NEW YORK LAW SCHOOL

NYLS Law Review

Volume 36 | Issue 1 Article 28

January 1991

Sacred Secrets: A Call for the Expansive Application and Interpretation of the Clergy-Communicant Privilege

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SACRED SECRETS: A CALL FOR THE EXPANSIVE APPLICATION AND INTERPRETATION OF THE CLERGY-COMMUNICANT PRIVILEGE

> Counsel in the heart of man is like deep water; but a man of understanding will draw it out.[1]

> The sustaining function of the cure of souls in our day continues to be a crucially important helping ministry . . . . Tightly knit communities once furnished friends and neighbors who could stand by in moments of shock, whereas in a society on wheels the task of providing such sustenance to urban and suburban people falls heavily upon the clergy.[2]

I. INTRODUCTION

More than forty percent of Americans who seek counseling or guidance initially consult a clergyperson.[3] Clergy are generally accessible[4] and may also have had previous contact with the counselee in a noncounseling environment, thus establishing some prior degree of trust.[5] This trust may be enhanced by the nature of the religious calling because a clergyperson's authority may be perceived as ultimately derived from God.[6] Thus, a person seeking help may assume that confidences

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1. *Proverbs* 20:5 (King James).

2. WILLIAM A. CLEBSCH & CHARLES R. JAEKLE, PASTORAL CARE IN HISTORICAL PERSPECTIVE 80 (1964).

3. Ezra E.H. Griffith & John L. Young, *Pastoral Counseling and the Concept of Malpractice*, 15 BULL. AM. ACAD. PSYCHIATRY & L. 257, 257 (1987).

4. *See generally* HOWARD CLINEBELL, BASIC TYPES OF PASTORAL COUNSELING 46-71 (1984). Clinebell notes several strategic advantages of the clergy-counselor, including a high level of trust, the identity of the role, established relationships, family contacts, frequent presence in crisis times, unique training, and the availability of most clergy. He believes that "[a] troubled person can usually see a minister without waiting several days . . . often without making an appointment in advance." *Id.* at 71. Moreover, that clergypersons "can counsel without charging is also an advantage in that it allows them to see persons, including the very poor, entirely on the basis of need." *Id.*

5. *Id.* at 54, 79.

6. *See* Kenneth L. Woodward & Patricia King, *When a Pastor Turns Seducer*, NEWSWEEK, Aug. 28, 1989, at 48; *see also* CLINEBELL, *supra* note 4, at 67-70 (stating that "ministers tend to be perceived as religious authority figures, as religious 'transference figures'").

entrusted to God's care can also be entrusted to God's emissary on earth. Unfortunately, such an assumption of confidentiality may not be prudent.[7]

This note focuses on confidential communications between clergy and those seeking counsel, and on the privileged nature of such communications.[8] Part II provides a brief overview of the historical and

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7. *See* Weldon Ponder, *Will Your Pastor Tell?*, LIBERTY, May-June 1978, at 2.

8. The clergy-communicant privilege is a testimonial privilege governed in the federal courts by FED. R. EVID. 501 and in the state courts by statute. Rule 501 applies to privileges generally, including attorney-client, doctor-patient, husband-wife, and clergy-communicant. The rule, however, does not govern these privileges in specific terms. Rather, it provides for common law interpretation "[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority." *Id.* Moreover, the rules of privilege "shall be determined in accordance with State law." *Id.*

In 1973, the Supreme Court proposed specific provisions delineating thirteen privileges. The clergy-communicant privilege was proposed as Rule 506, which provided a rather expansive scope for the privilege:

> (a) DEFINITIONS. As used in this rule:
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> (1) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
>
> (2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
>
> (b) GENERAL RULE OF PRIVILEGE. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as a spiritual adviser.
>
> (c) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority to do so is presumed in the absence of evidence to the contrary.

Rules of Evidence for U.S. Courts and Magistrates, 56 F.R.D. 183, 247 (proposed 1973).

Much controversy accompanied Rule 506 and the other proposed privilege provisions. *See* FED. R. EVID., ART. V, comm. 500.1. The clergy-communicant privilege, however, was one of the least controversial. The Advisory Committee to the Federal Rules of Evidence saw the privilege as "merely defining a long-recognized principle of American law." *In re* Grand Jury Investigation, 918 F.2d 374, 381 (3d Cir. 1990). The Advisory Committee wrote in its note to proposed Rule 506:

> The choice between a privilege narrowly restricted to doctrinally required confessions and a privilege broadly applicable to all confidential communications with a clergyman in his professional character as a spiritual adviser has been exercised in favor of the latter. Many clergymen now receive training in marriage counseling and the handling of personality problems. Matters of this kind fall readily into the realm of the spirit.

56 F.R.D. at 248. Ultimately, Congress eliminated all of the specific privilege provisions promulgated by the Court and adopted Rule 501, the single, general privilege rule now in

current statutory status of the privilege, highlighting some inherent difficulties in statutory definition, interpretation, and variation. Part III raises several contemporary issues that have been, or could become, increasingly problematic for courts applying the privilege, including secular pastoral counseling, pluralism and the definition of clergy, marriage counseling, and child abuse counseling. Part IV considers the constitutional and public policy justifications of the privilege. Finally, this writer concludes that the best construction and interpretation of the privilege is the broadest one possible. In spite of the judiciary's discomfort with absolutes, the best statute or judicial decision in this area is one granting a virtually absolute privilege, holding inviolate any intended confidential communication between clergy and communicant.

II. HISTORICAL BACKGROUND: FROM COMMON LAW TO STATUTE

Although there is historical evidence that the clergy-communicant privilege has roots in English law before the Restoration,[9] the privilege was not a part of the common law adopted in this country.[10] Blackstone's *Commentaries*[11] do not even mention the privilege, and Wigmore, in his authoritative treatise on evidence, asserted that although the privilege was not a part of the common law, it is justifiably recognized on policy grounds.[12] In support of that assertion, Wigmore applied the following four prerequisites to a claim of privilege: (1) the allegedly privileged communication must have originated in confidence that it would not be disclosed, (2) the asserted confidentiality must be essential to satisfactory maintenance of the relationship between the parties, (3) this relationship must be one that, in the opinion of the community, should be sedulously fostered, and (4) the damage resulting from disclosure must exceed the benefit that would ensue from a more expeditious disposition of the

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effect.

The privilege is known by a variety of statutory and common law classifications, including priest-penitent privilege, priest-communicant privilege, clergy-penitent privilege, and clergy-communicant privilege. For purposes of inclusiveness and clarity, the term "clergy-communicant privilege" is used throughout this note to encompass all of the aforementioned statutory and common law classifications.

9. *See* WILLIAM H. TIEMANN & JOHN C. BUSH, THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW 39 (1983).

10. *See* 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2394 (McNaughton rev. ed. 1961 & Supp. 1988).

11. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (photo. reprint 1983) (Oxford, Clarendon Press 1765).

12. *See* WIGMORE, *supra* note 10, §§ 2394-96.

cause.[13] Wigmore concluded that the clergy-communicant privilege satisfied these requirements.[14]

Even Jeremy Bentham, considered by Wigmore to be "the greatest opponent of privileges,"[15] believed that the clergy-communicant privilege was worthy of recognition.[16] Bentham's words portend of the constitutional dimension and dilemma that no court has yet confronted directly:

> In the character of penitents, the people would be pressed with the whole weight of the penal branch of the law: inhibited from the exercise of this essential and indispensable article of their religion: prohibited, on pain of death, from the confession of all such misdeeds as, if judicially disclosed, would have the effect of drawing down upon them that punishment . . . .[17]

Bentham's assertion, directed toward the secrecy of the Catholic confessional, is problematic in the context of contemporary society, in which most religious bodies do not require or sacramentalize confession.[18] Nonetheless, the broader implications of the connection

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13. *Id.* § 2396.

14. *See id.*

15. *Id.*

16. *See* 4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 586 (photo. reprint 1978) (1827). Bentham, a nineteenth-century English authority on evidence law, was widely known as an opponent of testimonial privileges. He believed that the need for the "best evidence" required that all relevant evidence be revealed. *See id.* at 481. Consequently, his recognition of the validity of the clergy-communicant privilege is of great import.

17. *Id.* at 588. Although no court has decided a case concerning the clergy-communicant privilege on constitutional grounds, a district court in Utah discussed the constitutional issues in Scott v. Hammock, 133 F.R.D. 610, 618-19 (D. Utah 1990). The court upheld the privilege on evidentiary and statutory grounds.

18. "Sacraments," for Christians, are those rites ordained by Jesus and understood to be symbols, signs or consecrations of Jesus's life and teachings. Christians are expected to partake of and participate in the sacraments throughout their lives. "Penance" is one of seven sacraments recognized by the Roman Catholic Church. It involves the confession of sin or wrongdoing, repentance of that wrongdoing, and submission to penalties imposed. The other sacraments recognized by the Catholic Church include baptism, confirmation, the Eucharist (or the Lord's Supper), holy orders (ordination), matrimony, and extreme unction (burial rite). Protestant churches generally recognize only two sacraments—baptism and the Lord's Supper.

When construing the applicability of the clergy-communicant privilege, some courts have decided the issue on the basis of the sacraments recognized by the particular religion involved. Thus, if that church specifies and prescribes the sacrament of penance (or confession), the privilege will be recognized. See *infra* notes 20-27 and accompanying text

between the free exercise of religion and the privilege are provocative.[19]

The "free exercise justification" was noted in the first American case dealing with the privilege. In 1813, the New York Court of General Session decided *People v. Phillips*.[20] In *Phillips*, a parishioner confessed to his priest that he had recovered stolen goods. After the parishioner was charged, the priest refused to testify, claiming that the canons[21] of the Roman Catholic Church held him to secrecy.[22] The *Phillips* court stated that the priest could not be compelled to testify because such an order would infringe on the free exercise of his religion: "It is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected."[23]

The difficulty with *Phillips*, as with Bentham's assertion, is that the court focused on the sacramental and prescribed nature of the confessional for Catholics, leaving open the question of whether clergy of other denominations would be protected.[24] In a subsequent New York case, *People v. Smith*,[25] the court answered this question negatively. In *Smith*,

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for a discussion of related case law. Most modern statutes explicitly include confessions other than those in the Catholic Church as privileged communications, even if they do not include communications that are not confessional in nature.

19. See *infra* notes 165-204 and accompanying text for a discussion of the constitutional implications.

20. *Phillips* was not officially reported, but is excerpted in *Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955) [hereinafter *Privileged Communications*].

21. Canon law is the compilation of the ecclesiastical laws of the Roman Catholic Church. Confidentiality in the Catholic Church is governed by provisions of canon law, most specifically through the "seal of confession." Applicable canonical provisions include 1983 CODE c.1388, §§ 1, 2 (Book VI, *Sanctions in the Church*), and *id.* c.983, §§ 1, 2, and c.984, §§ 1, 2 (Book IV, *The Office of Sanctifying in the Church*). Canons governing confidential oral communications include *id.* c.127, § 3; c.377, §§ 2, 3; c.1455, §§ 1, 2. Some of the relevant language of the canons provides:

> The sacramental seal is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason.

Id. c.983, § 1.

> A confessor who directly violates the seal of confession incurs an automatic (*latae sententiae*) excommunication reserved to the Apostolic See; if he does so only indirectly, he is to be punished in accord with the seriousness of the offense.

Id. c.1388, § 1.

22. *Privileged Communications*, *supra* note 20, at 200.

23. *Id.* at 207.

24. *See* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 105 n.53 (1983). For a general discussion of the applicability of Bentham's assertion to non-Catholic clergy communications, see TIEMANN & BUSH, *supra* note 9, at 126.

25. The case was not officially reported, but portions of the text are excerpted in

a Protestant pastor was forced to testify concerning the confession of a prisoner charged with murder.[26] It is perhaps not surprising that, in response to the controversial *Smith* decision, the New York legislature considered the issue and in 1828 enacted the first statute establishing the privilege.[27]

Given the sensitive relationship between religion and law, it is also understandable that the judiciary has been generally reluctant, absent statutory guidance, to confront the privilege through litigation.[28] After *Smith*, there was little mention of the privilege in case law until the Supreme Court stated in dictum that "[o]n this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional."[29] Although this authority was merely persuasive, it was given great credence, for, in the absence of a statute and without common law precedent, the highest court in the land had recognized the legitimacy of the privilege.[30]

Nonetheless, the privilege was never considered absolute. Several nineteenth-century courts compelled clergy testimony if the communications were not confessional in nature,[31] not made to a clergyperson acting in professional character,[32] or not made to the

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Privileged Communications, *supra* note 20.

26. *Id.* at 211 ("His Honour thereupon decided that the testimony was admissible, and took distinction between auricular confessions made to a priest in the course of discipline, according to the canons of the church, and those made to a minister of the gospel in confidence, merely as a friend or an advisor.").

27. *See* 2 N.Y. Rev. Stat. ch. VII, tit. III, § 72 (1828) (current version at N.Y. CIV. PRAC. L. & R. 4505 (McKinney 1963 & Supp. 1991)). The statute provided that "[n]o 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." *Id.*

New York's current statute limits the privilege to "a clergyman, or other minister of any religion or duly accredited Christian Science practitioner . . . [and covers] a confession or confidence made to him in his professional character as spiritual advisor." N.Y. CIV. PRAC. L. & R. 4505 (McKinney 1963 & Supp. 1991).

28. *See* Note, *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1556 (1985).

29. Totten v. United States, 92 U.S. 105, 107 (1875). In this case, considering whether the U.S. was bound by a war-time contract for confidential services, the government argued that national secrets would be disclosed if the suit was tried. The Supreme Court agreed, saying that maintaining the suit would "inevitably lead to the disclosure of matters which the law itself regards as confidential." *Id.*

30. *See* Yellin, *supra* note 24, at 107.

31. *See, e.g.*, Knight v. Lee, 80 Ind. 201 (1881) (holding that a communication with a church official was not a confession within the statutory meaning and thus not privileged).

32. *See, e.g.*, People v. Gates, 13 Wend. 311 (N.Y. Sup. Ct. 1835) (holding that

clergyperson in a private setting.[33] Despite the relative paucity of litigation, legislators increasingly came to believe that the privilege should be recognized.[34] Thus, by 1963, forty-four states followed New York's lead and enacted statutes authorizing some form of the privilege.[35] Today, all fifty states and the District of Columbia have established the privilege statutorily,[36] albeit with a wide variance among the applicable provisions.[37]

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admissions to the president of a church were not privileged).

33. *See, e.g.*, Commonwealth v. Drake, 15 Mass. 161 (1818) (holding that a public confession before a clergyman and members of a church was not privileged).

34. *See* Yellin, *supra* note 24, at 107-08.

35. *See id.* at 108.

36. *See* ALA. CODE § 12-21-166 (1990); ALASKA CT. R. EVID. 26(b)(4) (1978); ARIZ. REV. STAT. ANN. §§ 12-2233, 13-4062(3) (1987 & Supp. 1991); ARK. CODE ANN. § 16-41-101 (Michie 1987), ARK. R. EVID. 505; CAL. EVID. CODE §§ 1030-34 (West 1992); COLO. REV. STAT. § 13-90-107(1)(c) (1991); CONN. GEN. STAT. ANN. § 52-146(b) (West Supp. 1991); DEL. R. EVID. 505; D.C. CODE ANN. § 14-309 (1989); FLA. STAT. ch. 90.505 (1991); GA. CODE ANN. § 24-9-22 (Michie 1981 & Supp. 1991); HAW. REV. STAT. § 626-1 (1985 & Supp. 1991), HAW. R. EVID. 506; IDAHO CODE § 9-203 (1990); ILL. ANN. STAT. ch. 110, para. 8-803 (Smith-Hurd 1984 & Supp. 1991); IND. CODE ANN. § 34-1-14-5 (Burns 1986 & Supp. 1991); IOWA CODE ANN. § 662.10 (West 1950 & Supp. 1991); KAN. STAT. ANN. § 60-429 (1965 & Supp. 1991); KY. REV. STAT. ANN. § 421.210(4) (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. § 15:477 (West 1981 & Supp. 1992); ME. R. EVID. 505; MD. CTS. & JUD. PROC. CODE ANN. § 9-111 (1989); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1986 & Supp. 1991); MICH. COMP. LAWS ANN. § 600.2156 (West 1986 & Supp. 1991); MINN. STAT. ANN. § 595.02 (West 1988 & Supp. 1992); MISS. CODE ANN. § 13-1-22 (Supp. 1991); MO. ANN. STAT. § 491.060 (Vernon 1952 & Supp. 1992); MONT. CODE ANN. § 26-1-804 (1991); NEB. REV. STAT. § 27-506 (1985 & Supp. 1991); NEV. REV. STAT. § 49.255 (1986 & Supp. 1991); N.H. REV. STAT. ANN. § 516:35 (Supp. 1991); N.J. STAT. ANN. § 2A:84A-23 (West 1976 & Supp. 1991); N.M. STAT. ANN. R. EVID. § 11-506 (Michie 1986 & Supp. 1991); N.Y. CIV. PRAC. L. & R. 4505 (McKinney 1963 & Supp. 1991); N.C. GEN. STAT. §8-53.2 (1986 & Supp. 1991); N.D. R. EVID. 505; OHIO REV. CODE ANN. § 2317.02 (Anderson 1991 & Supp. 1992); OKLA. STAT. ANN. tit. 12, § 2505 (West 1980 & Supp. 1992); OR. REV. STAT. § 40.260, R. EVID. 506 (1991); 42 PA. CONS. STAT. ANN. § 5943 (1982 & Supp. 1991); R.I. GEN. LAWS § 9-17-23 (1990); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1990); S.D. CODIFIED LAWS ANN. § 19-13-17 (1990); TENN. CODE ANN. § 24-1-206 (1980 & Supp. 1991); TEX. R. CIV. EVID. 505; UTAH CODE ANN. § 78-24-8 (1987 & Supp. 1991); VT. STAT. ANN. tit. 12, § 1607 (1983 & Supp. 1990); VA. CODE ANN. § 8.01-400 (Michie Supp. 1991); WASH. REV. CODE ANN. § 5.60.060 (West 1990); W. VA. CODE § 57-3-9 (Supp. 1991); WIS. STAT. ANN. § 905.06 (West 1975 & Supp. 1991); WYO. STAT. § 1-12-101 (1991).

37. For a synopsis of the statutory provisions of each state, see DONNA K. IOPPOLO ET AL., CONFIDENTIALITY IN THE UNITED STATES: A LEGAL AND CANONICAL STUDY 49-92 (1988).

The little case law that has developed under the statutes generally concerns definition and application of the privilege. When does the privilege apply? Who qualifies as clergy? What kind of communication is protected? Who may invoke or waive[38] the privilege?

A 1931 case, *In re Swenson*,[39] extended the privilege to non-Catholic clergy and communicants. The Minnesota Supreme Court interpreted the state's privilege statute to include a voluntary "confession" to a Lutheran pastor, overruling a lower court's decision that the statute applied only to penitents who were required to confess and to clergy who were required to hear confession and maintain secrecy as part of church discipline.[40] The lower court reasoned that, because the Lutheran Church did not require confession or the secrecy of that confession, the privilege did not apply.[41] The Minnesota Supreme Court called such a limitation an "absurdity."[42]

> The question is not the truth or merits of the religious persuasion to which a party belongs nor whether the particular creed or denomination exacts, requires, or permits a sacred communication; but the sole question is . . . whether the party

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38. "Waiver" is generally understood to occur if the communicant explicitly or implicitly states that intention. *See, e.g.*, NEV. REV. STAT. § 49.255 (1986 & Supp. 1991). *But cf.* EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 76.2(b) (3d ed. Supp. 1987) (stating that some states confer an independent privilege on the clergy). Waiver also occurs when, without coercion, the communicant has disclosed the communication to someone other than the protected parties, *see* De'udy v. De'udy, 495 N.Y.S.2d 616, 618 (Sup. Ct. 1988), or, in some states, if a third, unprotected party is present or hears the communication, *see* WIGMORE, *supra* note 10, § 2394.

39. 237 N.W. 589 (Minn. 1931).

40. *See id.* at 591. The terms "course of discipline," "church discipline," and "church tenets" are used interchangeably throughout this note to indicate a specific mandate or principle governing the clergy and members of a particular church. In the Catholic Church, "course of discipline" is a formal mandate explicitly stated in canon law. In other churches or religious organizations, it may be explicitly stated in the constitution or bylaws, *see, e.g.*, EVANGELICAL LUTHERAN CHURCH IN AM., DEFINITION AND GUIDELINES FOR DISCIPLINE OF ORDAINED MINISTERS (1989); PRESBYTERIAN CHURCH, CONSTITUTION OF THE PRESBYTERIAN CHURCH (U.S.A.): PART II, BOOK OF ORDER (1989), it may exist through resolution, *see, e.g.*, CENTRAL CONFERENCE OF AM. RABBIS, RESOLUTION ON PRIVILEGED COMMUNICATION (1976), or it may be implicitly understood.

Only the Catholic and Eastern Orthodox religions sacramentalize and formally require the "course of discipline" involved with the privilege. Therefore, if a statute uses the term or one of its variants, the scope of the privilege may be limited if a court construes the term as a sacrament or formal mandate rather than as a church guideline or principle.

41. *See Swenson*, 237 N.W. at 589.

42. *Id.* at 590.

> who bona fide seeks spiritual advice should be allowed it freely.[43]

The *Swenson* case has been cited in related cases that extend the privilege to clergy who are not specifically enjoined from disclosing confidential communications by the stated canons or disciplines of their church.[44] State courts, however, have not uniformly followed the reasoning of *Swenson* even when the particular statute being construed may have allowed for such an interpretation.[45] In *Ball v. State*,[46] the Supreme Court of Indiana ruled that a Baptist clergyman was competent to testify because the defendant's alleged confidential confession to him did not fall under one of the tenets or disciplines of the clergyman's church.[47] *Ball* is distinguishable from *Swenson*, however, because the minister in *Ball* told the court that he would not keep any admission of criminal activity confidential, given that *he* did not believe such a discipline was commanded by his church.[48] The Indiana court did not indicate whether its decision would have been different if the clergyman had not been willing to testify.

A Kentucky case, *Johnson v. Commonwealth*,[49] also demonstrates the difficulty in determining when a privilege statute may apply. In a murder prosecution, a Methodist pastor was called to testify as to his conversation with the defendant in the county jail.[50] On the pastor's claim of privilege, the court ruled that the communications were not penitential in character and that the pastor was not acting in the course of discipline prescribed by

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43. *Id.* at 591.

44. *See, e.g.*, Mullen v. United States, 263 F.2d 275, 277 (D.C. Cir. 1959) (citing *Swenson* as support in construing the D.C. code to include a communication to a Lutheran minister); Cimijotti v. Paulsen, 219 F. Supp. 621, 624 (N.D. Iowa) (citing *Swenson* in case applying privilege to testimony of witnesses in course of annulment proceeding), *appeal dismissed*, 323 F.2d 716 (8th Cir. 1963), *on remand*, 230 F. Supp. 39 (N.D. Iowa 1964), *aff'd*, 340 F.2d 613 (8th Cir. 1965); *see also* TIEMANN & BUSH, *supra* note 9, at 131 (stating that *Swenson*'s definition of clergy includes spiritual representatives, as well as others who are the source of spiritual discipline, advice, and remission of sins).

45. *See, e.g.*, Johnson v. Commonwealth, 221 S.W.2d 87 (Ky. 1949). See *infra* notes 49-52 and accompanying text for a discussion of this case.

46. 419 N.E.2d 137 (Ind. 1981).

47. *See id.* at 139. The defendant confessed to a clergyman that he had murdered three people. The clergyman subsequently testified, freely telling the court that his church did not mandate confession and confidentiality and that, even if it did, he would not follow that mandate if it meant suppressing evidence of a crime. *See id.* at 139-40.

48. *See id.* at 139-40.

49. 221 S.W.2d 87 (Ky. 1949).

50. *See id.* at 89.

his church.[51] The court reasoned that the defendant's statements to the pastor were not in furtherance of some religious duty and that the pastor's visits to the jail were entirely voluntary and unsolicited and, consequently, not penitential in nature.[52]

In a recent case construing the privilege, the Utah district court held that a communication that was nonconfessional in nature was privileged because the defendant approached the clergyperson seeking religious guidance and advice that was in the course of discipline of the defendant's church.[53] The court based its decision on its belief that the privilege should "protect communications made (1) to a clergyperson (2) in his or her spiritual and professional capacity (3) with a reasonable expectation of confidentiality."[54]

In response to questions raised by litigation or in the process of constructing a statute, a majority of state legislatures have enacted statutes that exclude the restraining words "course of discipline"[55] or have revised their statutes to include more than communications made in furtherance of church discipline.[56] These statutory provisions would include information confidentially communicated to the pastor in her professional role, regardless of the explicit requirements, or lack thereof, of her denomination or religion.

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51. *See id.*

52. *See id.*

53. *See* Scott v. Hammock, 133 F.R.D. 610, 619 (D. Utah 1990). The case involved an adopted daughter who sued her adoptive father for abusing her as a child. She requested documents relating to the excommunication of her father from the Mormon Church, which contained references to possible physical or sexual abuse. *See id.* at 611.

54. *Id.* at 616 (quoting *In re* Grand Jury Investigation, 918 F.2d 374, 384 (3d Cir. 1990)).

55. See *supra* note 40 for a definition of "course of discipline."

56. Consequently, the statutes are broad enough to cover more than confessions or pure penitential communications. Nonetheless, the statutes of 19 states retain the requirement that privileged communications be made in the course of discipline enjoined by the church to which the clergyperson belongs. *See* ALA. CODE § 12-21-166 (1990); ARIZ. REV. STAT. ANN. §§ 12-2233, 13-4062(3) (1987 & Supp. 1991); CAL. EVID. CODE §§ 1030-34 (West 1992); COLO. REV. STAT. § 13-90-107(1)(c) (1991); IDAHO CODE § 9-203 (1990); ILL. ANN. STAT. ch. 110, para. 8-803 (Smith-Hurd 1984 & Supp. 1991); IND. CODE ANN. § 34-1-14-5 (Burns 1986 & Supp. 1991); MICH. COMP. LAWS ANN. § 600.2156 (West 1986 & Supp. 1991); MONT. CODE ANN. § 26-1-804 (1991); N.C. GEN. STAT. § 8-53.2 (1986 & Supp. 1991); R.I. GEN. LAWS § 9-17-23 (1990); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1990); TENN. CODE ANN. § 24-1-206 (1980 & Supp. 1991); UTAH CODE ANN. § 78-24-8 (1987 & Supp. 1991); VT. STAT. ANN. tit. 12, § 1607 (1983 & Supp. 1990); VA. CODE ANN. § 8.01-400 (Michie Supp. 1991); WASH. REV. CODE ANN. § 5.60.060 (West 1990); W. VA. CODE § 57-3-9 (Supp. 1991); WYO. STAT. § 1-12-101 (1991).

In addition to the issue of when a communication with a clergyperson is protected, there is a question of definition: Who qualifies as clergy? The statutes vary widely in their stated or implied scope. Some statutes seem to limit "clergy" to Christian ministers or Jewish rabbis, with no allowance for non-Christian, non-Jewish, or lay ministers who may function in a similar capacity.[57] Other statutes are broader in definition and employ phrases such as "other person or practitioner authorized to perform similar functions"[58] or "other similar functionary"[59] to encompass the ever-increasing number of non-Christian, non-Jewish religions that will confront American courts.[60]

What constitutes "communication" for purposes of the privilege was considered in a 1974 South Dakota case, *United States v. Boe*.[61] The case involved a Lutheran minister, Paul Boe, who was cited for contempt by the South Dakota district court when he refused to answer questions concerning the occupation of Wounded Knee by a militant American Indian protest group.[62] Although the circuit court reversed Reverend Boe's contempt citation on other grounds,[63] it is significant that Boe was not asked to divulge the content of any conversations but rather to report what he had observed at Wounded Knee.[64] Courts thus far have tended

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57. *See, e.g.*, GA. CODE ANN. § 24-9-22 (Michie 1981 & Supp. 1991) (limiting the privilege to "any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister by whatever name called"). See *infra* notes 203-04 and accompanying text for a discussion of the constitutional difficulties inherent in this statutory construction.

58. *E.g.*, N.J. STAT. ANN. § 2A:84A-23 (West 1976 & Supp. 1991).

59. *E.g.*, CAL. EVID. CODE §§ 1030-34 (West 1992); ME. R. EVID. 505; MISS. CODE ANN. § 13-1-22 (Supp. 1991); NEB. REV. STAT. § 27-506 (1985 & Supp. 1991); N.M. STAT. ANN. R. EVID. 11-506 (Michie 1986 & Supp. 1991); N.D. R. EVID. 505; OKLA. STAT. ANN. tit. 12, § 2505 (West 1990 & Supp. 1992); WIS. STAT. ANN. § 905.06 (West 1975 & Supp. 1991).

60. *See infra* notes 92-93 and accompanying text.

61. 491 F.2d 970 (8th Cir. 1974). Since 1968, Boe had established ties with the American Indian Movement, a militant protest organization. He was invited to the "occupation" of Wounded Knee in the role of spiritual advisor. Boe made no claim to have heard confessions at Wounded Knee and he did answer questions in the grand jury proceeding that he believed would not betray confidences. However, he refused to identify the people he saw at the "occupation," claiming that it would destroy his relationship with them. *See* Dean M. Kelley, *"Tell All" or Go to Jail: A Dilemma for the Clergy*, CHRISTIAN CENTURY, Jan. 30, 1974, at 96, 96.

62. *See Boe*, 491 F.2d at 971.

63. *See id.* The circuit court did not rule on the merits but decided that Boe did not have a meaningful opportunity to raise his defense in the lower court.

64. The court wanted to know who was there and who was carrying guns. *See* Kelley, *supra* note 61, at 97.

to interpret the privilege to cover written or oral communication but have not been as willing to include simple observations. It could be argued, however, that the observations of a person who is perceived to be functioning in her professional capacity as clergy should be privileged regardless of precedent, because it is increasingly accepted that human beings communicate their thoughts and feelings in a variety of ways, including speaking, writing, and acting.[65]

The state statutes vary widely concerning who may claim the privilege. Traditionally, the privilege belonged to the communicant rather than the clergyperson, in that the communicant could choose whether to assert or to waive the privilege.[66] However, at least one state has recognized that clergy have the right to assert the privilege even when the communicant waives it.[67] Other states grant the right of waiver only to the clergy.[68] And some states go so far as to prohibit either party from waiving the privilege, thereby enacting the ultimate protection for clergy.[69]

III. CONTEMPORARY IMPEDIMENTS TO A BROAD PRIVILEGE

Given the historical and statutory background of the clergy-communicant privilege, several questions arise concerning its current

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65. See Commonwealth v. Zezima, 310 N.E.2d 590 (Mass. 1974), in which the court held that the privilege covered the showing of a gun during the course of otherwise privileged communication, stating that "communication in § 20A [the privilege statute] is not limited to conversation and includes other acts by which ideas may be transmitted from one person to another." *Id.* at 592.

Including observations within privileged communications would not necessarily include observations by clergy when they are not functioning or perceived as functioning in a professional capacity.

66. *See* TIEMANN & BUSH, *supra* note 9, at 150. See *supra* note 38 for a definition of "waiver."

67. *See* CAL. EVID. CODE §§ 1030-34 (West 1992) (stating that a clergyperson has a privilege to refuse to disclose a penintential communication).

68. *See, e.g.*, ILL. ANN. STAT. ch. 110, para. 8-803 (Smith-Hurd 1984 & Supp. 1991). Granting waiver only to clergy implies that they will be more discerning than the communicant about what should be privileged. However, it seems contrary to the policy of encouraging free and full disclosure if the communicant has no say in the confidential nature of the conversation.

69. *See, e.g.*, IND. CODE ANN. § 34-1-14-5 (Burns 1986 & Supp. 1991). Because the privilege is a mutual one, involving at least two parties, both parties should have some control over the disclosure of otherwise confidential communications. Moreover, in spite of a communicant's waiver, clergy may be concerned with keeping their own words confidential, with their duty to maintain confidences, or with the protection of innocent parties who may have been the subject of the communication.

status and the contemporary impediments to an expansive interpretation. These questions include: Is pastoral counseling ever secular and therefore arguably outside the boundaries of the privilege? Do the statutes and judicial decisions adequately define "clergy"? Should marriage counseling be considered a confidential communication? Is the privilege justifiably abrogated in cases of child abuse?

A. *The Illusion of Secular Pastoral Counseling*

All statutes appear to limit confidential communications to those received by a clergyperson in her professional role.[70] But when does that professional role begin and end? Given that none of the statutes demand that the privileged communication be conveyed in the confessional,[71] it follows that communication to a clergyperson that is intended to be confidential should be kept confidential regardless of the time, place or manner in which it is communicated. An underlying purpose of the privilege is to encourage members of society to confess their wrongdoing or seek counsel in order to be "healed."[72] This purpose would be undermined if the only communications protected were those technically spiritual in nature or function.

Moreover, many denominations consider ordination to be an "all or nothing" endeavor,[73] making it difficult to pinpoint when a clergyperson is functioning in her professional capacity giving spiritual counsel and when she is not. Arguably, counseling by a clergyperson is never secular per se and should always be privileged.[74] This assertion does not ignore the reality that much of pastoral counseling is not traditional "spiritual counseling."[75] Nonetheless, counseling is never wholly secular because

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70. See *supra* note 36 for specific statutory provisions.

71. Although some statutes may be read to cover only confessions, they do not limit the place of those confessions to the confessional—that is, the specific place in the Catholic Church where a penitent sits in a private cubicle with the priest in a nearby but separate cubicle, so that the priest can hear the penitent but generally cannot see her. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-2233, 13-4062(3) (1987 & Supp. 1991); IDAHO CODE § 9-203 (1990). The traditional concept of the privilege as construed in this context, however, was easier to define, interpret, and apply. Whatever was spoken in the confessional was privileged; whatever was spoken outside the confessional was not.

72. Kelley, *supra* note 61, at 98. For more discussion of the policy and utility of encouraging confession through the recognition of the privilege, see *infra* notes 206-14 and accompanying text.

73. Most Christian religions ordain (or appoint) clergy for life and expect the ordinand's life and work to reflect her calling at all times and in all places.

74. *See* IOPPOLO ET AL., *supra* note 37, at 158.

75. *See* CLINEBELL, *supra* note 4, at 103-393, for a discussion of the varieties of

a pastor is always a pastor simply by virtue of who she is. A pastor's role is not defined by what she says or where she says it. Given that perception, the privilege cannot be simply defined by place but is more clearly understood as person- and content-defined. Thus, whenever a communicant consults a clergyperson, she may do so with the belief and intent that what she says will not be divulged—without exception. Many clergy and church members feel that this belief and intent must be honored to ensure that trust and confidence in the church and the clergy will not be lost.[76]

As the role of clergy in society continues to change, it seems incumbent on courts and legislatures to consider these changes when drafting and interpreting statutes.[77] Clergy in inner cities often walk the streets in clerical garb, ready and willing to provide counsel at any moment and at any place.[78] This practice should not be discouraged by strict interpretations of spiritual or secular counseling or confessional confidences. Clearly, persons in need of help will not be as willing to confide in a clergyperson if they have to worry about being turned in. Moreover, some clergy find that people are more comfortable and willing to talk in their own environment than in a church office.[79] If a person requests a home or workplace visit, a strict statutory interpretation of the privilege would require that clergy preface their conversation with a warning that it might not be considered confidential.[80] Such a warning may be prudent, but it could ultimately prove counterproductive.

And what if a clergyperson in clerical garb enters a bar, a seemingly unsacred place, fully intending to give counsel, lend support or listen?[81] For several years in the Tacoma, Washington, area, clergy have been doing just that in a program called "Operation Nightwatch."[82] Every

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counseling that clergy are called upon to perform.

76. *See* Ponder, *supra* note 7, at 3.

77. *See* TIEMANN & BUSH, *supra* note 9, at 192.

78. *See infra* note 82.

79. *See* CLINEBELL, *supra* note 4, at 190-94.

80. *See* Michael C. Smith, *The Pastor on the Witness Stand: Toward a Religious Privilege in the Courts*, 29 CATH. LAW. 1, 2 (1984).

81. This question was asked in an editorial letter written by the Director of the Texas Civil Liberties Union in response to an inquiry as to why the ACLU did not have a strong and broad policy supporting protected communications between clergy and communicants. *See* Gara LaMarche, *But Who Is a Confessor?*, DALLAS MORNING NEWS, Oct. 16, 1985, at 8.

82. "Operation Nightwatch" originated in St. Louis, Missouri, in the early 1970s. It has now expanded throughout the country, placing clergy in the downtown areas of cities, where they walk the streets or sit in bars, bus stations or restaurants seeking to help in whatever way they can. Letter from the Rev. Dean C. Jones, Executive Director, Operation

evening one of the clergy spends the night talking with people in bars or "seedy" restaurants or on the street. Many of the patrons in the places the clergy frequent know the clergy and know why they are there. This "ministry of presence" is not evangelical, proselytory or directional in its counseling focus. It is simply an attempt to meet people on their time and in their place.

On a cold night in the fall of 1989, one of these pastors was out roaming the bars and restaurants along a run-down Tacoma strip.[83] He stopped in a tavern around 3:00 a.m. for a cup of coffee and sat down next to a man with long dirty hair, dishevelled clothes, and several days of beard on his face. The man saw the clerical collar and said he didn't need any preaching. The pastor said he was just looking for coffee, not somebody to preach to, but if the man wanted to talk, he would listen. And so they talked. Actually, the man talked, and the pastor listened. An hour later, they left together to get the man something to eat and a place to stay. Earlier that evening, the man's belongings had been stolen from a locker in the bus station, and all that was left in its place were two spent bullets. "A warning," he told the pastor. He had been a drug runner for one of Tacoma's major narcotics dealers and was now on the run himself because he wanted out of the whole racket. But in his line of work you didn't just quit your job.

There was no actual confession that night. There was no holy place where the two men talked to give their conversation an aura of spirituality. There was no absolution explicitly requested or offered. There were simply two people—one who shared his life and his fears, one who listened and gave counsel. And when asked if he would ever testify as to the man's identity or the particulars of that conversation, the pastor replied, "Never."

Similar communications between clergy and laity[84] occur all over this country during any hour of any given day, whether in a Tacoma bar or on a New York street. When people see the clerical collar or talk openly because they know they are talking to a clergyperson, they believe and intend that their words are between themselves, the clergyperson, and God.[85] Given this perception, such confidence and trust should not depend on where the communication took place or its seemingly secular content—a distinction clearly not recognized by the communicant.

Nightwatch in Tacoma, Wash., to Lori L. Brocker, Author (Nov. 27, 1989) (on file with the *New York Law School Law Review*).

83. The information in this and the following paragraph was obtained in an interview with the Rev. Frank Brocker, Tacoma, Wash. pastor and "Nightwatch" participant, in Seattle, Wash. (Nov. 11, 1989).

84. "Laity," in this context, includes all persons who are not clergy.

85. *See* Ponder, *supra* note 7, at 2.

Yet, even if place restrictions were broadly interpreted, some statutes would limit the privilege if the communicant sought counsel or guidance rather than absolution or forgiveness.[86] The drafters of these statutes and the courts that interpret them appear to be prisoners of traditions that undermine the purpose of the privilege. Clergy are increasingly used as counselors by people who do not trust or cannot afford more specialized counselors.[87] Moreover, even if a person could consult a psychiatrist, therapist or social worker, she may choose to consult a clergyperson because of the special commitment she brings to her profession.[88] It seems absurd to assert public policy justifications for encouraging the clergy-communicant relationship[89] while undermining that relationship by requiring express words of confession, forgiveness, and absolution in order to claim the privilege.

The New York privilege statute avoids the potential for such a restrictive interpretation by stating that disclosure of any confession or *confidence*[90] is not allowed, absent a communicant's waiver. Several other states refer to "confidential communication" as privileged, leaving out any express reference to "confession."[91] With this wording, courts would still need to define "confidential communication," but such communications would include more than confessions.

B. *Defining Clergy in a Changing Society*

The influx of immigrants into America in the twentieth century has also brought different cultures, different belief systems, and different religions.[92] The courts have yet to be confronted with non-Judeo-

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86. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2156 (West 1986 & Supp. 1991) (limiting the privilege to any "confession made to [a clergyperson] in his professional character").

87. *See* CLINEBELL, *supra* note 4, at 70-71.

88. *See id.* at 46-49. Clinebell claims that people may choose to talk to a religious or pastoral counselor based on the assumption that the counselor's guidance will be informed by his or her faith.

89. *See infra* notes 205-13 and accompanying text.

90. N.Y. CIV. PRAC. L. & R. 4505 (McKinney 1963 & Supp. 1991) ("[A] clergyman, or other minister . . . shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor.").

91. *See, e.g.*, MISS. CODE ANN. § 13-1-22 (Supp. 1991); NEB. REV. STAT. § 27-506 (1985 & Supp. 1991).

92. "Different religions" in this context includes all non-Judeo-Christian religions and those religions and faith practices that have grown in numbers with the influx of, among others, Asian, Hispanic, and East and West Indian immigrants, such as Buddhism, Hinduism, Islam, and Pentecostalism.

Christian religions or clergy in the context of the clergy-communicant privilege. Indeed, courts have rarely been willing to define and decide who are the clergy of a particular religion even within Judeo-Christian parameters.[93] However, it seems plausible that courts will be confronted with non-Judeo-Christian religions and clergy in the future, and when that happens the inadequacy of the statutory definitions will be apparent. Given the lack of legislative definition, the courts will have to decide whether the privilege extends to Buddhism, Islam or any other of the many faiths flourishing within America's shores. Moreover, in addition to determining who functions as clergy in non-Western faiths, courts may be confronted with the question of whether the privilege should extend beyond the borders of the ordained, certified or functional clergy.

In both instances, the variations in the statutes provide more confusion than clarity. The mainline Western denominations are often covered by statutory terms such as priest, minister or rabbi.[94] Thus, if a person is certified and ordained under those terms, it is generally clear that the privilege applies. However, some statutes simply say "member of the clergy,"[95] while others refer to "ministers of the gospel,"[96] thus limiting the scope of the definition even more.[97] The better-drafted statute would include all those who function as clergy or those perceived to do so by the person seeking counsel.[98] Such a definition would cover those who did not fit the classic definition of clergy as long as they functioned, or were perceived to function, in a similar capacity.

Although no court has decided a case precisely on the issue of who is clergy,[99] several courts have confronted the issue of who should be covered by the privilege even if they are not, and make no claim to be, clergy. In *In re Murtha*,[100] the Supreme Court of New Jersey held that the privilege did not extend to a nun, even though she had functioned as

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93. *See* Yellin, *supra* note 24, at 114-21.

94. All of the statutes protect clergy within these classifications. See *supra* note 36 for the specific statutory provisions.

95. *See, e.g.*, IND. CODE ANN. § 34-1-14-5 (Burns 1986 & Supp. 1991).

96. *See, e.g.*, IOWA CODE ANN. § 622.10 (West 1950 & Supp. 1991).

97. Limiting the privilege to "ministers of the gospel" arguably eliminates any clergy or faiths that are not Christian, since the general connotation of "the gospel" is the history and teachings of Jesus Christ and the Apostles. The "Gospels" are the first four books of the New Testament—Matthew, Mark, Luke, and John.

98. *See, e.g.*, OKLA. STAT. ANN. tit. 12, § 2505 (West 1980 & Supp. 1992) (defining clergy as "a minister, priest, rabbi, accredited Christian Science practitioner or other similar functionary of a religious organization, or any individual reasonably believed to be a clergyman by the person consulting him").

99. *See supra* note 93 and accompanying text.

100. 279 A.2d 889 (N.J. 1971).

a religious counselor.[101] The court reasoned that, regardless of the content of the communication, a nun was not included within the New Jersey statute because nuns do not perform the duties that are particular to priests in the Catholic Church.[102] This reasoning may not hold up, however, as the Catholic Church expands the role of nuns and lay Catholics to compensate for a shortage of priests.[103] If the Catholic Church authorizes the laity or sisterhood to preside over the sacrament of communion, it seems plausible that Catholic parishioners would also perceive them as worthy of presiding over other sacraments—including, perhaps, penance—or of giving counsel.

In some Protestant denominations laypersons have long had significant responsibilities under the doctrines of their church.[104] Courts have generally been reluctant to scrutinize a church's doctrines or organization beyond ascertaining whether the denomination recognized the laity as functioning in the manner of clergy.[105] For example, one court held that the ruling elders[106] of an Iowa Presbyterian church fell under the privilege because they were functioning in the religious capacity that their denomination ascribed to them.[107] However, this decision focused entirely on the polity of the Presbyterian Church, which appeared to include elders under the statutory definition of "ministers of the gospel."[108] Thus, its reasoning may not be helpful in cases in which the role of lay workers is not explicitly defined in church documents.

Some statutes may be interpreted to encompass communications overheard or found by a church worker. In those instances, the privilege will cover otherwise confidential information that was compromised when it was heard or seen by a church secretary or other layperson who was intentionally or unintentionally present or had access to the

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101. Sister Murtha had functioned as a spiritual advisor to the defendant for several years. Nonetheless, she was forced to disclose the content of a conversation she had with the defendant on the night the defendant was supposed to have committed a murder. *Id.* at 890, 892.

102. *See id.* at 892.

103. *See* IOPPOLO ET AL., *supra* note 37, at 11-12.

104. See, for example, the applicable provisions of the constitutions of the Presbyterian and Evangelical Lutheran churches delineating the service of deacons, elders, and associates in ministry, EVANGELICAL LUTHERAN CHURCH IN AM., *supra* note 40, *passim*; PRESBYTERIAN CHURCH, *supra* note 40, G-6.0100, G-6.0300, G-6.0400.

105. *See* IOPPOLO ET AL., *supra* note 37, at 161-62.

106. "Elders" are the governing officers of a church, who often have pastoral or teaching functions.

107. *See* Reutkemeier v. Nolte, 161 N.W. 290 (Iowa 1917).

108. *Id.* at 292-93.

communication.[109] Mississippi's statute has a section that explicitly covers this situation,[110] but Mississippi is not the norm. In considering privileges generally, courts usually hold that a third person is not covered by the privilege and may be compelled to testify, even if she was not supposed to be a party to the communication.[111]

In 1990, the Court of Appeals for the Third Circuit held that the privilege exists even in the presence of third parties if their presence is "essential to and in furtherance of the communication."[112] The counseling session at issue involved four people who allegedly participated in or were aware of an arson attack on a black family in their neighborhood. The pastor moved to quash the subpoena compelling him to testify.[113] Even though the case was remanded, the court clearly believed that the privilege should not be lost simply because of the presence of a third party if that party was there legitimately. This ruling, however, would not cover communications to which a third party was an unintentional listener or participant.

It seems irrational to argue, by analogy to the other privileges,[114] that a third person destroys the confidential nature of an intended privileged communication simply by being in the next office or by eavesdropping.[115] Given that one of the stated policies underlying the privilege is to encourage confessional or therapeutic communications to clergy,[116] intentional or unintentional overhearing should not change that communication or relationship in any way from that intended by the clergyperson or the communicant. The privilege stands for little if such behavior by a third party can destroy it.[117]

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109. *See, e.g.*, HAW. REV. STAT. § 626-1 (1985 & Supp. 1991), HAW. R. EVID. 506(2).

110. *See* MISS. CODE ANN. § 13-1-22 (Supp. 1991). The applicable provision reads: "A clergyman's secretary, stenographer or clerk shall not be examined without the consent of the clergyman concerning any fact, the knowledge of which was acquired in such capacity." *Id.*

111. *See* TIEMANN & BUSH, *supra* note 9, at 144-45.

112. *In re* Grand Jury Investigation, 918 F.2d 374, 377 (3d Cir. 1990). The court vacated the district court order and remanded for further proceedings, however, because the record was insufficient to establish whether the people present at a counseling session should be considered third parties as the court had defined them. *See id.*

113. *Id.* at 376.

114. See *supra* note 8 for a listing of the other privileges.

115. *See* TIEMANN & BUSH, *supra* note 9, at 145.

116. *See infra* notes 205-13 and accompanying text.

117. *See* TIEMANN & BUSH, *supra* note 9, at 144-45. Although a discussion of the destruction of the attorney-client privilege by a third party is beyond the scope of this note, similar arguments could be raised in that context—that is, communications intended to be

It may also become increasingly difficult to narrow the scope of the privilege by adhering to a traditional concept of clergy and their professional functions. As stated previously, the Catholic Church has responded to its clergy shortage in America by assigning some of the traditional priestly functions to laypersons or nuns.[118] Other churches and synagogues may be staffed by part-time clergy or worker-priests, thus blurring the identity of the professional clergyperson.[119] Many statutes include Christian Science practitioners among those covered by the privilege,[120] but those practitioners often have other employment. Should such employment negate their function as practitioners? Are children covered if they are functioning as missionaries or revivalists, as is the case in some Southern fundamentalist religions? Can the self-ordained claim the privilege? Would a Buddhist monk or an Islamic mullah fall within the privilege? And if not, do significant constitutional questions arise?

Although such difficulties will inevitably confront the courts, there is little case law to guide them. Many statutes state or imply a Judeo-Christian bias.[121] Georgia's statute allows the privilege for "any Christian or Jewish minister."[122] In addition to the constitutional difficulties discussed below, it is difficult to articulate sound policy reasons for excluding religions and clergy that are not traditional in the United States. Society benefits equally when a person seeks the aid, comfort, and counsel of an Islamic mullah or a Catholic priest.[123] It will be incumbent on a court confronting this issue to examine the statutory language and either to interpret it as broadly as possible to include such communications in furtherance of public policy or to declare the statute unconstitutional as violative of the constitutional premise that mandates the free exercise of all religions and precludes the establishment, or special treatment, of only some religions.[124]

Arguably, there is one clear area in which a claimed church body or clergyperson should not be recognized, and that is when it is established for the purpose of avoiding taxes. Case law indicates that courts will not

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confidential between a client and her attorney should at least presumptively remain so in spite of a third party's actions.

118. *See supra* note 104 and accompanying text.

119. *See* Yellin, *supra* note 24, at 122.

120. *See, e.g.*, ARK. CODE ANN. § 16-41-101 (Michie 1987), ARK. R. EVID. 505; D.C. CODE ANN. § 14-309 (1989); FLA. STAT. ch. 90.505 (1991).

121. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2233 (1987 & Supp. 1991) (establishing the privilege for clergypersons and priests who belong to a church).

122. GA. CODE ANN. § 24-9-22 (Michie 1981 & Supp. 1991).

123. *See* Yellin, *supra* note 24, at 121.

124. *See infra* notes 165-213 and accompanying text.

give credence to a religious organization or leader if there is no evidence of a religious function other than drawing benefits from the Internal Revenue Service.[125] Although it is unfortunate that self-denominated clergy or church bodies attempt to circumvent the tax or legal system by seeking religious exemptions or privileges, the testimonial privilege need not be limited as a consequence. Any statute could easily be interpreted to exclude all churches or clergy that could not withstand the test of the Internal Revenue Service.[126]

As the United States grows and is enriched by its pluralism, courts and legislatures must respond accordingly when confronted with claims of privilege by religious persons or organizations that do not easily come within the statutory definitions. Of course, the courts may continue to avoid the issue whenever possible, out of reluctance to confront the privilege at all. Nonetheless, legislatures should act either to broaden the statutory language or to ensure inclusion under the existing statutes of virtually all clergy, or their functional equivalent, of legitimate religious bodies. Such action could serve as a strong and decisive guide for the judiciary.

C. *Marriage Counseling*

Marriage counseling is one of the clergy's most important counseling responsibilities.[127] Statistics show that fifty-seven percent of the people who come to clergy for help and guidance are there because of marriage or family difficulties.[128] At least forty-five percent come for marriage counseling alone.[129] Since effective counseling of such couples necessarily includes a meeting of both partners with the clergyperson,[130] the question inevitably arises whether the privilege will cover such a meeting when the applicable statute or case law rejects the privilege in situations where third parties are present.[131] Moreover, the content of

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125. *See, e.g.*, United States v. Dube, 820 F.2d 886 (7th Cir. 1987) (holding that the defendant's conversations with a minister of a "tax-protest" church concerning defendant's effort to evade tax payments were not entitled to the protection of the clergy-communicant privilege).

126. The IRS generally looks to the purpose and function of the so-called religious body, making its determination by scrutinizing worship practices, doctrine, policy, and ecclesiastical systems. *See* United States v. Dykema, 666 F.2d 1096, 1100 (7th Cir. 1981).

127. *See* CLINEBELL, *supra* note 4, at 243.

128. *Id.* at 243 & n.3, 244.

129. *Id.* at 243 n.3, 244.

130. *See id.* at 270-71.

131. *See* TIEMANN & BUSH, *supra* note 9, at 191.

the sessions may not be covered if the statute excludes nonconfessional, or nonspiritual, guidance.[132]

In *Simrin v. Simrin*,[133] a California district court held that the statutory privilege did not cover communications made to a rabbi acting as a marriage counselor. Although the court expressed frustration with this aspect of its decision, it nonetheless felt constrained by the statutory language.[134] The court stated that, without the statutory restrictions,[135] public policy would have directed a different outcome, for marriages are to be preserved, and counseling with a clergyperson was a good and important step for troubled couples to take in moving toward such preservation.[136] Nonetheless, the rabbi was compelled to testify.

A New York Supreme Court reached a different result in *Kruglikov v. Kruglikov*.[137] In *Kruglikov*, a couple consulted a rabbi hoping to find some way to stay together. During the subsequent divorce proceeding, the rabbi refused to testify, claiming that the communications were confidential.[138] The court agreed, even though the couple was not part of the rabbi's congregation, holding that "[i]t cannot be supposed that either husband or wife, or both, would have been willing to disclose their marital problems to the rabbi if they thought that what they said would ever be divulged, even in a judicial proceeding."[139] Although the language of the New York statute was virtually identical to that of the statute construed in *Simrin*, the New York court looked to the "spirit of the statute"[140] rather than the literal language.

Simrin and *Kruglikov* are good indicators of the variation and division in the courts on this issue.[141] Some legislatures have enacted statutes that explicitly cover the privilege in marriage counseling, ostensibly in an

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132. *See supra* notes 70-80 and accompanying text.

133. 43 Cal. Rptr. 376 (Dist. Ct. App. 1965).

134. *See id.* at 378-79.

135. In 1966, the California statute limiting the privilege to confessions was expanded in scope. *See* CAL. EVID. CODE § 1032 (West 1992). The expanded statute would likely have dictated a different outcome in *Simrin*, especially given the court's reluctance to decide as it did.

136. *See Simrin*, 43 Cal. Rptr. at 378-79.

137. 217 N.Y.S.2d 845 (Sup. Ct. 1961), *appeal dismissed*, 226 N.Y.S.2d 931 (App. Div. 1962).

138. *See id.* at 846.

139. *Id.*

140. *Id.* at 847. The result in *Kruglikov* is not surprising, given the commitment of the New York courts to a "'broad and liberal construction'" of the privilege. *Id.* (quoting People v. Shapiro, 126 N.E.2d 559, 562 (N.Y. 1955)).

141. *See* Yellin, *supra* note 24, at 124.

attempt to avoid such judicial confusion.[142] In 1975, Delaware became the first state to enact such a statute,[143] and other states have since followed suit.[144]

From a policy perspective, it makes little sense to cover pastoral counseling in some forms but to exclude marital counseling.[145] In a country that places such a high premium on the stability of marriage and family life, guidance and counsel in times of marital and family conflict should be encouraged. The chilling effect that will inevitably ensue any time a couple or family believes that their "dirty laundry" may be aired in public undermines the very structure that marital counseling seeks to maintain.[146] Moreover, given the high divorce rate in the United States, actions intended to turn that rate around[147] by avoiding unpleasant and destructive litigation should not be discouraged.

The legislators of the many states that do not explicitly protect marital communications should recognize statutorily what the church, the clergy, and troubled couples have known for years. To protect the marriage and to encourage stability and reconciliation, it must be clear to all concerned that any communication intended to be confidential will remain so despite the nonconfessional character of the communications or the presence of a third party.

D. *Child Abuse Overrides: Overzealous Legislation?*

In arguing for a broad interpretation of the clergy-communicant privilege, the most difficult application to justify is in cases of child abuse. The statistics on child abuse are staggering, whether they are limited to reported cases or include estimates.[148] Some states couple privilege statutes granting an expansive privilege to clergy in all other respects with

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142. *See id.* at 125.

143. *See* DEL. CODE ANN. tit. 10, § 4316 (1975) (specifying that clergypersons shall not be examined on communications made in connection with efforts to reconcile estranged spouses), *repealed by* DEL. R. EVID. 505 (1981).

144. *See, e.g.*, ALA. CODE § 12-21-166 (1990) (covering "conversations with persons seeking . . . advice in connection with marital problems").

145. *See* Sandra M. Little, *Counsel by Clergy: Is it Privileged?*, 10 FAM. ADVOC. 24, 25 (1987).

146. *See* TIEMANN & BUSH, *supra* note 9, at 191.

147. *See* Little, *supra* note 145, at 25.

148. *See* William A. Cole, *Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis*, 21 COLUM. J.L. & SOC. PROBS. 1, 4 (1987).

statutes mandating reporting of child abuse to override the privilege and compel testimony.[149]

This conflict between the privilege and the state's attempt to prevent child abuse has led to the imposition of sanctions on clergy who invoked the privilege in this context. In a highly publicized 1984 case in Florida,[150] the Reverend John Mellish was cited for contempt of court for refusing to testify that a parishioner had confessed to abusing his six-year-old daughter.[151] Although Mellish served only twenty-four hours of a sixty-day sentence, the case stimulated numerous amicus briefs from church bodies and much media attention,[152] not only because of the difficulty of the issue, but also for the particular facts of the case. Ironically, Mellish was cited for refusing to answer questions after he had succeeded in convincing the alleged abuser to turn himself in.[153] Thus, for his attempt to protect society, and specifically his parishioner's daughter, Mellish was jailed. In an interview after his incarceration, Mellish maintained the legitimacy of his actions: "I would never divulge the confidence that was shared with me. [However,] I would do everything that was in my power to be able to prevent it in whatever [other] means that I could."[154]

Florida is not the only state that responded to the increased incidence of child abuse by abrogating virtually every privilege in such cases except the one between attorney and client.[155] Most people want child abusers to be punished or, at the very least, stopped. However, the statutory abrogation of the clergy-communicant privilege that has occurred in the past decade may not be the best way to achieve that goal.[156] One concern is that such an abrogation ultimately undermines one of the most important justifications for the existence of the privilege, which is to encourage people to confess their wrongdoing and to change their

149. *See id.* at 6.

150. The court record of the *Mellish* case is found primarily in transcripts of two hearings held in State v. Sands, No. 84-9516 CF (Fla. Cir. Ct., Broward County sentencing Feb. 25, 1985), on Aug. 31, and Sept. 4, 1984. The order dismissing the Mellish case is found in Mellish v. State, No. 84-1930 (Fla. Dist. Ct. App., Aug. 30, 1985).

151. *See* Record at 2, *Sands*, No. 84-9516 CF (Aug. 31, 1984).

152. *See, e.g., 60 Minutes: Sacred Confession* (CBS television broadcast, Sept. 29, 1985) [hereinafter *60 Minutes*] (transcript on file with the *New York Law School Law Review*).

153. *Id.* at 12.

154. *Id.*

155. *See* Cole, *supra* note 148, at 6 n.37.

156. *See* TIEMANN & BUSH, *supra* note 9, at 177-78.

ways.[157] The principle that confessions to clergy of criminal activity may go undisclosed has been accepted by both courts and legislatures.[158] This principle is weakened by abrogating the privilege for an isolated, though horrible, crime.

In *Mullen v. United States*,[159] the Court of Appeals for the District of Columbia Circuit refused to separate child abuse from other crimes and upheld the privilege even though the case involved a mother who chained-up her children when she left the home.[160] Although *Mullen* was a federal decision, and thus is not binding on the states, it indicates that abrogation of the privilege in child abuse cases is not the only law of the land. Several states explicitly except the privilege from requirements of child abuse reporting.[161] Interestingly, Florida has repealed the statute that was in effect during the *Mellish* case and now upholds the privilege in instances of child abuse.[162]

In spite of society's interest in getting all possible evidence against child abusers, the abrogation of the clergy-communicant privilege is too high a price to pay. A chilling effect on religious confession and guidance seems inevitable.[163] Moreover, if this crime is sufficient to compel otherwise privileged testimony, other crimes may someday be deemed

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157. Interview with the Rev. Oliver Thomas, Legal Counsel for the American Baptist Churches, in Washington, D.C. (Sept. 26, 1989).

158. *See* Cole, *supra* note 148, at 40.

159. 263 F.2d 275 (D.C. Cir. 1958). This case was decided on the basis of federal common law when no statutory privilege was available in this jurisdiction.

160. *See id.* at 280.

161. *See* ARIZ. REV. STAT. ANN. § 13-3620G (1991); FLA. STAT. ANN. ch. 415.512 (1986 & Supp. 1992); KY. REV. STAT. ANN. § 620.050(2) (Michie/Bobbs-Merrill 1990); MD. FAM. LAW CODE ANN. § 5-705 (Supp. 1991); MONT. CODE ANN. § 41-3-201 (1991); NEV. REV. STAT. § 432B.255 (1991); OR. REV. STAT. § 418.750 (1991); 23 PA. CONS. STAT. ANN. § 6381 (1991); S.C. CODE ANN. § 20-7-550 (Law. Co-op. 1985 & Supp. 1991); UTAH CODE ANN. § 62A-4-503 (1989 & Supp. 1991); WYO. STAT. § 14-3-210 (1986 & Supp. 1991). In addition, some states exempt the clergy from the requirement to report child abuse cases by implication. *See* ALASKA STAT. § 47.17.060 (1990); IOWA CODE ANN. § 232.74 (1986 & Supp. 1991); ME. REV. STAT. ANN. tit. 22, § 4015 (West 1992); N.Y. JUD. LAW § 1046 (McKinney 1983 & Supp. 1992); N.C. GEN. STAT. § 7A-551 (1989 & Supp. 1991); OHIO REV. CODE ANN. § 2317.02 (Anderson 1991); S.D. CODIFIED LAWS ANN. § 26-10-15 (1984 & Supp. 1990); TENN. CODE ANN. § 37-1-411 (1991); VA. CODE ANN. § 63.1-248.11 (Michie 1991).

Washington's Supreme Court recently held that ordained clergy do not have to report child-abuse cases if they learned about the situation in the course of their official duties. *See* Washington v. Motherwell, 788 P.2d 1066 (Wash. 1990).

162. *See* FLA. STAT. ch. 415.512 (1991).

163. *See* Cole, *supra* note 148, at 39.

sufficiently heinous also, and may potentially erode the privilege into virtual meaninglessness.[164]

IV. JUSTIFICATION FOR THE PRIVILEGE

A. *Is There a Constitutional Justification?*

Although scholars and judges have referred to the constitutional implications of the privilege, no case has turned on the issue of constitutionality.[165] The privilege has always been more directly supported or disputed on evidentiary and public policy grounds.[166] As a consequence of the statutory recognition of the privilege, rather than recognition of the privilege at common law, courts can more easily dispose of cases by simply deciding whether the communication falls within the parameters of the particular statute.[167]

Despite the lack of constitutional litigation, arguably the religion clauses of the First Amendment[168] are applicable, and they indeed have been used to bolster defense arguments. In *United States v. Boe*,[169] Reverend Boe raised a defense based on South Dakota's statutory privilege and the Free Exercise Clause of the First Amendment.[170] Although the Court of Appeals for the Eighth Circuit reversed his contempt conviction,[171] it did so on grounds unrelated to the Free Exercise Clause.[172] Nonetheless, the briefs filed for Boe argued that religious organizations should be free to establish their practices and beliefs as they

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164. *See* TIEMANN & BUSH, *supra* note 9, at 178; *see also* Cole, *supra* note 148, at 40. Cole writes: "If government can force a clergy member to violate sincere religious beliefs whenever he or she even *suspects* that a child's physical or emotional well-being is at risk, then certainly it can do the same when the clergy member has even the slightest information about virtually any other crime." *Id.* (footnote omitted). *But cf.* EVANGELICAL LUTHERAN CHURCH IN AM., *supra* note 40, at 4 (1989) ("Ordained ministers must respect privileged and confidential communication and may not disclose such communication, except . . . if the person is perceived to intend great harm to self or others.").

165. *See* IOPPOLO ET AL., *supra* note 37, at 160.

166. *See infra* notes 205-13 and accompanying text.

167. *See* Ponder, *supra* note 7, at 3.

168. "Congress shall make no law respecting the establishment of religion or the free exercise thereof . . . ." U.S. CONST. amend. I.

169. 491 F.2d 970 (8th Cir. 1974).

170. *See* Ponder, *supra* note 7, at 3; *see also supra* notes 61-64 and accompanying text.

171. *See Boe*, 491 F.2d at 971.

172. *Id.* (holding that Boe was denied due process requirements of notice and a meaningful opportunity to present his defense).

choose.[173] More specifically, if a religious body determines that confidentiality is a responsibility of the clergy, then the clergyperson's refusal to disclose information is ultimately a free exercise of her religion.[174] The implication of the briefs, and of the argument generally, is that those religious disciplines that clearly define and mandate confidential communication between clergy and communicants can legitimately argue that the right to the free exercise of religion guarantees their right to silence.

In analyzing the privilege within the context of the Free Exercise Clause, it is necessary to state the standard that the Supreme Court has developed to protect the free exercise mandate. A tripartite test must be applied: (1) The court must first determine if the statute at issue places a burden on free exercise, (2) if so, that burden must withstand strict scrutiny by outweighing the religious interest, and (3) the state must employ the least restrictive means to satisfy its compelling interest.[175] If the argument is accepted that clergy or communicants who refuse to disclose confidences do so out of commitment to their religious beliefs, then this test would be applied any time the privilege was denied.[176]

One of the clear burdens imposed by denying the privilege is the chilling effect on confidential communications. As has been asserted repeatedly in this note, people often approach clergy fully expecting and intending that any confidential or confessional information will never be disclosed.[177] If that information is disclosed, either inadvertently or through compelled testimony, it is likely that further communication will be inhibited.[178] It is conceivable that not only would a communicant's religious beliefs be burdened, but also that such disclosure would destroy

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173. For a discussion of the *Boe* briefs, see Ponder, *supra* note 7, at 3.

174. *Id.*

175. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (mandating strict scrutiny analysis in free exercise cases); *see also* Employment Div. v. Smith, 494 U.S. 872 (1990) (relaxing the standard by providing that if the state's restriction is neutral and the impact on religion is merely incidental, then the Free Exercise Clause is not violated).

176. See Jane E. Mayes, Note, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern*, 62 IND. L.J. 397, 412 (1987), in which the author argues that religious confidentiality statutes ultimately violate the Establishment Clause, even though they are necessary to ensure that the free exercise rights of clergy or communicants are not infringed. That author concludes, contrary to the conclusion of this note, that the courts, not the legislatures, should decide the issue through case-by-case inquiry. *See id.* at 423.

177. *See supra* notes 75-76 and accompanying text.

178. *See supra* notes 78-80 and accompanying text.

her trust and confidence in the church and ultimately inhibit any desire to seek spiritual aid or counsel.[179]

The clergy's free exercise rights may also be violated if clergypersons are forced to choose between the law of their faith and the law of the state. This dilemma is especially acute for Catholic clergy, because canon law mandates the secrecy of the confessional and punishes violation of that law by excommunication.[180] In *In re Keenan v. Gigante*,[181] a Catholic priest made this First Amendment claim, refusing to testify on the ground that his faith and vows ultimately gave him no choice. Gigante spent ten days in jail for contempt of court and yet, in a later interview, he reiterated his commitment to the privilege of the confessional: "[By testifying] to the authorities . . . I could destroy an entire institution that is sacred."[182]

Although the Catholic Church has an express doctrine of the seal of the confessional, many other faiths assume and expect that their clergy will keep confessions, if not all other confidential communications, inviolate.[183] In *In re Swenson*,[184] the court itself extended the privilege to the Lutheran minister involved. All clergy could theoretically be placed in the position of Father Gigante and forced to choose between their beliefs and jail. Such a choice is a clear burden on a clergyperson's free exercise rights, with a concomitant burden on the rights of the communicant.

In applying strict scrutiny[185] to the burdens imposed by denying the privilege, it is not self-evident that the state's interest substantially outweighs those burdens. In all instances when a clergyperson is receiving information from a communicant who has committed a crime,[186] the state is imposing an affirmative duty on the clergyperson.[187] Generally,

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179. *See supra* note 76 and accompanying text.

180. Telephone Interview with Father Mareni, Representative of the Archdiocese of New York, in New York, N.Y. (Nov. 6, 1989). See *supra* note 21 for a discussion of applicable canon law.

181. 390 N.E.2d 1151 (N.Y.), *cert. denied*, 444 U.S. 887 (1979).

182. *60 Minutes*, *supra* note 152, at 14.

183. *See* IOPPOLO ET AL., *supra* note 37, at 154-55.

184. 237 N.W. 589 (Minn. 1931).

185. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (requiring strict scrutiny analysis when a state's objective raises an impediment to an exempted religious group's free exercise of religion); *see also supra* note 177 and accompanying text.

186. No other situations compel disclosure to the extent that criminal activity does. For example, in marriage counseling, the social benefit is heavily weighted to the side of confidentiality because there is little threat to society.

187. *See* IOPPOLO ET AL., *supra* note 37, at 33-34.

there is no duty to turn in another person or to report or stop a crime.[188] This general rule should not be abrogated for clergy, especially because there are valid justifications for doing everything possible to foster the relationship between the clergyperson and the communicant.[189]

Granted, legislatures have asserted that there is a duty to warn of or to report instances of child abuse.[190] Yet, even if a duty to abused children on the part of clergy can be justified, does it necessarily follow that such a duty is best fulfilled by disclosure?[191] One writer claims that there is no statistical evidence that clergy reporting is any more effective than continued counsel of the child abuser.[192] Moreover, as was true in the case of Reverend Mellish,[193] the abuser may be far more willing to change her ways and cooperate with the authorities precisely because she trusts her pastor enough to confide in her and accept her guidance.[194]

As for the last prong of the free exercise standard, which requires the state to employ the least restrictive means of achieving its goal, there are arguably always less restrictive means in this context than compelling disclosure. The state will rarely be confronted with a situation in which the clergyperson's testimony is the only evidence attainable. And it seems questionable to deny the privilege simply because a state claims that a confession to a clergyperson is the best evidence it can garner. Moreover, the inconsistency and ambiguity of statutory protection leave open the possibility that a court will arbitrarily impose sanctions that would be unnecessary if statutory definitions were clearer or if the privilege was absolute.[195]

The difficulty in using the Free Exercise Clause to justify the privilege is that, because the state could always attempt to prove a compelling interest, the privilege could never be absolute.[196] Moreover, even if the Free Exercise Clause is interpreted to mandate the privilege, the Establishment Clause could then be raised as a countervailing argument. A further question would arise: Are communications to clergy protected more than communications to nonreligious counselors are protected?[197]

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188. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976) (stating a general rule that a person has no duty to control the conduct of another or to warn others endangered by such conduct).

189. *See infra* notes 205-13 and accompanying text.

190. *See supra* note 149 and accompanying text.

191. *See* Cole, *supra* note 148, at 40.

192. *See id.* at 44.

193. *See supra* notes 150-54 and accompanying text.

194. *See* Cole, *supra* note 148, at 45.

195. *See id.* at 51.

196. *See* Mayes, Note, *supra* note 176, at 417.

197. *But cf.* Washington v. Motherwell, 788 P.2d 1066 (Wash. 1990) (discussing why

In confronting this issue, a court would apply the Establishment Clause test formulated by the Supreme Court in *Lemon v. Kurtzman*.[198] This three-prong test considers the secular purpose of the statute, whether its primary effect advances or inhibits religion, and the potential for excessive entanglement of the state and religion.[199]

When considering the secular purpose of the privilege, it is fundamental to look not only to the practices of the church bodies, but also to the interest that a state may be advancing by providing for the privilege. Thus, if the state or the churches believe that the privilege will further religion, the privilege may violate the Establishment Clause. But if there is a stated and legitimate secular purpose, such as maintaining a person's mental health[200] or right to privacy, the privilege is less problematic. Moreover, there is little justification in claiming that the privilege involves governmental coercion, because the government does not order anyone to engage in a religious relationship.

If the primary effect of a privilege statute is ultimately to endorse religion, then arguably the second prong of the test is violated. However, no statute explicitly limits the privilege to religious communicants. Thus, the potential benefit to any particular religious body is mitigated by a concurrent benefit to society, because anyone may approach a clergyperson for absolution or counsel.[201]

Finally, in inquiring into the potential for excessive entanglement between government and religion, it is not clear that the privilege interferes with religion or the government in any definitive way. It could be argued that, by absolving clergy from testifying, the state is furthering communications with clergy. However, this enabling is not necessarily a per se violation of the Establishment Clause.[202] On the contrary, compelling clergy to testify could well be classified as a highly excessive and intrusive entanglement of government and religion.

Arguably, the most difficult potential conflict with the Establishment Clause would arise if a court construed a privilege statute so narrowly as to favor one religion over another. For example, if the court held that a

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communications to nonclergy counselors are not protected by the Free Exercise or Establishment Clause).

198. 403 U.S. 602 (1971).

199. *Id.* at 612-13.

200. *See* MISS. CODE ANN. § 13-1-22 (Supp. 1991). The Preamble to this statute states: "Whereas, the emotional, mental and spiritual health of many of our citizens depends upon the free and confidential access to their clergymen or spiritual advisors." *Id.*

201. *See supra* notes 72, 77-80 and accompanying text.

202. *But see* Mayes, Note, *supra* note 176, at 408 (arguing that privilege statutes per se violate the Establishment Clause because the state will interfere with and inquire into the practices of particular denominations).

confession to a Catholic priest was privileged but excluded a similar situation within another religion, the claim of unconstitutionality might be raised.[203] However, in *Sherbert v. Verner*[204] the Supreme Court held that different treatment of religions is not a per se violation of the Establishment Clause.

B. *The Public Policy Mandate*

The clergy-communicant privilege has traditionally been asserted on public policy grounds. Although society has a fundamental interest in obtaining the best evidence possible for use at trial, it also has a competing interest in protecting relationships whose furtherance may ultimately be of greater benefit. The original public policy concern asserted in defense of the privilege was that people would not confess their wrongdoing and, thus, after death would go to hell.[205] While this rationale would probably not hold up in modern American courts, the secular aspect implicit in the reasoning has been maintained. Society arguably benefits if people who are troubled or guilty of wrongdoing seek counsel, guidance or forgiveness.[206] In this way, the relationship between clergy and communicant is similar to that of husband and wife, attorney and client, or doctor and patient. That is, the assumption of confidentiality encourages people to enter into relationships that are often described as "socially desirable."[207] There is a countervailing concern, whenever the privilege is claimed, that helpful or necessary evidence will be suppressed. Nonetheless, as discussed earlier, even the greatest opponents of the testimonial privileges have recognized the legitimacy and social necessity of the clergy-communicant privilege.[208]

The judiciary is also in a difficult position if it compels a clergyperson to testify. Most people, regardless of their religious beliefs, would be uncomfortable with forcing a clergyperson to violate what she believes to be a sacred confession or confidence.[209] Judges are probably no different.[210] Many clergy would likely choose to go to jail rather than

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203. *See* TIEMANN & BUSH, *supra* note 9, at 146.

204. 374 U.S. 398, 409 (1963).

205. *See* Kelley, *supra* note 61, at 98.

206. *See* TIEMANN & BUSH, *supra* note 9, at 23.

207. Ponder, *supra* note 7, at 2, 3.

208. *See supra* notes 13-19 and accompanying text.

209. *See* Yellin, *supra* note 24, at 110.

210. *See* IOPPOLO ET AL., *supra* note 37, at 154 ("[P]olicy judgment might make it imprudent to call clergy unwilling to testify about matters received in confidence, and judges might still be loathe to compel testimony from priests and other clergy determined

be a party to the possible destruction of the communicant's trust and faith in the church.[211] Thus, the judiciary would be taking a "bad situation and making it worse."[212] In the words of Justice Holmes: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."[213]

V. CONCLUSION

This note has attempted to illustrate some of the inadequacies and potential pitfalls of the current status of the clergy-communicant privilege. Although the privilege is generally recognized, it is not uniformly or consistently defined or applied. With the ever-expanding role of the clergy in our society, it is probable that these inconsistencies and inadequacies will increasingly confront the courts, unless courts continue to avoid the issue out of respect for, or fear of confronting, religion.

It is unfortunate that the judiciary, including the Supreme Court, is often reluctant to hear a case that turns on the issue of the clergy-communicant privilege. The Supreme Court could provide clear guidance for the states and for the lower courts as to the rationale and the outer limits of the privilege.

With or without such a ruling, this writer believes that the best clergy-communicant privilege is an absolute one. As a protection of an individual's privacy and religious liberty and, most importantly, as a recognition that, for our society, there may be some relationships that are more important than the furtherance of the adversarial system, the privilege encourages and enables consciences to be unburdened and fears to be assuaged. The chilling effect on a communicant's willingness to confide created by compelling clergy testimony is ultimately a far greater burden to society than the loss of one witness. We as a society can ill afford to shake the very foundation of many of our citizens' lives. It is incumbent on the legislatures and the courts to seriously reconsider the potential effects of their statutory construction and analysis in the areas discussed. If they do so, there may lie in the future an affirmation of a broad and expansive privilege that will further the growth and stability of this fundamental relationship rather than its erosion and possible destruction.

Lori Lee Brocker

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to remain silent.").

211. *See supra* note 76 and accompanying text.

212. Ari L. Goldman, *Cases in Three States Challenge Privacy of Talks with Clergy*, N.Y. TIMES, Aug. 27, 1985, at A19.

213. Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).