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EXORCISING THE CLERGY PRIVILEGE

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This Article debunks the empirical assumption behind the clergy privilege, the evidentiary rule shielding confidential communications with clergy. For over a century, scholars and the judiciary have assumed generous protection is essential to foster and encourage spiritual relationships. Accepting this premise, all fifty states and the District of Columbia have adopted virtually absolute privilege statutes. To test this assumption, this Article distills data from over 700 decisions—making it the first scholarship to analyze state clergy privilege jurisprudence exhaustively. This review finds a privilege in decline; courts have lost faith in the privilege. More surprisingly, though, so have clergy. For decades, clergy have recast communications to ensure they fall outside testimonial protection—thus challenging how essential confidentiality actually is to spiritual relationships. This Article discusses both why clergy testimony frequently decides the question of privilege and the corresponding query of why some clergy break confidences. This understanding breathes new life into efforts to revise state statutes to reflect the narrowing privilege rather than perpetuate illusory promises of broad protection.

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INTRODUCTION

THE prevailing, two-century-old narrative depicts the clergy privilege as a battle between state power to compel testimony and secular commitment to protect spiritual communications.[1] If a communication satisfies the privilege, a court cannot force the speaker or cleric to reveal the confidence.[2] The premise of this narrative is an empirically untested assumption: only a broad absolute privilege can promote spiritual relationships, encourage individual autonomy, and mediate legal and canonical obligations.[3] A case-specific or qualified privilege will not achieve these ends.

[1] See, e.g., Shawn P. Bailey, How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege, 2002 BYU L. Rev. 489, 489–90 ("Th[e] conflict between the state's coercive power to collect evidence and the right to maintain confidential certain religious communications lies at the center of every challenge to the clergy-penitent privilege.").

[2] See, e.g., Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir. 1958) ("[A] clergyman shall not disclose on a trial the secrets of a penitent's confidential confession . . . at least absent the penitent's consent."); accord Totten v. United States, 92 U.S. 105, 107 (1876) ("[S]uits cannot be maintained which would require a disclosure of the confidences of the confessional . . . .").

[3] See, e.g., Trammel v. United States, 445 U.S. 40, 51 (1980) ("The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."). For clarity and consistency, this Article uses the

Judicial decisions continue to perpetuate the untested "empirical assumption"[4] that a broad privilege is essential for clergy-communicant relationships to thrive.[5] This assumption comes at a high cost. It supports an absolute privilege, which in turn sacrifices the highly probative, even outcome-determinative evidence contained in such communications. Nonetheless, this prevailing narrative presupposes clergy would place the sanctity of confidential communications with their flocks above judicial truth finding.

What if a different, more nuanced story exists? One where clergy *want* to testify about certain communications? And by acting on that desire, clergy—those presumed most likely to protect it—are actually narrowing the privilege?

Using data culled from over 700 federal and state clergy privilege decisions, this Article challenges the "empirical assumption" behind the absolute privilege. In doing so, it tells this second story. The data describes a privilege in decline: two-thirds of the time, courts rule against a privilege assertion.[6] More interesting, though, is the clergy's reluctance to embrace an absolute privilege. Rather than asserting bright-line protection, for many, the decision to testify is case specific.

phrase "the clergy privilege" and calls the parties to the privilege "clergy" and "communicants." However, even in a single jurisdiction, the privilege goes by many names. See, e.g., Lightman v. Flaum, 761 N.E.2d 1027, 1030 n.* (N.Y. 2001) (noting that the privilege has been alternatively referred to as the "priest-penitent" privilege, "clergy-penitent" privilege, "minister-penitent" privilege, "cleric-congregant" privilege, and "clergy-communicant" privilege (citations omitted)).

[4] Edward J. Imwinkelried, The New Wigmore: A Treatise on Evidence: Evidentiary Privileges § 1.2.1 (Richard D. Friedman ed., 1st ed. 2002) [hereinafter Imwinkelried, New Wigmore]; see also Edward J. Imwinkelried, The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges, 83 B.U. L. Rev. 315, 321–22 (2003) (discussing the assumptions underlying the traditional justification for privileges); cf. Walter J. Walsh, The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence, 80 Ind. L.J. 1037, 1084 (2005) (discussing how "legal and political decisions are informed by a social vision that incorporates particular empirical assumptions about human behavior and values").

[5] See Ryan v. Ryan, 642 N.E.2d 1028, 1034 (Mass. 1994) (holding that the privilege, unlike most other evidentiary privileges, is "absolute"); R. Michael Cassidy, Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?, 44 Wm. & Mary L. Rev. 1627, 1673 (2003) (discussing how, because of this assumption, "[t]he clergy-penitent privilege has been applied to a larger class of communications and a broader class of clergy, and, when it is deemed to apply, it is considered impenetrable").

[6] See infra Section II.A.

Consciously or otherwise, and most notably in violent crime cases, clergy share confidences that are facially protected under broad state statutory language.[7] Thus, the clergy's interpretation of the privilege is contributing to its decline.

This narrowing has significant implications given the role of religion in the United States. Eighty-nine percent of Americans self-identify as believing in God, a "remarkably high" figure compared to other advanced countries.[8] For religious Americans, faith impacts everyday life. Religious institutions offer frequent opportunities to interact with clergy, in which the religious partake.[9] From church, to jail, to schools, to hospitals, people turn to clergy for guidance.[10] Given religion's ubiquitous nature, perhaps it is unsurprising that forty-five percent of Americans rely on prayer, personal reflection, or advice from religious leaders to make major life decisions.[11] Communicants bring "everything from theological quandaries to everyday life challenges" to clergy.[12]

This context makes the lack of empirical scholarship on clergy privilege decisions surprising. While existing scholarship effectively

[7] See infra Section III.B (substantiating how clergy share confidences that are facially protected).

[8] Pew Research Ctr., U.S. Public Becoming Less Religious (Nov. 3, 2015); see also Mark Chaves, American Religion: Contemporary Trends 10 (2011) ("It bears repeating that, by world standards, Americans remain remarkably religious in both belief and practice."). The United States houses between 300,000 and 400,000 congregations devoted to hundreds of different religious denominations. Nancy T. Ammerman, Introduction: Observing Religious Modern Lives, *in* Everyday Religion: Observing Modern Religious Lives 3, 7 (Nancy T. Ammerman ed., 2007); see also Clifford Grammich et al., Ass'n of Statisticians of Am. Religious Bodies, 2010 U.S. Religion Census: Religious Congregations & Membership Study xv (2012) (identifying 320,000 separate congregations).

[9] See generally, e.g., Gary H. Woolverton, Church Ministry by Design: Designing Effective Ministry for Tomorrow's Church (2011) (discussing the import of religious institutions' influence in activities ranging from gardening to daycare to fine arts).

[10] See, e.g., Tankersley v. State, 724 So. 2d 557, 560 (Ala. Crim. App. 1998) (church); People v. Police, 651 P.2d 430, 430 (Colo. App. 1982) (jail); Woodard v. Jupiter Christian Sch., 913 So. 2d 1188, 1189–90 (Fla. Dist. Ct. App. 2005) (school); Nicholson v. Wittig, 832 S.W.2d 681, 682 (Tex. App. 1992) (hospital); cf. Seymour Moskowitz & Michael J. DeBoer, When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect, 49 DePaul L. Rev. 1, 21 (1999) ("Clergy fill a multitude of personal and professional roles. To the religious community, they are administrators and advisers, preachers and public figures, counselors and teachers. To the local community, they are fellow citizens and consumers, friends and neighbors, parents and spouses.").

[11] Michael Lipka, 5 Facts About Prayer, Pew Research Ctr. (May 4, 2016).

[12] Nancy Tatom Ammerman, Sacred Stories, Spiritual Tribes: Finding Religion in Everyday Life 105 (2014).

explores facets of the privilege, no article to date exhaustively analyzes this jurisprudence.[13] As then–Chief Justice Rehnquist noted, "In an area where empirical information would be useful, it is scant and inconclusive."[14] However, any challenge to the "empirical assumption" must examine the privilege in application—meaning actual judicial decisions and clergy testimony in those cases. This Article provides such analysis and, in doing so, debunks this time-honored foundational presumption.

Part I begins with the origin and subsequent evolution of clergy privilege statutes across the United States. This history is undebated, so this Part focuses specifically on the background rules and policy considerations necessary for the remainder of the argument. Part II details the results of the jurisprudence review. The heart of the empirical work underlying the Article, this Part highlights how pivotal clergy testimony is to privilege determinations. Rather than pushing for expansive testimonial protection, clergy adopt a more selective, restrictive conceptualization of the privilege. Part III explores why courts rely heavily on clergy testimony in deciding privilege assertions and why some clergy share confidences. Part IV then advocates for a qualified privilege to bridge the gap between existing, illusory statutory protection and the realities of the privilege in application. By exorcising the absolutist assumption, the privilege can serve its public policy goals

[13] See, e.g., Taylor L. Anderson, The Priest-Penitent Privilege: A Mormon Perspective, 41 Idaho L. Rev. 55, 57 (2004) (focusing on the privilege's application to the Mormon faith); Cassidy, supra note 5, at 1631 (arguing for the expansion of the dangerous person exception to the privilege); Michael J. Mazza, Should Clergy Hold the Priest-Penitent Privilege?, 82 Marq. L. Rev. 171, 172–73 (1998) (discussing ownership of the privilege); Walsh, supra note 4, at 1037–38 (discussing the privilege's application to Irish Catholics); Ari J. Diaconis, Note, The Religion of Alcoholics Anonymous (AA): Applying the Clergy Privilege to Certain AA Communications, 99 Cornell L. Rev. 1185, 1188 (2014) (addressing the privilege in the context of AA communications). Some discuss the privilege's history or constitutional dimensions. See, e.g., Cassidy, supra note 5, at 1700–22 (discussing First Amendment and Establishment Clause Considerations for the clergy privilege); Jacob M. Yellin, The History and Current Status of the Clergy-Penitent Privilege, 23 Santa Clara L. Rev. 95, 95–96 (1983) (discussing history). Other articles that do analyze state privilege law frequently focus on a single state or survey the statutes rather than case law interpreting them. See, e.g., Ronald J. Colombo, Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege, 73 N.Y.U. L. Rev. 225, 231–34 (1998) (surveying state privilege statutes).

[14] Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998).

without unnecessarily compromising the judiciary's truth-finding function.

I. THE CLERGY PRIVILEGE: ORIGIN AND EVOLUTION

The clergy privilege, much like other privileges such as the attorney-client privilege, is an evidentiary rule that shields certain communications—in this case spiritual, confidential communications—from disclosure during litigation.[15] In the United States, the privilege traces back to an 1811 New York decision.[16] In *People v. Smith*, a trial court compelled a Protestant minister to testify about the defendant's confidential admission[17] after shielding a sacramental Catholic confession in an earlier case.[18] In response to public outcry, the state's legislature enacted a statutory privilege protecting confidential communications made to all clergy in their professional capacity.[19] This statute served as a rough template for other states, spreading from West to Northeast, then finally to Southern states.[20] All fifty states and the

[15] Imwinkelried, New Wigmore, supra note 4, § 1.3.8 (explaining how privileges work).

[16] The privilege's pre-Reformation history is debated; the consensus recognizes that the privilege did not exist at common law. See, e.g., Lennard K. Whittaker, The Priest-Penitent Privilege: Its Constitutionality and Doctrine, 13 Regent U. L. Rev. 145, 146 (2000) ("While commonly accepted that the privilege existed in Catholic England, there is some disagreement as to how the priest-penitent privilege disappeared. Understandably, the privilege waned as the Anglican Church and other Protestant movements, which did not require auricular confessions, rose to prominence in England. Wigmore espouses that without question, after the restoration of the monarchy, no priest-penitent privilege existed at common law." (footnotes omitted)); Yellin, supra note 13, at 95–108 (detailing the privilege's history and development).

[17] N.Y. City Hall Rec. 77 (1817), *reprinted in* William F. Cahill, Mutations of the Rule of Fraud in Marriage, 1 Cath. Law. 185, 198 (1955); see also Yellin, supra note 13, at 106 (briefly discussing the case).

[18] People v. Phillips, N.Y.C. Ct. Gen. Sess. (1813), *reprinted in* 1 W. L.J. 109, 109–13 (1843). *Phillips* is one of the few decisions to exclude clergy communications on free exercise grounds. See Lori Lee Brocker, Note, Sacred Secrets: A Call for the Expansive Application and Interpretation of the Clergy-Communicant Privilege, 36 N.Y. L. Sch. L. Rev. 455, 480 (1991) (discussing the lack of constitutional litigation on the subject); Anthony Merlino, Note, Tightening the Seal: Protecting the Catholic Confessional from Unprotective Priest-Penitent Privileges, 32 Seton Hall L. Rev. 655, 675–709 (2002) (arguing for Free Exercise Clause "hybrid-rights" protections for the clergy privilege).

[19] 2 N.Y. Rev. Stat. pt. III, ch. VII, tit. 3, art. 8, § 72 (1829) (since amended).

[20] See Walsh, supra note 4, at 1040 ("By the 1960s, through this gradual geographic embrace of fundamental human rights, the radical alternative of *Philips* [sic] had challenged and ultimately overthrown nationwide the archaic legal principles inherited from the colonial

District of Columbia now have clergy privilege statutes.[21] While many of these statutes originally shielded confessions or religiously obligated communications,[22] over time, almost all states expanded protection.[23] This is in stark contrast to other evidentiary rules, which have seen a "significant[] liberaliz[ing of] the admissibility of evidence" post–World War II.[24]

These state statutes actively shape the federal privilege law. Rather than a specific clergy privilege, Congress instead passed Rule of

regime. The last holdouts were in the Northeast (Connecticut, Maine, and New Hampshire), in the South (Alabama and Mississippi), and in Texas.").

[21] Ala. Code § 12-21-166 (2012); Alaska R. Evid. 506; Ariz. Rev. Stat. Ann. §§ 12-2233 (2016), 13-4062(3) (2010); Ark. R. Evid. 505; Cal. Evid. Code §§ 1030–34 (Deering 2004); Colo. Rev. Stat. § 13-90-107(1)(c) (2017); Conn. Gen. Stat. § 52-146b (2015); Del. R. Evid. 505; D.C. Code § 14-309 (2001); Fla. Stat. § 90.505 (2016); Ga. Code. Ann. § 24-5-502 (2013); Haw. R. Evid. 506; Idaho Code § 9-203(3) (2010); 735 Ill. Comp. Stat. 5/8-803 (2016); Ind. Code Ann. § 34-46-3-1(3) (LexisNexis 2008); Iowa Code § 622.10 (2017); Kan. Stat. Ann. § 60-429 (2005); Ky. R. Evid. Ann. 505; La. Stat. Ann. § 13:3734.2 (2006); La. Code Evid. Ann. art. 511 (2017); Me. R. Evid. 505; Md. Code Ann., Cts. & Jud. Proc. § 9-111 (LexisNexis 2013); Mass. Gen. Laws ch. 233, § 20A (2016); Mass. R. Evid. 510; Mich. Comp. Laws Serv. §§ 600.2156 (LexisNexis 2004), 767.5a(2) (LexisNexis 2002); Minn. Stat. § 595.02(1)(c) (2016); Miss. Code Ann. § 13-1-22 (2012); Mo. Rev. Stat. § 491.060(4) (2016); Mont. Code Ann. § 26-1-804 (2015); Neb. Rev. Stat. § 27-506 (2016); Nev. Rev. Stat. Ann. § 49.255 (LexisNexis 2012); N.H. Rev. Stat. Ann. § 516:35 (2007); N.J. Stat. Ann. § 2A:84A-23 (West 2011); N.M. R. Evid. 11-506; N.Y. C.P.L.R. § 4505 (Consol. 2003); N.C. Gen. Stat. § 8-53.2 (2015); N.D. R. Evid. 505; Ohio Rev. Code Ann. § 2317.02(c) (LexisNexis 2017); Okla. Stat. tit. 12, § 2505 (2011); Or. Rev. Stat. § 40.260 (2015); 42 Pa. Stat. and Cons. Stat. Ann. § 5943 (West 2017); 9 R.I. Gen. Laws § 9-17-23 (2012); S.C. Code Ann. § 19-11-90 (2014); S.D. Codified Laws § 19-19-505 (2016); Tenn. Code. Ann. § 24-1-206 (2000); Tex. R. Evid. 505; Utah Code Ann. § 78B-1-137(3) (LexisNexis 2012); Vt. Stat. Ann. tit. 12, § 1607 (2002); Va. Code Ann. §§ 8.01-400, 19.2-271.3 (2015); Wash. Rev. Code § 5.60.060(3) (2016); W. Va. Code Ann. § 57-3-9 (LexisNexis 2012); Wis. Stat. § 905.06 (2015–16); Wyo. Stat. Ann. § 1-12-101(a)(ii) (2017). By the start of the twenty-first century, almost every state had enacted a clergy privilege statute, many of which legislatures subsequently amended to expand statutory protection. See, e.g., Merlino, supra note 18, at 699 n.86 (listing clergy privilege statutes enacted by 2002); see also infra Part III and accompanying notes (discussing these amendments).

[22] See, e.g., Ohio Rev. Code Ann. § 2317.02 (West 2000) (since amended); Vt. Stat. Ann. tit. 12, § 1607 (1973) (since amended); Crawford and Moses' Digest of the Statutes of Arkansas, § 4148 (1927) (repealed).

[23] The New Jersey statute illustrates this evolution. Compare N.J. Stat. Ann. § 2A:81-9 (West 1947) (protecting "a confession"), with N.J. Stat. Ann. § 2A:84A-23 (West 1960) (protecting "confessions and other communications made in confidence"). See also State v. J.G., 990 A.2d 1122, 1127–28 (N.J. 2010) (detailing the statute's evolution).

[24] Imwinkelried, New Wigmore, supra note 4, § 1.1, at 5.

Evidence 501, a catch-all privilege, which states, "The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege."[25] Federal courts turn to state privilege decisions to interpret Rule 501.[26] Further, under Rule 501, federal courts apply state privilege law in diversity and nonfederal question criminal cases.[27] Consequently, federal clergy privilege decisions are scant.[28] The Supreme Court only addressed the privilege in pre–Rule 501 dicta,[29] and post–Rule 501 circuit court clergy decisions are limited.[30]

[25] Fed. R. Evid. 501. Initially, the Proposed Rules of Evidence and Model Rules of Evidence included a specific clergy privilege. See Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183 (1973); Model Code Evid. 219 (Am. Law Inst. 1942). The Proposed Rule was never adopted. See Introduction: The Development of Evidentiary Privileges in American Law, 98 Harv. L. Rev. 1454, 1466 (1985). While the 1973 Proposed Rules debates challenged other privileges, they did not challenge the clergy privilege. See In re Grand Jury Investigation, 918 F.2d 374, 381 (3d Cir. 1990) (citation omitted); Stephen A. Saltzburg & Kenneth R. Redden, Federal Rules of Evidence Manual 333 (4th ed. 1986). Eleven statutes are fashioned from the Model Rules, twelve mirror Proposed Rule of Evidence 506, while the remainder are unique to the particular state.

[26] See, e.g., Varner v. Stovall, 500 F.3d 491, 496 (6th Cir. 2007) (relying on Michigan clergy privilege jurisprudence).

[27] Fed. R. Evid. 501; see also Fed. R. Evid. 501 advisory committee's note ("It is intended that the State rules of privilege should apply equally in original diversity actions and diversity actions removed under 28 U.S.C. § 1441(b)."); 19 Charles Alan Wright et al., Federal Practice and Procedure § 4512 (2d ed. 2002) (describing interaction between state and federal privilege and collecting cases).

[28] Since 1971, only twenty-three federal decisions addressed the clergy privilege. See, e.g., United States v. Dubé, 820 F.2d 886, 889 (7th Cir. 1987); Seidman v. Fishburne–Hudgins Educ. Found., 724 F.2d 413 (4th Cir. 1984); United States v. Gordon, 655 F.2d 478, 486 (2d Cir. 1981) (holding employee's business communications to priest were not protected by priest-penitent privilege); United States v. Webb, 615 F.2d 828, 828 (9th Cir. 1980); Eckmann v. Bd. of Educ., 106 F.R.D. 70, 72 (E.D. Mo. 1985) (observing that "[t]he 'priest-penitent' privilege has clearly been recognized by federal courts").

[29] See Trammel v. United States, 445 U.S. 906, 913 (1980) (analogizing the clergy and the adverse spousal testimonial privileges); United States v. Nixon, 418 U.S. 683, 709 (1974) ("[A]n attorney or a priest may not be required to disclose what has been revealed in professional confidence."); Totten v. United States, 92 U.S. 105, 107 (1875) (dismissing a secret agent's contract claim, noting such claims "would require a disclosure of the confidences of the confessional").

[30] The Third Circuit has expressly held the clergy privilege exists under Rule 501—a position other circuits have assumed. See, e.g., In re Grand Jury Investigation, 918 F.2d 374, 377 (3d Cir. 1990); United States v. Dubé, 820 F.2d 886, 890 (7th Cir. 1987) (holding that communications made to clergyman to avoid tax obligations were not privileged); United States v. Gordon, 655 F.2d 478, 486 (2d Cir. 1981) (holding that defendant's business communications to priest were not protected).

While variation exists,[31] the common broad strokes for federal and state clergy privileges require a: (1) confidential, (2) spiritual communication, (3) made to a cleric in his professional capacity.[32] The individual asserting the clergy privilege bears the burden.[33] The privilege is absolute, meaning unlike a qualified privilege, a case-specific showing of a compelling need for the underlying information cannot override it.[34]

Like other privileges, the clergy privilege furthers an "extrinsic social policy"[35] deemed worthy of protection at a cost to justice. The loss of this testimony can "distort the record, mislead the factfinder, and undermine the central truth-seeking function of the courts."[36] To minimize this potential, privileges must be narrowly tailored to serve a particular social policy goal.[37]

While agreeing on the "empirical assumption" underlying the privilege, courts and scholars debate the particular "extrinsic social

[31] Norman Abrams, Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes, 44 B.C. L. Rev. 1127, 1133 (2003); Cassidy, supra note 5, at 1641; Colombo, supra note 13, at 232.

[32] Statutes phrase the requirements differently. Compare Ga. Code Ann. § 24-5-502 (1981) (privileging communications "made by any person professing religious faith, seeking spiritual comfort, or seeking counseling"), with Fla. Stat. § 90.505 (2017) (protecting communications made "for the purpose of seeking spiritual counsel and advice"). Further, some courts collapse the requirements or renumber them. Compare Roman Catholic Archbishop v. Superior Court, 32 Cal. Rptr. 3d 209, 229 (Cal. Ct. App. 2005) (listing three requirements), with Elliott v. State, 49 So. 3d 795, 799 (Fla. Dist. Ct. App. 2010) (listing four requirements).

[33] See, e.g., In re Grand Jury Investigation, 918 F.2d 374, 385 n.15 (3d Cir. 1990); People v. Schultz, 557 N.Y.S.2d 543, 545 (N.Y. App. Div. 1990).

[34] Imwinkelried, New Wigmore, supra note 4, § 1.2.1, at 13–14 (defining absolute and conditional privileges); see also Robert B. Gibbons, Evidence—Defendant Must Establish Relevancy Before Obtaining Access to Sexual Abuse Victim's Privileged Records—*Commonwealth v. Bishop*, 416 Mass. 169, 617 N.E.2d 990 (1993), 28 Suffolk U. L. Rev. 243, 247 n.22 (1994) (same).

[35] Imwinkelried, New Wigmore, supra note 4, § 1.1, at 3.

[36] Swidler & Berlin v. United States, 524 U.S. 399, 413 (1998) (O'Connor, J., dissenting) (discussing the impact of privileges generally).

[37] See, e.g., Fisher v. United States, 425 U.S. 391, 403 (1976) (holding that a privilege should apply "only where necessary to achieve its purpose"); United States v. Nixon, 418 U.S. 683, 710 (1974) ("[T]hese exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

policy" the privilege serves.[38] For example, the traditional justification—the one case law most references—focuses on the need to foster religious relationships by stimulating the growth of communications between clergy and communicants.[39] This justification assumes a causal relationship: but for the privilege, people would be unwilling to share confidences with clergy.[40] Thus, the privilege has little to no cost to justice. As Justice Stevens explains, "Without a privilege, much of the desirable evidence to which litigants such as [plaintiffs] seek access . . . is unlikely to come into being."[41]

Dean Wigmore, the seminal force behind evidence scholarship, is best known for advancing this justification. In doing so, Wigmore hoped to eliminate—or at least, significantly narrow—the slew of privileges he saw as obstructing justice.[42] However, he viewed the clergy privilege as unique, believing it satisfied his four evaluative criteria necessary for an absolute privilege:

> (1) The clergy privilege involves communications that originate in a *confidence* that the communications will not be disclosed.
>
> (2) This element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The clergy-communicant relationship is one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications is *greater than the benefit* thereby gained for the correct disposal of litigation.[43]

[38] See generally Modes of Analysis: The Theories and Justifications of Privileged Communications, 98 Harv. L. Rev. 1471 (1985) (discussing the competing theoretical justifications for privileges).

[39] 26 Charles Alan Wright et al., Federal Practice and Procedure § 5612 (2d ed. 2002).

[40] Id.

[41] Jaffee v. Redmond, 518 U.S. 1, 11–12 (1996) (applying the instrumental rationale to the psychotherapist privilege); accord Swidler & Berlin v. United States, 524 U.S. 399, 408 (1998) (adopting similar rationale for attorney-client privilege).

[42] See 8 John Henry Wigmore, Evidence in Trials at Common Law § 2286, at 532, § 2380a, at 72–73 (J. McNaughton rev. ed. 1961) (1904) [hereinafter Wigmore]; id. § 2192, at 72–73, § 2285, at 527. Jeremy Bentham equally questioned privileges while respecting the clergy privilege. 4 Jeremy Bentham, Rationale of Judicial Evidence 589–91 (1827).

[43] See 8 Wigmore, supra note 42, §§ 2285, 2396; see also 8 John Henry Wigmore, Wigmore on Evidence § 2396, at 877 (John T. McNaughton ed., 1961) (asserting utilitarian

Though uncodified, these factors frequently appear in federal or state decisions.[44]

Contemporary evidence scholars, in particular Professor Edward Imwinkelried, challenge this rationale as based on mere "empirical assumption."[45] He maintains religious individuals would engage in such communications regardless of the privilege.[46] As he explains, "It is an insult to the sincerity of a fideist's belief to argue that he or she will make a doctrinally required confession only if the legal system confers an evidentiary privilege on the confession."[47]

Imwinkelried, instead, posits autonomy and democratic rationales for privileges. On the autonomy front, privileges arguably advance personal decision making, permit emotional release, and promote self-evaluation.[48] On the democratic theory front, he contends society finds it "offensive" and "shocking" to compel such testimony.[49] Still other scholars justify the privilege based on the assumption that, "Generally, ministers will not testify, regardless of what the trial judge says or does to them."[50]

and historical justifications). But see Walsh, supra note 4, at 1084 (criticizing Wigmore's historical argument for the clergy privilege).

[44] See, e.g., Towbin v. Antonacci, 287 F.R.D. 672, 675 (S.D. Fla. 2012); State v. J.G., 990 A.2d 1122, 1140 (N.J. 2010); Nicholson v. Wittig, 832 S.W.2d 681, 688 (Tex. App. 1992).

[45] Imwinkelried, New Wigmore, supra note 4, § 1.2.1, at 11–12 ("Many contemporary privilege rules rest on the empirical assumption that the rules cause the typical layperson to engage in desirable conduct . . . that supposedly would not occur but for the existence of an evidentiary privilege. On that assumption, the legal system's recognition of evidentiary privileges comes cost free.").

[46] Id. § 6.2.3, at 467–68.

[47] Id.; see also 1 George E. Dix et al., McCormick on Evidence § 76.2, at 139 (Kenneth S. Broun ed., 6th ed. 2006) (recognizing such communications occur "irrespective of the presence or absence of evidentiary privilege").

[48] See Imwinkelried, New Wigmore, supra note 4, § 6.2.3, at 469 ("Indeed, the humanistic case for this privilege is stronger than the corresponding case for any other privilege. A person's religious beliefs lie at the core of the decisional autonomy needed to develop his or her life plan.").

[49] Imwinkelried, New Wigmore, supra note 4, § 6.2.3, at 470; see also Mary Harter Mitchell, Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion, 71 Minn. L. Rev. 723, 768 (1987) ("[T]here is [a] general repugnance at the law's intrusion into such a relationship.").

[50] Weldon Ponder, Will Your Pastor Tell?, Liberty Mag., May-June 1978, at 3. Still others contend existing privileges are not so much rooted in encouraging communication or protecting privacy but rather reflect political power by groups who have sought and obtained special treatment. See, e.g., Eric D. Green & Charles R. Nesson, Problems, Cases, and

While case law echoes these varied rationales,[51] the traditional, Wigmorean justification remains primary.[52] Further, despite their differences, these various rationales share a common outcome: an absolute, broadly construed clergy privilege, assumed essential to serve political or societal gains.[53]

II. UNDERSTANDING THE CLERGY PRIVILEGE: SURVEY AND RESULTS

Testing the Wigmorean "empirical assumption" requires a macro understanding of the privilege in application. This includes the privilege's most litigated requirements, temporal trends, and transsubstantive application. An exhaustive analysis of clergy privilege decisions provides such an understanding.[54] This Part starts with the specifics of this exhaustive case law survey and its surprising results.

Rather than a privilege afforded judicial respect, the survey finds a dying privilege. Even more interesting, though, is the role of clergy in this decline. Existing empirical work on clergy and confidentiality, though discrete, depicts clergy strictly beholden to their perceived obligation to maintain confidences.[55] However, as this Part goes on to

Materials on Evidence 526 (1983); see also Modes of Analysis, supra note 38, at 1471 (discussing competing rationales).

[51] See, e.g., Simpson v. Tennant, 871 S.W.2d 301, 308 (Tex. App. 1994) (citations omitted) (discussing how the privilege benefits privacy, freedom of religion, the prestige of religious institutions, and avoids judicial versus canonical strife).

[52] See, e.g., Waters v. O'Connor, 103 P.3d 292, 296 (Ariz. Ct. App. 2004) (justifying the privilege on the basis of individuals' need to speak in "total and absolute confidence"); Purdum v. Purdum, 301 P.3d 718, 737 (Kan. Ct. App. 2013) ("The evidentiary privilege extends to parties and witnesses to advance public policy objectives in maintaining confidentiality for communications essential to a relationship society deems worthy of protection."); McFarland v. W. Congregation of Jehovah's Witnesses, Lorain, Ohio, Inc., 60 N.E.3d 39, 46 (Ohio Ct. App. 2016) (same).

[53] Case law and scholars routinely characterize the privilege as absolute. See, e.g., In re Lifschutz, 2 Cal.3d 415, 427–29 (1970); Misenheimer v. Burris, 183 N.C. App. 408, 412 (2007); 81 Am. Jr. 2d Witnesses § 493 (2006); Cassidy, supra note 5, at 1674 ("[U]nlike other professional privileges, the clergy-penitent privilege, when applicable, is considered absolute.").

[54] All data is on file with author and available upon request. See Bartholomew Clergy Data (Jan. 17, 2017) (on file with the Virginia Law Review Association). This data includes all available federal and state clergy privilege cases, identified either as a statutory annotation or by searching "clergy" /s "privilege." In states where the privilege is broken into multiple statutes, annotations to each statute were included. See, e.g., Cal. Evid. Code §§ 1030–34 (Deering 2004).

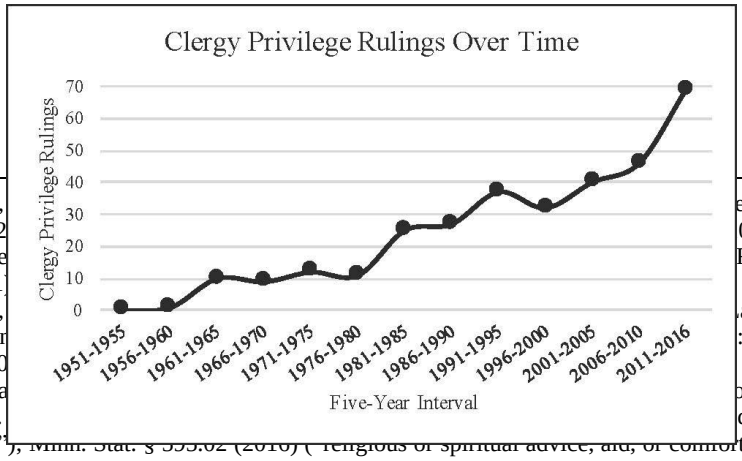
[55] See Elizabeth Audette, 115.3 The Christian Century 80 (1998).

explain, this hypothetical obligation does not translate to actual scenarios. Rather, clergy's testimony and pre-litigation conduct for three key privilege requirements supports a more qualified, more restricted privilege.

A. Survey Details

As previously detailed in Part I, current clergy privilege statutes provide generous protection. For example, statutes define clergy expansively to include priests, rabbis, ordained or licensed ministers of any church, and accredited Christian Science practitioners in all fifty states.[56] Six state statutes also protect any persons authorized to perform similar functions of any religion.[57] Additionally, every state now safeguards more communications beyond sacramental confessions, ranging from spiritual advice to communications of comfort.[58] States' expanded coverage triggered a corresponding rise in the number of assertions in written decisions, as depicted in Figure 1. From 1835 to 1980, there were only 63 reported clergy privilege decisions. By the end of the 1990s, that number grew to 175. By December 2016, the end date of this survey, 324 written opinions squarely decided a clergy privilege assertion.[59]

Figure 1



[56] See, ev. Stat. §§ 12-22 030–34; Colo. Re R. Evid. 505(a)(1

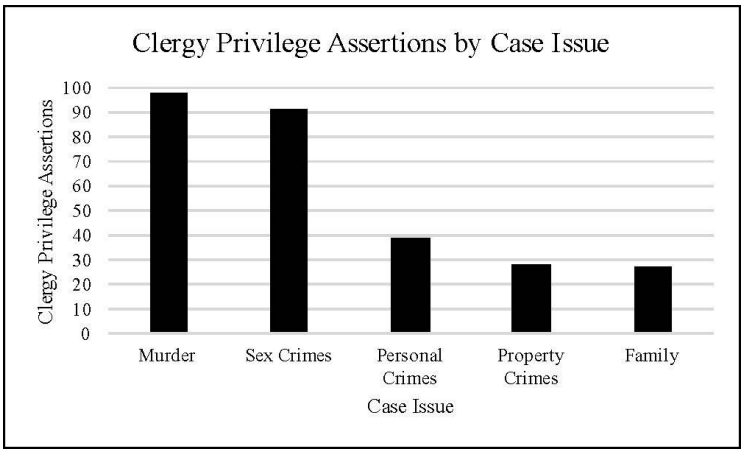
[57] See, a. Code Evid. Ar :84A-23 (West 20

[58] Wha blace, or comfort. dvice or comfort"); Minn. Stat. § 595.02 (2016) ("religious or spiritual advice, aid, or comfort"); Mo. Rev. St. 491.060 (2016) (advice, confession, comfort); N.M. R. Evid. 11-506 (advice).

[59] This number is a subset of the total reviewed decisions. It excludes dicta or remand decisions.

Criminal cases outnumbered civil ones almost two to one.[60] Murder cases most frequently trigger an assertion of privilege, with sex crimes a close second, as shown in Figure 2.[61]

Figure 2



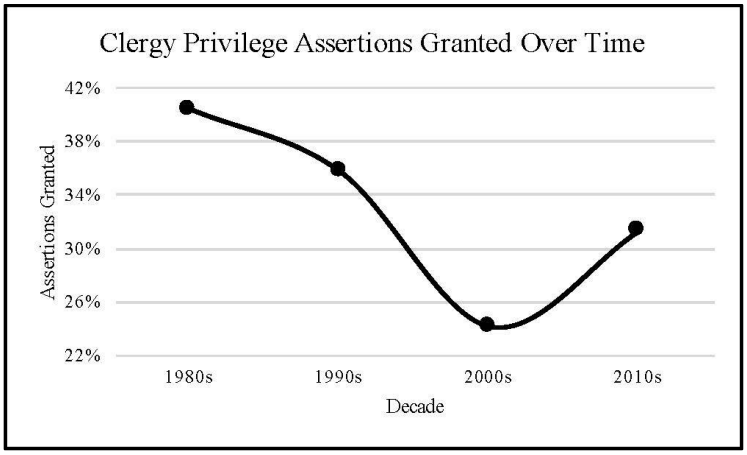
Successful assertion of the privilege is an increasing rarity. Figure 3 illustrates how this decline began in the 1980s, picked back up slightly in the 1990s, then dropped again in 2000.[62] Between 2000 and 2016, the percent of clergy privilege assertions granted fell to a low of twenty-six percent.

[60] See Bartholomew Clergy Data, supra note 54 (recording 219 criminal decisions and 105 civil claims).

[61] Sex crimes include: sexual abuse, rape, sexual assault, sexual misconduct, crimes against nature, indecent contact with children, child molestation, lewd conduct, sexual harassment, and bigamy. Personal crimes include: manslaughter, child abuse, assault, threat of force, police misconduct, mutilation of a deceased body, and wrongful death. Property crimes include: fraud, burglary, theft, damages claims, forgery, robbery, embezzlement, arson, and armed robbery. The "family" category includes: divorce, child custody, alienation of affection, parental custody, termination of parental rights, and paternity.

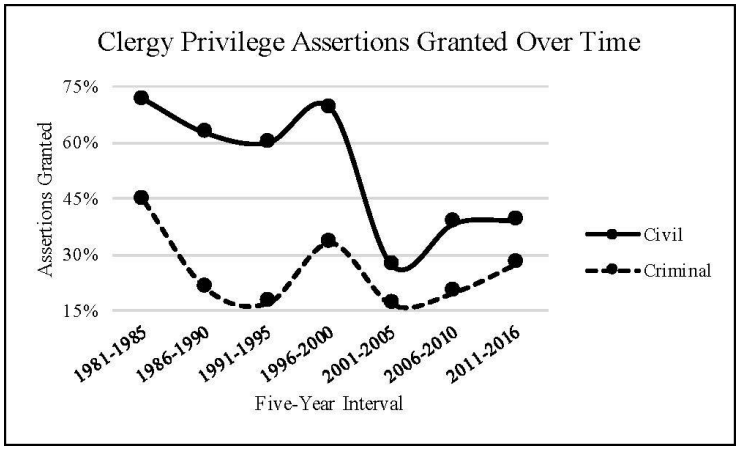
[62] Pre-1900s, the courts denied the privilege seventy-one percent of the time, but this figure is based on only seven written decisions. By the 1950s, this number was seventy-eight percent, based solely on twenty-three written decisions. To minimize statistical sample size issues, this Article concentrates on current trends.

Figure 3



Viewed separately, courts appear less willing to apply the privilege in criminal cases, where courts deny the privilege seventy-five percent of the time, versus civil cases, where the overall denial rate is fifty-five percent. However, while courts historically afforded the privilege more deference in civil cases, currently criminal and civil cases are more closely aligned, as reflected in Figure 4.

Figure 4



This temporal tracking does not encompass cases where judges summarily address the privilege. Nor can it reflect any decision by counsel to avoid calling clergy in the first place. It does, however, indicate which statutory requirements trigger litigation. Scholars predicted litigation over the "clergy" requirement.[63] However, it has actually generated minimal conflict, likely because most standards define clergy expansively.[64] Similarly, ownership and waiver are fairly

[63] See, e.g., Colombo, supra note 13, at 232 (discussing how a lack of clear statutory definition would "generate needless litigation over this issue").

[64] Thirty-nine states have adopted a generous definition of clergy, protecting communications to "a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization." Ala. Code § 12-21-166 (2012); Alaska R. Evid. 506; Ariz. Rev. Stat. Ann. § 13-4062(3) (2010); Ark. R. Evid. 505; Cal. Evid. Code § 1030 (Deering 2004); Colo. Rev. Stat. Ann. § 13-90-107(1)(c) (2017); Conn. Gen. Stat. Ann. § 52-146b (2015); Del. R. Evid. 505; D.C. Code § 14-309 (2001); Fla. Stat. § 90.505 (2016); Ga. Code. Ann. § 24-5-502 (2013); Haw. R. Evid. 506; Idaho Code § 9-203(3) (2010); Kan. Stat. Ann. § 60-429 (2005); Ky. R. Evid. Ann. 505; La. Code Evid. Ann. art. 511 (2017); Md. Code Ann., Cts. & Jud. Proc. § 9-111 (LexisNexis 2013); Mass. Gen. Laws ch. 233, § 20A (2016); Mass. R. Evid. 510; Mich. Comp. Laws Serv. § 767.5a(2) (LexisNexis 2002); Mo. Rev. Stat. § 491.060(4) (2016); Neb. Rev. Stat. § 27-506 (2016); N.H. Rev. Stat. Ann. § 516:35 (2007); N.J. Stat. Ann. § 2A:84A-23 (West 2011); N.M. R. Evid. 11-506; N.C. Gen. Stat. § 8-53.2 (2015); N.D. R. Evid. 505; Ohio Rev. Code Ann. § 2317.02(C)(2)(a) (LexisNexis 2017); Okla. Stat. tit. 12, § 2505 (2011); 42 Pa. Stat. and Cons. Stat. Ann. § 5943 (West 2017); 9 R.I. Gen. Laws § 9-17-23 (2012); S.C. Code Ann.

well settled. The vast majority of jurisdictions grant the communicant ownership of the privilege.[65] Further, most jurisdictions find the privilege waived when a communicant fails to object, fails to take reasonable precautions, shares the content of the communication with a third party, or proactively waives the privilege in court.[66]

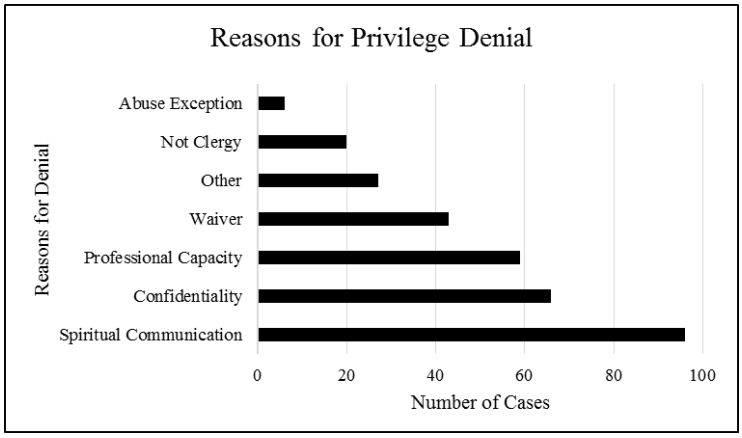
As depicted in Figure 5, when a court denies the privilege, it is usually because the proponent fails to establish: (1) the cleric acted in his professional capacity, (2) there was a spiritual communication, or (3) the communication was confidential. In analyzing clergy privilege decisions, one pattern quickly emerges: courts rely heavily on clergy testimony for these requirements.

Figure 5

§ 19-11-90 (2014); S.D. Codified Laws § 19-19-505 (2016); Tenn. Code Ann. § 24-1-206 (2000); Utah Code Ann. § 78B-1-137(3) (LexisNexis 2012); Vt. Stat. Ann. tit. 12, § 1607 (2002); Va. Code Ann. §§ 8.01-400, 19.2-271.3 (2015); W. Va. Code Ann. § 57-3-9 (LexisNexis 2012); Wis. Stat. § 905.06 (2015–16).

[65] The communicant owns the privilege in all but six states. See Ala. R. Evid. 505; Cal. Evid. Code §§ 912, 917, 1030–34 (Deering 2004); Colo. Rev. Stat. § 13-90-107(1)(c) (2017); Miss. Code Ann. § 13-1-22 (2012); N.J. Stat. Ann. § 2A:84A-23 (West 2011); Or. Rev. Stat. § 40.260 (2015). Thirty-five statutes spell out this ownership, while case law settles the question in the remaining states.

[66] See, e.g., Ga. Code Ann. § 9-11-34 (2015) (failure to object); Haw. R. Evid. 511 (third party); N.Y. C.P.L.R. § 4505 (Consol. 2003) (court waiver); Utah R. Evid. 510(a) (reasonable precautions). Waiver—generally meaning whether either the communicant or the cleric disclosed the information to a third party—is also a frequent ground for denying the privilege. However, waiver issues are often governed by separate statutes and thus are beyond the scope of this Article. See, e.g., La. Code Evid. Ann. art. 502 (2017); Mass. Guide to Evid. § 523; N.M. R. Evid. 11-511.



The next Sections detail how this testimony challenges the need for an absolute privilege.[67]

B. The Professional Capacity Requirement

Every state limits the clergy privilege to communications that occur in the cleric's professional capacity as a spiritual advisor.[68] Communicants asserting the privilege uniformly contend clergy were acting in their professional capacity. In contrast, as discussed below, clergy define professional capacity more narrowly, not always convincingly distinguishing their spiritual and other religious work. Not only do these more restrictive characterizations contribute to the privilege's decline, they also impugn the "empirical assumption" that an absolute, broad clergy privilege is essential to "sedulously foster[]"[69] religious relationships—at least not to clergy.

[67] This is not to say that courts always defer to clergy. On rare occasion, courts have upheld the privilege even when the clergy was willing to testify. See, e.g., Mullen v. United States, 263 F.2d 275, 276–77 (D.C. Cir. 1958) (Fahy, J., concurring) (finding privilege in child abuse case where Lutheran minister encouraged defendant to confess but was subsequently willing to testify at trial about the spiritual confession).

[68] This element is uniform across the states, though not every statute catalogues it. Compare, e.g., Ga. Code Ann. § 24-5-502 (2013) (no codified professional capacity requirement), with, e.g., 735 Ill. Comp. Stat. 5/8-803 (2016) (codified professional capacity requirement).

[69] 8 Wigmore, supra note 42, §§ 2285, 2396 (footnote omitted).

As clergy delineate their roles as spiritual advisors, the boundaries of what responsibilities fall within "professional capacity" vary. However, case law indicates a cleric is more likely to disclose: (1) conversations with employees, (2) discussions with friends, and (3) exchanges regarding factual investigations.

First, with employees or other church staff, clergy define their professional capacity narrowly, even though the line between employer and spiritual advisor can blur. For example, in *Bonds v. State*,[70] the witness, Brown, was a local minister and owner of the air conditioning business where the defendant, Bonds, worked. Bonds occasionally attended Brown's church and had previously sought ministering from Brown. Nonetheless, for the conversation at issue, which involved allegations of sexual misconduct, Brown "testified without contradiction that he made the call as Bonds' employer" without distinguishing this conversation from prior counseling sessions.[71] The Supreme Court of Arkansas upheld the trial court's wholesale reliance on Brown's characterization, finding the privilege did not apply because Brown was not acting in his "capacity as a spiritual advisor."[72]

Second, clergy frequently treat their ministerial capacity as mutually exclusive from their roles as friends, even when the two commingle.[73] The Court of Appeals of Iowa addressed this issue in *State v. McCurdy*.[74] McCurdy was convicted of sexual abuse, in part based on the testimony of his longtime friend and pastor, Acker. During a phone call, McCurdy told Acker he was under investigation and then detailed his transgressions. The two then prayed together and explored McCurdy's desire to be baptized. Acker advised McCurdy "to seek God and to give [his] life and heart over to God and ask for God's help with this matter." At the end of the conversation, McCurdy, at Acker's

[70] 837 S.W.2d 881 (Ark. 1992).

[71] Id. at 883.

[72] Id. at 884.

[73] But see, e.g., State v. Boling, 806 S.W.2d 202, 204 (Tenn. Crim. App. 1990) (finding privilege because clergy testified "he didn't distinguish between being the defendant's minister or friend on that occasion"). On rare occasion, a court rejects a cleric's delineation between friend and spiritual advisor. See, e.g., Tankersley v. State, 724 So. 2d 557, 561 (Ala. Crim. App. 1998) (disregarding pastor's claim the conversation with defendant occurred outside her professional capacity because her "status as a pastor influenced the appellant's decision to telephone her").

[74] 823 N.W.2d 418, 2012 WL 4901158 (Iowa Ct. App. 2012).

urging, accepted "Christ as his savior." Nonetheless, Acker testified the conversation fell outside his professional capacity, stating:

> I am a pastor, but I'm also a spiritual man, a man who loves God dearly. And so . . . as I'm talking to my sister or to my other friends . . . my parents even, I regularly offer spiritual guidance and advice. So to say that because I was offering him some spiritual advice that I was doing that in my ministerial capacity, I would definitely have to say no.[75]

Relying on this testimony, the court discounted the conversation's religious nature, agreeing that Acker did not act in his professional capacity.[76] Thus, once again, clergy testimony barred the privilege.

Third, and perhaps more notable, are cases where clergy distinguish their roles as disciplinarians,[77] confronters,[78] informants,[79] mediators,[80] or even neutral bystanders[81] from their religious professional capacity. These distinctions frequently arise when congregants are accused of or are victims of abuse.[82]

[75] Id. at *3 (alterations in original).

[76] Id.

[77] See, e.g., Kos v. State, 15 S.W.3d 633, 639–40 (Tex. App. 2000) (finding lack of professional capacity because "Father Broderick testified that, at the time of the meeting, he was not concerned about the 'state of [appellant's] soul'; rather, he described the meeting as a 'disciplinary intervention'" (alteration in original)).

[78] Fahlfeder v. Pa. Bd. of Prob. & Parole, 470 A.2d 1130, 1132–33 (Pa. Commw. Ct. 1984) (discussing how reverend did not act in his professional capacity in confronting defendant about abuse allegations); Maldonado v. State, 59 S.W.3d 251, 253 (Tex. App. 2001) (denying privilege based on cleric's representation that "the specific purpose of the meetings was to confront him about the allegations of his inappropriate behavior").

[79] See, e.g., State v. Jackson, No. M2000-00763-CCA-R3-CD, 2001 WL 812254, at *7 (Tenn. Crim. App. July 18, 2001) (denying privilege where cleric acted as an informant, not as a spiritual advisor).

[80] See, e.g., State v. Scoggins, 70 So. 3d 145, 149 (La. Ct. App. 2011), writ denied sub nom. State v. Scoggin, 79 So. 3d 1033, 1033 (La. 2012).

[81] See, e.g., State v. Mark R., 17 A.3d 1, 6 (Conn. 2011); State v. Latham, No. E2006-02262-CCA-R3CD, 2008 WL 748381, at *20 (Tenn. Crim. App. Mar. 20, 2008).

[82] This narrowing lacks uniformity. Compare, e.g., People v. Campobello, 810 N.E.2d 307, 312 (Ill. App. Ct. 2004) (illustrating how some clerics view investigating sexual abuse allegations as part of their professional responsibility as a spiritual advisor), with, e.g., State v. Hesse, 767 N.W.2d 420, 2009 WL 776530, at *5 (Iowa Ct. App. 2009) (distinguishing clerics' role as spiritual advisor from investigator).

Magar v. State,[83] a criminal case involving allegations of sexual abuse by a church member, highlights this overlap. Reverend Rowe, a witness in the case, had many prior counseling sessions with the appellant. The Reverend testified it was his practice "to keep confidential . . . information gained in a counseling relationship." Similarly, the appellant testified that the Reverend assured him "their conversations were private."[84] The Reverend testified he "confronted" Magar after allegations that he sexually abused two boys. At trial, the Reverend framed the conversation as "disciplinary in nature."[85] This framing helped the Supreme Court of Arkansas sweep aside the Reverend's original promise to Magar of nondisclosure.[86] Rather, the court allowed the testimony, holding the conversation took place outside the Reverend's professional capacity.[87]

Clergy maintain this constricted definition of professional capacity even though in many cases such conversations begin as confrontations but evolve into confessions, and sometimes even spiritual repentance. For example, in *Gutierrez v. State*, a priest confronted the defendant about his daughter's allegations of sexual abuse.[88] After contacting the police, Father Minifie called Gutierrez. During this conversation, Gutierrez confessed and sought spiritual guidance on how to move forward. The conversation was overtly religious, as the two discussed reading the Bible and the need to "let the Lord take care of this situation."[89] At trial, the priest "testified that the purpose of the call was not to provide spiritual advice, and he was not calling in the capacity of a spiritual advisor."[90] Relying on this restrictive interpretation of a clergy's professional capacity, the court denied the privilege.[91] This decision, too, shows clergy's testimony challenging the need for a broad, absolute privilege.

Professional capacity is not the only requirement where clergy testimony challenges the Wigmorean empirical assumption. As

[83] 826 S.W.2d 221 (Ark. 1992).
[84] Id. at 222.
[85] Id. (internal quotation marks omitted).
[86] Id. at 225 (Newbern, J., dissenting).
[87] Id. at 223.
[88] No. 01-09-00939-CR, 2010 WL 4484350, at *1 (Tex. App. Nov. 10, 2010).
[89] Id. at *1–2.
[90] Id. at *2.
[91] Id. at *1.

discussed next, this testimony suggests fewer communications need protection.

C. The Protected Communication Requirement

Clergy testimony also undercuts the traditional justification that an absolute privilege is "essential to the full and satisfactory maintenance of the relationship between the parties."[92] Originally, the privilege only protected sacramental confessions,[93] recognizing that Catholic priests who broke such sacraments faced excommunication.[94] Other religions do not view oral confession as a sacrament, or they permit a communicant to confess directly to God without a priest intermediary.[95] Rather than foreclose the privilege to non-Catholics, states expanded coverage to more than sacramental confessions. What additional communications are protected varies, as some states privilege all religiously required communications and others go further. With either approach, though, clergy testimony chips at the scope of potentially privileged communications.

First, some statutes now shield any communications necessary under a religious tenet.[96] This limitation frequently appears as statutory

[92] 8 Wigmore, supra note 42, § 2285 (footnote omitted).

[93] Confession is one of seven Catholic sacraments. General Council of Trent, Seventh Session, Decree on the Sacraments, Canon I, No. 1311 (1547), *reprinted in* J. Neuner, S.J. & J. Dupois, S.J., The Christian Faith: In the Doctrinal Documents of the Catholic Church 522 (Jacques Dupuis ed., 6th ed. 1998); see also Kevin Orlin Johnson, Why Do Catholics Do That?: A Guide to the Teachings and Practices of the Catholic Church 214–15 (1994) (listing "Baptism, Confirmation, the Eucharist, Reconciliation, Matrimony, Holy Orders, and the Anointing of the Sick").

[94] The Code of Canon Law 246, Can. 1388, § 1 (1983); see, e.g., Andrew A. Beerworth, Treating Spiritual and Legal Counselors Differently: Mandatory Reporting Laws and the Limitations of Current Free Exercise Doctrine, 10 Roger Williams U. L. Rev. 73, 105–06 (2004) (detailing the importance of confession in Catholic faith).

[95] This is true for Protestantism and Judaism, for example. See, e.g., William Harold Tiemann & John C. Bush, The Right to Silence: Privileged Clergy Communication and the Law 23 (1983); Chad Horner, Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society, 45 Drake L. Rev. 697, 698 (1997).

[96] Courts disagree whether the "discipline-enjoined" requirement also requires cross-referencing religious tenets. Compare Nussbaumer v. State, 882 So. 2d 1067, 1076 (Fla. Dist. Ct. App. 2004) ("Although the interpretation of the discipline enjoined requirement is by no means uniform, the modern trend is to interpret it as requiring only that the confider consulted the clergy member in his or her professional capacity."), with State v. Martin, 975 P.2d 1020, 1025 (Wash. 1999) (quoting Wash. Rev. Code § 5.60.060 (1995)) (interpreting the phrase "confession [made] . . . in the course of discipline enjoined by the church" to

language privileging communications "in the course of discipline enjoined by the church to which he belongs."[97] This "discipline-enjoined" restriction affords clergy significant, frequently outcome-determinative influence, as courts maintain it is not their "role to decide what types of communications constitute confessions within the meaning of a particular religion."[98] While over two-thirds of the clergy decisions involve Protestants, even in cases involving Judaism, Santeria, and Islam, courts have favored clergy testimony to determine whether a particular conversation was spiritual—despite contrary evidence from the communicant.[99]

Even for sacramental confessions, clergy adopt a case-specific approach, rejecting any categorical definition of a privileged communication. For example, in one case a Catholic priest received confession of a murder for which two others were convicted and sentenced. The priest, Father Towle, provided absolution for wrongdoing but struggled for years regarding whether to break the seal of confession and risk excommunication by sharing this information to avoid the continued incarceration of two innocent men. With the assistance of officials at the diocese, the priest decided he could share the confessed communication after all. Rather than maintaining it was a sacramental confession, the priest revised his view with the assistance of

mean a cleric's doctrinal obligations to hear a confidence, not a parishioner's obligation to confide), and State v. Price, 881 A.2d 1082, 1085 (Del. Super. Ct. 2005) (collapsing Pennsylvania's "discipline-enjoined" and "professional capacity" requirements). See also Cassidy, supra note 13, at 1640–44 (discussing the conflicting interpretations of the "discipline enjoined" requirement in some state clergy privilege statutes).

[97] See Ariz. Rev. Stat. § 13-4062(3) (2010); Colo. Rev. Stat. § 13-90-107(1)(c) (2017); D.C. Code § 14-309 (2001); Fla. Stat. § 90.505 (2016); 735 Ill. Comp. Stat. 5/8-803 (2016); Ind. Code Ann. § 34-46-3-1(3) (LexisNexis 2008); Mass. Gen. Laws ch. 233, § 20A (2016); Mich. Comp. Laws Serv. § 767.5a(2) (LexisNexis 2002); Minn. Stat. § 595.02(1)(c) (2016); Mont. Code Ann. § 26-1-804 (2015); N.J. Stat. Ann. § 2A:84A-23 (West 2011); 9 R.I. Gen. Laws § 9-17-23 (2012); Va. Code Ann. §§ 19.2-271.3, 8.01-400 (2015); W. Va. Code Ann. § 57-3-9 (LexisNexis 2012); cf. Cassidy, supra note 5, at 1642 n.77 ("So entrenched is the 'discipline enjoined' requirement in the history of the privilege that some courts cite it as a prerequisite to the application of the privilege, notwithstanding the fact that the statute that they are construing contains no such language.").

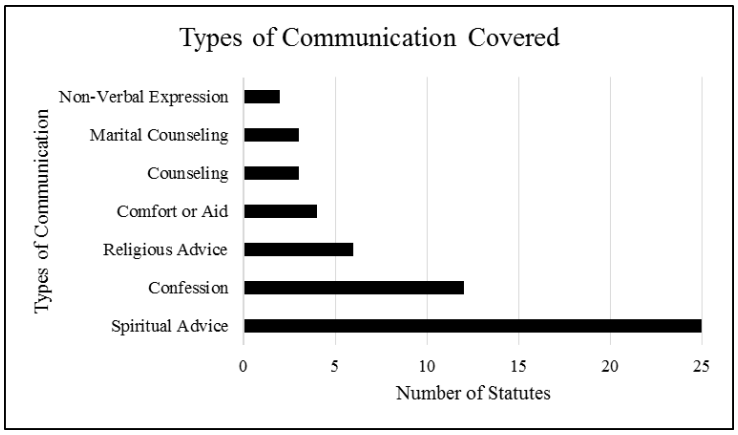
[98] State v. Martin, 959 P.2d 152, 156 (Wash. Ct. App. 1998), aff'd, 975 P.2d 1020 (Wash. 1999).

[99] See, e.g., People v. Drelich, 506 N.Y.S.2d 746, 748 (App. Div. 1986) (Judaism); State v. Gil, No. 2 CA–CR 2013–0508, 2014 WL 4725805, at *1, *4 (Ariz. Ct. App. Sept. 23, 2014) (Santeria); People v. Johnson, 497 N.Y.S.2d 539, 540 (App. Div. 1985) (Islam).

the Archdiocese, describing the communication as a "heart-to-heart," thus taking it outside the context of a sacramental confession. In affirming this characterization, the Southern District of New York pointed out it was "in no position to second-guess Father Towle or the Archdiocese in this respect."[100]

Other jurisdictions reject the "discipline-enjoined" requirement. Figure 6 depicts how, facially, these state statutes privilege confidential communications,[101] "religious or spiritual advice or comfort,"[102] or—more generally—"any communication" that otherwise satisfies the statute.[103]

Figure 6



While many decisions apply this broad coverage literally,[104] others adopt more fact-specific approaches to define the communications requirement.[105]

[100] Morales v. Portuondo, 154 F. Supp. 2d 706, 729 (S.D.N.Y. 2001).

[101] See, e.g., Ala. R. Evid. 505.

[102] See, e.g., Mass. Gen. Laws ch. 233, § 20A (2016).

[103] See, e.g., N.J. Stat. Ann. § 2A:84A-23 (West 2011); see also Horner, supra note 95, at 729–30 ("Today . . . the privilege is extended to protect conversations between spiritual leaders of non-Catholic Western religious groups and followers of those religions.").

[104] See, e.g., Tankersley v. State, 724 So. 2d 557, 560 (Ala. Crim. App. 1998) (covering more than just penitential communication); Reardon v. Savill, No. CV 950546948, 1999 WL

In this absence of a clear demarcation, clergy have resisted the privilege in scenarios that facially fall within statutory protection. This more restrictive view means clergy have willingly testified when part of the conversation is not spiritual, even if the remainder of the communication is overtly religious.[106]

In this way, clergy have identified a narrower category of communications they are willing to withhold from the eyes of the law than the wide swath of communications privileged by statute. Much like how clergy distinguish their other roles from their professional capacity, clergy delineate spiritual conversations as mutually exclusive from discussions of "family problems,"[107] investigations,[108] or "disciplinary"

1063195, at *2 (Conn. Super. Ct. Nov. 4, 1999) (covering "solace"); Commonwealth v. Nutter, 28 N.E.3d 1, 3 (Mass. App. Ct. 2015) (covering "rules or practice of the religious body to which [the cleric] belongs"), review denied, 35 N.E.3d 721 (Mass. 2015); People v. Bragg, 824 N.W.2d 170, 182 (Mich. Ct. App. 2012) (covering "any communication"); Congregation B'Nai Jonah v. Kuriansky, 576 N.Y.S.2d 934, 936 (App. Div. 1991) (covering "counsel, advice, solace, absolution or ministration").

[105] Judicial treatment of pastoral counseling highlights this tension. Compare Nussbaumer v. State, 882 So. 2d 1067, 1077 (Fla. Dist. Ct. App. 2004) ("[T]here are probably many instances in which it would be difficult to distinguish a call to personal growth based on a spiritual message from one that is only psychotherapeutic in origin . . . . Fortunately, [Florida's clergy privilege statute] does not require the courts to assess the spiritual content of the clergy member's response to the confider's request for spiritual advice and counsel."), with Brown v. State, 964 A.2d 516, 540–41 (R.I. 2009) (probing beyond the representation that the communication was pastoral counseling to segregate secular from nonsecular communications).

[106] See, e.g., State v. McCary, No. 03C01-9303-CR-00103, 1994 WL 176972, at *7 (Tenn. Crim. App. May 11, 1994) (noting the pastor "sought to minister," but defendant did not seek spiritual advice), rev'd on other grounds, 922 S.W.2d 511 (Tenn. 1996); Snyder v. State, 68 S.W.3d 671, 675 (Tex. App. 2000) (accepting youth director's characterization of the communication as not privileged even though director conceded the conversation "involved God and religion"). This difference is not universal. See, e.g., State v. J.G., 990 A.2d 1122, 1124 (N.J. 2010); EMC, LLC v. Cooper, No. F–46467–08, 2012 WL 5381688, at *10 (N.J. Super. Ct. App. Div. 2012) (referencing the cleric's willingness to testify but disregarding it).

[107] See, e.g., Commonwealth v. Kebreau, 909 N.E.2d 1146, 1159 (Mass. 2009) (characterizing the conversation at issue as a "family issue"); State v. Cardenas, No. A13-0775, 2014 WL 1516335, at *5 (Minn. Ct. App. Apr. 21, 2014) (holding a discussion of a family problem not to be covered by the privilege).

[108] See, e.g., State v. Tart, 672 So. 2d 116, 143 (La. 1996) (denying privilege based on minister's statement that he was "visiting Tart . . . to question him as to whether his civil rights were violated," not to engage in spiritual communications, despite praying together); State v. Weeks, 858 N.W.2d 36, 2014 WL 5243359, at *1 (Iowa Ct. App. 2014) ("[The pastor] testified at a hearing that he and [defendant] did not talk about religious matters, but they were 'two cycling buddies talking.'").

discussions.[109] In other cases, clergy testify that the communicant was not confessing but "trying to explain his side of the story"[110] or "popping off."[111]

For example, in *State v. Cartmell*, the chaplain witness testified about a communication with the defendant in a murder case.[112] The chaplain had accompanied the police and the defendant on a car ride to the victim's mother's house. During the ride and at the scene, the defendant told the chaplain details about the murder. According to the defendant, he and the chaplain prayed together at the scene, though the chaplain denied this. While the chaplain acknowledged he was there in his professional capacity, he maintained the communication was not spiritual but rather an opportunity for the defendant to "try[] to make peace, [to make] sense of what happened."[113] Relying on this characterization, the court found the privilege did not apply.[114]

Similarly, in *State v. Hancock*, the defendant had several conversations with his pastor in which he admitted that he had been the last person to see the murder victim alive.[115] The pastor maintained that "no spiritual counseling took place during that conversation,"[116] despite acknowledging he offered spiritual counsel at other times and that

[109] *Magar*, 826 S.W.2d at 222–23 (finding privilege inapplicable to defendant's admission to minister's accusation of sexual abuse of minors where minister initiated conversation for disciplinary, not spiritual, counseling).

[110] Elliott v. State, 49 So. 3d 795, 799 (Fla. Dist. Ct. App. 2010) ("According to elder Westbrook, appellant did not indicate that he was seeking spiritual counseling and guidance and did not want to talk about the Bible or pray. The trial court could conclude that appellant's words and actions indicated that he was not seeking spiritual advice or counseling, but was trying to explain his side of the story.").

[111] See, e.g., In re W.B.W., No. 11–11–00269–CV, 2012 WL 2856067, at *15 (Tex. App. July 12, 2012) (finding lack of privilege based on Pastor's testimony that defendant "merely began 'popping off' with a sexually explicit story").

[112] No. M2012-01925-CCA-R3-CD, 2014 WL 3056164, at *23–25 (Tenn. Crim. App. July 7, 2014).

[113] Id. at *26.

[114] Id.

[115] No. M2012-02307-CCA-R3-CD, 2014 WL 7006969, at *5 (Tenn. Crim. App. Dec. 12, 2014), appeal denied (May 14, 2015).

[116] Id. at *5; cf. Mitchell, supra note 49, at 748 (discussing the challenges of characterizing spiritual counseling since "the content of counseling sessions often includes many theoretically distinguishable types of confidential disclosure, including, for example, statements of the confider's past conduct, confessions, expressions of penitence, expressions of anger and other deeply felt emotions, solicitations of advice, personal background information, and statements about the wrongdoing of others").

during the conversation at issue,[117] he advised the defendant to "open up" about the murder so the defendant "could ask for forgiveness."[118] Without interrogating the pastor's representation, the Tennessee Court of Appeals affirmed the trial court's denial of the privilege.[119]

This narrowing is particularly apparent when clergy perceive the communicant is insufficiently contrite or using the clergy. In many religions, confession requires something more than getting something off your chest—a type of confession "plus," so to speak.[120] This "plus" is repentance, meaning a desire to make amends or change one's ways. In fact, there are strong canonical reasons to consider contrition.[121] Nonetheless, existing statutes have no such requirement. Yet privilege decisions reveal repeated instances where clergy treat patently confessional speech as nonprivileged because they perceive the communicant is not repentant.[122] Responding to clergy's characterizations, judicial decisions have turned on this distinction.[123]

For example, the Massachusetts appellate court decision in *Commonwealth v. Nutter* shows clergy refusing to shield verbal "comfort"—a category of protected communication under the privilege

[117] *Hancock*, 2014 WL 7006969, at *5.

[118] Id.

[119] Id. at *1.

[120] See, e.g., Presbyterian Church in Am., The Westminster Confession of Faith 15:3 ("Although repentance be not to be rested in, as any satisfaction for sin, or any cause of the pardon thereof, which is the act of God's free grace in Christ; yet it is of such necessity to all sinners, that none may expect pardon without it."); Pinchas H. Peli, On Repentance: In the Thought and Oral Discourses of Rabbi Joseph B. Soloveitchik 235 (2000) (discussing the interrelationship between confession and repentance in Orthodox Judaism).

[121] This focus on repentance traces back to Jeremy Bentham, who tied repentance to the clergy privilege: "Repentance, and consequent abstinence from further misdeeds of the like nature; repentance, followed even by satisfaction in some shape or other, satisfaction more or less adequate for the past: such are the well-known consequences of [clergy-penitent communication]." Bentham, supra note 42, at 590.

[122] See, e.g., Parnell v. State, 581 S.E.2d 263, 267 (Ga. Ct. App. 2003) (relying on cleric (defendant's father's) testimony "that he did not start ministering to his son until after he was arrested, which was after the [confessions] were made"); State v. Cardenas, No. A13–0775, 2014 WL 1516335, at *5 (Minn. Ct. App. Apr. 21, 2014) ("The record reflects that appellant did not seek to repent, and Pastor Samuel testified that appellant did not seek spiritual guidance, comfort, aid, or religious counseling. Instead, the discussions involved a family problem . . . .").

[123] See, e.g., Commonwealth v. Patterson, 572 A.2d 1258, 1265 (Pa. Super. Ct. 1990) (denying the privilege to statements not motivated by religious considerations or the search for forgiveness).

statute in the state.[124] Defendant's pastor previously provided the defendant and his wife marital and parental counseling. During a phone call, the defendant confessed to sexually abusing his step-daughter. The pastor conceded the defendant was seeking "comfort" but distinguished religious comfort from seeking sympathy.[125] He opined that the conversation "could be manipulation" given the defendant "might have recognized that his statements were incriminating and that the defendant might have felt a 'need to cover [his] tracks.'"[126] According to the pastor, the defendant was looking for "someone who could bring some influence to bear on the situation" and "act as a middle man" between the defendant and his wife.[127] Thus, the pastor concluded he could testify—reasoning the trial and appellate court accepted.[128]

Between statutes dependent on clergy's interpretations of religious disciplines and clergy's own line drawing, the scope of protected communications is narrowing. This suggests a more discrete subset of protection may achieve the "full and satisfactory maintenance of the relationship" between cleric and communicant, thus further challenging the need for an absolute privilege.

D. The Confidentiality Requirement

Third, statutes uniformly privilege only confidential spiritual communications. Despite differences in black letter law, in application, clergy testimony frequently resolves the inquiry. This testimony shows clergy adopting restrictive definitions of confidentiality, thus challenging the traditional justification's "empirical assumption" that sweeping "confidentiality is essential" to protect the clergy-communicant relationship.

Some courts focus on the communicant's subjective expectations that the communication is confidential.[129] This approach invites self-serving

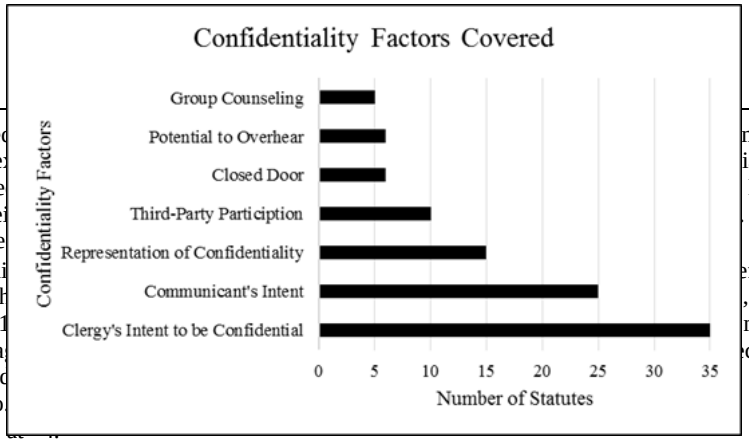
[124] 28 N.E.3d 1, 3 (Mass. App. Ct. 2015), rev. denied, 35 N.E.3d 721 (Mass. 2015).
[125] Id. at 4.
[126] Id. (alteration in original).
[127] Id.
[128] Id. But see State v. Gerhart, 129 S.W.3d 893, 899–900 (Mo. Ct. App. 2004) (denying privilege after minister characterizes conversation with communicant about her miscarriage as "simply a 'Hi, how are you' type conversation").
[129] See, e.g., Gonzalez v. State, 21 S.W.3d 595, 598 (Tex. App. 2000), aff'd, 45 S.W.3d 101 (discussing how "appellant's subjective intent would have been relevant" to evaluating privilege); State v. Glenn, 62 P.3d 921, 926 n.5 (Wash. Ct. App. 2003) (subjective).

statements, particular by defendant communicants asserting the privilege.[130] Aware of this, courts rely on clergy testimony as a check on a communicant's claims of expected confidentiality.

For example, in *State v. Cardenas*, a Minnesota Court of Appeals decision, the defendant was accused of sexual assault.[131] He testified that he had a ten-year-long relationship with his pastor and sought him out to speak privately about the wrongdoing.[132] With this testimony, the defendant's subjective intent no longer controlled. Instead, the analysis converted to whether the cleric would confirm or refute the communicant's intent.[133]

Other courts adopt an objective standard, requiring that communicants have a reasonable expectation of confidentiality.[134] This standard is intended to "separate[] idiosyncratic views from reasonable ones and disregards subjective thoughts that are not conveyed."[135] Under this approach, courts consider various factors, as set forth in Figure 7.

Figure 7



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[131] No…

[132] Id. …

[133] Id. at *4–5.

[134] See, e.g., State v. Mark R., 17 A.3d 1, 8 (Conn. 2011) ("In evaluating claims of privilege, we assess the confidentiality of a communication according to a standard of objective reasonableness."); State v. J.G., 990 A.2d 1122, 1131 (N.J. 2010) ("We agree that the test should be an objective one."); State v. List, 636 A.2d 1054, 1057 (N.J. Super. App. Div. 1993) (finding defendant's letter to his pastor, "left for anyone to find and read" in unsealed file folder in a file cabinet in defendant's abandoned house, was not made with "a reasonable expectation of confidentiality"); see also In re Grand Jury Investigation, 918 F.2d 374, 377 (3d Cir. 1990) (holding privilege only protects persons "who reasonably expect that their words will be kept in confidence").

[135] *J.G.*, 990 A.2d at 1131.

These factors include whether the cleric and communicant met in private, the nature of their relationship, the type of information shared, and any promises of confidentiality.[136] While clergy actively preserve confidentiality in some cases,[137] their conduct and testimony more frequently generate new, more restrictive interpretations of confidentiality.

For example, rather than actively helping "people handle their anxieties, guilts, fears, rages, doubts, and despairs,"[138] some clergy are setting boundaries that limit such disclosures. This includes meeting with individuals in public places,[139] conducting meetings with office doors left open,[140] bringing third parties to meetings with potential communicants,[141] or otherwise discouraging a communication.[142] Often,

[136] See, e.g., Scott v. Hammock, 133 F.R.D. 610, 615 (D. Utah 1990) (considering who initiated the meeting and the location of the meeting); State v. MacKinnon, 957 P.2d 23, 28–29 (Mont. 1998) (considering representations of confidentiality, who attended, lack of promised confidentiality, and the location of the meeting); *J.G.*, 990 A.2d at 1133–34 (considering the nature of the relationship between the cleric and the penitent, and the fact that the pastor and defendant met in private).

[137] Clergy are more protective of jail or hospital communications than courts. However, the trend is to deny the privilege to communications where, even for reasons outside the communicants' control, an expectation of confidentiality is unrealistic. In such settings, the finding of privilege post 2000 drops to one out of eight cases. See, e.g., State v. Gardiner, 898 P.2d 615, 619 (Idaho Ct. App. 1995) (finding discussion with hospital chaplain not confidential because hospital staff could enter the room where communications occurred). That said, some jurisdictions, like Texas, recognize these challenges and thus minimize this requirement in such settings, requiring only that the parties attempt to keep the communication as confidential as possible given these obstacles to true privacy. See, e.g., Nicholson v. Wittig, 832 S.W.2d 681, 685 (Tex. App. 1992) ("It is difficult to conceptualize a hospital setting that affords complete privacy to a chaplain and a communicant in circumstances where a family member is undergoing surgery. Common experience tells us that, more often than not, the chaplain will be assisting the family by affording company and comfort in the waiting room of a surgical suite, recovery room, or intensive care unit.").

[138] Ronald Goldfarb, In Confidence: When to Protect Secrecy and When to Require Disclosure 124–25 (2009).

[139] See People v. Peterson, 47 N.E.3d 1005, 1053 (Ill. App. Ct. 2015), reh'g denied (Dec. 16, 2015), appeal allowed, 48 N.E.3d 1095 (Ill. 2016); *MacKinnon*, 957 P.2d at 28.

[140] See, e.g., State v. Mark R., 17 A.3d 1, 6 (Conn. 2011) (open door); State v. Beloved, No. 14–1796, 2015 WL 8390222, at *2, *4 (Iowa Ct. App. 2015) (open door).

[141] See, e.g., State v. Pulley, 636 S.E.2d 231, 241 (N.C. Ct. App. 2006) (discussing how cleric intentionally brought other ministers and a church elder to meeting with communicant).

[142] See, e.g., *Cartmell*, 2014 WL 3056164, at *24 (discussing chaplain telling defendant that "he did not need to tell him what happened").

clergy urge the communicant to go to the police and share the communication.[143] In some instances, they go further, directly telling communicants early in conversations that they will not maintain a communicant's confidences.[144] Alternatively, some negate a potential privilege by repeating the communication to another person.[145]

At trial, clergy's conduct continues to limit when a communicant has a reasonable expectation of confidentiality. Clergy have testified despite previous promises to maintain the communicant's confidentiality.[146] As courts permit such testimony, it greatly narrows the concept of objective confidentiality. A communicant cannot rely on clerical representations of confidentiality to establish this required element.[147]

Where clergy testimony is particularly pivotal, though, is in jurisdictions that consider religious doctrine to evaluate confidentiality.[148] For these courts, a communication is objectively

[143] See, e.g., Bordman v. State, 56 S.W.3d 63, 66 (Tex. App. 2001) (discussing how Pastor and elders repeatedly urged defendant to confess).

[144] See, e.g., Cline v. Commonwealth, No. 2012-CA-001870-MR, 2014 WL 2159281, at *1 (Ky. Ct. App. May 23, 2014) (involving a cleric telling defendant to "stop right there. I'm a minister, and I'm a mother first, and I don't want to hear anymore of this"); State v. Hancock, No. M2012-02307-CCA-R3-CD, 2014 WL 7006969, at *6 (Tenn. Crim. App. Dec. 12, 2014), appeal denied (May 14, 2015) (noting clergy "made it clear to the defendant during these conversations that his paramount concern was locating the victim and that he intended to share with the police anything the defendant revealed regarding the victim's disappearance").

[145] See, e.g., State v. Gray, 891 So. 2d 1260, 1262 (La. 2005) (finding conversation not confidential because communicant failed to object to minister calling another pastor for assistance).

[146] See, e.g., People v. Edwards, 248 Cal. Rptr. 53, 54 (Cal. Ct. App. 1988) (telling communicant conversation would be confidential but then requiring disclosure to provide guidance); Hester v. Barnett, 723 S.W.2d 544, 550 (Mo. Ct. App. 1987) ("Notwithstanding the prior assurances [of confidentiality], the minister divulged to deacons of the church and members of the community the confidential communications from the family, and without their authority.").

[147] Commonwealth v. Kebreau, 909 N.E.2d 1146, 1158–59 (Mass. 2009) ("At the beginning of the meeting, Pastor Ralph announced 'rules' for the meeting, including that any discussion at the meeting would remain confidential," though at trial the pastor willingly testified.); Commonwealth v. Vital, 988 N.E.2d 866, 869–70 (Mass. App. Ct. 2013) ("Before disclosing the details of the incident, the defendant first asked the pastor whether he would have to testify against the defendant if a case were to ever proceed to trial. The pastor replied that he did not think that he would have to testify," but the pastor proceeded to testify at trial.).

[148] See, e.g., Or. Rev. Stat. § 40.260(3) (2015) (preventing the examination of a clergy member "as to any confidential communication made to the member in the member's professional character, if, under the discipline or tenets of the member's church,

confidential once clergy identify some canonical basis to shield it.[149] This approach is similar to the "discipline-enjoined" restriction courts apply to the spiritual communications requirement and is equally problematic for confidentiality. Religious doctrine—particularly for the many Protestant religions that dominate the American religious landscape—is frequently inconclusive on these confidentiality queries. Thus, different clergy's interpretations generate conflicting conclusions—thus challenging how essential confidentiality is.

For example, consider two Michigan cases involving communications with Baptist ministers. Both involved allegations of criminal sexual misconduct.[150] In both, the ministers learned of the abuse and spoke to the defendants in the private setting of their offices.[151] In both, the defendants admitted their wrongdoing, and the clergy reported the abuse to the police.[152] The courts splintered on whether the communications were privileged, though, based on conflicting representations by the clergy regarding confidentiality.[153] In one, the cleric testified that under Baptist doctrine, the communication was confidential.[154] In the other, the pastor stated, "under Baptist doctrine, the circumstances of his meeting

denomination or organization, the member has an absolute duty to keep the communication confidential").

[149] See, e.g., State v. Billman, No. 12 MO 3, 2013 WL 6859096, at *14 (Ohio Ct. App. Dec. 16, 2013) (relying on Pastor's representations regarding canonical teaching to evaluate confidentiality); State v. Cox, 742 P.2d 694, 696 (Or. Ct. App. 1987) ("[Minister] also testified that, as a Mormon minister, he had a duty under the discipline of the church not to disclose confidential communications made to him.").

[150] Compare People v. Richard, No. 315267, 2014 WL 2881081, at *1 (Mich. Ct. App. June 24, 2014), with People v. Bragg, 824 N.W.2d 170, 174 (Mich. Ct. App. 2012).

[151] Compare *Richard*, 2014 WL 2881081, at *4 (discussing setting of conversation), with *Bragg*, 824 N.W.2d at 175 (discussing setting of conversation).

[152] Compare *Richard*, 2014 WL 2881081, at *1 (reporting to police), with *Bragg*, 824 N.W.2d at 187 (reporting to police).

[153] Compare *Richard*, 2014 WL 2881081, at *6 (finding communications were not privileged because "under Baptist doctrine, the circumstances of [the pastor's] meeting with defendant did not trigger . . . confidentiality"), with *Bragg*, 824 N.W.2d at 187 (finding communications were privileged because pastor "testified that under Baptist doctrine his communication with defendant would have been considered confidential").

[154] *Bragg*, 824 N.W.2d at 176 ("The prosecutor inquired, '[U]nder the Baptist doctrine, under your church rules, would this communication that you had with him, and the nature how the communication came about, would that be . . . considered a confidential communication?' [Pastor] Vaprezsan responded, 'I'm sure it would.'" (alteration in original)).

with defendant did not trigger that confidentiality" because the conversation involved abuse.[155]

As courts rely on clergy testimony to decide confidentiality, other fractures appear in the assumption that absolute confidentiality is essential to the clergy-communicant relationship. Notably, clergy are less likely to characterize communications regarding violent crimes as confidential.[156] This directly contributes to a higher rate of privilege denials in such cases.[157]

For example, the Alabama Court of Appeals in *Tankersley v. State* relied on clergy testimony to hold a communicant must affirmatively request confidentiality.[158] There, the defendant called his pastor and discussed his desire to kill his ex-girlfriend. The pastor had spiritually counseled the defendant repeatedly in the past.[159] At the subsequent murder trial, the pastor refuted the communicant's claim of confidentiality. Rather than push for a protective definition of confidentiality, the pastor argued for carve-outs. She maintained the conversation was not confidential because "not one time did [defendant] say, I am talking to you as a pastor or this is a confidential conversation."[160] The pastor maintained she owed no obligation of confidence for threats of violence—a position not supported by the state privilege statute. Nonetheless, the trial court adopted the pastor's restrictions, which the appellate court affirmed by finding a lack of privilege.[161]

Thus, through both pretrial conduct and litigation testimony, clergy challenge the necessity—from a cleric's perspective—of an absolute privilege. Though they continue to shield confidential, spiritual communications received in their professional capacity, clergy's

[155] *Richard*, 2014 WL 2881081, at *1–2, 6.

[156] This is true even of communications made in otherwise confidential spiritual counseling. See, e.g., Gonzalez v. State, 45 S.W.3d 101, 102 (Tex. Crim. App. 2001) (involving the disclosure communication between a Pastor and the appellant, whom the pastor was counseling because the appellant did not care about the pastor's ability to keep secrets).

[157] Denial rate in violent crimes cases is 72.22%. See Bartholomew Clergy Data, supra note 54.

[158] 724 So.2d 557, 561–62 (Ala. Crim. App. 1998).

[159] In fact, as the trial court noted, "The evidence indicated that [the defendant] had always called Pastor Henderson for spiritual guidance during times of distress." Id. at 561.

[160] Id. at 560.

[161] Id. at 562, 566.

definition of qualifying conversations is narrower than existing statutory protection. These trends, however, only partially untangle the twisted history of privilege's decline. Why courts rely on clergy testimony and why clergy testify contribute to the narrative. As the next Part explains, these answers challenge whether an absolute clergy privilege is even necessary—let alone realistic.

III. UNDERSTANDING THE HOW AND WHY

By their own words and conduct, clergy defy the traditional justification for absolute clergy privilege statutes. Rather than a relationship that should always be "sedulously fostered,"[162] jurisprudence shows clergy drawing ad hoc boundaries with communicants. Rather than treating confidentiality as "essential to the full and satisfactory maintenance" of those relationships,[163] clergy willingly testify on a case-by-case basis. These cases only partially explain the privilege's decline. This Part steps back to explore the factors that merged to give clergy significant say in privilege determinations. This Part then considers why clergy embrace a more qualified privilege. Combined, the following two Sections help explain the findings in Part II.

A. How Clergy Testimony Became Pivotal

Legislative and judicial dogmatic adherence to an absolute privilege has contributed to its decline. Sweeping statutory protection has pushed clergy to act as quasi-legislators, articulating boundaries that reflect canonical and judicial ends. Similarly, courts approach privilege determinations with increased judicial skepticism yet concurrently insist on maintaining an absolute privilege. This, too, foists responsibility to define the privilege on clergy, as discussed next.

1. How Legislative Imprecision Opened the Door

First, the inexactitude of state statutes triggers increased judicial reliance on clergy testimony for privilege determinations. The majority of state statutes adopt the same opaque language from the original New

[162] 8 Wigmore, supra note 42, § 2285.
[163] Id.

York statute.[164] Legislators have done little to decode some of the generic requirements from the initial statute.

For example, take Iowa's basic requirement that clergy be "the minister of the gospel."[165] This requirement necessarily turns on religious doctrine. As one court explains:

> What is a "minister of the gospel" within the meaning of [Iowa Code, Section 622.10]? The law as such sets up no standard or criterion. That question is left wholly to the recognition of the "denomination." The word "minister," which in its original sense meant a mere servant, has grown in many directions and into much dignity. Few English words have a more varied meaning. In the religious world it is often, if not generally, used as referring to a pastor of the church and a preacher of the gospel. This meaning, however, is not applicable to all Christian denominations. Some of them have no pastors and recognize no one as a minister in that sense, and yet all denominations recognize the spiritual authority of the church and provide a source of spiritual advice and discipline.[166]

Similarly, defining "confessions" pushes courts to consider clergy testimony. Courts could require disclosure of the entirety of the communication and make their own evaluation about whether it is a confession. However, doing so conflicts with the notion of a testimonial

[164] Compare, e.g., N.Y. Rev. Stat. § 72, pt. III, ch. VII, tit. 3, art. 8 (1829) (since amended) ("No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination."), with Ariz. Rev. Stat. Ann. § 13-4062 (2010) ("A clergyman or priest, without consent of the person making the confession, as to any confession made to the clergyman or priest in his professional character in the course of discipline enjoined by the church to which the clergyman or priest belongs."), and Mont. Code Ann. § 26-1-804 (2015) ("A member of the clergy or priest may not, without the consent of the person making the confession, be examined as to any confession made to the individual in the individual's professional character in the course of discipline enjoined by the church to which the individual belongs.").

[165] See Iowa Code Ann. § 4608 (1913) (since amended). Iowa subsequently revised its privilege to cover communications with equally undefined "member of the clergy." Iowa Code § 622.10 (2017).

[166] Reutkemeier v. Nolte, 161 N.W. 290, 292 (Iowa 1917).

privilege: parties would still have to disclose the confidence.[167] Faced with this conundrum, courts instead adopt clergy's labeling.

Legislators' efforts to expand clergy privilege statutes increase clergy influence. For example, as previously detailed in Subsection II.B.2, rather than first locking down the definition of confession, legislators in most states increased the categories of protected communications.[168] These new categories are equally imprecise. Take, for example, state statutes that protect communications offering "comfort."[169] Such a broad term necessitates further judicial interpretation: are the contents of prayer between clergy and communicants covered? What about blessings during times of crisis: are they "comfort?" Should it matter who initiates the conversation?

In rare instances, state legislators have attempted to remedy these vague requirements. The results, however, only further complicate interpretation. For example, fifteen states impose the previously discussed "discipline-enjoined" requirement.[170] "Discipline," though, is hardly self-defining.[171] As the Minnesota Supreme Court explains, "The

[167] Cf. In re Grand Jury Investigation, 918 F.2d 374, 388 (3d Cir. 1990) (finding that courts must consider delicate first amendment issues when conducting *in camera* hearings to determine whether communications are privileged).

[168] See, e.g., Ind. Code Ann. § 34-46-3-1(3) (LexisNexis 2008); Mass. Gen. Laws ch. 233, § 20A (2016); Minn. Stat. § 595.02 (2016); N.J. Stat. Ann. § 2A:84A–23 (West 2011) (amended in 1994 to include "privileged communications" such as confessions, counseling, and other communications); Utah R. Evid. 503 n.(b) (amended to extend the privilege beyond "doctrinally required confessions").

[169] See, e.g., Ala. Code § 12-21-166 (2012) (applying privilege to person communicating "(1) to make a confession, (2) to seek spiritual counsel or comfort, or (3) to enlist help or advice in connection with a marital problem"); Ga. Code Ann. § 24-5-502 (2013) (protecting "[e]very communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling"); Mass. Gen. Laws ch. 233, § 20A (2016) (protecting "any communication made to him by any person in seeking religious or spiritual advice or comfort, or as to his advice"); Minn. Stat. § 595.02 (2016) (protecting "religious or spiritual advice, aid, or comfort or advice").

[170] See Ariz. Rev. Stat. Ann. § 12-2233 (2016); Cal. Evid. Code § 1032 (Deering 2004); Colo. Rev. Stat. § 13-90-107 (2017); D.C. Code § 14-309 (2001); Fla. Stat. § 90.505 (2016); Idaho Code § 9-203 (2010); 735 Ill. Comp. Stat. Ann. 5/8-803 (2016); Mich. Comp. Laws Serv. § 600.2156 (2004); Mont. Code Ann. § 26-1-804 (2015); Or. Rev. Stat. § 40.260 (2015); 9 R.I. Gen. Laws § 9-17-23 (2012); Tenn. Code Ann. § 24-1-206 (2000); Utah Code Ann. § 78B-1-137 (LexisNexis 2012); Va. Code Ann. § 8.01-400 (2015); Wash. Rev. Code § 5.60.060 (2016); W. Va. Code Ann. § 57-3-9 (LexisNexis 2012); Wyo. Stat. Ann. § 1-12-101 (2017).

[171] See, e.g., Cassidy, supra note 13, at 1640–44 (discussing judicial splits in interpreting the "discipline enjoined" requirement).

word 'discipline' has various meanings. It may relate to education. It involves training and culture. It may mean training in moral rectitude, and it was probably in part so used here. It may refer to rules and duties. The word has no technical legal meaning . . . ." [172] Or, as Professor Mary Mitchell more colorfully explains, "Such sloppy drafting leaves unanswered the question of the privilege's application to most confidential communications to most clergy! Few churches *require* their members to make private confessions to clergy; probably none *require* their members to seek counseling."[173] While courts adopt conflicting interpretations to this "discipline-enjoined" requirement,[174] clergy keep chipping away against legislative efforts to broaden protection. In doing so, clergy are not acting with malice or indifference to the communicants. Rather, the cases highlight clergy discomfort with an absolute privilege.

Imprecise terms, alone, are not necessarily problematic. As Judge Ruggero Aldisert explains: "Case-by-case development allows experimentation because each rule is re-evaluated in subsequent cases to determine whether it produces a fair result. If it operates unfairly, it can be modified."[175] Rather, the point here is that legislators have failed to revisit the privilege in response to clergy's case-by-case approach.[176] This leaves courts to balance potentially wide-reaching statutory

[172] In re Swenson, 237 N.W. 589, 590 (Minn. 1931).

[173] Mitchell, supra note 49, at 754.

[174] In the face of this ambiguity, some courts ignore the "discipline-enjoined" requirement, others wade into murky religious doctrine, and still others impose it to construe both the "communication" and "confidentiality" requirements. Compare, e.g., Nussbaumer v. State, 882 So. 2d 1067, 1076 (Fla. Dist. Ct. App. 2004) (merging "discipline-enjoined" and professional capacity requirements), and *Swenson*, 237 N.W. at 591 (same), with, e.g., State v. Martin, 975 P.2d 1020, 1025 (Wash. 1999) (defining the state's "discipline enjoined" requirement as clergy's doctrinal obligations to hear a confidence), and People v. Johnson, 75 Cal. Rptr. 605, 607 (Cal. Ct. App. 1969) (same), and Scott v. Hammock, 870 P.2d 947, 955–56 (Utah 1994) (considering the "discipline of [the clergy's] church" to evaluate whether a nonpenitential communication was privileged), and Ball v. State, 419 N.E.2d 137, 139–40 (Ind. 1981) (permitting testimony of Baptist minister regarding parishioner's admission to murders because constitution of church did not require pastoral confession, or confidential pastor-parishioner discussion with respect to crime), and People v. Richard, No. 315267, 2014 WL 2881081, at *1 (Mich. Ct. App. June 24, 2014) (considering religious practices for both confidentiality and communication requirements), and State v. Billman, No. 12 MO 3, 2013 WL 6859096, at *13–14 (Oh. Ct. App. Dec. 16, 2013) (same).

[175] Ruggero J. Aldisert, The Honorable Ralph Cappy: Distinguished Keeper of the King's Bench Tradition, 47 Duq. L. Rev. 481, 482 (2009).

[176] See supra Part II.

protection against their obligation to interpret privileges narrowly. This impossible tightrope act leaves courts relying on clergy testimony to reach more restrained privilege determinations.

2. How the Judiciary Began Deferring to Clergy

The lack of legislative guidance is but one source of judicial reliance on clergy in privilege determinations. A change in how ardently courts interrogate the privilege also creates room for greater clergy influence.

For over a century, most courts only loosely examined clergy privilege assertions. A decision may address a single requirement or generically recite the requirements with little analysis.[177] However, the growth of clergy privilege assertions in the late 1980s brought a corresponding greater scrutiny of the privilege's requirements. Rather

[177] For example, in *Milburn v. Haworth*, the Supreme Court of Colorado subjected the defendant's clergy privilege assertion to minimal scrutiny, simply stating:

> The statements made by the defendant to his fellow churchmen, including the minister, were not made to the minister in his professional character in the course of discipline enjoined by the particular church. . . . The statements were made in the same manner that they would have been made to any other four gentlemen whom the defendant might call together.

108 P. 155, 156 (Colo. 1910). The court did not address any of the criteria for the requirement in depth nor attempt to detail how it reached its conclusion. This hands-off, deferential approach continues today in Washington and Oregon, where courts only loosely question a clergy privilege challenge. For example, in most other states, courts trend towards refusing the privilege in cases of child abuse. See, e.g., State v. Latham, No. E2006-02262-CCA-R3CD, 2008 WL 748381, at *20 (Tenn. Crim. App. Mar. 20, 2008) (finding communication by defendant accused of aggravated child abuse not privileged because the chaplain was merely a bystander); Maldonado v. State, 59 S.W.3d 251, 253 (Tex. App. 2001) (finding communication by defendant accused of indecency with a child to a bishop not privileged because the bishop was not acting in his professional character as a spiritual advisor). In Oregon and Washington, though, the trend is the opposite. See, e.g., State v. Cox, 742 P.2d 694, 696–97 (Or. Ct. App. 1987) (finding defendant's confession of sexual intercourse with his step-daughter privileged based on cleric's promise of confidentiality, despite defendant's testimony that "he did not want [the clergy] to withhold any testimony"); "Jane Doe" v. Corp. of President of Church of Jesus Christ of Latter-Day Saints, 90 P.3d 1147, 1151–52 (Wash. Ct. App. 2004) (accepting church's statement that all disciplinary investigations are confidential, thus finding defendant's communications regarding allegations of abuse to eighteen church council members privileged despite lack of finding the participants were clergy); State v. Glenn, 62 P.3d 921, 925–27 (Wash. Ct. App. 2003) (finding communication by defendant accused of child molestation and rape to his church elder privileged despite the church's lack of a "doctrine of confession" and the clergy's statement that he did not consider defendant's communication a confession).

than accepting wholesale assertions of privilege, courts began scrutinizing them more closely, evaluating each requirement at length.[178]

This increased scrutiny, particularly of the confidentiality requirement, is not isolated. The judiciary has already narrowed privacy rights in both intellectual property[179] and Fourth Amendment jurisprudence.[180] This same trend is now evident in the clergy privilege; though in this context, this skepticism has other roots as well. Though it would be overreaching to draw a causal connection, the timing of both the 1980s televangelist scandals[181] and the more recent clergy abuse scandals suggests it would be naïve to ignore their impact. As illustrated in Figure 8, a wave of clergy privilege denials followed the televangelist scandals and a corresponding drop in Americans' confidence in organized religion.[182] A second wave of denials followed in 2002, when societal confidence began a free fall from which it has yet to recover.[183]

[178] See, e.g., People v. Campobello, 810 N.E.2d 307, 321–22 (Ill. App. Ct. 2004) (analyzing multiple statutory requirements before denying privilege); *Richard*, 2014 WL 2881081, at *3–6 (analyzing each statutory requirement). This is not universal though. See, e.g., Cline v. Commonwealth, No. 2012-CA-001870-MR, 2014 WL 2159281, at *2 (Ky. Ct. App. May 23, 2014) (analyzing only communication requirement); Lundman v. McKown, 530 N.W.2d 807, 829 (Minn. Ct. App. 1995) (same).

[179] See, e.g., Neil Richards, Intellectual Privacy: Rethinking Civil Liberties in the Digital Age 82–83 (2015) (discussing Supreme Court jurisprudence narrowing privacy rights).

[180] See, e.g., Schuyler B. Sorosky, *United States v. Forrester*: An Unwarranted Narrowing of the Fourth Amendment, 41 Loy. L.A. L. Rev. 1121, 1137 (2008). See generally Albert W. Alschuler, Interpersonal Privacy and the Fourth Amendment, 4 N. Ill. U. L. Rev. 1, 16–17 (1983) (detailing the Supreme Court's narrowing of Fourth Amendment standing).

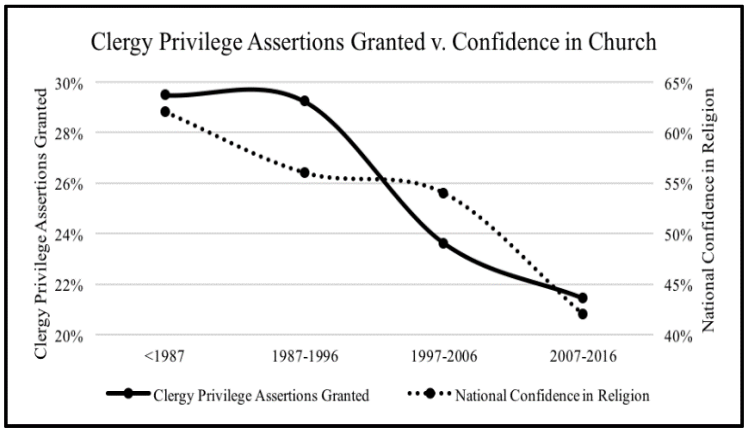
[181] Three then-prominent televangelists had scandals in the late 1980s: Jimmy Baker, Pat Robinson, and Jimmy Swaggart. First, in 1987, Baker admitted to having an affair and paying his secretary, Jessica Hahn, to conceal a sexual encounter. The next year, he was indicted for fleecing his congregation of $150 million. He was convicted in 1989. Meanwhile, in 1987, Pat Robertson admitted to lying about his marriage to conceal the premarital conception of a child. Then, Jimmy Swaggart, another televangelist whose ministry was broadcasted on more than 250 television stations, was implicated in two scandals with prostitutes after Swaggart exposed a fellow minister of adultery. Swaggart's transgressions culminated with a famous speech in February 1988, during which he confessed. Ann Rowe Seaman, Swaggart: The Unauthorized Biography of an American Evangelist 341 (1999).

[182] Jeffrey M. Jones, Confidence in U.S. Institutions Still Below Historical Norms, Gallup Org. (June 15, 2015), http://www.gallup.com/poll/183593/confidence-institutions-below-historical-norms.aspx (noting a 13% decline in confidence in churches and religious institutions in 2015 compared to historical averages).

[183] Mark Chaves, American Religion: Contemporary Trends 79 (2013) (analogizing the drop comparable "in magnitude to the sudden drop in confidence in banks and financial institutions caused by the 2008 global financial crisis").

Notably, 2002 marked the publication of the Boston Globe report of the clergy abuse scandals—reporting that began a "firestorm of negative publicity" for religious institutions.[184]

Figure 8



As confidence dropped, judicial interrogation of privilege assertions deepened. The response to the clergy abuse by some religious institutions only fueled judicial skepticism. Rather than mirroring the general trend of clergy narrowly interpreting the privilege, in the church sex abuse cases, clergy uniformly pushed for blanket protection.[185] Many churches raised clergy privilege objections to shield communications by alleged clergy perpetrators to their superiors[186] and fellow priests.[187] These cases reflect a self-interested interpretation of the privilege, where

[184] Id.

[185] See, e.g., Roman Catholic Archbishop v. Superior Court, 32 Cal. Rptr. 3d 209, 216, 231 (Ct. App. 2005), as modified on denial of reh'g (Aug. 16, 2005) (discussing how appellant Archbishop improperly asserted blanket privilege assertions for twenty-two document requests); People v. Campobello, 810 N.E.2d 307, 311–12 (Ill. App. Ct. 2004) (reflecting monsignor's refusal to produce any of the requested documents in clergy abuse case).

[186] See, e.g., Ex parte Zoghby, 958 So. 2d 314, 325 (Ala. 2006) (evaluating clergy privilege assertion over defendant priest's communications to his Archbishop); *Campobello*, 810 N.E.2d at 311 (deciding whether clergy privilege applied to priest's records maintained by his monsignor); Hutchison v. Luddy, 606 A.2d 905, 908 (Pa. Super. Ct. 1992) (evaluating defendant priest's communications in church's "secret archive").

[187] Kos v. State, 15 S.W.3d 633, 638–40 (Tex. App. 2000) (addressing priest's assertion of privilege regarding communications to a fellow priest).

clergy claimed virtually every document between a cleric and superior was privileged.[188]

While this absolutist approach appears across denominations in church sex abuse cases,[189] the Roman Catholic church, most notably, has urged broader privilege coverage, even when a priest is the victim in a case. For example, in *Commonwealth v. Stewart*, the defendant was charged with murdering a priest.[190] As part of his defense, he asserted self-defense and sought production records regarding the priest's alleged alcohol and drug use; any allegations of misconduct or disciplinary action; and all personal records, correspondence, diaries, or similar documents maintained by the Reverend.[191] The Church refused to produce any of these materials in whole or part, asserting clergy privilege. The trial court rejected such a sweeping interpretation, noting "it is clear that the [clergy privilege] statute does not provide blanket protection for all documents in the hands of the Diocese simply because of the Diocese's status as a religious organization."[192]

It may not be surprising that skepticism towards religious institutions impacts judicial willingness to shield religious communications. With

[188] For example, in *Hutchison v. Luddy*, the plaintiff, an alleged victim of sexual assault by Father Luddy, sought discovery of three categories of documents, all of which were related to the Church's investigation of wrongdoing:

> (1) documents in the Canon 489 file which in any way pertain to Father Francis Luddy, for the years 1974 through the present. (Request for Production No. 27).
>
> (2) documents in the Canon 489 file which pertain to any alleged and/or actual reports of sexual involvement with minor male children by priests in the Altoona–Johnstown Diocese, for the years 1974 through the present. (Request for Production No. 28).
>
> (3) documents in the Canon 489 file relating to a specifically named priest. (First Supplemental Request for Production No. 9).

606 A.2d at 906. The defendants categorically refused, providing blanket assertions of privilege, which the Superior Court of Pennsylvania subsequently denied for failure to establish how the privilege applied to each document. Id.

[189] State v. Dotseth, 766 N.W.2d 648, 648 (Iowa Ct. App. 2009) (asserting privilege in Church of One abuse case); Vermilye v. State, 754 S.W.2d 82, 86 (Tenn. Crim. App. 1987) (claiming privilege in Episcopalian priest abuse scandal). This self-protecting interpretation applies even when the cleric is the victim, not the defendant. See, e.g., Commonwealth v. Stewart, 690 A.2d 195, 196–97, 200–01 (Pa. 1997) (noting in case involving murder of priest wherein defendant sought victim's personnel records where it is unclear whether the requested information is within the privilege, an *in camera* review of the documents is appropriate).

[190] 647 A.2d 597, 598 (Pa. Super. Ct. 1994).

[191] Id. at 599.

[192] Id. at 601.

clergy pushing for blanket privileges in child abuse cases, courts responded with across-the-board increased scrutiny of clergy privilege assertions[193]—even in non-abuse cases.[194] What is a bit surprising, though, is the judicial decision to embrace clergy testimony, rather than shy away from it.[195] This is particularly surprising given confidence in religious leaders has declined at a faster rate than for leaders of any other institutions.[196] Given the problems with the statutory language previously detailed,[197] courts have had little choice but to depend on the clergy to shape the privilege. Judicial reliance on court-appointed experts or other neutral sources is problematic. Such an approach requires courts to undertake independent fact finding as courts weigh competing religious testimony to interpret canonical law. As one court explains the problem, "civil judges attempting to apply such a test would first have to identify and define the specific religious tenets of a particular religion, which may not always be readily apparent."[198] Further, identifying neutral experts is difficult, given how prevalent

[193] For example, in clergy abuse cases, courts increasingly rely on *in camera* reviews to evaluate such assertions. See, e.g., Hethcote v. Norwich Roman Catholic Diosean Corp., No. X04CV054003450S, 2007 WL 1121361, at *1 (Conn. Super. Ct. Apr. 3, 2007) (applying *in camera* review); People v. Campobello, 810 N.E.2d 307, 321–22 (Ill. App. Ct. 2004) (same).

[194] A comparison of two Massachusetts appeals, just over two decades apart, shows this trend towards increased scrutiny of clergy privilege assertions. Compare Commonwealth v. Nutter, 28 N.E.3d 1, 4, review denied, 35 N.E.3d 721 (Mass. App. Ct. 2015) (affirming the denial of clergy privilege in a child abuse case after exploring the relationship between the clergy and communicant and the content of the communication at issue), with Ryan v. Ryan, 642 N.E.2d 1028, 1034 (Mass. 1994) (affirming granting of privilege in annulment case by assuming the communication "may well have literally involved 'seeking religious or spiritual advice or comfort'").

[195] The argument here is not that courts suddenly began relying on clergy testimony. Rather, from inception, clergy privilege cases often turned on clergy testimony. See, e.g., People v. Gates, 13 Wend. 311, 323 (N.Y. Sup. Ct. 1835) ("An objection was made to the proof of certain admissions made by the defendant, on the ground that they were confessions made to a clergyman. The answer to this objection is found in the testimony of Dr. Ludlow, that he did not consider the communication made to him in his professional character, or as a clergyman."). Increased judicial scrutiny generated greater reliance on clergy testimony.

[196] Chaves, supra note 183, at 79.

[197] See supra Subsection III.A.1.

[198] State v. J.G., 990 A.2d 1122, 1132 (N.J. 2010).

different canonical interpretations are.[199] To minimize this questionable judicial religious entanglement,[200] courts turn to the clergy witness.

This reliance perpetuates continued reliance on clergy testimony by stunting the development of common law interpretations of the privilege's requirements. By relying on clergy testimony, trial courts are making factual, not legal findings. These fact findings are subject to abuse of discretion review.[201] This limits appellate review, where reversal is limited to "arbitrary, irrational, capricious, whimsical, fanciful, or unreasonable" decisions.[202] Unlike the *de novo* review afforded to questions of law, this extreme deference limits appellate

[199] See supra Section II.D.

[200] Judicial interpretation of religious doctrine walks a fine constitutional line. Under the Establishment Clause, government activity (including conduct by the judiciary) must not foster excessive entanglement with religion. See Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (setting forth a three-part test for Establishment Clause claims and including excessive entanglement as the third prong). By turning to religious doctrine to identify religiously necessary or confidential communications, courts must delve into questions of doctrine and faith—the very intertwining prohibited under the Establishment Clause. See Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969) (noting civil courts may not "determine matters at the very core of religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion"); Jane E. Mayes, Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern, 62 Ind. L.J. 397, 408 (1987) (discussing how "religious confidentiality statute[s] launch[] state investigations into religious doctrines and provide[] for government surveillance of religious institutions, [which] leaves the state and religion closely intertwined, a result forbidden by the establishment clause"); cf. Klagsbrun v. Va'ad Harabonim of Greater Monsey, 53 F. Supp. 2d 732, 739–42 (D.N.J. 1999) (dismissing defamation claim because "questions of religious doctrine permeate" complaint and resolving claim would "delve dangerously into questions of doctrine and faith"), aff'd o.b., 263 F.3d 158 (3d Cir. 2001); Abdelhak v. Jewish Press, 985 A.2d 197, 200 (N.J. App. Div. 2009) (dismissing defamation claim that would invite excessive entanglement contrary to First Amendment, because jury could not evaluate claim "without developing a keen understanding of religious doctrine, and without applying such religious doctrine to the facts presented").

[201] See, e.g., State v. Archibeque, 221 P.3d 1045, 1048 (Ariz. Ct. App. 2009) (where the court applies a three-pronged factual determination to decide the application of privilege); People v. Trammell, 345 P.3d 945, 947–48 (Colo. App. 2014), ¶10, cert. denied, No. 14SC335, 2015 WL 1205596 (Colo. Mar. 16, 2015) ("We will not disturb a trial court's evidentiary rulings absent a showing of an abuse of discretion."); accord Nicholson v. Wittig, 832 S.W.2d 681, 684 (Tex. App. 1992) (reviewing trial court's finding of privilege using an abuse of discretion standard); State v. Glenn, 62 P.3d 921, 924 (Wash. Ct. App. 2003) (reviewing trial court's finding of privilege using an abuse of discretion standard).

[202] Peter Nicolas, De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System, 54 Syracuse L. Rev. 531, 533 (2004) (internal quotation marks omitted).

courts from articulating clear, consistent guidelines to evaluate privilege determinations.[203] It also sacrifices the more cerebral and academic understanding of testimony that usually accompanies appellate decisions.[204]

Judicial reliance on clergy testimony only increases as courts issue unpublished or otherwise unciteable decision designations.[205] In California alone, more than one-third of clergy privilege cases are unpublished.[206] These unpublished opinions hinder the growth of a "coherent, consistent and intelligible body of case law."[207] When one court interprets a particular clergy privilege requirement in an

[203] See Robert L. Hess II, Judges Cooperating with Scientists: A Proposal for More Effective Limits on the Federal Trial Judge's Inherent Power to Appoint Technical Advisors, 54 Vand. L. Rev. 547, 586 (2001) (noting "the efficacy of mere abuse of discretion review is doubtful"). This problem with deferential evidentiary standards of abuse is not limited to the clergy privilege. See, e.g., Christine P. Bartholomew, Death by *Daubert*: The Continued Attack on Private Antitrust, 35 Cardozo L. Rev. 2147, 2179–80 (2014) (discussing how a deferential abuse of discretion review hinders evaluation of economic expert testimony); Amy B. Hargis & Joe R. Patranella, Rethinking Review: The Increasing Need for a Practical Standard of Review on *Daubert* Issues in Place of *Joiner*, 52 S. Tex. L. Rev. 409, 417 (2011) (arguing that trial courts evaluate economic expert testimony subjectively).

[204] See L. Steven Emmert, Appellate Law, 45 U. Rich. L. Rev. 169, 180 (2010); Jonah J. Horwitz, Social Insecurity: A Modest Proposal for Remedying Federal District Court Inconsistency in Social Security Cases, 34 Pace L. Rev. 30, 56 (2014) (discussing the appellate court's "capacity for attracting cerebral jurists").

[205] See, e.g., State v. Gil, No. 2 CA-CR 2013-0508, 2014 WL 4725805, at *1 (Ariz. Ct. App. Sept. 23, 2014); Candice S. v. Superior Court, No. H032683, 2008 WL 3274099, at *4 (Cal. Ct. App. Aug. 11, 2008); Hethcote v. Norwich Roman Catholic Diosean Corp., No. X04CV054003450S, 2007 WL 1121361, at *1 (Conn. Super. Ct. Apr. 3, 2007); People v. Pearson, No. 305957, 2012 WL 2919543, at *2 (Mich. Ct. App. July 17, 2012); State v. Schauer, No. A13-0500, 2014 WL 6608790, at *7 (Minn. Ct. App. Nov. 24, 2014); EMC, LLC v. Cooper, No. A-0948-10T4, 2012 WL 5381688, at *10 (N.J. Super. Ct. App. Div. Nov. 5, 2012); Jackson v. Futrell, No. M1999-01046-COA-R3-CV, 2000 WL 279900, at *3 (Tenn. Ct. App. Mar. 16, 2000); State v. Huffman, No. 50937–3–1, 120 Wash. App. 1038, (2004).

[206] See Bartholomew Clergy Data, supra note 54; Jennifer K. Anderson, Comment, The Minnesota Court of Appeals: A Court Without Precedent?, 19 Wm. Mitchell L. Rev. 743, 760–63 (1993) (discussing how a lack of published opinions makes it difficult to know to evaluate the current state of the law); see also People v. Rodriguez, No. G046114, 2012 WL 5992130 (Cal. Ct. App. Nov. 29, 2012); People v. Hoffman, No. F061127, 2012 WL 2583404 (Cal. Ct. App. July 5, 2012), as modified on denial of reh'g (July 30, 2012); *Candice S.*, 2008 WL 3274099; People v. Camacho, No. E037402, 2006 WL 3445491 (Cal. Ct. App. Nov. 30, 2006).

[207] Hart v. Massanari, 266 F.3d 1155, 1179 (9th Cir. 2001).

unpublished opinion, another court cannot rely on that decision.[208] Instead, the court reanalyzes the requirement anew,[209] with judges again turning to clergy to make fact-specific findings.[210]

Thus, increased judicial scrutiny of privilege assertions has solicited more clergy testimony. This testimony, in turn, undermines the traditional justification for an absolute privilege. That said, more clergy testimony did not have to diminish the privilege's application: clergy could have maintained the same absolutist approach adopted in the church abuse scandal cases. However, they have not. The next Section explores why.

B. Why Clergy Resist the Privilege

As mentioned in Part I, when posed with a hypothetical scenario, clergy responses indicate genuine intentions to maintain confidences.[211] As Part II details, however, clergy repeatedly cast testimony as outside the privilege.[212] Thus, the question of why clergy testify explores the gap between clergy's desires and actual practices. This exploration

[208] See, e.g., Shenoa L. Payne, The Ethical Conundrums of Unpublished Opinions, 44 Willamette L. Rev. 723, 750 (2008); Erica S. Weisgerber, Unpublished Opinions: A Convenient Means to an Unconstitutional End, 97 Geo. L.J. 621, 647 (2009) (noting that "[courts] may subsequently depart from the rules or holdings in those prior unpublished opinions").

[209] See David R. Cleveland, Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions, 10 J. App. Prac. & Process 61, 169 (2009) (describing a survey in which judges attributed unsettled jurisprudence, in part, to unpublished opinions); Sarah E. Ricks, The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit, 81 Wash. L. Rev. 217, 228 (2006) (discussing how nonprecedential dispositions hinder decision making).

[210] Federal clergy privilege decisions are limited but similarly encourage greater reliance on clergy testimony. The most exhaustive circuit court treatment of the privilege is *In re Grand Jury Investigation*, 918 F.2d 374, 377–78 (3d Cir. 1990). There, a Lutheran minister jointly counseled the defendant, his fiancée, and his parents. The defendant, Shaw, was suspected of racially motivated arson of his neighbor's home. Shaw occasionally attended church, while his parents were active members. At trial, the pastor maintained that all attendants of the counseling sessions were essential for effective counseling and expected such communications be kept strictly confidential. The Third Circuit remanded the trial court's denial of the privilege. The Court directed the lower courts to inquire into the nature of the communicants' relationship as well as the pastoral counseling practices of the relevant synod of the Lutheran church. Id. at 387–88. Clergy testimony is central to such inquiries.

[211] See supra Part I and accompanying notes.

[212] See supra Part II and accompanying notes.

necessarily traverses the terrain of supposition: individual clerics may have unknowable reasons for testifying in a given case.

Given this caveat, this Section offers a potential explanation of clergy's conduct in privilege cases. In the absence of religious guidance and standardized professional codes of conduct, clergy—consciously or otherwise—weigh the importance of testifying.[213] Under the traditional justification, the clergy privilege is absolute, in part because of a presumption that "[t]he *injury* that would inure to the relation by the disclosure of the communication [is] *greater than the benefit* thereby gained for the correct disposal of litigation."[214] Clergy privilege statutes treat confidentiality as an isolated duty. Once confidential information is shared, privilege statutes assume a cloak of silence drapes the communication, not to be lifted by the courts.[215] Hence, underlying the privilege is an unstated assumption that for clergy, too, confidentiality is paramount.

This premise ignores clergy's competing duties. As one cleric explains, clergy serve multiple constituents:

> [Clergy] are citizens under the laws of their own society; they also have responsibilities to individual members of their families and to their neighbors. As people of broad moral outlook, many clergy feel an accountability to the wider human community. They are accountable to their denominational leadership and denominational policy. They also have an answerability to God as they understand God. Within their congregations, clergy must assume the difficult and sometimes contradictory roles of administrator, preacher, counselor,

[213] Cf. William W. Rankin, Confidentiality and Clergy: Churches, Ethics, and the Law 10 (1990) ("The clergy person assuredly does not assume the same stance in every situation; rather the clergy person chooses a particular stance, based on his or her reading of that given situation. He or she interprets the situation in order to respond appropriately to the need or concern, and upon this interpretation of the clergy person plays through the situation as it begins to unfold.").

[214] 8 Wigmore, supra note 42, §§ 2285, 2396; see also supra Part I and accompanying notes (detailing this and other justifications for the clergy privilege).

[215] While some jurisdictions provide carve-outs for child abuse reporting, all other spiritual communications remain protected by the letter of the law. See, e.g., N.H. Rev. Stat. Ann. § 516:35 (2007); N.C. Gen. Stat. § 8-53.2 (2015); Okla. Stat. tit. 12, § 2505 (2010); 9 R.I. Gen. Laws § 9-17-23 (2012); Tex. R. Evid. 505; W. Va. Code Ann. § 57-3-9 (LexisNexis 2012).

> teacher, worship leader, officiant at specialized ritual functions, friend, and professional colleague, among others.[216]

Confidentiality is but one of clergy's many responsibilities.[217] Clergy also shoulder secular and nonsecular obligations to protect their congregations,[218] aid the search for justice,[219] and help victims.[220]

These competing duties can outweigh a cleric's hypothetical interest in confidentiality. In *State v. Hancock*,[221] for example, a pastor testified about communications with the defendant in a murder case.[222] As part of ongoing pastoral counseling, the defendant told the pastor details about his wife's recent disappearance and the defendant's role in that

[216] Rankin, supra note 213, at 8–9; see also Moskowitz & DeBoer, supra note 10, at 21 ("To the religious community, [clergy] are administrators and advisers, preachers and public figures, counselors and teachers. To the local community, they are fellow citizens and consumers, friends and neighbors, parents and spouses. Functioning in these widely differing roles, clergy interact with parishioners and nonparishioners alike in a whole host of religious and non-religious communications."); Video: Faith & Community: The Public Role of Clergy (Polis Ctr. at Ind. Univ. 2003) ("[T]he public roles of clergy can include leader of worship at a public event, caregiving during time of crisis, advocate for social issues, interpreter of tradition for a wider audience, education for faith and ministry, public care, and pastoral care and counseling.").

[217] See, e.g., Mark Herman, The Liability of Clergy for the Acts of Their Congregants, 98 Geo. L.J. 153, 167 (2009) (detailing clergy's various duties).

[218] See, e.g., Eileen Schmitz, Staying in Bounds: Straight Talk on Boundaries for Effective Ministry 175 (2010) ("It is the responsibility of the pastor, as shepherd of the congregation, to insure the health and safety of her sheep.").

[219] See, e.g., Azizah al-Hibri, The Muslim Perspective on the Clergy-Penitent Privilege, 29 Loy. L.A. L. Rev. 1723, 1730 (1996) (discussing how Muslims are obligated to "advance justice in society and to serve the societal maslaha").

[220] See, e.g., Marie M. Fortune, Confidentiality and Mandatory Reporting: A Clergy Dilemma?, Faith Tr. Inst. 1, 3–4 (2014), http://www.faithtrustinstitute.org/resources/articles/Confidentiality-and-Mandatory-Reporting2014.pdf ("The other ethical principle which applies here is that of justice-making in response to harm done by one person to another. Christian scripture here is very specific: 'Be on your guard! If another disciple sins, you must rebuke the offender, and if there is repentance, you must forgive.' (Luke 17.3 NRSV) The one who sins and who harms another must be confronted so that he might seek repentance. Both Hebrew and Christian scriptures are clear that repentance has to do with change: ' . . . get yourselves a new heart and a new spirit! . . . Turn, then, and live.' (Ezekiel 18.31-32 NRSV). The Greek word used for repentance is *metanoia*, 'to have another mind.'"(alteration in original)).

[221] No. M2012-02307-CCA-R3-CD, 2014 WL 7006969, at *5 (Tenn. Crim. App. Dec. 12, 2014), appeal denied (May 14, 2015).

[222] Id. at *2.

disappearance.[223] In deciding to testify, the pastor focused on his responsibility to help the victim, stating, "I felt that was my paramount duty, not just as a citizen, but even as a pastor was to find the location [of the victim]."[224] Adopting this prioritizing of duties, the court denied the privilege.[225]

Particularly in criminal cases, a cleric's duty of confidentiality competes with a concurrent duty to aid the search of justice.[226] Shielding a confession reduces the likelihood the defendant will face the consequences of his wrongdoing. As one religious scholar states: "Confidentiality was never intended to be merely keeping of secrets. Nor was it ever intended to protect offenders from the consequences of their behaviors. Clergy who interpret confidentiality in this way are enabling the offender to continue offending."[227] Cases reflect this concern, as *People v. Johnson* illustrates.[228] The case involved a confession of murder to Muslim brothers.[229] The appellate court of New York recognized that such communications could be privileged.[230] Nonetheless, at trial, the brothers testified, overlooking potential confidentiality issues based on "fear that defendant might be dangerous, and their desire to get him out of the mosque."[231]

Clergy traverse a fine line in prioritizing their varied duties. A cleric who maintains confidences in cases of violent crimes and sexual abuse risks harm to the very relationship the privilege is intended to foster.[232]

[223] Id. at *5 (discussing how this counseling focused on defendant's relationship "[w]ith the Lord and with his wife").

[224] Id.

[225] Id. at *6.

[226] Cf. Gerald J. Margolis, The Psychology of Keeping Secrets, 1 Int'l Rev. Psycho-Analysis 291, 291 (1974) ("The more dangerous a secret, the greater the desire to give it away, and at the same time the greater the fears of its revelation.").

[227] Marie M. Fortune, Violence in the Family 208 (1991).

[228] 115 A.D.2d 973, 973 (N.Y. App. Div. 1985).

[229] Id.

[230] Id.

[231] Id. Some clergy similarly prioritize protecting the congregation in child abuse cases. See, e.g., Gutierrez v. State, No. 01-09-00939-CR, 2010 WL 4484350, at *1 (Tex. App. Nov. 10, 2010) (breaching defendant's confidences out of concern for other children in the church).

[232] See Alberta Mazat, Abuse: Confidentiality, Reporting, and the Pastor's Role, Ministry (Nov. 1995), https://www.ministrymagazine.org/archive/1995/11/abuse-confidentiality-reporting-and-the-pastors-role [https://perma.cc/PFH6-6NCL] ("When confidentiality

This perspective clarifies clergy's willingness to cast confessions as "confrontations" or "investigations"[233] or even serve as informants.[234] Doing so moves such communications outside the duty of confidentiality and into the realm of the competing duty to protect.[235] In contrast, hiding behind the privilege risks the congregation viewing the cleric as part of the wrongdoing.[236] Yet, sharing such confidences may similarly fuel discontent. Speaking out may draw the ire of congregants who may not recognize the competing duties implicated.[237] Such conflicting pressures may push clergy to make case-specific decisions regarding whether to testify.[238]

becomes the means of keeping in bondage even for one more day a person undergoing harmful and illegal exploitation, it is no longer serving its purpose.").

[233] See, e.g., State v. McCurdy, 823 N.W.2d 418, 418 (Iowa Ct. App. 2012) (investigation); *Gutierrez*, 2010 WL 4484350, at *1 (confrontation).

[234] State v. Jackson, No. M2000-00763-CCA-R3-CD, 2001 WL 812254, at *7 (Tenn. Crim. App. July 18, 2001).

[235] Cf. Rankin, supra note 213, at 10 ("Sometimes the pastor 'reframes' a situation based on his or her interpretation of what is actually needed.").

[236] See, e.g., Rebecca Edmiston-Lange, Boundaries and Confidentiality, *in* The Safe Congregation Handbook: Nurturing Healthy Boundaries in Our Faith Communities 28, 28 (Patricia Hoertdoerfer & Fredric Muir eds., 2005) (discussing how "destructive [the] cloak of secrecy can be"); Marci A. Hamilton, Child Sex Abuse in Institutional Settings: What Is Next, 89 U. Det. Mercy L. Rev. 421, 436 (2012) (discussing how shielding communications allows a "perpetrator [to] find the next victim in the very same institution and . . . assume that the cloak of anonymity will cover his or her misdeeds").

[237] For a discussion of these competing tensions in the context of clergy communications and elder abuse, see Moskowitz & DeBoer, supra note 10, at 5 ("Clergy who report elder abuse face risks including disclosure and hostility, the accusation of causing 'unfair charges,' loss of trust and credibility, and breach of religious discipline. Those who do not report also face risks such as criminal penalties and civil damages; indeed, the religious institution itself could be liable through vicarious liability.").

[238] Some religious scholarship actively encourages clergy to engage in this moral weighing. See, e.g., Ronald K. Bullis & Cynthia S. Mazur, Legal Issues and Religious Counseling 111–14 (1993) (providing guidelines for religious counselors, broken down between considerations for "the religious counselor [that] wants to break a confidence" and "the religious counselor [who] wants to remain silent"); D. Elizabeth Audette, Confidentiality in the Church: What the Pastor Knows and Tells, Christian Century (Jan. 28, 1998), http://www.religion-online.org/showarticle.asp?title=317 (arguing confidentiality turns on how the cleric "perceives the ministerial role at a given time in a given encounter" so it is up to the pastor to "determine the limits of his or her confidentiality"); Rebecca Edmiston-Lange, Boundaries and Confidentiality (Unitarian Universalist), http://www.uua.org/safe/handbook/leadership/165736.shtml [https://perma.cc/SZR5-949N] ("[I]f a rigorous moral justification to override a confidence exists, they should not feel they have betrayed another by divulging the information.").

Clergy have bemoaned the need for greater guidance in reconciling confidentiality and competing ethical duties.[239] Other professionals, such as attorneys and psychotherapists, have the benefit of nuanced canons of professional conduct to guide them.[240] Clergy lack similar professional canons of ethics[241] or governing ethics committees.[242] Similarly, educational training on how to deal with crises is often inadequate,[243] despite the reality that clergy are frequently "first responders."[244]

[239] See, e.g., Audette, supra note 55; Rankin, supra note 213, at 130–31.

[240] Unlike other professionals, clergy are unlikely to face potential malpractice actions for breaching confidentiality. Currently, no state recognizes a cause of action for clergy malpractice. Only Ohio permits a potential negligence claim for violating the clergy privilege. Alexander v. Culp, 705 N.E.2d 378, 382 (Ohio Ct. App. 1997) (permitting negligence claim against clergy for alleged disclosure of confidential information that parishioner had affair). But see Strock v. Pressnell, 527 N.E.2d 1235, 1239 (Ohio 1988) (rejecting tort of clergy malpractice on the facts of the case). Rather than permitting a cause of action, Tennessee courts can impose a fine for breach of spiritual communications. See, e.g., Tenn. Code Ann. § 24-1-206 (2000) (stating violation of the clergy privilege statutes is a Class C misdemeanor). Some may view malpractice liability as a way to clarify disclosure requirements. However, it is unclear that courts would necessarily use such claims for such an undertaking. See, e.g., *Alexander*, 705 N.E.2d at 381 (permitting negligence claim without delineating between protected and nonprotected communications).

[241] Rankin, supra note 213, at 131; see also Lightman v. Flaum, 761 N.E.2d 1027, 1032 (N.Y. 2001) (explaining clergy "are not subject to State-dictated educational prerequisites and, significantly, no comprehensive statutory scheme regulates the clergy-congregant spiritual counseling relationship"); Richard M. Gula, Ethics in Pastoral Ministry 3 (1996) (discussing limited ethical foundations for clergy duty of confidentiality); Cassidy, supra note 5, at 1684 ("[T]here are no universal standards of ethics that govern clergy conduct.").

[242] See, e.g., Am. Psychological Ass'n, Ethical Principles of Psychologists and Code of Conduct (1992) (psychotherapists); Am. Bar Ass'n, Model Rules of Professional Conduct, Rule 1.6 (2015) (attorneys); cf. Rankin, supra note 213, at 131 ("Lawyers, physicians, and hospitals, after all have professional standards review bodies and ethics committees of one sort or another. Why not have the same for clergy and the church? The absence of clear ethical codes argues for some ongoing resource of this sort.").

[243] Bullis & Mazur, supra note 238, at 34 ("A nonrandom sample of theological schools indicates that few courses are offered to prepare religious counselors for the variety of clinical situations that may lead to lawsuits. Thus, clergy are increasingly faced with legal issues that previous generations of clergy have not had to address."); Wanda Lott Collins & Sharon E. Moore, Theological and Practice Issues Regarding Domestic Violence: How Can the Black Church Help Victims, 33 Soc. Work & Christianity 252, 258 (2006) ("[M]ost pastors' seminary training does not include crisis counseling that focuses on dangerous, threatening, or violent behavior."); Nancy Nason-Clark, Making the Sacred Safe: Woman Abuse and Communities of Faith, 61 Soc. Religion 349, 359–65 (2000).

[244] U.S. Conf. of Catholic Bishops, When I Call for Help: A Pastoral Response to Domestic Violence Against Women (2002), http://www.usccb.org/issues-and-action/marriage-and-family/marriage/domestic-violence/when-i-call-for-help.cfm.

This absence leaves clergy to search out guidance wherever available—even if that means the annals of the Internet. Take, for example, a recent blog post by a pastor. After he gave a sermon at an out-of-state summer camp, a man approached the Protestant cleric, confessing to the murder of a man who raped his girlfriend. Faced with this information, the cleric sought guidance online because he is of "a Protestant, non-demoniational [sic] church. We do not consideral [sic] confession a sacrament, as a Catholic would, so there are no particular clerical obligations to uphold. Our polity [sic] is complete congregation autonomy: there is no supervising bishop or denomination headquarters to consult."[245] Instead, the minister was forced to rely on online responses for guidance—and the responses highlight how individualized decision making is for clergy.[246] While some encouraged the pastor to divulge the information, others adamantly contended he was obliged to keep the confidence.

Some individual denominations have responded to this request for guidance. Unfortunately, these responses have trended towards the generic.[247] For example, the Christian Church (Disciples of Christ) adopted a proposed code of ethics that merely instructs that ministers:

[245] See Ask MetaFilter, How Does a Protestant Minister Handle a Confession of Murder? (Oct. 20, 2006 4:29 PM), http://ask.metafilter.com/48795/How-does-a-Protestant-minister-handle-a-confession-of-murder [https://perma.cc/VQ2G-8CGL].

[246] Id. (detailing the various, inconsistent responses on whether minister is morally obligated to report a murder to the police).

[247] See, e.g., Nat'l Ass'n of Evangelicals, Code of Ethics for Congregations and Their Leadership Teams (Sept. 2015), http://nae.net/code-of-ethics-for-congregations/ [https://perma.cc/7ZTH-FC64] (discussing the need for transparency and dealing "fairly and openly with causes of scandal" without providing confidentiality guidelines); Univ. Presbyterian Church, Code of Conduct for Clergy, Church Staff and Volunteers (Feb. 26, 2008), www.upc.org/download_file/view/473/ [https://perma.cc/TF8U-U2UC] (instructing church personnel to "maintain confidentiality" without further guidance). Others are more helpful, though, and clarify a cleric's obligation to protect confidentiality, guiding clerics to discuss issues of confidentiality at the outset of a communication and forgoing confidentiality when the client discusses intent to harm himself or others. Archdiocese of St. Louis, Code of Ethical Conduct for Clergy, Employees and Volunteers Working with Minors § 3 http://archstl.org/sep/page/policies-information-and-resources-code-ethical-conduct-1 [https://perma.cc/TA2E-DLU8] (last visited Aug. 16, 2017).

"protect[] confidences; covenanting to only tell those who need to know, what they need to know, when they need to know it."[248]

Canonical tenets are equally imprecise. Judaism and most Protestant religions have no explicit canonical or doctrinal obligation to maintain confidences.[249] At the other extreme is Catholicism, where confidentiality absolutism is at its most extreme, with canonical law stating, "it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever."[250] For religions between these extremes, any institutional treatment only minimally assists clergy in evaluating their competing duties.[251] For example, the United Methodist Book of Discipline states: "Ministers . . . are charged to maintain all confidences inviolate, including confessional confidences, except . . . where mandatory reporting is required . . . ."[252]

Thus, religious institutions share responsibility for the decline in the privilege.[253] Nonspecific mandates to maintain confidentiality ignore the ongoing internal debate clergy experience when called as witnesses. Without leadership, clergy chart their own paths between silence and disclosure.[254]

[248] Christian Church (Disciples of Christ), My Ministerial Code of Ethics (Oct. 10, 2011), http://disciples.org/wp-content/uploads/2015/04/Ministerial_Code_of_Ethics-english.pdf [https://perma.cc/6EB5-A5M5].

[249] See Goldfarb, supra note 138, at 138; William Harold Tiemann, The Right to Silence: Privileged Communication and the Pastor 22 (1964).

[250] Catholic Code of Canon Law c.983, § 1 (2003).

[251] See, e.g., David Neff, Why the NAE Issued a Clergy Code of Ethics, Christianity Today (June 13, 2012), http://www.christianitytoday.com/ct/2012/juneweb-only/nae-clergy-ethics-code.html ("Denominations have produced a few things, but most haven't. The few existing statements tend to be truncated in scope or overly legalistic and rule specific.").

[252] Marvin W. Cropsey, The Book of Discipline of the United Methodist Church ¶ 341.5 (2012).

[253] Some denominations have promulgated codes of ethics for pastoral counseling. These too, though, are less than exacting. See, e.g., Ethics Statement of the Christian Association for Psychological Studies (Apr. 7, 2005), http://caps.net/about-us/statement-of-ethical-guidelines [https://perma.cc/KAR6-KYG2] (instructing CAPS members to "maintain the confidentiality of information that is provided to them in a professional setting, consistent with the limits of applicable laws and regulations").

[254] Sissela Bok's work on secrecy and confidentiality supports this understanding of clergy behavior. Sissela Bok, The Limits of Confidentiality, The Hastings Center Report 24, 31 (Feb. 1983). ("The premises supporting confidentiality are strong, but they cannot support practices of secrecy—whether by individual clients, institutions, or professionals—that undermine and contradict the very respect for persons and for human bonds that confidentiality was meant to protect.").

Admittedly, no single answer explains clergy's willingness to testify. Legislators continue to expand clergy privilege statutes without clarifying the triggering requirements for the privilege. Courts fill these gaps by turning to clergy testimony about religious doctrine. In providing this testimony, though, clergy must balance competing duties with insufficient legal or secular guidance on when to speak and when to stay silent. Consequently, the decline of the privilege—and clergy's role in that decline—is the result of this mutable blend.

IV. QUALIFYING THE CLERGY PRIVILEGE

Through their interpretation of statutory requirements, clergy have created an opening to reevaluate the necessity of an absolute clergy privilege. The general thrust of the traditional justification for the privilege is still apt: the clergy privilege exists to protect religious relationships between communicants and clergy. Yet, the conclusion that this relationship must *always* be sedulously fostered or that confidentiality is *essential* to that relationship is unsupported conjecture. Given this reality, as informed by the empirical analysis undertaken earlier in this Article, this Part argues in favor of codifying a qualified clergy privilege.[255]

As discussed in Part I, privileges are grouped into two distinct categories: absolute—meaning the privilege does or does not apply—or qualified—meaning courts decide the privilege through a case-specific, need-based balancing test.[256] Such binary categories ignore that sometimes a party other than the court engages in a case-specific

[255] As an initial clarification, the proffered solution is not for the clergy to own the privilege outright. Consequently, this proposal stands in contrast to Professor Colombo's proposal for a specific clergy testimonial privilege. See Colombo, supra note 13, at 248–51. Shifting ownership invites clergy to assert the privilege even when the communicant is willing to testify—thus potentially increasing the privilege's application at an unacceptable cost to justice. See, e.g., Jack B. Weinstein, Some Difficulties in Devising Rules for Determining Truth in Judicial Trials, 66 Colum. L. Rev. 223, 228–29 (1966) (truth-finding capability of rules of evidence is fundamental concern of rules' drafters).

[256] See, e.g., Edward J. Imwinkelried, A Psychological Critique of the Assumptions Underlying the Law of Evidentiary Privileges: Insights from the Literature on Self-Disclosure, 38 Loy. L.A. L. Rev. 707, 726 (2004) (discussing how a rejection of Wigmorean absolutist assumptions behind privileges "would probably lead to the reclassification of most privileges as qualified or conditional").

balancing test. Currently, clergy undertake this balancing, making moral decisions that shape and narrow the "real" scope of the privilege.

Adopting a qualified privilege shifts responsibility back to the judiciary. Rather than wholesale acceptance of clergy's labeling, courts would engage in case-specific weighing. Fortunately, this Article's research provides a foundation for this shift. Courts and legislators can integrate the lessons learned from existing jurisprudence. Clergy's testimony and conduct have generated multi-factor tests to balance the privilege against the need for evidence in a given case. For example, courts could consider the type of case at issue. Cases involving violent crimes, potential future danger to others, or abuse could require a greater showing that the communication needs shielding on religious grounds. Similarly, to decide whether a cleric acted in his professional capacity, a court could consider the location of the meeting, the duration of the relationship between the communicant and clergy, and a preexisting spiritual counseling relationship to decide an asserted privilege.[257]

At its core, this proposed solution pushes legal realism over legal formalism.[258] A qualified privilege would remedy illusory statutory protection. As the case law establishes, existing clergy privilege statutes promise a degree of protection that—if applied literally—would shield far more testimony than actually occurs. A qualified privilege moves clergy privilege statutes towards protection aligned with prevailing interpretations.

As this Part explains, the argument here is not solely to unify law and application. For many statutes, application is detached from law, despite the fairness[259] and transparency[260] gains afforded by unity.[261] Rather, a

[257] See supra Figure 7 (setting out confidentiality factors).

[258] Robert A. Shiner, Legal Realism, *in* The Cambridge Dictionary of Philosophy 425 (Robert Audi ed., 1995).

[259] See, e.g., Stuart F. Schaffer, Informing the Jury of the Legal Effect of Special Verdict Answers in Comparative Negligence Actions, 1981 Duke L.J. 824, 847 (1981) (discussing how gaps in law and application can "erod[e] public confidence in the fairness of the legal system").

[260] See Michael M. O'Hear, Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime, 95 J. Crim. L. & Criminology 133, 239 (2004) ("A system characterized by a gap between law and practice is a system that lacks transparency.").

[261] As Roscoe Pound long ago noted, "the law upon the statute books will be far from representing what takes place actually." Roscoe Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 34 (1910); see also Karl N. Llewellyn, A Realistic Jurisprudence—The

qualified approach unifies the clergy privilege with liberal evidentiary rules. Further, this solution best straddles the need for relevant evidence in the truth-finding endeavor with the concurrent need to respect religious relationships.

A. Aligning Policy and the Clergy Privilege

Congress adopted the Federal Rules of Evidence to liberalize the admissibility of evidence.[262] The rules begin with a controlling missive: evidence is admissible unless there is some special reason to exclude it. From broadening the definition of competent witnesses to expanding evidence an expert can rely on,[263] evidentiary restrictions have lessened. State evidentiary rules unsurprisingly reflect this trend; the majority of states refashioned their laws to model the federal approach.[264] Further, particularly for privileges, these rules are to be dynamic. The Supreme Court has reiterated the need for "evolutionary development" of testimony privileges—urging reconsideration of privileges when "experience suggest[s] the need for change."[265]

Yet, as detailed in Part II, the clergy privilege is an anomaly against this backdrop.[266] Qualifying the clergy privilege is a step closer to

Next Step, 30 Colum. L. Rev. 431, 439 n.9 (1930) (differentiating "paper" rules from "real" ones). Generally, such disconnect occurs with restrictive laws, meaning those that prohibit certain behavior—such as speed limits or littering laws—where the potential compliance gains of the law justify the disconnect. See Michael D. Gilbert, Insincere Rules, 101 Va. L. Rev. 2185, 2185–88 (2015) (discussing the disconnect between law and application and the rationale for the disconnect). The clergy privilege presents an inverse scenario: rather than a limit on activity, the privilege promises a scope of protection that would not exist but for the privilege, and in fact does not actually exist in application.

[262] Robert P. Burns, Notes on the Future of Evidence Law, 74 Temp. L. Rev. 69, 79 (2001) ("[A]t least since the passage of the Federal Rules of Evidence, there has been a strong drift towards admissibility in the law of evidence . . . .").

[263] See, e.g., Jeffrey Cole, The Federal Hearsay Rule: You Can't Believe Everything You Hear, Litigation, Spring 2008, at 51, 56 (detailing these expansions).

[264] See, e.g., Richard D. Friedman, *Crawford*, *Davis*, and *Way* Beyond, 15 J. L. & Pol'y 553, 553 (2007) (discussing how state evidentiary law has liberalized because most states adopted the Federal Rules of Evidence, which themselves embodied a more generous view towards admissibility); Mark Hansen, Believe It or Not, 79 A.B.A. J. 64, 67 (1993) (discussing how state and federal courts alike have liberalized evidentiary standards).

[265] Trammel v. United States, 445 U.S. 40, 47–48 (1980).

[266] See Imwinkelreid, supra note 256, at 726 ("In the past few decades, there has been an incipient trend to treat privileges as qualified rather than absolute.").

unifying evidentiary rules towards liberalizing admissibility. It also finally integrates judicial experience with the privilege.

This approach would also limit the shielding of often highly probative testimony without unnecessarily compromising the key policy considerations underlying the privilege. In this way, such a revision protects judicial truth finding by ensuring the clergy privilege does not expand beyond its policy aims. Taken in turn, a qualified privilege limits the privilege while respecting the policy considerations underlying the traditional and autonomy rationales detailed in Part I.

First, a qualified privilege still promotes the traditional justification of protecting religious relationships. Protecting all spiritual communications can compromise—rather than advance—spiritual relationships more generally. A qualified approach more expansively protects "religious relationships." A qualified privilege allows courts to assess whether, in a given case, the privilege promotes or compromises the "prestigious place in society" that religion holds. To the extent the privilege exists because of a desire to promote spiritual relationships, a qualified privilege best tempers the potential harm from too broad a privilege. It provides a mechanism to weigh a cleric's competing duties to other members of his congregation and thus to protect not just the spiritual relationship between the particular communicant and clergy but the relationships with other potential communicants as well.

Similarly, a qualified privilege considers both parties to the religious relationship. Absolute statutes currently on the book disproportionately emphasize the communicant. These statutes, if applied literally, protect at cost to a cleric who might want to testify. Arguably, even a comforting pat on the back from a cleric during a conversation could convert it into a privileged discussion. Rather than focusing solely on communicants' desires to confide, a qualified privilege also takes into account a cleric's desire to disclose. Courts can weigh these views, along with other factors relevant to the case, in making a privilege determination.

A qualified privilege also advances the traditional justification by encouraging spiritual communications. Communicants decide to talk based on more than legal considerations. As Professor Leo observed, after hearing *Miranda* warnings, detained individuals still talk roughly

seventy-five percent of the time.[267] Even more on point, though, is the absence of any chilling effect under the current arrangement, whereby clergy rather than courts are engaging in this weighing. In fact, communicants already confide to clergy who explicitly state their intention to share the information. Behavioral science research shows motivation for self-disclosure is too multifaceted and individualized to causally link to any single variable.[268] The privilege does not need to be absolute.[269]

A qualified approach could also incentivize religious institutions to articulate concrete tenets regarding spiritual communications for clerical and judicial consideration. Tailored rather than generic tenets have the potential to advance confidence in religion by conceding not all communications are confidential. This, in turn, encourages religious relationships and advances the traditional justification far more than clergy-by-clergy decision making.[270]

Second, a qualified privilege does not compromise autonomy. Communicants can still rely on religious consultations and beliefs when making decisions. As cases evidence, even with the rate of successful privilege assertions dropping, clergy remain a primary source of advice and guidance on everything from legal guidance to marital problems.[271] A qualified privilege does not compromise this consulting function, seen as essential to an autonomy-based rationale. A qualified privilege may even enhance communicant autonomy.[272] Currently, a communicant could rely on statutory language and incorrectly assume a

[267] See Richard A. Leo, The Impact of *Miranda* Revisited, 86 J. Crim. L. & Criminology 621, 653 (1996).

[268] See Imwinkelried, supra note 256, at 713–14 (debunking the link between law and self-disclosure using behavioral science research).

[269] This requisite involvement of religious institutions is realistic, since, as detailed in Section III.B, canonical confidentiality requirements are evolving.

[270] Thus, this solution is tripartite. State legislatures would need to enact statutory language to recognize the existing qualified nature of the privilege. The judiciary then would adopt relevant factors. Finally, religious institutions would articulate guidelines that courts could consider about a particular religion.

[271] See, e.g., People v. Police, 651 P.2d 430, 430 (Colo. App. 1982) (legal advice); People v. Peterson, 47 N.E.3d 1005, 1052 (Ill. App. Ct. 2015), reh'g denied (Dec. 16, 2015), appeal allowed, 48 N.E.3d 1095 (Ill. 2016) (marital counseling).

[272] See Joseph Raz, The Morality of Freedom 155 (1986) (discussing how the exercise of autonomy intelligently as a rational actor requires informed choice); accord Joseph Raz, Liberalism, Autonomy, and the Politics of Neutral Concern, *in* 7 Midwest Studies in Philosophy: Social and Political Philosophy 89, 112 (Peter A. French et al. eds., 1982).

communication is privileged. A qualified privilege would help communicants understand the potential legal consequences of seeking religious guidance. These are not new consequences. Rather, the current absolute appearance of the privilege masks these risks. In contrast, a codified qualified privilege is more transparent about potential judicial disclosures.[273]

A qualified privilege also brings more balance to autonomy concerns. An absolute privilege spotlights a communicant's right to autonomy. This narrow focus compromises clergy's freedom of choice in responding to the divulgences. In revealing a confidence, the speaker has divested a portion of that secret to another.[274] He foregoes some of his autonomy by involving the listener. Consequently, in sharing a secret, the communicant has triggered consideration of the cleric's autonomy, and with it concordant consideration of the cleric's duties and obligations.[275] A qualified privilege provides an opening currently missing for judicial consideration of these duties.

Third, a qualified privilege also sufficiently responds to the democratic rationale. Clergy's testimony and the declining rate of successful privilege assertions minimize this rationale. A court rarely faces the "offensive" scenario of compelling clergy to testify.[276] However, the current dynamic creates an opposing offensive scenario: an absolute privilege can force a cleric to maintain a confidence he does not want to keep. A qualified privilege moderates both problematic scenarios. A clergy's view is relevant but not an outcome-determinative factor in deciding the privilege. Hence, a qualified privilege reflects legal realities while still minimizing "the unpleasant prospect of imprisoning clergy for contempt of court."[277]

[273] Further, a qualified privilege also remedies inconsistency between various autonomy-based privileges. See, e.g., Beerworth, supra note 94, at 100 (discussing the existing disconnect between the attorney-client privilege and the clergy privilege).

[274] Cf. Sissela Bok, Secrets: On the Ethics of Concealment and Revelation 24 (1982) ("[T]he claim to own secrets about oneself is often far-fetched.").

[275] See Charles Foster, Choosing Life, Choosing Death x (2009) (discussing how individual autonomy must give ground to competing ethical duties). These duties drove Jeremy Bentham, a rabid opponent of privileges, to conclude that the clergy's claim to the privilege exceeds the communicant's. Bentham, supra note 42, at 588.

[276] In rare situations where a clergy member is in contempt, courts usually impose little to no penalty for not testifying. See, e.g., People v. Campobello, 810 N.E.2d 307, 322 (Ill. App. Ct. 2004) (discussing issuance of contempt order only to allow appeal, not to punish).

[277] Imwinkelried, New Wigmore, supra note 4, § 5.4.4.a., at 420 n.138.

Combined, this proposed solution returns responsibility to the legislature, the judiciary, and religious institutions and off the shoulders of clergy. State legislatures would need to recognize the existing qualified nature of the privilege and enact statutory language to codify this reality.[278] The judiciary would then finally develop factors to consider for such a balancing test. Finally, religious institutions would articulate guidelines for courts to consider—but not necessarily mirror—as part of that multifactor analysis. This approach, thus, respects the rationale for the privilege while remediating the trifold abdication that shifted decision-making responsibility onto clergy.

B. A Qualified Privilege Is the Most Tailored Solution

Any proposed solution triggers questions about whether one solution is preferable to another. Admittedly, this Article's solution is no different. A qualified privilege precludes ex ante guarantees of protection. Currently, though, such protection is equally uncertain. Though it is not without its downsides, a qualified privilege is less problematic than other alternative revisions.

The more skeptical may urge eviscerating the privilege altogether. If the trend in evidentiary rules is liberalized admissibility, surely removing the clergy privilege altogether best achieves that goal. However, such an argument goes too far. Further, scholars have made strong First Amendment arguments, which are beyond the scope of this argument, for some clergy privilege.[279] Eliminating the clergy privilege altogether would also mean that policy justifications, such as autonomy, matter more for conversations with psychotherapists or attorneys than with clergy. Such an extreme approach unnecessarily challenges public

[278] Once state legislators take this step, it paves a path for federal courts to follow in suit. See Peter Nicolas, "They Say He's Gay": The Admissibility of Evidence of Sexual Orientation, 37 Ga. L. Rev. 793, 869 (2003) ("One factor to which the federal courts look in deciding whether to recognize a new privilege, or to alter the parameters of an existing one, are the trends in the states.").

[279] Courts have yet to hold the First Amendment requires a clergy privilege. Nonetheless, scholars have convincingly argued this point. See, e.g., Bailey, supra note 1, at 514.

support for the privilege,[280] ignoring how deeply etched the clergy privilege is in the American psyche.[281]

The better question, perhaps, is why not articulate a series of exceptions or presumptions. Codified exceptions could provide a greater degree of predictability than a qualified privilege. For example, potential exceptions could include removing threats or communications about abuse from the categories of protected communications. Alternatively, why not identify different standards for different cause of action, like the spousal privileges do?

Such incremental proposals forgo the lessons from clergy privilege jurisprudence. Consequently, they inaccurately identify cases where clergy willingly testify. For example, courts and clergy alike are reticent to privilege clergy communications in criminal cases.[282] This might suggest excluding criminal cases.[283] Some privileges already only apply either in civil or criminal cases, but not both.[284] In fact, some courts have inched towards this approach by recognizing a cleric's duty to warn and

[280] See id. at 504 ("The fact that all fifty states and the District of Columbia have enacted statutes ensuring the place of the clergy-penitent privilege demonstrates public approval of the privilege.").

[281] Cassidy, supra note 5, at 1630 ("The clergy-penitent privilege is deeply engrained in American culture."). Movies, television shows, and books all reinforce society's expectations for some form of the clergy privilege. See, e.g., I Confess (Warner Brothers 1953); Law and Order: The Collar (Season 12, Episode 11). Popular culture does not dictate the parameters of justice, but it does influence how radically to alter law. More fundamentally, though, the privilege remains a vital part of the tenuous contract between church and state. Thus, a lesser course than elimination is necessary.

[282] See, e.g., Tankersley v. State, 724 So.2d 557, 562 (Ala. Crim. App. 1998); Commonwealth. v. Nutter, 28 N.E.3d 1, 4–5 (Mass. App. Ct. 2015), review denied, 35 N.E.3d 721.

[283] Accord Goldfarb, supra note 138, at 143 (discussing how refusal to testify "may be appropriate, even socially acceptable, in civil cases . . . but it should not be tolerated when ongoing criminal actions are involved or gross miscarriages of justice are perpetrated as a result").

[284] See, e.g., Michael H. Graham, 1 Handbook of Federal Evidence § 505.1 at 715 (5th ed. 2001) (explaining how in federal court, the martial testimony privilege applies only to criminal cases); accord Thomas A. Mauet & Warren D. Wolfson, Trial Evidence § 8.10 at 259 (1997); 2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 206 at 426 (2d ed. 1994); 3 Weinstein & Berger, supra note 129, § 505.04 at 505–07. But see Katherine O. Eldred, "Every Spouse's Evidence": Availability of the Adverse Spousal Testimonial Privilege in Federal Civil Trials, 69 U. Chi. L. Rev. 1319, 1346 (2002) (arguing it is unclear whether the privilege applies differently in criminal and civil cases).

to protect his congregation as reasons to waive the confidentiality.[285] However, simply carving out criminal cases creates an arbitrary boundary. Such cases involve undoubtedly privileged communications, such as sacramental Catholic confessions. At the same time, this option excludes other instances where clergy decline to testify—such as divorce proceedings. Thus, such an approach is both over and under inclusive.[286]

Piecemeal exceptions also invite half-measures rather than comprehensive change.[287] Efforts to expand abuse reporting illustrate the problem. Clergy are mandatory reporters in twenty-two states.[288] In seventeen additional states, any person who suspects child abuse or neglect is required to report it.[289] While some states deny the clergy

[285] See, e.g., Cassidy, supra note 5, at 1673 (arguing clergy bear the same duty to warn as psychotherapists and attorneys). But see Terry Wuester Milne, "Bless Me Father, for I Am About to Sin . . .": Should Clergy Counselors Have a Duty to Protect Third Parties?, 22 Tulsa L.J. 139, 147–65 (1986) (arguing against clergy obligation to protect third parties).

[286] Privileging only confessions is also under inclusion. It risks protecting only Catholics, without similar protection for religions where a penitent confesses directly to her god. Hence, such a carve-out invites the potential for unnecessary religious entanglement by the judiciary and related concerns regarding unnecessarily hampering religious liberty.

[287] Similarly, affording clergy their own privilege or, at a minimum, shared ability to waive the privilege is unworkable. This would make the privilege an aberration, as the communicant owns almost all other privileges. See supra Part I. Further, allowing the clergy to decide the privilege cases would lead to a two-tier privilege. Clergy may afford more restrictive interpretations when they are witnesses rather than parties. Adopting a qualified privilege minimizes such issues.

[288] Ala. Code § 26-14-3 (2016); Ariz. Rev. Stat. Ann. § 13-3620 (2010); Cal. Penal Code § 11165.7 (Deering 2008); Colo. Rev. Stat. § 19-3-304 (2017); Conn. Gen. Stat. § 17a-101 (2015); 325 Ill. Comp. Stat. Ann. 5/4 (2016); La. Child. Code Ann. art. 603 (2014); Me. Stat. tit. 22, § 4011-A (2016); Mass. Gen. Laws ch. 119, § 51A (2016); Mich. Comp. Laws Serv. § 722.623 (LexisNexis 2013 & Supp. 2017); Minn. Stat. § 626.556 (2016); Miss. Code Ann. § 43-21-353 (2015 & Supp. 2016); Mo. Rev. Stat. § 210.115 (2016); Mont. Code Ann. § 41-3-201 (2015); N.H. Rev. Stat. Ann. § 169-C:29 (2014); N.M. Stat. Ann. § 32A-4-3 (2013); N.D. Cent. Code § 50-25.1-03 (2007 & Supp. 2015); 23 Pa. Stat. and Cons. Stat. Ann. § 6311 (West 2017); S.C. Code Ann. § 63-7-310 (2010 & Supp. 2016); Vt. Stat. Ann. tit. 33, § 4913 (2014 & Supp. 2016); W. Va. Code § 49-2-803 (LexisNexis 2015); Wis. Stat. Ann. § 48.981 (2015–16).

[289] Del. Code Ann. tit. 16, § 903 (2003); Fla. Stat. § 39.201 (2016); Idaho Code § 16-1619 (2009 & Supp. 2017); Ind. Code Ann. § 31-33-5-1 (LexisNexis 2013); Ky. Rev. Stat. Ann. § 620.030 (LexisNexis 2014); Md. Code Ann., Fam. Law § 5-705 (LexisNexis 2012); Neb. Rev. Stat. § 28-711 (2016); Nev. Rev. Stat. Ann. § 202.882 (LexisNexis 2012); N.J. Stat. Ann. § 9:6-8.10 (West 2013); N.C. Gen. Stat. § 7B-301 (2015); Okla. Stat. tit. 10A, § 1-2-101 (2011 & Supp. 2016); Or. Rev. Stat. § 419B.010(1) (2015); 40 R.I. Gen. Laws § 40-11-3 (2006 & Supp. 2016); Tenn. Code Ann. § 37-1-403 (2014); Tex. Fam. Code Ann. § 261.101

privilege in cases of child abuse or neglect,[290] others allow the privilege despite reporting obligations.[291] Yet, at the same time, while potentially self-serving, statements by religious institutions indicate more willingness to disclose such communications.[292] Many major religions in the United States no longer shield otherwise confidential communications of abuse, and some mandate reporting.[293] Yet, despite the changing landscape, efforts to exempt abuse disclosures from the privilege remain at a standstill.

Thus, a series of exceptions would likely leave clergy responsible for deciding whether to testify. After over a hundred years of statutory privilege, legislatures are no closer to writing a statute that addresses the

(West 2014 & Supp. 2016); Utah Code Ann. § 62A-4a-403 (LexisNexis 2011); Wyo. Stat. Ann. § 14-3-205 (2017).

[290] See Greenwald, 2 Testimonial Privileges § 6:14 (3d ed. 2015) (listing New Hampshire, North Carolina, Oklahoma, Rhode Island, Texas, and West Virginia as states that abrogate the privilege altogether in cases of abuse).

[291] See, e.g., Va. Code Ann. §§ 8.01-400, 19.2-271.3 (2015); cf. Wash. Rev. Code § 5.60.060(3) (2016) (where clergy are not mandatory reporters but their testimony is provided statutory immunity from liability). Cf. Abrams, supra note 31, at 1142 (detailing survey showing "in many states the clergy privilege trumps the obligation to report; in others, a fewer number to be sure, the obligation to report trumps the privilege; and in a third group, the question of the relationship is not answered in the statute").

[292] Take, for example, the Church of Latter Day Saints. For many years, the Church handled child abuse allegations internally. Church officials investigated them. Only if the Church found wrongdoing were these investigations shared outside the church. Recently, the Church has adopted a "zero-tolerance policy," whereby the church agrees to "cooperate with law enforcement to report and investigate abuse." Church of Jesus Christ of Latter-Day Saints, How the Church Approaches Abuse, Mormon Newsroom, http://www.mormonnewsroom.org/article/how-mormons-approach-abuse [https://perma.cc/89GC-MBM3] (last visited Aug. 16, 2017).

[293] Statements by the Georgia Baptist Convention, Southern Baptist Convention, and Evangelical Lutheran Church of America evidence this shift. See, e.g., Ga. Baptist Convention, What a Church Should Know About Reporting Suspected Child Abuse: Georgia's Mandatory Reporting Statute, https://gabaptist.org/wp-content/uploads/2014/07/reporting-suspected-child-abuse.pdf [https://perma.cc/JH83-JXSW] (last visited Aug. 16, 2017) ("[M]embers of the clergy should not avoid reporting suspected child abuse based on this '*confessional*' exception."); Exec. Comm. of the Southern Baptist Convention, Responding to the Evil of Sexual Abuse (June 2008), http://www.sbc.net/pdf/2008ReportSBC.pdf [https://perma.cc/WLP8-G3CM] ("Any individual confessing to, or being credibly accused of, sexual abuse should be reported immediately to the governing authorities."); Evangelical Lutheran Church in Am., Report Misconduct, https://www.elca.org/Our-Work/Leadership/Vocation-Become-a-Leader/Report-Misconduct [https://perma.cc/HN4L-NAHK] (last visited Aug. 16, 2017) ("The ELCA encourages immediately reporting to the civil authorities all instances of child abuse regardless of personal confidentiality issues.").

current problems with the privilege. This historical failure suggests identifying boundaries through a series of exemptions is unlikely. Rather than continue to foist this burden on clergy, it is time for courts to undertake this weighing more fully. Only a qualified privilege would return this responsibility to courts while simultaneously upholding the policy considerations underlying the privilege.

CONCLUSION

Legislatures and courts blindly assume that only an absolute clergy privilege can resolve religious policy concerns. This Article confronts this assumption. It uncovers how the language of the fifty states' clergy privilege statutes reflects none of clergy's reticence to rely on the privilege. This disconnect between what seems privileged versus what actually is cries out for legislative reform.

That reform starts with an exorcism of the faulty premise underlying an absolute privilege. Not all confidences need shielding to foster and encourage spiritual relations. Nor does autonomy necessitate unqualified confidentiality. Using clergy's own construction of the privilege provides a roadmap towards reconciling law and application. This map gives legislators, scholars, and the judiciary a path towards long needed balance between liberal admissibility rules and policy concerns shielding communicant disclosures. Codifying a qualified privilege recognizes the need for privileged communications while developing a conservative construction that concurrently respects religion.

The longevity of the clergy privilege is a testament to America's steadfast commitment to religious freedom. The purpose of this Article is not to undermine that commitment. Rather, it is to push against the "empirical assumption" underlying the absolute nature of the privilege. Neither clergy nor courts are willing to blindly privilege a wide swath of spiritual communications. Thus, it is time to dispel the long-standing myth preserving absolutist clergy privilege statutes. By clergy's conduct, the privilege has already shifted towards qualified protection. Now is the time to recognize that shift.