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The Clergy-Communicant Privilege in the Age of Electronic Surveillance

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THE CLERGY-COMMUNICANT PRIVILEGE IN THE AGE OF ELECTRONIC SURVEILLANCE

The adversarial system in the United States is based on the belief that, by pitting two opposing sides against each other in a court of law, truth will prevail. This presupposes that sufficient credible evidence will emerge to allow a trier of fact to best decide a case.[1] Most of this evidence is gathered from investigations that are conducted. One technique used in criminal investigations to gather evidence is electronic surveillance.[2] Whether through telephone interception or hidden microphones, electronic surveillance is a constitutionally sound law enforcement tool.[3] These communications may be offered as evidence during the course of a trial. Relevant evidence, however, may be withheld because of public policy reasons.[4] Often various communications and data are excluded from both civil and criminal trials because of testimonial

[1] *See In re* Koller v. Richardson-Merrell Inc., 737 F.2d 1038, 1056, (D.C. Cir.) (stating that adversary system is based on premise that truth is best ascertained through zealous and competent presentation by each side of its strongest case), *cert. granted*, 469 U.S. 915 (1984), *vacated*, 472 U.S. 424 (1985); *In re* Tutu Wells Contamination Litig., 162 F.R.D. 46, 71 (D.V.I. 1995) (stating that cornerstone of our adversarial system of justice "is access of all parties to all evidence bearing on controversy between them, including that in control of adverse parties"). *See generally* Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 916 (1992) (stating that forces of adversary system allow parties to present sufficient evidence for jury to reach accurate verdict).

[2] *See generally* Cheryl Spinner, *Let's Go to the Videotape: The Second Circuit Sanctions Covert Video Surveillance of Domestic Criminals* United States v. Biasucci, 53 BROOK. L. REV. 469, 498 (1987) (discussing electronic surveillance as valuable tool for gathering evidence about organized crime); John D. LaDue, Note, *Electronic Surveillance and Conversations in Plain View: Admitting Intercepted Communications Relating to Crimes Not Specified in the Surveillance Order*, 65 NOTRE DAME L. REV. 490, 498 (1990) (discussing how Title III enhances law enforcement by permitting use of electronic surveillance as investigatory tool).

[3] *See* U.S. v. Donovan, 429 U.S. 413, 429 (1977) (holding that notice and judicial overview provisions of federal wire-tap statute satisfy constitutional requirement); Thomas M. Messana, Note, Ricks v. State*: Big Brother Has Arrived in Maryland*, 48 MD. L. REV. 435, 435 (1989) (discussing case which held that court-ordered surreptitious video surveillance violated neither Maryland Wiretapping and Electronic Surveillance Act nor Fourth Amendment of United States Constitution).

[4] *See* Keith Burgess-Jackson, *An Epistemic Approach to Legal Relevance*, 18 ST. MARY'S L.J. 463, 478 (1986) (stating that truth is but one of many judicial goals and that even relevant evidence is often withheld from jury because of other social justifications).

privileges.[5] One of the basic evidentiary privileges is the clergy-communicant privilege.

When wiretapping intercepts privileged communications, those communications are in danger of losing their protection.[6] The electronic surveillance of clergy-communicant privileged communications has rarely been the subject of judicial controversy.[7] Recently, however, the case of *Mockaitis v. Harcleroad*[8] has sparked debate. In *Mockaitis*, an inmate's confession to a priest, a privileged communication, was surreptitiously tape recorded,[9] which was authorized by the local District Attorney.[10] The federal court judge while noting the reprehensibility of the District Attorney's actions, ruled that the decision rested with the state court.[11]

This Note analyzes the effect of wiretapping statutes on otherwise protected communications under the clergy-communicant privilege. Possible modifications to these statutes are suggested to ensure adequate protections. Part One of this Note briefly examines the evidentiary privileges, focusing on the attorney-client and clergy-communicant privileges. Part Two discusses federal and state legislation on wiretapping, classifying it according to varying degrees of protection afforded to evidentiary privileges. This section also describes the Free Exercise Clause of the Constitution

[5] *See* Burgess-Jackson, *supra* note 4, at 478 (stating that relevant evidence is often withheld for societal reasons). *See generally* Michael F. Kelleher, *The Confidentiality of Criminal Conversations on Tdd Relay Systems*, 79 CAL. L. REV. 1349, 1349 (1991) (comparing privileges and exclusionary rules and their effect upon criminal proceeding: both exclude relevant evidence from court to further specific goals).

[6] *See* Scott v. United States, 436 U.S. 128, 147 (1978) (Brennan, J., dissenting) (maintaining that congressional action, coupled with judicial failure to enforce certain provisions of Title III have resulted in consistent violations of privileged communications by government); Michael Goldsmith & Kathryn Balmforth, *The Electronic Surveillance of Privileged Communications: A Conflict in Doctrines*, 64 S. CAL L. REV. 903, 905 (1991) (stating that combination of congressional and judicial neglect has created situation where unnecessary governmental intrusions into privileged communication routinely occur). *But see In re* United States, 10 F.3d 931, 936 (2d Cir. 1993) (limiting authority to approve wiretapping under Title III to those areas specifically granted in statutory language).

[7] *See* Goldsmith & Balmforth, *supra* note 6, at 917 (maintaining that priest-penitent communications are of less interest to law enforcement); *see also* Tom Bates, *Judge Protects Taped Confession*, THE OREGONIAN (Portland), Aug. 13, 1993, at A1 (discussing comments of District Court Judge Owen Panner who, after abstaining from deciding whether tape recording of religious confession should be destroyed, stated that it was unlikely that this would be recurring controversy).

[8] 938 F. Supp. 1516 (D.Or. 1996), *rev'd on other grounds*, 104 F.3d 1522 (9th Cir. 1997).

[9] *See id.* at 1524 (admitting that confession was privileged communication).

[10] *See id.* (demonstrating that District Attorney Harcleroad requested tape recording of conversation).

[11] *See id.* at 1516 (holding that decision more properly rests with state court based on *Younger* Doctrine).

and outlines the criteria imposed by the Supreme Court to ensure religious freedom. Part Three relates a recent controversy in Oregon involving the monitoring and tape recording of a suspect's privileged communication with a priest. It then analyzes this controversy under Oregon's wiretapping laws and the Free Exercise Clause. Part Four proposes uniform wiretapping statutes for all states that better protect the clergy-communicant privilege. This Note concludes that modification of wiretapping statutes must occur in order to protect the integrity of privileged communication.

I. THE EVIDENTIARY PRIVILEGES

The four basic evidentiary privileges are attorney-client,[12] clergy-communicant,[13] doctor-patient,[14] and husband-wife.[15] Of the four, the clergy-communicant and attorney-client privileges raise important issues of constitutionality.[16] These are the First

[12] *See* Fisher v. United States, 425 U.S. 391, 403 (1976) (stating that purpose of privilege is to encourage full disclosure in attorney-client relationship); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that privilege is based on need for open and honest communication, in interest of justice). *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE § 5.8 (1995) (stating elements of attorney-client privilege).

[13] *See* Totten v. United States, 92 U.S. 105, 107 (1875) (establishing that priest-penitent communications are entitled to protection); McMann v. SEC, 87 F.2d 377, 378 (2d Cir. 1937) (recognizing traditional privileges involving penitent communications); *In re* Verplank, 329 F. Supp. 433, 435 (C.D. Cal. 1971) (upholding priest-penitent privilege). *See generally In re* Grand Jury Investigation, 918 F.2d 374, 379 (3d Cir. 1990) (discussing evidentiary privileges encompassed by proposed Federal Rules of Evidence); MUELLER & KIRKPATRICK, *supra* note 12, § 5.38 (explaining clergy-penitent privilege); *Developments in the Law of Privileged Communications*, 98 HARV. L. REV. 1450, 1454 (1985) [hereinafter *Developments*] (discussing evidentiary privileges).

[14] *See* Simpson v. Braider, 104 F.R.D. 512, 522 (D.C. Cir. 1985) (holding that physician/psychotherapist-patient privilege applies to communications between psychiatrist and patient or from his family members); *McMann*, 87 F.2d at 378 (recognizing patient-physician communications). *See generally* MUELLER & KIRKPATRICK, *supra* note 12, § 5.36 (explaining physician-patient privilege); *Developments*, *supra* note 13, at 1454 (discussing evidentiary privileges).

[15] *See* Trammel v. United States, 445 U.S. 40, 50 (1980) (noting that confidential marital communications are privileged); Blau v. United States, 340 U.S. 332, 333-34 (1951) (recognizing privilege of confidential marital communications); *McMann*, 87 F.2d at 378 (recognizing traditional privileges involving spousal communications). *See generally Grand Jury Investigation*, 918 F.2d. at 379 (discussing evidentiary privileges); MUELLER & KIRKPATRICK, *supra* note 12, § 5.33 (explaining spousal privilege); *Developments*, *supra* note 13, at 1454 (discussing evidentiary privileges from historical context to modern day).

[16] *See* Walstad v. State, 818 P.2d 695, 697 n.2 (Alaska Ct. App. 1991) (noting attorney-client privilege is explicitly tied to Sixth Amendment); Mary H. Mitchell, *Must Clergy Tell?: Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 726-27 (1987) (arguing for constitutional basis for clergyman-penitent privilege); *Privileged Communications to Clergymen*, 1 CATH. LAW. 198, 198 (1955) [hereinafter *Privileged Communications*] (noting that in *People v. Phillips*, N.Y. Ct. Gen. Sess. (1813) court relied on Free Exercise Clause of New York State Constitution in honoring priest's refusal to disclose statements made during confession). *See generally Develop-*

Amendment right of free exercise of religion[17] and the Sixth Amendment right to an attorney.[18]

There are four fundamental elements which must be met in order to give a communication a privileged nature.[19] These requirements are: 1) the communications must be made with the belief that they will not be disclosed; 2) confidentiality must be essential to the relationship between the parties; 3) the relation between the parties must be one that the community seeks to encourage and protect, and; 4) the injury caused by the disclosure of the communication must be greater than the benefit gained by disclosure for justice.[20] Fostering communication and the need for privacy are the rationales for the existence of the privileges.[21] Using these criteria, courts have recognized privileged communication in relationships between attorneys and their clients,[22] clergy and

ments, *supra* note 13, at 1470 (stating that one of general sources of privilege law is United States Constitution).

[17] *See* U.S. CONST. amend. I. The First Amendment provides, in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id.*; *Developments*, *supra* note 13, at 1560. The Free Exercise Clause of the First Amendment requires that religions which mandate some form of confidential confession be granted testimonial privilege. *Id.*; Mitchell, *supra* note 16, at 793-821. The author presents an argument that the Free Exercise Clause affords constitutional status to clergy privilege. *Id.*

[18] *See* U.S. CONST. amend. VI. The Sixth Amendment proclaims that, in all criminal prosecutions, the accused has the right to have the assistance of counsel for his defense. *Id.*; Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 603 (1980). The author argues that the Right to Counsel Clause of the Sixth Amendment may extend constitutional protection to the attorney-client privilege, even though the privilege is not mentioned explicitly in the Constitution. *Id.*; Elizabeth F. Maringer, Note, *Witness for the Prosecution: Prosecutorial Discovery of Information Generated by Non-Testifying Defense Psychiatric Experts*, 62 FORDHAM L. REV. 653, 655 (1993). The author concludes that privilege law protects communications between defendants, defense attorneys, and defense psychiatric experts consulted for purposes of trial preparation. *Id.*

[19] *See* JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2285 (McNaughton rev. ed. 1961) (setting out four conditions that should exist before communication is treated as privileged); *see also Grand Jury Investigations*, 918 F.2d at 383-84 (determining that evidentiary privileges exist when criteria set out by Wigmore are met). *See generally Developments*, *supra* note 13, at 1460-61 (discussing efforts to rationalize and codify evidence rules).

[20] *See Grand Jury Investigations*, 918 F.2d at 383-84 (weighing Dean Wigmore's four fundamental prerequisites for privilege against disclosure of communications to determine if evidentiary privileges exist). *See generally* WIGMORE, *supra* note 19, § 2285 (delineating four criteria for privileged communication).

[21] *See* Trammel v. United States, 445 U.S. 40, 51 (1980) (acknowledging that full and complete exchange of information from patient to physician was necessary to treat patient); United States v. Lofton, 957 F.2d 476, 477 (7th Cir. 1992) (noting that part of rationale of marital privilege is to promote free communication between spouses); Spectrum Sys. Int'l Corp. v. Chemical Bank, 581 N.E.2d 1055, 1059 (N.Y. 1991) (describing open line of communications as essential to effective legal representation).

[22] *See* Prichard v. United States, 181 F.2d 326, 328 (6th Cir.) (stating that when legal advice is sought from legal advisor acting in professional capacity, communications relating to that purpose, made in confidence, are protected from disclosure), *aff'd*, 339 U.S. 974

their communicants,[23] husbands and their wives,[24] and physicians and their patients.[25] Although the common law traditionally deemed only attorney-client communications privileged, the clergy-communicant privilege also has a long and varied history.[26]

(1950); Sackman v. Liggett Group, 920 F. Supp. 357, 363 (E.D.N.Y. 1996) (discussing circumstance under which attorney-client privilege attaches); *In Re* Richardson, 157 A.2d 695, 698 (N.J. 1960) (asserting that attorney-client privilege is solidly embedded in common law despite constitutional or statutory silence); *Spectrum*, 581 N.E.2d at 1059-60 (noting that open dialogue between client and attorney is element to effective representation of client); People v. Mitchell, 448 N.E.2d 121, 123 (N.Y. 1983) (describing purpose of attorney-client privilege as promoting candor between client and attorney by guaranteeing confidentiality and freedom from disclosure); Priest v. Hennessy, 409 N.E. 2d 983, 988 (N.Y. 1980) (Fuschberg, J., dissenting) (arguing paramount importance of maintaining sanctity of attorney-client relationship, as it facilitates client's ability to obtain competent legal advice). *See generally* MUELLER & KIRKPATRICK, *supra* note 12, § 5.8 (stating elements of attorney-client privilege).

[23] *See Grand Jury Investigations*, 918 F.2d at 384 (maintaining that privilege should apply to communications made to clergy acting in spiritual capacity where there is expectation of privacy); *see also In re* Verplank, 329 F. Supp. 433, 435 (C.D. Cal. 1971) (applying four conditions discussed by Dean Wigmore, court concluded that clergy-communicant privilege should be recognized in federal criminal matters); U.S. v. Keeney, 111 F. Supp. 233, 234 (D.C.D. 1953) (citing priest-penitent privilege as established in discussion of less developed evidentiary privileges), *rev'd on other grounds*, 218 F.2d 843 (D.C. Cir. 1954).

[24] *See Trammel*, 445 U.S. at 53 (concluding that marital privilege doctrine should be modified so that marital witness is neither compelled to testify nor foreclosed from testifying); Hawkins v. United States, 358 U.S. 74, 78-79 (1958) (upholding validity of husband and wife privileged communication); *Lofton*, 957 F.2d at 477 (discussing dual purpose of marital privilege, to protect individual marriage of defendant from negative impact of testimony and to insure that free communication between spouses can exist); People v. Starr, 622 N.Y.S.2d 1010, 1012 (N.Y. App. Div. 1995) (recognizing that confidential communications made to spouse during marriage cannot be disclosed absent spousal consent). *But see* State v. Szemple, 640 A.2d 817, 824 (N.J. 1994) (holding that marital privilege does not apply when written marital communication is intercepted by third party thus destroying confidentiality of privilege). *See generally* Kristina K. Pappa, *Evidence-Privilege Communications—The Marital Communications Privilege Does Not Preclude a Third Party from Testifying as to the Contents of a Written Interspousal Communication and the Priest Is the Sole Holder of the Priest-Penitent Privilege and Can Waive That Privilege Without the Consent of the Penitent*—State v. Szemple, *135 N.J. 406, 640 A.2d 817 (1994)*, 25 SETON HALL L. REV. 1591, 1626-27 (1995) (applauding narrow construction of marital and priest-penitent privileges in *Szemple*, author criticizes New Jersey Supreme Court for its failure to define and develop idea of "surreptitious appropriation" of written marital communication by third party).

[25] *See Trammel*, 445 U.S. at 51 (noting that physician-patient privilege is based on premise that full and complete communications are necessary for physician to effectively treat patient); Lora v. Board of Educ., 745 F.R.D. 565, 571 (E.D.N.Y. 1977) (contending that inherent and justifiable expectation of confidentiality in psychotherapy mandates protection of confidentiality); State v. More, 382 N.W.2d 718, 721 (Iowa Ct. App. 1985) (acknowledging that doctor-patient privilege applies to all knowledge gained by doctor during course of treating patient); Dillenbeck v. Hess, 536 N.E.2d 1126, 1128 (N.Y. 1989) (holding that doctor-patient privilege applies unless medical condition is at issue). *But see* Rhodes v. Metropolitan Life Ins. Co., 172 F.2d 183, 184 (5th Cir. 1949) (stating that patient's right to exclude physician testimony is statutory in nature and not rooted in common law); Williams v. Roosevelt Hosp., 488 N.E.2d 94, 97 (N.Y. 1985) (noting that general medical history is not protected).

[26] *See Developments*, *supra* note 13, at 1554 (discussing history and development of privileged communications); Julie Ann Sippel, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U. L. REV. 1127, 1130 (1994) (discussing 1875 Supreme

A. *Policy: Attorney-Client and Clergy-Communicant Privilege*

The overriding justification behind evidentiary privileges is the encouragement of communication.[27] A lack of confidentiality undermines the foundation of intimate relationships which society deems indispensible.[28] For example, in an attorney-client relationship, a client must be able to freely divulge information to his attorney to receive competent legal counsel without fear of repercussions.[29]

As with the attorney-client privilege, confidentiality is an important element in the clergy-communicant relationship.[30] A penitent must feel free to relate his transgressions to his confessor in order to receive spiritual counseling without apprehension of disclosure.[31] Additionally, the clergy-communicant privilege involves

Court acknowledgment of evidentiary privilege and analogizing priest-penitent relationship to attorney-client relationship); *see also Grand Jury Investigations*, 918 F.2d at 378-79 (explaining testimonial privileges and history of rule); *Verplank*, 329 F. Supp. at 435 (discussing attorney-client and clergy-communicant privilege).

[27] *See Trammel*, 445 U.S. at 51 (holding that privilege is necessary incentive to encourage open communication); Totten v. United States, 92 U.S. 105, 105 (1875) (holding privileges are necessary in fostering communication); *Grand Jury Investigations*, 918 F.2d at 374 (stating that as with attorney-client privilege, protection of disclosure in penitential confidence is necessary to allow formation of religious institutions which are socially desirable); People v. Edwards, 203 Cal. App. 3d 1358, 1362 (Cal. Dist. Ct. App. 1988) (recognizing justification for priest-penitent privilege is to encourage communication and develop religious institutions). *See generally* Sippel, *supra* note 26, at 1127 (recognizing that privileges are granted to encourage confidential communications).

[28] *See* Upjohn v. United States, 449 U.S. 383, 401 (1981) (holding that confidentiality in attorney-client relationship is essential for attorney to properly represent client); *Grand Jury Investigations*, 918 F.2d at 374 (acknowledging that attorney-client privilege exists so one may seek legal advice without fear of disclosure); EDNA EPSTEIN ET AL., THE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 2 (2d ed. 1989) (specifying purpose of attorney client privilege is to encourage clients to be truthful and supply all facts to aid in effective legal counsel).

[29] *See Grand Jury Investigations*, 918 F.2d at 382 (asserting policy behind attorney-client privilege is to prevent disclosures tending to inhibit development of confidential relationships that are socially desirable). *See generally* EPSTEIN, *supra* note 28, at 2 (discussing justification of evidentiary privileges).

[30] *See Edwards*, 203 Cal. App. 3d at 1362 (explaining importance of confidentiality to society, as it encourages social interest in communication and development of religious institutions).

[31] *See id.* Religious institutions are fostered if one is encouraged to receive spiritual absolution when there is no apprehension of disclosure. *Id.*; 1983 *Codex lurix Canonici* c. 916. Under Canon Law, revelation of anything said in the confessional is a serious matter and excommunication automatically results. *Id.* Faced with conflict of choosing God's law or secular law, some priests have chose not to testify, even under penalty of fine or imprisonment. *Id.*; *see also In re* Keenan v. Gigante, 390 N.E.2d 1151, 1154 (N.Y. 1979) In this case, a priest refused to testify about seeking preferential treatment for a convicted mobster. *Id.*; *In re* Williams, 152 S.E.2d 317, 324 (N.C. 1967). In this case, a priest refused to testify in court in order to set a precedent. *Id. See generally* JOHN C. BUSH & WILLIAM H. TIEMANN, THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW 27 (1989) and JOHN C. HEENAN, PRIEST AND PENITENT: A DISCUSSION OF CONFESSION 10-13 (1937). These books provide an in-depth discussion of the importance of confession in Catholicism as well

the constitutionally-protected religious interests of the clergy under the First Amendment.[32] Each member of the clergy enjoys an individual freedom of religion as provided by the First Amendment.[33] Although bound by a code of ethics,[34] an attorney's interests enjoy no comparable First Amendment protection.[35] Therefore, it is urged that the clergy-communicant privilege should be accorded protection no less than that of the attorney-client privilege.

B. History of the Clergy-Communicant Privilege

The clergy-communicant privilege had been recognized in England since the time of the Norman conquest.[36] The first case in the

as many other faiths. *Id.*; John J. Montone, Note, *In Search of Forgiveness:* State v. Szemple *and the Priest-Penitent Privilege in New Jersey*, 48 RUTGERS. L. REV. 263, 273-82 (1995). The article discusses policy reasons behind the priest-penitent statutes. *Id.* An additional policy justification for priest-penitent privilege is the dilemma that arises when a priest is forced to testify. *Id.*

32 Griffin v. Coughlin, 743 F. Supp. 1006, 1028 (N.D.N.Y. 1990) (concluding that Free Exercise Clause recognizes need for privacy in confidential communications between inmate and spiritual advisor); *Developments*, *supra* note 13, at 1560 (stating that Free Exercise Clause of First Amendment necessitates testimonial privileges for religions which mandate some form of confidential confession); Mitchell, *supra* note 16, at 793-821 (arguing that Free Exercise Clause affords constitutional status to clergy privilege).

33 *See* O'Malley v. Brierley, 477 F.2d 785, 789 (3d Cir. 1973) (declaring that clergyman had right to free exercise of religion but not within prisons); Mitchell, *supra* note 16, at 793 (explaining that Free Exercise Clause of First Amendment protects individual clergy when state attempts to forcibly compel them to testify); *see also Grand Jury Investigations*, 918 F.2d at 385 (stating that restricting privilege to only Roman Catholic priests raises serious First Amendment concerns).

34 Bonnie Hobbs, Note, *Lawyers' Papers: Confidentiality Versus The Claims Of History*, 49 WASH. & LEE L. REV. 179, 181 (1992) (discussing American Bar Association Model Code of Professional Responsibility confidentiality provisions and more recent Model Rules of Professional Conduct for attorneys).

35 *See* Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional*, 75 IOWA L. REV. 601, 651 n.96 (1990) (citing FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 450 (1990)) (showing that lawyers' First Amendment rights lessen when interests of their clients or legal system are more important); *see also* Bradley A. Siciliano, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 HOFSTRA L. REV. 217, 240 (1991) (asserting that curtailing attorney contributions to political campaigns may infringe on their First Amendment rights).

36 *See* BUSH & TIEMANN, *supra* note 31, at 48. The authors detail the historical development of privilege. *Id.*; LINDELL L. GUMPER, LEGAL ISSUES IN THE PRACTICE OF MINISTRY 34-35 (1981). The author attempts to clarify the confusion surrounding the scope of privilege. *Id.*; Capt. Michael J. Davidson, *The Clergy Privilege*, 1992 ARMY LAW. 16, 17-19 (1992). This article traces the early roots of clergy privilege to Seal of Confession of the Roman Catholic Church. *Id.*; Mitchell, *supra* note 16, at 735-36. The author traces the earliest references to the act of confession to acknowledgment of the practice by Pope Leo I in the fifth century. *Id.*; *see also* Trammel v. United States, 445 U.S. 40, 51 (1980). The clergy-penitent privilege is described as "rooted in the imperative need for confidence and trust." *Id.*; Seward Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 57 (1963). Even though not expressly adopted by the English courts after Reformation, judges nonetheless continued to show deference to the privilege. *Id.* English judges have excused clergy from testifying

United States to hold that communications between a communicant and a clergyman was privileged was the case of *People v. Phillips*,[37] decided in New York in 1813. This court held that compelling a priest to disclose information revealed in the confessional violated the right to free exercise of religion.[38] Fifteen years later, the New York State legislature passed the nation's first statute recognizing the privilege.[39] This statute codified the holding in *Phillips* and effectively expanded it to include ministers of denominations other than the Roman Catholic Church.[40] The United States Supreme Court first recognized the privilege in *Totten v. United States*.[41] Today, all fifty states have some form of clergy-communicant privilege statute.[42] Although not absolute,[43] courts

about confessional matters even without "absolute priest-penitent privilege" in modern common law. *Id.*; Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 97-8 (1983). This article describes early Anglo-Saxon records that recognized the importance of confession. *Id.* The author also discusses the belief by some that clergy-communicant privilege continued for some years after Reformation. *Id.* at 102. *But see* PAPPA, *supra* note 24, at 1629. Common law did not the recognize the privilege after the Reformation. *Id.*; Montone, *supra* note 31, at 268-69. Montone asserts that since the Reformation, English courts have refused to excuse clergy from testifying. *Id.*

[37] *See Privileged Communications*, *supra* note 16, at 199 (weighing benefits of disclosure against non-disclosure).

[38] *Id.* at 201 (deciding that Roman Catholic priest should not be compelled to reveal what was confessed to him, in violation of his conscience and canons of his church, when disclosure would result in loss of his sacred function, religious communion, and social intercourse with denomination to which he belongs). *But see id.* at 211 (reprinting People v. Smith, 2 N.Y. City Hall Rec. 77 (Rogers 1817)) (allowing testimony based on distinction between auricular confessions made to Roman Catholic priest in course of discipline and those made to minister of gospel in confidence, as friend and advisor).

[39] N.Y. Rev. Stat. Pt. 3, c. 7., tit. 3, § 72 (1828) (codifying privilege).

[40] *See Developments*, *supra* note 13, at 1556. This article explains the passage of N.Y. Rev. Stat. Pt.3, c. 7., tit. 3, § 72 (1828), in response to the *Smith* decision where the court refused to extend the privilege to Protestant clergy. *Id.* The New York legislature expanded the holding of *Phillips* by enacting a non-denominational statute protecting communications made to all clergy, not just priests. *Id.*; *see also Privileged Communications*, *supra* note 16, at 209-13. This article reprints *People v. Smith* where the court refused to extend privilege to Protestant clergy. *Id.*

[41] *See* 92 U.S. 105, 107 (1875) (disallowing lawsuit that would lead to disclosure of confidential matters); *see also* Mullen v. United States, 263 F.2d 275, 275 (D.C. Cir. 1958) (Fahy, J., concurring) (agreeing that confession was privileged in child abuse case despite absence of federal statute on privilege); *In re* Verplank, 329 F. Supp. 433, 435 (C.D. Cal. 1971) (recognizing privilege under modern law because tolerance of religious freedom sanctioned its existence).

[42] *See* ALA. CODE § 12-21-166 (1990); ALASKA STAT. § 506 (Michie 1992); ARIZ. REV. STAT. ANN. § 13-4062(3) (West 1996); ARK. STAT. ANN § 28-1001 (Michie 1987), EVID. 505 (1996); CAL. EVID. CODE §§ 1030 - 1034 (West 1992); COLO. REV. STAT. § 13-90-107(1)(c) (1991); CONN. GEN. STAT. ANN. § 52-146b (West 1993); DEL. CODE ANN. tit. 10 § 4316 (1989); D.C. CODE ANN. § 14-309 (1996); FLA. STAT. ANN. § 90.505 (West 1996); GA. CODE ANN. § 24-9-22 (1993); HAW. REV. STAT. § 626-1 (1991); IDAHO CODE § 9-203(3) (1996); 110 ILL. COMP. STAT. 8-803 (West 1994); IND. CODE ANN. § 34-1-12-5 (Michie 1991); IOWA CODE ANN. § 622.10 (West 1991); KAN. STAT. ANN. § 60-429 (1995); KY. REV. STAT. ANN. § 421.210(4) (Michie 1992); LA. CODE EVID. ANN. art. 511 (West 1996); CODE ME. R. EVID. § 505 (1982); MD. CTS.

have upheld this privilege when the communication falls within the defined framework of the statute.[44]

C. Constitutional Rationale

Courts have found that the attorney-client and clergy-communicant privileges are supported by the Constitution.[45] The attorney-client privilege is grounded within the Sixth Amendment[46] guarantee that every person accused of a crime has the right to an attorney.[47] Similarly, the clergy-communicant privilege is pre-

& JUD. PROC. CODE ANN. § 9-111 (1989); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1996); MICH. COMP. LAWS ANN. § 600.2156 (West 1996); MINN. STAT. ANN. § 595.02(1)(c) (West 1996); MISS. CODE ANN. § 13-1-22 (1995); MO. ANN. STAT. § 491.060(4) (West 1996); MONT. CODE ANN. § 26-1-80(4) (1995); NEB. REV. STAT. § 27-506 (1995); NEV. REV. STAT. § 49.255 (1995); N.H. REV. STAT. ANN. § 516.35 (1991); N.J. STAT. ANN. § 2A:84A-23 (West 1992); N.M. STAT. ANN. § 11-506 (Michie 1996); N.Y. C.P.L.R. 4505 (McKinney 1996); N.C. GEN. STAT. § 8-53.2 (1994); N.D. CENT. CODE. § 505 (1991); OHIO REV. CODE ANN. § 2317.02 (Anderson 1993); OKLA. STAT. ANN. tit. 12, § 2505 (West 1996); OR. REV. STAT. § 40.260 (1995); 42 PA. CONS. STAT. ANN. § 5943 (West 1996); R.I. GEN. LAWS § 9-17-23 (1995); S.C. CODE ANN. § 19-11-90 (Law Co-op. 1995); S.D. CODIFIED LAWS §§ 19-13-16 - 19-13-18 (Michie 1996); TENN. CODE ANN. § 24-1-206 (1994); TEX. REV. CIV. STAT. ANN. § 3715a (West 1986); UTAH CODE ANN. § 78-24-83 (1996); VT. STAT. ANN. tit. 12, § 1607 (1990); WASH. REV. CODE ANN. § 5.60.060(3) (West 1996); W. VA. CODE § 57-3-9 (1996); WIS. STAT. ANN. § 905.06 (West 1996); WYO. STAT. ANN. § 1-12-101 (Michie 1991); *see also* BUSH & TIEMANN, *supra* note 31, at 223-247 (listing current priest-penitent privilege statutes); *Bill Aims to Prevent Use of Confession*, ORLANDO SENTINEL, June 8, 1996, at D6 (discussing "Religious Communications Sanctity Bill" which was introduced in Congress in response to controversy in Oregon and provides strict penalties for any government official who secretly records act of confession); Dana Tims, *Legislators Propose Laws Banning Secret Jail Tapings*, THE OREGONIAN (Portland), June 13, 1996, at D4 (noting proposed Oregon legislation designed to bar secret jailhouse taping of prisoners' confession to clergy).

[43] *See* United States v. Gordon, 655 F.2d 478, 486 (2d Cir. 1981) (holding that conversation was not privileged when it related to business and not spiritual matters); United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971) (deciding that contact with priest was not within privilege because defendant was not seeking spiritual counseling).

[44] *See* Trammel v. United States, 445 U.S. 40, 51 (1980) (stating that priest-penitent privilege recognizes need of penitent to disclose to religious figure, in confidence, acts or thoughts to receive guidance and forgiveness); Totten v. United States, 92 U.S. 105, 105 (1875) (acknowledging that priest-penitent relationship formed through disclosure of confidential information is entitled to protection).

[45] *See* Walstad v. State, 818 P.2d 695, 697 n.2 (Alaska Ct. App. 1991) (stating that attorney-client privilege is "inextricably tied to right to counsel"); Theodore Harman, *Fairness and the Doctrine of Subject Matter Waiver of the Attorney-Client Privilege in Extrajudicial Disclosure Situations*, 1988 U. ILL. L. REV. 999, 1004 (1988) (justifying attorney-client privilege based on constitutional right to effective assistance of counsel); Mitchell, *supra* note 16, at 726-27 (arguing that clergy-communicant privilege has constitutional basis); *Privileged Communications*, *supra* note 16, at 199 (recognizing that clergy-communicant privilege comports with Free Exercise Clause of New York Constitution); Sippel, *supra* note 26, at 1132 (stating that courts recognize nexus between clergy-communicant privilege and free exercise of religion).

[46] U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy. . . the Assistance of Counsel for his defense." *Id.*

[47] *See* Weatherford v. Bursey, 429 U.S. 545, 545 (1977) (recognizing that intrusions into attorney-client privilege endanger right to counsel); Fajeriak v. State, 520 P.2d 795, 799 (Alaska 1974) (recognizing that infringement on attorney-client privilege violates due pro-

mised on the First Amendment[48] right of free exercise of religion.[49]

How these privileges apply, however, depends on the context. It has been determined, for instance, that certain constitutional safeguards may be restricted in a prison setting.[50] Prisoner's constitutional rights, while not absolute,[51] have nonetheless been protected insofar as they are "not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."[52]

cess and Sixth Amendment right to counsel); People v. White, 207 Cal. Rptr. 266, 270 (Cal. Ct. App. 1984) (stating that unless conversation involved legal counseling, prisoner has expectation of privacy). *See generally* People v. Penrod, 169 Cal. Rptr. 533, 540 (Cal. Ct. App. 1980) (recognizing importance of attorney-client privilege).

[48] U.S. CONST. amend I. The First Amendment of the Constitution states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." *Id.*

[49] *See* U.S. CONST. amend. XIV.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person the within its jurisdiction the equal protection of the laws.

Id.; *see also Developments*, *supra* note 13, at 1554 (citing People v. Phillips, N.Y. Ct. Gen. Sess. (1813)). Phillips was the first case to recognize the priest-penitent privilege. *Id.* The court held that forcing a priest to disclose confession was violative of the First Amendment right to free exercise of religion. *Id.* The Free Exercise Clause of the First Amendment requires testimonial privileges to be granted to those religions which mandate confidential confessions. *Id.* at 1559; Sippel, *supra* note 26, at 1127. The priest-penitent statutes avoid violations of First Amendment rights, since a person is not required to violate religious beliefs by disclosing confidential communications. *Id. See generally* Robert L. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege-The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27, 56-63 (1967). The author discusses the constitutionality of the priest-penitent privilege. *Id.*

[50] *See* Hudson v. Palmer, 468 U.S. 517, 523 (1984) (holding that inmate has no reasonable expectation of privacy while incarcerated); Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (stating that fundamental right may be denied by law for sufficient state interests provided that legislation is narrowly drawn to effectuate only those interests); *see also* Turner v. Safley, 586 F. Supp. 589, 594-96 (W.D. Mo. 1984) (holding that prison may impinge upon incarcerated person's constitutional rights when regulations are reasonably related to legitimate state interests), *aff'd in part, rev'd in part*, 482 U.S. 78, 87-90 (1987). *See generally* Braunfield v. Brown, 366 U.S. 599, 608-09 (1961) (noting that religious practices may not be completely free from restriction).

[51] *See Turner*, 586 F. Supp. at 594-96 (upholding restrictions on inmate correspondence as necessary to protect institutional order and security); *Id.* at 95 (stating that incarceration results in substantial restrictions to rights, such as right to marry); *see also* Diaz v. Collins, 872 F. Supp. 353, 358 (E.D. Tex. 1994) (holding that requiring prison inmate to cut his hair did not violate free exercise rights).

[52] *See In re* Arias, 725 P.2d 664, 671 (Cal. 1986) (citing Lanza v. New York, 370 U.S. 139, 143-44 (1966)) (recognizing that relationships which law has "endowed with particularized confidentiality" must continue to receive protection especially in prison setting); *see also Hudson*, 468 U.S. at 523 (holding that prisoner has no reasonable expectation of privacy, but that religious freedom must not be abridged except for compelling reasons); Bell v. Wolfish, 441 U.S. 520, 546 (1979) (reasoning that accused does not forfeit all rights when incarcerated); Salaam v. Lockhard, 856 F.2d 1120, 1122 (8th Cir. 1988) (stating that "[a]

Among the constitutional rights that are retained by prisoners is the free exercise of religion which is guaranteed by the First Amendment.[53] The courts have recognized name changes,[54] dietary practices,[55] religious services,[56] access to clergy,[57] religious publications,[58] religious accouterments,[59] personal appearance and attire[60] as valid components of a prisoner's free exercise of

convicted criminal does not completely shed his First Amendment rights when he dons prison garb").

[53] *See Hudson*, 468 U.S. at 523 (stating that prisoners must be afforded reasonable opportunities to exercise religious beliefs); Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curium) (holding that prisoners must be provided with "reasonable opportunities" to exercise their religious freedom as guaranteed by First Amendment of United States Constitution); Cooper v. Pate, 378 U.S. 546, 546 (1964) (per curium) (holding that assertions of Black Muslim prisoners for religious freedom stated viable claim for judicial review); *Salaam*, 856 F.2d at 1122 (acknowledging that convicted criminal does not completely lose First Amendment rights when incarcerated). *But see* St. Claire v. Cuyler, 634 F.2d 109, 116 (3d Cir. 1980) (holding that officials met "reasonable relation to security interests" test in denying prisoner's request to attend religious prayer services).

[54] *See* Malik v. Brown, 16 F.3d 330, 333 (9th Cir. 1994) (acknowledging use of legal and religious name as being included in inmate's right to free exercise of religion); Ali v. Dixon, 912 F.2d 86, 90 (4th Cir. 1990) (recognizing inmate's First Amendment right to name change for religious purposes), *aff'd sub nom.*, Thacker v. Dixon, 953 F.2d 639 (4th Cir. 1992); Felix v. Rolan, 833 F.2d 517, 518 (5th Cir. 1987) (recognizing religious practice of inmate may include name change in exercise of First Amendment rights); Masjid Muhammad-DCC v. Keve, 479 F. Supp. 1311, 1322-23 (D. Del. 1979) (holding that First Amendment protects inmate's right to legal recognition of chosen religious name).

[55] *See* LaFevers v. Saffle, 936 F.2d 1117, 1119 (10th Cir. 1991) (holding vegetarian diet was to be provided to Seventh Day Adventist when part of religious belief); Kahane v. Carlson, 527 F.2d 492, 495 (2d Cir. 1975) (holding inmates were entitled to Kosher diet).

[56] *See Cooper*, 382 F.2d at 522 (acknowledging potential religious discrimination in denial to Muslim sect of access to religious services); Termunde v. Cooke, 684 F. Supp. 255, 260-61 (D. Utah 1988) (noting that prison inmates have First Amendment right to attend group religious services); Knuckles v. Prasse, 302 F. Supp. 1036, 1048 (E.D. Pa. 1969) (recognizing prisoner's right to attend religious services absent threat to prison security and order).

[57] *See Cooper*, 382 F.2d at 518 (holding that denial of visits with prayer leader to Elijah Muhamuad Muslim is basis for cause of action); Griffen v. Coughlin, 743 F. Supp. 1006, 1025 (N.D.N.Y. 1990) (holding inmate was entitled to private meetings with religious advisor).

[58] *See* McCabe v. Arave, 827 F.2d 634, 638 (9th Cir. 1987) (declaring that religious literature advocating white supremacy, but not advancing violence or unlawful activities cannot be constitutionally banned as rationally related to rehabilitation); Jones v. Bradley, 590 F.2d 294, 296 (9th Cir. 1979) (asserting that prisoners have right to store properly censored literature); Aikens v. Jenkins, 534 F.2d 751, 754 (7th Cir. 1976) (recognizing First Amendment right of prisoners to publish materials but noting that right is more limited than for other members of society).

[59] *See* Thornburgh v. Abbott, 490 U.S. 401, 408 (1995) (acknowledging that prison officials may limit prisoner access to printed materials, but government must show that such regulation furthers compelling state interest); Turner v. Sotley, 482 U.S. 78, 79 (1987) (setting forth reasonableness standard); Hosna v. Groose, 80 F.3d 298, 305 (8th Cir. 1996) (holding prison regulations which affect receiving of publications by prisoners must reasonably conform to legitimate penological interests); Valient-Bey v. Morris, 829 F.2d 1441, 1444 (8th Cir. 1987) (holding confiscation of religious material that was not inflammatory unconstitutional).

[60] *See* Ward v. Walsh, 1 F.3d 873, 880 (9th Cir. 1993) (stating that within certain parameters, inmate could wear clothes that satisfy religious beliefs); Burgin v. Henderson, 536

religion. Since various practices of religion have been recognized in the prison setting, it seems that confidential communication between clergy and communicants should also be recognized.[61]

II. FEDERAL AND STATE LEGISLATION

A. *Title III*

Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968[62] ("Act") in order to govern electronic surveillance. The main purpose of the Act is to safeguard individual privacy rights by regulating the interception of wire, oral and electronic communications.[63] The Act provides mandatory guidelines for the use of electronic surveillance in law enforcement.[64] Civil and criminal penalties are imposed for violations of the Act.[65]

Title III recognizes the special status of privileged communication.[66] It states that "no otherwise privileged wire, oral, or electronic communications intercepted . . . shall lose its privileged

F.2d 501, 502 (2d Cir. 1976) (permitting Sunni Muslims to assert viable claim where evidence suggested that religious practice posed no real threat to prison security).

[61] *See* Luckette v. Lewis, 883 F. Supp. 471, 476 (D. Ariz. 1995) (holding that First Amendment rights of prisoners are included under protection of Religious Freedom Restoration Act); *see also* Brown-El v. Harris, 26 F.3d 68, 69 (8th Cir. 1994) (holding that RFRA can be used to review claims in which governmental action restricts freedom of religion as intended by Congress); Abdul-Akbar v. Department of Corrections, 910 F. Supp. 986, 1007 (D. Del. 1995) (stating that RFRA applies to prisoner's free exercise of religion claims); Campbell-El v. District of Columbia, 874 F. Supp 403, 408 (D.D.C. 1994) (asserting that prisoner's claim under RFRA may be maintained when substantial burden on free exercise of religion is established).

[62] 18 U.S.C. §§ 2510-2521 (1996). The entire act is entitled Wire and Electronic Communications Interception and Interception of Oral Communications. *Id.*

[63] *See* Congressional Findings, June 19, 1968, P.L. 90-351, Title III, s. 801, 82 Stat. 211 (stating that since Congress wanted, "to protect the privacy of innocent persons, the interception of wire or oral communications should be limited.").

[64] *See* 18 U.S.C. § 2518 (1986). This part of Title III outlines the procedures for obtaining a wiretapping order from a judge. *Id.* Among other things the application must contain the identity of the investigating officer and person over whom surveillance is sought as well as a summary of facts including the nature of the crime, where, when and how interception will take place and for how long it will take place. *Id.* All this information is to be taken into consideration by the judge when deciding whether or not to grant the wiretapping order. *Id.*; *see also* MONRAD G. PAULSEN, THE PROBLEMS OF ELECTRONIC EAVESDROPPING 84 (1977) (explaining minimization guidelines of Title III).

[65] *See* 18 U.S.C. § 2511(1) (1982) (providing that violation of Title III is crime punishable by either fine of not more than $10,000, imprisonment of not more than five years, or both); 18 U.S.C. § 2520 (1986) (stating that "any person whose wire, oral or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter, may in a civil action recover from the person or entity, which engaged in that violation, such relief, as may be appropriate.")

[66] 18 U.S.C. § 2517(4) (1986). "No otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter, shall lose its privileged character." *Id.*

character."[67] Thus, Title III protects the disclosure of privileged conversations but does not expressly prohibit the interception of such conversations.[68]

When electronic surveillance is authorized, the Act requires that efforts be made to minimize interception of communications not otherwise subject to interception under the Act.[69] Minimization requires the temporary termination of surveillance when the intercepted communication is not relevant to the investigation.[70] This minimization is intended to protect a person's privacy from indiscriminate eavesdropping on conversations.[71] Although not an explicit prohibition, this minimization provision also diminishes the interception of privileged communications as much as possible.[72]

[67] *Id.* (demonstrating that statute has no express protection against interception of privileged communications).

[68] *See* United States v. Cianfrani, 448 F. Supp. 1102, 1116 (E.D. Pa. 1978) (stating that privileged conversation does not lose its privileged status when intercepted in accordance with Title III), *rev'd on other grounds*, 573 F.2d 835 (3d Cir. 1978).

[69] 18 U.S.C. § 2518(5) (1982) (requiring that efforts be made in advance to limit interception of communications not intended to be intercepted); *see also* United States v. Focarille, 340 F. Supp. 1033, 1046 (D. Md. 1972) (stating that minimization requires that interception should be conducted in manner which reduces to smallest possible number, interceptions of communications which do not relate to commission of crime specified in investigative warrant); Morrow v. State, 249 S.E.2d 110, 118 (Ga. Ct. App. 1978) (stating that minimization requires that interception of conversations be limited as much as possible to communications that are relevant to criminal investigation). *See generally* Ronald Goldstock & Steven Chananie, *Criminal Lawyers: The Use of Electronic Surveillance and Search Warrants in the Investigation and Prosecution of Attorneys Suspected of Criminal Wrongdoing*, 136 U. PA. L. REV. 1855, 1873-74 (1988) (discussing effect of minimization on attorney-client privileged communications).

[70] *See* 18 U.S.C. § 2518(5). This provision provides in relevant part:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

Id.; *see also* United States v. King, 335 F. Supp. 523, 541 (S.D. Cal. 1971) (stating that object of minimization is to prevent wiretap authorized only to intercept conversations dealing with one alleged type of criminal activity from turning into unconstitutional general search and wholesale invasion of privacy), *aff'd. in part, rev'd in part on other grounds*, 478 F.2d 494 (1973); United States v. Scott, 331 F. Supp. 233, 247 (D.D.C. 1971) (ruling that Fourth Amendment right of privacy would be illusory if investigative agents disregarded minimization statute and indiscriminately intercepted every conversation).

[71] *See* Gelbard v. United States, 408 U.S. 41, 48 (1972) (stating that reason for Title III was to provide "[n]ew protections for privacy. . . ."); *In re* Kansas City Star, 666 F.2d 1168, 1171 (8th Cir. 1981) (stating that requirements of Act serve purpose of protecting privacy and delineating uniform conditions under which communications can be intercepted).

[72] *See* CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING § 8:125 (2d ed. 1995) (stating that effect of Title III minimization language severely limits interception of privileged communications).

All fifty states have enacted wiretapping statutes.[73] While state restrictions on electronic surveillance can exceed those of Title III, they may not fall below the minimal standards set forth in the Act.[74]

B. *State Wiretapping Statutes*

Existing state wiretapping statutes can be divided into four categories in their treatment of privileged communications. In the first category, there are twenty-five states, including Oregon,[75] that mirror the language used in Title III.[76] These statutes ex-

[73] *See* ALA. CODE §§ 13A-11-30 (1996); ALASKA STAT. §§ 12.37.010 - 12.37.130 (Michie 1995); ARIZ. REV. STAT. §§ 13-3004 - 13-3008 (1996); ARK. CODE ANN. § 5-60-120 (Michie 1995); CAL. PENAL CODE § 630 - 637.2 (West 1995); COLO. REV. STAT. §§ 16-15-101 - 16-15-104 (1995); CONN. GEN. STAT. §§ 54-41a - 54-41t (1995); DEL. CODE ANN. tit. 11, § 1335-36 (1995); D.C. CODE ANN. §§ 23-541 - 23-543 (1995); FLA. STAT. ch. 934.01 - 934.23 (1996); GA. CODE ANN. §§ 16-11-62 - 16-11-63 (1986); HAW. REV. STAT. §§ 893-41 - 893-48 (1995); IDAHO CODE §§ 18-6701 - 18-6709 (1996); 735 ILL. COMP. STAT. 5/108B-1 - 5/108B-6 (West 1992); IND. CODE §§ 35-33.5-1-1 - 35-33.5-1-9 (1996); IOWA CODE § 808B.1 - 808B.9 (1994); KAN. STAT. ANN. §§ 22-2501 - 22-2530 (1996); KY. REV. STAT. ANN. §§ 527.010 - 527.130 (Banks-Baldwin 1995); LA. REV. STAT. ANN. §§ 15.1301 - 15.1313 (West 1992); ME. REV. STAT. ANN. tit. 15, §§ 709 - 713 (West 1995); MD. CODE ANN. CTS. & JUD. PROC. 10-401 - 10-413 (1977); MASS. GEN. LAWS ch. 272, § 99 (1995); MICH. COMP. LAWS §§ 750.539a - 750.539f (1995); MINN. STAT. § 626A.01 - 626A.13 (1994); MISS. CODE ANN. §§ 41-29-501 - 41-29-513 (1992); MO. REV. STAT. §§ 542.401 - 542.413 (1996); MONT. CODE ANN. § 45-8-213 (1995); NEB. REV. STAT. §§ 86-701 - 86-713 (1994); NEV. REV. STAT. §§ 179.410 - 179.515 (1989); N.H. REV. STAT. ANN. §§ 570-A:1 - 570-A:13 (1995); N.J. REV. STAT. §§ 2A:156A-1 - 2A:156A-24 (1985); N.M. STAT. ANN. §§ 30-12-1 - 30-12-13 (Michie 1973); N.Y. PENAL LAW §§ 250.00 - 250.25 (McKinney 1995); N.C. GEN. STAT. §§ 15A-286 - 15A-299 (1995); N.D. CENT. CODE §§ 29-29.1-01 - 29-29.1-05 (1993); OHIO REV. CODE ANN. §§ 29533.51 - 29533.62 (Anderson 1996); OKLA. STAT. tit. 13, §§ 176.1 - 176.23 (1996); OR. REV. STAT. §§ 133.721 - 133.743 (1989); 18 PA. CONS. STAT. ANN. §§ 5701 - 5728 (West 1978); R.I. GEN. LAWS §§ 12-5.1-1 - 12-5.1-16 (1995); S.C. CODE ANN. §§ 17-29-10 - 17-29-33 (Law Co-op. 1995); S.D. CODIFIED LAWS §§ 23A-35A-01 - 23A-35A-23 (Michie 1996); TENN. CODE ANN. §§ 40-6-301 - 40-6-311 (1996); TEX. CRIM. P. CODE ANN. §§ 18.01 - 18.23 (West 1996); UTAH CODE ANN. §§ 77-23a-1 - 77-23a-23 (1988); VT. STAT. ANN. tit. 13, § 16 (1996); VA. CODE ANN. §§ 19.2-61 - 19.2-83 (Michie 1996); WASH. REV. CODE §§ 9.73.010 - 9.73.095 (1995); W. VA. CODE §§ 62-1D-1 - 62-1D-13 (1987); WIS. STAT. §§ 968.21-968.33 (1995); WYO. STAT. ANN. §§ 7-3-601 - 7-2-623 (Michie 1994).

[74] *See* S. REP. NO. 90-1097, at 98 (stating that states are free to adopt more stringent legislation but not less); United States v. Mora, 821 F.2d 860, 863 n.3 (1st Cir. 1987) (noting that states may impose more stringent requirements on wiretapping than those of Federal law but may not implement less restrictive requirements); *see also* Anjali Singhail, *The Piracy of Privacy? A Fourth Amendment Analysis of Key Escrow Cryptology*, 7 SAN. L. & POL'Y REV. 189, 192 (1996) (discussing Title III and ECPA as methods of accountability and supervision for wiretap process).

[75] *See* OR. REV. STAT. § 133.737(4) (1994) (stating that "[n]o otherwise privileged communication intercepted in accordance with, or in violation of, the provisions of ORS 133.721, 133.724 and 133.729 to 133.739, shall lose its privileged character").

[76] *See* ALASKA STAT. § 12.37.050 (Michie 1993); COLO. REV. STAT. § 16-15-102(15) (1995); FLA. STAT. ch. 934.08(4) (1996); IDAHO CODE § 18-6707 (1996); IND. CODE § 35-33.5-5-3(2)(d) (1996); IOWA CODE § 808B.4(4) (1994); KAN. STAT. ANN. § 22-2515(e) (1994); MD. CODE ANN. CTS. & JUD. PROC. 10-407(d) (1977); MASS. GEN. LAWS ch. 272, § 99.2(e) (1995); MINN. STAT. § 626A.09(4) (1994); MISS. CODE ANN. § 41-29-511(4) (1992); MO. REV. STAT. § 542.406(4)

pressly prohibit disclosure, but not interception, of privileged communications.[77] Eleven states in the second category have no express protection against the interception or disclosure of privileged communications.[78] Tennessee comprises the third category, which only protects against the interception of privileged communications.[79] It is possible in Tennessee for an inadvertent interception to be disclosed since there is no express prohibition against disclosure. The fourth and most protective category incorporates the Title III language and goes one step further. The thirteen states and the District of Columbia in this category protect against both the interception and disclosure of privileged communications.[80]

Within the fourth category, there are varying degrees of protection. Connecticut's statute[81] is the most stringent. Connecticut forbids interception of all communication emanating from "any facility used by a licensed physician, an attorney-at-law, or a prac-

(1996); NEB. REV. STAT. § 86-704(4) (1994); NEV. REV. STAT. § 179.465(3) (1989); N.H. REV. STAT. ANN. § 570-A:8(IV) (1995); N.M. STAT. ANN. § 30-12-10(A) (Michie 1973); N.C. GEN. STAT. § 15A-290(e) (1995); N.D. CENT. CODE § 29-29.2-02(17) (1995); OKLA. STAT. tit. 13, § 176.07 (1996); OR. REV. STAT. § 133.737(4) (1989); 18 PA. CONS. STAT. ANN. § 5711 (West 1995); S.D. CODIFIED LAWS § 23A-35A-19 (Michie 1996); TEX. CRIM. P. CODE ANN. § 18.20(d) (West 1996); UTAH CODE ANN. § 77-23a-9(4) (1988); VA. CODE ANN. § 19.2-67(D) (Michie 1996); WYO. STAT. ANN. § 7-3-606(4) (Michie 1994).

[77] *See id.*; *see also* 18 U.S.C. §§ 2510-2521 (1996). These statutes have similar language to Title III which states "[n]o otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." *Id.*

[78] *See* ALA. CODE § 13A-11-30 (1996); ARIZ. REV. STAT. ANN. § 13-3004- 13-3008 (West 1996); ARK. CODE ANN. § 5-60-120 (Michie 1995); GA. CODE ANN. §§ 16-11-62 - 16-11-63 (1986); KY. REV. STAT. ANN. §§ 527.010 - 527.130 (Michie 1995); ME. REV. STAT. ANN. tit. 15, §§ 709 - 713 (West 1995); MICH. COMP. LAWS §§ 750.539a - 750.539f (1995); MONT. CODE ANN. § 45-8-213 (1995); S.C. CODE ANN. §§ 17-29-10 - 17-29-33 (Law Co-op. 1995); VT. STAT. ANN. tit. 13, § 16 (1996).

[79] *See* TENN. CODE ANN. § 40-6-306(d) (1996). This section provides that any privileged communication should not be intercepted unless the judge issuing the order finds probable cause that the parties committed or conspired to commit a homicide offense, and it is silent on disclosure. *Id.*

[80] *See* CAL. PENAL CODE § 629.30 (West 1995); CONN. GEN. STAT. § 54-41h (1995); DEL. CODE ANN. tit. 11, § 1336(j) (1995); D.C. CODE ANN. § 23-547(j) (1995); HAW. REV. STAT. § 893-46(e)(1) (1995); 735 ILL. COMP. STAT. 5/108B-1 - 5/108B-6 (West 1992); LA. REV. STAT. ANN. § 15.1310(C)(5) (West 1992); MASS. GEN. LAWS ch. 272, §§ 99 (D)(2)(e), 99(F)(2)(e) (1993); N.J. REV. STAT. § 2A:156A-11 (1985); N.Y. PENAL LAW §§ 250.00, 700.20 (McKinney 1995); OHIO REV. CODE ANN. § 29533.54(C) (Anderson 1996); R.I. GEN. LAWS § 12-5.1-4 (1980); W. VA. CODE § 62-1D-9(d) (1987); WIS. STAT. § 968.30(10) (1995). The applicable state statutes contain standard Title III language preventing disclosure and additional language preventing interception of some or all privileged communications. *Id.*

[81] *See* CONN. GEN. STAT. § 54-41h (1995).

ticing clergyman."[82] It narrowly focuses on the place where the communication occurs rather than on the privileged nature of the conversation itself.[83] Illinois appears to be the most beneficial towards privileged communications,[84] flatly prohibiting any interception or use of privileged communication.[85] There interception is not allowed, but if by chance, a privileged conversation is intercepted, the use or disclosure of its contents is prohibited.[86] The West Virginia and Wisconsin statutes explicitly limit the interception of attorney-client conversations, but are silent about interception of the other privileges.[87] Finally, the remaining eight states and the District of Columbia bar interception except when officials demonstrate a special need or employ specific minimization procedures so that no privileged conversations are intercepted.[88] This

[82] *See* CONN. GEN. STAT. § 54-41h (1995). This statute prohibits the interception of facilities which are "being used, or about to be used, or are leased to, listed in the name of, or commonly used by, a licensed physician, an attorney-at-law or a practicing clergyman." *Id.*

[83] *See id.*; *see also* State v. Ferrule, 463 A.2d 573, 576 (Conn. 1983) (stating that right to consult with one's counsel includes right to consult without being overheard); Goldsmith & Balmforth, *supra* note 6, at 943-44 (asserting that Connecticut's statute is overbroad since it may prohibit interception of many non-privileged conversations). *But see* Leonard Atkinson, *The Origins of Wiretapping in Connecticut*, 12 U. BRIDGEPORT L. REV. 247, 267-74 (1991) (explaining what must be in Connecticut court order for there to be valid wiretapping).

[84] *See* FISHMAN & MCKENNA, *supra* note 72, § 8:63 (explaining levels of protection for various privilege statutes).

[85] *See* 735 ILL. COMP. STAT. 5/108B-1 - 5/108B-6 (West 1992). "Nothing in this article shall be construed to authorize the interception, disclosure or use of information obtained from privileged communications." *Id.*

[86] *See id.* (allowing neither interception nor disclosure).

[87] *See* W. VA. CODE § 62-1D-9(d) (1987). This statute adopts Title III language but, in addition, forbids the use of electronic surveillance to monitor conversations emanating from an attorney's office. *Id.* In an interception of any communication, if the law enforcement officer realizes that the conversation is attorney-client in nature, monitoring must cease immediately. *Id.*; WIS. STAT. § 968.30(10) (1995). Interception of any wire, electronic or oral communication between an attorney and a client is prohibited. *Id.*; *see also* Goldsmith & Balmforth, *supra* note 6, at 943-44. The authors point out that wiretapping statutes that just recognize privileges are not evidentiary privilege statutes. *Id.*

[88] *See* CAL. PENAL CODE § 629.30 (West 1995). California follows the same language as Title III with an additional minimization requirement. *Id.* The statute provides that if a conversation is deemed to be privileged, then strict procedural guidelines are to be followed. *Id.*; D.C. CODE ANN. § 23-547(j) (1995). This statute provides interception of facilities which are "being used, or about to be used, or are leased to, listed in the name of, or commonly used by, a physician, an attorney or a clergyman" for professional purposes is not permitted. *Id.* Protection is also provided for the residence of a husband and wife. *Id.* There is an exception if a determination is made that the location is being used by organized crime and such interceptions will be conducted as to minimize the interception of the above privileged communication. *Id.*; HAW. REV. STAT. § 893-46(e)(1) (1995). "Privileged conversations, including those between a person and the person's spouse, attorney, physician, or clergyman, shall not be intercepted unless both parties to the conversation are named or described in the application and order." *Id.*; LA. REV. STAT. ANN. § 15.1310(C)(5) (West 1992). A judge may issue an electronic surveillance order if he has decided that the wiretapping is not reasonably expected to intercept privileged communications. *Id.*; MASS. GEN.

fourth category is the most practical and effective position among the states.

While supporting the privilege, these nine statutes balance the needs of the confidentiality of the communication with the needs of law enforcement to obtain evidence not otherwise available from any other source.[89] By permitting monitoring of privileged communications under special circumstances with strict minimization requirements, these states limit the possibility that the privilege cannot be used to create sanctuaries free from all electronic surveillance.[90]

C. *The Free Exercise Clause*

The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[91] In *Sherbert v. Verner*[92] and *Wisconsin v. Yoder*,[93] the Supreme Court inter-

LAWS ch. 272, § 99 (F)(2)(e) (1993). Massachusetts requires that an application for wiretapping must contain a statement that the communications to be monitored are not "legally privileged." *Id.*; N.J. REV. STAT. § 2A:156A-11 (1985). New Jersey law requires a special need for court-ordered wiretapping of a public place or a "facilit[y] from which, or the place where, are being used, or about to be used, or are leased to, listed in the name of, or commonly used by a privileged communicant." *Id.* Privileged communicants include a licensed physician, a licensed practicing psychologist, an attorney-at-law, a practicing clergyman, a newspaperman, or husband and wife. *Id.* To prove special need, the state must show that the privileged communicant has or will engage in criminal activity. *Id.*; N.Y. PENAL LAW § 700.20 (McKinney 1995). The New York application must contain "[a] statement that such communications or observations are not otherwise legally privileged." *Id.*; *see also* DEL. CODE ANN. tit. 11, § 1336(j) (1995); OHIO REV. CODE ANN. § 29533.54(C) (Anderson 1996); R.I. GEN. LAWS § 12-5.1-4 (1980). Delaware, Ohio, and Rhode Island have enacted statutes which are virtually the same. *Id.* They provide that there shall be no interception if the facilities from which, or the place where communications are to be intercepted are being used, or are about to be used, or are leased to, listed in the name of or commonly used by an attorney, or clergyman or is dwelling of a husband and wife, unless a court decides that there is a special need to intercept such communications over such facilities or in such places as listed above. *Id.*

[89] *See* CAL. PENAL CODE § 629.30 (West 1995); DEL. CODE ANN. tit. 11, § 1336(j) (1995); D.C. CODE ANN. § 23-547(j) (1995); HAW. REV. STAT. § 893-46(e)(1) (1995); LA. REV. STAT. ANN. § 15.1310(C)(5) (West 1992); N.J. REV. STAT. § 2A:156A-11 (1985); N.Y. PENAL LAW § 700.20 (McKinney 1995); OHIO REV. CODE ANN. § 29533.54(C) (Anderson 1996); R.I. GEN. LAWS § 12-5.1-4 (1980).

[90] *See* Goldsmith & Balmforth, *supra* note 6, at 943-44 (arguing statues that forbid all eavesdropping from wherever privileged persons are may lead to creation of criminal activity); Goldstock & Chanie, *supra* note 69, at 1863-65 (discussing how lawyers can not be wiretapped in some states even when suspected of criminal activity). *But see* Reid H. Weingarten, *Judicial Misconduct A View from the Department of Justice*, 76 KY. L.J. 799, 802 (1988) (noting court holdings that have found lawyer's arguments for not allowing wiretapping on their phones unpersuasive).

[91] U.S. CONST. amend. I.

[92] 374 U.S. 398, 406 (1963).

[93] 406 U.S. 205, 214 (1972).

preted this clause to mean that the constitutional right of religious expression can only be restricted when the state demonstrates an interest of sufficient magnitude to override the interest claiming protection.[94] The Court, however, in *Employment Div. Dep't of Human Resources of Oregon v. Smith*[95] upheld a valid and neutral law of general applicability even though it burdened the free exercise of religion.[96] In 1993, Congress enacted the Religious Freedom Reformation Act[97] to restore the "compelling state interest" test for all laws, even those of general applicability, which substantially burden a person's right to free exercise of religion.[98] Recently, the Supreme Court ruled that the Religious Freedom Reformation Act was unconstitutional.[99]

In prison situations, where inmates are deprived of many rights,[100] prisoners should be allowed to exercise certain constitu-

[94] *See id.* (denying free exercise of religious belief is justifiable if there is state interest of sufficient magnitude); *Sherbert*, 374 U.S. at 406 (arguing that in this highly sensitive constitutional area, only grave abuses give occasion for showing of compelling state interest).

[95] 494 U.S. 872 (1990).

[96] *See id.* at 874. The Court ruled that the Free Exercise Clause would not be used to invalidate Oregon's law against peyote (marijuana) even though respondents' religion called for them to ingest the drug for sacramental purposes. *Id.* at 878. Justice Scalia, further wrote that a person's religious practices do not give him the freedom to choose when to comply with an otherwise valid law forbidding conduct that the State is free to regulate. *Id.* (citing Prince v. Massachusetts, 321 U.S. 158 (1944)); *see also* Michael P. Farris & Jordan W. Lorence, Employment v. Smith *and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65, 66-70 (1995). The authors describe the impact of *Smith* on religious freedom cases. *Id.*; Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747, 747-50 (1993). This article asserts certain responses to the *Smith* decision. *Id.*

[97] 42 U.S.C. § 2000bb (1996).

[98] *See* 42 U.S.C. § 2000bb (b). The Act states in pertinent part:

> The purposes of this chapter are (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) and to guarantee its' application in *all cases* where free exercise of religion is substantially burdened by the government. (emphasis supplied)

Id.; *see also* Farris & Lorence, *supra* note 96, at 85-90. This section explains the importance of enacting the RFRA after the *Smith* decision. *Id.*; Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 93-117 (1996). This article describes the development of the RFRA in response to the Smith decision. *Id.*

[99] *See* City of Boerne v. P.F. Flores, 117 S. Ct. 2157, 2170-75 (1997) (ruling that RFRA exceeded Congress' power under enforcement provision of Fourteenth Amendment because it: contradicts guidelines to maintain federal-state balance of powers, applies to laws of general applicability that put incidental burden on religion which do not unnecessarily burden that religion, and was not created to identify and counterbalance state laws likely to be unconstitutional).

[100] *See* Hudson v. Palmer, 468 U.S. 517, 523-24 (1984) (stating that conviction and sentencing deprives one of right to freedom of confinement but that prisons are not outside stretch of Constitution); Bell v. Wolfish, 441 U.S. 520, 544-47 (1979) (holding that prisoner's constitutional rights are subject to certain restrictions for penal interests); Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (stating that fundamental right may be denied by law

tional rights, including the free exercise of religion, when it is not inconsistent with the objectives of incarceration.[101] Prison officials must allow inmates "reasonable opportunities" to exercise their religious freedom.[102] A prison regulation that infringes on a prisoner's religious freedom is valid only if it is reasonably related to a legitimate penal interest.[103] The "reasonableness test" is a lower standard than the "compelling interest" test used in *Sherbert* and *Yoder*.[104]

The Supreme Court identified four relevant factors used to determine the reasonableness of a prison regulation.[105] Courts should consider: whether there is a logical connection between the

for sufficient state interests). *See generally* Braunfield v. Brown, 366 U.S. 599, 603 (1961) (citing Cantwell v. State of Connecticut, 310 U.S. 296, 303-304 (1940)) (noting that religious practices may not be completely free from restriction).

[101] *See Hudson*, 468 U.S. at 523 (providing overview of case law which allow prisoners constitutional rights); Estelle v. Gamble, 429 U.S. 97, 102-05 (1976) (finding that prisoners are protected by Eighth Amendment's protection against "cruel and unusual punishment"); Pell v. Procunier, 417 U.S. 817, 822 (1917) (allowing certain First Amendment rights); Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (ruling that prisoners have constitutional right to Due Process).

[102] *See* Turner v. Safley, 482 U.S. 784, 787 (1987) (stating that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests"); O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (delineating rational relationship test); Cruz v. Beto, 405 U.S. 319, 322 (1982) (per curiam) (deciding that prison must make "reasonable opportunity" to allow Buddhist to practice his religion as it did for Catholics, Protestants and Jews).

[103] *See O'Lone*, 482 U.S. at 348 (setting forth requirement that prison regulation be "reasonably related to legitimate penological interests" was test for whether prison regulations interfered with inmate's free exercise of religion); *Turner*, 482 U.S. at 89 (holding prison may impinge upon incarcerated person's constitutional rights when regulations are reasonably related to legitimate state interests); *Pell*, 417 U.S. at 822-23 (allowing First Amendment rights in prisons that are in line with "legitimate penological objectives"); Procunier v. Martinez, 416 U.S. 396, 412 (1974) (finding that certain constitutional rights must be curtailed in prisons).

[104] *See O'Lone*, 482 U.S. at 349 (rejecting more rigorous standard of review); *Turner*, 482 U.S. at 80 (ruling that lesser standard of review for prisoners' constitutional claims is warranted); MICHAEL MUSHLIN, INDIVIDUAL RIGHTS OF PRISONERS 261 (2d ed. 1993) (noting that *Shabazz* test is lowest standard that could be chosen by court); David M. Mulane, *Thirteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals*, 72 GEO. L.J. 723, 1047 (1983) (showing how reasonableness test is lowest of available alternatives); Simeon Goldstein, Note, *Constitutional and Statutory Rights Implicated in Family Visitation Programs*, 31 B.C. L. REV. 987, 1010 (1990) (proving that prisoner reasonableness test is lowest of possible standards); Eric J. Zorgy, Comment, *Orthodox Jewish Prisoners and the* Turner *Effect*, 56 LA. L. REV. 905, 934 (1996) (claiming that RFRA calls for compelling state interest test for prisoners claims).

[105] *See O'Lone*, 482 U.S. at 350-53 (describing application of certain factors); *Turner*, 482 U.S. at 89-91 (stating that courts should consider whether: "valid, rational connection" exists between regulation and legitimate interest advanced to justify it; whether alternative means for exercising asserted right remain available; whether accommodation of asserted right will adversely affect guards, other inmates, and allocation of prison resources generally; and whether obvious alternative to regulation exists "that fully accommodate prisoner's right at de minimis cost to valid penological interests"); Mulane, *supra* note 104, at 1047 (explaining reasonableness test factors).

regulation and the stated goal; whether alternative means are available to exercise the right; whether the extent of the accommodation impacts on the prison and its administration, and; whether the regulation represents an exaggerated response to prison concerns.[106] It is submitted that any infringement on an inmate's religious freedom must pass the "reasonableness test" set forth by the Supreme Court.

III. THE OREGON DILEMMA

A. *Mockaitis*

A recent controversy in Oregon, involving the interception of a privileged communication, received national attention.[107] In this case, Conan Wayne Hale had been arrested and awaited trial on murder charges.[108] When visited by Reverend Timothy Mockaitis, Hale made a religious confession to the priest.[109] Unknown to either Hale or Mockaitis, Portland District Attorney F. Douglass Harcleroad had authorized a surreptitious recording of the pair's conversation.[110] Although Harcleroad declared he would not seek to admit the "confession" into evidence, the collateral legal conflicts were far from resolved.[111]

[106] *See Turner*, 482 U.S. at 89-91 (applying factors of "reasonableness test"); Block v. Rutherford, 468 U.S. 576, 587 (1984) (defining final factor of test); Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 131 (1977) (clarifying second and third factor of test); *Pell*, 417 U.S. at 828 (delineating first factor of test).

[107] *See* Mockaitis v. Harcleroad, 104 F.3d 1522, 1525 (9th Cir. 1997) (stating that communication was intercepted and taped on audiocassette by officers or employees of Lane County Sheriff's Department); Celestine Bohlen, *Vatican Wants Tape of Jail Confession Destroyed*, NEW YORK TIMES, May 26, 1996, §1 at 26 (explaining wide media coverage of case and impact on religion).

[108] *See* Mockaitis v. Harcleroad, 938 F. Supp. 1516, 1522 (D.Or. 1996) (stipulating that Hale is suspect in numerous capital and non-capital crimes), *rev'd on other grounds*, 104 F.3d 1522, 1525 (9th Cir. 1997) .

[109] *See id.* at 1523 (explaining that Father Mockaitis went to visit Hale for express purpose of administering Sacrament of Penance to him).

[110] *See id.* at 1524 (stating that no court order or search warrant pursuant to O.R.S. 133.724 or O.R.S. 133.726, or any other court authorization, was obtained prior to monitoring of confession).

[111] *See id.* at 1518. The District Attorney stated, "[t]here are some things which are legal and ethical but are simply not right. I have concluded that tape recording confidential clergy-penitent communications falls within the zone of societally unacceptable conduct." *Id.* It was only after much public outcry that the District Attorney agreed not to use the tape as evidence. *Id. See, e.g.*, Bob Ewegen, *A Bayonet in the Confessional*, DENVER POST, July 22, 1996, at B7. This article discusses the outrage over the District Attorney's actions. *Id.*; Harvey A. Silvergate, *Secret as a Confession?*, NAT'L L.J., July 1, 1996, at A17. This article described the uproar in the religious community over the taping of the confession. *Id.* The author condemned Harcleroad's decision. *Id.*

Reverand Mockaitis and the Archdiocese of Portland filed suit in the United States District Court for the District of Oregon,[112] claiming that Harcleroad's action "broke the seal of the confessional" in violation of Reverand Mockaitis' First Amendment rights.[113] Because the lawyers had already listened to the tape by the time of the suit,[114] the Archdiocese asked for an order that the tape be destroyed.[115]

Following the abstention doctrine set out in *Younger v. Harris*,[116] District Judge Owen Panner declined to decide the matter.[117] Agreeing that the District Attorney's actions had been less than laudatory,[118] Judge Panner noted that Title III probably did not require suppression or destruction of the tape.[119] He stated that the decision more properly rested with the state trial court.[120] Father Mockaitis and the Archdiocese appealed to the Ninth Circuit, which held that the act of tape recording the confession substantially burdened their right to free exercise of religion.[121]

112 *See Mockaitis*, 938 F. Supp. at 1525. The church objected to the tape because with each disclosure of the contents of the tape, the seal of the confessional was violated. *Id.* The Archdiocese first moved in Lane County District Court to have the tape destroyed but the motion was denied for lack of standing. *Id.* at 1519. The Archdiocese then brought the case in federal district court. *Id.*

113 *See id.* at 1541 (arguing that taping violated priest's First Amendment rights).

114 *See id.* at 1524, 1526. At the initiation of the suit, the Archdiocese sought to enjoin Hale's lawyers from hearing the taped confession. *Id.*

115 *See id.* at 1539. Counsel asserted that the only effective relief was to destroy the tape because its very existence violated the secrecy of the Sacrament and it has a chilling effect on religion. *Id.*

116 *See* Younger v. Harris, 401 U.S. 37, 53 (1971). The case created doctrine in which federal courts should not interfere with ongoing state criminal proceeding either by injunction or declaratory relief, unless the prosecution has been brought in bad faith or for harassment purposes. *Id.* The three requirements that invoke *Younger* are: 1) ongoing state proceedings; 2) implications of an important state interest in the state proceedings; and 3) an adequate opportunity to raise federal questions in those proceedings. *Id.*

117 *See Mockaitis*, 938 F. Supp. at 1518 (holding that *Younger* requirements are met here and case should be resolved at state level).

118 *See id.* (stating that "[k]nowingly taping an intended confession between penitent and priest is inappropriate and should not have occurred").

119 *See id.* at 1521 (asserting that even if District Attorney violated Title III, there would be no need to suppress or destroy tape).

120 *See id.* at 1520 (stating "I abstain because granting plaintiffs requested relief would 'have the effect of a federal court telling a state court how to run an ongoing criminal prosecution and [] such relief' would have the intrusive impact on the state proceeding that *Younger* and its progeny abhorred") (quoting Williams v. Ruberia 539 F.2d 470, 473-74 (5th Cir. 1976)).

121 *See* Mockaitis v. Harcleroad, 104 F.3d 1522, 1525-30 (9th Cir. 1997). The court held that the district court erred in refusing to determine the case on the merits. *Id.* at 1526. The Ninth Circuit also held that the RFRA was constitutional. *Id.* at 1528.

B. *Oregon's Wiretapping Statute*

Following Title III language, Oregon's wiretapping law does not prohibit interception of privileged communications.[122] With the exception of attorney-client conversations, the statute permits the monitoring of prisoners' conversations.[123] In fact, this type of surveillance is a common practice in Oregon for institutional order and security reasons.[124]

In *Mockaitis*, the monitoring and recording of a religious confession in a county jail was authorized by a public official.[125] Under Oregon's wiretapping law and Title III, this recording was legal.[126] This is so even though Oregon's Constitution provides for the free exercise of religion[127] and a state statutory provision recognizes the clergy-communicant privilege.[128]

C. *Analysis Under the Free Exercise Clause*

In prison, any act that substantially burdens the free exercise of religion must meet the "reasonableness test."[129] Prison surveillance, like other infringements of a prisoner's rights, has been justified by balancing state interests against the individual's rights.[130] The Supreme Court has recognized institutional order

[122] *See* OR. REV. STAT. § 133.737 (1994) (stating that privileged communication will not lose its privileged nature).

[123] *See* OR. REV. STAT. § 165.540(2)(a) (1996) (stating that prohibitions against taping of conversations do not apply to public officials in penal institutions except as to communications between attorney and his client).

[124] *See Mockaitis*, 938 F. Supp. at 1526 (demonstrating that jails monitor conversations of inmates convicted of serious crimes and in this case monitored ninety percent of Hale's conversations, excluding those with his attorney).

[125] *See id.* at 1524 (stating that Harcleroad authorized taping of communication through his assistants).

[126] *See* OR. REV. STAT. § 165.540(2)(a) (1995) (exempting jail officials from prohibitions against electronic surveillance, except for attorney-client privileges); *see also Mockaitis*, 104 F.3d at 1531-32 (holding that Wiretap Act was not violated by recording of confession).

[127] *See* OR. CONST. art. I, § 3 (stating that "no law shall in any case control free exercise of religion").

[128] *See* OR. REV. STAT. § 40.260 (1989). "A priest or clergyman shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs." *Id.*

[129] *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 347 (1987) (finding that "reasonableness test" applies to all prisoner constitutional claims); Turner v. Safley, 482 U.S. 78, 89 (1987) (explaining reasonableness test); Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 131 (1977) (providing insight into test); Mulane, *supra* note 104, at 1047 (explaining reasonableness test factors).

[130] *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (stating that fundamental right may be denied by law for sufficient state interests); *see also Turner*, 482 U.S. at 89 (holding prison may impinge upon incarcerated person's constitutional rights when regulations are reasonably related to legitimate state interests). *See generally* Braunfield v. Brown, 366

and security in the prison setting as legitimate and compelling interests.[131] In determining the reasonableness of the regulation in *Mockaitis*, which allowed the taping of a religious confession, the four enumerated factors should be considered.

The first requirement is that there be a logical connection between the regulation and the asserted goal and if it is too remote, the policy is rendered arbitrary or irrational.[132] Prison security was held to be a legitimate interest[133] in *Mark v. Nix*[134] where the court permitted the confiscation of rosary beads because the attached crucifix could be used as a potential weapon.[135] A California court, however, has held[136] that the monitoring of a jail telephone system was not undertaken for security purposes but was

U.S. 599, 603 (1961) (noting religious practices may not be completely free from restriction).

131 *See* Hudson v. Palmer, 468 U.S. 517, 524 (1984) (holding that inmate has no reasonable expectation of privacy while incarcerated); *see also* Rowland v. Jones, 452 F.2d 1003, 1005, 1006 (8th Cir. 1971) (holding prisoner's right to religious practice was outweighed by prison safety concerns that religious medal could be used as weapon); Best v. Kelly, 879 F. Supp. 305, 309 (W.D.N.Y. 1995) (stating that prison's interest in protecting rabbi from insolent and disparaging behavior justified denying inmate right to attend religious assembly); Marrero v. Commonwealth, 284 S.E.2d 809, 811 (Va. 1981) (upholding random searches of prisoners as constitutional because of prison's interest in maintaining safety). *But see Turner*, 482 U.S. at 94-97 (finding that regulation that required superintendent's approval for prisoners to marry civilians or other prisoners as unconstitutional because it was not reasonably related to any legitimate penological objective).

132 *See Turner*, 482 U.S. at 89 (finding regulation arbitrary and capricous when there is no logical relationship); Bell v. Wolfish, 441 U.S. 520, 551 (1979) (recognizing importance of logical connection between goals and security interests); Pell v. Procunier, 417 U.S. 817, 828 (1917) (ruling that it is important to question whether restrictions on prisoners' First Amendment rights are neutral).

133 *See* Mack v. O'Leary, 80 F.3d 1175, 1175-80 (7th Cir. 1996) (recognizing that compelling state interest of prison security in requiring religious groups to join groups in order to celebrate their religious holidays); Muhammad v. City of New York Dep't of Corrections, 904 F. Supp. 161, 188 (S.D.N.Y. 1995) (recognizing that prison security and institutional objectives are compelling governmental interests which are allowed to burden religion); H.R. 88, 103d Cong., 1st Sess., § 8 (1993) (stating that "[t]hus if a religious restriction is legitimately grounded in security concerns, it is likely that courts will consider that it serves a compelling interest").

134 983 F.2d 138 (8th Cir. 1993).

135 *See id.* at 139 (upholding seizing of rosary beads with hard plastic crucifix because potential threat to security was compelling state interest).

136 *See* DeLancie v. Superior Court of San Matei County, 647 P.2d 142, 148 (Cal. 1982) (holding that as long as security interests are rationally based and not result of arbitrary or capricious reasoning, courts will respect them and permit surveillance for security purposes, but not for obtaining evidence); *see also* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1986) (finding that limits in First Amendment rights may arise "from the fact of incarceration and from valid penological objectives-including deterrence of crime, rehabilitation of prisoners, and institutional security"); Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 FORDHAM L. REV. 327, 337 (1985) (explaining that "[p]risons may restrict prisoner's rights . . . to the extent necessary to maintain security and achieve the legitimate penological objectives of the corrections system").

utilized primarily to gather evidence for use in a criminal trial and therefore was not justified.[137] Where security interests have been based on arbitrary or capricious reasoning or anticipated or exaggerated fears, courts have failed to find the state interest reasonable.[138] Using the same reasoning, the monitoring and recording of a prisoner's conversation undertaken for legitimate security purposes would not appear to be a compelling state interest in the *Mockaitis* case.[139]

Alternative means of exercising a right must be kept open to inmates.[140] In *Mockaitis*, there were no alternative means for a religious confession available to the inmate. The inmate was not allowed outside of the jail and confessions were only held in the visitors' room, which was monitored.[141] In one case, the court held that the electronic surveillance of a chapel presented no alternative means for inmates to give religious confessions.[142] Similarly,

[137] *See Delancie*, 647 P.2d at 147 (stating real purpose for monitoring conversations between pre-trial detainee and her visitors was to gather evidence to be used against inmate at trial rather than jail security); *see also* Hudson v. Palmer, 468 U.S. 517, 527 (1984) (asserting that continuous surveillance conflicts with Fourth Amendment right of privacy). *But see* Calloway, *supra* note 136, at 337 (noting that monitoring of prisoners is constitutional because security interests outweigh prisoner's right of privacy).

[138] *See* Turner v. Safley, 482 U.S. 78, 89 (1987) (stating that "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational"); Hill v. Blackwell, 774 F.2d 338, 339 (8th Cir. 1985) (involving prisoners' claims that regulations prohibiting beards or long hair burdened their free exercise of religion); *see also* Lorijean Golichowski Dei, Note, *The New Standard of Review for Prisoners' Rights: A "Turner" for the Worse?* Turner v. Safley, 33 VILL. L. REV. 393, 418-425 (1988) (explaining impact of *Turner*, and arbitrary nature of interests set forth by correctional institutions); Ross A. Epstein, Note, *Urinalysis Testing in Correctional Facilities*, 67 B.U. L. REV. 475, 502 (1987) (interpreting arbitrary and capriciousness factor of reasonableness test).

[139] *See* Mockaitis v. Harcleroad, 938 F. Supp. 1516, 1518 (D. Or. 1996), *rev'd on other grounds*, 104 F.3d 1522 (9th Cir. 1997). Stipulated facts state that Father Mockaitis visited the jail only to hear prisoner's confession and law enforcement personnel were aware of this fact. *Id.*; *see also Hill*, 774 F.2d at 341. This court found prisoners' claims that regulations prohibiting beards or long hair burdened their free exercise of religion because security concern was not a "compelling state interest" *Id.*; Wilson v. Schillinger, 761 F.2d 921 (3d Cir. 1985). The court held that the prison's security interest was arbitrary and capricious when forcing Rastafarian inmate to have his hair cut. *Id.*

[140] *See O'Lone*, 482 U.S. at 351 (declaring it important that alternative means for prisoners to exercise their constitutional rights remain open); *Turner*, 482 U.S. at 89 (proclaiming that if other alternatives remain available judicial deference will be given to correctional facilities regulation under review); Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 131 (1977) (allowing deference to be given to prison regulations so long as alternative remains available); Pell v. Procunier, 417 U.S. 817, 827 (1917) (creating reasonable alternatives factor).

[141] *See Mockaitis*, 938 F. Supp. at 1522-23 (stipulating that Hale was resident of Lane County Jail at all material times awaiting trial for capital and non-capital crimes and that all confessions took place in the visitor's room where Mockaitis and Hale met).

[142] *See In re* Arias, 725 P.2d 664, 698 (Cal. 1986) (stating that government needs to explore other security options to ensure that they are applying least intrusive security

in *Mockaitis*, the Lane County Jail presented no other opportunities for the inmate to receive religious confession.[143]

Another factor to consider is whether the accommodation of the free exercise right adversely impacts on the administration, other inmates and the resources of the jail. In this case, the accommodation for the inmate to receive religious confession would have no impact on the rest of the jail.[144] In fact, it might even have a positive impact by allowing prisoners to receive spiritual counseling.

The last factor is whether the regulation is an exaggerated reaction to a prison concern. Here, the regulation was passed to ensure jail security. In this case, however, it seems that the interception of the accused's religious confession could be for no other reason than to gather evidence and not for security purposes.[145] It is difficult to imagine how a conversation between an inmate and a Catholic priest, known to jail officials,[146] presented a legitimate security risk.[147] The sheriff's department knew that Mockaitis was a validly ordained priest and that he came to the jail solely to administer spiritual counseling and the sacraments.[148] Moreover, jail officials had previously agreed not to intercept or record conversations between Catholic clergy and inmates.[149] Due to this as-

measures); *In re* Bell, 168 Cal. Rptr. 100, 102 (Cal. Ct. App. 1980) (explaining that reasonableness of security means that security interests of institution can be furthered by least restrictive means).

143 *See Mockaitis*, 938 F. Supp. at 1522-25. The stipulated facts were that this was the only place that religious confessions could occur between prisoners and their spiritual counselors. *Id.*

144 *See id.* at 1526. Stipulated facts stated that prison officials recorded only ninety percent of this particular inmate's conversations and excluded his conversations with legal counsel. *Id.* The decision to record inmates' conversations with visitors was discretionary and made on an individual basis for inmates charged with serious crimes. *Id.*

145 *See* Mockaitis v. Harcleroad, 104 F.3d 1522, 1530 (3d Cir. 1997) (stating that acts of prosecutor utilized statutory authorization to monitor inmate conversations in order to "gain access to a confession expected to be given in accordance with a religious rite").

146 *See Mockaitis*, 938 F. Supp. at 1523 (stating that Father Mockaitis was wearing Roman Collar and that jail officials knew he was Roman Catholic priest because of his previous visits to jail).

147 *See id.* (stating that Father Mockaitis was there to hear prisoner's confession); *see also* Jay P. Kessan & Stephanie L. Teicher, *Prisoners' Substantive Rights*, 83 GEO. L.J. 1461, 1467 (1995) (recognizing that First Amendment affords prisoners some freedom of communication when security is not threatened).

148 *See Mockaitis*, 938 F. Supp. at 1523 (stating that priest had performed same task in past and was familiar with all of prison personnel).

149 *See id.* at 1524. Lane County agreed not to intercept or tape conversations between Catholic clergy and inmates at the Lane County Jail. *Id.* An order was posted in the visitor sign-in area containing a statement by the Lane County Sheriff's Department that "no recording equipment is allowed" in the jail's visiting area. *Id.* at 1523.

surance, both the priest and the prisoner had an expectation of confidentiality.[150]

The *Mockaitis* case suggests that the recording of conversations between detainees and their visitors was an accepted practice.[151] Under the "reasonable test,"[152] this practice infringes on the inmates' rights of free exercise of religion.[153] Demonstrating the reasonableness of taping a religious confession for security purposes would appear to be impossible to sustain,[154] while not recording the conversations would clearly allow the prisoner's to retain their religious freedom.[155]

D. Reasonable Expectation of Privacy

Another argument for extending protection to the privilege in the Oregon wiretapping law is that by allowing religious confessions to take place in the prison, the officials create an expectation of privacy under the Fourth Amendment.[156] An expectation of pri-

[150] *See id.* at 1523 (stipulating that Father Mockaitis would not have come to administer sacrament of penance if he had known that confession would be taped).

[151] *See Mockaitis*, 104 F.3d at 1525 (stating that Sheriff's Department monitored defendant Hale's conversations with approximately ninety percent of his visitors except Hale's legal counsel).

[152] *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (prison regulations judged under less restrictive reasonableness standard); Turner v. Safley, 482 U.S. 78, 89 (1987) (presenting reasonableness test, including factors to be considered, such as whether regulation has logical connection with legitimate government interest, whether alternative means exist to exercise asserted right and impact that accommodation of prisoner's right would have on prison resources); Pierce v. Society of the Sisters, 268 U.S. 510, 535 (1925) (stating that rights guaranteed by Constitution may not be abridged by legislation which has no reasonable relation to some purpose within competency of state). *But see* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (noting that more than merely "reasonable relation to some purpose within the competency of the State" is required to sustain validity of state's requirement under First Amendment).

[153] *See Mockaitis*, 104 F.3d at 1530, (stating that special safeguards concerning religious confession are needed because "knowledge, belief, or suspicion that freely-confessed sins would become public would operate as a serious deterrent to participation in sacrament").

[154] *See id.* (stating that religious rite was deliberately focused upon and preserved for exploitation as state's evidence); *see also In re* Arias, 725 P.2d 664, 688 (Cal. 1986) (explaining that no effort was made to explore new technology which might be less intrusive upon religious practices within chapel).

[155] *See* Mockaitis v. Harcleroad, 938 F. Supp. 1516, 1526 (D. Or. 1996) (stating that conversation could have taken place with recording device off or in unmonitored area, as was provided for prisoners and their attorneys), *rev'd on other grounds*, 104 F.3d 1522 (9th Cir. 1997); *see also Arias*, 725 P.2d at 688 (holding that public officials should have explored other security measures before being allowed to eavesdrop on conversations within chapel); Goldsmith & Balmforth, *supra* note 6, at 944-946 (suggesting safeguards to ensure that privileged communications would not be intercepted when eavesdropping).

[156] *See* North v. Superior Court of Riverside County, 502 P.2d 1305, 1309-10 (Cal. 1972) (holding that prisoner has no right of privacy in jail except when there is special relationship among communicants, including conversations between prisoner and his attorney, religious advisor, and licensed physician), *overruled in part by* DeLancie v. Superior Court,

vacy has been found by courts when officials led prisoners to believe that the ensuing conversations would not be monitored.[157] Aware of the importance of confidentiality in religious confessions, the Oregon jail officials agreed not to tape conversations between clergy and inmates.[158] Having visible signs stating that "no recording equipment is allowed" in the visiting area could also be interpreted as creating an expectation of privacy.[159] Moreover, the Ninth Circuit adds two other grounds to this expectation of privacy: the clergy-penitent privilege and the historical deference that government has accorded sacramental confessions.[160] This expectation of privacy may be sufficient to invalidate Oregon's wiretapping law as it applies to the privilege.[161]

IV. UNIFORM WIRETAPPING STATUTES

The way that the majority of states have structured their wiretapping laws,[162] it is possible that the *Mockaitis* case was not an

647 P.2d 142 (Cal. 1982). *But see* DiGuilio v. State, 451 So. 2d 487 (Fla. Dist. Ct. App. 5th Dist. 1984) (stating that privacy relationship does not exist between brothers); State v. Wilkins, 868 P.2d 1231, 1237-1239 (Idaho 1994) (holding that even though defendant created expectation of privacy by asking police officer to leave room so he could talk to his wife alone, concerns of safety are paramount over defendant's privacy expectations). *See generally* Katz v. United States, 389 U.S. 347, 350-55 (1967) (explaining right of privacy under Fourth Amendment).

157 *See North*, 8 P.2d at 1309-10 (stating that there is no reasonable expectation of privacy unless inmates have been lulled into believing their conversations would remain private by prison officials); People v. Estrada, 93 Cal. App. 3d 76, 98-99 (Cal. Ct. App. 1979) (finding that actions of jailers must lead prisoner to reasonably believe that privacy will be created); *see also* People v. Santos, 26 Cal. App. 3d 397, 402 (Cal. Ct. App. 1972) (holding that once parties realize that their conversation is monitored there is no expectation of privacy).

158 *See Mockaitis*, 938 F. Supp. at 1524. According to affidavits filed, the District Attorney understood that the penitent received absolution from his sins by making a full and genuine acknowledgment of all his wrongdoing only before God and his priest. *Id.*

159 *See Mockaitis*, 104 F.3d at 1525 (stating that sign-in area for visitors displayed sign prohibiting recording equipment in jail's visiting area).

160 *See* Mockaitis, 104 F.3d at 1531-33 (ruling evidentiary privilege and historical respect given to confession provide reasonable expectation of privacy under Fourth Amendment).

161 *See North*, 502 P.2d at 1311-12 (stating that conversation taking place in private office yields understanding that conversation will be confidential and remain private). *But see Estrada*, 93 Cal. App. 3d at 98-99 (recognizing that there was no expectation of privacy because defendant failed to demonstrate one); *Santos*, 26 Cal. App. 3d at 402 (holding that expectation of privacy ceases once parties realize conversation is being monitored).

162 *See* ALASKA STAT. § 12.37.050 (Michie 1993); COLO. REV. STAT. § 16-15-102(15) (1995); FLA. STAT. ch. 934.08(4) (1996); IDAHO CODE § 18-6707 (1996); IND. CODE § 35-33.5-5-3(2)(d) (1996); IOWA CODE § 808B.4(4) (1994); KAN. STAT. ANN. § 22-2515(e) (1994); MD. CODE ANN. CTS. & JUD. PROC. 10-407(d) (1977); MASS. GEN. LAWS ch. 272, § 99.2(e) (1995); MINN. STAT. § 626A.09(4) (1994); MISS. CODE ANN. § 41-29-511(4) (1992); MO. REV. STAT. § 542.406(4) (1996); NEB. REV. STAT. § 86-704(4) (1994); NEV. REV. STAT. § 179.465(3) (1989); N.H. REV. STAT. ANN. § 570-A:8(IV) (1995); N.M. STAT. ANN. § 30-12-10(A) (Michie 1973); N.C. GEN.

isolated incident.[163] This is the first case where the deliberate monitoring of a clergy-communicant conversation has been well-publicized.[164] Although Title III was primarily enacted to safeguard individual privacy from indiscriminate wiretapping, it has left large gaps with regards to privileged communications.[165] Under the facts of *Mockaitis*, the Ninth Circuit held that the interception did not violate federal wiretapping laws,[166] therefore, the question remains as to whether it will happen again.

With technological advances increasing the capabilities of surveillance, wiretapping will become more prevalent.[167] Once inter-

STAT. § 15A-290(e) (1995); N.D. CENT. CODE § 29-29.2-02(17) (1995); OKLA. STAT. tit. 13, § 176.07 (1996); OR. REV. STAT. § 133.737(4) (1989); 18 PA. CONS. STAT. ANN. § 5711 (West 1995); S.D. CODIFIED LAWS § 23A-35A-19 (Michie 1996); TEX. CRIM. P. CODE ANN. § 18.20(d) (West 1996); UTAH CODE ANN. § 77-23a-9(4) (1988); VA. CODE ANN. § 19.2-67(D) (Michie 1996); WYO. STAT. ANN. § 7-3-606(4) (Michie 1994). All of these statutes have similar language to Title III which states "No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." *Id.*; *see also* ALA. CODE § 13A-11-30 (1996); ARIZ. REV. STAT. ANN. § 13-3004- 13-3008 (West 1996); ARK. CODE ANN. § 5-60-120 (Michie 1995); GA. CODE ANN. §§ 16-11-62 - 16-11-63 (1986); KY. REV. STAT. ANN. §§ 527.010 - 527.130 (Michie 1995); ME. REV. STAT. ANN. tit. 15, §§ 709 - 713 (West 1995); MICH. COMP. LAWS §§ 750.539a - 750.539f (1995); MONT. CODE ANN. § 45-8-213 (1995); S.C. CODE ANN. §§ 17-29-10 - 17-29-33 (Law Co-op. 1995); VT. STAT. ANN. tit. 13, § 16 (1996). These statutes have no provision for the protection of privileged communications. *Id.*

[163] *See* Daniel R. Alonso, *Are Inmate Confessions Protected? Clergy Communicant Privilege Examined*, N.Y.L.J. August 23, 1996, at § 2, (discussing uniqueness of case and application of New York law to it). *But see* Commonwealth v. Alves, 608 N.E.2d 733, 734 (Mass. 1993) (noting that privilege is not lost despite failure to recognize it within statute).

[164] *See* Mockaitis v. Harcleroad, 938 F. Supp. 1516, 1518 (D. Or. 1996) (citing Harvey A. Silverglate, *Secret as A Confession?*, NAT'L L.J., July 1, 1996, at A17) (noting "protests from all sides" including American Civil Liberties Union and Rutherford Institute), *rev'd on other grounds*, 104 F.3d 1522 (9th Cir. 1997); Bob Ewegen, *A Bayonet in the Confessional*, DENVER POST, July 22, 1996, at B7 (condemning Harcleroad's decision to tape); Laurie Goodstein, *Taped Confession to Priest Raises Ire*, HOUSTON CHRONICLE, May 11, 1996, at 23 (noting Archdiocese's "uproar" over taping); Dana Tims, *Parishioners Back Priest in Jailhouse Confession*, OREGONIAN (Portland), May 13, 1996, at B1 (noting standing ovation for Mockaitis by his parishioners at Sunday Mass and noting varied expressions of outrage); *Vatican Enters Debate About Lane County Jailhouse Taping*, OREGONIAN (Portland), May 25, 1996, at D1 (reporting that Vatican's Secretary of State wrote to United States Ambassador deploring recording of confession); *see also* Goldsmith & Balmforth, *supra* note 6, at 916 (stating that clergy-communicant privilege has never been litigated in Title III context).

[165] *See* FISHMAN & MCKENNA, *supra* note 72, at 8-125 (asserting that Title III could have gone further in protecting privileged communications); Goldsmith & Balmforth, *supra* note 6, at 903 (stating that legislative and judicial interpretation of Title III has led to grave governmental intrusions into privileged communications); Goldstock & Chanie, *supra* note 69, at 1867 (arguing that policies behind Title III when intercepting privileged communication).

[166] *See* Mockaitis v. Harcleroad, 104 F.3d 1522, 1531-33 (9th Cir. 1997) (citing 18 U.S.C. § 2510(5)(a) (1996)) (noting that statute does not apply to interceptions "by investigative or law enforcement officer in the ordinary course of his duties").

[167] *See* Clifford S. Fishman, *Interception of Communications in Exigent Circumstances: The Fourth Amendment, Federal Legislation, and The United States Department of Justice*, 22 GA. L. REV. 1, 34 (1987) (outlining steps government has taken to keep up with eaves-

ceptions have occurred it will become more likely that this information will have a prejudicial effect on the defendant if disclosed, unless stricter protections are enacted.[168]

Under the current federal wiretapping law and the majority of state statutes modeled after it, the interception of privileged communications is not illegal.[169] These statutes protect the privileged character of these conversations only after they are intercepted. At the moment the clergy-communicant conversation is intercepted, however, the communication loses its privileged nature.[170]

The authors suggest that more uniform protection for privileged communications is needed. Laws should be enacted similar to those statutes that prohibit both the interception and disclosure of privileged communications.[171] If safeguarded in this manner, a clergy-communicant conversation would be protected to the fullest

dropping technology); Goldsmith & Balmforth, *supra* note 6, at 905-10 (detailing increase in wiretapping since passage of Title III); Henry R. King, Note, *Big Brother, the Holding Company: A Review of Key-Escrow Encryption Technology*, 21 RUTGERS COMPUTER & TECH. L.J. 224, 260 (1995) (describing new techniques used for wiretapping).

168 *See* CAL. PENAL CODE § 629.30 (West 1995); CONN. GEN. STAT. § 54-41h (1995); DEL. CODE ANN. tit. 11, § 1336(j) (1995); D.C. CODE ANN. § 23-547(j) (1995); HAW. REV. STAT. § 893-46(e)(1) (1995); 735 ILL. COMP. STAT. 5/108B-1 - 5/108B-6 (West 1992); LA. REV. STAT. ANN. § 15.1310(C)(5) (West 1992); MASS. GEN. LAWS ch. 272, §§ 99 (D)(2)(e), 99(F)(2)(e) (1993); N.J. REV. STAT. § 2A:156A-11 (1985); N.Y. PENAL LAW §§ 250.00, 700.20 (McKinney 1995); OHIO REV. CODE ANN. § 29533.54(C) (Anderson 1996); R.I. GEN. LAWS § 12-5.1-4 (1980); W. VA. CODE § 62-1D-9(d) (1987); WIS. STAT. § 968.30(10) (1995). These state statutes contain standard Title III language preventing disclosure and additional language preventing interception of some or all of privileged communications. *Id.*

169 *See* 18 U.S.C. §§ 2510-2521 (1996); ALASKA STAT. § 12.37.050 (Michie 1993); COLO. REV. STAT. § 16-15-102(15) (1995); FLA. STAT. ch. 934.08(4) (1996); IDAHO CODE § 18-6707 (1996); IND. CODE § 35-33.5-5-3(2)(d) (1996); IOWA CODE § 808B.4(4) (1994); KAN. STAT. ANN. § 22-2515(e) (1994); MD. CODE ANN. CTS. & JUD. PROC. 10-407(d) (1977); MASS. GEN. LAWS ch. 272, § 99.2(e) (1995); MINN. STAT. § 626A.09(4) (1994); MISS. CODE ANN. § 41-29-511(4) (1992); MO. REV. STAT. § 542.406(4) (1996); NEB. REV. STAT. § 86-704(4) (1994); NEV. REV. STAT. § 179.465(3) (1989); N.H. REV. STAT. ANN. § 570-A:8(IV) (1995); N.M. STAT. ANN. § 30-12-10(A) (Michie 1973); N.C. GEN. STAT. § 15A-290(e) (1995); N.D. CENT. CODE § 29-29.2-02(17) (1995); OKLA. STAT. tit. 13, § 176.07 (1996); OR. REV. STAT. § 133.737(4) (1989); 18 PA. CONS. STAT. ANN. § 5711 (West 1995); S.D. CODIFIED LAWS § 23A-35A-19 (Michie 1996); TEX. CRIM. P. CODE ANN. § 18.20(d) (West 1996); UTAH CODE ANN. § 77-23a-9(4) (1988); VA. CODE ANN. § 19.2-67(D) (Michie 1996); WYO. STAT. ANN. § 7-3-606(4) (Michie 1994). All of these statutes have similar language to Title III which states "[n]o otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." *Id.*

170 *See* BUSH & TIEMANN, *supra* note 31, at 39 (asserting that erosion of inviolability of confession occurs when its contents are revealed); REV. PAUL E. MCKEEVER, THE NECESSITY OF CONFESSION FOR THE SACRAMENT OF PENANCE 37 (1953) (stating that breach of seal of confessional occurs at exact instant when communication is intercepted). *See, e.g.*, Mockaitis v. Harcleroad, 938 F. Supp. 1516, 1524 (D. Or. 1996) (stating that since taping, information obtained has been transcribed and disclosed to other people besides original recorders), *rev'd on other grounds*, 104 F.3d 1522 (9th Cir. 1997).

171 *See* Goldsmith & Balmforth, *supra* note 6, at 945-50. The authors discuss a model statute. *Id.* The authors suggest that Title III should be amended to include: 1) extended probable cause requirement; 2) special need requirement; limited use of Dragnet clause

extent possible from wiretapping.[172] A public official would not be allowed to monitor a privileged conversation without a warrant or prior consent of the parties.[173] If an inadvertent interception occurs the communication should not be disclosed or utilized for any purpose.[174]

Under these statutes, the clergy-communicant privilege would be afforded the same protection as the attorney-client privilege.[175] In accord with the reasoning behind the privilege, it would foster communication without fear of disclosure.[176] In order to prevent the erosion of privileged communication between clergy and their communicants in the age of electronic surveillance, the enactment of similarly constructed laws is needed.

CONCLUSION

Society has deemed certain relationships worthy of protection. To ensure this protection, society created evidentiary privileges to encourage confidential communication. The advent of electronic eavesdropping threatens these privileges. Although federal and state governments have enacted statutes prohibiting the utiliza-

(limit conversations to named parties); 3) mandated judicial supervision; 4) extend mandatory notice provision. *Id.*

[172] *See* Atkinson, *supra* note 83, at 270 (demonstrating that Connecticut's wiretapping statute protects privileged communications); Goldsmith & Balmforth, *supra* note 6, at 944-47 (discussing statutes that offer most protection); Patricia M. Worthy, *The Impact of New and Emerging Telecommunications Technologies: A Call to the Rescue of the Attorney-Client Privilege*, 39 How. L.J. 437, 461 (1996) (criticizing Title III's safeguarding of attorney-client privilege and suggesting improvements).

[173] *See* Alonso, *supra* note 163, at S2 (noting that if *Mockaitis* case had taken place in New York, wiretapping would never have taken place).

[174] *See* Goldsmith & Balmforth, *supra* note 6, at 945-50. In discussing a model statute, the authors propose that if interception occurs that the privileged communication not be disclosed. *Id.*; *see also* Fishman & McKenna, *supra* note 72, at 8-125. The authors assert that there is greater protection of privileged communication when wiretapping laws go beyond the privilege language of Title III. *Id.*

[175] *See* Cal. Penal Code § 629.30 (West 1995); Conn. Gen. Stat. § 54-41h (1995); Del. Code Ann. tit. 11, § 1336(j) (1995); D.C. Code Ann. § 23-547(j) (1995); Haw. Rev. Stat. § 893-46(e)(1) (1995); 735 Ill. Comp. Stat. 5/108B-1 - 5/108B-6 (West 1992); La. Rev. Stat. Ann. § 15.1310(C)(5) (West 1992); Mass. Gen. Laws ch. 272, §§ 99 (D)(2)(e), 99(F)(2)(e) (1993); N.J. Rev. Stat. § 2A:156A-11 (1985); N.Y. Penal Law §§ 250.00, 700.20 (McKinney 1995); Ohio Rev. Code Ann. § 29533.54(C) (Anderson 1996); R.I. Gen. Laws § 12-5.1-4 (1980). These applicable state statues contain standard Title III language preventing disclosure and additional language preventing interception of privileged communications. *Id.*; *see also* Fishman & McKenna, *supra* note 72, at 8-125. The authors point out that laws that go beyond Title III language provide greater protection of the privilege. *Id.*

[176] *See* Trammel v. United States, 445 U.S. 40, 44 (1980) (ruling that privilege is necessary incentive in modern era to encourage open communication); Totten v. United States, 92 U.S. 105, 107 (1875) (holding privileges essential in fostering communication).

tion of electronic surveillance to infringe on citizens' rights, these statutes are not always sufficient.

The *Mockaitis* controversy demonstrates that Title III and most state wiretapping statutes do not adequately protect the clergy-communicant and other privileges from electronic surveillance. These statutes, as written, violate the free exercise of religion. They also fail to satisfy Congress' purpose in enacting wiretapping legislation, which is to protect the privacy of innocent persons. Father Mockaitis is such an innocent person and his confidential communications deserve protection under the statute. Wiretapping statutes must be modified to safeguard this vital testimonial privilege to avoid the erosion of religious freedom in the United States.

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