Regulating Pastoral Counseling Practice: The Problem of Sexual Misconduct

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Growing concern about sexual abuse covers many kinds of perpetrators. Therapist and clergy abusers have been increasingly targeted, yet clergy counselors who sexually abuse their clients have so far largely escaped effective sanctions from the courts. This article identifies the justifications given by these courts, identifying and evaluating their supporting arguments. This analysis suggests that the courts have decided not to enter this public policy fray, or to do so with considerable caution because of their fundamental respect for the freedom of religion. It is a choice especially problematic in regard to pastoral counselors practicing outside the discipline of either a central church authority or a professional counseling organization. The authors suggest potential legal bases for reaching sexually abusive clergy counselors without encroaching on religious freedom. They urge the churches to meet their responsibility and assume a more active stance toward helping to resolve this problem. The question of whether society does in fact value religious freedom above protection of clients sexually abused by clergy counselors remains an important policy issue.

Psychiatrists have become well aware of the prohibition against having sex with one's patients.[1,2] Indeed, psychotherapists of all disciplines are close to general agreement that sex with patients is to be condemned.[3] The American Medical Association has extended to all physicians the prohibition against sexual activity with their patients.[4] Similarly, clergy found to have had sex with their parishioners are now facing penalties. The cases usually arise in civil court when victims are (or have become) adults,[5,6] and in criminal court with child victims.[7] Thus, it is now clear that sexual activity is forbidden between therapists and their patients and between clergy and their parishioners.

For the most part, pastoral counselors' sexual practices are similarly regulated, since they do their work subject to the oversight of either a well recognized church or a specific secular professional guild.[8] These professional groups include the Association for Clinical Pastoral Ed-

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ucation, the American Association of Pastoral Counselors, and the Christian Association for Psychological Studies. All have ethics rules or guidelines to which their members are expected to adhere. These associations also have developed procedures for receiving and evaluating clients' complaints about their members' professional conduct and for determining sanctions to be applied for conduct judged to be unethical. The same, of course, is true of such secular organizations as the American Psychological Association and the American Association for Marriage and Family Therapy, which include many pastoral counselors in their ranks.

However, there are some pastoral counselors who practice their craft beyond the reach of any well recognized religious organization or of any professional guild. Individuals who have been sexually abused by these pastoral counselors would reasonably hope to find help from the courts, especially after finding no other available avenue for redress. Indeed, pastoral counselors and insurance underwriters have for some time expected courts to begin applying the concept of clergy malpractice to a variety of situations, including sexual misconduct, in which actions of clergy counselors have fallen below the proper standard of care.[9, 10] But as we shall see, this has not yet occurred.

In this article, we show why the courts have been unwilling to extend malpractice theory to this unique context, thereby creating a significant problem in the regulation of pastoral counseling practice. As a consequence, a subgroup of pastoral counselors may be able to escape the traditional sanctions usually brought to bear on the larger class of mental health professionals when they engage in sexual relations with their patients. We call this fact to the attention of our peers, and point out roles for those who may wish to be of some help. Finally, we also identify legal approaches other than clergy malpractice that may be useful in confronting this problem.

Judicial Arguments Regarding Anticlergy Suits

Bases for Rejecting a Clergy Malpractice Concept. *Lack of Precedents* Litigants trying to use the concept of malpractice in order to sue clergy for sexual misconduct have faced rejection based on a variety of arguments. Most courts have begun their reasoning by pointing out the lack of precedents. That is, no other court had yet seen fit to recognize the concept of clergy malpractice. For example, in 1988 the Ohio Supreme Court dealt with the case of *Strock v. Pressnell,*[11] involving a clergy marriage counselor who had an affair with a female client. She and her husband had sought counseling from the clergyman. Clergy malpractice was the husband's first complaint, and the court began its response with the understatement that "most courts have been cautious in accepting this cause of action" (p. 1238). The court went on to point out that the concept of clergy malpractice had ultimately been rejected by the California Second District Court of Appeals in the famous *Nally* case[12] brought by the parents of a pastoral counselor's client who had committed suicide. The case had

been widely cited (before it was appealed) as the first to give judicial recognition to a concept of clergy malpractice. This was the Ohio Supreme Court's first reason for rejecting the clergy malpractice concept.

In another 1988 case of sexual misconduct by a clergy marriage counselor, *Destefano v. Grabrian*,[13] the wife complained of negligent marriage counseling only to be told by the Colorado Supreme Court that her claim "falls within the realm of 'clergy malpractice'" (p. 285) because it was against a Catholic priest. The court then went on to say that since no other court had yet done so, neither would it recognize a claim of clergy malpractice. In a footnote, the court declined to use the alternative term "spiritual counseling malpractice" (note 10, p. 285) because clergy counselors often direct themselves to secular issues. Moreover, the court's finding had stronger support from recent state legislation that specifically excluded clergy from malpractice liability, provided they neither held themselves out as offering psychological services nor carried a state psychologist's license.

In 1991, the Southern District Federal Court in New York insisted on a similar restatement of a complaint of sexual misconduct that had extended over many years from the time when the victim was 12 years old. In this diversity (involving parties from different states) case, *Schmidt v. Bishop*,[14] Ms. Schmidt brought a complaint of malpractice against her pastor as a "youth worker and counselor" (p. 326). Calling the complaint artfully styled, the court insisted that it was in fact an allegation of clergy malpractice, since the parents had brought their daughter to the defendant "because he was their clergyman" (p. 327), a point acknowledged in the complaint.

The court supported its approach with a practical analysis: most clergy counsel youth as part of their primary religious work, just as surgeons counsel their patients before and after surgery. And just as the surgeons' counseling does not open them to suits for "counseling malpractice," so it should be with the clergy. After identifying the complaint before it as one of clergy malpractice, this federal court properly looked to the state law. It observed that the lack of precedent for clergy malpractice in New York, "this most litigious of states, speaks to this point, and loudly" (p. 327).

Redundancy of the Remedy Courts deciding suits against sexually inappropriate clergy counselors have argued that a clergy malpractice tort would constitute a redundant remedy; in other words, more appropriate alternatives were available. For example, the Ohio Supreme Court opined in the *Strock*[11] case that the sexual misconduct could be seen far more readily as a case of one or more of several already well established torts. That is, going to bed with a client constitutes intentional or reckless behavior. It is like battery or child sex abuse, rather than failure to exercise the required degree of professional skill and care. The court also pointed out (p. 1240) that it was not closing the door to malpractice suits against clergy counselors who might be profes-

sionally negligent for reasons other than sexual misconduct.

In a 1991 case involving alleged sexual indiscretions by a clergy marriage counselor, *Byrd v. Faber*,[15] the Ohio Supreme Court repeated the redundancy argument. In 1992, in the case of *Greene v. Roy*,[16] involving a priest accused of repeated intercourse with a married female counselee, the Louisiana Appeal Court, third circuit, agreed, citing the *Strock* case. Thus, as outrageous as the clergyman's behavior may have been in all three cases, it could not be judged malpractice. The availability of intentional torts, related directly to the alleged sexual abuse, made the clergy malpractice concept redundant, raising a formidable barrier to its judicial recognition in these cases.

Conflict with the First Amendment Courts dealing with clergy sexual misconduct have generally at least mentioned the First Amendment. The federal trial court for the Southern District of New York in *Schmidt v. Bishop*[14] offered a striking First Amendment argument against recognizing clergy malpractice. First, it readily conceded that clergymen should not molest children; then it said that recognizing a molestation complaint as a clergy malpractice case would open the way to a slippery slope. Once having permitted this, a court might later be impelled to condemn the conduct of a well intentioned clergy counselor who, attempting to help a depressed person, demanded religious conversion and thereby precipitated the person's suicide.

The *Strock*[11] court offered three distinct arguments in support of ruling out clergy malpractice on a First Amendment basis, all related to difficulties with the duty of a cleric. First, that duty would be difficult to define in view of the numerous ranks and denominations that would have to be distinguished. Second, it would not be clear whether or not a cleric performing a service such as marriage counseling should be held to the same duty of care as a secular professional. Finally, defining or forbidding particular ways of performing the cleric's duty might "clash with the religious beliefs of some faiths" (p. 1239).

The *Destefano*[13] court did point out that the defendant's attempt to invoke the First Amendment need not stand if the acts in question are not a matter of religious belief (p. 283). Since a Catholic priest's sexual misconduct clearly falls outside what his church practices and believes, the First Amendment will not protect him. As we shall see below, this recognition provides some relief for the victims of clergy counselor sexual misconduct.

No Mishandling of Transference In 1993, the Oklahoma Supreme Court provided a clear statement of yet another reason for refusing to recognize a tort of clergy malpractice. The case of *Bladen v. First Presbyterian Church*[17] involved a minister who previously had been sexually involved with a secretary of another church. When he repeated this behavior with the wife of an elder in his own church, whom he was counseling, the husband sued for malpractice. He based his suit on the affair itself and on the minister's having advised him to pay less attention to his wife. The court noted that therapist malpractice cases for sexual

misconduct tended to be primarily based on mishandling of transference. It then extended to clergy Stone's argument[18] that malpractice for sexual misconduct is inappropriate for lawyers, gynecologists, and biological psychiatrists, since they do not hold themselves out as offering a transference-based form of treatment. The *Schmidt*[14] case makes passing references to the concept (pp. 325, 330), acknowledging its validity but not applying it to the issue of alleged clergy malpractice.

Intentional Infliction of Emotional Distress In addition to clergy malpractice, victims of clergy counselors' sexual misconduct have often brought complaints of intentional infliction of emotional distress. The Ohio Supreme Court dealt with such a complaint in the *Strock*[11] case by pointing out in great detail that the substance of the plaintiff's allegations was in fact an assertion of alienation of affections. As has happened in the majority of states, the Ohio legislature had become concerned about abuses in alienation of affections cases and acted to remove this tort from its statutes. The predominant problem had been the use of the threat of publicity as a way to force unjust settlements. Once reduced to alienation of affections, of course, the emotional distress complaint fell.

Later, the Louisiana Court of Appeal, Third Circuit, was more direct in making a similar disposition in *Greene*.[16] It pointed out that the alleged misconduct was not directed against the plaintiffs, but rather against the spouse who, far from suffering distress, was still voluntarily involved with Father Roy. Although the plaintiffs claimed to have suffered emotional distress, they did not allege, let alone prove, that the defendants had any intention of causing it.

In similar fashion, the Washington Supreme Court rejected a complaint of "outrageous conduct" causing emotional distress, because the aggrieved person was not present for the conduct, as required in that state's law. The case was *Lund v. Caple*[19] and involved a two-year period of intimate and eventually sexual relations between a wife and a pastor that began after a brief series of personal and marriage counseling sessions at which the husband was never present.

In striking contrast, however, two courts did accept the validity of complaints based on the alleged sexual misconduct as so outrageous or offensive that it caused severe emotional distress. Without elaborating, these courts simply found that enough had been asserted in the lower court to protect the complaint from dismissal. The first such decision came from the Colorado Supreme Court in *Destefano*[13] (p. 286). Of note in this case is that the surviving complaint came from the wife, who was the person allegedly seduced. The fact that this complaint was brought by both former spouses makes it unusual among actions brought against clergy counselors for sexual misconduct and may have helped in getting this part of it upheld on appeal. The second case was that of *Erickson v. Christenson,* from the Court of Appeals of Oregon in 1989.[20] This was a case brought against her pastor-counselor by a woman accusing him of establishing a relationship with

her during her teens and taking advantage of her more than a decade later.

Breach of Fiduciary Duty Another often used complaint against clergy counselors who commit sexual misconduct is that of breach of fiduciary duty. A fiduciary is defined as "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking"[13] (p. 284; cf. Ref. 11, p. 1243). In the case of the pastoral counselor, one could argue that by presenting oneself as a clergyperson and marriage counselor, one acquires a duty to exercise reasonable care and skill. Such a person would also be responsible for any harm resulting from a breach of that duty. The Colorado Supreme Court in *Destefano*[13] found that the clergy counselor, by undertaking the counseling, acquired duties both to help the marriage improve and to refrain from potentially harmful conduct. Thus, the complaint that he had caused harm by failing to meet these obligations could not be dismissed.

The same court again recognized this complaint in the 1993 case of *Moses v. Diocese of Colorado.*[21] In this case, a bishop summoned the female victim of sexual misconduct by one of his priests in the course of marriage counseling. He offered her no help but bound her to secrecy and ordered counseling for the priest. The court found that the bishop had breached his fiduciary duty. In the *Erickson*[20] case, the Oregon Court of Appeals agreed with the Colorado Supreme Court in favor of a claim of breach of fiduciary trust, just as it had done on the issue of inflicting emotional distress.

Other courts have viewed the matter differently. For example, in *Strock*[11] the Ohio Supreme Court chose to focus not on the conduct (which it admitted was reprehensible), but on its outcome. This view turned the fiduciary breach complaint into one of alienation of affections, which the court of course ruled out as no longer allowed by state law. A more thorough rejection of the fiduciary breach complaint occurred in the *Schmidt*[14] case. The federal district court found support in New York law for considering a broad range of relationships as fiduciary, but did not include those of counselors and social workers. This reduced the defendant's duty to that of not violating penal laws. Moreover, there were two additional problems with the fiduciary violation complaint: it would raise "constitutional difficulties," since it involved a clergyman, and it was already fully included in the malpractice complaint that the court had ruled out.

Based on this brief series, the breach of fiduciary duty complaint appears attractive to some courts because it is an inherently persuasive way to describe what happens when a trusted clergy person seduces a person in need who has sought help. Nonetheless, other courts find ways to reject this complaint in favor of what they consider higher concerns such as those of the First Amendment.

Fraud Another claim sometimes made against sexually abusive clergy therapists but generally not recognized by the courts is that of fraud. This was of particular import in the *Schmidt*[14] case because of the significantly longer statute of limitations in New York for fraud com-

pared with other complaints. The court dismissed the fraud complaint, pointing out that such claims usually involve commercial transactions in which a pecuniary loss results from deliberately induced reliance on knowingly false information. Significantly, the court pointed out that the damage was alleged to have flowed from the sexual misconduct, not from the lies that enabled it.

The *Byrd*[15] court also excluded a fraud claim, using a different line of reasoning. This court pointed out a key statutory requirement, that fraud complaints must be stated with a high degree of particularity, a provision intended to discourage the damaging of reputations by making unfounded charges. This case shows that the protection necessary to prevent the abuse of fraud claims discourages their use against counselors who promise to help clients while intending instead to make them worse by sexually abusing them.

Vicarious Liability Victims of clergy counselors' sexual misconduct usually bring lawsuits not only against the counselor but also against the church, be it a local church, a free-standing counseling center, or a regional administration such as a diocese. In addition to vicarious liability, such terms as negligent employership (including hiring, training, and supervision) and *respondeat superior* ("the higher one should answer") are used.

Most appellate courts upheld rejections of complaints against the sponsoring or employing church organization. Most often the lower courts rejected complaints against the employing organization because no complaint was left after granting a motion for summary judgment in favor of the individual defendant. This was true for the *Strock*,[11] *Schmidt*,[14] and *Bladen*[17] cases.

Another reason for rejection of complaints against the church is illustrated by the *Byrd*[15] case. Here, the Ohio Supreme Court noted that several complaints against the clergyman were still pending and proceeded to discuss at some length the question of whether a church could be held liable for a pastor's sexual misconduct with a parishioner. Inasmuch as the torts alleged (fraud and intentional infliction of emotional distress) were intentional ones, said the court, it would be necessary to show that the conduct giving rise to the allegations was intended to promote the church's goals. The court easily saw that the cleric's sexual activity with the member-counselee was an independent and self-serving act. On this basis, it upheld the trial court's dismissal of the complaint against the church. Similarly, the Colorado Supreme Court ruled in *Destefano*[13] that going to bed with a female client does not qualify as within the scope of a Catholic priest's work. In the *Moses*[21] case, the same court ruled likewise regarding an Episcopal priest.

Two courts articulated First Amendment-based reasons for rejecting vicarious liability claims. In *Byrd*,[15] the Ohio Supreme Court rejected the plaintiffs' "mere incantation of an abstract legal standard" (p. 589) without alleging specific facts to support a complaint of negligent hiring. This was deemed relevant in the case of a religious organization because general scrutiny of its hiring standards could easily run afoul of the First

Amendment. In order to survive a petition for summary judgment, a complaint must identify some relevant nonreligious problems in the cleric's past and show that the church knew or should have known about them. Along the same lines, the *Schmidt*[14] court stated that evaluating vicarious liability claims against churches could "involve the Court in making sensitive judgments about the propriety of the Church Defendants' supervision in light of their religious beliefs" (p. 332).

Nonetheless, three courts accepted vicarious liability complaints. In *Erickson*[20] the Oregon Appeals Court defined three elements for considering an act as within the scope of employment: taking place within the employer's authorized time and space limits, being at least partially motivated by a desire to serve the employer, and being of the kind which the employee was hired to perform. Furthermore, the court embraced the plaintiff's assertion that the defendant had been acting within the scope of employment when he formed the pastoral relationship that made the alleged abuse possible. In both of its cases,[13, 21] the Colorado Supreme Court held that a person carrying out an activity through another can be held directly liable for harm that results from reckless or negligent supervision. This occurs when there was reason to know or believe that the harm was likely. To show this, the complaints pointed to past behavior. The court laid down a prudent person standard for the evaluation of such claims, giving examples of individuals entrusted with responsibility to function in an area after having established a pattern of negligent performance that caused harm.

The Alaska Supreme Court found similarly in the 1990 case of *Doe v. Samaritan Counseling Center*.[22] According to the complainant, she saw a pastoral counselor for some 34 sessions and was then suddenly told that no more therapy was necessary. At the end of the session, the client, "feeling very vulnerable," asked the counselor to hold her. Fondling followed shortly and continued at the next session, after which the counselor suggested meetings outside the office. At these meetings he was "more aggressive sexually," and intercourse followed within six weeks, even as he acknowledged being in the wrong when his victim confronted him. Reasoning from several past cases, the state supreme court reversed the trial court's dismissal of the *respondeat superior* claim. Recognizing its disagreement with several other courts in similar cases, it outlined a broad and flexible concept for the scope of employment. In particular, the court pointed out "the centrality of transference to therapy" as a basis for asserting that its misuse could fall within the scope of employment. Therefore it called upon the trial court to find whether the sexual misconduct was linked to the mishandling of transference. Unfortunately, this did not happen. Instead, trial court judge K. L. Hunt accepted from the parties a stipulation for dismissal with prejudice.[23]

Comment

Patients or clients who are sexually abused by mental health professionals have several routes they may use to seek

redress. Complaints about the professional's behavior may be lodged with his or her professional organization, usually on the basis that the clinician has violated certain ethical standards. The patient also often has the option of complaining to a state's licensure board about the professional's behavior in an effort to seek some limitation of his or her practice. In addition, criminal charges may be pressed, but not without the serious difficulties described below. Finally, abused clients also regularly seek redress through the civil courts as a way of righting the wrong and being made whole.

In contrast to mental health professionals, pastoral counselors operate within a special context, which presents an unusual dilemma. Not all of them belong to professional organizations with ethics rules. Many may not even receive general oversight or supervision through a church hierarchy. Similarly, pastors are generally not licensed by any secular or governmental organization as are most secular professionals involved in counseling. Consequently, clients seeking redress for suffering at the hands of pastoral counselors have good reason to look to civil courts for help. As things currently stand, however, civil courts are not responding with much enthusiasm.

Nevertheless, clients of pastoral counselors ought to have some legitimate way to establish a complaint when there has been sexual abuse in the counseling relationship. Additionally, the public should be protected against such pastors. The trouble is, of course, the courts rightly remind us that the First Amendment forbids us to regulate religious practice in the same way we may so vigorously regulate secular professional practice. Indeed, the complexity of distinguishing the religious from the secular in what pastoral counselors do with their counseling clients remains formidable.[8, 10] This difficulty is further compounded when we try to elucidate what is significant among the different standards of diverse pastoral counseling practices. Thus it is easy to understand the civil courts' repeated refusals to consider malpractice claims against pastoral counselors.

The failure of malpractice complaints does not end the matter. Rather, this review of cases has identified two alternative legal approaches under which complaints have been filed against sexually abusive pastoral counselors without encroaching on the First Amendment. First is the tort of breach of fiduciary duty. Courts have spelled out that this complaint captures precisely what is unacceptable about sexual misconduct by clergy counselors. Instead of acting primarily for the client, they seek their own gratification. Since it is based on trust, the fiduciary duty concept strikes directly at the heart of the ethical aspects of this issue.[24] Second, complaints of intentional infliction of emotional distress met with success in two cases.[13, 20] However, in these cases the courts have said very little about their reasons for supporting this complaint.

Yet some courts, even when they hear complaints of these two classes that other courts have accepted, are clearly fearful of treading on what they see as sacred ground. We think that courts in general are not likely to overcome this fear unless

the churches themselves take a collective stand and state categorically that there is nothing sacred about clergymen having sex with their counseling clients. Churches must establish this position as a religious standard and assert it as such. They must claim it as an ethical posture that has its rightful place within their view of religious practice. There is evidence that when the large, established church groups take this position and do so vigorously, the smaller independent churches will follow suit.[25]

Meanwhile, through its legislatures and courts, society has valued the independence of churches highly enough to tolerate the risk that some clergy candidates may not be properly screened. Similarly, the independence of some pastors from both secular and religious oversight makes it difficult to assure that they will practice continued life-long education. Thus, it becomes obvious that some pastoral counselors need supervision and consultation, and at times referral for treatment. Like others involved in providing any form of psychological treatment, some pastoral counselors could benefit from help in dealing with their susceptibility to erotic impulses and similar problems that open the way to sexual abuse. Whether the incidence of this behavior by pastoral counselors is increasing or merely being recognized more often, churches as a group need to promote and encourage more effective regulation of pastoral counseling activity. As we have shown, at least three courts have begun to accept this proposition by acknowledging *respondeat superior* complaints.

The growing trend to apply criminal sanctions to sexually abusive therapists bears a brief mention here.[26] So far, such statutes have been enacted in California, Colorado, Connecticut, Florida, Georgia, Iowa, Maine, Minnesota, North Dakota, and Wisconsin. The statutes of some states, including Minnesota and Connecticut, encompass sexually abusive pastoral counselors. There is a recent Minnesota case of successful criminal action against a clergy counselor involved in sexual misconduct, *State v. Dutton*.[27] The client consulted Pastor Dutton for help with depressive and compulsive symptoms, and within a short time the sexual involvement provided as a part of the counseling reached the point of intercourse. Expert opinions converged to show the pastor's dominance in the situation, and he was convicted of four counts of psychotherapist-patient criminal sexual conduct. His attempt to raise the constitutional objections that the statute was vague and violated privacy rights was fruitless.

However, the violation of privacy rights is one of the problems with such criminal sanctions. Although the abuse of power and influence is usually involved, there is always the concern and sometimes the reality of the client's consent. Strange as it may seem to some ears, there are clients who treasure a mutually respectful sexual experience with a pastor-counselor and would hardly consider themselves as victims. (The same may occasionally be true of a few clients of secular therapists.[28]) Moreover, concerns have begun to arise among pastors, who now feel constrained from expressing the most natural and casual social gestures of courtesy and affection, or from even of-

fering counseling to their parishioners. In addition, there is a rapidly growing concern about the supposedly therapeutic recovery of memories of abuse, including the sometimes questionable recall of sexual abuse of young adults by pastoral therapists.[29, 30]

Appelbaum has suggested that general criminalization of therapists' sexual misconduct constitutes an extreme that has additional disadvantages.[31] It may cause delay of more helpful civil measures by inhibiting the possibility of an appropriate confession by the therapist. It may also, in some cases, decrease the prospects for civil remedies. Further, the move towards criminalization may reflect an impatient public rather than a wise or thoughtful legislature seeking what is actually best for its constituents. Over time, we shall undoubtedly learn from experiences in different states with their various legal models.[32] At present the risk is clear that criminal sanctions will often prove to be too much too late.

We expect that forensic psychiatrists can play an important role in this challenging area of law, religion, and psychiatry. They can certainly provide effective guidance to institutions and individuals seeking help with this problem of regulating the practice of clergy counselors. Forensic psychiatrists can help religious organizations and pastors see beyond the veil provided by the First Amendment to conceptualize more realistically what practices of the pastoral counselor are incompatible with a fiduciary duty to the counseling client. Some forensic psychiatrists may also wish to be involved in the appropriate treatment of pastoral counselors in difficulty, and in screening evaluations and training for seminary students, as well as in providing consultation to those who are in practice. Some forensic psychiatrists may wish to help actual victims and assess potential ones. There is, finally, an important place for well informed public advocacy, including testimony at legislative hearings, to promote both the removal of sexually offending pastoral counselors and the righting of the wrongs they perpetrate.

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