiduciary duty to Edna. His duty to Edna was 'created by his undertaking' to counsel her.").

overcome First Amendment objections, but may not impose fiduciary duties on clergypersons who acted solely in a religious professional capacity.[105]

C. The Counseling Approach

In *F.G. v. MacDonell*, the Supreme Court of New Jersey outlined another approach to analyze fiduciary duties: the counseling approach. In contrast to the above approaches, under this approach, a claim for breach of fiduciary duty may be adjudicated without entanglement in the free exercise of religion.[106] The court was particularly skeptical of the First Amendment objections and reasoned that the First Amendment does not permit nor shield a member of the clergy "from actions for breach of fiduciary duty arising out of sexual misconduct that occurs during a time when the clergy member is providing counseling to a parishioner."[107]

The victims thus could pursue fiduciary duty claims against a clergyperson if he offered counseling, even if that clergyperson did not wear "two hats" or hold himself out as a secular professional. The facts of *MacDonell* should be familiar by now. The defendant was a married Episcopalian priest who induced a vulnerable woman into a sexual relationship in the context of pastoral counseling. Since the essence of a fiduciary relationship is the trust and confidence placed on another in a dominant and superior position, and since trust and confidence are "vital" to the counseling relationship between parishioner and pastor, a pastor "accepts the responsibility of a fiduciary" by accepting a parishioner for counseling.[108]

The New Jersey Supreme Court recognized that for many people religion is the "most likely source" of support when they are troubled and feel vulnerable, so their religious beliefs would motivate them to seek pastoral counseling.[109] The court reasoned that a "pastor knows, or should know of the parishioner's trust and the pastor's dominant position."[110] Therefore, when a pastor in a counseling relationship engages in sexual

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[105] *See, e.g.*, Jacqueline R. v. Household of Faith Fam. Church, 118 Cal. Rptr. 2d 264, 270 (Ct. App. 2002) ("At most, plaintiffs showed the pastor provided counseling to them as church members that was based on his status as a clergyman . . . . Such counseling was part of his church ministry, and there is no evidence he received payment for his counseling services. . . . Here, there is no evidence the pastor did or said anything that would subject him to professional counseling standards. Consequently, he did not owe plaintiffs the same independent duty of care required of licensed professionals.").

[106] 696 A.2d 697, 700 (N.J. 1997).

[107] *Id.* at 702.

[108] *Id.* at 704.

[109] *Id.*

[110] *Id.*

intercourse with a parishioner he is counseling, the pastor may be liable for a breach of a fiduciary duty.[111]

Under the "counseling" approach, proof that a parishioner trusted and sought counseling from the pastor makes him a fiduciary. Even if a clergyperson's "ultimate goal" in counseling is to "help [a counselee] receive assistance from God," sexual misconduct violates a counselee's legal rights.[112] A clergyperson does not need to hold himself out as a mental health professional, be licensed, or engage in exclusively secular conduct. A primarily *religious* relationship could qualify as a fiduciary relationship which would make a clergyperson that engages in sexual conduct with a parishioner liable in tort under certain circumstances—namely, where counseling is offered.[113]

However, it is not entirely clear what is necessary to be a pastoral *counselor* under *MacDonell*. While the court recognized that the primary aim of a pastoral counselor may be to help a counselee "receive assistance from God,"[114] there is no discussion about other means, ends, or methods employed in the counseling relationship. Whether it would even need to be termed pastoral counseling is also not clear. The existing legal discussions have insufficiently addressed this issue.[115]

There are therefore two possible ways that this "counselor approach" could be interpreted. The first is "counseling *plus*." Under this reading, a pastoral counselor must be engaging in some *nonreligious* behavior that makes analogizing the clergyperson's activities to a secular counselor proper. For example, addressing or treating conditions recognized by the DSM using spiritual means, or using tools derived from modern psychiatry to help a counselee in their spiritual life. The second is "counseling *lite*." Under this interpretation, what matters are the *circumstances* of the relationship, namely whether there exists vulnerability, entrustment, confidence, or power differentials on account of the relationship analogous to the counselor–counselee relationship. Under the counselor lite reading, whether the clergyperson was engaged in widely recognized "counselor" behavior or methods matters less.

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[111] *Id.* at 705.

[112] *Id.* Moreover, it is entirely unrelated to religious doctrine.

[113] As the dissent notes, "There is absolutely no suggestion of such an assumption of secular duties in this case." *Id.* at 708 (O'Hern, J., dissenting).

[114] *Id.* at 705.

[115] *See infra* Part III.

The dissent in *MacDonell* construes the majority as adopting the "counseling lite" position,[116] but it is not entirely clear how to interpret the majority's holding. On the one hand, the court reasons that "[b]ut for MacDonell's status as a clergyman, his conduct was unrelated to religious doctrine."[117] The majority also claimed that establishing a fiduciary duty requires proof that the abuse victim (i) trusted the clergyperson and (ii) sought counseling from him.[118] This would indicate the importance of the nonreligious counseling behavior to the relationship. On the other hand, the court stresses the importance of trust and vulnerability and concedes that even if the "ultimate goal in counseling [the plaintiff] may have been to help her receive assistance from God" the sexual contact violated her legal rights because of the violation of the trust and the victim's vulnerability.[119]

This ambiguity leaves certain victims without a path to recovery if a court were to find the "counseling plus" interpretation more persuasive. Furthermore, the rationale for imposing a fiduciary duty on a clergyperson would be based on other assumptions and beliefs about the nature of counseling, mental health treatment, and the distinctiveness of religious practice. These issues will be addressed further in Part III below.

D. The "Something More" Approach

Some courts, when faced with more ambiguous factual situations where a plaintiff has not been in a formal and well-defined counseling relationship, have found that a fiduciary relationship between a priest and congregant requires "something more" in addition to the congregant–clergyperson relationship.[120] In other words, the congregant–clergyperson relationship is not in itself sufficient to warrant the imposition of a fiduciary duty without something else in addition to it. In these cases, the courts do not specify what

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[116] *MacDonell*, 696 A.2d at 707 (O'Hern, J., dissenting) (distinguishing this case from *Dausch v. Rykse*, where the clergyperson "represented to the plaintiff that he was a capable, trained professional on whom she could rely to assist her with her personal problems and could provide 'secular psychological, not religious, counseling'" (emphasis omitted) (citing Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994))).

[117] *Id.* at 705.

[118] *Id.* at 703–04.

[119] *Id.* at 704–05.

[120] Doe v. Hartz, 52 F. Supp. 2d 1027, 1065 (N.D. Iowa 1999) ("[I]n those cases permitting a breach-of-fiduciary-duty claim against a member of the clergy to go forward, the claim was allowed because *something more* than a general priest-parishioner relationship was the basis for the fiduciary duty." (emphasis added)); Ahern v. Kappalumakkel, No. CV010075617S, 2004 WL 5748892, at *7 (Conn. Super. Ct. Mar. 9, 2004) ("Similarly, the acts of a priest interacting with a parishioner in a comforting, supportive or consoling manner, do not, in and of themselves, give rise to a fiduciary duty, as a matter of law. *Something more* must happen, to trigger the establishment of a fiduciary relationship between a priest and a parishioner. This something, though necessarily vague in definition under Connecticut law, is missing in the instant case." (emphasis added)).

is necessary or sufficient to satisfy the "something more." A counseling relationship, although not necessary, may be sufficient to meet this "something more." Other courts claim that this "something more" must be a showing of "de facto control and dominance,"[121] which may be demonstrated through the plaintiff's unique vulnerability. Still, in other cases, the plaintiff's vulnerability is not sufficient to unilaterally show that the alleged fiduciary wielded "de facto control."[122] On the other hand, a confidential relationship could be this "something more" that pushes a relationship into fiduciary territory.[123] It is possible that the court will just know what "something more" is when they see it.[124]

What this approach shows is that although a clergyperson need not be a secular professional or necessarily acting as a counselor in order to be a fiduciary, demonstrating the existence of a fiduciary relationship requires some clear facts that would likely render a nonclergyperson a fiduciary as well—i.e., evidence of control, dominance, and vulnerability. With that said, this approach shows that there is still nothing unique about the role of clergy that makes it easier to establish that they are a fiduciary as opposed to a nonclergyperson. Although being a clergyperson may give rise to more situations in which something like "de facto control" may arise, it is not inherent to the status of a clergyperson.

III. ANALYSIS

Let us return to Jane. If Jane wanted to recover against her former spiritual director for breach of fiduciary duty, she would need to demonstrate (i) that a fiduciary relationship existed; (ii) that a fiduciary duty was breached; and (iii) that this breach caused her harm. Here the harm is clear.

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[121] Marmelstein v. Kehillat New Hempstead, 892 N.E.2d 375, 378 (N.Y. 2008) ("[T]wo essential elements of a fiduciary relation are . . . de facto control and dominance." (internal quotation marks omitted) (quoting Ne. Gen. Corp. v. Wellington Advert., 82 N.Y.2d 158, 173 (1993) (Hancock, J., dissenting))).

[122] Doe v. Roman Cath. Diocese of Rochester, 907 N.E.2d 683, 683–84 (N.Y. 2009) ("As we recently reaffirmed, a fiduciary relationship must exhibit the characteristics of 'de facto control and dominance.' . . . The bare allegation that Jane Doe was 'a vulnerable congregant' is insufficient to establish that plaintiff was particularly susceptible to Father De–Bellis's influence." (quoting *Marmelstein*, 892 N.E.2d at 378)).

[123] Doe v. Apostolic Assembly of Faith in Christ Jesus, 452 F. Supp. 3d 503, 534 (W.D. Tex. 2020) ("Thus, under Texas law, the clergy-member relationship generally is not a fiduciary one, but a clergyperson's relationship with a member in their secular capacity can constitute a 'confidential relationship' triggering fiduciary obligations.").

[124] Indeed, it may seem that some courts do apply an "I know it when I see it" approach to finding fiduciary relationships, especially fact-based ones. For an attempt to articulate a methodology underlying Texas courts' apparent "I know it when I see it" approach to certain informal fiduciary relationships, see Gregory B. Westfall, *"But I Know It When I See It": A Practical Framework for Analysis and Argument of Informal Fiduciary Relationships*, 23 TEX. TECH L. REV. 835, 836 (1992).

The sexual contact that occurred between her and her priest led to serious emotional trauma. And, if a fiduciary relationship did exist, then Jane will likely be able to show that the priest breached his fiduciary duty.

The primary issue for her recovery is the threshold issue: whether their relationship constituted a fiduciary relationship. Without establishing that, a court would likely not find the sexual misconduct a civil wrong. Jane's recovery against her abusive spiritual director therefore depends on whether she can convince a court or a jury that her spiritual director—who only ever provided religious guidance—acted as a fiduciary.

If a court were to adopt either the "no fiduciary duty" approach or the "two hats" approach, liability would likely be foreclosed because Jane's spiritual director was neither a licensed professional, nor did he hold himself out as someone who could provide secular mental health counseling. In short, there is nothing outside the priest's status as a clergyperson that would bring him within the traditional purview of fiduciary law. Professors Fenton and Villiers have argued that this judicial reluctance to analyze the alleged fiduciary character of religious relationships is incorrect and that the First Amendment's Free Exercise Clause should not be read as a shield for wrongful sexual misconduct by clergy.[125] Nevertheless, absent this constitutional prohibition, it is still not entirely clear whether a clergyperson who only provided religious guidance is a fiduciary.

According to Professors Fenton and Villiers, clergypersons like Jane's spiritual director can be fiduciaries because they effectively occupy *counseling* roles.[126] The argument effectively proceeds as follows:[127] Those who provide mental health counseling are recognized as fiduciaries; clergypersons often provide pastoral services that are analogous to nonreligious professional counselors; therefore, they can be deemed fiduciaries without evaluating the religious content of the relationship when they provide such analogous services. The embedded premise in this

[125] Fenton, *supra* note 11, at 94 ("Common law prohibitions of sexual misconduct by fiduciaries and professionals should be considered a generally applicable law. Exceptions for religious institutions counter common sense and social expectations imbedded in the fiduciary/professional relationship."); Villiers, *supra* note 11, at 4 ("The doctrine of separation of church and state does not relieve the state of its responsibility to protect its citizens from harm when clergy are engaged in nonreligious activities.").

[126] Fenton, *supra* note 11, at 89 ("The fiduciary relationship in the context of clergy sexual misconduct can be established in two ways: the counselor/counselee relationship or the clergy/congregant relationship. The former should be the focus with the latter being an important qualifier, as the existence of the counseling relationship with the cleric is enough to establish the fiduciary relationship."); Villiers, *supra* note 11, at 64 ("The cleric and parishioner share a very special relationship—one that is similar to the professional relationship between psychiatrist, psychologist, or social worker and patient. . . . Consequently, it may be argued that a fiduciary duty is created between the clergy and parishioners.").

[127] This is my representation of the argumentative thrust of Professors Fenton's and Villiers's articles.

argument is that if one engages in activities or services analogous to the services provided by a recognized fiduciary, then the fiduciary status is more easily demonstrated. This argument is a deployment of the fact-based *analogical* method of finding fiduciary duties discussed in Part I. In other words, since clergypersons are not fiduciaries because of their status as clergypersons, then they must be determined to be fiduciaries in a fact-based, ad hoc analysis done by analogizing to already recognized fiduciaries.

If Jane were abused in New Jersey, her priest may qualify as a fiduciary under *MacDonell*.[128] There, the court argued what mattered most was whether the plaintiff trusted the clergyperson and whether the clergyperson agreed to provide counseling services.[129] The question then would be whether providing solely religious guidance would qualify as counseling for the second prong.

Unfortunately, the majority in *MacDonell* never tells us what is sufficient to constitute a counseling relationship. Therein lies the weakness of the *MacDonell* opinion and Professors Fenton's and Villiers's analogous approaches. Moreover, Professor Fenton herself never defines counseling for the purposes of her article. Professor Villiers does define counseling but groups together all types of one-on-one pastoral relationships. With such ambiguous, unclear, and expansive notions of what counseling is, there are no criteria or guidance to evaluate a clergyperson's conduct to establish whether it should be considered "counseling." Does offering consistent confidential guidance on various spiritual and family matters constitute counseling? Perhaps. What if the subject matter for discussion was only the congregant's subjective understanding of her faith and theological issues? The confession of sins?

In short, whether the services provided by clergypersons to their congregants are in fact analogous to what mental health therapists provide to counselees is a controversial area. As discussed in Part I, two adults discussing matters of faith, trauma, and past transgression in a private intimate setting and then engaging in a sexual relationship is not, on its face, a civil wrong. Why, therefore, should it matter that one of the people happened to be a member of the clergy? That counseling and religious guidance are analogous depends on a person's preconceived notions about the nature of religion and mental health counseling. For instance, Professor Brian Leiter in his book *Why Tolerate Religion?* argues that there is nothing special about religion that makes it particularly worthy of affirmative respect

[128] F.G. v. MacDonell, 696 A.2d. 697, 704 (N.J. 1997).
[129] *Id.*

and toleration under U.S. law.[130] On Professor Leiter's view, this is because religion often involves "culpable failures of epistemic warrant."[131] That it is to say, it is unsupported by reason and evidence, and people are blameworthy for having religious beliefs.

While philosophers and legal scholars have criticized Professor Leiter's view on religion,[132] it is not difficult to reach this conclusion if one thinks that the beliefs of many religions cannot be rationally justified. On this view, the fact that a clergyperson is not a fiduciary is not just the result of a constitutional prohibition, but also the fact that clergypersons have no more expertise or social value than a fortune teller or witch doctor. If one takes this skeptical approach towards religion—that it is superstitious and irrational gobbledygook—it becomes difficult to argue that clergypersons provide socially beneficial services akin to secular mental health counselors, and the argument by analogy becomes an immediate nonstarter.

Furthermore, the argument by analogy approach suffers from another potential issue, namely that it does not take religion's distinctiveness seriously. Someone might disagree with Professor Leiter's account of religion and nevertheless think analogizing a pastoral relationship to a counseling relationship mischaracterizes religion's unique role and value. Religion provides a unique social good and value in the lives of congregants beyond any residual and ancillary mental health benefits. As such, the argument by analogy psychologizes what occurs in religious environments, reducing the benefits to secular benefits. Religious people like Jane may go to a clergyperson upon experiencing some emotional concerns but may understand those primarily as the effects of religious causes, for example, a lack of prayer or a failure to discern God's will, among others.

To circumvent these issues, this Note suggests that there is a better method of analyzing the prospective fiduciary status of clergypersons under scrutiny—the fact-based definitional approach discussed in Part II. In what follows, this Note will explore what this approach looks like, and why it is better able to handle the difficult edge cases of clergy who only provide religious guidance. The Note will suggest that a relationship between a clergyperson and a congregant is a fiduciary relationship where it (i) involves the divulgence of confidential information (ii) which would not be otherwise shared but for the institutional role of the clergy person (iii) in

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[130] BRIAN LEITER, WHY TOLERATE RELIGION? 68–70 (2013).

[131] *Id.* at 82.

[132] *See* Andrew Koppelman, *How Should I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 962 (2010); Robert Merrihew Adams, *Why Tolerate Religion?*, NOTRE DAME PHIL. REVS. (Jan. 6, 2013), https://ndpr.nd.edu/reviews/why-tolerate-religion/ [https://perma.cc/J2YQ-ADUB] (reviewing LEITER, *supra* note 130).

regular private meetings (iv) at or near the locus or loci of the clergyperson's institutional authority. This better captures the fiduciary character of the relationship, the risks inherent in the relationship, and does not over expand the new potential fiduciary relationships.

A. Applying the Fact-Based Definitional Approach

A clergyperson cannot be a fiduciary on account of their status as a member of the clergy. For a legislature or a court to make such an authoritative declaration would likely constitute an unconstitutional intrusion into the lives and practices of religious persons and institutions.[133] Therefore, for a clergyperson to be deemed a fiduciary for the purposes of imposing civil liability, an ad hoc, fact-based determination is required. Part II outlined situations where courts adopt this fact-based analysis under the "something more" and the "counselor" approaches. There are two methods of engaging in fact-based inquires: the first is analogical, the second definitional.[134] The preceding section discussed the issues with the analogical approach. We now move onto a fact-based definitional analysis.

A definitional approach would require a court to adopt a distinct conceptual definition of fiduciary relationships—one which would allow it to evaluate the relationship under scrutiny. As discussed in Part I, courts do not often venture to lay out such definitions. Nevertheless, there are sufficient similarities in the way courts and private law scholars discuss fiduciaries: there is emphasis on trust, vulnerability, discretionary power, and risks of abuse. It is therefore possible to distill an abstract definition of a fiduciary to evaluate various relationships under scrutiny. Professor Frankel's account of fiduciary relationships is an ideal candidate for such a

[133] In *Kennedy v. Bremerton School District*, Justice Neil M. Gorsuch states that the Establishment Clause must be interpreted by reference to historical practices and understandings. 142 S. Ct. 2407, 2428 (2022). In his opinion, Justice Gorsuch cites to his own concurring opinion in *Shurtleff v. City of Boston* for a discussion of the "hallmarks of an established religion" the Framers sought to prohibit in adopting the First Amendment. *Id.* at 2429 n.5 (citing Shurtleff v. City of Boston, 142 S. Ct. 1583, 1608–10 (2022) (Gorsuch, J., concurring)). In *Shurtleff*, Justice Gorsuch noted that "traditional hallmarks" of an established religion include, among others, "a formal declaration that a religious denomination was in fact the established church" and "the government exert[ing] control over the doctrine and personnel of the established church." 142 S. Ct. at 1605–09 (Gorsuch, J., concurring). To impose a fiduciary status on clergy solely on account of clergy status would involve determining an objective standard for who constitutes a member of the clergy and prescribing an official view of what a clergyperson would do, especially in the duty of care context. This would likely violate one of the hallmarks of established religion identified by Justice Gorsuch. A fact-based approach bases the imposition of fiduciary duties on the nature of the relationship and, thereby, likely avoids violating these hallmarks.

[134] *See supra* notes 59–66 and accompanying text.

distinct definition as it encompasses the most important aspects of fiduciary relationships stressed by other scholars.[135]

To evaluate the prospective fiduciary status of Jane's spiritual director using Frankel's conceptual definition, she would need to show the following:

(i) That her spiritual director offered socially desirable services that typically require expertise;
(ii) That the spiritual director was entrusted with property or power in order to more effectively offer these services;
(iii) That there was risk that this entrusted power could be misused;
(iv) There was a risk that Jane would fail to protect herself from the risks of this entrustment, the market may fail to protect her from these risks, and the cost to ensure trustworthiness would be higher than the socially desirable benefits.

To make a case that her spiritual director was in fact a fiduciary, Jane would need to demonstrate that her spiritual director would qualify as a fiduciary under the above definition. Her success will likely depend on her ability to explain the relationship in terms that make themselves amenable to "public reason"—a way of explaining something from a common point of view that is acceptable to all persons within a liberal community.[136] In short, Jane needs to explain her relationship with her priest in a way that, while not ignoring the religious underpinnings, can make the relationship's intricacies understandable to those who do not share her own religious beliefs. Essentially, she needs to translate it.[137]

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[135] FRANKEL, *supra* note 49, at 6. The present author does not believe that all abstract conceptual definitions of fiduciary relationships are equal. Many of them implicate other theoretical commitments that are not currently under discussion. It is the present author's belief that an ideal conceptual definition of fiduciary relationships would do two things: First, it must carry a descriptive burden and show why seemingly disparate professional and social practices all properly fit under one label. Second, it must capture the underlying normative rationales for such a body of law. It would go beyond the present purposes of this Note to discuss why I think Frankel's account can do these things. Nevertheless, it is worth saying that if one were to favor, for instance, Judge Frank Easterbrook's idea that fiduciary duties are derivative of implied contract obligations, this analysis may not work. It is beyond the scope of this Note to discuss the potential issues with Easterbrook's account of fiduciary duties.

[136] For more on this idea of public reason, see Charles Larmore, *Public Reason*, *in* THE CAMBRIDGE COMPANION TO RAWLS 368, 368–93 (Samuel Freeman ed., 2003).

[137] This idea of translation is based on the work of Jürgen Habermas, specifically what he calls the "translation proviso," i.e., that religious views can enter the public sphere when they have been translated into language that is universally acceptable to the public at large. *See* Jürgen Habermas, *Religion in the Public Sphere*, 14 EUR. J. PHIL. 1, 10 (2006) ("Religious citizens can well recognize this 'institutional translation proviso' without having to split their identity into a public and a private part the moment they participate in public discourses. They should therefore be allowed to express and justify their convictions in a religious language if they cannot find secular 'translations' for them.").

Some philosophers argue that religious beliefs or relationships founded thereon cannot be adequately translated into secular equivalents.[138] However, that such translations do not perfectly capture the *religious* significance of the relationship is not at issue. Rather, the issue is the *legal* significance of the relationship. To avoid knee-jerk reactions from courts wary about intruding into the religious practices of people and institutions, Jane's chances of recovering against her spiritual director are improved when she can explain the factual circumstances of the relationship with neutral, nonreligious facts to help guide their analysis. The explanation necessary would demonstrate there was a socially beneficial service provided by an expert, that she entrusted the priest with power with the resulting risk of misuse of the power, and, finally, that there was a risk Jane would fail to protect herself from the risk of misuse.

First, Jane must show that her spiritual director was providing a socially desirable service that typically requires expertise. A service could be considered "socially desirable" in two ways. It could be socially desirable on a subjective level—that people believe that the services are providing an important benefit—or on an objective level—that the services further some public interest or helps secure a public good.[139] In the case of pastoral and spiritual care, this service could arguably be socially desirable in both ways.[140] A clergyperson providing religious guidance offers various pastoral services. For instance, there could be a penitential aspect to the relationship, or the relationship could primarily be educational, or centered on giving religiously informed advice about important life decisions. In providing these services, a clergyperson is, in effect, offering guidance to a congregant

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[138] *See, e.g.*, Lovisa Bergdahl, *Lost in Translation: On the Untranslatable and Its Ethical Implications for Religious Pluralism*, 43 J. PHIL. EDUC. 31, 32 (2009) ("[W]hat gets lost in Habermas's translation is the possibility that translation is both impossible and necessary."). *But see* Andrew Cummings, *The Habermas–Ratzinger Discussion Revisited: Translation as Epistemology*, 22 CATH. SOC. SCI. REV. 311, 322 (2017) (arguing that a translation proviso can be accepted on the terms provided by the philosopher Habermas). For an overview of this debate about the nature of religious language in the public sphere, see ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE (1997).

[139] Something could be both subjectively and objectively socially desirable. For instance, many people believe that obtaining medical services is good for them personally and it seems rather uncontroversial to say that treating diseases and preventing unnecessary deaths is good for the political community. Alternatively, people could desire a service and there could nevertheless be debate about whether such a service furthers the public interest.

[140] There will likely be those who believe that religion is a net harm for the public. This is beyond the scope of this Note. It suffices to say that, regardless of one's belief about the value of religion in the lives of citizens, the United States Constitution has enshrined religious practice as a distinctive human good worthy of special protection. *See* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 11 (2013) ("[T]he First Amendment is not hostile to religion, because it treats religion as a distinctive human good.").

on how to better understand meaningful and important aspects of a congregant's life. They are taking the beneficiary's chosen interpretative framework for understanding the ultimate meaning and value in their lives and using that framework to provide various services of care, like listening, offering advice, providing consolation, and reconciliation among others. One does not need to affirm the tenants of a particular religion to accept that people can benefit from such services and that those who rely on such services should not lack legal protection.[141]

That these services are provided by an "expert" can be demonstrated by particular factual circumstances, such as the clergyperson's title, the credentials he possesses, and the ways in which the clergyperson has been empowered to act by the institutions in which he serves. Although philosophers and psychologists debate the nature of expertise,[142] an expert is typically someone who possess greater knowledge that qualifies them to speak authoritatively about some subject matter, and whose epistemic authority is recognized socially, either through accreditation or by institutional affiliation.[143] Here, Jane's spiritual director is a Catholic priest, someone who went through several years of academic training giving him superior knowledge and authority in the matters that concern Jane. He has also been trusted by a nonprofit entity to use this superior knowledge to provide services to students at the university. It is reasonable, therefore, to conclude that such a person has relevant expertise to provide the services described above.

Second, Jane would need to show that she *entrusted* her spiritual director with the power or property necessary to provide these services. Here, there is no transfer of property or financial assets. Rather, Jane has entrusted her clergyperson with *herself*, specifically her emotional well-being. To provide the socially beneficial services of religious guidance, a congregant would likely be expected to divulge personal and confidential information to a clergyperson. Information is powerful, and private and confidential personal information provided to a clergyperson, especially in penitential relationships where past wrongdoings—some of which may even be criminal—skew the power dynamics between the parties. Jane could likely

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[141] This also brings this relationship within the principle instrumental justification for fiduciary law as a distinct body of law: to maintain the integrity and utility of those relationships where one person serves the interests of another and to impose a duty of loyalty to ensure that integrity and utility. *See* Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 999–1000 (2013).

[142] *See, e.g.*, JAMIE CARLIN WATSON, EXPERTISE: A PHILOSOPHICAL INTRODUCTION, at ix (2021); Alvin I. Goldman, *Expertise*, 37 TOPOI 3, 3 (2018).

[143] *See generally* Alvin I. Goldman, *Experts: Which Ones Should You Trust?*, 63 PHIL. & PHENOMENOLOGICAL RSCH. 85, 91–94 (2001) (attempting to specify an objective sense of expertise). I thank Matt Glaser for helping me navigate the philosophical literature on expertise.

make a showing that, but for the clergyperson's institutional role and the fact he held himself out to provide services, she would not have trusted him with the private information and that this entrustment was necessary to realize the unique social utility of this relationship. In other contexts, courts recognize these "confidential relationships" as fiduciary relationships.[144] That one party is a clergyperson should not make a difference.[145]

Third, Jane would need to show that there were risks that this power would be misused to her detriment. She would need to show that this entrustment made her vulnerable to the harms that occurred while the clergyperson was providing these services. It would go beyond the limits of this Note to discuss what evidence would properly satisfy this burden of proof. The fact that what happened to Jane has also been experienced by other women who have sought spiritual care from clergypersons in private, one-on-one settings shows that this is a constant and present risk underlying all forms of pastoral relationships.

Finally, that Jane might fail to protect herself is demonstrated primarily by the fact that her spiritual director, operating as a campus minister and representative of Jane's faith, took advantage of her within the locus of his institutional authority. The fact that the abuse took place within the walls of her campus ministry center, where the priest was supposed to provide care for her and her fellow students, is significant for this prong. In many instances clergy sexual abuse—and the foundational relationships preceding the abuse—take place in confessionals, pastoral offices, and within the very halls of worship where a congregant sought aid and shelter. These are the places where a person expects to be safe and lets their guard down. This is a place where the market would fail to protect a person from these risks.

Whether Jane would succeed in convincing a judge or a jury that her spiritual director was a fiduciary is uncertain. As discussed, these claims are heavily fact intensive and not amenable to predictable legal outcomes. However, by adopting a definitional-based approach, a victim of clergy sexual abuse could make a convincing claim that someone providing religious guidance qualifies as a fiduciary, making the sexual misconduct by the clergyperson actionable as a breach of fiduciary duty.

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[144] *See* Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 SMU L. REV. 315, 316 (2000) ("If the words of the courts are to be taken literally, a confidential relationship giving rise to fiduciary obligation may include any business, social, or purely personal relationship in which one party justifiably places trust and confidence in another to care for his or her welfare and interests.").

[145] Of course, there are circumstances where such divulgence of confidential personal information does not occur. If so, then there is likely less risk of abuse. A lack of entrustment of such power would bring this relationship outside the fiduciary heading.

Regardless of the content of discussions, the divulgence of confidential information which would not be otherwise shared but for the institutional role of the clergyperson in regular private meetings at or near the locus or loci of the clergyperson's institutional authority are all strongly indicative that a relationship has crossed from being a consensual sexual relationship that happens to involve a clergyperson into a relationship that has violated the legal rights of the victim.

While there are certainly borderline cases where the relationship between a clergyperson and a congregant takes place away from the usual private and sacred spaces, these are likely cases which are more *inappropriate* than a violation of legal rights.[146] As the court in *MacDonell* writes, "Ordinarily, consenting adults must bear the consequences of their conduct, including sexual conduct. In the sanctuary of the church, however, troubled parishioners should be able to seek pastoral counseling free from the fear that the counselors will sexually abuse them."[147]

This approach also helps limit what could otherwise be an overinclusive account of fiduciary relationships. Sharing secrets or confidential information should not be sufficient to constitute a fiduciary relationship. The proxy of using a site of institutional authority helps separate what may be morally wrong or inappropriate sexual contact from sexual contact that has violated the legal rights of one of the parties. This does not expand the categories of fiduciary relationships beyond its proper domain. Rather, such an approach brings other important relationships of trust that have potential for harmful and damaging violations of trust under its purview.

B. Objections and Responses

First, it is possible those who prefer a more uniform and standardized duty of care like clergy malpractice might argue that fiduciary law is too unwieldy and fact dependent to be a helpful tool for plaintiffs. This is the position that Emily C. Short takes.[148] According to her, the tort of clergy malpractice would be viable if courts relied on secular and neutral documents establishing personnel policies. This, she argues, would avoid the excessive entanglement worry and ensure that there is a uniform approach to clergy sexual misconduct against adults.[149]

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[146] *See, e.g.*, Pelitire v. Rinker, 270 So. 3d 817, 829–30 (La. Ct. App. 2019) (holding that the plaintiff offered no evidence of a legal duty unrelated to the alleged tortfeasor's role as a pastoral counselor and minister when the relationship began online and involved visits to the plaintiff's home).

[147] F.G. v. MacDonnell, 696 A.2d 697, 705 (N.J. 1997).

[148] Short, *supra* note 33, at 195–96 ("[T]he breach of fiduciary duty claim remains problematic because of the difficulty in defining breach and the reluctance of courts to allow the claims to stand.").

[149] *Id.* at 183–84, 224.

The precedential and constitutional hurdles to the tort of clergy malpractice are likely insurmountable.[150] Moreover, basing a standard of care on an institution's own documents could incentivize religious organizations to be intentionally vague about their policies or infuse them with more religious language to make them impenetrable by courts. Furthermore, such an approach would likely require holding certain religious congregations to higher standards, which would likely run afoul of the First Amendment by advancing or impinging certain denominations. For example, celibate Catholic priests might find themselves subject to much higher legal liability than an evangelical pastor for whom seemingly consensual sexual relationships are not taboo as a church-governance matter. While fiduciary law is a fact-intensive inquiry, this is actually a benefit compared to the malpractice approach above. Cases involving sexual abuse of adults by clergy are extremely complicated. Since most sexual activity engaged in by clergypersons is not otherwise a clear violation of a person's legal rights, and it is often the case that many married clergy meet their wives in the context of ministry, the fiduciary duty captures what separates the normal sex from the sex that violates someone's rights, namely the misuse of trust for personal gain.

Given the sheer religious diversity, differences in practices, and different standards, it would seem difficult to establish a uniform approach for victims of clergy sexual misconduct and a standard method of recovery, like Short advocates. Even under Short's proposal, any standard of care would nevertheless be determined by a factual inquiry into the governing policies of a particular church or congregation. This would likely run afoul of the First Amendment's religion clauses by either stipulating objective standards for clergy or treating religious congregations differently. Thus, a tort of clergy malpractice is likely a nonstarter and collapses back into the ad hoc, factual inquiry that Short attempts to avoid.

Second, one might argue that clergy sexual misconduct between adults should *not* be actionable because the law does not subject secular leaders to similar liability for sexual relations with followers. Thus, to treat clergy differently would be to subject religion to unique and disparate treatment.[151] This position rests on a faulty premise that religious leaders are properly analogous to nonprofessional leaders of organizations, clubs, or gyms. It

[150] *See supra* notes 33–41 and accompanying text.

[151] *See* William P. Marshall, *Separation, Neutrality, and Clergy Liability for Sexual Misconduct*, 2004 BYU L. REV. 1921, 1925 ("Rather, the conclusion that clergy should not be subject to liability for misconduct with their adult congregants is more appropriately reached through the application of a neutrality model, which would suggest that sexual misconduct in clergy–congregant relationships is not actionable because current law does not subject secular leaders to similar liability for sexual relations with their followers.").

would be beyond the scope of this paper to explore the vast philosophical and sociological literature to explain the issue with that premise.

This objection can be dealt with more simply. If a secular leader engaged in the sort of behavior that clergypersons did, offering services that requires trust and dependence of the person receiving services and places that person at the mercy of the one offering those services, then he too should be liable for taking sexual advantage of his followers. The fact that there aren't many other secular roles where this is the case is already evidence of the earlier point: religious leaders often play unique roles that are not properly analogous to secular leaders or pure professionals. This objection, therefore, fails to appreciate the fact that fiduciary law is generally a religiously neutral law.

CONCLUSION

Adult women who cross the thresholds of churches, synagogues, and mosques should not be expected to leave their rights at the door. Abusive clergypersons who offer religious guidance in confidential settings in locations where their institutional authority is most palpable must be deemed fiduciaries and liable for inappropriate sexual contact that occurs in the contexts of such relationships. This Note explored the various approaches courts have taken in allowing—or not allowing—breach of fiduciary duty claims against clergypersons for sexual abuse. In so doing, it outlined why fiduciary duties remain an attractive and plausible cause of action for victims as opposed to other remedies, such as intentional torts and malpractice. It identified four different approaches adopted by courts. This Note also argued that adopting a fact-based definitional approach to finding fiduciary relationships shows why clergypersons who only provide religious guidance can nevertheless be fiduciaries and, in so doing, highlighted important factual circumstances that courts should look to in making this determination.