EVIDENCE—PRIVILEGED COMMUNICATIONS—THE MARITAL COMMUNICATIONS PRIVILEGE DOES NOT PRECLUDE A THIRD PARTY FROM TESTIFYING AS TO THE CONTENTS OF A WRITTEN INTERSPOUSAL COMMUNICATION AND THE PRIEST IS THE SOLE HOLDER OF THE PRIEST-PENITENT PRIVILEGE AND CAN WAIVE THAT PRIVILEGE WITHOUT THE CONSENT OF THE PENITENT—*State v. Szemple*, 135 N.J. 406, 640 A.2d 817 (1994).

Evidentiary rules serve two main functions in the judicial system: to exclude evidence and to aid the truth-seeking process.[1] Those rules which exclude evidence do so either to omit unreliable evidence or to promote an extrinsic social policy.[2] Privileges are rules that exclude otherwise admissible evidence in furtherance of

---

[1] *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1454 (1984-85) [hereinafter *Developments*]. Evidence rules were established for five fundamental reasons. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 1 (1988). The first and overriding reason for evidentiary rules was society's mistrust of juries. *Id.* For example, society's belief that a typical jury cannot properly consider statements made outside the jury's presence led to the creation of the hearsay rule. *Id.* In a legal system which assigns great responsibility to the jury, such a rule exemplifies the mistrust of juries pervasive in our society. *Id.* The second reason was to advance substantive policies associated with the litigated issue. *Id.* For example, rules setting and allocating the burden of persuasion affect the outcome of litigation by requiring a higher standard of proof in situations where the suing party is partially at fault. *Id.* at 1-2. The third reason for the establishment of evidentiary rules was to promote extrinsic substantive policies not related to the litigated issue. *Id.* at 2. Privileges, the primary example of such rules, seek to affect behavior outside the courtroom. *Id.* The fourth reason was to guarantee accurate fact-finding. *Id.* The best evidence rule, which requires that the original document be entered into evidence to prove the content of that document, and rules governing the authenticity of documents and other evidence provide the best examples of such rules. *Id.* These rules force litigatory parties to be careful and accurate in their presentation at trial. *Id.* The fifth reason for evidence rules was to control the duration and the scope of trials. *Id.* These rules authorize the court to organize and limit the dispute so that the judicial process efficiently attains a final result. *Id.*

[2] EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 201 (1980). Examples of rules excluding unreliable evidence include: the best evidence rule, the opinion rule, and the hearsay rule. *Id.* For example, the hearsay rule makes inadmissible any statement within the definition of hearsay unless an exception specifically applies. FED. R. EVID. 802. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Excluding such out-of-court statements reduces the risks of misperception, misstatement, distortion, and faulty memory. MUELLER & KIRKPATRICK, *supra* note 1, at 117-18. Alternatively, privileges may exclude reliable evidence to protect extrinsic social policies unrelated to the truth-seeking purpose of courts. James J. Dalessio, Comment, *Evidentiary Privileges and the Exclusion of Derivative Evidence: Commentary and Analysis*, 26 SAN DIEGO L. REV. 625, 629-30 (1989). An example of such a policy includes fostering communication within relationships that society deems socially desirable, such as the attorney-client or doctor-patient relationship. *Id.* at 631-35.

social policies unrelated to the judicial process.[3] One such extrinsic social policy is the protection of confidential or privileged communications.[4] Confidential communications enjoy protection for the unique reason that their disclosure is inimical to the societal interest in preserving and fostering the relationship in which they transpire.[5] Conferral of a privilege, however, results in the exclu-

---

[3] MICHAEL M. MARTIN, BASIC PROBLEMS OF EVIDENCE 147 (6th ed. 1988). Privilege is defined as "[a] particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens." BLACK'S LAW DICTIONARY 1197 (6th ed. 1990). There are two types of privileges: viatorial and testimonial. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2197, at 113 (McNaughton rev. 1961). Viatorial privileges exempt evidence because they excuse a witness from attendance at trial. 8 *id.* The viatorial privilege exempts the witness from travel and attendance provided that the witness has not received notice that the court required and summoned his or her testimony, that the court did not compensate the witness in advance for his or her related expenses, and that the court did not previously or subsequently excuse the witness for reasons constituting an inability to attend. 8 *id.* at 113-14.

By comparison, the testimonial privilege prevents disclosure of evidence because of the topic or the communication it affects. 8 *id.* at 114. Privileged communications are recognized as testimonial privileges due to the confidential relationships in which they transpire. 8 *id.* Excluding the substance of those communications, despite reliability, promotes an extrinsic social policy unrelated to the truth-seeking process. Dalessio, *supra* note 2, at 630.

[4] Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 762 (1987); *see also infra* note 5 (discussing the reasons underlying the creation of privileges). Confidential communication is defined as a "statement made under circumstances showing that [the] speaker intended [the] statement only for [the] ears of [the] person addressed." BLACK'S LAW DICTIONARY 298 (6th ed. 1990).

[5] GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 86, at 317 (1978). The traditional justification, known as the utilitarian approach, asserts that the communication should only be privileged if it serves a greater purpose to society. *Developments*, *supra* note 1, at 1472. Under this justification, Wigmore set out four conditions for the establishment of a privilege:

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

8 WIGMORE, *supra* note 3, § 2285, at 527 (footnote omitted). Further examples of privileges include: 1) physician-patient; 2) attorney-client; 3) priest-penitent; and 4) husband-wife. 8 *id.* at 528.

Commentators have recently advanced a privacy rationale as an alternative to the utilitarian theory. Dalessio, *supra* note 2, at 636. The privacy rationale strives to protect the right of the individual to have control over highly personal information. *Id.* The rights and interests are personal to the holder of the privilege, hence personal information will not be disclosed without the holder's consent. *Id.* Another justifica-

sion of potentially reliable evidence.[6] Hence, courts frequently tend to construe privileges narrowly.[7] Nevertheless, some privileges enjoy near universal recognition.[8] Examples of such privileges include the marital communications privilege[9] and the priest-penitent privilege.[10]

Created at common law, the marital communications privilege protects confidential spousal communications.[11] Such a privilege promotes confidences which consequently foster the inviolability of the marital relationship.[12] The privilege, however, only extends

---

tion for privileges, the power/image theory, seeks to protect the image of the judiciary. Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 GA. L. REV. 89, 99 (1987). This theory contends that privileges prevent the embarrassment of courts and legislatures by protecting communication within relationships from which the system would normally be unable to compel obedience. *Id.* at 99-100. The inability of the court to compel disclosure from a party in a confidential relationship could erode public perception of the court's authority. *Id.* at 99. Simply creating a privilege in such cases avoids this problem. *Id.*

6 Dalessio, *supra* note 2, at 630. Frequently, evidence with substantial probative value and trustworthiness could be derived from the privileged communications. LILLY, *supra* note 5, § 86, at 317. Therefore, privileges result in "the suppression of probative evidence and makes the trier decide factual issues without its benefit." *Id.*

7 Dalessio, *supra* note 2, at 630.

8 *Id.* While most jurisdictions may recognize the same privileges, they often vary in scope, form, or interpretation. Catz & Lange, *supra* note 5, at 104.

9 Catz & Lange, *supra* note 5, at 104, 105. The marital communications privilege protects confidential communications between spouses. *Id.* at 105.

10 *Id.* at 104, 105-06. The priest-penitent privilege applies generally to communications between a penitent and a clergyperson as defined by the relevant statute. *Id.* at 105-06. For a detailed discussion of the marital communications privilege and priest-penitent privilege, see *infra* notes 11-16, 17-25 and accompanying text. For the purpose of this Note, "priest-penitent" privilege will be used to refer to this privilege for consistency purposes, although other works refer to it in many other forms. The word "priest" indicates ordained clergypersons or clerics of all denominations and is not meant to be gender exclusive.

11 LILLY, *supra* note 5, § 87, at 320. Marital privileges exist in two forms: the spousal testimonial privilege and the marital communications privilege. Catz & Lange, *supra* note 5, at 105. The spousal testimonial privilege enables a party to preclude testimony by his or her spouse, or confers upon a witness the right to decline to testify against a spouse. *Id.* The marital communications privilege protects communications intended to be confidential between spouses. *Id.*

The English Evidence Amendment Act of 1853 provided that "[n]o husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." The Evidence Amendment Act, 1853, 16 & 17 Vict., ch. 83, § 3 (Eng.). The Act clearly established a distinct marital communications privilege. Steven N. Gofman, Note, *"Honey, The Judge Says We're History": Abrogating the Marital Privileges Via Modern Doctrines of Marital Worthiness*, 77 CORNELL L. REV. 843, 848 n.26 (1992).

12 LILLY, *supra* note 5, § 87, at 320. The privilege fosters the marital relationship by encouraging spouses to share their intimate thoughts and secrets, thus adding intimacy and support to the marriage. *Id.*; *see also* Gofman, *supra* note 11, at 843 (stating

to confidential statements made between spouses during the existence of a legal marriage.[13] The courts recognize a rebuttable presumption that all communications between spouses are confidential in nature.[14] Determinations by the courts regarding what circumstances overcome the presumption of confidentiality have varied, especially when dealing with a communication that has been intercepted by a third party.[15] Ultimately, the scope of

---

that "marital privileges evolved because courts and legislatures, by implication, determined that protecting the harmony of legal marital unions was more important than truth-seeking at trial") (footnote omitted).

[13] Gofman, *supra* note 11, at 850. Courts have refused to extend the privileges to unmarried cohabitants, sham marriages, and common law marriages. *Id.* In these situations the courts and legislatures draw inferences about marital viability and premarriage acts to determine whether the marital privileges apply. *Id.* at 855.

Applicability of marital privileges and the existence of a legal marriage are not discrete issues for judicial determination; rather, the determination of one issue directly influences the latter. *See id.* at 844 ("Thus, courts and legislatures applying the marital privileges must look to state law for a definition of legal marriage.") (footnote omitted). Courts and legislatures have severely narrowed marital privileges through the application of three principles of marital worthiness: the marital viability doctrine; the *Trammel* rule; and the premarriage acts exception. *Id.* at 845. The viability doctrine denies the marital privileges to nonviable marriages even if such marriages are legally valid and nonfraudulent. *Id.* at 860. The *Trammel* rule, which applies only in federal criminal trials, posits that only the spousal witness may exercise the adverse testimonial privilege. *Id.* at 855; *see also* Trammel v. United States, 445 U.S. 40, 53 (1980) ("[W]e conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely . . . ."). The premarriage acts exception bars application of the adverse testimonial privilege to testimony concerning events that occurred before the marriage. Gofman, *supra* note 11, at 866. These doctrines redefine legal marriage. *Id.* at 872.

[14] Anne N. DePrez, Note, *Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communication Privilege*, 56 IND. L.J. 121, 128 (1980); *see also* 1 CHARLES TILFORD MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 80, at 299 (John William Strong, ed., 4th ed. 1992) ("Communications in private between husband and wife are assumed to be confidential . . . .") (footnote omitted). The presumption may be rebutted, however, if either the circumstances surrounding the communication or the contents of the communication itself indicate that it was not intended to be confidential. DePrez, *supra*, at 128-29; *see, e.g.*, State v. Curtis, 334 S.W.2d 757, 763 (Mo. Ct. App. 1960) (explaining that the presumption of confidentiality does not apply to interspousal communications concerning business matters). The presumption is generally justified on the basis that spouses engage in confidential communications without an express request of confidentiality and therefore intent may be difficult to establish. DePrez, *supra*, at 129.

[15] 1 MCCORMICK, *supra* note 14, § 80, at 299-300; *see, e.g.*, Pereira v. United States, 347 U.S. 1, 6 (1954) (concluding that the presence of third persons at the time of communications will rebut the presumption of confidentiality); United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972) (determining that the marital communications privilege does not preclude testimony regarding illegal activity) (quotation omitted), *cert. denied*, 411 U.S. 986 (1973), *rev'd on other grounds*, 415 U.S. 143 (1974); State v. Smith, 384 A.2d 687, 692-93 (Me. 1978) (recognizing that the presence of a third party defeats the privilege); *Curtis*, 334 S.W.2d at 763 (explaining that the presumption of confidentiality does not apply to marital communications concerning business

the marital communications privilege hinges upon its narrow construction by the courts, as required by public policy.[16]

The priest-penitent privilege similarly presents problems of interpretation and construction for the judiciary.[17] The priest-penitent privilege originated in the Catholic Church with the Seal of Confession.[18] The fundamental rationale behind the privilege is the encouragement of the priest-penitent relationship.[19] This relationship furthers the general societal interest in creating socially desirable relationships.[20] Though not recognized at common

---

matters); Hicks v. Hicks, 155 S.E.2d 799, 802 (N.C. 1967) (declaring that the presence of an eight year-old does not destroy the privilege because the child is too young to understand the meaning of the communication).

16 *See* Gofman, *supra* note 11, at 850 (stating that "[b]ecause both marital privileges are contrary to truth-seeking, all jurisdictions have held that courts must construe them narrowly") (footnote omitted).

17 Raymond C. O'Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating That Clergy Report Child Abuse*, 25 LOY. L.A. L. REV. 1, 33 (1991). Those problems of interpretation typically arise as a result of the statutory provisions which define the scope of the privilege. *Id.*; *see infra* notes 121 & 137 (providing the relevant statutory provisions).

18 *Id.* at 31. The Seal of Confession prevents priests from disclosing the content of communications exchanged during confession. Mitchell, *supra* note 4, at 735. In the Roman Catholic Church, confession is sacramentalized. Lori Lee Brocker, Note, *Sacred Secrets: A Call For the Expansive Application and Interpretation of the Clergy-Communicant Privilege*, 36 N.Y.L. SCH. L. REV. 455, 458 n.18 (1992). Sacraments are those rites Christians are expected to participate in and partake of throughout their lives because the rites reflect the teachings of Jesus. *Id.* Penance, recognized by the Roman Catholic Church as one of seven sacraments, involves the confession and repentance of sins. *Id.* The Seal of Confession, as compiled in the Canon Law, governs the confidentiality of confession. *Id.* at 459 n.21. The Code of Canon Law explains the Seal of Confession, providing in pertinent part: "[t]he 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." 1983 CODE c.983, § 1. The Code further provides that "[e]ven if every danger of revelation is excluded, a confessor is absolutely forbidden to use knowledge acquired from confession when it might harm the penitent." 1983 CODE c.984, § 1. The penalties for violating the Seal include automatic excommunication for direct violations and punishment "in accord with the seriousness of the offense" for indirect violations. 1983 CODE c.1388, § 1.

19 Mitchell, *supra* note 4, at 762. In the Roman Catholic Church, the Seal of Confession was part of the Sacrament of Penance which requires that a penitent sincerely confess his or her sins and resolve themselves before God. O'Brien & Flannery, *supra* note 17, at 5 n.24. Canon 983 states that the Seal of Confession is inviolable and that violation of the Seal is a crime. 1983 CODE c.983, § 1. Any clergyperson or penitent who acts within the context of the sacrament is protected through the Seal of Confession and arguably should be able to invoke the protection of the priest-penitent privilege. O'Brien & Flannery, *supra* note 17, at 34.

20 *See* O'Brien & Flannery, *supra* note 17, at 37 (quoting *In re* Grand Jury Investigation, 918 F.2d 374, 383 (3d Cir. 1990)). Socially desirable relationships are those which "society deems worthy of preserving and fostering." LILLY, *supra* note 5, § 86, at 317. Socially desirable status is one of the four conditions proffered by Dean Wigmore as necessary to establishment and recognition of a privilege. 8 WIGMORE, *supra*

law,[21] the priest-penitent privilege has been statutorily created in every American jurisdiction.[22] These statutes differ from state to

note 3, § 2285, at 527. The condition requires that to enjoy privileged status "[t]he *relation* must be one which in the opinion of the community ought to be sedulously *fostered*." *Id.* In analyzing the propriety of the priest-penitent privilege, Dean Wigmore determined that the privilege satisfied this condition because the United States promotes considerable religious tolerance and, further, many citizens practice a religion that advocates a confessional system. *Id.* § 2396, at 878.

[21] Jane E. Mayes, Note, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern*, 62 IND. L.J. 397, 397 (1987). English common law first recognized the Seal of Confession in 1066, after the Norman Conquest. O'Brien & Flannery, *supra* note 17, at 31. After the Reformation, however, English common law no longer recognized the privilege. *Id.* at 32. Accordingly, most American courts did not recognize the privilege unless imposed by statute. *Id.* The first United States case to address the priest-penitent privilege, *People v. Phillips*, relied on constitutional theory rather than on public policy. *Id.* In that case, decided in 1813, the New York Court of General Sessions concluded on the basis of free exercise of religion that a priest should not be compelled to disclose confidential spiritual communications. *Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 209 (1955) (reprinting the original, unreported opinion). The court emphatically averred that:

> Although we differ from the witness and his brethren, in our religious creed, yet we have no reason to question the purity of their motives, or to impeach their good conduct as citizens. They are protected by the laws and constitution of this country, in the full and free exercise of their religion, and this court can never countenance or authorize the application of insult to their faith, or of torture to their consciences.

Id. Four years later, in *People v. Smith*, another New York court failed to extend the privilege to a Protestant minister. *Id.* (reprinting the original, unreported opinion). The *Smith* court drew a distinction between a Catholic priest operating within the canons of the Church and a minister acting in a merely advisory capacity. *Id.* at 211.

[22] Mayes, *supra* note 21, at 397; *see also* ALA. CODE § 12-21-166 (1986); ARIZ. REV. STAT. ANN. § 12-2233 (1994); ARK. CODE ANN. RULE 505 (Michie 1994); CAL. EVID. CODE §§ 1030-34 (West 1966); COLO. REV. STAT. ANN. § 13-90-107 (West 1989); CONN. GEN. STAT. ANN. § 52-146(b) (West 1991); DEL. CODE ANN. RULE 505 (1991); D.C. CODE ANN. § 14-309 (1989); FLA. STAT. ANN. § 90.505 (West 1979); GA. CODE ANN. § 24-9-22 (1982); HAW. REV. STAT. RULE 506 (1985); IDAHO CODE § 9-203 (1990); ILL. ANN. STAT. ch. 735, para. 5/8-803 (Smith-Hurd 1992); IND. CODE ANN. § 34-1-14-5 (West 1983); IOWA CODE ANN. § 622.10 (West 1950); KAN. STAT. ANN. § 60-429 (1983); KY. REV. STAT. ANN. § 421.210 (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. § 15:477 (West 1992); ME. R. OF CT., R. OF EVID. RULE 505 (West 1994); MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (1989); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1986); MICH. COMP. LAWS ANN. § 600.2156 (West 1986); MINN. STAT. ANN. § 595.02 (West 1988); MISS. CODE ANN. § 13-1-22 (Supp. 1994); MO. ANN. STAT. § 491.060 (Vernon 1952); MONT. CODE ANN. § 26-1-804 (1993); NEB. REV. STAT. § 27-506 (1989); NEV. REV. STAT. ANN. § 49.255 (Michie 1986); N.H. REV. STAT. ANN. § 516:35 (Supp. 1994); N.J. STAT. ANN. § 2A:84A-23 (West 1994), *amended by* 1994 N.J. Laws 123; N.M. STAT. ANN. RULE 506 (Michie 1983); N.Y. CIV. PRAC. L. & R. § 4505 (Consol. 1978); N.C. GEN. STAT. § 8-53.2 (1994); N.D. CT. R. ANN. RULE 505 (Michie 1994); OHIO REV. CODE ANN. § 2317.02 (Anderson 1991); OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); OR. REV. STAT. § 40.260 (1993); 42 PA. CONS. STAT. ANN. § 5943 (1982); P.R. LAWS ANN. tit. 32, RULE 28 (1984); R.I. GEN. LAWS § 9-17-23 (1985); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 19-13-16 (1987); TENN. CODE ANN. § 24-1-206 (1980); UTAH CODE ANN. § 78-24-8 (1992); VT. STAT. ANN. tit. 12, § 1607 (1973); VA. CODE ANN. § 8.01-400 (Michie 1992); WASH. REV. CODE ANN. § 5.60.060

state, resulting in multiple interpretations and applications of the privilege.[23] Each statute, however, requires the resolution of at least one crucial issue: to whom does the privilege apply, or, more specifically, who holds the right of waiver?[24] The determination of whether the priest, the penitent, or both holds the privilege, similar to the determination of confidentiality of marital communications, depends upon how narrowly the court construes the scope of the privilege.[25]

Recently the New Jersey Supreme Court squarely confronted the scope of both privileges in *State v. Szemple*.[26] The *Szemple* court held that the marital communications privilege does not preclude a third party from testifying as to the contents of a written interspousal communication because third party appropriations destroy the confidentiality.[27] The court also held that the priest was the sole holder of the priest-penitent privilege because the statutory

---

(West 1963); W. VA. CODE § 48-2-10a (1995); WISC. STAT. ANN. § 905.06 (West 1993); WYO. STAT. § 1-12-101 (1988).

23 Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 114 (1983). Due to the differences in statutory construction and interpretation from state to state, "there is no typical clergy privilege statute." Mitchell, *supra* note 4, at 740.

24 Mayes, *supra* note 21, at 399. The issue of who holds the privilege for purposes of waiver has been a source of contentious debate and confusion. Mitchell, *supra* note 4, at 755. Some statutes confer the privilege upon the clergyperson "in his own right." *Id.* at 757. Many other statutes bestow the privilege solely upon the penitent. *Id.* at 756-57. Still other statutes simply treat the clergyperson as an incompetent witness when testifying as to confidential penitent communications. *Id.* at 758.

When interpreting the priest-penitent privilege, courts also focus on two other issues: 1) who qualifies as a clergyperson within the confines of the applicable statute; and 2) was the communication confidential? Mayes, *supra* note 21, at 399.

25 *See* Mayes, *supra* note 21, at 399 (explaining that courts have traditionally construed the scope of priest-penitent statutes narrowly, and noting that some jurisdictions interpret the statutes more liberally). The privilege has taken different forms in each state. Mitchell, *supra* note 4, at 740. For example, in states such as Oklahoma the privilege is conferred upon the penitent; the clergyperson only has the right to assert the privilege on behalf of the penitent. *See* OKLA. STAT. ANN. tit. 12, § 2505 (West 1993). In states such as Louisiana and Massachusetts the clergyperson is prohibited from disclosing priest-penitent communications unless he/she obtains the penitent's consent. *See* LA. REV. STAT. ANN. § 15:477 (West 1992); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1986). Alabama, California and Puerto Rico confer the privilege on both the penitent and the clergyperson. *See* ALA. CODE § 12-21-166 (1986); CAL. EVID. CODE §§ 1030-34 (West 1966); P.R. LAWS ANN. tit. 32, RULE 28 (1984). Georgia and Illinois are among a few states that, alternatively, confer the privilege upon the clergyperson alone. *See* GA. CODE ANN. § 24-9-22 (1982); ILL. ANN. STAT. ch. 735, para. 5/8-803 (Smith-Hurd 1992). For a discussion of the policy reasons underlying the narrow construction of privileges, see *supra* notes 6-7 and accompanying text.

26 135 N.J. 406, 409, 640 A.2d 817, 819 (1994).

27 *Id.* at 419, 420, 640 A.2d 823, 824.

protection applied to the priest; thus the priest could unilaterally waive the privilege by consenting to disclosure.[28] This holding generated immediate remedial legislation that explicitly vested the priest-penitent privilege in both the priest and the penitent.[29]

In 1991, Craig Szemple, was arrested and charged with murder.[30] After Szemple's arrest, Theresa Boyle, his wife, moved out of their house with the help of her father, Michael Boyle.[31] While sorting through his daughter's belongings, Mr. Boyle discovered a letter to Theresa from her husband.[32] Concerned about his daughter and suspicious of Szemple,[33] Mr. Boyle took the letter without his daughter's knowledge or consent.[34] Mr. Boyle read the letter several weeks after returning to his house in North Carolina.[35] The letter contained a description of a murder.[36] Nevertheless, Mr. Boyle failed to disclose the contents of the letter to the authorities.[37] It was not until almost a year later that Mr. Boyle gave the

---

28 *Id.* at 433, 640 A.2d at 830.

29 Art Weissman, *New Law Protects Confessions to Clergy From Court*, ASBURY PARK PRESS, Oct. 28, 1994, at A7; *see also* 1994 N.J. Laws 123 (to be codified as N.J.R.E. 511, N.J. STAT. ANN. § 2A:84A app. A).

30 *Szemple*, 135 N.J. at 410, 411, 640 A.2d at 819. Morris County police charged Szemple with "first-degree murder, unlawful possession of a thirty-two caliber handgun, and murder while armed with that handgun." *Id.* at 410, 640 A.2d at 819. Szemple had also been indicted for murder in Hudson and Warren Counties. *Id.*

31 *Id.* at 411, 640 A.2d at 819.

32 *Id.* The sheets of paper were in one of the boxes in which Theresa packed her belongings. *Id.*

33 Mr. Boyle knew little about the defendant other than that he had recently been arrested on a murder charge. *Id.*

34 *Id.* Mr. Boyle, in an effort to conceal the letter from his daughter, carried it underneath his shirt out to his pickup truck and placed it in a plastic bag. *Id.* When his daughter subsequently learned that he had taken the letter and given it to the authorities, she was furious. *Id.* at 412, 640 A.2d. at 820. Mr. Boyle lamented that "[my] daughter won't have nothing to do with [me] now." *Id.*

35 *Id.* at 411, 640 A.2d at 820. Mr. Boyle temporarily forgot about the letter, thus explaining the several weeks that passed between his possession of the letter and his actual knowledge of its contents. *See id.*

36 *Id.* The letter describing the murder read, in pertinent part:

> My first hit was an act of treachery, the ultimate deceit. 4 Bullets in the back 1 in the neck and a broken promise made at the parting of the oncoming river. I never did tell his mother what happened to him. The second I pulled that trigger, I became larger than death to all of my associates.

Id. Mr. Boyle concluded that this description was "dynamite." *Id.* Several months later, Mr. Boyle, upon his return to New Jersey, gave a copy of the letter to Theresa Boyle's mother, his ex-wife. *Id.* at 412, 640 A.2d at 820.

37 *Id.* Mr. Boyle's ex-wife subsequently communicated with an attorney who informed her that because the state had already gathered significant evidence against the defendant, it did not need the letter. *Id.*

letter to the Morris County Prosecutor's Office.[38]

Meanwhile, defendant remained in prison where he was periodically visited by Paul Bischoff, a Minister of Visitation.[39] In October 1991, the defendant confessed to Bischoff that he had committed "not one but three" murders.[40] Bischoff, a long-time acquaintance of defendant's family, informed defendant's sister and brother-in-law of the confession.[41] The Szemple family subsequently relayed this disclosure to the authorities.[42]

Szemple was indicted in Morris County for first degree murder, possession of a dangerous weapon, and murder while armed with a dangerous weapon.[43] The indictment alleged that in 1975, the defendant shot and killed a sixteen-year-old boy, Nicholas Miroff.[44] At trial, after initially resting its direct case, the State made a motion to reopen the case to present the two confessions allegedly made by the defendant.[45] The letter that Szemple wrote to his wife, subsequently discovered by Mr. Boyle, constituted the first alleged confession, while the second alleged confession consisted of what Szemple divulged to Bischoff while incarcerated.[46]

The trial court determined that the marital communications

---

38 *Id.* This action was prompted when Mr. Boyle asked Theresa how defendant's case was proceeding and she informed him that the prosecutor planned to drop the charges. *Id.* Subsequently, at trial, the state presented evidence that connected the murder to the contents of the letter. *Id.*

39 *Id.* at 413, 640 A.2d at 820. Bischoff was a retired Newark firefighter. *Id.* at 412, 640 A.2d at 820. The elders of the Trinity Baptist Church in Montville had ordained him a Minister of Visitation. *Id.* Prior to his ordination, Bischoff served as a Deacon to the church. *Id.* Bischoff's duty as a Minister of Visitation was to visit penitentiaries to comfort the inmates and counsel them in religious matters. *Id.* at 412-13, 640 A.2d 820. Acting in his official capacity as a Minister of Visitation, Bischoff visited the defendant "about nineteen times between April 1991 and January 1992." *Id.* at 413, 640 A.2d at 820.

40 *Id.* It was not clear at trial if the confession to Bischoff could be linked to the specific murder at issue. *State v. Szemple*, 263 N.J. Super. 98, 100-01, 622 A.2d 248, 249 (App. Div. 1993).

41 *Szemple*, 135 N.J. at 413, 640 A.2d at 820.

42 *Id.* The defendant's family disclosed the confession to the prosecutor's office with Bischoff's consent. *Id.* at 420-21, 640 A.2d at 824.

43 *Id.* at 410, 640 A.2d at 819. Defendant was also charged with murder in Hudson and Warren Counties. *Id.* Defendant's weapon was a .32-caliber handgun. *Id.*

44 *Id.* The victim was shot to death on July 19, 1975. Bill Riley, *Szemple to Take Stand in His Own Murder Trial*, NEWARK STAR-LEDGER, July 7, 1994, at 33. Authorities found his remains in Mount Olive, but the body remained unidentified for 16 years. *Id.*

45 *Szemple*, 135 N.J. at 410, 640 A.2d at 819.

46 *Id.*; *see supra* notes 31-36 and accompanying text (providing the contents of the letter and facts relating to its discovery); *supra* notes 39-42 and accompanying text (discussing Bischoff's Minister of Visitation status and the facts relating to the confession).

privilege did not apply to the contents of the letter because a third party unsurreptitiously obtained possession of the letter.[47] The trial court further concluded that Bischoff, assuming he qualified as a clergyperson under the confines of the applicable statute, properly waived the priest-penitent privilege without the defendant's consent.[48] Accordingly, the court granted the prosecution's motion and allowed the two confessions to be admitted into evidence.[49]

In an interlocutory appeal, the New Jersey Superior Court, Appellate Division, reversed the denial of the motion for a mistrial, granting leave to appeal to review the lower court's ruling regarding the evidentiary privileges.[50] The appellate division affirmed the trial court's decision that neither privilege applied.[51] The appeals court approached the privileges issue from a traditional standpoint, restricting the scope of those privileges and limiting their preclusive effect.[52] Accordingly, the appellate division concluded that the marital communications privilege did not apply to defendant's letter because the privilege attaches to the communication rather than to the document.[53] Thus, the court determined

---

47 *Szemple*, 135 N.J. at 412, 640 A.2d at 820. The court found no evidence to suggest that Mr. Boyle obtained the letter through the involvement of the defendant's wife. *Id.* The trial court held a N.J. EVID. R. 8 hearing, determining that the confessions were not protected by either the marital-communications privilege or the priest-penitent privilege. *Id.* at 410, 640 A.2d at 819. Rule 8 provided in relevant part: "When . . . the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge." N.J. EVID. R. 8 (renumbered as N.J.R.E. 104, N.J. STAT. ANN. § 2A:84A app. A (West 1994)). The State presented evidence connecting the content of defendant's letter to the murder. *Szemple*, 135 N.J. at 412, 640 A.2d at 820.

48 *Id.* at 420 n.2, 640 A.2d at 824 n.2. The trial court initially found that Bischoff did not qualify as a clergyperson under the statute. *Id.*

49 *Id.* at 410, 640 A.2d at 819. Consequently, the defense filed a motion for a mistrial. *Id.* at 410-11, 640 A.2d at 819. The trial court found that the new evidence did not amount to unfair surprise and denied the defendant's motion. *Id.*

50 *Id.* at 411, 640 A.2d at 819.

51 State v. Szemple, 263 N.J. Super. 98, 99, 622 A.2d 248, 249 (App. Div. 1993). One judge dissented, arguing that the confessions at issue were protected by the privileges. *Id.* at 117, 622 A.2d at 258 (Stein, J., dissenting).

52 *Id.* at 101, 106, 622 A.2d at 249-50, 252 (citation omitted). The appellate division noted that traditionally courts have narrowly construed privileges because they prevent the disclosure of relevant evidence and "are obstacles in the path of the normal trial objective of a search for ultimate truth." *Id.* at 101, 622 A.2d at 249-50 (quoting State v. Briley, 53 N.J. 498, 506, 251 A.2d 442, 446 (1969)). Privileges, the court proclaimed, are only accepted because they serve a stronger public interest. *Id.* at 101, 622 A.2d at 249. The court found that the 1992 amendment to the marital communications privilege, requiring the consent of both spouses before disclosure is allowed, significantly restricted the privilege. *Id.* at 103, 622 A.2d at 251.

53 *Id.* at 105-06, 622 A.2d at 252. The court noted that other jurisdictions deem

that the privilege did not prohibit disclosure by a third party who unsurreptitiously obtained the document.[54] With respect to the priest-penitent privilege, the appellate division, basing its holding on the historical development of the privilege and the plain meaning of the statutory language, determined that the privilege belonged solely to the priest.[55] Hence, the appellate division held that neither privilege precluded disclosure of defendant's communications, and remanded the case for further proceedings.[56]

The New Jersey Supreme Court granted leave to appeal[57] and held that the marital communications privilege did not apply to

---

the privilege as attaching to the document, yet "[t]hat is not the rule in New Jersey." *Id.* (citations omitted).

[54] *See id.* ("[u]nder the circumstances here, the spousal privilege does not apply to defendant's letter.") The court found that the testimony did not support a conclusion that the letter was disclosed by the defendant's wife, but rather that Mr. Boyle inadvertently discovered the letter. *Id.* at 104, 622 A.2d at 251. Thus, the court reasoned that the privilege "[did] not by its express terms apply." *Id.*

[55] *Id.* at 116, 622 A.2d at 257. The appellate division did not address the issue of whether Mr. Bischoff qualified as a clergyperson within the statutory definition because neither party raised that issue on appeal. *Id.* at 107 n.3, 622 A.2d at 252 n.3; *see supra* notes 18-25 and accompanying text (discussing the historical development of the priest penitent privilege and the plain meaning of the statute).

When analyzing the plain meaning of the statute, the appellate court noted that the express language of N.J. EVID. R. 29, "does not identify the penitent as the holder of the privilege." *Szemple*, 263 N.J. Super. at 107, 622 A.2d at 252 (citing N.J. EVID. R. 29, N.J. STAT. ANN. § 2A:84A app. A (West 1988)). The court further opined that the words "allowed" and "compelled" as used in the statute do not necessarily apply to the penitent but rather may refer to the state "allowing" a priest to breach the confidentiality of the confessional. *Id.*, 622 A.2d at 252-53; see *infra* note 137 for the statutory text. Moreover, the court determined that within the context of the privilege's historical development the privilege clearly belongs to the priest. *Szemple*, 263 N.J. Super. at 107, 622 A.2d at 253.

The appellate court grounded the interpretation of the statutory priest-penitent privilege on the *Report of the Committee on the Revision of the Law of Evidence to the New Jersey Supreme Court* and the *Report of the Commission to Study the Improvement of the Law of Evidence*. *See id.* at 107-11, 622 A.2d at 253-55 (discussing the findings and reports of the Jacobs Committee and Bigelow Commission). Considering these documents, the court reasoned that the conclusion reached by those committees—to recommend the adoption of the current New Jersey law as opposed to the Uniform Rule—indicated the legislature's intent to protect the clergyperson. *Id.* at 107-10, 622 A.2d at 253-54. The court further noted that the subsequently adopted legislation reflected the recommendations of the Jacobs Committee and Bigelow Commission with only one minor change relating to who qualifies as a clergyperson. *Id.* at 110, 622 A.2d at 254; *see infra* notes 146-53 and accompanying text (discussing the committees' reports and findings). Recognizing that the privilege as adopted included a specific reference to waiver pursuant to N.J. EVID. R. 37, the appellate division concluded that the waiver was only conferred upon the holder of the privilege and that the penitent was not the holder; thus the penitent does not hold a right of waiver. *Szemple*, 263 N.J. Super. at 110-11, 622 A.2d at 254-55.

[56] *Szemple*, 263 N.J. Super. at 116, 622 A.2d at 257-58.

[57] State v. Szemple, 135 N.J. 406, 411, 640 A.2d 817, 819 (1994).

the defendant's letter because possession by a third party without the consent of the recipient destroyed the confidentiality of the communication.[58] The court, refusing to recognize a distinction between oral and written communications, reasoned that New Jersey has long accepted the principle that the marital communications privilege does not bar disclosure of communications overheard by a third party.[59] Furthermore, the majority proffered that it is the duty of the spouses to ensure the letter's confidentiality.[60] The court explained that because defendant did not take the necessary precautions to ensure confidentiality, he lost the privilege.[61]

With respect to the priest-penitent privilege, the court found that the priest held the privilege because he was the party the statute intended to protect.[62] The majority concluded that because the priest was the holder of the privilege, the priest could unilaterally waive the privilege.[63] The supreme court, by narrowly construing the scope of both privileges, affirmed the judgment of the appellate division.[64]

---

58 *Id.* at 419, 420, 640 A.2d at 823, 824.

59 *Id.* at 416, 417, 640 A.2d at 822; *see* State v. Young, 97 N.J.L. 501, 505, 117 A. 713, 715 (1922) (holding that the privilege does not apply to a letter between husband and wife if transmitted through a third party); State v. Laudise, 86 N.J.L. 230, 231, 90 A. 1098, 1098 (1914) (citation omitted) (declaring that the marital communications privilege does not apply to an accusation by one spouse against the other while in a neighbor's presence); State v. Sidoti, 134 N.J. Super. 426, 430, 341 A.2d 670, 672 (App. Div. 1975) (citations omitted) (concluding the privilege does not apply to a communication between a husband and wife overheard by a third party); State v. Brown, 113 N.J. Super. 348, 352-53, 273 A.2d 783, 785, 786 (App. Div. 1971) (determining that the privilege did not extend to a conversation between a father and son overheard by the mother). See *infra* notes 85-105 and accompanying text for further discussion of these cases.

60 *Szemple*, 135 N.J. at 420, 640 A.2d at 824. Defendant never told his wife to protect the letter; consequently Theresa left the letter in a box. *Id.* at 419, 640 A.2d at 824.

61 *Id.* at 420, 640 A.2d at 824.

62 *Id.* at 433, 640 A.2d at 830. The court relied on the privilege's historical development, statutory language, and the committee reports relating to legislative intent. *Id.*; *see also* COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE, REPORT TO THE SUPREME COURT OF N.J. 76-77 (1955) [hereinafter JACOBS COMM. REP.] (recommending that the Uniform Rule, which permits either the priest or the penitent to claim the privilege, be rejected and that the New Jersey statute, under which the penitent has no privilege at all, be adopted as the rule); COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE, REPORT 37-38 (1956) [hereinafter BIGELOW COMM'N REP.] (recommending that the Legislature adopt the Jacobs Committee recommendation with two substantive changes: 1) that the scope be expanded to include "other confidential communication;" and 2) that the rule be subject to waiver). See *infra* note 142 for a discussion of the history and statutory language of the priest-penitent privilege.

63 *Szemple*, 135 N.J. at 433, 640 A.2d at 830.

64 *Id.* at 416, 433, 640 A.2d at 822, 830.

Prior to the *Szemple* decision, the judicial system in America had long supported the principle that privileges should be narrowly construed because they preclude the admission of relevant evidence.[65] For example, in *State v. Briley*,[66] the New Jersey Supreme Court declared that because strict application of privileges tends to suppress the truth, privileges are acceptable only to the extent that they serve a greater public interest.[67] The *Briley* court applied this principle to the marital-testimonial privilege and determined that a wife's testimony was not precluded by the privilege when the testimony related to a crime in which the wife was a victim.[68] The court opined that narrowly construing the privilege and allowing the testimony served the greater public interest.[69]

The United States Supreme Court in *United States v. Nixon*[70] adopted a principle similar to the one set forth by the New Jersey Supreme Court in *Briley*, holding that because privileges are "exceptions to the demand for every man's evidence," they should not be expansively construed.[71] In *Nixon*, the Court addressed the is-

---

65 *See* Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (stating that privileges should be limited because "permitting a refusal to testify or excluding relevant evidence" frustrates the search for truth); State v. Schreiber, 122 N.J. 579, 582, 588, 585 A.2d 945, 946, 950 (1991) (holding that the effect of privileges is clearly inhibitive and strictly limiting the physician-patient privilege to its express terms); State v. Dyal, 97 N.J. 229, 237, 478 A.2d 390, 394 (1984) (holding that "[b]ecause the [testimonial] privilege precludes the admission of relevant evidence, it is restrictively construed").

66 53 N.J. 498, 251 A.2d 442 (1969).

67 *Id.* at 506, 251 A.2d at 446. The court explained that "[i]t is the basic policy of our law that every person is qualified and compellable to be a witness and to give relevant and competent evidence at a trial" and that "[p]rivileges . . . are exceptions to that policy." *Id.* (citations omitted). Rigid adherence to such privileges, the court opined, is only justified when it serves a greater public interest. *Id.*

68 *Id.* at 509, 251 A.2d at 448. The police charged defendant with assaulting his wife and murdering another person; the offenses arose from a single event and accordingly the court joined the offenses into one indictment. *Id.* at 501, 251 A.2d at 443. A jury convicted the defendant of "manslaughter and atrocious assault and battery." *Id.* The principal basis of appeal was that defendant's wife should have been precluded from testifying except as to facts regarding the assault upon her. *Id.* The court recognized the wife as a competent witness to both crimes because spousal disqualification is eliminated in a criminal action when the wife is a victim. *Id.* at 509, 251 A.2d at 448.

69 *See id.* at 506, 251 A.2d at 446 ("Since rigid adherence to the letter of the privileges promotes the suppression of truth, they should be construed and applied in sensible accommodation to the aim of a just result."). The court stated that, in situations such as *Briley*, public policy dictates that anachronistic restraints on testimony be abandoned in favor of competent testimony. *Id.* at 509, 251 A.2d at 448.

70 418 U.S. 683 (1974).

71 *Id.* at 710 (citation omitted). The Court noted that privileges protect legitimate interests, yet reasoned that the need to attain relevant evidence in an adversarial system of justice may sometimes outweigh those interests. *Id.* at 709.

sue of an absolute presidential privilege.[72] The Court noted that President Nixon based the claim of presidential privilege on two grounds: first, that protection of the confidentiality of presidential communications serves a vital need; and second, that the doctrine of separation of powers shields the President from the application of a judicial subpoena due to the independent nature of the Executive Branch.[73] Chief Justice Burger, writing for a unanimous court, announced that neither the need for confidentiality in presidential communications nor the doctrine of separation of powers provided an absolute privilege.[74] Specifically, the Court noted that the requirements of the judicial process outweigh even the Presidential interest in preserving absolute confidentiality.[75] The Court emphasized that because production of relevant evidence is critical to the function of courts, exceptions that exclude evidence should be limited in scope.[76] This principle of narrow construction and

---

[72] *Id.* at 703. The privilege of confidentiality of Presidential communications "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties." *Id.* at 705. The Court found that although there is no provision in the Constitution expressly conferring a privilege upon Presidential communications, the silence of the Constitution was not dispositive of the issue. *Id.* at 705-06 n.16. Rather, the Court determined that certain privileges flow from enumerated powers and that the Presidential privilege was one such privilege. *Id.* at 705-06.

[73] *Id.* at 705, 706. The President argued that if his advisors had to fear public dissemination of their statements, communications would not be as candid and hence would hamper the decision-making process. *Id.* at 705.

[74] *Id.* at 686, 706. President Nixon claimed that the doctrine of separation of powers supported a claim of absolute privilege because the independence of the Executive Branch "insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications." *Id.* at 706. The President further argued that there was a strong need for confidentiality between government officials and their advisors because if such confidentiality was not guaranteed those officials and advisors would be less candid with their opinions to the impairment of the decision-making process. *Id.* at 705. The Court acknowledged the need for candor and objectivity in the decision-making process, but found that absent a more specific justification this argument could not be accepted. *Id.* at 706. The Court concluded that "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713. Refuting the President's argument that the separation of powers doctrine insulates a President from a special subpoena due to the independent nature of the Executive Branch, the Court based the findings on the premise that the Framers did not intend the separate branches to operate with complete independence but rather as a cohesive system. *Id.* at 707.

[75] *Id.* The Court acknowledged the fundamental need for a Presidential privilege. *Id.* at 708. The Court also noted, however, that "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Id.* at 709. Having acknowledged the competing interests, the Court concluded that the generalized assertion of confidentiality in the case at issue did overcome the judicial system's demand of full disclosure. *Id.* at 713.

[76] *Id.* at 709, 710. The Court averred that "[t]he need to develop all relevant facts

interpretation explicitly applies to the marital communications and priest-penitent privileges.[77]

Prior to the decision in *Nixon*, the United States Supreme Court had applied similar principles of interpretation and construction to the marital communications privilege in *Wolfle v. United States*.[78] The Court specifically addressed the issue of whether the privilege extended to communications made between husband and wife through a third party stenographer.[79] The husband dictated a letter to be sent to his wife, the contents of which were testified to by the stenographer who took the dictation.[80] The Court strictly construed the privilege and held that the use of a stenographer negated the confidential nature of the communication.[81] The *Wolfle* Court acknowledged the assumption that spouses generally intend their communications to be confidential,[82] but after considering the nature of the communication at

---

in the adversary system is both fundamental and comprehensive." *Id.* at 709. The integrity of the judicial system, the court opined, depends upon a compulsory process and because privileges hinder that process they are not to be "lightly created nor expansively construed." *Id.* 709, 710.

77 *See* 8 WIGMORE, *supra* note 3, § 2285, at 527-28 (stating that because privileges frustrate the purpose of the judiciary, four narrow conditions should be met for such a privilege to be recognized, and further acknowledging that the marital-communications privilege and priest-penitent privilege meet those criteria). See also *supra* note 5 for Wigmore's four conditions and relevant discussion.

78 291 U.S. 7, 11 (1934). Specifically, the Court stated that "[a]s the tendency of the [marital communications] privilege is to prevent the full disclosure of the truth, it should be strictly construed." *Id.*

79 *Id.* at 15. The Court maintained that the determination of that issue turned upon whether courts employ a test that focuses on "the nature and the purpose of the communication" or alternatively, a test that disregards the purpose and that dictates "admissibility is purely a matter of custody," so once seized the communication is not privileged. *Id.* at 7-8. The Court opined that the first test was more appropriate, adopting the rule that "privileged communication[s] remain[ ] privileged, irrespective of custody." *Id.* at 8-9 (citations omitted).

80 *Id.* at 12. The Court did not view the stenographer in this case as a stranger to the parties, but rather as an agent and representative. *Id.* at 9. The communication to which the stenographer testified was relevant and probative of the defendant's guilty purpose or intent. *Id.* at 13.

81 *See id.* at 17 ("The privilege . . . should be allowed only when it is plain that marital confidence can not otherwise reasonably be preserved."). The Court analogized this communication to one made in the presence of competent children or other family members, and thus concluded that the privilege did not protect such a communication. *Id.*

82 *Id.* at 14; *see supra* note 14 (discussing the rationale underlying the presumption).

The Supreme Court relied on this rule in *Blau v. United States*. 340 U.S. 332, 333 (1951). In *Blau*, a husband refused to disclose to a Grand Jury the whereabouts of his wife, asserting his privilege against disclosure of confidential communications between husband and wife. *Id.* The Court recognized the presumption that marital communications are confidential and privileged. *Id.* The Court reasoned that the

issue, determined that knowledge of or disclosure to a third party precludes the application of the privilege.[83]

In accordance with *Wolfle*, New Jersey courts have long recognized that the marital communications privilege does not preclude disclosure of spousal communications by third parties.[84] New Jersey courts initially considered the issue in *State v. Laudise*,[85] in which the Court of Errors and Appeals rejected the application of the marital communications privilege to an accusation by one spouse against another while a neighbor was present.[86] The neighbor testified at trial about the accusation and defendant's silence and final reply.[87] The court concluded that the presence of a third party negated the confidentiality of the communication.[88]

Within ten years of *Laudise*, the New Jersey Court of Errors and Appeals, in *State v. Young*,[89] issued another significant opinion regarding the scope of the marital communications privilege

---

communication was likely intended to be confidential because the wife knew she was "wanted" as a witness but concealed herself so that she would not have to testify. *Id.* at 334. Such circumstances, the Court opined, fostered the probability that the wife made the communication in confidence. *Id.* Accordingly, the Court held that the husband properly invoked the privilege. *Id.*

83 *Wolfle*, 291 U.S. at 14. The Court reasoned that the privilege should only be allowed when the marital confidence could not be preserved otherwise. *Id.* at 17. The Court explained that the privilege protects confidential communications by encompassing every party integral to the confidentiality. *Id.* at 16. Although confidentiality may be an essential duty of any stenographer, the Court stated that the preservation of marital confidences does not rely on the extension of a privilege to such third parties. *Id.* at 15, 16, 17.

The Court postulated that the application of the privilege depends upon the balancing of two countervailing presumptions. *See id.* at 14. The Court first identified that privately made communications between spouses are generally presumed to be confidential. *Id.* Alternatively, communications made in the presence of a third party, the Court acknowledged, typically do not fall within the privilege because the circumstances of such communications vitiate the presumption of confidentiality. *Id.* The Court admitted, however, that certain spousal communications made in the presence of third parties may be made in confidence. *Id.* at 15.

84 State v. Szemple, 135 N.J. 406, 416, 640 A.2d 817, 822 (1994).

85 86 N.J.L. 230, 90 A. 1098 (1914).

86 *Id.* at 231, 90 A. at 1098. The court considered the defendant-husband's appeal from a conviction for murdering his illegitimate child. *Id.* At trial, a neighbor testified that when the defendant's wife accused defendant of adultery and resulting paternity, the defendant remained silent. *Id.* The defendant's wife accused him of fathering a child with her sister. *Id.* The defendant objected to the admission, contending that admittance of the neighbor's testimony in effect compelled the indirect testimony of a wife against her husband. *Id.*

87 *Id.*

88 *Id.* The court further asserted that if the privilege precluded the testimony, the court would not reverse the judgment because the error was harmless because it amounted at most to a confession of paternity. *Id.*

89 97 N.J.L. 501, 117 A. 713 (1922).

wherein a third party overheard the communication.[90] In *Young*, a husband claimed that the marital communications privilege applied to a communication dictated to a third party and intended for his wife.[91] The Court of Errors and Appeals opined that to divulge a communication to a third party vitiated the element of confidentiality, thus constructively waiving the privilege.[92] Finding that the privilege was personal to spouses, the court concluded that it was not error to permit a third party witness to testify as to the contents of the communication.[93]

New Jersey courts continued to refuse extension of the marital communications privilege to conversations not deemed confidential.[94] In *State v. Brown*,[95] the New Jersey Superior Court, Appellate Division, refused to apply the privilege to a communication between a father and son which the mother overheard.[96] The father was convicted for receiving a stolen typewriter of which he admitted possession but denied knowing that it had been stolen.[97] Defendant's wife testified that she overheard a conversation between her husband and son in which defendant told his son that a third party had some typewriters which defendant was to either sell or discard.[98] The court concluded that the communication did not

---

90 *Id.* at 505, 117 A. 715.

91 *Id.* at 504, 117 A. 715. While incarcerated, defendant requested that a fellow inmate write a letter to the defendant's wife under defendant's direction and dictation. *Id.*

92 *Id.* at 505, 117 A. at 715. The court found that the determinative factor was that the defendant confessed not to his wife but rather to a third party. *Id.* By analyzing the statute, the court ascertained three elements that must be satisfied before the privilege shall apply: 1) the communication was made "by one to the other;" 2) the communication was made during the marriage; and 3) the communication was confidential. *Id.* (quotation omitted). Communication to a third party, the court avowed, destroyed the element of confidence. *Id.*

93 *Id.* The court justified the holding by citing to a principle expressed in another case. *Id.* (citing Commonwealth v. Wakelin, 120 N.E. 209, 212 (Mass. 1918) (holding that "[t]here is no rule of law that third persons who hear a private conversation between a husband and wife shall be restrained from testifying what it was")). The *Young* court asserted that the situation in the instant case was much "stronger" because the husband actually entrusted the third party with the communication, thus warranting a similar holding. *See id.*

94 State v. Brown, 113 N.J. Super. 348, 352-53, 273 A.2d 783, 785 (App. Div. 1971).

95 113 N.J. Super. 348, 353, 273 A.2d 783, 786 (App. Div. 1971).

96 *Id.*

97 *Id.* at 349, 350, 273 A.2d at 784. The defendant testified that he obtained possession of the typewriter from two men he had helped with a flat tire who had typewriters in their car. *Id.* at 350, 273 A.2d at 784 (quotation omitted). The two men asked the defendant to hold the typewriters until the next day, but never returned to retrieve them. *Id.*

98 *Id.* After his wife testified, defendant was convicted of receiving a stolen typewriter. *Id.* at 349, 350, 273 A.2d at 784. The defendant's wife also testified as to the

qualify for the privilege because it was not between husband and wife but rather between father and son.[99] Furthermore, the court held that the defendant did not make the communication in confidence.[100]

The New Jersey judiciary expanded upon the principle that third parties may destroy the confidentiality of spousal communications in *State v. Sidoti*.[101] The New Jersey Superior Court, Appellate Division, held in *Sidoti* that the marital communications privilege does not apply to spousal communications overheard by third parties.[102] The police taped conversations between defendant and his wife through the use of a wiretap, subsequently admitting the tapes at trial as evidence of defendant's alleged involvement in a gambling ring.[103] The defendant conceded that the conversations did not include confidential communications, yet contended that admission of those conversations violated the marital communications privilege.[104] The court noted that the communication was not confidential, not only because it was overheard by a third party, but also because the parties did not intend it to be confidential.[105] The appellate division narrowly construed the privilege to preclude communications overheard by third parties.[106]

The judiciary has also narrowly construed the priest-penitent privilege.[107] In *Trammel v. United States*,[108] the United States

---

state of their marriage and separation. *Id.* at 350, 273 A.2d at 784. The defendant contended that it was error to admit testimony as to the conversation because the marital communications privilege precluded such testimony. *Id.* at 351, 273 A.2d at 784. The defendant and his wife subsequently divorced. *Id.* at 350-51, 273 A.2d at 784.

99 *Id.* at 352-53, 273 A.2d at 785. Specifically, the court agreed with the trial court's finding that "the communication . . . was not made to her." *Id.*

100 *Id.*

101 134 N.J. Super. 426, 430, 341 A.2d 670, 672 (App. Div. 1975) (citations omitted).

102 *Id.* (citations omitted).

103 *Id.* Defendant appealed from convictions for gambling offenses. *Id.* at 428, 341 A.2d at 671. The court proclaimed that the police executed the wiretap "in good faith and in compliance with the wiretap order." *Id.*

104 *Id.* at 430, 431, 341 A.2d at 672. The court noted that because the conversations did not refer to illegal activity, the police only used the conversations to corroborate the defendant's identity. *Id.*

105 *Id.* The court further opined that even if admission was in error, the judgment would stand because the error was harmless. *Id.* at 431, 341 A.2d at 672.

106 *See id.* at 430, 341 A.2d at 672 ("It is generally held that a third person overhearing a confidential communication between a husband and wife may testify as to it.").

107 William A. Cole, *Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis*, 21 COLUM. J.L. & SOC. PROBS. 1, 23 (1987). Dean Wigmore noted that courts, in interpreting the statutes, have restricted the privilege:

> to communications made in the understood pursuance of that church discipline which gives rise to the confessional relation, and, therefore,

Supreme Court noted the importance of the testimonial privilege, but coupled this recognition with the pronouncement that such privileges should be narrowly construed so as not to exclude probative evidence.[109] The Court stated that the priest-penitent privilege limits protection to private communications because such a privilege recognizes the need to disclose flawed acts and thoughts to spiritual counselors in total confidence.[110]

The New Jersey Supreme Court first attempted to analyze the scope of the statutory priest-penitent privilege with *In re Murtha*.[111] The *Murtha* court rejected a nun's contention that the priest-peni-

---

> in particular to confessions of sin only, not to communications of other tenor; that it includes only the communications, and not information otherwise acquired; and that it exempts the penitent also, as well as the priest, from disclosure.

8 WIGMORE, *supra* note 3, § 2395, at 876-77 (footnotes omitted).

108 445 U.S. 40 (1980).

109 *Id.* at 50-51. The *Trammel* Court did not consider the priest-penitent privilege explicitly, but rather the privilege against spousal testimony. *Id.* at 51. The Court illustrated the principle that the legislature did not intend testimonial privileges in general to sweep broadly but rather expected that they be narrowly construed, noting the judicially accepted scope of other privileges such as the priest-penitent and attorney-client privilege. *Id.* at 50, 51. The Court indicated that those privileges were "rooted in the imperative need for confidence and trust." *Id.* at 51. With regard to the priest-penitent privilege, the Court submitted that the "privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." *Id.* The Court distinguished the spousal testimonial privilege from privileges such as the priest-penitent by noting that as compared to the spousal privilege, "[n]o other testimonial privilege sweeps so broadly." *Id.* Accordingly, the Court concluded that the spousal privilege against adverse testimony frustrated justice and was hence inapplicable to the case at bar. *Id.* at 53.

110 *Id.* at 51.

111 115 N.J. Super. 380, 386, 279 A.2d 889, 892 (App. Div. 1971), *certif. denied*, 59 N.J. 239, 281 A.2d 278 (1971). The *Murtha* court addressed the priest-penitent privilege by applying the principles developed in *State v. Briley*. *Id.*; *see supra* notes 66-69 and accompanying text (discussing the New Jersey Supreme Court's treatment of testimonial privileges in *State v. Briley*). The court previously confronted the issue of the priest-penitent privilege in *State v. Morehous*, but did not make a finding as to the scope of that privilege because, at the time, no statute in New Jersey created or acknowledged such a privilege and the common law provided no basis for the privilege. 97 N.J.L. 285, 295, 117 A. 296, 300 (1922). In *Morehous*, a man accused of murder sought to prevent a statement he made to his spiritual advisor from being admitted into evidence. *Id.* The court concluded that even if this spiritual advisor qualified as a clergyman, the privilege could not apply because it had no foundation in the law. *Id.*

New Jersey finally recognized the privilege by statute in 1947, stating in relevant part:

> A clergyman, or other minister of any religion, shall not be allowed or compelled to disclose in any court, or to any public officer, a confession made to him in his professional character, or as a spiritual advisor, or as a spiritual advisor in the course of discipline enjoined by the rules or

tent privilege justified her refusal to answer questions before a Grand Jury.[112] In concluding that the nun, Sister Margaret Murtha, did not qualify as a clergyperson under the dictates of the statute, the appellate division examined the scope of the priest-penitent privilege.[113] The court noted that the privilege explicitly applied only to a clergyman, minister, or other person or practitioner authorized to perform similar functions.[114] The appellate division posited that Sister Margaret did not conduct any religious functions and thus did not qualify under the statute.[115] In reaching this conclusion, the appellate division relied on the *Briley* principle that because strict adherence to privilege frustrates the search for truth, privileges instead should be construed narrowly to achieve a just result.[116]

With this judicial history in mind, the New Jersey Supreme Court once again confronted the issue of construction and inter-

---

practice of the religious body to which he belongs or of the religion which he professes.

1947 N.J. Laws 324.

112 *Murtha*, 115 N.J. Super. at 382, 387, 279 A.2d at 890, 893. The nun, Sister Margaret, appeared before a Grand Jury pursuant to a subpoena. *Id.* at 381, 279 A.2d at 890. The Grand Jury was investigating an alleged homicide and required the testimony of Sister Margaret because she had conversed with the accused suspect. *Id.* As a result of her refusal to answer the questions, the court held Sister Margaret in contempt. *Id.*, 279 A.2d at 889.

113 *Id.* at 385, 386, 279 A.2d at 892. The court determined the scope of the privilege on the basis of N.J. EVID. R. 29, which conferred the privilege. *Id.*; *see infra* note 137 (providing the statutory language of N.J. EVID. R. 29). The *New Jersey Rules of Evidence* have been renumbered, with occasional deviations, to correspond with the *Federal Rules of Evidence*. *See* N.J. STAT. ANN. § 2A:84A app. A, at 83, 86-89 (West 1994) (providing the reasoning behind and details of the alterations). For future reference, N.J. EVID. R. 28 is now N.J.R.E. 509 and N.J. EVID. R. 29 is now N.J.R.E. 511. N.J. STAT. ANN. § 2A:84A supp. A, at 87. *State v. Szemple* began before the renumbering and the court used the previous numbering system in the opinion. For sake of continuity, this Note will use the old numbering as well.

114 *Murtha*, 115 N.J. Super. at 386, 279 A.2d at 892 (quoting N.J. EVID. R. 29). The court further noted that neither the court nor counsel for the parties could find textual or decisional authority to support Sister Margaret's assertion that she was protected by the priest-penitent privilege. *Id.* at 387, 279 A.2d at 893.

115 *Id.* at 386, 279 A.2d at 892. The court found that Sister Margaret neither heard confession nor performed absolution functions generally performed by priests or clergyman. *Id.* Furthermore, the court noted that Sister Margaret's church superiors urged her to testify, evidencing their belief that no such privilege barred her from doing so. *Id.* at 387, 279 A.2d at 893.

116 *Id.* at 385-86, 279 A.2d at 892; *see supra* notes 66-69 and accompanying text (discussing *State v. Briley*). The principle as set forth in *Briley* stated, "[s]ince rigid adherence to the letter of the privileges promotes the suppression of truth, they should be construed and applied in sensible accommodation to the aim of a just result." State v. Briley, 53 N.J. 498, 506, 251 A.2d 442, 446 (1969).

pretation of evidentiary privileges in *State v. Szemple*.[117] The court specifically addressed the scope of the marital communications privilege and the priest-penitent privilege.[118] Justice Garibaldi, writing for the majority, began by establishing the general principle that privileges should be narrowly construed because they contravene the search for truth.[119]

Justice Garibaldi first focused on the marital communications privilege.[120] The justice proclaimed that the privilege, as set forth in *N.J. Evid. R.* 28,[121] precludes the disclosure of spousal communications made in confidence during the marriage except in distinct situations.[122] The court noted that subsequent to the trial the legis-

---

117 135 N.J. 406, 409, 640 A.2d 817, 819 (1994).

118 *Id.*

119 *Id.* at 413, 640 A.2d at 820. Setting the foundation for the court's analysis, the justice reviewed well established principles of testimonial privileges. *Id.* The court began by citing to previous decisions of the New Jersey courts as well as the United States Supreme Court, all of which held that because evidentiary privileges preclude the admission of probative evidence, they should be construed restrictively. *Id.* at 413-14, 640 A.2d 820-21 (citing United States v. Nixon, 418 U.S. 683, 710 (1974) (noting that as a general proposition privileges are to be narrowly construed); Trammel v. United States, 445 U.S. 40, 50 (1980) (declaring that because privileges contravene the fundamental search for truth by frustrating the public's right "to every man's evidence," they must be narrowly construed); State v. Schreiber, 122 N.J. 579, 582-83, 585 A.2d 945, 946 (1991) (holding that privileges are inhibitive in effect and thus must be narrowly construed); State v. Briley, 53 N.J. 498, 506, 251 A.2d 442, 446 (1969) (concluding that testimonial privileges should be restrictively construed because they preclude the admission of relevant evidence); State v. Bodtmann, 248 N.J. Super. 100, 101, 590 A.2d 259, 260 (Law Div. 1990) (stating that because privileges "obstruct[ ] the search for truth, [they] must be construed restrictively")).

120 *Id.* at 414, 640 A.2d at 821. The specific issue was whether appropriation by a third party destroys the confidentiality of a written interspousal communication. *See id.* at 416, 640 A.2d at 822.

121 N.J. STAT. ANN. § 2A:84A-22 (West Supp. 1994) [hereinafter N.J. EVID. R. 28]. N.J. EVID. R. 28 provides in relevant part:

> No person shall disclose any communication made in confidence between such person and his or her spouse unless both shall consent to the disclosure or unless the communication is relevant to an issue in an action between them or in a criminal action or proceeding in which either spouse consents to the disclosure, or in a criminal action proceeding coming within Rule 23(2). When a spouse is incompetent or deceased, consent to the disclosure may be given for such spouse by the guardian, executor or administrator. The requirement for consent shall not terminate with divorce or separation. A communication between spouses while living separate and apart under a divorce from bed and board shall not be a privileged communication.

Id. (footnote omitted).

122 *Szemple*, 135 N.J. at 414, 640 A.2d at 821. The privilege does not apply to interspousal communications relating to business matters nor to communications to which third parties are privy, as it is assumed that in those distinct situations confidentiality was not intended. DePrez, *supra* note 14, at 128, 129.

lature had amended the Rule.[123] The court contended that although the amendment was not applicable to the instant case—because defendant's wife did not consent to the disclosure—the amendment nonetheless was demonstrative of the legislature's intent to limit the scope of the privilege.[124]

The court next averred that the legislature had long recognized the marital communications privilege because public policy supports unfettered communications between spouses to foster the inviolability of marriage.[125] The court noted, however, that strong public policy considerations do not abrogate the judicial principle of restrictively construing privileges, including the marital communications privilege.[126] Expanding upon this principle, Justice Garibaldi declared that because courts must narrowly construe the privilege, it does not apply to written interspousal communications obtained by a third party absent the recipient spouse's consent.[127] The majority expounded that although New Jersey courts had never specifically held that the privilege does not preclude the admission of a written interspousal communication acquired by a third party, the state judiciary had held that orally transmitted com-

---

123 *Id.* (quotation omitted). At the time of defendant's trial, N.J. EVID. R. 28 provided in relevant part that "[n]o person shall disclose any communication made in confidence between such person and his or her spouse unless both shall consent to the disclosure." N.J. STAT. ANN. § 2A:84A-22 (West 1976), *amended by* 1992 N.J. Laws 142. The legislature amended this version by providing that either spouse may unilaterally consent to disclosure. *See* N.J. EVID. R. 28; *see also supra* note 121 (providing the current statutory language of N.J. EVID. R. 28).

124 *Szemple*, 135 N.J. at 414, 640 A.2d at 821. The justice averred that the amendment considerably relaxed the privilege by permitting a marital communication to be disclosed in a criminal proceeding when either spouse assents to the disclosure rather than requiring the consent of both spouses. *Id.*

The amendment conforms the New Jersey spousal privilege to the federal rule. ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMM., COMM. STATEMENT NO. 1055, at 1 (1992). The amendment allows either spouse to waive the privilege by consenting to the disclosure of marital communications. *Id.*

125 *Szemple*, 135 N.J. at 414-15, 640 A.2d at 821 (citing Blau v. United States, 340 U.S. 332, 333 (1951); Wolfle v. United States, 291 U.S. 7, 14 (1934); Rozycki v. Peley, 199 N.J. Super. 571, 579, 489 A.2d 1272, 1276 (Law Div. 1984); State v. Young, 97 N.J.L. 501, 505, 117 A. 713, 715 (1922); 8 WIGMORE, *supra* note 3, § 2332, at 642).

126 *Id.* at 415, 640 A.2d at 821 (quoting 1 MCCORMICK, *supra* note 14, § 82, at 303 (stating that because "the [marital communications] privilege has as its only effect the suppression of relevant evidence, its scope should be confined as narrowly as is consistent with reasonable protection of marital communications")).

127 *Id.* (quoting 8 WIGMORE, *supra* note 3, § 2339, at 668 (asserting the general proposition that if written communications "were obtained surreptitiously or otherwise without the addressee's consent, the privilege should cease")). The court explained that in comporting with the goal of narrowly construing privileges, the majority of jurisdictions do not extend the privilege to written communications that come into the possession of a third party. *Id.* at 416, 640 A.2d at 822.

munications are admissible when overheard by a third party.[128]

Examining the case at bar in the context of prior New Jersey case law, Justice Garibaldi concluded that as a general principle the involvement of a third party destroys the confidential nature of the communication.[129] The justice explained that the privilege is personal to spouses and does not adhere to the communication itself.[130] The majority found no important distinction between a written and oral communication and, accordingly, concluded that third party involvement vitiates the confidential nature of a written communication just as readily as it does an oral one.[131]

---

128 *Id.* The court examined four prior cases that refused to extend the marital communications privilege to oral communications overheard by third parties. *Id.* at 416-17, 640 A.2d at 822 (citing State v. Young, 97 N.J.L. 501, 505, 117 A. 713, 715 (1922); State v. Laudise, 86 N.J.L. 230, 231, 90 A. 1098, 1098 (1914); State v. Sidoti, 134 N.J. Super. 426, 430, 341 A.2d 670, 672 (App. Div. 1975); State v. Brown, 113 N.J. Super. 348, 353, 273 A.2d 783, 785 (App. Div. 1971)); *see supra* notes 85-105 and accompanying text (discussing in depth the four cases relied upon by the New Jersey Supreme Court).

129 *Szemple*, 135 N.J. at 417, 640 A.2d at 822.

130 *Id.*

131 *Id.* The justice rationalized this conclusion by noting two cases from other jurisdictions, both of which adopted this position. *Id.* at 417-18, 640 A.2d at 822-23 (citing State v. Myers, 640 P.2d 1245, 1248 (Kan. 1982); Zimmerman v. State, 750 S.W.2d 194, 200 (Tex. Crim. App. 1988) (en banc)). *Zimmerman* and *Myers*, the court explained, both confronted the issue of whether the marital communications privilege extended to written interspousal communications obtained by a third party and held that such communications were not privileged. *Id.* at 417, 418, 640 A.2d at 823.

In *Zimmerman v. State*, a letter sent by defendant to his wife was found by his wife's mother in a dresser drawer while she was admittedly looking for evidence of defendant's guilt. 750 S.W.2d at 197. The defendant's mother-in-law subsequently read the letter without the consent of the defendant's wife. *Id.* Although the letter was a communication between spouses, the Texas court recognized certain exceptions to the rule that spousal communications are absolutely privileged. *Id.* at 199. One such exception, the court noted, were communications overheard by third parties because such communications have lost their confidential character. *Id.* (citations omitted). The court acknowledged the analogy between oral and written communications and accordingly concluded that written communications obtained by third parties are no more privileged than oral communications overheard by third parties. *Id.* (quotation omitted). Consequently, the *Zimmerman* court held that the letter containing the confession was not a privileged marital communication because it came into the possession of a third party without the collusion of the recipient spouse and hence lost its confidential character. *Id.* at 200. (quotation omitted). The primary authority the *Zimmerman* court used in support of that conclusion was the rule set forth by the Kansas Supreme Court in *State v. Myers*. *Id.* (citation omitted).

In *State v. Myers*, the resident of a house discovered a written interspousal communication under a mattress three months after the defendant's wife vacated the premises. 640 P.2d at 1246. The Kansas Supreme Court discerned that the following rule was to be followed: when a written spousal communication is discovered "inadvertently and without the consent or connivance of the addressee-spouse," the third party's testimony as to the contents of that communication should be admissible. *Id.* at 1248. The *Myers* court determined that public policy would be better served by

Having established the principle that the marital communications privilege is lost when a third party obtains the communication, the court next addressed the defendant's assertion that this principle is only true if the third party inadvertently discovered the communication.[132] The court stated that the purpose of the inadvertency requirement was to prevent a spouse from unilaterally defeating the privilege through connivance with a third party.[133] Moreover, the court noted that the recent amendment to *N.J. Evid. R.* 28, which permitted the disclosure of a marital communication with the consent of only one spouse, renders the inadvertency requirement unnecessary because the spouse can simply disclose the communication directly to the court.[134] Furthermore, the court proclaimed that because the parties failed to take the necessary precautions to ensure the confidentiality of the letter, they lost the benefit of the privilege.[135] The court thus held that the trial court properly admitted the letter because the privilege did not apply to the written communication obtained by a third party.[136]

Turning to the priest-penitent privilege, the court noted that

---

admitting the communication into evidence to ascertain the truth. *Id.* In conclusion, the court stressed that the rule set forth was "entirely consistent" with the almost universally accepted rule that oral statements between spouses lose their confidential nature and hence, privileged status, when overheard by a third party. *Id.* at 1249.

132 *Szemple*, 135 N.J. at 418-19, 640 A.2d at 823. The court acknowledged Judge Stein's adoption of that qualification in his appellate division dissent, but found that both Judge Stein and the defendant had applied the inadvertency requirement to the incorrect party. *Id.* at 419, 640 A.2d at 823.

133 *Id.* The inadvertency requirement, the court opined, referred to the recipient spouse. *Id.* The court thus found the lower court's dissent, which stated that the privilege would apply as long as the third party intentionally obtains the communication, even if a spouse intended disclosure, to be both misplaced and unnecessary. *Id.* at 418-19, 640 A.2d at 823.

134 *Id.* at 419, 640 A.2d at 823; *see also supra* note 121 (providing the text of N.J. EVID. R. 28). The court also noted that the theory advanced by the dissent below was based upon the unsubstantiated assertion that the third party "surreptitiously appropriated" the written communication. *Szemple*, 135 N.J. at 420, 640 A.2d at 824 (citation omitted). Justice Garibaldi refuted this assertion by indicating that although the concealment of the letter was deliberate, the actual discovery was unintentional. *Id.* The court also found no evidence to suggest that the recipient spouse, defendant's wife, had orchestrated the discovery. *Id.* at 419, 640 A.2d at 823-24.

135 *Id.* at 419, 420, 640 A.2d at 824. Justice Garibaldi proffered that the risk of a third party obtaining a written communication is foreseeable and thus, the parties are responsible to guard against this eventuality. *Id.* at 419-20, 640 A.2d at 824. The court opined that the defendant's failure to ask his wife to either destroy or conceal the letter and his wife's apathy in leaving the letter in a box illustrated the parties' failure to take the necessary precautions. *Id.* at 419, 640 A.2d at 824.

136 *Id.* at 420, 640 A.2d at 824. The court concurred with the lower courts that third party appropriation destroys the confidentiality of spousal communications. *Id.* at 419, 640 A.2d at 823.

under *N.J. Evid. R.* 37,[137] the holder of a testimonial privilege may waive that privilege by consenting to the disclosure of the confidential communication.[138] Justice Garibaldi postulated that although Bischoff undoubtedly consented to the disclosure, the crucial issue was whether the priest may unilaterally waive the privilege.[139] The majority determined that the plain language of the statute was ambiguous,[140] requiring the court to construe the statute in such a

---

137 N.J. STAT. ANN. § 2A:84A-29 (West 1976) [hereinafter N.J. EVID. R. 37]. N.J. EVID. R. 37 is a waiver statute that provides in pertinent part:

> A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.
>
> A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a wavier under this section. The failure of a witness to claim a right or privilege with respect to [one] question shall not operate as a waiver with respect to any other question.

Id.

138 *Szemple*, 135 N.J. at 420, 640 A.2d at 824. The court noted that the holder may also waive the testimonial privilege by simply disclosing the communication. *Id.*

The priest-penitent privilege as codified in New Jersey provides that:

> Subject to Rule 37, a clergyman, minister or other person or practitioner authorized to perform similar functions, of any religion shall not be allowed or compelled to disclose a confession or other confidential communication made to him in his professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which he belongs or of the religion which he professes, nor shall he be compelled to disclose the confidential relations and communications between and among him and individuals, couples, families or groups with respect to the exercise of his professional counseling role.

N.J. STAT. ANN. § 2A:84A-23 (West 1976) (footnote omitted) [hereinafter N.J. EVID. R. 29].

139 *Szemple*, 135 N.J. at 420-21, 640 A.2d at 824. Simply stated, the court questioned who holds the priest-penitent privilege for the purpose of waiver. *Id.* at 421, 640 A.2d at 824. The court noted that a determination of this issue first required consideration of the plain language of the statute. *Id.* (citing Town of Morristown v. Woman's Club, 124 N.J. 605, 610, 592 A.2d 216, 219 (1991) (stating construction of any statute necessarily begins with consideration of its plain language); Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 128, 527 A.2d 1368, 1371 (1987) (same)). Justice Garibaldi assessed that although the language of N.J. EVID. R. 29 excludes specific mention of which party holds the privilege, the language does direct the privilege toward the clergyperson "who shall not be allowed or compelled to disclose a confidential communication." *Id.*, 640 A.2d at 824-25.

140 *Id.* at 422, 640 A.2d at 825. The court addressed defendant's contention that the phrase "shall not be allowed . . . to disclose" (alteration in original) evidences that the penitent's consent is also required for a valid waiver because the phrase alludes to the penitent "allowing" the cleric to disclose. *Id.* at 421-22, 640 A.2d at 824-25. The majority determined that the statute was ambiguous on this point because the appellate division determined that the same phrase had a different meaning in that it re-

way as to best effectuate the legislative intent.[141] Based on the legislative history of the priest-penitent privilege, coupled with the privilege's origin in the Seal of Confession,[142] the court opined that *N.J.*

---

ferred to either the State or the Court—not the penitent—allowing the clergyperson to disclose the communication. *Id.*, 640 A.2d at 825.

141 *Id.* at 422, 640 A.2d at 825 (citing Cedar Cove, Inc. v. Stanzione, 122 N.J. 202, 213, 584 A.2d 784, 789 (1991) (stating that when a statute is ambiguous a court must construe the statute in a way that will best effectuate the legislature's intent); Accountemps v. Birch Tree Group, Ltd., 115 N.J. 614, 622, 560 A.2d 663, 667 (1989) (holding same)). Noting the validity of the legal principle that a court shall avoid a construction which renders a portion of a statute meaningless, the *Szemple* court stated that effectuating the intention of the legislature was the controlling principle when construing a statute. *Id.* (citations omitted). While clarifying statutory ambiguity, the court observed that in determining the intent of the legislature, the judiciary may rely on extrinsic aids such as legislative history. *Id.* (citations omitted). The legislative history, the court announced, includes, among other things, "the reports of special committees or commissions appointed to study and suggest legislation." *Id.* (citation omitted).

142 *Id.* at 422, 423, 640 A.2d at 825. Justice Garibaldi related that under the Code of Canon Law of the Roman Catholic Church, betrayal by a confessor of a penitent was a severely penalized crime which often resulted in an automatic excommunication. *Id.* at 423, 640 A.2d at 825 (citation omitted). The court further reported that English courts acknowledged the sanctity of the confessional until the English Reformation, when malevolence toward the Catholic Church resulted in nonrecognition of the privilege. *Id.*, 640 A.2d at 825-26. (citations omitted). Therefore, the court posited, the privilege was not recognized in American common law and as a result, clergypersons were compelled to testify unless the privilege had been conferred by statute. *Id.* at 423-24, 640 A.2d at 826. (citations omitted).

Justice Garibaldi noted that the tradition of the sanctity of the confessional endured not only in the Roman Catholic Church, but also in many other Christian denominations. *See id.* at 424, 640 A.2d at 826 (listing the testimonial traditions of the Episcopal Church, American Lutheran Church, Presbyterian Church in the United States, United Presbyterian Church, and American Baptist Convention). Accordingly, the court observed, various religious groups confronted with a potential choice between imprisonment or a breach of religious duty began to pressure legislatures to create a privilege. *Id.* Hence, the court charged, the Legislature enacted the privilege not with the purpose of protecting the penitent, but rather with the purpose of protecting the clergyperson from forced disclosure of spiritual confidences. *Id.* (citation omitted).

Justice Garibaldi recounted that consequently almost all states now statutorily recognize the priest-penitent privilege. *Id.* New Jersey, the court noted, first statutorily recognized the privilege in 1947. *Id.* (citing N.J. STAT. ANN. § 2A:81-9 (1952), *repealed by* 1960 N.J. Laws 52). N.J. STAT. ANN. § 2A:81-9 provided in relevant part:

> A clergyman, or other minister of any religion, shall not be allowed or compelled to disclose in any court, or to any public officer, a confession made to him in his professional character, or as a spiritual advisor, or as a spiritual advisor in the course of discipline enjoined by the rules or practice of the religious body to which he belongs or of the religion which he professes.

N.J. STAT. ANN. § 2A:81-9 (West 1952). The *Szemple* court noted that like its modern successor, the original New Jersey statute failed to specify the holder of the privilege. *Szemple*, 135 N.J. 425, 640 A.2d at 826.

Evid. R. 29 confers the privilege solely upon the clergyperson.[143] Therefore, the court determined that the clergyperson may elect to waive the privilege without the penitent's consent.[144]

In reciting the legislative history of the priest-penitent privilege, Justice Garibaldi noted that because the legislature originally enacted the privilege under a subsection regarding the competency of witnesses and failed to include a waiver provision, courts could interpret the privilege as merely a rule of competency and not a privilege.[145] The majority suggested that the rule read not as a waivable privilege, but rather "as an absolute ban on disclosure."[146] Ultimately, however, the court rejected this contention, proclaiming that the recommendations of the two committees appointed to study New Jersey's evidentiary rules demonstrated that the legislature intended the statute to confer a privilege, not merely state a rule of competency.[147]

The justice recounted that in the 1950s, the court appointed the Committee on the Revision of the Law of Evidence (Jacobs Committee), to study the New Jersey Evidentiary Statutes and issue a report making recommendations regarding whether to adopt the Uniform Rules of Evidence.[148] The Jacobs Committee, the justice

---

143 *Szemple*, 135 N.J. at 422-23, 640 A.2d at 825.

144 *Id.* at 423, 640 A.2d at 825. The court explained that the clergyperson's waiver does not require the penitent's consent. *Id.* The majority also noted that the only limitation to this waiver rule lies in the clergyperson's own religious tenets. *Id.* The court concluded that this interpretation most accurately reflected the Legislature's intent. *Id.*

145 *Id.* at 425, 640 A.2d at 826.

146 *Id.* (citation omitted).

147 *Id.*, 640 A.2d at 826-27. The court relied primarily on the findings of the Jacobs and Bigelow Committees to support the holding in this case. *Id.* at 425-30, 640 A.2d at 826-29.

148 *Id.* at 425, 640 A.2d at 827. The court noted that the Jacobs Committee report, issued in 1955, compared the Uniform Rules of Evidence, which had met with wide acceptance, with the New Jersey Evidentiary Statutes. *Id.* (citation omitted). The court provided the text of the Uniform Rule and quoted the Drafter's comment to that rule, which stated that the "rule permits either priest, broadly defined, or penitent to claim the privilege." *Id.* at 425-26, A.2d at 827 (quoting JACOBS COMM. REP., *supra* note 62, at 76).

The Uniform Rule provided in relevant part:

> A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he claims the privilege and the judge finds that (a) the communication was a penitential communication and (b) the witness is the penitent or the priest, and (c) the claimant is the penitent, or the priest making the claim on behalf of an absent penitent.

UNIF. R. EVID. 29(2), *reprinted in* CALIFORNIA LAW REVISION COMMISSION, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 453 (1964) (superseded by UNIF. R. EVID. 505).

explained, subsequently advised the legislature to adopt *N.J. Stat. Ann.* § 2A:81-9 as the rule rather than the Uniform Rule.[149] The court reasoned that the Jacobs Committee preferred the statute because it most effectively protected the clergyperson from compelled disclosure by conferring the privilege exclusively upon the cleric.[150] On the basis of the Jacobs Committee Report, the court related, the legislature retained *N.J. Stat. Ann.* § 2A:81-9.[151]

The court then recounted the legislature's appointment of the Commission to Study the Improvement of the Law of Evidence (Bigelow Commission).[152] The court stated that the Bigelow Commission Report, issued in 1956, essentially adopted the recommendations made by the Jacobs Committee, but proposed two changes to *N.J. Stat. Ann.* § 2A:81-9: expanding the scope of the privilege beyond confessions and including a waiver provision.[153] Relying

---

149 *Szemple*, 135 N.J. at 426, 640 A.2d at 827. In its annotation the Jacobs Committee made the following pertinent comments:

> 4. *Comparison between New Jersey Statute and Uniform Rule.* Under the rule the privilege belongs to the penitent, and he can waive it by a partial disclosure to any one, or waive it in other ways, thereby compelling the priest to testify. The statute seems preferable.
>
> 5. Under the rule the penitent has a privilege to refuse to disclose his confession whereas under the statute he has no privilege at all. Although the rule is better here, such disclosures almost always would be hearsay and therefore the matter is not important.

JACOBS COMM. REP., *supra* note 62, at 77. The Committee found that although the Uniform Rule is superior in that it bestows the privilege, the statute is ultimately preferable because it does not compel the priest to testify if the penitent discloses the communication. *Id.* Furthermore, the committee found that any disclosures under the Uniform Rule would almost always be hearsay and thus inadmissible anyway. *Id.*

150 *Szemple*, 135 N.J. at 426-27, 640 A.2d at 827. Relying on the decision of the appellate division, the court noted that this apprehension may have arisen from a desire to either prevent the penitent from manipulating the privilege or simply to protect the cleric's free exercise of religion. *Id.* at 426, 640 A.2d at 827 (citing State v. Szemple, 263 N.J. Super. 98, 110-11 n.5, 622 A.2d 248, 254-55 n.5 (1993)). Justice Garibaldi again noted the Jacob Committee's preference for the statutory language of N.J. STAT. ANN. § 2A:81-9, which on its face granted "no privilege at all" to the penitent as opposed to the language of the Uniform Rule which did grant a waivable privilege to the penitent. *Id.* at 426-27, 640 A.2d at 827 (quoting JACOBS COMM. REP., *supra* note 62, at 77). The court maintained that construing the statute so as to confer the privilege upon the clergyperson alone answers the Jacobs Committee's concerns because if the privilege does not attach to the penitent, he or she cannot consequently waive the privilege and compel the clergyperson to disclose the communication. *Id.* at 427, 640 A.2d at 827-28.

151 *Id.*, 640 A.2d at 828. See *supra* note 141 for the appropriate text of the statute.

152 *Szemple*, 135 N.J. at 427, 640 A.2d at 828. The legislature appointed the Bigelow Commission pursuant to a joint resolution. BIGELOW COMM'N REP., *supra* note 62, at 1.

153 *Szemple*, 135 N.J. at 427, 640 A.2d at 828 (citing BIGELOW COMM'N REP., *supra* note 62, at 38). The Bigelow Commission, the justice proffered, explained that other communications that would not qualify as confessions should also be privileged. *Id.* at

extensively on the Jacobs and Bigelow Committee Reports, as well as on the express language of the statute and the privilege's origin, the court found that the cleric is the only party authorized to waive the privilege.[154]

Turning to Szemple's contention that the statutory construc-

427-28, 640 A.2d at 828 (quoting BIGELOW COMM'N REP., *supra* note 62, at 38). The court opined that that explanation coupled with the inclusion of a wavier provision illustrated the Bigelow Commission's view that N.J. STAT. ANN. § 2A:81-9 created a waivable privilege rather than a rule of competency. *Id.* at 428, 640 A.2d at 828. Thus, the court explained, the rule does not act as an unequivocal ban on disclosure. *Id.*

The court next rejected the claim by the Commentator to the *New Jersey Rules of Evidence* that the Bigelow Commission erred in including a waiver provision because it contradicts the purpose of rule that a religious figure should never be considered as a source of this type of evidence. *Id.* (quotation omitted). Justice Garibaldi conceded that the Bigelow Commission may have misunderstood the purpose of the rule, but stated that one could not ignore the fact that the legislation later adopted contained an explicit reference to waiver pursuant to N.J. EVID. R. 37. *Id.* Nevertheless, the court submitted that the mere inclusion of a waiver provision did not solve the problem of who may waive the privilege. *Id.* The court then addressed the language of the statute, which is directed toward the cleric yet silent as to who holds the privilege. *Id.* The court found this inexact language to be determinative, particularly because other evidentiary privileges make explicit mention of who holds the privilege. *Id.* at 428-29, 640 A.2d at 828 (citations omitted). Moreover, the court asserted, other evidentiary privileges identify the confider as the holder of the privilege because there is less opportunity for such confiders to exploit the privilege and because no conflicting religious duty inheres in those privileges which would force one party to maintain confidentiality despite the holder's willingness to permit disclosure. *Id.* at 429, 640 A.2d at 828-29. (quoting Yellin, *supra* note 23, at 137).

154 *Id.* at 429, 640 A.2d at 829. The court further supported this conclusion by noting that the language of the statute was directed toward the clergyperson and that the Jacobs Committee was concerned with the cleric when it evaluated the legislation. *Id.* (citation omitted). For textual support for this principle, the *Szemple* court turned to *In re Murtha*, an appellate division case involving the priest-penitent privilege. *Id.* (citing *In re* Murtha, 115 N.J. Super. 380, 384, 279 A.2d 889, 891 (App. Div. 1971)); *see supra* notes 110-15 and accompanying text (providing an analysis of *Murtha*). The court posited that although the *Murtha* court held that a nun was not a clergyperson under the statute, without reaching the issue of who held the privilege, the *Murtha* court suggested in dicta that even if the nun did fall within the statute, the privilege did not apply because the nun had effectively waived the privilege. *Szemple*, 135 N.J. at 429-30, 640 A.2d at 829 (citing *Murtha*, 115 N.J. Super. at 387-88, 279 A.2d at 893). Thus, Justice Garibaldi implied that the dicta in *Murtha* clearly indicated that the clergyperson holds the priest-penitent privilege and thus may waive the privilege without the penitent's consent. *Id.* at 430, 640 A.2d at 829.

Next, the court reported that a 1981 amendment to the priest-penitent privilege did not identify the holder of the privilege but merely expanded the privilege's scope. *Id.* (quotation omitted). The court assessed that the legislature's failure to amend the statute in this regard amounted to an agreement with the dicta expressed in the *Murtha* decision that the clergyperson unilaterally holds the priest-penitent privilege. *Id.* (citations omitted). The 1981 amendment added the following language to N.J. EVID. R. 29: "nor shall he be compelled to disclose the confidential relations and communications between and among him and individuals, couples, families or groups with respect to the exercise of his professional counseling role." 1981 N.J. Laws 303(2).

tion adopted by the appellate division would render the phrase "shall not be allowed"[155] meaningless, the court agreed that such a result could be undesirable.[156] Nevertheless, the court found that to give that phrase its literal meaning would not comport with the legislative intent.[157] Moreover, Justice Garibaldi opined that the express waiver provision more accurately represented the legislative intent.[158] Furthermore, the court determined that the clergyperson was to be the sole holder of the privilege because the phrase "shall not be compelled"[159] suggests that the clergyperson may, at his or her discretion, either waive or invoke the privilege.[160] The majority articulated that because the principle rationale for the priest-penitent privilege was to protect the clergyperson from compelled disclosure, it was unnecessary to include the penitent as a holder.[161]

Finally, the court acknowledged various interpretations of the priest-penitent privilege and conceded that most states do not confer the privilege solely upon the clergyperson.[162] Justice Garibaldi, however, emphasizing that the court was only construing the New Jersey statute, held that the clergyperson holds the priest-penitent privilege exclusively and accordingly may waive the privilege, without the penitent's consent, by disclosing confidential communica-

---

155 See *supra* note 137 for the specific language of the New Jersey priest-penitent statute; see *supra* notes 138-43 and accompanying text for the majority's analysis of N.J. EVID. R. 29.

156 *Szemple*, 135 N.J. at 431, 640 A.2d at 829-30 (quoting N.J. EVID. R. 29) (other citations omitted). The defendant based his assertion on the well established statutory principle that courts should avoid a construction which renders part of a statute superfluous. *Id.*, 640 A.2d at 829.

157 *Id.*, 640 A.2d at 830 (citations omitted). The majority further reasoned that the "shall not be allowed" language was probably a remnant of an old rule of competency. *Id.* (citations omitted).

158 *Id.* at 431-32, 640 A.2d at 830. (citations omitted).

159 See *supra* note 137 for the specific language of the New Jersey priest-penitent statute; see *supra* notes 138-43 and accompanying text for the majority's analysis of N.J. EVID. R. 29.

160 *Id.* at 432, 640 A.2d at 830. (citing Mitchell, *supra* note 4, at 755-56 n.181). Justice Garibaldi also noted that when a legislature intends to grant the privilege to both the penitent and the clergyperson, the statutory language usually qualifies the waiver with a statement expressing the requirement of the penitent's consent. *Id.* (citations omitted). The justice pointed out that N.J. EVID. R. 29 does not include this type of language. *Id.*

161 *Id.* Justice Garibaldi conceded that the penitent's need for spiritual counseling was valid, but was nonetheless unpersuaded that the penitent's comfort was a rationale behind N.J. EVID. R. 29. *Id.* (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).

162 *Id.* at 432, 640 A.2d at 830 (citations omitted).

tions.[163] Consequently, the court affirmed the decision of the appellate division disqualifying the privilege.[164]

Justice Clifford authored a short concurrence with three cutting observations.[165] First, the justice discredited the notion that the chairmen of the Jacobs Committee and Bigelow Commission did not understand the consequences of the Jacobs Committee Report's comment that "the penitent . . . has no privilege at all."[166] The justice reasoned that for the committees "the penitent . . . has no privilege at all" meant exactly that.[167] Second, Justice Clifford noted that generally priests keep confessions confidential not because of secular laws but because their religious obligation requires them to do so.[168] The justice posited that despite the ruling of the court, priests will continue to obey the dictates of that higher law.[169] Third, the justice agreed with the trial court that the person to whom Szemple confessed did not qualify as a clergyperson under *N.J. Evid. R.* 29, and thus the privilege did not apply.[170]

Justice Clifford expounded that it was unthinkable that a priest would disclose the confidences of the confessional.[171] The justice noted, however, that the privilege may serve a purpose in the rare case where a priest believes the demands of the law outweigh the dictates of religion.[172] Moreover, the justice reasoned that if the court misinterpreted the legislative intent when determining the scope of the privilege, the legislature could simply

---

163 *Id.* at 433, 640 A.2d at 830. The court adopted this view in light of the statute's history and previous interpretations by the Jacobs and Bigelow committees. *Id.*

164 *Id.*

165 *Id.* at 433-34, 640 A.2d at 830-31 (Clifford, J., concurring).

166 *Id.* at 433, 640 A.2d at 831 (Clifford, J., concurring) (quoting JACOBS COMM. REP., *supra* note 62, at 77).

167 *Id.* The justice explained that neither of those scholars had ever had difficulty expressing their views with complete accuracy. *Id.*

168 *Id.* at 434, 640 A.2d at 831 (Clifford, J., concurring). Justice Clifford referred to the dissent's argument—that conferring the priest-penitent privilege upon the priest deprived penitents of their right to confide in spiritual advisers—as "a fish of reddish hue that diverts one's focus from the issue before us." *Id.* at 433, 640 A.2d at 831 (Clifford, J., concurring).

169 *Id.* at 434, 640 A.2d at 831 (Clifford, J., concurring). Moreover, the justice contended that if a priest chose to ignore religious obligations and reveal the confidences of the confessional, such a disclosure would be a matter for the church, not the law. *Id.*

170 *Id.* (quotation omitted).

171 *Id.*

172 *Id.* The justice found it implausible that "a priest to whom a penitent has disclosed, in the sacrament of confession, his or her pride, covetousness, lust, anger, gluttony, envy, sloth, lawlessness, immorality, perversion, or lesser misdeeds would for one moment entertain the thought of disclosure to *any* third person under *any* circumstances." *Id.*

amend the statute.[173]

Justice O'Hern authored a stirring dissent regarding the priest-penitent privilege.[174] The justice first concluded that neither the legislature nor the *New Jersey Rules of Evidence* contemplated that a clergyperson could freely disclose confidential spiritual conversations.[175] Next, the dissenting justice analyzed the purposes of the priest-penitent privilege.[176] Justice O'Hern found privileges an exception to the general principle that "the public . . . has a right to every [person's] evidence."[177] Justice O'Hern stated that the most prevalent rationale for the priest-penitent privilege was society's need to encourage a positive penitential relationship.[178] According to the justice, most jurisdictions accomplish the goal of protecting the priest-penitent relationship by enacting statutes that grant the power of waiver solely to the penitent.[179]

Justice O'Hern maintained that the New Jersey statute accommodates society's need by clearly providing that a clergyperson

---

173 *Id.* Justice Clifford commented that once the legislature amended the statute, the judiciary could "launder the *Evidence Rule* accordingly." *Id.*

174 *Id.* (O'Hern, J., dissenting).

175 *Id.* at 434-35, 640 A.2d at 831 (O'Hern, J., dissenting). The dissent supported that conclusion with three contentions: 1) most jurisdictions treat the privilege as barring disclosure by the clergyperson; 2) New Jersey jurisprudence has never held that a cleric may waive the Seal of Confession; and 3) such a fundamental change in the law would never have been advised by the state committees on evidence without definitive discussion of the issue. *Id.* at 435, 640 A.2d at 831 (O'Hern, J., dissenting).

176 *Id.*

177 *Id.* (alteration in original) (quoting 8 WIGMORE, *supra* note 3, § 2192, at 70). Justice O'Hern quoted commentaries buttressing the view that the rules of privilege were a justified exception because they are requirements of extrinsic policy. *Id.* (quoting 8 WIGMORE, *supra* note 3, § 2175, at 3). The justice pointed out that the attorney-client privilege was not created to save attorneys the bother of appearing in court, but rather to serve the greater objective of ensuring clients' confidentiality so that they may consult openly with their attorneys. *Id.*, 640 A.2d at 832 (O'Hern, J., dissenting) (citing State v. Toscano, 13 N.J. 418, 424 100 A.2d 170, 172 (1953) (holding that the attorney-client privilege is universally recognized on the basis of public policy supporting freedom in communication between parties to special relationships)). The *Szemple* dissent noted that society deems those relationships important enough to justify nondisclosure. *Id.* at 435-36, 640 A.2d at 832 (O'Hern, J., dissenting) (quoting Mitchell, *supra* note 4, at 762).

178 *Id.* at 435, 640 A.2d at 832 (O'Hern, J., dissenting). The justice noted that there are many privileges, including the physician-patient, attorney-client, and marital communications privileges, that are designed to encourage special relationships by protecting the communications made pursuant to those relationships. *Id.* at 435-36, 640 A.2d at 832 (O'Hern, J., dissenting) (citation omitted). The dissent noted that these relationships are protected because the law has concluded that fostering the relationships serves a greater purpose to society than does disclosing the communications. *Id.* at 436, 640 A.2d at 832 (O'Hern, J., dissenting) (quotation omitted).

179 *Id.* (quoting Seidman v. Fishburne-Hudgins Educ. Found., Inc., 724 F.2d 413, 415 (4th Cir. 1984); and Keenan v. Gigante, 390 N.E.2d 1151, 1154 (N.Y. 1979)).

shall not be "allowed or compelled" to disclose confidential spiritual communications.[180] The justice interpreted this language to mean that a penitent must consent to disclosure and posited that attaching such a meaning would be in accord with other jurisdictions.[181] The dissenting justice opined that requiring the penitent to consent to disclosure best implements the policies underlying the privilege.[182]

Justice O'Hern next averred that the majority incorrectly focused on the Jacobs Committee Annotation to their comment on proposed *Unif. R. Evid.* 29, which stated that, unlike the Uniform Rule, under the New Jersey statute the penitent has no privilege at all.[183] The dissent asserted that the reason the statute did not grant a privilege to the penitent was because it would have been redundant: the 1955 version of the statute absolutely banned the disclosure of confidential communications by clerics.[184] The justice concluded that the majority's deference to the Jacobs Committee should be offset by the fact that the committee was analyzing a statute that completely banned cleric disclosures, thus affording the penitent inviolable protection.[185] Moreover, the dissent as-

---

180 *Id.* at 436-37, 640 A.2d at 832 (O'Hern, J., dissenting) (quoting N.J. EVID. R. 29).

181 *Id.* at 437, 640 A.2d at 832 (O'Hern, J., dissenting). The dissent continued the analysis by noting that only three state statutes allow the clergyperson to disclose a communication absent the penitent's consent. *Id.* Those statutes do not prohibit a clergyperson from breaching spiritual confidences voluntarily, but rather only prohibit the clergyperson from being compelled to disclose. *Id.* (citing ILL. ANN. STAT. ch. 735, para. 5/8-803 (Smith-Hurd 1992); MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (1989); VA. CODE ANN. § 8.01-400 (Michie 1992)). The dissent also noted that case law in Illinois and Virginia supports this interpretation. *Id.* (citations omitted). The justice further explained that although six other statutes do not appear to grant the penitent a privilege, they do have that effect because the clergyperson is considered an incompetent witness and thus is not allowed to testify at all. *Id.*, 640 A.2d at 833 (O'Hern, J., dissenting) (citing GA. CODE ANN. § 24-9-22 (1982); IND. CODE ANN. § 34-1-14-5 (West 1983); MICH. COMP. LAWS ANN. § 600.2156 (West 1986); MO. ANN. STAT. § 491.060 (Vernon 1952); VT. STAT. ANN. tit. 12, § 1607 (1973); WYO. STAT. § 1-12-101 (1988)).

182 *Id.*

183 *Id.* at 437-38, 640 A.2d at 833 (O'Hern, J., dissenting) (quoting JACOBS COMM. REP., *supra* note 62, at 77); *see supra* note 148 (discussing the relevant Jacobs Committee comments).

184 *Szemple*, 135 N.J. at 438, 640 A.2d at 833 (O'Hern, J., dissenting). In accordance with that view, the dissenting justice contended that the question of privilege only emerged once the Bigelow Commission recommended the inclusion of a waiver provision. *Id.* (footnote omitted).

185 *Id.* Moreover, the justice discounted the Jacobs Committee's concern that a clergyperson would be forced to disclose confidential communications in violation of his or her religious duty, noting the Drafters' Comment to UNIF. R. EVID. 29 which provided that either the priest or penitent may claim the privilege. *Id.* (quoting JACOBS COMM. REP., *supra* note 62, at 76). The dissent reasoned that the Jacobs Com-

serted that while the concept that a clergyperson could be forced to disclose spiritual confidences is troubling, the possibility that a penitent's confession could be disclosed against his or her wishes is even more disturbing.[186]

The dissent conceded that the statute did not explicitly confer a privilege upon the penitent, yet noted that to do so would have been unnecessary due to the statute's construction.[187] Furthermore, the dissenting justice submitted that New Jersey case law did not support the proposition that the penitent has no privilege.[188] Justice O'Hern took particular exception to the court's view that the Bigelow Commission's inclusion of a waiver provision indicated that the clergyperson has the power to unilaterally waive the privilege.[189]

The justice attested that the language of the statute is not de-

---

mittee's fear could not be realized because if both the penitent and clergyperson hold the privilege the penitent could not compel the clergyperson to disclose the communications. *Id.* at 439, 640 A.2d at 833 (O'Hern, J., dissenting). The Drafters' Comment to UNIF. R. EVID. 29 provides in pertinent part: "This rule permits either priest, broadly defined, or penitent to claim the privilege." JACOBS COMM. REP., *supra* note 62, at 76.

186 *Szemple*, 135 N.J. at 439, 640 A.2d at 833 (O'Hern, J., dissenting).

187 *Id.*, 640 A.2d at 833-34 (O'Hern, J., dissenting).

188 *Id.*, 640 A.2d at 834 (O'Hern, J. dissenting). Justice O'Hern criticized the majority's reliance on *In re Murtha*, finding the case inapplicable because the *Murtha* court never reached the issue of who held the privilege. *Id.* (citing *In re* Murtha, 115 N.J. Super 380, 279 A.2d 889 (App. Div. 1971)). The justice contended that had the court below reached the issue, it would have held that the privilege barred the testimony. *Id.*; *see supra* notes 110-15 and accompanying text for a further discussion of *Murtha*.

189 *Szemple*, 135 N.J. at 439, 440, 640 A.2d at 834 (O'Hern, J., dissenting). Specifically, Justice O'Hern argued that "[t]he language of the waiver reference is most inept for the interpretation that the Court reaches." *Id.* at 440, 640 A.2d at 834 (O'Hern, J., dissenting). The justice admitted that the Bigelow Commission's inclusion of a waiver provision is troublesome. *Id.* at 439, 640 A.2d at 834 (O'Hern, J., dissenting). The dissent noted that until this case addressed the issue, it had been assumed by the Commentary to the *New Jersey Rules of Evidence* that the Bigelow Commission's addition of the reference to the waiver provision was in error as it contravened the original goal of the statute. *Id.* at 439-40, 640 A.2d at 834 (O'Hern, J., dissenting) (quotation omitted).

The commentary to the *New Jersey Rules of Evidence* provides in relevant part:

> The inclusion of this [waiver] provision by the Bigelow Commission was probably in error because it contradicts the thrust of the rule and the original statute, namely that under no circumstances should a religious figure be considered as a source of evidence of this type. Since the person who made the confidential communication is not the holder of this privilege, no conduct on his part falling within the scope of Rule 37 can effectively compel disclosure by the religious figure.

RICHARD J. BIUNNO, CURRENT N.J. RULES OF EVIDENCE, Comment 1 on N.J. EVID. R. 29, at 416 (1993).

monstrative of the intended meaning.[190] Justice O'Hern stated that the majority's conclusion that the penitent had no privilege at all emasculated one of the most privileged communications.[191] The justice maintained that the majority's construction was not in accordance with the legislative intent and further opined that, contrary to the finding of the majority, the statute unambiguously stated that a cleric shall not be "allowed or compelled" to disclose a spiritual confidence.[192] The dissent suggested that most penitents

---

190 *Szemple*, 135 N.J. at 440, 640 A.2d at 834 (O'Hern, J., dissenting). The justice urged that the statutory language, with the exception of the heading, does not annunciate that the cleric even has a privilege. *Id.* Furthermore, the dissent posited that the waiver provision of N.J. EVID. R. 37 is out of context in N.J. EVID. R. 29 and that when the meaning attributed to a statute is not conveyed by the language, it can be inferred that the Legislature did not intend the attributed meaning. *Id.* at 440-41, 640 A.2d at 834 (O'Hern, J., dissenting). The dissenting justice argued that "[t]he generic provisions of *Evidence Rule* 37 simply do not fit the context of *Evidence Rule* 29." *Id.* The dissent found it incongruous to interpret the privilege as conferring a right of waiver upon the clergyperson when the language of the privilege clearly states that clerics may not testify. *Id.* at 441, 640 A.2d at 835 (O'Hern, J., dissenting). The justice further stated that to rationalize this interpretation with absurd scenarios, as envisioned by the majority, was unthinkable. *Id.* The dissent specifically characterized as ridiculous three of the majority's scenarios: 1) a priest contracting with someone not to claim the privilege; 2) a clergyperson who would consent to a disclosure made by anyone; and 3) a clergyperson who would disclose without coercion. *Id.* Further, the justice discounted the following situations: "a priest who would blurt out at a social gathering that penitent Jones mentioned during confession that he has visited a crack house, or a priest who would give consent to Smith, who happened to be standing near the confessional, to disclose Jones's confession." *Id.* The justice further contended that it was unnecessary for the Bigelow Commission to qualify the waiver provision—by explaining that a cleric could not disclose without the penitent's consent—because the public would simply assume that a cleric would not destroy the inviolability of the confessional. *Id.* The dissenting justice proffered that the Bigelow commission may have included the waiver provision to prevent a penitent who had already disclosed a communication from retracting and asserting the privilege. *Id.*

191 *Id.* The justice opined that the majority's conclusion could not possibly effectuate the legislature's intent because courts have construed all the other evidentiary privileges to confer the privilege upon the confider. *Id.* at 441-42, 640 A.2d at 835 (O'Hern, J., dissenting). The dissent demonstrated that the legislature concurrently codified all the evidentiary privileges and that it would be an anomaly to construe one as affording less protection than the other. *Id.* at 442, 640 A.2d at 835 (O'Hern, J., dissenting).

192 *Id.* (quoting N.J. EVID. R. 29). The dissent further challenged the majority's conclusion by arguing that the legislature would not have deprived citizens of their constitutional right to confide in spiritual counselors without earnest debate on the issue. *Id.* In this regard, the dissent noted the argument raised by the American Civil Liberties Union (ACLU) alleging that vesting the power of waiver in the clergyperson unconstitutionally burdens the penitent's right of free exercise of religion. *Id.* The justice agreed with the contention that N.J. EVID. R. 29 is not narrowly tailored to a compelling state interest. *Id.* Justice O'Hern recognized that the state's interest could be compelling in certain instances, such as child abuse, however the justice maintained that the majority's interpretation of N.J. EVID. R. 29 denies the penitent the right to prevent disclosure in any circumstance. *Id.*

would find the fact that they have no right to confidentiality in the confessional unthinkable and an affront to their religious principles.[193] Hence, Justice O'Hern opined that the majority's interpretation of the statutory language subverted the legislative intent, and thus should not be permitted.[194]

Justice O'Hern found this case particularly shocking because, had the defendant confided in an attorney or psychiatrist as opposed to a spiritual advisor, he would have been able to bar disclosure of those communications.[195] The justice further contended that the purpose behind the priest-penitent privilege is not served when a priest is allowed to testify against a penitent to whom he or she provided counseling.[196] The justice concluded by noting that the privilege exists to protect the penitent, and that it belongs to both the priest and the penitent.[197]

The narrow interpretation afforded both the marital communication and priest-penitent privileges by the *Szemple* court exemplifies the proper judicial approach. By construing the marital communication privilege narrowly, the court correctly determined

---

193 *Id.* According to Justice O'Hern, the notion of a legislator advancing such a position was doubtful. *Id.* at 443, 640 A.2d at 835-36 (O'Hern, J., dissenting). The dissent illustrated this point by questioning what reaction would have followed in 1957 if a legislator stated, "I want the clergy to be able to disclose confessions at will, no matter what the person giving the confession wants, because the sanctity of religious confessions must give way to the needs of a lawsuit." *Id.* at 442-43, 640 A.2d at 835 (O'Hern, J., dissenting). The justice noted that penitents would react negatively to that position despite continued trust in their spiritual advisors. *Id.* at 442, 640 A.2d at 835 (O'Hern, J., dissenting).

194 *Id.* at 443, 640 A.2d at 836 (O'Hern, J., dissenting). Justice O'Hern stated that because the judiciary accords the legislature great deference on how to serve its purposes, to read a statute in a manner that directly contravenes the legislative intent is undesirable. *Id.* (citations omitted). Further, the dissent noted that the language of N.J. EVID. R. 29 and N.J. EVID. R. 37 strengthens the conclusion that the Legislature did not intend to confer the privilege solely on the clergyperson. *Id.* The justice did, however, acknowledge instances in which the legislature may wish to modify the privilege, such as cases of child abuse. *Id.* The dissent conceded, however, that no such legislative change has currently been made. *Id.*

195 *Id.* at 444, 640 A.2d at 835 (O'Hern, J., dissenting).

196 *Id.* The dissent restated the purpose of the privilege: to encourage the relationship between a clergyperson and a penitent. *Id.* The dissent suspected that the issues in this case would not again be confronted by the court, as it is rare for a clergyperson to betray the confidences of the confessional. *Id.* The dissenting justice also opined that defendant's case should not turn on the success of his spiritual encounters. *Id.*

197 *Id.* The justice remarked that "[t]he clergy privilege exists not for the cleric to choose among the worthy members of the flock, but to furnish a 'secure repository for the confessant's confidences.'" *Id.* (quoting Seidman v. Fishburne-Hudgins Educ. Found., Inc., 724 F.2d 413, 415 (4th Cir. 1984)). In accordance with that view, the dissent opined that a conviction based on the disclosure of a confidential communication between cleric and penitent could not be sustained. *Id.*

that unsolicited third party intervention destroys the confidential nature of a marital communication and thus renders the communication unprotected.[198] The court properly abolished the inadvertency requirements.[199] This prerequisite was antiquated and served no purpose in modern jurisprudence. Unfortunately, the court dealt with the issue of "surreptitious appropriation" in a very cursory manner.[200] The court did not determine, for purposes of future litigation, whether surreptitious appropriation would justify the protection of the privilege, nor did the court define "surreptitious appropriation." By providing such guidelines, the court could have avoided unnecessary future adjudications. Furthermore, though the holding is tailored to the demands of today's society, it must be noted that as technology advances, methods of intercepting private communications, such as wiretaps, may render third party disclosure unfair and a true affront to the notion of privacy.

With respect to the priest-penitent privilege, the court properly noted that the privilege was meant to protect the clergyperson.[201] The majority, however, in emphasizing the clergyperson's rights, scarcely noted the rights of the penitent. Many theorists believe that the penitent's rights were also an issue when creating the privilege.[202] Ignoring this idiosyncracy, the court found that the clergyperson unilaterally holds the privilege. Further, the court did not even consider the interpretation that both parties may hold the privilege. The dissent pointed out that such an interpretation would further the majority's goal of protecting the clergyperson.[203] Had the court taken this approach, it would have joined a strong minority of states.[204] Furthermore, the majority based its argument almost exclusively upon the interpretations and recommendations of the Jacobs Committee and Bigelow Commission. Despite the eminence of those legal commentaries, the past four decades have eroded the validity of the committee's determinations. The needs

198 *Cf. id.* at 420, 640 A.2d at 824 (holding that the communication at issue was not privileged and was properly admitted).

199 *Cf. id.* at 418-19, 640 A.2d at 823 (determining that the inadvertency requirement does not apply third party acquisition of confidential communications).

200 *See id.* at 420, 640 A.2d at 824 (addressing the issue of surreptitious appropriation).

201 *Cf. id.* at 424, 640 A.2d at 826 (finding that the history of the privilege tends to indicate that the focus of protection lies with the clergyperson).

202 *See, e.g.*, 8 WIGMORE, *supra* note 3, § 2394, at 869.

203 *Szemple*, 135 N.J. at 438-39, 640 A.2d at 833 (O'Hern, J., dissenting).

204 *See* Mayes, *supra* note 21, at 400 ("Under the minority view, however, the privilege is said to exist for the benefit of both parties . . . .").

of society change frequently in today's fast-paced world. Those changes should be taken into account before basing a statutory interpretation upon dated principles.

The reach of this case will have a profound negative effect on the entire New Jersey judicial system. As noted in the dissent, the waiver may extend to an extraordinarily broad range of cases.[205] The court will eventually be forced to address this issue as it presents a substantial infringement upon people's daily activities.

To allow clergypersons to testify in court is quite different than compelling them to do so. Clergypersons are not currently compelled to disclose information in courts, thus, the decision in this case is not as catastrophic as first thought. The Seal of Confession will still prevent priests from disclosures, as will similar beliefs or doctrines in other religions. It is, however, quite frightening that the key to one's religious privacy rests in the hands of another. Furthermore, people whose religions do not have a doctrine regarding confidentiality have no guarantee of religious autonomy or a true feeling of free exercise.

Free exercise of religion is guaranteed by the United States Constitution[206] and cannot be infringed upon unless there is a compelling state interest.[207] The *Szemple* majority never explicitly addressed the Free Exercise clause. Nevertheless, the clergyperson's Free Exercise rights are by implication and by effect protected by the court's decision. Except for a brief mention in the dissent, the court ignored the penitent's right to Free Exercise.[208] The court's determination that the privilege belongs solely to the clergyperson functionally implicates a countervailing interest of Free Exercise on the part of the penitent. The majority decision results in a "unilateral bestowal of ecclesiastical prerogative"[209] without the reciprocal choice based on the penitent's Free Exer-

---

205 *See Szemple*, 135 N.J. at 443 n.3, 640 A.2d at 836 n.3 (O'Hern, J., dissenting) (noting that a simple tax matter could warrant invocation of the privilege).

206 U.S. CONST. amend. I

207 *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (holding that the free exercise of religion is part of the fundamental concept of liberty embodied in the Fourteenth Amendment and is thus applicable to the States and subject to strict scrutiny). In *People v. Phillips*, the New York court relied on the New York Constitution and upheld the priest-penitent privilege on free exercise grounds. *Privileged Communications to Clergymen*, *supra* note 21, at 206, 209 (reprinting the original, unreported opinion). See *supra* note 21 for a discussion of the holding and rationale in *Phillips*.

208 *Cf. Szemple*, 135 N.J. at 442, 640 A.2d at 835 (O'Hern, J., dissenting) (mentioning an ACLU contention that a denial of the priest-penitent privilege to the penitent violates the Free Exercise Clause).

209 Brief for the American Civil Liberties Union at 11, State v. Szemple, 135 N.J. 406, 640 A.2d 817 (1994).

cise rights. The right to free exercise of religion does not belong exclusively to the clergyperson. Such an interpretation would make the privilege a benefit of ecclesiastical office and not a protection of free exercise. Protection should also have been afforded the penitent to eradicate the Free Exercise conflict.

In response to *Szemple*, the New Jersey Legislature passed remedial legislation signed into law in October 1994.[210] The legislation (S-1164) amended *N.J.R.E.* 511 to specifically provide that both penitent and clergyperson hold the privilege and that the privilege is not waivable.[211] The purpose of this legislation is to balance two "very real and very sincere interests" and effectively overcomes the priest-penitent portion of the *Szemple* decision.[212]

Kristina K. Pappa

---

210 *See supra* note 29 and accompanying text (describing the legislative response to the *Szemple* decision).

211 1994 N.J. Laws 123.

212 Telephone Interview with Senator William Gormley (August 1, 1994). The legislation was reconsidered due to Governor Whitman's conditional veto, which sent the bill back to the legislature with recommended changes. Tim O'Brien, *Whitman Seeks Changes; Nixes 'Priest-Penitent' Bill*, 137 N.J. L.J. 1843 (1994). Governor Whitman's proposed changes sought to make the privilege more balanced by allowing waiver upon the consent of both parties and permitting clerics to tell police of plans of future crime. *Id.* The changes still protect the priest from compelled disclosure and thus, are in accordance with the intent of the original bill. *Id.* Governor Whitman signed the revised bill into law on October 27, 1994. *See* Weissman, *supra* note 29, at A7.