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Sharing Sacred Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?

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SHARING SACRED SECRETS: IS IT (PAST) TIME FOR A
DANGEROUS PERSON EXCEPTION TO THE CLERGY-
PENITENT PRIVILEGE?

R. MICHAEL CASSIDY*

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*Nothing is concealed that will not be revealed, and nothing hidden that will not become known.*¹

INTRODUCTION

The growing crisis of pedophilia in the Roman Catholic Church² has cast renewed focus on the clergy-penitent privilege in America.³ As many state legislatures scramble to consider proposed amendments to their child abuse reporting statutes that would designate clergy as mandated reporters,⁴ the scandal has prompted widespread debate about whether information learned from otherwise privileged communications should be excluded from the statutory obligation to report.⁵ This debate has highlighted the tension between respecting clergy confidences and protecting the public

1. *Matthew* 10:26 (New American Bible).

2. Elizabeth Mehren, *Scandal Shaking Catholicism to Core*, L.A. TIMES, Mar. 13, 2002, at A12. The present crisis began following revelations that Reverend John Geoghan, a Roman Catholic priest, allegedly abused more than one hundred children and was transferred from one parish to another even after high-ranking church officials knew or had reason to know about his pedophilia. *Id.*; see also Angie Cannon & Jeffrey L. Shelter, *Catholics in Crisis*, U.S. NEWS & WORLD REPORT, Apr. 1, 2002, at 51 (describing the Church's response to sex-abuse scandals).

3. The privilege for confidential communications with religious clerics has been referred to variously throughout its history as the "priest-penitent" privilege, the "clergy-penitent" privilege, the "minister-penitent" privilege, the "cleric-congregant" privilege, and the "clergy-communicant" privilege. With no intent to limit its reach or application to any particular religion, class of clerics, or type of confidential spiritual communication, the privilege will be referred to throughout this Article as the "clergy-penitent" privilege.

4. See Julia C. Martinez & Howard Pankratz, *Legislators in no Hurry to Amend Reporting Laws*, DENVER POST, Mar. 24, 2002, at A24; Stephanie McRummen, *Bill Would Mandate Clergy Abuse Reports*, NEWSDAY, Mar. 26, 2002, at A42.

5. The Massachusetts legislature recently amended its child abuse reporting statute to add clergy to the list of professionals, including doctors, teachers, and social workers, who are required to report suspected instances of child abuse to the state Department of Social Services. MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2002). The new Massachusetts statute excludes privileged conversations from the clergy reporting obligation, providing that a clergy member "need not report information solely gained in a confession or similarly confidential communication in other religious faiths." *Id.* This exception for privileged communications was widely debated in the Massachusetts legislature. See Stephanie Ebbert, *Measure Would Require Clergy to Report Abuses*, BOSTON GLOBE, Jan. 24, 2002, at B6. Several states other than Massachusetts already include clergy in their statutes requiring certain professionals with responsibility or oversight of children to report suspected child abuse to state authorities, with only some of these states exempting privileged communications. See *infra* notes 213-28 and accompanying text.

welfare. In this Article, I suggest that it is time to revisit the clergy-penitent privilege, and to question seriously whether its presently broad application truly serves the public interest.

The clergy-penitent privilege is deeply engrained in American culture.⁶ Although the privilege has its origins in the seal of the confessional of the Roman Catholic Church,⁷ statutory forms of the privilege in most states now protect any confidential communications with a clergy member for the purposes of "penitential confession or spiritual advice" from compelled disclosure.⁸ In recent years, another area of growth in the doctrine has been in the expanding definition of who constitutes a cleric for purposes of the privilege.⁹ Many nonhierarchical religions rely on peer counseling rather than counseling by ordained ministers.¹⁰ Other churches are experiencing a scarcity of ordained clergy, and increasingly are relying on lay ministers to perform certain spiritual functions previously performed only by the officially ordained.¹¹ Just as courts and legislatures over the past several decades have expanded the definition of what constitutes a protected communication, many states have taken a similarly broad view of who constitutes a clergy member for purposes of their clergy-penitent privilege statutes.¹²

As a consequence of this interpretive growth, more types of religious officers and functionaries are now recognized as ministers, and more types of communications, such as marital counseling

6. All fifty states and the District of Columbia recognize by statute some form of the clergy-penitent privilege. MCCORMICK ON EVIDENCE § 76.2, at 109 (John William Strong ed., 4th ed. 1992).

7. WILLIAM HAROLD TIEMANN & JOHN C. BUSH, *THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW* 33-35 (1983).

8. See Jane E. Mayes, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern*, 62 IND. L.J. 397, 400 (1987). See generally PROPOSED FED. R. EVID. 506, 56 F.R.D. 183, 247 (1973).

9. See Seward Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 64-65 (1963).

10. See TIEMANN & BUSH, *supra* note 7, at 194-97; Reese, *supra* note 9, at 64-65. For example, in the Quaker tradition, the Society of Friends believes that the spirit of the scriptures requires no specially ordained ministers. MACMILLAN, *WORLD RELIGIONS* 441 (1998).

11. See Gustav Niebuhr, *Demand is Rising for Members of the Clergy as Fewer Answer the Calling*, N.Y. TIMES, June 9, 2001, at A10; Larry Witham, *Searching for Shepherds: American Churches Struggle to Find Qualified Leaders to Answer the Call*, WASH. TIMES, July 2, 2001, at A1.

12. See *infra* notes 142-59 and accompanying text.

sessions, are recognized as falling within the ambit of spiritual counseling or advice.¹³ This expanding application of the privilege during the twentieth century has been motivated in part by a growing respect for the diversity of religious affiliation and spiritual belief in our society, if not an explicit concern for potential collision with the Free Exercise and Establishment Clauses of the First Amendment.¹⁴

The doctrinal creep of the clergy-penitent privilege described in this Article has come with serious collateral costs.¹⁵ Whenever more types of conversations with more types of religious or quasi-religious functionaries are protected from disclosure, society pays a price in terms of relevant and highly probative evidence being excluded from the fact-finding process.¹⁶ Because ministers are often intimately involved in the lives of many citizens, they frequently have relevant and highly probative evidence to offer a judicial tribunal on a wide variety of subjects including, among others, paternity, domestic violence, child abuse, child custody, and will contests.

In this Article, I scrutinize one highly problematic yet previously unexamined issue raised by the clergy-penitent privilege: Whether the doctrine should protect a parishioner's disclosure to a clergy member that the parishioner intends to commit a future violent act against another individual. I argue that a member of the clergy who learns that a parishioner intends to commit a crime involving death or serious bodily injury should be required to disclose this conversation. The pivotal question is: How should our society enforce this duty of disclosure? Should it be through tort law, through canons of ethics, or through the rules of evidence? After analyzing each of these options, I conclude that the rules of evidence offer the best possible vehicle for reform, and I propose that the law should recognize a limited exception to the clergy-penitent privilege for certain conversations pertaining to future dangerous crimes.

In Part I of this Article, I review the purposes of the clergy-penitent privilege and trace its historical roots. In Parts II and III,

13. See Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 114-20 (1983).

14. See *id.*; see also *Scott v. Hammock*, 133 F.R.D. 610, 616-17 (D. Utah 1990).

15. See Yellin, *supra* note 13.

16. See *id.*

I analyze the evolution and expansion of the privilege in state and federal courts in the United States since its adoption in the early nineteenth century. In Part IV, I look at the clergy-penitent privilege through the lens of child abuse reporting statutes, and discuss the implications of these laws for a clergy member's duty to report future dangerous behavior. In Part V, I hypothesize a scenario in which a parishioner discloses to his clergy member an intention to murder his spouse, and I use this fact pattern as a vehicle to compare the ethical and legal responsibilities of a clergy member with those of an attorney and a psychotherapist facing a similar dilemma. In Part VI, I explore the possible avenues for closing the gap that presently exists between the responsibilities of each of these professionals with respect to dangerous clients, and ultimately recommend a model clergy-penitent privilege statute that contains an exception for conversations involving threats of death or serious bodily harm to a reasonably ascertainable individual. Finally, in Part VII of this Article, I conclude that such a carefully crafted dangerous person exception to the clergy-penitent privilege would not violate either the Free Exercise or the Establishment Clauses of the First Amendment.

I. PURPOSE AND HISTORY OF THE CLERGY-PENITENT PRIVILEGE

A. *Rationale for the Privilege*

Testimonial privileges contravene the general principle that "the public ... has a right to every man's evidence."¹⁷ Because privilege rules tend to hinder litigation and make the accurate ascertainment of the truth more difficult, they have been strictly construed.¹⁸ The most generally accepted rationale for the adoption of privileges, and the one recognized by the United States Supreme Court in several opinions, is the utilitarian justification.¹⁹ Privileges are recognized

17. 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2192 (McNaughton rev. ed. 1961); see *United States v. Bryan*, 339 U.S. 323, 331 (1950).

18. See David W. Louisell & Byron M. Crippin, Jr., *Evidentiary Privileges*, 40 MINN. L. REV. 413, 413-14 (1956).

19. "Our cases make clear that an asserted privilege must also 'serv[e] public ends.'" *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

only when necessary to preserve relationships that society values above the truth-finding functions of its courts.²⁰ "Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice."²¹ Even Wigmore, a general critic of privileges, made a strong argument for recognizing the clergy-penitent privilege on utilitarian or instrumental grounds.²²

Under the utilitarian view, the privilege protecting confidential communications with clergy, like the attorney-client and psychotherapist-patient privileges, is grounded in a policy of preventing disclosures that would tend to inhibit the development of a confidential relationship that society has decided is socially desirable.²³ Relationships with clergy are thought to be socially desirable because they may lead to repentance and spiritual salvation, a nonsecular goal, and because they may lead to reform of errant conduct, a secular goal.²⁴ Apart from the individual's interest in spiritual health and redemption, society has an interest in fostering a morally-grounded and well-behaved citizenry. Denying the clergy-penitent privilege may not only chill confidential communications with clergy,²⁵ but it may also hamper activities of

20. *Trammel v. United States*, 445 U.S. 40, 50 (1979) (citing *Elkins v. United States*, 364 U.S. 206, 234 (1960)).

21. *MCCORMICK*, *supra* note 6, § 72, at 101.

22. Wigmore posited four threshold conditions for the application of an evidentiary privilege: (1) the communication must have originated in confidence; (2) the confidence must be essential to the relationship in question; (3) the relationship must be one worth fostering; and (4) the injury to society from disclosure of the communication must be greater than the benefit to society and the truth finding function achieved by disclosure. WIGMORE, *supra* note 17, § 2396, at 877. Believing that all four of these prerequisites to the recognition of a privilege had been met, Wigmore concluded that "[o]n the whole, then, [the clergy-penitent] privilege has adequate grounds for recognition." *Id.*

23. Yellin, *supra* note 13, at 109.

24. See Fred L. Kuhlmann, *Communications to Clergymen—When Are They Privileged?*, 2 VAL. U. L. REV. 265, 286-87 (1968); see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001) (stating that a "quintessentially religious" organization can also be characterized as playing a role in character development and the teaching of morals).

25. See Kuhlmann, *supra* note 24, at 287. Interestingly, Wigmore's utilitarian justification for the clergy-penitent privilege has its weakest force for faiths in which confession is required by rules of the church, notwithstanding that these religious denominations are commonly conceived to have formed the historical basis for the privilege in early English law. See *infra* notes 43-46 and accompanying text. Where confession is required by religious precepts,

religious groups that perform important social functions, such as, among others, education and works of charity.²⁶ For these reasons, respect for clergy confidences can be seen as instrumental in safeguarding the important role that religion plays in a civil society.²⁷

Empirical studies²⁸ and scholarly comment²⁹ suggest that there may be reasons to doubt the utilitarian justification for the professional privileges, which claims that individuals will be inhibited from confiding in attorneys, psychotherapists, or clergy members unless they know that such private conversations are shielded from disclosure in court. But the clergy-penitent privilege, like the other professional privileges, is motivated by more than instrumental concerns—it is also motivated by concerns for privacy.³⁰ The privilege “is based in part upon the idea that the human being does sometimes have need of a place of penitence and confession and spiritual discipline. When any person enters that secret chamber, this [privilege] closes the door upon him, and civil

confidential communications would continue among the devout even if courts did not recognize the privilege. For example, faithful Catholics who practice the sacrament could not stop seeking confession for fear that their admissions would be used against them, because confession is required by church doctrine. Perhaps then the strongest utilitarian argument for the privilege comes from examining the effect not on the parishioner, but on the clergy. To the priests, compelling disclosure “would be an order to violate what by them is numbered amongst the most sacred of religious duties.” 4 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 588 (Rothman & Co. 1995) (1827).

26. Yellin, *supra* note 13, at 113.

27. “Civil society” is the voluntary sector of society, which includes churches, civic associations, charitable groups, religious hospitals, and private educational institutions.... This sector is responsible for forming people’s character and identity and for inculcating and instantiating values that are essential to a democratic government.” Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 293, 309 (1993). Maddigan and others have argued persuasively that religious groups are in a unique position to teach our nation’s citizens important values, such as “the infinite worth of the individual, the obligation to tell the truth, the importance of mutual respect, and the value of mutual care,” all crucial to the well being of a civil society. *Id.* at 316; see also John A. Coleman S.J., *Public Religion and Religion in Public*, 36 WAKE FOREST L. REV. 279, 281 (2001).

28. See, e.g., Robert Weisberg & Michael Wald, *Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform*, 18 FAM. L.Q. 143, 183-84 (1984).

29. Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 232 (1992).

30. See David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Courts Today*, 31 TUL. L. REV. 101, 110-14 (1956).

authority turns away its ear."³¹ The privacy rationale for privileges suggests that there is intrinsic value to confidences apart from their instrumental ends, and that it would be fundamentally indecent for the law to intrude upon certain intimate relationships.³²

A third justification for the clergy-penitent privilege, unrelated to the concern for fostering confidences or protecting privacy, is a practical one.³³ Society pays a cost collateral to the inhibition of the clergy-penitent relationship by not recognizing the privilege. If a priest or minister resists a call to testify about a confidential conversation, society cannot obtain such testimony without compulsion.³⁴ Such compulsion of a minister, either in the form of a fine or imprisonment, would engender public backlash and perhaps undermine public faith in government.³⁵ The community feels uncomfortable when ministers are forced to testify despite deeply held religious objections; moreover, such compulsion may be ineffective, leading to public sentiment that the secular state has punished a cleric simply for adhering to religious convictions.³⁶ Legislative enactments of the clergy-penitent privilege may thus be seen as nothing more than a pragmatic recognition that the costs to society in enforcing a duty to disclose are too high to warrant the effort.³⁷ Even Jeremy Bentham, a sharp opponent of privileges,³⁸ supported the clergy-penitent privilege, not on instrumental or privacy grounds, but rather for reasons of religious tolerance.³⁹ "But, with any idea of toleration, a coercion of this nature [forced clergy testimony] is altogether inconsistent and incompatible."⁴⁰

31. *Reutkemeier v. Nolte*, 161 N.W. 290, 293 (Iowa 1917).

32. See RICHARD M. GULA, S.S., *ETHICS IN PASTORAL MINISTRY* 120-21 (1996) (discussing ethical foundations for clergy duty of confidentiality); cf. Charles L. Black, Jr., *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45 (stating that the diminishment of human privacy is one of the great evils of our time).

33. Yellin, *supra* note 13, at 110-11.

34. See *id.* at 111.

35. See *id.* at 111-12.

36. See *id.*

37. See *id.* at 112.

38. Professor Wigmore referred to Bentham as the "greatest opponent of privileges." WIGMORE, *supra* note 17, § 2396, at 877.

39. BENTHAM, *supra* note 25, at 588.

40. *Id.* Although Bentham was himself a Protestant, he argued on religious liberty grounds that government should have no part in undermining auricular confession, which is so central a part of the discipline of the Roman Catholic Church. See *id.* at 588-91; TIEMANN

B. History of the Privilege

The clergy-penitent privilege has its origins in the sacramental confession of the early Roman Catholic Church.⁴¹ Under Canon law, the seal of the confessional is "inviolable," and a priest may be excommunicated for disclosing a matter revealed to him during a sacramental confession.⁴² The evidentiary privilege was first recognized in England after the Norman Conquest circa 1066,⁴³ in large part due to deference to the official status of the Roman Catholic Church, and to the fact that the King's courts at the time were manned by bishops.⁴⁴ The privilege ceased to exist sometime after the break from Rome during the Reformation in the sixteenth

& BUSH, *supra* note 7, at 125.

41. Biblical references to confession are to public rather than to private confession; that is, confession to other members of the church or to the church as a whole. *Matthew* 3:6 contains a reference to people coming to the river Jordan to be baptized by John the Baptist and acknowledging their sins. *James* 5:16 exhorts the faithful to "confess your sins to one another, and pray for one another so that you may be healed." The first reference to private confessions appears to come from Saint Augustine in 431 A.D. in *Sermon* 82. Augustine emphasizes that "[God] endeavors to heal secret sins in secret, without exposing them." BERTRAND KURTSCHIED, *A HISTORY OF THE SEAL OF CONFESSION* 49-50 (Rev. F. A. Marks trans., 1927). The first papal recognition of a private confession came from Pope Leo I, Bishop of Rome from 440 to 461, who outlawed public confessions and instead mandated that they be made in private. TIEMANN & BUSH, *supra* note 7, at 34-35; see also KURTSCHIED, *supra*, at 51-55. At the Council of Trent in 1551, the Catholic Church officially recognized that oral confession and absolution by a priest were necessary to obtain forgiveness for sins. 1 HENRY CHARLES LEA, *A HISTORY OF AURICULAR CONFESSION AND INDULGENCES IN THE LATIN CHURCH* 251 (1968).

42. The seal of the confessional was codified in 1917 as *Canon* 889. 1917 CODE c.889, § 1. "The sacramental seal is inviolable; therefore a confessor will diligently take care that neither by word nor by sign nor in any other way or for any reason will he betray in the slightest anyone's sin." *Id.* The 1983 revisions to Canon law contain an almost identical reference to the inviolable seal of the confessional, 1983 CODE c.983, § 1, and makes excommunication automatic for any priest who violates the seal. See *id.* c.1388, § 1 ("A confessor who directly violates the sacramental seal, incurs a[n automatic] *latae sententiae* excommunication ... he who does so only indirectly is to be punished according to the gravity of the offence."). Under the nomenclature of the Catholic Church, it is important to note that the "confessor" is the priest, and the penitent is the parishioner receiving the sacrament. BLACK'S LAW DICTIONARY 269 (5th ed. 1979).

43. See EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 629 (1797). Coke looked to the *Articuli Cleri*, a statute of parliament enacted in 1315, as the first statutory proof that the privilege was recognized in pre-Reformation England. *Id.*

44. TIEMANN & BUSH, *supra* note 7, at 41-42.

century and the rise of the Anglican Church.⁴⁵ Confession in the Anglican Church, unlike the Roman Catholic Church, was voluntary and not compulsory.⁴⁶ As the Anglican Church began to shed certain practices of the Roman Catholic tradition, English law ceased to recognize the clergy-penitent privilege.⁴⁷ By the mid-seventeenth century, the clergy-penitent privilege had been eliminated in England altogether,⁴⁸ and presently it does not exist under English law.⁴⁹

One leading authority suggests that there was no common law of clergy-penitent privilege in early America.⁵⁰ State cases in this country at the turn of the nineteenth century denied the privilege,

45. *Id.* at 52. Scholars have debated whether and for how long the privilege continued to exist in England after the Reformation and the break from Rome in 1531. Tiemann argues that the common law of England continued to recognize the privilege for some years after the Reformation, whether the confession was made to a Catholic priest or Anglican minister. *Id.* Wigmore also suggests that the privilege endured in England prior to the Restoration. See WIGMORE, *supra* note 17, § 2394, at 869. He dates its abolition to the return of the monarchy of Charles II in 1660. *Id.* For a history of the privilege during this period and a summary of this debate, see Yellin, *supra* note 13, at 101-04.

46. TIEMANN & BUSH, *supra* note 7, at 50. By contrast, in the Roman Catholic tradition, auricular confession is mandatory, and is one of the seven sacraments of the church. Even post-Vatican II, with the renaming of the sacrament "Reconciliation," the Holy See has reaffirmed the importance and mandatory nature of this sacramental right. See Pope Paul Speaks on Sacrament of Penance in Liturgical Reform, L'OSSERVATORE ROMANO (Eng. ed.), Apr. 11, 1974, at 1, 12. See generally Robert John Araujo, S.J., *International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the "Priest-Penitent" Privilege Under International Law*, 15 AM. U. INT'L L. REV. 639 (2000). There is some dispute as to whether an Episcopal Minister has a duty to keep confidential a pastoral counseling session. See *People v. Edwards*, 203 Cal. App. 3d 1358, 1363-64 (Ct. App. 1988). Although "the Episcopal Church recognizes the inviolability of an act of confession" seeking absolution from God, the rules of the church are not clear on a pastor's duty to keep confidences not involving confession and request for absolution. See *id.* The *Book of Common Prayer* adopted by the Episcopal Church in America provides that "[t]he content of a confession is not normally a matter of subsequent discussion." BOOK OF COMMON PRAYER 446 (1979) (emphasis added).

47. See Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 736 (1987).

48. Blackstone's *Commentaries* written in 1765 mention no such privilege. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 370-71 (U. of Chi. Press 1979) (1768); see also *Regina v. Hay*, 175 Eng. Rep. 933 (1860) (upholding contempt for Catholic priest who refused to reveal name of parishioner who had delivered stolen goods to church); *Cook v. Carroll*, 1945 Ir. R. 515, 517 (recounting English common law).

49. 17 LORD HALISHAM OF ST. MARYLEBONE, HALSBURY'S LAW OF ENGLAND § 237 n.4 (4th ed. 1973).

50. WIGMORE, *supra* note 17, § 2394, at 870.

citing English common law.⁵¹ "During the period [in America] when most of the common law privileges were taking shape, no clear-cut privilege for communications between priest and penitent emerged. The English political climate [of hostility toward Rome] may well furnish the explanation."⁵²

The earliest judicial recognition of the clergy-penitent privilege in the United States has been traced to the 1813 case of *People v. Phillips*.⁵³ In this decision by the New York Court of General Sessions, the court held that provisions of the New York State Constitution protecting free exercise of religion prevented the court in a criminal case from forcing a Roman Catholic priest to testify as to what a penitent told him during confession regarding where and how he had received stolen goods.⁵⁴ The court ruled that such compulsion would infringe upon the priest's right to freely practice his religion. "Secrecy is of the essence of penance.... To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman [C]atholic religion would be thus annihilated."⁵⁵

Four years later, the *Phillips* decision was limited in scope by the New York case of *People v. Smith*, wherein the court ruled that a criminal defendant's confession of murder to a protestant minister was not similarly privileged.⁵⁶ The court made the distinction between auricular confession made to a priest according to canons of the Church, as in *Phillips*, and those confessions made to a protestant minister, which were for spiritual advice but not expressly required by the religion.⁵⁷ In response to this decision, the New York legislature enacted the first clergy-penitent privilege statute in

51. See, e.g., *Commonwealth v. Drake*, 15 Mass. (14 Tyng) 161 (1818) (affirming denial of motion for new trial of defendant convicted, in part, based on admission of penitential confessions made to clergyman).

52. PROPOSED FED. R. EVID. 506 advisory committee's note, 56 F.R.D. 183, 247 (1972) (citation omitted).

53. This case was not officially reported, but the record and opinion were later reprinted in 1 W. L.J. 109 (1843).

54. In 1813 when *Phillips* was decided, the court quoted and distinguished two English cases denying the privilege. See *Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 202 (1955).

55. *Id.* at 207.

56. *Id.* at 209, 211 (quoting *People v. Smith*, 2 City Hall Recorder 77 (N.Y. 1817)).

57. *Id.*

America in 1828, reversing the effects of *Smith* and extending the privilege to priests, rabbis, and ministers of other religious denominations.⁵⁸ The New York statute served as a model for the subsequent adoption of a clergy-penitent privilege in many other states.⁵⁹

II. STATE STATUTES TODAY

All fifty states and the District of Columbia have now enacted privilege statutes that protect certain communications between parishioners and clergy members.⁶⁰ Although there is significant uniformity in the core value being protected, these statutes differ widely in their definitions and their reach, which makes generalizations about the state of the doctrine difficult.⁶¹ The general prerequisites to the application of the privilege in almost all states require that there be a confidential communication between a person and a minister, in the minister's professional capacity, for purpose of confession, spiritual advice, or counseling.⁶² Specific definitions of terms within this construction vary widely from state to state. They differ in their definitions of who constitutes a minister, who holds the privilege, and what types of communications are covered.⁶³ In most states, the privilege survives the death of the parishioner, and may be asserted by his representative.⁶⁴ Notably, only a few states require the parishioner to be a member of the same religious denomination as the clergy member to whom he confides.⁶⁵

58. Yellin, *supra* note 13, at 108.

59. Reese, *supra* note 9, at 57.

60. MCCORMICK, *supra* note 6, § 76.2, at 109.

61. See Mitchell, *supra* note 47, at 742.

62. Mayes, *supra* note 8, at 400-01.

63. Mitchell, *supra* note 47, at 740-42.

64. See ROBERT E. DOYLE, JR. & HUGH O. HAYES, *MANUAL FOR EVIDENCE IN FLORIDA* § 4.49 (5th ed. 1999); see, e.g., ALA. R. EVID. 505; ALASKA R. EVID. 506; ARK. R. EVID. 505; DEL. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West 1999); HAW. R. EVID. 506; KY. R. EVID. 505; LA. CODE EVID. ANN. art. 511 (West 1995); ME. R. EVID. 505; MISS. R. EVID. 505; NEB. REV. STAT. § 27-506 (1995); N.M. R. EVID. 11-506; N.D. R. EVID. 505; S.D. CODIFIED LAWS §§ 19-13-16, 19-13-17, 19-13-18 (Michie 2002); TEX. R. EVID. 505; VT. R. EVID. 505; WIS. STAT. ANN. § 905.06 (West 2000).

65. Arkansas, Idaho, and Iowa appear to require that the minister and parishioner be members of the same religious sect in order to invoke the privilege. See, e.g., *Alford v.*

Attempts to unify state law in this area have been relatively unsuccessful. The American Law Institute's *Model Code of Evidence* adopted in 1942 and the National Commissioners of Uniform State Laws' *Uniform Rules of Evidence* adopted in 1953 both made a provision for a clergy-penitent privilege, although they were extremely narrow in scope.⁶⁶ Common features of these model laws included a narrow definition of priest (only those whose religious discipline recognized secret penitential communications) and a narrow definition of penitential communication (confession of culpable conduct). Both model laws defined the holder of the privilege as the penitent.⁶⁷ In 1974, the National Commissioners of Uniform State Laws amended their Uniform Rule of Evidence 29 to Model Proposed Federal Rule of Evidence 506, which is discussed below, eschewing any "penitential communication" language, and protecting simply "confidential communication[s] by [a] person to a clergyman in his professional character as spiritual advisor."⁶⁸ Since 1974, more than thirty states have enacted or amended their statutes to more closely track this latter version of the uniform state law.⁶⁹

A. The Discipline Enjoined Requirement

One of the early prerequisites of the privilege, found in both the *Model Code* and the 1965 version of the *Uniform State Laws*, was that the confession have been made to a clergy member "within the sanctity and under the necessity of their own disciplinary requirements."⁷⁰ This phrase suggests that the evidentiary privilege

Johnson, 146 S.W. 516, 517-18 (Ark. 1912); *Angleton v. Angleton*, 370 P.2d 788, 797 (Idaho 1962); *Allen v. Lindeman*, 148 N.W.2d 610, 614-15 (Iowa 1967).

66. MODEL CODE EVID. 219 (1942); UNIF. EVID. ACTS 29, 9A U.L.A. 617 (1965); Mitchell, *supra* note 47, at 738-39.

67. In 1974, Rule 505 of the *Uniform Rules of Evidence* was modified to broaden its application to a larger class of clerics and a larger class of communications, almost identical to Proposed Rule of Evidence 506, discussed *infra* note 171 and accompanying text.

68. TIEMMANN & BUSH, *supra* note 7, at 153.

69. UNIF. R. EVID., 13A U.L.A. 1 (2000) (Table of Jurisdictions Wherein Act Has Been Adopted). The 2000 version of the uniform clergy-penitent privilege statute substantially tracks the 1974 version. See UNIF. R. EVID. 505, 13A U.L.A. 371 (2000).

70. See UNIF. EVID. ACTS 29, 9A U.L.A. 617, 618 (1965); MODEL CODE EVID. 219 (1942); see, e.g., ARIZ. REV. STAT. ANN. § 12-2233 (West 1994); MINN. STAT. ANN. § 595.02 (West 2000).

protects communications that would be held confidential under the governing religious code. Yet the term is far from unambiguous. Does the discipline enjoined requirement refer to the communication (that is, the religious discipline must require the confidential communication) or to the minister's obligation of secrecy (that is, church discipline must require the minister to keep the conversation confidential)? Only Roman Catholics, Eastern Orthodox, and some Lutheran sects recognize the formal sacrament of confession.⁷¹ Most Protestant denominations and the Jewish tradition do not practice confession, nor do they have religious tenets that mandate professional secrecy.⁷² "The vast majority of ministers, due to personal conscience and the realization that their effectiveness as clergy members would be destroyed, operate under a self imposed duty of confidentiality."⁷³ A construction of discipline enjoined that applied the privilege only to mandated auricular confessions would limit its application to members of very few religious denominations.⁷⁴

Although sixteen states and the District of Columbia still have some remnant of the discipline enjoined requirement in their clergy-penitent privilege statutes,⁷⁵ the trend among the states is to

71. Yellin, *supra* note 13, at 128-29. Lutheran churches require confession, but not enumeration of each specific sin. J.L. NEVE, D.D., *THE AUGSBERG CONFESSION: A BRIEF REVIEW OF ITS HISTORY AND AN INTERPRETATION OF ITS DOCTRINAL ARTICLES* 11 (1914). In the Lutheran tradition, the seal of the confessional is also inviolate. See JOHN T. MCNEILL, *A HISTORY OF THE CURE OF SOULS* 188 (1951).

72. Yellin, *supra* note 13, at 132. The American Baptist Convention and the Lutheran Church have included requirements of confidentiality in their ministerial codes of ethics. *Id.* at 131.

73. *Id.* at 132.

74. *Sherman v. State* is an example of a strict construction of this requirement. 279 S.W. 353 (Ark. 1926). The court held that a letter from a parishioner to a Protestant minister asking for prayer, and implying his guilt of rape, was not privileged in a subsequent criminal prosecution, because the church member was not under a religious duty to confess his sins according to the doctrine of the church. *Id.*

75. See ARIZ. REV. STAT. ANN. § 12-2233 (West 1994); CAL. EVID. CODE § 1033 (West 1995); COLO. REV. STAT. § 13-90-107 (2001); D.C. CODE ANN. § 14-309 (2001); FLA. STAT. ANN. § 90.505 (West 1999); IDAHO CODE § 9-203 (Michie 1998); 735 ILL. COMP. STAT. ANN. 5/8-803 (West 1993); MICH. COMP. LAWS ANN. § 600.2156 (West 2000); MONT. CODE ANN. § 26-1-804 (2001); OR. REV. STAT. § 40.260 (2001); R.I. GEN. LAWS § 9-17-23 (1997); TENN. CODE ANN. § 24-1-206 (2000); UTAH CODE ANN. § 78-24-8 (1996); VA. CODE ANN. § 8.01-400 (Michie 2002); WASH. REV. CODE ANN. § 5.60.060 (West Supp. 2002); W. VA. CODE ANN. § 57-3-9 (Michie Supp. 2002); WYO. STAT. ANN. § 1-12-101 (Michie 2001). The recent trend has been for state legislatures to amend their priest-penitent privilege statutes to eliminate any discipline enjoined language. See, e.g., NEB. REV. STAT. § 27-506 (1995). Indiana, Massachusetts, and

remove this requirement from their privilege statutes altogether, making them consistent with the uniform state laws.⁷⁶ Although it has become part of the lexicon in this area, there is much confusion surrounding the meaning of the term,⁷⁷ and what, if anything, it adds to the other requirements of the clergy-penitent privilege.⁷⁸ Many states, such as Minnesota, have construed this phrase broadly to mean simply that the parishioner was confiding to the minister in his professional capacity; these states do not require either that the church mandate the communication (e.g., confession), or that church rules mandate that the minister keep the confidence secret.⁷⁹ States that equate "discipline enjoined" with "professional capacity"

Minnesota have retained their protections for confessions made in the course of discipline enjoined by the church, but have added protection for communications made for the purposes of religious or spiritual advice, without modifying the latter phrase by the traditional discipline enjoined language. IND. CODE ANN. § 34-46-3-1 (Michie 1998); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 2002); MINN. STAT. ANN. § 595.02 (West 2000).

76. See Yellin, *supra* note 13, at 126 (noting that in 1983, twenty-one states had statutes utilizing discipline enjoined language).

77. So entrenched is the "discipline enjoined" requirement in the history of the privilege that some courts cite it as a prerequisite to the application of the privilege, notwithstanding the fact that the statute that they are construing contains no such language. See, e.g., *Commonwealth v. Stewart*, 690 A.2d 195 (Pa. 1997) (finding the "discipline enjoined" requirement satisfied when a statement is made in confidence for the purpose of spiritual guidance or penance).

78. Mitchell, *supra* note 47, at 754-55.

79. Kuhlmann, *supra* note 24, at 268; Yellin, *supra* note 13, at 122. The frequently cited case of *In re Swenson* began the trend of liberalization of the "discipline enjoined" requirement. 237 N.W. 589 (Minn. 1931). The Minnesota Supreme Court held that a Lutheran minister could not be compelled in a divorce proceeding to testify as to what the defendant's husband said to him about extramarital affairs, even though such confidential communications occurred not in confession but in a private counseling setting. *Id.* at 590-91. Although at the time the applicable Minnesota statute referred to confession, the court interpreted this term broadly to include any confidential spiritual advice. *Id.* "Certainly the Legislature never intended the absurdity of having the protection extend to the clergy of but one church." *Id.* at 590. Turning then to the definition of "discipline enjoined," the court ruled that this term did not limit application of the privilege to religions that require the minister to keep secrets. *Id.* at 591. The court interpreted the "discipline enjoined" requirement very broadly, essentially reading it right out of the rule. "[D]iscipline enjoined" includes the 'practice' of all clergymen ... to be as willing to give spiritual aid, advice, or comfort as others are to receive it, and to be keenly concerned in reformatory methods of correction leading towards spiritual confidence." *Id.* "Under such 'discipline' enjoined by such practice all faithful clergymen render such help to the spiritually sick and cheerfully offer consolation to suppliants who come in response to the call of conscience." *Id.* The court essentially interpreted "discipline enjoined" to mean "in the line of duty," and then took notice of the fact that it was the duty of all clergy to hear confidences and give spiritual advice. *Id.*

render a confidential communication between parishioner and minister privileged so long as the parishioner was seeing the minister for religious reasons.⁸⁰ This approach allows courts to avoid the sometimes unwelcome, if not difficult, task of parsing church doctrine to determine whether the type of communication at issue was required to be made and to be kept confidential.

Other "discipline-enjoined" states have construed their statutes to require that *at least one* of the following conditions be present in order for the minister to be acting in the course of discipline enjoined by the church: (1) the doctrine of the church requires the minister to hear confidences and give spiritual advice; *or* (2) the doctrine of the church requires the minister to keep confidences secret.⁸¹ In these states, some doctrinal obligation on the part of the clergyman regarding the confidential communication is necessary before the privilege attaches. For example, an appellate court in Illinois has ruled that where a clergyman seeks to testify despite the

80. See, e.g., *State v. MacKinnon*, 957 P.2d 23, 28 (Mont. 1998) (holding that a conversation in which group leaders of a church facilitated discussion between the defendant and his estranged wife about child visitation was not privileged under Montana clergy-penitent privilege statute in later sexual assault prosecution). Although the court interpreted the term "confession" in the state statute broadly to include confidential conversations for the purpose of spiritual advice, "nothing in the record suggests that they were acting as ministers or counselors at the time they facilitated the [conversation]". *Id.*

81. See *State v. Martin*, 975 P.2d 1020, 1025-28 (Wash. 1999) (affirming reversal of an order of contempt against an ordained Evangelical minister for refusing to answer deposition questions about confidential communications with father suspected of shaking to death his three-month-old child). The Washington Supreme Court interpreted the phrase "confession made ... in the course of discipline enjoined by the church" in the state privilege statute to refer to the doctrinal obligations of a *clergy member* in hearing confidence, not the doctrinal obligations of a *parishioner* in making the confidence. *Id.* at 1025 (quoting WASH. REV. CODE § 5.60.060 (1995)). The "discipline enjoined" language does not mandate that the church at issue require the parishioner to make a confession or disclose a wrongdoing; the "discipline enjoined" language of the Washington statute requires only that a church doctrine require the minister "to receive the confidential communication and to provide spiritual counsel." *Id.* (quoting *State v. Martin*, 91 Wash. App. 621, 629 (Ct. App. 1998)); see also *People v. Johnson*, 75 Cal. Rptr. 605, 607 (Ct. App. 1969) (holding there was no privilege where an armed robber fled into church and made statements to minister dressed in civilian clothes, absent showing that minister "was authorized or accustomed to hear such communications, or that he had a duty to keep any such communications secret under the discipline, practice or tenets of his church") (emphasis added); *Scott v. Hammock*, 870 P.2d 947, 955 (Utah 1994) (holding that a nonpenitential communication between father and bishop was privileged because it was intended to be confidential and was made for the purpose of seeking spiritual counseling, guidance, or advice from a cleric acting in his professional role and pursuant to the discipline of his church).

parishioner's objection, the court will presume that the disclosure is not prohibited by church doctrine, absent evidence to the contrary.⁸² Some churches have reacted to the discipline enjoined doctrine by specifically recognizing in their charters that ministers are required to keep secret confidential spiritual counseling sessions.⁸³

The most traditional view suggests that *both* of the foregoing elements must be met in order for the priest to be acting in the course of discipline enjoined by the church; that is, the minister must be required under church doctrine to hear confidences, *and* must be required under church rules to keep them secret.⁸⁴ This is the most conservative construction of the term, and it has fallen out of favor. As noted above, legislatures are either deleting the "discipline enjoined" requirement from their statutes altogether,⁸⁵ or courts faced with such language are applying the requirement with less rigor.⁸⁶

82. *People v. Diercks*, 411 N.E.2d 97, 101 (Ill. 1980).

83. For example, in the Presbyterian and Baptist faiths, which do not recognize formal confessions, ministers are nonetheless required to keep spiritual counseling sessions confidential. See TIEMANN & BUSH, *supra* note 7, at 70-71, 80.

84. See UTAH CODE ANN. § 78-24-8(3) (1996), *superseded by* UTAH R. EVID. 503; *Ball v. State*, 419 N.E.2d 137, 139-40 (Ind. 1981) (holding that Baptist minister was allowed to testify about parishioner's admission to murders, where constitution of church did not require pastoral confession, or confidential pastor-parishioner discussion with respect to crime); see also *Sherman v. State*, 279 S.W. 353, 354 (Ark. 1926) (holding that a letter written to a preacher by the defendant, which might have indicated an indirect confession, was admissible into evidence because confessions were not enjoined by the rules of the preacher's denomination).

85. See *People v. Carmona*, 627 N.E.2d 959, 962 (N.Y. 1993) (discussing history of New York privilege and legislature's abandonment of "discipline enjoined" language, expanding the privilege to protect all confidential communications with religious ministers for purposes of obtaining spiritual guidance or advice).

86. Yellin, *supra* note 13, at 134. For a general construction of the discipline enjoined rule, see TIEMANN & BUSH, *supra* note 7, at 109-10.

B. Types of Protected Communications

Only certain forms of communication⁸⁷ are protected under the clergy-penitent privilege. All states require that the communications be made in private,⁸⁸ with an expectation of confidentiality, to a minister in his or her professional capacity as a member of the clergy. They differ in terms of what topics of conversation are covered.⁸⁹

The most conservative approach to the privilege is to protect only *confessions* made in the course of discipline enjoined by rules of the church.⁹⁰ This is the narrowest possible construction of the privilege,

87. "Communication" refers to both oral and written forms of expression and it may also include nonverbal acts intended to be communicative. *See, e.g., Commonwealth v. Zezima*, 310 N.E.2d 590, 592 (Mass. 1974) (holding a murder defendant's act of displaying gun to priest in private car could have been "communication" within meaning of state privilege statute and that voir dire should have been allowed to determine whether the purpose of the communication was to obtain spiritual advice).

88. The presence of third parties will not defeat the privilege where those third parties are essential to the objective of the conversation, such as in joint marital counseling sessions. *See TIEMANN & BUSH, supra* note 7, at 109-10; *see, e.g., MISS. R. EVID.* 505; *State v. Martin*, 975 P.2d 1020, 1029 (Wash. 1999) (holding that the presence of defendant's mother who brought him to preacher and urged him to confess did not necessarily vitiate privilege). *But see Commonwealth v. Drake*, 15 Mass. 161, 162 (1918) (holding no privilege existed where defendant "confessed" to charge of lewdness before entire congregation); *People v. Diercks*, 411 N.E.2d 97 (Ill. 1980) (holding that statement by burglary suspect to reverend in presence of suspect's friend and neighbor was not privileged). *See generally WIGMORE, supra* note 17, § 2311, at 601-03 (discussing presence of third party and the effect on the attorney-client privilege). The presence of multiple parties, however, may defeat the condition that the communication be made with a reasonable expectation of confidentiality. *See, e.g., In re Grand Jury Investigation*, 918 F.2d 374, 386-88 (3d Cir. 1990) (holding that the "modern view of the privilege is more expansive than the traditional one," and remanding for consideration of whether family members' group consultation with a Lutheran minister was privileged, considering practices and doctrines of particular denomination and utility of having family members present for spiritual objective to be achieved). Some states explicitly provide in their statutes that the privilege applies even when third parties are present, so long as those third parties are essential to the objective of the confidential communication. *See FLA. STAT. ANN.* § 90.505 (West 1999); *WIS. STAT. ANN.* § 905.06 (West 2000).

89. Yellin, *supra* note 13, at 121-26.

90. *See, e.g., IDAHO CODE* § 9-203 (Michie 1998); *MICH. COMP. LAWS ANN.* § 600.2156 (West 2000); *MONT. CODE ANN.* § 26-1-804 (2001); *UTAH CODE ANN.* § 78-24-8 (1996); *WASH. REV. CODE ANN.* § 5.60.060 (West 1995); *WYO. STAT. ANN.* § 1-12-101 (Michie 2001). Some states whose statutes expressly apply only to confessions nonetheless have interpreted the word broadly to include any communications for the purpose of spiritual counseling or advice that are required to be kept confidential under the doctrines of the religion involved, undoubtedly to avoid constitutional challenges based on the Free Exercise or Establishment clauses of the First Amendment. *See, e.g., State v. MacKinnon*, 957 P.2d 23, 28 (Mont. 1998) (interpreting

applying it only to sacramental confessions.⁹¹ Another traditional formulation of the privilege is to protect "penitential" communications.⁹² Penitential communication is broader than confession, because the term sweeps within its reach any confidential communication admitting a perceived moral transgression, regardless of whether the minister is empowered under church doctrine to absolve the parishioner of his sin.⁹³ In California, for example, courts interpreting the term "penitential communication" have protected conversations seeking spiritual healing and forgiveness for past acts, whether in the Catholic Church or some other denomination, but have excluded from protection marital counseling sessions⁹⁴ and private pastoral counseling or problem-solving

the term "confession" in Montana's statute to encompass any private conversation for purposes of spiritual counseling, "in order to minimize the risk that § 26-1-804 ... might be discriminatorily applied because of differing judicial perceptions of a given church's practices or religious doctrine"); *Scott v. Hammock*, 870 P.2d 947, 954 (Utah 1994) (analyzing question certified by federal court in *Scott v. Hammock*, 133 F.R.D. 610 (D. Utah 1990), and interpreting word "confession" in Utah statute to avoid constitutional defect). According to the *Scott* court, "a narrow construction of the statute would raise serious questions under Article I, section 4 of the Utah Declaration of Rights, which provides for freedom of conscience and religion." *Scott*, 870 P.2d at 954. Other courts have taken a similar approach. See *Martin*, 975 P.2d at 1028 (holding that even though Washington's statute uses the word "confession," this word means any "confidential communication between a clergy and a penitent" for the purposes for spiritual advice).

91. See *Killingsworth v. Killingsworth*, 217 So. 2d 57, 63-64 (Ala. 1968) (holding that a church pastor who had discussed marital troubles with parties in a divorce action did not have the privilege to refuse to answer questions as to whether husband had stated that his wife had threatened his life).

92. Although California and Kansas use the terms "penitent" and "penitential communication" in their clergy privilege statutes, the phrase is defined differently in the two states. California defines "penitential communication" as a confidential communication made to a clergyman "who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret." CAL. EVID. CODE § 1032 (West 1995). The Kansas privilege statute defines "penitent" as "a person who recognizes the existence and the authority of God and who seeks or receives from a regular or duly ordained minister of religion advice or assistance in determining or discharging his or her moral obligations, or in obtaining God's mercy or forgiveness for past culpable conduct." KAN. STAT. ANN. § 60-429 (1997).

93. *Webster's Dictionary* defines penitence as "sorrow for sins or faults." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1670 (Philip Babcock Gove ed., 1986).

94. *Simrin v. Simrin*, 43 Cal. Rptr. 376, 378-79 (Ct. App. 1965) (refusing to allow wife to call rabbi in child custody proceeding to testify about statements made by her husband during joint counseling session because both parties had agreed at the outset of counseling that rabbi

sessions conducted for purposes other than seeking forgiveness for sin.⁹⁵

The more modern approach, which has become the majority position, is to discard any requirement of confession or penitential communication as a precondition to the application of the privilege, and to protect any confidential communication with a clergy member whenever the parishioner is "seeking spiritual counsel and advice,"⁹⁶ or communicating with the clergy member "in his professional capacity as a spiritual advisor."⁹⁷ This approach avoids issues of which religious denominations require auricular confession, and whether the parishioner was undertaking the communication for the purposes of forgiveness of sin. Instead, it focuses simply on the minister's role in providing spiritual advice, and whether the confidence was shared in that context. This is the construction recommended by Proposed Federal Rule of Evidence 506⁹⁸ and the 2000 version of the Uniform State Laws.⁹⁹ Under this approach, any private conversation with a clergy member that is related to the spiritual well-being of the parishioner would be protected by the privilege, even if the source of the underlying problem pertained to employment, financial issues, family matters,

would not be forced to testify). The court held the conversations excluded by advance agreement, not because they were legally privileged. *Id.* "It would wrench the language of the statute to hold that it applies to communications made to a religious [official] ... acting as a marriage counselor." *Id.*

95. *People v. Edwards*, 248 Cal. Rptr. 53, 56 (Ct. App. 1988) (stating that parishioner who sought out parish priest for advice involving embezzlement from parish guild was "seeking counseling and not absolution," and therefore, conversation did not constitute a penitential communication).

96. VA. CODE ANN. § 8.01-400 (Michie 2002).

97. MO. ANN. STAT. § 491.060 (West 1996); *see also* FLA. STAT. ANN. § 90.505 (West 1999); GA. CODE ANN. § 24-9-22 (1995); IND. CODE ANN. § 34-46-3-1 (West 1998); MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2002); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 2002); N.H. REV. STAT. ANN. § 516:35 (1997); N.Y. C.P.L.R. § 4505 (McKinney 1990); N.C. GEN. STAT. § 8-53.2 (2002); TENN. CODE ANN. § 24-1-206 (2000); *see also* *People v. Carmona*, 627 N.E.2d 959, 962 (N.Y. 1993) (finding that statute protects conversations for purposes of spiritual guidance and providing that "the privilege may not be invoked to enshroud conversations with wholly secular purposes solely because one of the parties to the conversation happened to be a religious minister"); *Simpson v. Tennant*, 871 S.W.2d 301, 306 (Tex. App. Ct. 1994) (finding privilege where communicant was "seeking spiritual solace and guidance," and ruling that communication need not be strictly penitential to qualify for protection).

98. PROPOSED FED. R. EVID. 506, 56 F.R.D. 183, 248 (1973) (rendering privileged any confidential communications made to clergy "in professional character as spiritual advisor").

99. UNIF. R. EVID. 505, 13A U.L.A. 371 (2000).

or physical and mental health.¹⁰⁰ For example, most states that protect communications "for the purposes of spiritual advice or counseling" or similar language have interpreted their privilege statutes to protect marital counseling sessions.¹⁰¹

Many state statutes—whether they shield "confessions," "penitential communications," or "conversations for the purposes of spiritual advice or counseling"—emphasize that the confidence must also be shared with the minister in his professional capacity.¹⁰² When the parishioner confides in the clergy member due to friendship, kinship, business association, or some other relationship, the communication is not privileged.¹⁰³

100. Cf. *United States v. Isham*, 48 M.J. 603, 605 (1998) (interpreting privilege broadly under Military Rule of Evidence 503 to include discussion of mental depression with Navy chaplain, where conversation had "obvious religious overtones"). See generally Mitchell, *supra* note 47.

101. See *Pardie v. Pardie*, 158 N.W.2d 641, 645 (Iowa 1968); *LeGore v. LeGore*, 31 Pa. D. & C.2d 107, 108 (Ct. Com. Pl. 1963); cf. *Rivers v. Rivers*, 354 S.E.2d 784, 787 (S.C. 1987). Other states expressly include marriage counseling sessions in their clergy-penitent privilege statutes. See, e.g., D.C. CODE ANN. § 14-309 (2001); N.J. STAT. ANN. § 2A:84A-23 (West 1994).

102. See, e.g., COLO. REV. STAT. ANN. § 13-90-107 (West 2001); CONN. GEN. STAT. ANN. § 52-146B (West 1991); D.C. CODE ANN. § 14-309 (2001); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 2002).

103. See *People v. Thompson*, 184 Cal. Rptr. 72, 76 (Ct. App. 1982) (holding that Christian Science "ethics officer" hired by business as sales consultant was not acting in capacity as clergyman in hearing confession of murder); *People v. Police*, 651 P.2d 430, 431 (Colo. Ct. App. 1982) (holding that the conversation between the father of a murder victim who also happened to be a minister and the defendant at the jail house was not privileged because there was no evidence that the minister was acting as the defendant's spiritual advisor or providing pastoral counseling to him); *People v. Bole*, 585 N.E.2d 135, 147 (Ill. App. Ct. 1991) (finding no privilege where cleric had informed defendant accused of sexually assaulting his stepdaughter before disclosure that he would not act as defendant's pastoral counselor because in that situation defendant could not have been confiding in minister "in his professional capacity"); *Christensen v. Pestorious*, 250 N.W. 363, 365 (Minn. 1933) (denying privilege where witness told minister about accident when he visited her in the hospital, but there was no spiritual component or purpose to the confidence); *State v. Cary*, 751 A.2d 620, 626 (N.J. 2000) (holding that the cleric-penitent privilege did not apply to confession made to Baptist deacon who was also a New Jersey State Trooper, when defendant told his pastor he wanted to surrender on charge of murder, and pastor thereafter summoned the deacon/trooper to take his statement in his role as a police officer and take him into custody); *State v. Barber*, 346 S.E.2d 441, 441-45 (N.C. 1986) (finding no privilege where rape suspect confided in minister as friend); *Masquat v. Maguire*, 638 P.2d 1105, 1106 (Okla. 1981) (holding that no privilege existed where hospital patient "contacted and consulted with [a Catholic nun] in her capacity as a hospital administrator and not in her capacity as a 'clergyman'").

The broadest construction of the privilege, but still the minority position, is to protect all confidential communications made to a minister "in his professional capacity," without any limitation as to the spiritual purpose or nature of the conversation.¹⁰⁴ A few states have apparently concluded that parishioners frequently turn to clergy members with a wide variety of problems and attempts to restrict the privilege to spiritual advice causes no fewer complications of line drawing than confessions or penitential communications. In these jurisdictions, a wide variety of counseling sessions are protected, including, among others, child rearing advice, employment counseling, and personal problems such as alcoholism or sexual dysfunction, so long as they are directed to the minister in his professional capacity. With the increasing involvement of ministers in a wide variety of counseling activities, the potential for expanding the reach of the privilege in these states is greatly increased.¹⁰⁵ Moreover, states that protect any confidential communication to a minister in his professional capacity run the risk of sweeping within their reach matters relating not to the counseling needs of the parishioner, but to the business or employment affairs of the religious organization.¹⁰⁶ For example, in Illinois the applicable clergy-penitent privilege statute was held to protect conversations between a youth group counselor and a Lutheran minister about the counselor's alleged molestation of a youth in his charge.¹⁰⁷ Although this interview about charges of

104. 735 ILL. COMP. STAT. 5/8-803 (West 1993); IOWA CODE ANN. § 622.10 (West 1999); N.J. STAT. ANN. § 2A:84A-23 (West 1994); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985).

105. Some critics have argued that extending the privilege to all forms of counseling conducted by ministers is unwise because many ministers do not have adequate training or experience in counseling to meet minimum standards of competency in this area. Samuel Knapp & Leon VandeCreek, *Privileged Communications for Pastoral Counseling: Fact or Fancy?*, 34 J. PASTORAL CARE 293 (1985) (arguing that lack of competency in counseling means that society should not sedulously encourage ministers to enter such relationships, thus undercutting Wigmore's four-pronged justification for application of privilege).

106. *Cf. Commonwealth v. Stewart*, 690 A.2d 195, 197-200 (Pa. 1997) (affirming order of trial court requiring production for *in camera* inspection of church records pertaining to personnel records of priest and investigation into allegations of drug and sexual abuse by him with the records being privileged only if "spiritual or penitential" in nature); *Hutchison v. Luddy*, 606 A.2d 905, 909-12 (Pa. Super. Ct. 1992) (ordering church to comply with discovery requests for personnel documents and internal investigatory reports of suspected child abuse because Pennsylvania statute limits privilege to discussions of "spiritual" matters).

107. *People v. Burnidge*, 664 N.E.2d 656, 659 (Ill. App. Ct. 1996).

work-related misconduct could readily have been termed an employment matter rather than a spiritual matter, the court concluded that the session was privileged because the defendant was summoned to speak with the minister "in [his] professional character" under the express terms of the Illinois statute.¹⁰⁸

C. Who Holds the Privilege?

States are split on who holds the privilege, but a substantial majority recognize that the privilege belongs to the parishioner,¹⁰⁹ just as the attorney-client privilege and the doctor-patient privileges rest in the hands of the client and not the professional.¹¹⁰ A common formulation in these state statutes provides that the privilege may be asserted by the parishioner or the clergyman on behalf of the parishioner, and that the clergy member is presumed to have authority to assert the privilege on behalf of the parishioner in the absence of evidence to the contrary.¹¹¹ In states where the parishioner holds the privilege,¹¹² he can choose to waive the privilege and thereby force the minister to testify.¹¹³ This can lead

108. *Id.* In Illinois, the clergy-penitent privilege statute applies to confidential communications made to a clergyman "in [his] professional character or as [a] spiritual advisor." 735 ILL. COMP. STAT. 5/8-803 (West 1993) (emphasis added).

109. SCOTT N. STONE & ROBERT K. TAYLOR, 2 TESTIMONIAL PRIVILEGES § 6.08, at 6-15 (2d ed. 1995).

110. *Id.* at § 7.01, at 7-8; PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 1.3 (2d ed. 1999).

111. *See, e.g.*, DEL. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West 1999).

112. ARIZ. REV. STAT. ANN. § 12-2233 (West 1994); CONN. GEN. STAT. ANN. § 52-146b (West 1991); D.C. CODE ANN. § 14-309 (2001); IDAHO CODE § 9-203 (Michie 1998); IOWA CODE ANN. § 622.10 (West 1999); LA. CODE EVID. ANN. art. 511 (West 1995); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 2002); MINN. STAT. ANN. § 595.02 (West 2000); MONT. CODE ANN. § 26-1-804 (2001); NEV. REV. STAT. ANN. § 49.255 (Michie 2002); N.H. REV. STAT. ANN. § 516:35 (1997); N.Y. C.P.L.R. 4505 (Consol. 1990); N.C. GEN. STAT. § 8-53.2 (2002); OR. REV. STAT. § 40.260 (2001); R.I. GEN. LAWS § 9-17-23 (1997); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985); TENN. CODE ANN. § 24-1-206 (2000). As a variation on this approach, some states follow Proposed Rule 506 and place the privilege in the hands of the parishioner, but these states also provide that the cleric is presumed authorized to assert the privilege on behalf of the parishioner unless there is evidence to the contrary, such as an affirmative waiver. ARK. R. EVID. 505; DEL. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West 1999); ME. R. EVID. 505.

113. *See, e.g.*, *DeUdy v. DeUdy*, 495 N.Y.S.2d 616, 618-19 (Sup. Ct. 1985). With perhaps the strongest religious justification for the privilege in light of its Roman Catholic traditions, even Ireland has recognized that the privilege belongs to the penitent, not to the clergyman. *See Johnston v. Church of Scientology*, 1999 Ir. R. 682 (Ir. H. Ct.) (recognizing that although

to some seemingly harsh results, such as holding a priest in contempt for refusing to reveal a private conversation with the defendant even after the defendant has waived the privilege and called the priest to testify.¹¹⁴ If one of the purposes of the privilege is to protect religious freedom, why is it not equally abhorrent to require a minister to violate what they perceive to be a sacred duty of confidence, even when the parishioner has waived the privilege?¹¹⁵ Not surprisingly, in states where the parishioner holds the privilege, there are very few reported cases compelling the cleric to testify over the clergy member's objection, even when the parishioner desires the confidence to be revealed.¹¹⁶

A smaller number of jurisdictions provide that both the parishioner and the priest hold the privilege.¹¹⁷ Where both parties to the communication hold the privilege, both must consent before the minister may be forced to testify. This means that a minister may

seal of confessional may be absolute, counseling session outside of confession "would always be capable of waiver unilaterally by the person being counseled").

114. *Commonwealth v. Kane*, 445 N.E.2d 598, 602-03 (Mass. 1983) (holding priest in contempt and fining him for refusing to reveal contents of private, nonpenitential conversation with defendant in murder case); *De'Udy*, 495 N.Y.S.2d at 618 (denying minister's motion to quash subpoena and forcing him to testify in contested divorce proceeding after both husband and wife waived privilege in marital counseling sessions with clergyman).

115. Statutes that place the privilege in the hands of only the parishioner create a direct conflict with the seal of confession of the Roman Catholic Church because priests are required under Canon law to keep sacramental confessions secret, notwithstanding any waiver of the confidence by the parishioner. 1983 CODE c.983, § 1.

116. There are several possible reasons for this scarcity of case law. First, when the parishioner wishes to reveal the confidence, he can do so through his own testimony absent a hearsay bar. Second, it is unlikely that the parishioner's attorney would pursue the cleric's testimony as a matter of litigation strategy because such compulsion may potentially backfire before a jury. This latter dynamic is a likely explanation for the relatively small number of reported cases in the clergy-penitent privilege area in general. Attorneys who wish to subpoena a minister to provide relevant evidence in a case may be reluctant to risk backlash from the jury, or, in the case of an elected or appointed government attorney, backlash from the public.

117. ALA. R. EVID. 505; CAL. EVID. CODE §§ 1033-1034 (West 1995); COLO. REV. STAT. ANN. § 13-90-107 (West 2001); 735 ILL. COMP. STAT. 5/8-803 (1993); KAN. STAT. ANN. § 60-429 (1997); N.J. STAT. ANN. § 2A:84A-23 (West 1994); 42 PA. CONS. STAT. ANN. tit. 42, § 5943 (West 2000); see *Eckmann v. Bd. of Educ.*, 106 F.R.D. 70, 73 (E.D. Mo. 1985) (interpreting Missouri law under pendant state law claims). The wording of Pennsylvania's statute is interesting because it provides that a minister shall not "be compelled, or allowed without consent of such person" to disclose confidential communications. 42 PA. CONS. STAT. ANN. tit. 42, § 5943 (West 2000). The use of the disjunctive "or" suggests that a priest may not be compelled even if the penitent waives the privilege.

refuse to testify to the substance of a confidential communication even if the parishioner wishes him to reveal the confidence.¹¹⁸ States that place the privilege in the hands of the minister as well as the parishioner recognize that the privilege serves not only to protect the parishioner's expectation of privacy and confidentiality, but also the clergyman's status as repository of spiritual information.¹¹⁹ This approach suggests that the free exercise rights of the minister are an important value underlying the privilege,¹²⁰ and that even a participant to the conversation and the presumed beneficiary of the confidential relationship should not be allowed to require a minister to violate a sacred oath or mandate of his church.¹²¹

New Jersey is unusual among the states in differentiating the holder of the privilege depending on the type of confidential communication at issue. For most spiritual counseling sessions, both the clergyman and the parishioner hold the privilege; that is, both have to consent before either can testify.¹²² However, for communications occurring in a spiritual counseling setting that pertain to a future criminal act, only the minister holds the privilege.¹²³ The minister may choose to testify or not testify about the content of such communications depending on his own moral

118. See, e.g., *People v. Pecora*, 246 N.E.2d 865, 872-73 (Ill. App. Ct. 1969), *cert. denied*, 397 U.S. 1028 (1970) (upholding a ruling that a clergyman did not have to answer questions relating to conversations between himself and the defendant because "a clergyman cannot be compelled to disclose in any court any 'confession or admission made to him in his professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of [his] religious body'").

119. *Eckmann*, 106 F.R.D. at 73.

120. Yellin, *supra* note 13. In *People v. Phillips*, the first case in America to recognize the clergy-penitent privilege, the New York court founded its decision on the free exercise rights of the subpoenaed priest. 1 W.L.J. 109 (1843); see also *supra* notes 53-54 and accompanying text.

121. In some states, such as Illinois, where both the parishioner and clergyman are deemed to hold the privilege, if the clergyman does not object to testifying and the parishioner asserts the privilege, the parishioner has the burden of showing that disclosure is enjoined by the rules or practices of the minister's religion. *People v. Burnidge*, 664 N.E.2d 656, 659 (Ill. 1996). The Illinois and Maryland statutes do not expressly state that both parties to the conversation hold the privilege, but rather that clergy shall "no[t] be compelled [to testify]." 735 ILL. COMP. STAT 5/8-803 (1993); MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2002). Although those words are equally consistent with only the clergy person holding the privilege and both parties holding the privilege, the courts in Illinois have interpreted this language to vest the privilege in both parties. See *Burnidge*, 664 N.E.2d at 689.

122. N.J. STAT. ANN. § 2A:84A-23 (West Supp. 2002).

123. *Id.*

judgment and the applicable religious doctrine of his church. As discussed more fully below, New Jersey is thus unique among the states in that it carves out conversations pertaining to future crimes for special treatment in its clergy-penitent privilege statute.¹²⁴

Finally, some states place a complete bar to clergy testimony about certain qualifying confidential communications.¹²⁵ In these states, such clergy testimony is not privileged, but rather is deemed *incompetent*.¹²⁶ Even if the parishioner calls the minister to testify and the minister wishes to testify, he is not allowed to do so. This is a minority position. Ohio and Oregon statutes contain variations of this incompetence rule; statutes in these states provide that the parishioner is the holder of the privilege, but declare a minister incompetent to testify despite parishioner consent if the minister's testimony would constitute a violation of a sacred trust, such as with an auricular confession in the Roman Catholic tradition.¹²⁷

D. Who Constitutes a Cleric?

State statutes also differ widely in terms of what types of religious clerics and functionaries are entitled to invoke the privilege. The most traditional approach is to confine the privilege to confidential communications with priests or members of the clergy without further specification or definition of these terms.¹²⁸

124. New Jersey amended its statute in 1994 in response to a decision by the New Jersey Supreme Court upholding the prosecutor's use of a confession at trial, because under the old statute, only the priest held the privilege; thus a "minister of visitation" from a Baptist church was allowed to testify that a prisoner had confessed to him the murder of a sixteen-year-old boy. *State v. Szemple*, 640 A.2d 817, 825-29 (N.J. 1994). Public outrage over this decision, and the fear that priests could unilaterally disclose even confessions about past crimes led New Jersey to amend the statute.

125. In Vermont, a priest or minister of the gospel "shall not be *permitted* to testify in court [about] statements made to him by a person under the sanctity of a religious confessional." VT. STAT. ANN. tit. 12, § 1607 (1973) (emphasis added); cf. *Eckmann v. Bd. of Educ.*, 106 F.R.D. 70, 73 (E.D. Mo. 1985) (interpreting the Missouri statute, which similarly uses the word "incompetent," not to create an absolute bar, but rather a privilege that is waivable by the parties to the conversation).

126. See, e.g., VT. STAT. ANN. tit. 12, § 1607 (1973).

127. Ohio and Oregon statutes render a clergyman's testimony incompetent if disclosure would be a "violation of his sacred trust," OHIO REV. CODE ANN. § 2317.02 (West 1994), or if he "has an absolute duty to keep the communication confidential." OR. REV. STAT. § 40.260 (2001).

128. ARIZ. REV. STAT. ANN. § 12-2233 (West 1994); IDAHO CODE § 9-203 (Michie 1998); IOWA

Some states attempt to ensure the cleric is bona fide by protecting only those officially affiliated with a religious organization, such as those ordained or licensed by the church.¹²⁹ This limits the privilege to ministers who have achieved official status in their church through ordination or accreditation.¹³⁰ Another approach is to focus not on the bona fides of the minister, but on the bona fides of the church; some states limit the privilege to practitioners of an "established" or "legally recognizable" religion.¹³¹ The requirement that the church be "established" suggests that one of the legislative objectives in crafting the privilege in these states was to ensure that the religion indeed played a meaningful role in the lives of some citizens, rather than being a sham created solely for the purposes of obtaining secular or legal benefits.¹³²

CODE ANN. § 622.10 (West 1999); MONT. CODE ANN. § 26-1-804 (2001); NEV. REV. STAT. ANN. § 49.255 (Michie 2002); N.Y. C.P.L.R. 4505 (Consol. 1992); R.I. GEN. LAWS § 9-17-23 (1997); WYO. STAT. ANN. § 1-12-101 (Michie 2001). Georgia's statute is the most traditional and specific of all in this regard, limiting the privilege to a "Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister." GA. CODE ANN. § 24-9-22 (1995). Because this statute excludes clerics in many non-Western religious traditions, it might be found unconstitutional if challenged.

129. MASS. GEN. LAWS ANN. ch. 233, § 20A (West 2002); N.H. REV. STAT. ANN. § 516:35 (1997); OHIO REV. CODE ANN. § 2317.02 (West Supp. 2002); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985); TENN. CODE ANN. § 24-1-206 (2000).

130. See *State v. Barber*, 346 S.E.2d 441, 445 (N.C. 1986) (denying privilege to "exhorter" of Church of God who had never been ordained and whose ten dollar license from Christian Ministry of Tennessee had expired at time of confidential conversation). Few states actually license ministers, except to solemnize marriage; even in those states, authority to conduct marriages flows automatically from ordination and/or official recognition as a minister by the ecclesiastical body of the denomination. N.Y. RELIG. CORP. LAW, § 2 (Consol. Supp. 2002); OHIO REV. CODE ANN. § 3101.08 (West 2000); see also Valentine A. Toth, *The Clergyman: His Privileges and Liabilities*, 9 CLEV.-MARSHALL L. REV. 323 (1960). The District of Columbia privilege statute extends its testimonial privilege to any minister "authorized to perform a marriage ceremony." D.C. CODE ANN. § 14-309 (2001).

131. States following this "official status" approach include Ohio, which limits the privilege to ministers of an "established and legally cognizable church," OHIO REV. CODE ANN. § 2317.02 (West 1994), and Alabama, which limits the privilege to a practitioner "of any bona fide established church or religious organization," ALA. R. EVID. 505. See also KY. R. EVID. 505; MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2002); N.C. GEN. STAT. § 8-53.2 (2002).

132. The Internal Revenue Service has developed fourteen criteria to determine whether a religious group is a "church" entitled to particular tax benefits:

- (1) a distinct legal existence;
- (2) a recognized creed and form of worship;
- (3) a definite and distinct ecclesiastical government;
- (4) a formal code of doctrine and discipline;

Although somewhat dated, one of the few cases to thoughtfully address the issue of who constitutes a minister for purposes of state privilege law is *Reutkemeier v. Nolte*,¹³³ a civil action in tort by a farmer against his neighbor for allegedly debauching the farmer's minor daughter and impregnating her.¹³⁴ The defendant attempted to impeach the victim by inquiring into her alleged confession of sexual activity to a Presbyterian minister and elders within the church.¹³⁵ Through his inquiry, the defendant hoped to prove that the fourteen-year-old victim had sexual relations with other men thereby "cast[ing] much uncertainty upon the paternity of the child."¹³⁶ The trial court refused to allow this cross-examination, and the Iowa Supreme Court affirmed.¹³⁷ Interpreting Iowa Code section 4608, the court confronted the issue of whether a group meeting among the victim, the minister, and three ruling elders of the church constituted a confidential communication with a "minister of the gospel" within the meaning of the state privilege statute.¹³⁸ The court reasoned that in order to determine who constitutes a minister within a particular religious denomination, the court must look to church doctrine.¹³⁹

What is a "minister of the gospel" within the meaning of this statute? The law as such sets up no standard or criterion. That

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- (5) a distinct religious history;
 - (6) a membership not associated with any other church or denomination;
 - (7) an organization of ordained ministers;
 - (8) ordained ministers selected after completing prescribed studies;
 - (9) a literature of its own;
 - (10) established places of worship;
 - (11) regular congregations;
 - (12) regular religious services;
 - (13) Sunday schools for religious instruction of the young; and
 - (14) schools for the preparation of its ministers.

Church of the Visible Intelligence That Governs the Universe v. United States, 4 Cl. Ct. 55, 64 (1983) (citing Remarks of IRS Commissioner Jerome Kurtz, PLI Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), reprinted in *Fed. Taxes (P-H)* P64, 820 (1978)).

133. 161 N.W. 290 (Iowa 1917).

134. *Id.*

135. *Id.* at 291-92.

136. *Id.* at 291.

137. *Id.* at 291-92.

138. *Id.*

139. *Id.* at 292.

question is left wholly to the recognition of the "denomination." The word "minister," which in its original sense meant a mere servant, has grown in many directions and into much dignity.¹⁴⁰

The court looked to the "Confession of Faith" of the Presbyterian Church and determined that elders were actual officers of the church with the power to preach in the minister's absence, to exercise church discipline, and to "inquire into the knowledge and Christian conduct of the members of the church," and thus that they were ministers of the gospel.¹⁴¹

Rather than generally applying the privilege to clergy or ministers of the gospel, some states protect communications with designated clergy, typically priests, rabbis, ministers, or any "similar functionary" of a church.¹⁴² This is the more modern scope of the privilege and has become the majority view. Some states have interpreted the term "similar functionary" broadly to include those in roles such as deacons, nuns, or elders who perform officially recognized church functions, whether they are employed full-time or part-time, for compensation or as a volunteer.¹⁴³ Extending even broader protection, Oklahoma, Nebraska, North Dakota, South Dakota, Texas, and Wisconsin apply their privileges to confidential communications with persons "reasonably believed" by the parishioner to constitute such a religious cleric.¹⁴⁴ Other states have taken

140. *Id.*

141. *Id.* at 292-93.

142. See ALA. R. EVID. 505; ARK. R. EVID. 505; CAL. EVID. CODE § 1030 (West 1995); DEL. R. EVID. 505; HAW. R. EVID. 506; LA. CODE EVID. ANN. art. 511 (West 1995); ME. R. EVID. 505; MISS. R. EVID. 505; MO. ANN. STAT. § 491.060 (West Supp. 2002); NEB. REV. STAT. § 27-506 (1995); N.J. STAT. ANN. § 2A:84A-23 (West Supp. 2002); N.M. R. EVID. 11-506; N.D. R. EVID. 505; OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); S.D. CODIFIED LAWS § 19-13-16 (Michie 1995); TEX. R. EVID. 505; VT. R. EVID. 505; WIS. STAT. ANN. § 905.06 (West 2000).

143. See, e.g., *Eckmann v. Bd. of Educ.*, 106 F.R.D. 70, 72-73 (E.D. Mo. 1985) (holding that a Catholic nun acting as the spiritual director of a congregation met the statutory definition of "minister" under the Missouri privilege statute, because the statute includes "a minister of the gospel, priest, rabbi or other persons serving in a similar capacity," and the nun in question undertook many aspects of Catholic ministry engaged in by priests and sisters alike) (emphasis added).

144. NEB. REV. STAT. § 27-506 (1995); N.D. R. EVID. 505; OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); S.D. CODIFIED LAWS § 19-13-16 (Michie 1995); TEX. R. EVID. 505; WIS. STAT. ANN. § 905.06 (West 2000); see also TIEMANN & BUSH, *supra* note 7, at 115.

a more moderate approach and have excluded “helpers” in the church who have a subsidiary role to the official clergy.¹⁴⁵

States have struggled with the issue of whether to protect conversations with self-proclaimed ministers who have not gone through any formal training or ordination ceremony,¹⁴⁶ lay officers of a church,¹⁴⁷ and even peer counseling groups such as Alcoholics Anonymous.¹⁴⁸ An overly broad interpretation of the term “minister” would encourage cult leaders and self-appointed spiritual healers¹⁴⁹ to avoid testifying by claiming the privilege, thus opening the doors to fraud and abuse.¹⁵⁰ Pennsylvania’s statute, which some have argued reflects an obvious Judeo-Christian bias,¹⁵¹ excludes from

145. See *In re Murtha*, 279 A.2d 889, 893 (N.J. App. Div. 1971) (holding that a Roman Catholic nun could not claim the privilege because she was not authorized to receive penitential communications according to the discipline of her church); *State v. Buss*, 887 P.2d 920, 922-24 (Wash. Ct. App. 1995) (holding that conversations with an assistant to a Catholic priest acting as a “family minister” did not qualify for the Washington privilege because the “family minister” was nonordained and there was no record that the religion required disclosure to such a functionary of the church).

146. See *State v. Hereford*, 518 So. 2d 515, 516 (La. Ct. App. 1987) (although the Louisiana statute does not define “clergyman,” denying privilege to a “self ordained minister,” noting that “[s]imply because [the preacher] studied the Bible and took it upon himself to give religious guidance to others does not make him a clergyman”); *State v. Barber*, 346 S.E.2d 441, 445-46 (N.C. 1986) (finding the clergy-communicant privilege inapplicable to conversations with a nonordained “licensed exhorter”).

147. See *People v. Johnson*, 497 N.Y.S.2d 539, 539-40 (App. Div. 1985) (recognizing that confidential communications with a Muslim brother may in some instances be privileged); *Ellis v. United States*, 922 F. Supp. 539, 541-42 (D. Utah 1996) (finding that even assuming that the “ward” and the “stake” leaders of the Church of Latter Day Saints were clergy within the meaning of the Utah privilege statute, their investigation about a drowning during a church-sponsored youth trip was not a communication for the purposes of spiritual counseling).

148. See *Cox v. Miller*, 296 F.3d 89, 110 (2d Cir. 2002) (reversing lower court’s determination that petitioner’s communications with fellow Alcoholics Anonymous (A.A.) members were protected by clergy-penitent privilege; although “Twelve Step” methodology of A.A. is religiously based, petitioner did not seek A.A. counseling for purposes of “spiritual advice” within the meaning of the state privilege statute).

149. See *People v. McNeal*, 677 N.E.2d 841, 852-53 (Ill. 1997) (holding defendant’s statements to his brother, who was a self-proclaimed minister of the “Church of the Second Coming” were not privileged because they were not made for purposes of spiritual counseling).

150. Georgia has interpreted its privilege statute to exclude communications with a “spiritual advisor” or “psychic,” ruling that such a person is not a “minister of the gospel” within the meaning of the applicable statute. *Manous v. State*, 407 S.E.2d 779, 782 (Ga. Ct. App. 1991). Georgia’s statute does not have a catch-all provision protecting conversations with a “similar functionary” of a church, or a person performing functions “similar to” a minister. GA. CODE ANN. § 24-9-22 (1995).

151. Rev. Martin R. Bartel, O.S.B., *Pennsylvania’s Clergy-Communicant Privilege: For*

the protections of the privilege any communications with "clergymen or ministers, who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers."¹⁵² Ohio is another example of a jurisdiction that appears to have drafted its privilege statute in an attempt to withhold protection for conversations with ministers of emerging or fringe religions. Ohio defines "minister" for the purposes of its privilege statute as "[a] member of the clergy, rabbi, priest, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect."¹⁵³ Under the terms of Ohio's statute, the court can thus look to either church doctrine or to church licensure to determine whether a person is a "minister" for the purposes of its privilege statute.¹⁵⁴

Whether courts apply a broad or narrow construction of "minister" for purposes of the privilege depends not only on the precise wording of the applicable state statute, but also on what types of relationships the court feels inclined to promote. If the court views the privilege as a means to promote spiritual counseling in general, it is likely to apply the privilege broadly to any religious functionary who, by way of training or experience, is in a position to provide spiritual aid and comfort to the parishioner.¹⁵⁵ If the court views the privilege as a means only to foster relationships which

Everything There is ... A Time to Keep Silent, 69 TEMP. L. REV. 817, 822 (1996) ("The current statutory definition seems to be construed with a Judeo-Christian bias.").

152. 42 PA. CONS. STAT. ANN. § 5943 (West 2000). For example, Jehovah's Witnesses believe that all members of the church are called to the ministry and that the church constitutes a "society of ministers." See Reese, *supra* note 9, at 66 n.45 (citing ROYSTON PIKE, *JEHOVAH'S WITNESSES: WHO THEY ARE, WHAT THEY TEACH, WHAT THEY DO* 99-102 (1954)). Statutes like those in effect in Pennsylvania would not construe private conversations between two Jehovah's Witnesses as privileged unless one played a leadership role in the church. See *id.* at 66.

153. OHIO REV. CODE ANN. § 2317.02(c) (West Supp. 2002).

154. Cf. *In re Grand Jury Investigation*, 918 F.2d 374, 387 n.21, 388 (3d Cir. 1990) (directing the lower court to look to church doctrine and practices to determine whether group counseling was accepted as an efficacious form of spiritual advice, and holding that "inquiring into the pastoral counseling practices of a particular denomination would appear to pose no such threat to first amendment rights").

155. See, e.g., *Cox v. Miller*, 296 F.3d 89, 110 (2d Cir. 2002) (even if lower court was correct in concluding that A.A. was a religion for purposes of state's privilege statute, petitioner did not attend meetings for purposes of obtaining spiritual advice); *Eckmann v. Bd. of Educ.*, 106 F.R.D. 70, 73 (E.D. Mo. 1985) (upholding assertion of privilege by a Roman Catholic nun).

may lead to redemption and spiritual salvation, it is likely to apply the privilege only to that narrower class of church professionals who are directly responsible for spiritual healing under the established tenets of the religion—usually the pastor or leader of the congregation.¹⁵⁶ The arguments in favor of interpreting “minister” broadly are the same as those advanced for abandoning the “discipline enjoined” requirement; that is, to avoid distinguishing between and among religions, and avoid inquiring into religious doctrine.¹⁵⁷ Another reason to interpret “minister” broadly, however, is that spiritual guidance, unlike mental health care, does not typically cost money. Applying a testimonial privilege to psychiatrists, but not to religious counselors or lay ministers, favors those who can afford to pay for therapy; less affluent individuals quite frequently turn to various functionaries within their church for the same types of problems for which the elite turn to psychiatrists.¹⁵⁸ Applying a broad definition of “minister” may avoid not only difficult problems of line drawing between religious sects, but also class-based disparities that could result from recognizing some forms of therapeutic professional privileges but not others.¹⁵⁹

III. THE EVOLVING FEDERAL PRIVILEGE

Precedent establishing the contours of the clergy-penitent privilege in federal courts¹⁶⁰ is scarce, likely because a large percentage of criminal and family law cases, wherein the privilege frequently arises, are brought in state court where state law of privilege governs. Even in diversity and federal question cases involving pendant state law claims, state privilege law applies in federal court.¹⁶¹ Recognition of a common law clergy-penitent

156. See, e.g., *In re Murtha*, 279 A.2d 889, 892 (N.J. App. Div. 1971) (construing “minister” to include priests, but not nuns).

157. See Yellin, *supra* note 13, at 136.

158. See *Jaffee v. Redmond*, 518 U.S. 1, 15-17 (1996) (recognizing that the class disparity argument favors applying psychiatric privilege to licensed clinical social workers performing psychotherapy).

159. See *id.*

160. See *In re Grand Jury Investigation*, 918 F.2d 374, 377 (3d Cir. 1990) (noting the “relative dearth of federal precedent”); Yellin, *supra* note 13, at 96 (recognizing that the “minister’s privilege has not been the subject of extensive appellate litigation”).

161. FED. R. EVID. 501.

privilege has thus been slower to evolve in the federal courts, and has followed the trend in most states.¹⁶²

Congress enacted the *Federal Rules of Evidence* in 1975 after more than four years of study and debate.¹⁶³ Rule 501 does not contain a specific and exclusive list of privileges to be applied in the federal courts.¹⁶⁴ Instead, Rule 501 dictates the evolution and application of privileges "in the light of reason and experience."¹⁶⁵ The common law privilege formula adopted by Congress in Rule 501 eschews the nine specifically enumerated privileges recommended by the Advisory Committee and approved by the Supreme Court, including the clergy-penitent privilege.¹⁶⁶ In order to determine whether a conversation is privileged in federal cases, the courts must thus look to federal common law.¹⁶⁷

Proposed Rule 506, adopted by the Supreme Court's Advisory Committee in 1972 but not enacted by Congress, provided a "Communications to Clergyman Privilege" which placed the privilege in the hands of the parishioner.¹⁶⁸ Rule 506 would have significantly liberalized the 1942 and 1953 model rules.¹⁶⁹ The terms "priest," "penitent," and "penitential communication" were abandoned.¹⁷⁰ Proposed Rule 506 extended the privilege to any

162. One of the earliest federal cases to recognize the clergy-penitent privilege was decided in 1958. See *Mullen v. United States*, 263 F.2d 275, 276, 280 (D.C. Cir. 1958) (Fahy, J., concurring) (suggesting that even absent an erroneous jury instruction on criminal intent, the admission of a Lutheran minister's testimony regarding defendant's confidential admission that she had shackled her children constituted grounds for overturning criminal conviction).

163. H.R. REP. NO. 93-650, at 3-4 (1973). The more general privilege formula adopted by Congress in Rule 501 had its origin in Rule 26 of the *Federal Rules of Criminal Procedure*. See *Grand Jury Investigation*, 918 F.2d at 379.

164. FED. R. EVID. 501.

165. *Id.* This standard was derived from Federal Rule of Criminal Procedure 26, which governed the application of privileges in federal cases prior to the enactment of the *Federal Rules of Evidence*. H.R. REP. NO. 93-650, at 8-9 (1973). The Rule 26 standard was, in turn, derived from *Wolfe v. United States*, 291 U.S. 7, 13 (1934), a case concerning the competence of witnesses in federal courts.

166. See PROPOSED FED. R. EVID. 502-510, 56 F.R.D. 183, 234-58 (1973).

167. In federal diversity cases where state law provides the rule of decision, and for pendant state law claims brought in federal court, the court must apply the rules of privilege which govern in the applicable state. See *supra* note 161 and accompanying text.

168. See PROPOSED FED. R. EVID. 506, 56 F.R.D. 183, 247 (1973) (requiring that a communication "not [be] intended for further disclosure" in order to be covered by the privilege).

169. See MODEL CODE EVID. 219 (1942); UNIF. R. EVID. 29 (1953).

170. UNIF. R. EVID. 29 (1974); see TIEMANN & BUSH, *supra* note 7, at 151-53.

"confidential communication by the person to a clergyman in his professional character as spiritual advisor."¹⁷¹ Significantly, the Proposed Rule eschewed any "discipline enjoined" language, making it irrelevant whether the minister's religious denomination promoted spiritual counseling or required the minister to keep such sessions confidential.¹⁷² Proposed Rule 506 would have also extended the definition of "minister" to include an accredited Christian Science practitioner, and one who, although not an official minister, was a "similar functionary" of a religious organization.¹⁷³ The phrase "similar functionary" seems to have been intended to allow for growth in the application of the privilege to new or emerging religions, or to new roles within existing religions.¹⁷⁴

Although Congress did not adopt Proposed Rule 506 or the other specifically enumerated privileges recommended by the Supreme Court, neither did it specifically disapprove of them.¹⁷⁵ Significantly, Proposed Rule 506 was "one of the *least* controversial of the specifically enumerated privileges" proposed by the Supreme Court and debated by Congress.¹⁷⁶ This was most likely because a clergy-penitent privilege was by that time seen as firmly rooted in American law notwithstanding its somewhat dubious history,¹⁷⁷ and because confidential communications with priests and ministers were perceived as beyond secular intervention in any event.¹⁷⁸

The Supreme Court has cited the clergy-penitent privilege on at least three occasions, implicitly recognizing its common law status, although never squarely addressing its contours.¹⁷⁹ Although

171. PROPOSED FED. R. EVID. 506, 56 F.R.D. 183, 247 (1973).

172. For a general discussion of the "discipline enjoined" requirement, see *supra* notes 70-86 and accompanying text.

173. PROPOSED FED. R. EVID. 506, 56 F.R.D. 183, 247 (1973); see also *supra* note 142 and accompanying text (discussing state statutes that apply the privilege to "similar functionaries" of a religious body).

174. See PROPOSED FED. R. EVID. 506 advisory committee's note, 56 F.R.D. 183, 248 (1973) ("No further specification seems possible in view of the lack of licensing and certification procedures for clergymen.").

175. The Senate Judiciary Committee's Report on Rule 501 states: "It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of ... any ... of the enumerated privileges contained in the Supreme Court rules." S. REP. NO. 93-1277, at 13 (1974).

176. Bartel, *supra* note 151, at 838 (emphasis added).

177. *Id.* at 838-41.

178. *Id.* (citing MCCORMICK, *supra* note 6, § 76.2, at 109).

179. See *Trammel v. United States*, 445 U.S. 40 (1979) (discussing privilege for adverse

relatively few lower federal courts have had occasion to interpret the clergy-penitent privilege since the enactment of the *Federal Rules of Evidence*, those that have done so have found the common law privilege to be consistent with the express terms of Proposed Rule 506, essentially adopting that expansive formulation for the federal courts.¹⁸⁰ One of the most thorough discussions of the clergy-penitent privilege by a federal court can be found in the Third Circuit's *In re Grand Jury Investigation* decision, in which the court looked to Proposed Rule 506 to define the scope and contours of the privilege under federal common law.¹⁸¹ In that case, the Third Circuit remanded the matter for a factual determination of whether a grand jury subpoena to a Lutheran minister who had engaged in a counseling session with a family suspected of burning down the home of an African-American neighbor met the court's new test for application of the clergy-penitent privilege.¹⁸² The Third Circuit instructed the trial court to grant the Government's motion to compel the minister's testimony unless the trial court concluded that the communication was (1) made to a clergyperson, (2) in his or

spousal testimony and favorably referring to other privileges by analogy, including the clergy-penitent privilege); *United States v. Nixon*, 418 U.S. 683, 709 (1974) ("[A]n attorney or a priest may not be required to disclose what has been revealed in professional confidence."); *Totten v. United States*, 92 U.S. 105, 107 (1875) (dismissing a contract suit brought by a secret agent to recover for espionage services and recognizing that claims on contract for spy services, like suits which "would require a disclosure of the confidences of the confessional," may not be maintained). Several United States courts of appeals and district courts recognized the clergy-penitent privilege prior to the enactment of the *Federal Rules of Evidence*, either expressly or in dicta. See, e.g., *United States v. Luther*, 481 F.2d 429, 432 (9th Cir. 1973) (finding that the clergy-penitent privilege would not prevent the IRS from inspecting corporate records of the Bible Institute) (expressly); *In re Verplank*, 329 F. Supp. 433, 435-36 (C.D. Cal. 1971) (quashing subpoena of grand jury investigating selective services violations directed to Claremont College's chaplain, who was engaged in draft counseling) (expressly); *United States v. Keeney*, 111 F. Supp. 233, 234 (D.D.C. 1953) ("Under the law of the United States privileged communications are strictly limited to a few well-defined categories, such as communications between attorney and client, clergyman and penitent, and physician and patient."), *rev'd on other grounds*, 218 F.2d 843 (D.C. Cir. 1954) (dictum).

180. See *In re Grand Jury Investigation*, 918 F.2d 374, 380 (3d Cir. 1990) ("We believe that the proposed rules provide a useful reference point and offer guidance in defining the existence and scope of evidentiary privileges in the federal courts."); *Verplank*, 329 F. Supp. at 435 (citing Proposed Rule 506 with approval while pending).

181. *Grand Jury Investigation* 918 F.2d at 380.

182. *Id.* at 385, 388.

her spiritual and professional capacity, and (3) with a reasonable expectation of privacy.¹⁸³

Most federal courts that have addressed the issue have suggested that the clergy-penitent privilege belongs to the parishioner,¹⁸⁴ following the suggestion of Proposed Rule 506.¹⁸⁵ Only one federal court has suggested that the privilege belongs to the clergy person, and this was a federal question case involving pendant state law claims in which the court was interpreting both federal and state privilege law.¹⁸⁶

In terms of the types of confidential communications covered, most federal courts have focused not on whether the communication was a confession or a penitential communication, but rather whether it occurred in private with a clergy member in that person's professional capacity as a spiritual advisor.¹⁸⁷ This is consistent with the expansive approach of Proposed Rule 506.¹⁸⁸ Under this

183. *Id.* at 385-88.

184. *See id.* at 380; *Scott v. Hammock*, 133 F.R.D. 610, 615 (D. Utah 1990).

185. "The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary." PROPOSED FED. R. EVID. 506, *supra* note 8. In the comment to Proposed Rule 506(c), the Advisory Committee "makes clear that the privilege belongs to the communicating person." PROPOSED FED. R. EVID. 506 advisory committee's notes, 56 F.R.D. 183, 249 (1973).

186. *Eckmann v. Bd. of Educ.*, 106 F.R.D. 70, 72-73 (E.D. Mo. 1985) (explaining that the privilege belonged to the Roman Catholic nun under Missouri and federal law, and could not be waived by plaintiff in submitting facts of conversation to book publisher). Because the court did not know whether the nun's deposition testimony was relevant to the federal claim or the state claim, the court assumed that it was relevant to both. *Id.* at 72. The court found it unnecessary to decide whether federal or state law of privilege should apply in such situations, because it ruled that the nun's testimony "is privileged under both federal and state law." *Id.* The court interpreted federal law as vesting the privilege in the hands of the clergy member. *Id.*

187. *See United States v. Dube*, 820 F.2d 886, 889 (7th Cir. 1987) (explaining that conversations the defendant had with his pastor about income tax obligations were not for purposes of spiritual counseling, and therefore not within the federal common law privilege); *United States v. Wells*, 446 F.2d 2, 3-4 (2d Cir. 1971) (holding that admission into evidence of letter from defendant to priest did not violate privilege, where there was no indication either that the letter was intended to remain confidential or that it was for the purposes of spiritual counseling).

188. The Federal District Court in Utah, applying state law in a diversity case, construed "confession" in that state's privilege statute broadly to mean any confidential communication for purposes of spiritual advice, essentially following the approach of Proposed Rule 506. *Scott*, 133 F.R.D. at 616. This construction was considered necessary in order to avoid a free exercise problem. *Id.* at 617. According to the court:

It is difficult to believe or concede that the Utah territorial legislature, around

"spiritual counseling" approach, the privilege has been applied to protect the contents of draft counseling sessions¹⁸⁹ and group family counseling sessions¹⁹⁰ with clergy members.

The comments to Proposed Rule 506(a)(2) suggested that the definition of confidential communication for the clergy-penitent privilege should be consistent with the doctrine of confidentiality under the attorney-client and psychotherapist-patient privilege, and that the presence of a third person should not destroy the privilege so long as the presence of that person was necessary in aid of the communication.¹⁹¹ "Given the requisite showing of confidentiality, proposed Rule 506 would have extended the clergy-communicant privilege to group discussions."¹⁹²

There is a paucity of case law on the subject of who constitutes a clergy member under the federal privilege. In the *Verplank* case,¹⁹³ the district court extended the privilege to members of the college draft counseling staff working with a college chaplain, even though they were not themselves ordained ministers.¹⁹⁴ Relying on advisory committee notes to Proposed Rule 506, the court found that they performed functions "conforming at least in a general way with those of ... an established Protestant denomination,"¹⁹⁵ and therefore quashed a grand jury subpoena seeking records of both the chaplain and the nonordained counselor working with him. In applying the

1876, would have intended to limit the term confession to something akin to the Catholic religion where the dominant church in the Territory did not follow that form of religious practice.... A second reason is also compelling for a more liberal construction of the privilege. A statute should be construed, if possible, to avoid an unconstitutional application.

Id. at 618.

189. *See In re Verplank*, 329 F. Supp. 433, 435-36 (C.D. Cal. 1971).

190. *See In re Grand Jury Investigation*, 918 F.2d 374, 385-86 (3d Cir. 1990). *But see Dube*, 820 F.2d at 889 (denying privileged status to defendant's conversation with minister regarding defendant's efforts to avoid taxation because conversation did not involve "a penitent seeking spiritual relief from his sins").

191. In comment (a)(2) to Proposed Rule 506, the Advisory Committee noted that the definition of "confidential" communication for purposes of the clergy-penitent privilege "is consistent with the use of the term in Rule 503(a)(5) for lawyer-client" PROPOSED FED. R. EVID. 506, advisory committee's notes, 56 F.R.D. 183, 248 (1973).

192. *Grand Jury Investigation*, 918 F.2d at 380.

193. *Verplank*, 329 F. Supp. at 433.

194. *See id.* at 436.

195. *Id.* (quoting PROPOSED FED. R. EVID. advisory committee's notes, 51 F.R.D. 372 (Revised Draft 1971)).

functional approach of Proposed Rule 506, the court concluded that the staff member was essentially performing a function similar to the college chaplain.¹⁹⁶ This case was unusual in not insisting that the draft counseling staff member be performing his spiritual counseling functions at either the direction of the chaplain¹⁹⁷ or at least under the authority of the church.¹⁹⁸ This case highlights the dangerous elasticity of the "similar functionary" language of Proposed Rule 506.¹⁹⁹

196. See *id.* The Supreme Court recently applied a similar functional approach to federal privileges in *Jaffee v. Redmond*, recognizing for the first time a federal common law patient-psychiatrist privilege under Rule 501 and ruling that this privilege applied to psychotherapeutic counseling sessions with a licensed social worker. 518 U.S. 1, 17 (1995). Noting that the poor and people of modest means are more apt to receive mental health counseling from a social worker than a medical doctor, the Supreme Court agreed with the court of appeals that "[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose." *Id.* (quoting *Jaffee v. Redmond*, 51 F.3d 1346, 1358 n.19 (7th Cir. 1995)). Importantly, however, social workers are licensed and regulated by the state, whereas clergy are not. Even with respect to the psychotherapist-patient privilege, a number of states have declined to follow the Supreme Court's functional approach of *Jaffee* in interpreting their state privilege statutes. See *State v. Clark*, 570 N.W.2d 195, 204 (N.D. 1997) (holding that a conversation with a social worker who was not a psychologist or psychiatrist was not covered under state's psychotherapist-patient privilege); *Williams v. Texas*, No. 07-96-0087-CR, 1997 Tex. App. LEXIS 260, at *2 (Tex. Ct. App. Jan. 23, 1997) (holding that no privilege exists for conversations with suicide prevention worker).

197. The court in *Verplank* analogized the counselor to a paralegal working with an attorney whose assistance is indispensable to the provision of services to a client. *Verplank*, 329 F. Supp. at 436. However, the element of "assistance," which is necessary to the application of the attorney-client privilege to a paralegal was not apparent from the record in *Verplank*. *Id.*; see also PROPOSED FED. R. EVID. 503, *supra* note 8, at 235-37. Although the court in *Verplank* noted that the chaplain had hired "staff to assist him" in providing counseling, it did not make any finding that the chaplain exerted direction or control over the other counselor. *Verplank*, 329 F. Supp. at 436.

198. The court in *Verplank* overlooked the fact that the language of Proposed Rule 506 defines clergyman as a "minister, priest, rabbi, or other similar functionary of a religious organization." PROPOSED FED. R. EVID. 506, 56 F.R.D. 183, 247 (1973) (emphasis added). The record in *Verplank* suggests that the nonordained counselor was an employee of the college, and not an employee of a church. 329 F. Supp. at 436.

199. In *Eckmann v. Board of Education*, a federal district court in Missouri denied a motion to compel a Roman Catholic nun to answer questions about her communications with a postulate in her charge. 106 F.R.D. 70 (E.D. Mo. 1985). The nun objected on the grounds that she served as the spiritual director of the young woman seeking admission to the religious congregation, and that their conversations pertaining to such admission were privileged. *Id.* at 71. The court concluded that the role of "spiritual director" within a religious congregation was "such a position within the Church" as to entitle the nun to invoke the clergy-penitent privilege. *Id.* at 73. Unlike the claimant in *Verplank*, however, the claimant of the privilege in *Eckmann* at least was a member of a religious order. *Id.* at 71.

IV. CLERGY OBLIGATIONS WITH RESPECT TO DANGEROUS PERSONS: LESSONS LEARNED FROM THE MANDATED REPORTING STATUTES

The issue of whether professionals should have a role to play in identifying dangerous clients and helping to prevent their future injurious conduct raises competing tensions that have been felt acutely in the area of state child abuse reporting requirements, so-called "mandated reporting" laws.²⁰⁰ Whether a clergy member should have a legally enforceable duty to report suspected child abuse is different from, but related to, the question of whether he should have an obligation to report threatened future harm. First, mandated reporting statutes apply to past or ongoing acts of child abuse; a mandated reporter has a duty to disclose reasonably founded suspicions of past abuse, even if he has no reason to believe that it will reoccur.²⁰¹ Although one of the aims of mandated reporting statutes is the intervention and prevention of future harm, another primary aim is the detection of ongoing abuse and the punishment of those responsible.²⁰² Second, child abuse reporting statutes focus on only one limited type of dangerous conduct, and single it out for special treatment.²⁰³ The question posed by this Article is whether clergy should have a role to play in identifying and preventing a much wider scope of dangerous activity, including violent crimes such as murder, rape, and arson. Notwithstanding the differences in these two questions, there are lessons to be learned from the state experience with mandated reporting laws because many states have already grappled with the difficult issue of whether society's interest in exposing dangerous behavior outweighs the parties' interests in confidentiality.

Mandated reporting statutes were first enacted in the 1960s after research established that child abuse was a problem of widespread

200. See, e.g., Karen L. Ross, *Revealing Confidential Secrets: Will It Save Our Children?*, 28 SETON HALL L. REV. 963, 968 (1998). A smaller number of jurisdictions have also adopted mandated reporting statutes that apply to elder abuse. See Seymour Moskowitz & Michael J. DeBoer, *When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect*, 49 DEPAUL L. REV. 1, 33-35 (1999).

201. For example, most states require mandated reporters to disclose child abuse even if the abuser is believed to be deceased. See, e.g., 78 Op. Att'y Gen. 189 (Md. 1993).

202. See Ross, *supra* note 200, at 967.

203. See Mitchell, *supra* note 47, at 807.

proportions likely to go undetected by law enforcement due to the age and vulnerability of its victims and a variety of other sociological factors.²⁰⁴ The Department of Health, Education, and Welfare drafted the first model reporting statute in 1963.²⁰⁵ By 1967, every state had passed a mandated reporting law.²⁰⁶ Modern mandated reporting statutes generally require professionals with frequent contact with children to file a report with the state Department of Social Services, or an equivalent child protection agency, whenever they have reasonable cause to believe that a child has suffered abuse.²⁰⁷ These statutes generally provide the mandated reporter with immunity from civil liability for filing a report and set forth misdemeanor criminal penalties, usually a fine, for failure to report when required to do so.²⁰⁸ Reportable conditions typically include evidence of past or current "physical, mental, or sexual abuse" of a child under circumstances indicating "harm or threatened harm" to the child's health or welfare.²⁰⁹

The development of mandated reporting laws has proceeded in several stages; in fact, most states have amended their statutes at least once since 1967.²¹⁰ The first mandated reporting statutes applied to medical personnel, who were likely to encounter evidence of child abuse in a treatment context, and law enforcement personnel, who were likely to encounter such evidence in responding to domestic disturbance.²¹¹ Following the Federal Child Abuse and Treatment Act of 1974, and a revised model reporting statute issued by the American Medical Association in 1975, most states amended their statutes to require reports from a broader class of professionals with access to or responsibility for children, including teachers, social workers, and in some instances, attorneys and members of the clergy.²¹²

204. *See id.* at 726.

205. *See id.*

206. *See Mosteller, supra* note 29, at 212.

207. *See Ross, supra* note 200, at 966-67.

208. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 119, § 51A (Supp. 2002)

209. Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a (2000) (requiring each state to develop procedures for investigation and intervention).

210. Mitchell, *supra* note 47, at 727.

211. Mosteller, *supra* note 29, at 212.

212. *Id.* at 212-13.

Today, thirty-two of the fifty states include clergy as mandated reporters of child abuse. Eighteen of these states expressly include clergy within their list of mandated reporters, among designated professionals such as teachers, social workers, doctors, and mental health care workers.²¹³ Fourteen other states have general catch-all provisions that apply the mandatory reporting requirement to "any person" who has reason to suspect child abuse, potentially, but not expressly, sweeping clergy within the statutes' reach.²¹⁴

States that apply their mandated reporting statutes to clergy take differing approaches as to whether the clergy-penitent privilege survives the duty to report.²¹⁵ This debate has been brought into sharp focus by the recent scandal of child sexual abuse by priests in the American Catholic Church. In response to the crisis, some states have amended their child abuse reporting statutes to include clergy among their lists of mandated reporters,²¹⁶ and in the context of this amendment have debated whether privileged conversations should give rise to a duty to report.²¹⁷

While the current scandal among clergy in the Catholic Church has focused public attention on the matter of clergy confidences, the

213. See ARIZ. REV. STAT. ANN. § 13-3620 (West 2001); CAL. PENAL CODE § 11,165.7 (West Supp. 2002); CONN. GEN. STAT. ANN. § 17a-101 (West Supp. 2002); LA. CH. C. Art. 603, 609 (West 1995); ME. REV. STAT. ANN. tit. 22, § 4011-A (West Supp. 2001); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 2002); MINN. STAT. ANN. § 626.556 (West Supp. 2002); MISS. CODE ANN. § 43-21-353 (1999); MO. ANN. STAT. § 210.115 (West 1996); MONT. CODE ANN. § 41-3-201 (2001); NEV. REV. STAT. ANN. 432b.220 (Michie Supp. 2002); N.H. REV. STAT. ANN. § 169-C:29 (1994); N.D. CENT. CODE § 50-25.1-03 (1999); OR. REV. STAT. § 419b.010 (2001); 23 PA. CONS. STAT. ANN. § 6311 (West 2001); TEX. FAM. CODE ANN. § 261.101 (Vernon 2002); UTAH CODE ANN. § 62A-4a-403 (2000); W. VA. CODE ANN. § 49-6A-2 (Michie 2001).

214. Mitchell, *supra* note 47, at 786; see DEL. CODE ANN. tit. 16, § 903 (Supp. 2000); FLA. STAT. ANN. § 39.201 (West Supp. 2002); IDAHO CODE § 16-1619 (Michie 2001); IND. CODE ANN. § 31-33-5-1 (Michie 1997); KY. REV. STAT. ANN. § 620.030 (Michie 1999); MD. CODE ANN., FAM. LAW § 5-705 (1999); NEB. REV. STAT. § 28-711 (1995); N.J. STAT. ANN. § 9:6-8:10 (West 1993); N.M. STAT. ANN. § 32A-4-3 (Michie 1999); N.C. GEN. STAT. § 7b-301 (2002); OKLA. STAT. ANN. tit. 10, § 7103 (West Supp. 2002); R.I. GEN. LAWS § 40-11-3 (Supp. 2001); TENN. CODE ANN. § 37-1-403 (2001); WYO. STAT. ANN. § 14-3-205 (Michie 2001).

215. The 1963 Model Child Abuse Reporting Statute recommended abrogating the physician-patient and husband-wife privileges in all judicial proceedings resulting from reports of abuse, but did not recommend abrogating the attorney-client or clergy-penitent privileges. COUNCIL OF STATE GOV'T, 24 SUGGESTED STATE LEGISLATION 66, 67-68 (1965).

216. See, e.g., MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 2002); MO. ANN. STAT. § 210.115 (West Supp. 2002).

217. Michael Paulson, *Sex Abuse Reporting Measure Hits Snag House, Senate Divided Over Clergy Exemptions*, BOSTON GLOBE, Mar. 7, 2002, at A1.

detection and prevention of pedophilia infrequently raise broad implications for issues of privileged communications. Church leaders who receive information about sexual misconduct by clergy seldom learn of this information solely in a privileged setting, such as when the offending minister confesses or seeks spiritual counseling from his superior. Much more frequently, church leaders learn of the abuse from parents of the children affected, or by other clergy members who are reporting misconduct by their peers.²¹⁸ In both of these latter scenarios, the information generally arises in an employment context rather than a spiritual counseling context. These types of communications, even if intended to be kept confidential, generally would *not* be subject to the clergy-penitent privilege because they are not made for the purpose of spiritual counseling.²¹⁹ Thus, in all thirty-two states that include clergy as mandated reporters, a priest or a bishop who learns of abuse of a child from a victim, a victim's relative, or another clergy member in most instances already would be subject to criminal prosecution and penalty for failure to notify authorities of these allegations.

But what about a priest or minister who learns about suspected child abuse in a privileged setting? Let us suppose that a parishioner confides to a minister in a spiritual counseling context that he has been molesting his stepdaughter. Fifteen of the thirty-two states that apply their mandated reporter statutes to clergy provide that the clergy-penitent privilege *survives* the duty to report; that is, that the clergy member is exempt from the statutory duty to report suspected child abuse if the information was obtained in a privileged setting, and will have a duty to report *only* that information received outside of the confidential spiritual counseling context.²²⁰ In seven states, it is unclear whether and how the

218. See, e.g., Michael Rezendes & Walter V. Robinson, *The Issue of Record Keeping; Critics Blast Law for Comments on Archdiocese Files*, BOSTON GLOBE, Apr. 13, 2002, at B7.

219. In those few states which sweep within the reach of their privilege statute any confidential communication with a minister in his "professional capacity," without regard for the spiritual counseling nature of the conversation, a court can consider such employment-related discussions privileged if intended to be kept confidential. See *supra* notes 104-08 and accompanying text.

220. ARIZ. REV. STAT. ANN. §§ 8-805, 13-3620 (West 1999); CAL. PENAL CODE § 11,166 (West 2000); FLA. STAT. ANN. § 39.204 (West Supp. 2002); KY. REV. STAT. ANN. § 620.050 (Michie 1999); LA. REV. STAT. ANN. § 14:403 (West 1995); ME. REV. STAT. ANN. tit. 22, § 4011-A (West Supp. 2001); MD. CODE ANN., FAM. LAW § 5-705 (1999); MASS. GEN. LAWS ANN. ch. 119, § 51a (West Supp. 2002); MINN. STAT. ANN. § 626.556 (West Supp. 2002); MO. ANN. STAT. § 210.140

legislature intended to preserve the clergy-penitent privilege.²²¹ In ten states, however, the mandated reporting statutes "abrogate" the privilege, and require disclosure of evidence related to child abuse *even if it would otherwise be protected from disclosure* by the evidentiary privilege.²²²

"Abrogation" of the privilege can mean two different things for the purposes of mandated reporting statutes: It can mean that the clergy member is required to *report* suspected child abuse even if he learns of it in a privileged setting, and/or it can mean that the clergy member is required to *testify* about the child abuse if he is later called as a witness in a judicial proceeding.²²³ Most of the statutes in these ten states use widely varying language in abrogating the privilege, and unfortunately many of the statutes are imprecise in

(West Supp. 2002); MONT. CODE ANN. § 41-3-201 (2001); NEV. REV. STAT. ANN. 432b.220 (Michie 2002); OR. REV. STAT. § 419b.010 (2001); 23 PA. STAT. ANN. § 6311 (West 2001); UTAH CODE ANN. § 62A-4a-403 (2000). Many of these mandated reporter statutes make cross-references to their state's clergy-penitent privilege statutes; others exempt from the duty to disclose "otherwise privileged" communications; others delineate precisely the types of confidential communications which are exempt from disclosure.

221. See CONN. GEN. STAT. ANN. § 17a-101 (West 1998); IND. CODE ANN. § 31-33-5-1 (West 1997); NEB. REV. STAT. ANN. § 28-711 (Michie 1995); N.J. STAT. ANN. § 9:6-8.10 (West 1993); N.M. STAT. ANN. § 32A-4-3 (Michie 1999); N.D. CENT. CODES §§ 50-25-1-03, 50-25-1-10 (1999); TENN. CODE ANN. § 37-1-403 (2001). North Dakota, for example, abrogates testimonial privileges between "any professional person and the person's patient or client, except between attorney and client ..." in cases involving child abuse and neglect. N.D. CENT. CODE § 50-25-1-10 (1999). No court has yet construed whether a minister engaged in counseling represents a "client" for purposes of this statute. Moreover, when a state enacts a statute that requires certain professionals to report, and does not address specifically the effect of a preexisting statutory privilege on this reporting obligation, a difficult statutory interpretation question arises as to whether the later-enacted reporting requirement was intended to abrogate the otherwise general rule of privilege. See Mosteller, *supra* note 29, at 221. No court has yet addressed this difficult issue in any of the aforementioned states.

222. See *infra* notes 225-27 and accompanying text.

223. In discussing how the mandated reporter statutes apply to attorneys, Professor Mosteller has pointed out that the issue of abrogation is further complicated by the fact that some state privilege statutes shield a confidential communication from disclosure only in judicial or administrative proceedings. Mosteller, *supra* note 29, at 224-26. It can be argued that a report of child abuse to the Department of Social Services is not a "proceeding" even if it is compelled by law, and therefore that there is no conflict between a duty to report and such state's applicable evidentiary privilege. *Id.* at 225-26. One consequence of this argument may be that in states that abrogate the privilege, and where it is unclear whether the legislature intended to exempt privileged communications from the duty to report child abuse or the duty to testify about child abuse, or both, courts should favor the latter approach because there would be no need for the legislature to abrogate a privilege which does not exist in a reporting context.

defining exactly how the privilege is intended to be abrogated, making the law in this area extremely unclear.²²⁴ Nonetheless, some categorization of the laws in these ten states is possible. In Wyoming, clergy appear to have a duty to report child abuse even if it is learned in a privileged setting, but have no duty subsequently to testify in judicial proceedings.²²⁵ In Delaware, Mississippi, New Hampshire, North Carolina, Oklahoma, Rhode Island, Texas, and West Virginia, clergy have a duty to report child abuse even if learned in a privileged context, *and* must later testify about the privileged communication in judicial proceedings arising out of the child abuse or neglect. In other words, the mandatory reporting statutes in these states abrogate the privilege in the child abuse context both as to reporting and as to testifying.²²⁶ Oddly, in Idaho, a clergy member has *no duty to report* child abuse if the abuse was learned of in a privileged context, but does have a *duty to testify* about the same privileged communication if later called as a witness in a judicial proceeding.²²⁷

224. *Id.* at 220-21. This lack of statutory clarity is exacerbated by the fact that the intersection between the law of privilege and the law of mandated reporting has seldom been addressed by the courts, most likely because law enforcement authorities have been reluctant thus far to enforce criminal sanctions against ministers for failure to report evidence which may have been learned in private counseling sessions. *But see* JM-342 Op. Att'y Gen. 1559 (Tex. 1985) (opining that clergy privilege is abrogated by a statute which abrogates all privileges for child abuse proceedings).

225. WYO. STAT. ANN. § 14-3-210 (Michie 2001).

226. DEL. CODE ANN. tit. 16, § 909 (Supp. 2000) (excluding only sacramental confessions from the duty to report and testify); MISS. CODE ANN. § 43-21-353 (1999); N.H. REV. STAT. ANN. § 169-C:32 (2001); N.C. GEN. STAT. § 7B-310 (2002); OKLA. STAT. ANN. tit. 10, §§ 7103, 7113 (West 1998); R.I. GEN. LAWS § 40-11-11 (1997); TEX. FAM. CODE ANN. §§ 261.101, 261.202 (Vernon 2002); W. VA. CODE ANN. § 49-6A-7 (Michie 2001). Notwithstanding the language of these statutes, whether an assertion of the clergy-penitent privilege in a judicial proceeding would actually be denied by a court in these states is open to debate. For example, the New Hampshire statute abrogates the testimonial privilege "between husband and wife and any professional person and his patient or client" in "proceedings instituted pursuant to [the child abuse] chapter." N.H. REV. STAT. ANN. § 169-C:32 (2001). A clergy member could argue that he does not serve patients or clients, and therefore is not within the reach of this attempted abrogation of the privilege.

227. Under Idaho law, a clergy member is exempt from reporting child abuse learned via a "confession or confidential communication ... made in the manner and context which places the duly ordained minister of religion specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine." IDAHO CODE § 16-1619(c)(3) (Michie 1995). However, another provision of Idaho law abrogates all privileges "except the lawyer-client privilege ... at any proceeding regarding the abuse, abandonment or neglect of the child." IDAHO CODE § 16-1620 (Michie 1995).

Notwithstanding the differences in these ten statutes, one important conclusion can be reached about the policy judgment that underlies their enactment. By abrogating the privilege in their mandated reporter statutes, ten states have made a legislative determination that protecting children from mental, physical, and sexual abuse is more important than protecting and fostering confidential communications between clergy and their parishioners about such unlawful activity.²²⁸ This leads to an obvious question: If the state's interest in detecting and deterring *past or ongoing* child abuse is paramount to fostering a confidential relationship, why isn't the prevention of *future* serious bodily harm an even more compelling state interest?²²⁹ Child abuse is certainly pernicious and widespread, but is it any more dangerous or destructive to our society than homicide? Bioterrorism? Airline hijacking? In nine of the ten states described above, a minister who receives a confidence in a spiritual counseling session from a parishioner revealing that the parishioner *has* molested a child would have a duty to disclose this confidence, but paradoxically a minister who receives a confidence during a spiritual counseling session from a parishioner revealing that he *intends* to blow up a public building would have no duty to report this future crime, and furthermore would have a valid privilege to refuse subsequently to testify about it in court. The experience of mandated reporting states should lead to the conclusion that the confidence is unworthy of protection in *either* situation, and certainly less spiritually beneficial in the latter.

V. LESSONS LEARNED FROM THE OTHER PROFESSIONS: THE "HOMICIDAL SPOUSE" EXAMPLE

The broad application of the clergy-penitent privilege described above should give lawyers, judges, and scholars reason for great concern. First, testimonial privileges stand in the way of the search

228. See WIGMORE, *supra* note 17, § 2285, 527 (stating that the fourth criterion for application of an evidentiary privilege is whether "[t]he injury that would inure to the relation by the disclosure ... must be greater than the benefit thereby gained") (emphasis omitted).

229. This is not necessarily to suggest that murder, terrorism, or hijacking are more evil or socially destructive than child abuse. Rather, I am arguing that society has a more compelling interest in preventing future harm than it does in detecting and punishing past wrongs or acts because the prevention of future harm spares identifiable individuals from bodily injury.

for truth, and historically have been interpreted *narrowly* wherever possible.²³⁰ In stark contrast to other professional privileges, however, the clergy-penitent privilege seems to have been defined and interpreted *broadly* by courts and legislatures, out of fear that a narrow construction would trample religious freedoms.²³¹ Second, unlike other professional privileges, the clergy-penitent privilege, when applicable, is considered absolute. In contrast to the attorney-client and the psychotherapist-patient privileges—both riddled with exceptions that allow for the revelation of a confidential communication when interests of fairness or necessity outweigh the parties' interest in privacy²³²—the clergy-penitent privilege admits no exceptions except in the mandated reporting context.²³³ This presents a multiplier effect of socially undesirable consequences: The clergy-penitent privilege has been applied to a larger class of communications and a broader class of clergy, and, when it is deemed to apply, it is considered impenetrable.

The deference afforded clergy members stands in sharp contrast to that shown to other professionals with respect to the law's treatment of their obligations in terms of dangerous clients. Imagine a scenario in which a spouse is experiencing difficulties in his marriage, and turns to an attorney, psychotherapist, or clergy member for professional assistance with respect to his marital problems. Imagine further that in the context of a confidential counseling session, the client reveals to his attorney/psychotherapist/clergy member that he believes the situation to be hopeless, and that he has purchased a gun and intends to shoot his spouse the following day. Assume further that the level of detail provided by the "client" and his demeanor give the attorney/psychotherapist/clergy member reasonable cause to believe that the

230. *Trammel v. United States*, 445 U.S. 40, 44-45 (1980).

231. *See, e.g., State v. MacKinnon*, 957 P.2d 23 (Mont. 1998); *Scott v. Hammock*, 870 P.2d 947, 954 (Utah 1994).

232. *STONE & TAYLOR*, *supra* note 109, §§ 1.01-1.66, 7.02, at 1-4 through 1-179, 7-8 through 7-10; *see also* PROPOSED FED. R. EVID. 503, 56 F.R.D. 183, 235-37 (1973) (creating exceptions to attorney-client privilege for communications in furtherance of crime or fraud, for will contests, for proof of document attestation, for action between joint clients, and when breach of duty by the lawyer is alleged); *id.* (creating exception to psychotherapist-patient privilege in proceedings for hospitalization, when a court orders a psychiatric examination of a party, or when the patient puts his mental or emotional condition at issue in litigation).

233. *See, e.g., PROPOSED FED. R. EVID.* 506, 56 F.R.D. 183, 247 (1973).

client intends to carry out the planned homicide. As discussed below, the way that the law constrains the behavior of the clergy member in this scenario is vastly different from the way it constrains the behavior of the attorney or the psychotherapist. When either an attorney or a psychotherapist has reason to believe that his client presents a serious risk of danger to a known third person, he may have an ethical, and in some cases, legal duty to warn that third party, and might also be foreclosed from refusing to testify about the confidential communication at a later proceeding if called upon to do so.²³⁴ But no legal duties, binding rules of ethical conduct, or exceptions to the testimonial privilege operate to constrain the behavior of the clergy member.

In order to frame the discussion of the various professionals' obligations in this "homicidal spouse" hypothetical, it is helpful to first draw a distinction between rules of privilege and rules of client confidence. Testimonial privileges are rules of evidence that typically prevent disclosure in judicial or administrative proceedings without the consent of the holder of the privilege.²³⁵ Rules of confidentiality are ethical norms that typically prevent disclosure outside of court without the consent of the client, except in limited circumstances.²³⁶ Testimonial privileges are not always coextensive with professional obligations of secrecy; a professional may in certain circumstances be authorized under the ethical canons of his profession to breach client confidences, even if the communication is subject to a testimonial privilege. In such circumstances, the professional would have the right to breach confidentiality outside of court, for instance, to warn a third party about a dangerous client, but he would still be entitled to refuse to answer questions about the same confidential communication in a later judicial or administrative proceeding.²³⁷

234. See *infra* notes 238-83 and accompanying text.

235. See Mosteller, *supra* note 29, at 224-28.

236. Rules of confidentiality typically operate outside of the judicial setting because many such rules contain "unless required by law" exceptions which allow revelation in a judicial or administrative proceeding if the tribunal orders disclosure. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 5 (2002) ("The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.").

237. A testimonial privilege may only be waived by the holder of the privilege. In circumstances where a lawyer, psychiatrist, or clergy person reveals a confidence out of court without the client's consent, the client may still claim the privilege at a later judicial

A. Responsibilities of the Psychotherapist

Confronted with the homicidal spouse situation, the psychotherapist may reveal his client confidence under the controlling ethical norms of his profession. Section 9 of the *Principles of Medical Ethics* governing psychiatrists provides:

A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.²³⁸

Standard 5.05 of the *American Psychologist Association's Code of Conduct* provides that a psychologist may disclose confidential information "to protect the patient or client or others from harm."²³⁹ Some states have enacted statutes providing a similar exception to the psychotherapist's duty of confidentiality for dangerous patients.²⁴⁰

Even apart from ethical considerations, the psychotherapist will be subject to civil liability if he fails to act reasonably to protect the victim's spouse. In *Tarasoff v. Regents of the University of California*,²⁴¹ the Supreme Court of California recognized that a psychiatrist treating a mentally ill patient under certain circumstances has a duty to warn third parties of potential danger, ruling that "once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, [the therapist] bears a duty to exercise reasonable care to protect the foreseeable victim of that danger."²⁴² The *Restatement (Second)*

proceeding to prevent the professional from testifying.

238. AMA PRINCIPLES OF MEDICAL ETHICS § 9 (1958) (emphasis added); see Victor W. Sidel, *Confidential Information and the Physician*, 264 NEW ENG. J. MED. 1133 (1961).

239. ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 5.05, reprinted in 47 AM. PSYCHOLOGIST 1597, 1606 (1992) (emphasis added).

240. See, e.g., 740 ILL. COMP. STAT. ANN. 110/11 (West 1993); S.C. CODE ANN. § 19-11-95 (Law Co-op Supp. 2001).

241. 551 P.2d 334 (Cal. 1976) (en banc).

242. *Id.* at 345.

of *Torts* provides that as a general rule a person owes no duty to control the conduct of another nor to warn those endangered by this conduct.²⁴³ The court in *Tarasoff*, however, relied on section 315(a) of the *Restatement*, creating an exception to the "no duty to warn" rule when a special relation between the defendant and the violent person imposes on the defendant a duty to control the violent person's conduct.²⁴⁴ The court relied on two unique aspects of the therapist-patient relationship in concluding that such a "special relationship" existed: (1) the psychotherapist's ability to predict dangerous behavior,²⁴⁵ and (2) the psychotherapist's ability to exercise some degree of control over dangerous behavior.²⁴⁶ The court also looked to the dangerous person exception to the California psychotherapist-patient privilege²⁴⁷ as evidence of a strong public policy in favor of disclosure where essential to avert danger to others.²⁴⁸

Most states have followed *Tarasoff* and have recognized that the duty of reasonable care for psychotherapists includes a duty to warn or protect reasonably identifiable third parties whenever a patient confides in them a realistic threat to commit serious physical harm to another.²⁴⁹ Some states have codified or redefined this *Tarasoff*

243. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

244. *Tarasoff*, 551 P.2d at 343.

245. *Id.* at 345.

246. *Id.* at 344. The court analogized a psychotherapist's duty in this regard to the duty of a hospital to exercise reasonable care to prevent one patient from injuring other patients. *Id.* This reasoning is derived from section 319 of the *Restatement (Second) of Torts*, which provides that "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." RESTATEMENT (SECOND) OF TORTS § 319 (1965). Some commentators have argued that this ability to control has never in and of itself been sufficient to create a "special relationship" under the *Restatement* approach, which explains why mere bystanders are not under a duty to rescue those in peril, even if they may have the capacity to do so. "Instead, the Restatement and developing case law took the approach that a duty will be imposed where a person can exercise an ability to control and there is some additional ingredient to the relationship." John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 888. That "additional ingredient" in *Tarasoff* may have been the recognition by the legislature, as expressed by enactment of an exception to the testimonial privilege, favoring disclosure in furtherance of public safety.

247. CAL. EVID. CODE § 1024 (West 1995).

248. *Tarasoff*, 551 P.2d at 347.

249. See Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 100 (1994).

duty by statute.²⁵⁰ In almost every state today, however, a psychiatrist or psychologist faced with the homicidal spouse scenario must take some affirmative action to avert the perceived danger, such as warning the spouse, notifying the police, or, if appropriate, hospitalizing the client.²⁵¹ A psychiatrist or psychologist who failed to do so would face tort liability for any resulting injury to the third party victim.²⁵²

Let us assume that our hypothetical psychiatrist exercised his duty to warn under *Tarasoff*, and the threatened murder of the spouse was averted at the eleventh hour. The patient/spouse is then charged with attempted murder. If the psychotherapist is called as a witness against his patient at the criminal trial, may he assert the evidentiary privilege? The privilege has not been waived because the privilege belongs to the patient, who did not consent to the disclosure. Whether a "dangerous patient" exception to the privilege, as opposed to the duty of confidentiality, exists has been a matter of considerable debate.²⁵³ Proposed Federal Rule of Evidence 504 contained no such exception to the privilege.²⁵⁴ However, in *Jaffee v. Redmond*,²⁵⁵ the first Supreme Court case to recognize the psychotherapist-patient privilege under the common law privilege formulation of Rule 501, the Court stated in a now famous footnote: "[W]e do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the

250. See, e.g., FLA. STAT. ANN. § 456.059 (West 2001); MINN. STAT. ANN. § 148.975 (West 1998).

251. It should be noted that one therapist defendant in *Tarasoff* in fact did warn the campus police about his client's threats, but the campus police released the client after briefly taking him into custody for questioning. *Tarasoff*, 551 P.2d at 341. The California Supreme Court did not rule on the issue of whether the therapist's notification to the police satisfied his duty of reasonable care under the circumstances, because the court was only deciding the narrower issue of whether the pleadings stated a cause of action. See *id.* at 348 n.16. Since the date of the *Tarasoff* decision, the California legislature has enacted a statute providing that a psychotherapist's duty of care with respect to dangerous patients shall be discharged by "communicat[ing] the threat to the victim or victims and to a law enforcement agency." CAL. CIV. CODE § 43.92(b) (West Supp. 2002) (emphasis added).

252. See *id.*

253. See George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 WASH. L. REV. 33, 47-48 (1999).

254. PROPOSED FED. R. EVID. 504, 56 F.R.D. 183, 241 (1972).

255. 518 U.S. 1 (1995).

patient or to others can be averted only by means of a disclosure by the therapist."²⁵⁶

At least for the federal courts, the *Jaffee* footnote has left open the question of whether there is a dangerous person exception to the psychotherapist-patient testimonial privilege. The Tenth Circuit has adopted such an exception, ruling that when a psychiatrist has a duty to warn a third party of potential danger arising out of a confidential communication, this communication loses its privileged character, and the psychiatrist may later be required to testify in court.²⁵⁷ The Sixth Circuit has rejected this approach, ruling that a duty to protect this type of communication creates an exception to the requirement of confidentiality, but not an exception to the testimonial privilege.²⁵⁸ Most states have left the intersection of the duty of disclosure and the privilege unanswered.²⁵⁹ California and several other states, however, have enacted a dangerous person exception to their testimonial privilege that requires the psychiatrist to testify about these conversations pertaining to future dangerous activity in a later criminal or civil proceeding.²⁶⁰

256. *Id.* at 18 n.19.

257. *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998).

258. The court opined:

[W]e will first clarify a misperception held by Hayes, the government, and, to some extent, the Tenth Circuit that the standard of care exercised by a treating psychotherapist prior to complying with (or, for that matter, failing to comply with) a state's "duty to protect" requirement is somehow pertinent to the applicability of the psychotherapist/patient privilege in criminal proceedings. We think there is little correlation between these two inquiries.

United States v. Hayes, 227 F.3d 578, 583 (6th Cir. 2000).

259. See *Harris*, *supra* note 253, at 47-48.

260. See CAL. EVID. CODE § 1024 (West 1995); D.C. CODE ANN. § 14-307(b)(1) (2001) (stating that no testimonial privilege exists when the accused is charged with death or bodily injury to another and disclosure is required "in the interests of public justice"); LA. CODE EVID. ANN. arts. 510(B)(2)(e), 510(C)(2)(b) (West 1995) (stating that there is no privilege in criminal cases when the conversation in question was intended to assist in crime or fraud); NEV. REV. STAT. ANN. § 49.213 (Michie 2002) (offering an exception to the privilege "[i]f there is an immediate threat that the patient will harm himself or other persons"); WYO. STAT. ANN. § 33-27-123(a)(iv) (Michie 2001) (stating that no privilege exists when the communication discloses to a psychiatrist an immediate threat of physical violence toward an identifiable victim); see also *Menendez v. Superior Court*, 834 P.2d 786, 786-87 (Cal. 1992) (holding that a psychiatrist who has a duty to warn of patient's threats loses the privilege to later refuse to disclose audiotapes of counseling sessions in which threats were made in response to subpoena). The Oregon Supreme Court has taken the opposite approach, and has held that *Tarasoff* disclosures do not vitiate that state's statutory psychotherapist-patient privilege. *State v. Miller*, 709 P.2d 225, 236-37 (Or. 1985), *cert. denied*, 475 U.S. 1141 (1986).

B. Responsibilities of the Attorney

A lawyer confronted with the homicidal spouse scenario may also reveal his client's confidences under the ethical rules applicable to attorneys in most states. Model Rule of Professional Conduct 1.6 provides the following exception to the duty of confidentiality: "A lawyer may reveal [client confidences] to the extent the lawyer reasonably believes necessary ... to prevent reasonably certain death or substantial bodily harm."²⁶¹ Under the *Model Rules*, a lawyer who learns from his client that he may commit a serious crime of violence towards another is allowed, but not required, to disclose this confidence.²⁶² However, in ten states, the attorney has an ethical *obligation* to reveal the confidence; these states phrase the ethical obligation as mandatory ("shall" or "must") rather than as

261. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002). The predecessor to Rule 1.6, Model Code DR 4-101, provided a broader exception to confidentiality, allowing an attorney to reveal a client confidence involving "the intention of his client to commit a crime and the information necessary to prevent the crime." PROFESSIONAL RESPONSIBILITY STANDARDS, RULES AND STATUTES 580 (Dzienkowski ed., 2001).

262. When the *Model Rules of Professional Conduct* were enacted in 1983, the Commission in charge of their drafting recommended that the "may" in former Model Code provision 4-101 be changed to the mandatory "shall." See Robert J. Kutak, *The Law of Lawyering*, 22 WASHBURN L.J. 413, 426-27 (1983). There was substantial criticism of this proposal, however, and the draft was changed to reflect the current permissive language of Model Rule 1.6(b). Symposium, *The Lawyer's Dilemma Over Model Rule 1.6 and Client Confidentiality—Conflicting Duties to Clients and Society*, 13 FORDHAM URB. L.J. 1, 7 (1984). The *Model Rules*, where they apply, do not take a firm position on whether the lawyer "should" disclose the dangerous intentions of his client, they simply state that he "may" do so. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002). According to the comments, the lawyer "has professional discretion to reveal information in order to prevent such consequences." *Id.* R. 1.6 cmt. 12. Elsewhere in the comments, however, the ABA appears to weigh in on the side of nondisclosure:

[T]o the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is *better* protected if full and open communication by the client is encouraged than if it is inhibited.

Id. R. 1.6 cmt. 9 (emphasis added). Some commentators and state bar associations have recognized that the permissive language of Rule 1.6 leaves a gap between what is morally required and what is ethically required. DEL. BAR ASS'N PROF'L ETHICS COMM., OP. 1988-2, *digested in* 5 A.B.A./B.N.A. LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 203 (1989) (discussing propriety of lawyer disclosing fact that his client has AIDS). See generally Deborah Abramovsky, *A Case for Increased Disclosure*, 13 FORDHAM URB. L.J. 43, 44-53 (1984) (arguing that permissive disclosure under Rule 1.6 places unwarranted emphasis on client confidentiality to the detriment of society).

permissive ("may").²⁶³ In these states, the lawyer is *required* under threat of suspension or disbarment to reveal the confidential information in order to prevent the client from inflicting death or serious bodily injury on an identifiable third person.²⁶⁴

Whether our hypothetical attorney reveals his client's homicidal intent, the attorney may in certain circumstances also be compelled to testify about the confidential communication in a later proceeding. Most states and the federal courts carve out an exception to the attorney-client privilege if the lawyer's advice is sought in order to obtain assistance with respect to future or ongoing criminal activity, the so-called "crime-fraud" exception.²⁶⁵ In circumstances where a client is enlisting or engaging the attorney's help in perpetrating a crime or fraud, such conversation is not privileged.²⁶⁶ This exception is founded on the recognition that there simply is no public interest in protecting the attorney-client relationship when it is being exploited for an unlawful purpose.²⁶⁷

In the attorney-client context, mere disclosure of intent to commit a future crime to an attorney, without more, does not destroy the

263. See ARIZ. SUP. CT. R., 42 RULE OF PROF'L CONDUCT E.R. R. 1.6(b) (1997); CONN. RULES OF PROF'L CONDUCT R. 1.6(b) (2002); FLA. ST. BAR R. 4-1.6(b) (1994); ILL. SUP. CT. RULES OF PROF'L CONDUCT R. 1.6(b) (2002); NEV. SUP. CT. R. 156(2) (2002); N.J. RULES OF PROF'L CONDUCT R. 1.6(b) (1) (2002); N.D. RULES OF PROF'L CONDUCT R. 1.6(a) (2002); TEX. RULES OF PROF'L CONDUCT R. 1.05 (2002); VA. RULES OF PROF'L CONDUCT R. 1.6 (2002); WIS. SUP. CT. R. 20:1.6 (2001); cf. N.M. RULES OF PROF'L CONDUCT R. 16-106(B) (2002) (contending that an attorney "should" reveal his client's intention to commit a crime involving serious bodily harm). See generally Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client's Threat to Cause Serious Physical Harm or Death*, 36 IDAHO L. REV. 479, 481 n.4 (2000) (stating the *Model Code* and *Model Rules* do not require that a lawyer issue a warning if his or her client threatens to kill or injure a third party).

264. See Cooper, *supra* note 263, at 479.

265. Clark v. United States, 289 U.S. 1, 15 (1933); see J. Michael Callan & Harris David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 342 (1976).

266. United States v. Zolin, 491 U.S. 554, 562-63 (1989); see also PROPOSED FED. R. EVID. 503(d)(1), 56 F.R.D. 183, 236 (1973) (not enacted) ("There is no privilege under this rule.... If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.").

267. "The [attorney-client] privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) (quoting Upjohn v. United States, 449 U.S. 383, 389 (1981)). If the client is using the lawyer's services to engage in a crime or fraud, the utilitarian justification for the privilege fails. *Id.*

privilege.²⁶⁸ For example, when a defendant in an eviction proceeding confided to his lawyer that he intended to blow up his apartment building, a Massachusetts court held in *Purcell v. District Attorney for the Suffolk District* that the statement was not subject to the crime-fraud exception because the client was not engaging the lawyer's help in the criminal enterprise, or seeking legal advice in order to obtain assistance in perpetrating the crime.²⁶⁹ Even though the attorney in *Purcell* was justified in breaking client confidences and warning the intended victims, he could not later be subpoenaed to testify against his former client in a grand jury proceeding arising out of the criminal act.²⁷⁰ The crime-fraud exception to the testimonial privilege is thus both narrower and broader than the exception to the lawyer's ethical duty of confidentiality. It is narrower because it excepts only communications "in furtherance" of the lawyer's assistance with the crime or fraud.²⁷¹ It is broader because a lawyer's assistance or intended assistance in *any crime or fraud* will result in a piercing of the privilege, not just crimes involving death or substantial bodily injury.²⁷²

Returning to our homicidal spouse example, the client's disclosure to his lawyer would generally remain privileged, and the attorney could refuse to testify against his client even after revealing the client's murderous scheme pursuant to Model Rule 1.6, *unless* the legal advice was sought or used in furtherance of the intended crime. Courts are increasingly expanding the scope of the crime-fraud exception,²⁷³ however, and have found assistance by the lawyer in an illegal act even where none was expressly requested by

268. See, e.g., *Purcell v. Dist. Attorney*, 676 N.E.2d 436, 441 (Mass. 1997) ("A statement of an intention to commit a crime made in the course of seeking legal advice is protected by the privilege, unless the crime-fraud exception applies. That exception applies only if the client or prospective client seeks advice or assistance in furtherance of criminal conduct.").

269. *Id.*

270. *Id.*

271. *Id.* at 440-41.

272. RICE, *supra* note 110, § 8.11, at 84.

273. David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 479 (1986) (arguing that courts have interpreted the "in furtherance" requirement of the crime-fraud release very loosely, and have simply inferred that the client's purpose in obtaining the legal advice was unlawful from the fact that a consultation on the same subject was followed by the crime).

the client or contemplated by the attorney.²⁷⁴ If the party seeking the evidence could make any prima facie showing²⁷⁵ that the client approached the lawyer with the intent to utilize his services to assist in planning or implementing the crime, or, regardless of the client's purpose at the time of the visit, actually used the lawyer's advice in some fashion to assist with the illegal plan, then courts have been willing to pierce the testimonial privilege for reasons of public policy. The intent of the lawyer is irrelevant; the determinative factors are the intent of the client in seeking the legal advice, or the actual use to which the advice is put.²⁷⁶ In our scenario, then, if there was some foundation in fact for a conclusion that the homicidal spouse used any of the advice or recommendations provided by the attorney in pursuit of his unlawful plan, by transferring assets, for example, or arranging for child custody, then the conversation would lose its privileged character.

May the attorney in our hypothetical situation be subject to civil liability in tort if he fails to warn the victim-spouse? Thus far, there

274. See, e.g., *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1041 (2d Cir. 1984) (finding that the government made prima facie showing that sale of company was a fraudulent conveyance and concluding that law firm's records recounting legal advice precipitating such sale could be subpoenaed by grand jury); *Henderson v. State*, 962 S.W.2d 544, 545 (Tex. Crim. App. 1997), cert. denied, 525 U.S. 978 (1988) (holding that the privilege did not protect subpoena of maps that an alleged kidnapper had delivered to her attorney because sequestration of evidence was determined to be continuing crime); see also *In re Grand Jury*, 845 F.2d 896, 898 n.5 (11th Cir. 1988) ("[T]he requirement that legal advice must be related to the client's criminal or fraudulent conduct should not be interpreted restrictively.") (quoting *In re Grand Jury Investigation*, 842 F.2d 1223, 1227 (11th Cir. 1987)).

275. Application of the crime-fraud release doctrine presents difficult questions concerning the degree of proof necessary to make out the exception to the attorney-client privilege. There has been widespread "disagreement and confusion" regarding what constitutes a prima facie case, and whether such a prima facie case dispels the privilege, or merely shifts the burden back to the claimant to prove that he had no intent to use the legal advice in furtherance of a crime or fraud. RICE, *supra* note 110, § 8.6, at 38-63. Those complex issues are beyond the scope of this Article.

276. Judith A. McMorro & Daniel R. Coquillette, *The Federal Law of Attorney Conduct*, in MOORE'S FEDERAL PRACTICE § 811.06[2][c] (3d ed. 2001). The *Restatement (Third) of the Law Governing Lawyers* § 82 (1969) provides that a confidential attorney-client communication is not privileged when the client:

(a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or (b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.

Id.

have been no reported cases in which the court has extended the *Tarasoff* duty to lawyers.²⁷⁷ In fact, those few courts that have addressed the issue have concluded that lawyers have no common law duty to warn third parties of their client's dangerous intentions.²⁷⁸ There are several explanations advanced for this result.²⁷⁹ First, attorneys are trained to solve legal problems, they are not trained to predict dangerousness.²⁸⁰ Psychological assessment of a client and the realistic probability of violent behavior is not ordinarily a part of most attorneys' skill sets. Second, attorneys are less-well equipped than therapists to control dangerous clients, such as by prescribing medication or institutional commitment.²⁸¹ Finally, an attorney has a unique role as a "zealous advocate"²⁸² for his client; extending duties to third parties would be contrary to the client-centered model of our adversarial system.²⁸³

C. Responsibilities of the Clergy

The clergy member faced with our homicidal spouse scenario has much more discretion, and much less guidance from legal norms and

277. Cooper, *supra* note 263, at 481.

278. See *Jones v. Gen. Motors Corp.*, 24 F. Supp. 2d 1335, 1339 (M.D. Fla. 1998) (noting that under Florida law communications protected by the attorney-client privilege cannot give rise to a duty to warn); *Hawkins v. King County*, 602 P.2d 361 (Wash. Ct. App. 1979) (refusing to extend *Tarasoff* to tort action brought by guardians of criminal defendant against his attorney for failure to warn of client's violent and suicidal tendencies following release on bail and attack on mother; recognizing common law arguments in favor of applying duty to warn to attorneys, but refusing to apply *Tarasoff* in this case because victim-mother already knew about violent tendencies, and because the lawyer had heard about danger from mother and not based on secrets learned from client).

279. Third party liability for lawyers, at least in the context of litigation, remains "virtually unheard of" because of the adversarial process and the need for zealous representation. Cooper, *supra* note 263, at 486 (quoting Forest J. Bowman, *Lawyer Liability to Non-Clients*, 97 DICK. L. REV. 267, 273 (1993)).

280. Marc L. Sands, *The Attorney's Affirmative Duty to Warn Foreseeable Victims of a Client's Intended Violent Assault*, 21 TORT & INS. L.J. 355, 362-63 (1986).

281. *Id.* at 362.

282. See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1983).

283. Although it could certainly be argued that differing treatment between psychiatrists and attorneys in terms of their responsibilities for dangerous clients reflects nothing more than self-protection by lawyers/lawmakers, it is true that attorneys may have a continuing role to play within the legal system with respect to a dangerous client whether he discloses the dangerous intentions, and that forced disclosure might drive a wedge between the attorney and any client whom he continues to represent.

standards of professional conduct, in determining an appropriate course of action. First, there are no universal standards of ethics that govern clergy conduct.²⁸⁴ Attorneys, physicians, and psychiatrists derive their authority to practice from the state, which conditions the issuance of a license on the completion of formalized education, certification, and training. Regulations governing these professions prohibit the disclosure of certain confidences, and allow or require the disclosure of others. "In contrast, clerics are free to engage in religious activities without the State's permission, they are not subject to State-dictated educational prerequisites and, significantly, no comprehensive statutory scheme regulates the clergy-congregant ... relationship."²⁸⁵ Although individual religious groups and pastoral associations have enacted statements of best ethical practice for particular ministries,²⁸⁶ clergy members in

284. See GULA, *supra* note 32, at 3; see also *Lightman v. Flaum*, 761 N.E.2d 1027, 1032 (N.Y. 2001).

285. *Lightman*, 761 N.E.2d at 1032. In *Lightman*, the New York Court of Appeals reversed a trial court order denying summary judgment in a case where the plaintiff sued two of her former rabbis alleging breach of fiduciary duty by their disclosure in a divorce proceeding of confidential communications between herself and the rabbis. *Id.* at 1028-29. The plaintiff argued that these confidential communications were privileged under *New York Civil Practice Law and Rules* § 4505, and that their disclosure without her consent was an actionable tort. *Id.* at 1029. The court rejected the argument that rules of evidence can establish an actionable fiduciary duty of confidentiality, distinguishing attorneys and psychiatrists, who have ethical codes independent of the rules of privilege, from clerics, who do not. *Id.* at 1032.

286. See *supra* notes 72, 83. The American Association of Pastoral Counselors provides the following instructions regarding confidentiality of counseling sessions: "We do not disclose client confidences to anyone, except: as mandated by law; to prevent a clear and immediate danger to someone; in the course of a civil, criminal or disciplinary action arising from the counseling where the pastoral counselor is a defendant; ... or by previously obtained written permission." AM. ASS'N OF PASTORAL COUNSELORS CODE OF ETHICS Principle (IV)(D) (1994), available at <http://www.aapc.org/ethics.htm> (emphasis added). The College of Chaplains Code of Ethics requires that the seal of the confessional be broken when "greater health for individuals can be achieved by such revelation." Yellin, *supra* note 13, at 146 (citing COLL. OF CHAPLAINS CODE OF ETHICS (1976)) (emphasis added). Bylaws of the Lutheran Church state that a minister may divulge a confidential disclosure made to him "in order to prevent the commission of a crime." TIEMANN & BUSH, *supra* note 7, at 60 (quoting Minutes of the Twenty-Second Biennial Convention of The United Lutheran Church of America (1960) (emphasis added)). Jewish law suggests that "if another human being is in imminent harm," the need for disclosure outweighs the requirement of confidentiality. Moskowitz & DeBoer, *supra* note 200, at 21 (1999) (citing MICHAEL J. BROYDE, THE PURSUIT OF JUSTICE AND JEWISH LAW: HALAKHIC PERSPECTIVES ON THE LEGAL PROFESSION 25-29 (1996)) (emphasis added). Even in the conservative Jewish tradition, the prohibition of talebearing is not absolute; rabbis who know about an abusive situation are required "to report it to the civil authorities so that it might end." *Id.* at 20 (quoting ELLIOT DORFF, FAMILY VIOLENCE 28 (1995)).

general are not required to adhere to uniform rules of practice that guide or curtail their discretion in addressing this difficult issue.²⁸⁷

Moreover, courts have declined to impose tort liability on clergy members for failure to warn a third party of a parishioner's dangerous intentions. Twelve years after its decision in *Tarasoff*, the California Supreme Court in *Nally v. Grace Community Church of the Valley*²⁸⁸ declined to extend the duty to warn/protect to a pastoral counselor who had failed to take steps to prevent the suicide of a college student who attended his church.²⁸⁹ The court distinguished nontherapists from mental health professionals, concluding that the lack of a supervised medical relationship precluded application of a *Tarasoff* duty to the clergy.²⁹⁰ Pragmatic concerns over and above the minister's inability to predict and control behavior contributed to this decision: The court felt that it would "be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors," in light of the diversity of religious practices in the United States.²⁹¹ Courts outside of California that have addressed the issue have similarly declined to extend *Tarasoff* to clergy members.²⁹²

Finally, there is no recognized exception to the evidentiary privilege that would require a clergy member to testify against his parishioner in our "homicidal spouse" example. Whereas the *Jaffee* footnote suggests that an exception to the testimonial privilege for dangerous persons may be imposed on psychotherapists, and the crime-fraud exception may operate to dispel any protection for the lawyer, no similar doctrine would operate to require a clergy member to testify about his confidential communications with a parishioner concerning a future dangerous crime. So long as the evil

287. TIEMANN & BUSH, *supra* note 7, at 171.

288. 763 P.2d 948 (Cal. 1988).

289. *Id.* at 960.

290. *Id.* at 957. See Knapp & VandeCreek, *supra* note 105, for a discussion of lack of formal counseling training provided to clergy.

291. *Nally*, 763 P.2d at 960.

292. See *Neufang v. Aetna Cas. & Sur. Co.*, No. 81-08118-CS (Fla. Cir. Ct. Apr. 29, 1981) (concluding that the First Amendment compelled the conclusion that a minister owed no duty to wife to disclose violent tendencies of husband learned about in counseling relationship), cited in *Sands*, *supra* note 280, at 368 n.75; *J.A.W. v. Roberts*, 627 N.E.2d 802, 810 (Ind. Ct. App. 1994) (noting that there is no duty in tort law imposed on clergy to report suspicions of child abuse and that the status of clergy member, standing alone, does not give rise to a "special relationship").

plan was disclosed in a private spiritual counseling context, most states would protect the conversation from compelled disclosure.²⁹³ As discussed above, where the clergy-penitent privilege is held to apply, it is generally thought to admit no exceptions, even on obvious public policy grounds.²⁹⁴ Moreover, because in most states the parishioner and not the clergy member holds the privilege,²⁹⁵ even if the minister wished to testify he could not do so over the parishioner's objection.

Few courts or commentators²⁹⁶ have addressed the lack of a "dangerous person" exception to the clergy-penitent privilege. The Third Circuit, in reviewing the federal law of clergy-penitent privilege under Federal Rule of Evidence 501, flagged the issue by noting: "The precise scope of the privilege and its additional facets, such as whether a clergy-person should be required to disclose confidential communications when harm to innocent parties is threatened and imminent, are, therefore, most suitably left to case-by-case evolution."²⁹⁷ The reluctance of courts and legislatures to recognize an exception to the clergy-penitent privilege is perhaps best understood as simple avoidance of a delicate and complex policy issue. Nonetheless, it is both a curious and troubling omission in our laws. Even the spousal communication privilege, perhaps the most jealously guarded of all testimonial privileges,²⁹⁸ has been held to admit an exception for conversations pertaining to joint future crimes.²⁹⁹

293. See discussion *supra* notes 96-100 and accompanying text.

294. See *United States v. Isham*, 48 M.J. 603, 606 (N.M. Ct. Crim. App. 1998); *Kruglikov v. Kruglikov*, 217 N.Y.S.2d 845 (N.Y. Sup. Ct. 1961).

295. See discussion *supra* note 109 and accompanying text.

296. See Yellin, *supra* note 13, at 147 (concluding "[i]t is difficult to reach a firm conclusion on the limit of the clergy privilege," and that a "definitive answer [on this public safety issue] must await further judicial pronouncement"). Without elaboration, Yellin suggested in a model statute appended to his 1983 article that the clergy-penitent privilege should contain an exception when the communication at issue "threatens harm to any person." *Id.* at 156; see also Harris, *supra* note 253, at 60 n.116 ("Whether there is an exception to the clergy-communicator privilege for prevention of harm, like the dangerous patient exception to the therapist-patient privilege, remains undecided.").

297. *In re Grand Jury Investigation*, 918 F.2d 374, 385 (3d Cir. 1990).

298. Due to the strong public policy in favor of protecting marital harmony and providing a safe haven with one's spouse for the discussion of personal affairs, exceptions to the spousal communications privilege have been very slow to develop. See Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 HARV. L. REV. 730, 734 (1964).

299. There are two types of marital privilege: (1) a privilege that protects confidential

VI. CLOSING THE GAP

When a parishioner reveals to a minister an intent to commit a future violent crime, there is marginal social value in protecting that conversation.³⁰⁰ In utilitarian terms, the injury caused to

communications between spouses, which applies to both civil and criminal cases; and (2) a privilege against adverse spousal testimony, which is the right of one spouse to refuse to testify against another spouse in a criminal proceeding. *Trammel v. United States*, 445 U.S. 40, 52-53 (1979). The former applies only to private communications, and both parties must waive the privilege where it is applicable before the substance of the communications may be disclosed. The latter applies to testimony about *facts* perceived by the witness other than through confidential communications, and may be waived by the testifying spouse.

One almost universally recognized exception to the spousal communication privilege is for cases alleging a crime by one spouse against another or a crime against a child of the marriage. SCOTT N. STONE & ROBERT K. TAYLOR, 2 TESTIMONIAL PRIVILEGES § 5.13, at 5-31 (2d ed. 1993). Until the latter half of the twentieth century, those were the only recognized exceptions at common law and under the statutes existing in most states. However, many federal circuits have recently begun to recognize an exception to the spousal communications privilege for conversations pertaining to ongoing or future joint criminal activity, on the grounds that such communications are contrary to public policy and therefore not worthy of protection. *United States v. Sims*, 755 F.2d 1239, 1241 (6th Cir. 1985); *United States v. Ammar*, 714 F.2d 238, 258 (3d Cir. 1983); *United States v. Price*, 577 F.2d 1356, 1365 (9th Cir. 1978); *United States v. Mendoza*, 574 F.2d 1373, 1379-81 (5th Cir. 1978); *United States v. Kahn*, 471 F.2d 191, 194-95 (7th Cir. 1972), *rev'd on other grounds*, 415 U.S. 143 (1974).

Even when faced with a privilege statute cast in absolute terms, some state appellate courts have also crafted a "future crimes" exception to their spousal privilege. *See, e.g., In re Heistand*, 708 S.W.2d 125, 126 (Mo. 1986) (en banc) (stating that as a matter of public policy the marital privilege should not apply to discussions in written communication related to future crimes); *People v. Watkins*, 63 A.D.2d 1033, 1034 (N.Y. App. Div. 1978) (holding that conversations between husband and wife pertaining to management of joint gambling operation was not privileged). Federal circuits are split on the issue of whether this emerging "joint or future crimes" exception applies to the privilege for adverse spousal testimony as well as the privilege for spousal communications; that is, whether a spouse may validly refuse to testify as to *facts witnessed* where the couple is engaged in joint criminal conduct. *But see In re Malfitano*, 633 F.2d 276, 280 (3d Cir. 1980) (reversing order of contempt against wife who refused to testify at husband's criminal trial about corporate records which she had access to as corporate secretary on grounds of adverse spousal testimony privilege); *United States v. Van Drunen*, 501 F.2d 1393, 1396-97 (7th Cir. 1974), *cert. denied*, 419 U.S. 1091 (1974) (holding marital privilege for adverse spousal testimony does not apply if the testifying spouse is *either* a victim or a participant in the crime).

300. *See* WIGMORE, *supra* note 17, § 2396, at 877. A utilitarian may argue that breaching confidentiality or privilege in this situation will not save lives, it will simply chill the act of disclosure, and thereby eliminate the possibility that a clergy person could counsel the errant party to forego his intended unlawful conduct. The same argument was rejected by the California Supreme Court in *Tarasoff v. Regents of University of California*, wherein the court cited empirical studies casting doubt on the suggestion that rules piercing confidentiality

society by shielding the conversation outweighs the harm to the relationship occasioned by disclosure. The harm to the person threatened is real and immediate. The likelihood of the parishioner benefitting from spiritual counseling about his future violent conduct is speculative.³⁰¹ Concern for the preservation of human life should outweigh concerns for maintaining confidentiality, because the primacy of human life is paramount in the hierarchy of moral values recognized by most individuals, and even most religious faiths.³⁰² Even viewed from the perspective of the privacy rationale for the privileges, there is no greater justification for shielding a conversation with a priest pertaining to a future dangerous conduct than in shielding the very same conversation with a psychotherapist.

Fundamental decency and respect for human dignity suggest that a clergy member faced with the difficult choice of respecting confidentiality and protecting someone's bodily integrity should choose the latter path. But the difficult question is, how should the law influence this choice? One approach would be to do nothing. Perhaps we should have confidence in the moral choices made by our clergy. Most conscientious clergy members faced with a violent parishioner undoubtedly would try to advise the person not to engage in the criminal conduct, counsel him or her to seek medical or legal intervention,³⁰³ and ask for permission to disclose the

deter violent persons from being candid in their therapy sessions. 551 P.2d 334, 346 n.12 (Cal. 1976).

301. This is not to diminish the valuable role clergy may play in helping parishioners to modify their conduct and turn away from sin. Even if a minister learns of a violent intention from his parishioner, however, he may not be in an adequate position to prevent it because the parishioner might be suffering from a severe mental illness or an addiction—diseases of the body, and not of the soul. Simply put, the parishioner's spirit might be able and willing to conform to moral and legal codes of conduct, but their mind and body might be weak. Psychotherapists are in a better position than clergy to diagnose and treat violent tendencies that stem from such conditions. If the public interest is best served by requiring psychotherapists to disclose the criminal intentions of dangerous persons, the public safety argument holds even greater weight for members of the clergy. Because the minister is less competent to handle such dangerous tendencies, there is more, rather than less, need for disclosure. See *Barefoot v. Estelle*, 463 U.S. 880, 920 (1983) (Blackmun, J., dissenting) (citing the amicus brief of the American Psychiatric Association estimating that psychiatrists are only able to accurately predict future violence one-third of the time).

302. Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63, 87 (1998).

303. One anomaly of the current state of the law is that a clergy member has no duty to

conversation to others for the purposes of seeking help. If those approaches were unavailing, many if not most of those clergy members not constrained by sacred duties of confidentiality would probably "do the right thing" and disclose their parishioner's violent intentions, either to their intended victim or to the police.³⁰⁴ So long as this option of voluntary disclosure is available to clergy,³⁰⁵ why should we not have confidence that their discretion will be exercised appropriately?

One response to this argument is that recent history provides us with examples of the clergy putting personal or institutional interests ahead of the interests of innocent third parties, especially if they believe that their failure to disclose might never become public. The current crisis of child sexual abuse in the Roman Catholic Church, and the apparent decision by some clergy members to transfer known pedophiles to positions where they would have further access to and responsibility over children, is one obvious example of this phenomenon.³⁰⁶

Assuming that the law should stake a position in this important battle between confidentiality and public safety, the question becomes where? Other professions have licensing systems, which subject their members to mandatory compliance with common ethical standards. States have been reluctant to engage in licensing of clergy, however, due to the entanglement that would ensue between church and state, and the obvious difficulty in establishing eligibility and performance criteria without interfering with the free exercise of religion.

warn about a parishioner's dangerous intentions, but if that same clergy member refers the parishioner to a psychotherapist for medical help and the parishioner makes an identical revelation in a clinical context, the psychotherapist would be under a legal duty to disclose.

304. See GULA, *supra* note 32, at 151-52 (proposing a model code of ethics for pastoral ministers, and recommending disclosure of confidence "[w]hen it is necessary to avert a serious threat of harm to another").

305. *Lightman v. Flaum* suggests that disclosure by clergy in violation of the testimonial privilege is not an actionable breach of fiduciary duty. 761 N.E.2d 1027, 1031-32 (N.Y. 2001).

306. See *supra* note 2 and accompanying text. Avoidance of scandal, or perceived connection to scandal, seems to have been a dominant value in the decision making of some in the Catholic Church. One possible positive outcome of the ongoing sexual abuse crisis in America may be that church decision makers will be more sensitive in the future to the adverse effect which *failure to warn* will have on public opinion.

Were the state to require licensing of the clergy, it would, on the one hand, have to establish criteria of eligibility which would necessitate the state's involvement in doctrinal and theological matters clearly forbidden by the [F]irst [A]mendment.... On the other hand, licensing by the state, even without fixed eligibility criteria, would have the state place its imprimatur on religion and put it in the business of legitimizing anyone who claimed to be a qualified clergyman.³⁰⁷

Even apart from First Amendment concerns, the wide disparity of acceptable clergy counseling practices in America is generally considered a sufficient reason to exempt clergy from professional licensing requirements.³⁰⁸

Another option would be for the courts to recognize a clergy member's common law duty in tort to warn third parties of their parishioner's intended violent acts, similar to the duty imposed on psychotherapists by the *Tarasoff* decision.³⁰⁹ The threat of civil liability and large damage awards would then act as a check on clergy decisions in this area. However, as discussed above, courts have been reluctant to recognize a special relationship within the meaning of the *Restatement (Second) of Torts* between a clergy member and an ordinary parishioner,³¹⁰ due to clerics' inability to either predict or control dangerous behavior.³¹¹ Moreover, the impracticability of crafting reasonable standards of care for the clergy is a major obstacle to creating a common law duty in tort.³¹²

307. Ben Zion Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V. L. REV. 47, 51 (1981) (citations omitted).

308. See Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 232-34 (2000).

309. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 344, 345-47 (Cal. 1976).

310. A clergy member's duty to warn/protect could be found where an employment relationship exists between the clergy member and the penitent. Cf. *Marquay v. Eno*, 662 A.2d 272, 280 (N.H. 1995) (holding that school officials had a duty to act affirmatively to prevent sexual misconduct by an employee against students that occurred outside of the scope of his employment). It may also be found where a special relationship exists between the clergy member and the third-party victim. See *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 985 P.2d 262, 276-78 (Wash. 1999) (en banc) (imposing on church an affirmative duty to prevent foreseeable harm to children in its care).

311. Sands, *supra* note 280, at 368-69 (discussing possible extension of *Tarasoff* to ministers, and concluding that "attempts to apply a *Tarasoff*-like duty to the clergy have so far failed"); see Knapp & VandeCreek, *supra* note 105, at 298.

312. TIEMANN & BUSH, *supra* note 7, at 171.

The duty owed to a third party victim, assuming that such a duty was imposed, would be the duty to exercise "reasonable care" under the circumstances.³¹³ The very fact that a reasonable clergyperson standard would be difficult or impossible to define cautions against fashioning a common law remedy in tort.³¹⁴ Courts and juries may simply not be well enough equipped to ascertain the competence of counseling when performed by persons affiliated with religious organizations.

A third possibility would be to create a statutory duty to warn, essentially legislating *Tarasoff* and extending the "mandated reporting" statutes beyond their present application to past or ongoing acts of child abuse,³¹⁵ to include intended future violent conduct. Such a statute could require clergy members to warn authorities, the intended victim, or both of a parishioner's communicated intent to commit serious bodily injury, and either subject a clergy member who violates this statutory requirement to a criminal penalty, or to a private right of action by the victim. But whether creating statutory disclosure obligations in this piecemeal fashion is wise policy, it is unlikely to be politically viable. If a clergy member should have a statutory duty to warn individuals about future violent acts intended by a parishioner, why not a bartender, a hairdresser, or the parishioner's best friend? Those individuals might be just as likely to learn about an individual's dangerous behavior, and equally or better suited to prevent it.³¹⁶ For these and other reasons, Good Samaritan proposals generally have not fared well in our federal or state legislatures.³¹⁷ Imposing an affirmative duty on strangers to help one another has always been suspect in the American legal tradition because it is considered

313. *Tarasoff*, 551 P.2d at 345 ("[T]herapists need only exercise 'that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances.'") (alteration in original).

314. Sands, *supra* note 280, at 369.

315. See discussion *supra* notes 228-29 and accompanying text.

316. An individual who knows about the criminal plans of another and fails to prevent them is not liable as an accomplice or accessory before the fact to the crime, absent evidence that he shared the required mental state of the actor and either solicited the crime, or aided, agreed to aid, or attempted to aid in its perpetration. See MODEL PENAL CODE § 2.06(3) (1962).

317. See Mosteller, *supra* note 29, at 277. Mosteller cites one failed legislative attempt in 1983 to require attorneys to report future crimes when the lawyer's professional services had wittingly or unwittingly aided in the scheme. *Id.* at 277 n.212 (citing Lawyer's Duty of Disclosure Act of 1983, S. Res. 485, 98th Cong., 129 CONG. REC. 2281 (1983)).

inconsistent with our society's commitment to personal autonomy and privacy.³¹⁸ Only a handful of states have passed general "duty to aid" statutes, imposing a misdemeanor penalty on any bystander to an accident or person with knowledge of a crime in progress who fails to render aid to the victim.³¹⁹

A fourth potential solution to the problem, and the one that I propose, is for states to enact a dangerous person exception to their clergy-penitent privilege statutes. This is both a modest and an inelegant solution. It is modest because it is consistent with the Supreme Court's admonition that testimonial privileges stand in the way of the search for truth, and should be narrowly applied wherever possible.³²⁰ It is also consistent with, if not directly parallel to, similar exceptions already found in the psychotherapist-patient and attorney-client privileges.³²¹ The proposal is inelegant, however, in the sense that it attempts to solve a problem of *confidentiality* with an alteration to the laws of *privilege*. An exception to the testimonial privilege will not require clergy to *warn*, at most it will require clergy to *testify* about the confidential communication if ever called upon to do so. What we care most about—and what we are trying to promote—is a warning by clergy to third party victims *before* a crime occurs, so that death or serious bodily injury may be averted. Although society certainly has a strong interest in detecting crime and punishing criminals, the objective of preventing crime in the first instance is of a higher

318. Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 1-2 (1993).

319. See Shayna Rochester, *What Would Seinfeld Have Done if He Lived in a Jewish State? Comparing the Halakhic and Statutory Duties to Aid*, 79 WASH. U. L.Q. 1185, 1200 (2001) (citing "duty to aid" statutes in Minnesota, Rhode Island, Vermont, and Wisconsin). In addition, nine states have enacted "duty to report" statutes for violent crime outside the area of child abuse or elder neglect; these jurisdictions typically apply their Good Samaritan provisions only to *completed or ongoing* designated felonies that have been *observed or witnessed* by the individual upon whom the legal duty evolves, not to inchoate or future crimes. See Nancy Levit, *The Kindness of Strangers: Interdisciplinary Foundations of a Duty to Act*, 40 WASHBURN L.J. 463, 466-67 (2001). Massachusetts, for example, has enacted a statute that requires a citizen "at the scene of" a rape, murder, or armed robbery to report the crime to authorities "to the extent that said person can do so without danger or peril to himself or others." MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1999).

320. *Trammel v. United States*, 445 U.S. 40, 50 (1979).

321. See discussion *supra* notes 257, 260, 265 and accompanying text; see also *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996) (protecting conversations between a psychotherapist and her patient as privileged within the meaning of Rule 501 of the *Federal Rules of Evidence*).

moral priority than the objective of punishing it after the fact. Due to the lack of licensure and common law standards of reasonable care for clergy, however, a solution of the duty to warn problem within the doctrine of confidentiality is extremely unlikely. Perhaps the best we can do is to tailor our laws of evidentiary privilege in judicial proceedings to mirror what we think a clergy member's obligations of confidentiality should be outside of the courtroom.³²²

Though perhaps an imperfect solution,³²³ a privilege exception would have two important benefits. First, it would send a strong message to those clergy members conscientiously trying to do the right thing that the law values human life over confidentiality, and that there is no extant public policy to promote confidential communications on the subject of future dangerous crimes. Knowledge by a clergy member that the law will require him to testify about the conversation if later called upon to do so, for example, in a civil commitment or criminal proceeding, may be sufficient to encourage him to reveal the information in time to avoid the harm.³²⁴ Second, a dangerous person exception to the

322. Critics of my proposal may also argue that creating a privilege exception based on the subject matter of the communication creates problems of judicial administration, because a court will not be able to determine whether the privilege applies without examining the contents of the conversation, thereby breaching confidentiality. But this same argument could be leveled against the crime-fraud exception under the attorney-client privilege, and courts nonetheless have been willing to conduct a limited *in camera* review in order to determine whether the privilege attaches. See, e.g., *United States v. Zolin*, 491 U.S. 554, 568-69 (1989). Moreover, if my proposal operates as intended, it will encourage the clergy to reveal the confidence in advance of litigation in order to prevent the harm. This revelation, by way of notification to the police or the victim, would create a nonprivileged source of evidence that the court could examine to determine whether the parishioner's initial conversation with the clergy member is subject to the exception for conversations pertaining to future violent crimes. See *id.* at 574-75.

323. Purists will not be satisfied with my approach, because an exception to the privilege for future dangerous crimes is being suggested in order to solve a problem of confidentiality that arguably should be dealt with through licensing or professional regulation. But the axiom that "the perfect should not be the enemy of the good" seems apposite in this area. Courts and legislatures may have done nothing about the problem of clergy confidentiality to date due to the vast complexities of the issues involved. Competing tensions and strongly held views about the underlying core values suggest that no single solution will be without some limitations.

324. GULA, *supra* note 32, at 126 (arguing that because ministers have no codified rules of ethics, they tend "to look for moral guidance in legal statutes"). It may be argued that clergy will be less likely to reveal their parishioner's dangerous intentions if they perceive that such a revelation will cause them to be subpoenaed to testify against their parishioner at a later civil or criminal proceeding, and that creating an exception to the testimonial privilege will

evidentiary privilege may alleviate concerns held by clergy members that they could be sued if they voluntarily revealed their parishioners' dangerous secrets,³²⁵ providing them with a defense to a possible cause of action for malpractice or breach of fiduciary duty arising out of their morally laudable decision to warn the victim, the authorities, or both.³²⁶

One reason that courts and legislatures may have been reluctant to create such an exception to the clergy-penitent privilege for dangerous persons is that it raises the difficult and controversial issue of what to do about sacramental confessions.³²⁷ Returning to

actually *discourage* warnings because it will expose the clergy member as a source of future damaging testimony against his parishioner. *Cf. Purcell v. Dist. Attorney*, 676 N.E.2d 436, 441 (Mass. 1997) (permitting an attorney to disclose a client's contemplated dangerous act without later being called upon to testify about the confidence revealed). I find this argument unconvincing. It assumes that clergy members would rather avoid testifying than avoid a potential murder or other violent act. Assuming that the clergy member has some modicum of interest in his parishioner's welfare and the welfare of others, it seems that preventing the parishioner's crime altogether will be a higher priority than avoiding testifying after the fact.

325. Because there are no uniform standards of conduct or state licensing requirements applicable to clergy, there is no legal impediment, other than fear of tort liability, to prevent most clergy members from voluntarily disclosing a parishioner's serious threat of violence towards another. *Cf. 1983 CODE c.1388, § 1* (imposing penalty of excommunication for breach of confidentiality in the priest-penitent relationship). Attorneys and psychotherapists, by comparison, are required under threat of suspension, to retain their clients' confidences unless an exception to the rule of confidence applies. *See supra* notes 238, 261 and accompanying text.

326. Although the New York Court of Appeals has ruled that a clergy member's unauthorized disclosure of otherwise privileged communications does not give rise to a common law action for breach of fiduciary duty, *Lightman v. Flaum*, 761 N.E.2d 1027, 1031 (N.Y. 2001), there is disagreement among other jurisdictions as to whether similar tort actions are sustainable, leaving clergy at risk that they could expose themselves to liability if they warn the authorities or innocent third parties of their parishioner's stated intent to commit a future violent crime. *See Barnes v. Outlaw*, 937 P.2d 323, 327 (Ariz. Ct. App. 1996) (recognizing cause of action against clergy for counselor malpractice for disclosure of confidence in contravention of state privilege); *Alexander v. Culp*, 705 N.E.2d 378, 382 (Ohio Ct. App. 1997) (recognizing cause of action against clergy in common law negligence for disclosure of confidence in contravention of state privilege). Another tort theory possibly applicable to this situation is invasion of privacy. This tort, however, generally requires proof not only that the defendant intentionally disclosed facts of such a personal nature that it would be highly offensive to the reasonable person, but also that these facts were of no legitimate concern to the public. *See RESTATEMENT (SECOND) OF TORTS § 652* (1965). This last element of an invasion of privacy claim would be difficult to prove in a case where a clergy member disclosed a parishioner's intent to commit a violent crime. *See In re Viviano*, 645 So. 2d 1301, 1307 (La. Ct. App. 1995) (holding action of psychiatrist in disclosing patient's threats on judge's life reasonable under the circumstances).

327. As discussed *supra* notes 122-24 and accompanying text, the state of New Jersey has

our "homicidal spouse" example, let us suppose that the parishioner reveals his intent to murder his wife not in a private spiritual counseling session, but in a confessional of a Roman Catholic Church. Let us further suppose that this penitent confesses to a priest and asks for absolution of past sins committed towards his wife, say rage or infidelity, but also in the course of this confession reveals both an irrepressible homicidal impulse towards his wife and a plan to carry it out. In that situation, may the priest warn the wife or the authorities about the danger, or does the seal of the confessional protect the communication?

Canonists of the Roman Catholic Church have struggled with this difficult issue. Because the priest cannot give absolution unless the penitent is resolved to turn away from sin and make satisfaction,³²⁸ some canonists have recognized legitimate arguments in favor of *not* applying the seal of the confessional to the revelation of an intent to commit future sins.³²⁹ Although not free from doubt, however, the prevailing view among canonists in the Roman Catholic Church is to the contrary.³³⁰ Canon law declares the seal of the confessional

come the closest to creating a dangerous person exception to the clergy-penitent privilege by placing the privilege in the hands of the minister when the confidential communication concerns "a future criminal act." N.J. STAT. ANN. § 2A:84A-23 (West Supp. 2002). Under the New Jersey statute, a minister has the *option* of disclosing a communication that reveals an intent to harm another. Although this is an improvement from the law in effect in most states in which the penitent holds the privilege, it still does not serve the purpose of signaling to ministers that they *should* disclose these conversations. On the critical issue of whether concerns for public safety outweigh the parties' interests in confidentiality, this statute remains completely neutral.

328. Under Canon law, the faithful may receive the remedy of the sacrament of penance only if they are disposed toward "repudiating the sins they have committed and having the purpose of amending their lives." See 1983 CODE c.987. Confession in the Catholic Church is thus a sacrament of conversion, or "a call to a change of heart." LAWRENCE E. MICK, *PENANCE: THE ONCE AND FUTURE SACRAMENT* 18 (1987). The sacrament of penance consists of three actions by the penitent and absolution by the priest. The penitent's three acts are (1) confession of sin; (2) contrition (or "sorrow") for sin; and (3) the intention to make reparation (or "satisfaction"). PATRICK J. TWOHIG, *A BRIEF CATECHISM OF THE CATHOLIC CHURCH* 32 (2001).

329. Lynwood, perhaps the most famous English canonist, wrote in the *Provincial of Lynwood* in 1679: "Others say that where the confession is one of a sin about to be committed it is not a real confession, and that to the person making it, a penance cannot be given." TIEMANN & BUSH, *supra* note 7, at 43.

330. Anthony Cardinal Bevilacqua argued that the obligation to protect the seal of the confessional is absolute, and that this seal may not be broken even if the penitent consents or if it is necessary to prevent a greater evil. Anthony Cardinal Bevilacqua, *Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L.A. L. REV. 1733,

inviolable, and mandates that matters revealed *attendant* to a confession may not be disclosed under any circumstances.³³¹ Thus, in the Roman Catholic tradition, requiring clergy to reveal evidence of their parishioner's intent to commit a future dangerous act may require the clergy member to take action in direct contravention of their sacred duties, and expose them to the penalty of automatic excommunication.³³²

I propose that states concerned about the absolute nature of the clergy-penitent privilege enact a "dangerous person" exception to this privilege for conversations revealing the parishioner's intent to commit a future dangerous crime, but that this exception be limited to confidential communications occurring outside of the confessional. When a parishioner reveals to a clergy member his intent to commit a future dangerous crime in a sacramental setting such as a confessional, the communication should still be privileged, but

1737 (1996). "[T]he secret [of the confessional] is more rigid than any other and never permits the least exception." *Id.* at 1735-36 (quoting Emile Jombart, *Le Secret*, in 4 Dictionnaire de Droit Canonique 41 (Raoul Naz ed., 1957)). "That which the priest learns in the confessional, he knows uniquely as the representative of God, and not at all through human knowledge or communication; he should completely detach himself from (such knowledge); it is as if he knows nothing." *Id.* (quoting Jombart, *supra*). The catechism of the Catholic Church requires that a priest "never reveal any sins he has heard in confession." REV. GERALD WILLIAMS, *THE CONTEMPORARY CATHOLIC CATECHISM* 136 (1973). Because desiring and undertaking a plan to murder one's wife is itself a sin, most priests would take the view that disclosure of this secret outside of the confessional would violate the seal, irrespective of whether the penitent had "perfected" his confession by resolving to make reparation and turn away from the intended act. See HENRY DAVIS, S.J. *MORAL AND PASTORAL THEOLOGY* 317-18 (Z.W. Geddes, S.J. ed., 8th ed. 1959) (arguing that even when a confession is interrupted before absolution is conferred, or when the priest decides to deny or postpone absolution, the priest is still forbidden to disclose the contents of what he heard in such an imperfect confession); see also 1983 CODE c.984, § 1, ("The confessor is wholly forbidden to use *knowledge* acquired in confession to the detriment of the penitent, even when all danger of disclosure is excluded.") (emphasis added).

331. *Canon 983* provides: "The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion." 1983 CODE c.983, § 1. The commentary to *Canon 983* supports an absolute construction of the seal of the confessional:

Neither the Canon nor earlier interpretations admit exceptions to the norm: this is the meaning of the expression 'in any way ... by word or in any other manner or for any reason.' *No distinction is made among the matters confessed*, whether the sinful act itself or *attendant circumstances*, or the acts of satisfaction of penances imposed, etc. The secrecy concerning the penitent and his or her confession of sins that is to be maintained is properly described as total.

Id. (emphasis added).

332. See *id.* c.1388, § c.1.

only at the option of the clergy member.³³³ Catholic, Greek Orthodox, and Lutheran ministers would have the option to reveal a parishioner's intent to commit future harm learned in a confessional setting, but would have no *obligation* to do so if, after consultation with their superiors, they believed their sacred duty of secrecy outweighed their ethical duty to warn. A model clergy-penitent privilege statute reflecting this proposed exception would look something like the following:

A. Definitions. As used in this rule:

1. A "clergy member" is a minister, priest, rabbi, or other similar functionary of a religious organization, or a person reasonably believed to be so by the individual consulting him.
2. A "confidential communication" is any communication, written or oral, made privately by an individual to a clergy member for the purposes of spiritual advice or counseling, and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
3. A "penitential communication" is any confidential communication between an individual and a clergy member made pursuant to the recognized sacraments of the church for the purposes of spiritual absolution or forgiveness, provided that the clergy member is authorized under Canon law or church doctrine to hear such communication and has a sacred duty under Canon law or church doctrine to keep it secret.

B. General Rule of Privilege:

An individual has a privilege to refuse to disclose and to prevent another from disclosing a confidential

333. My proposal borrows one positive feature of the New Jersey statute, discussed *supra* notes 122-24 and accompanying text, by providing that for conversations pertaining to future dangerous crimes that occur under the seal of the confessional, the privilege should rest with the clergy member rather than with the parishioner. See N.J. STAT. ANN. § 2A:84A-23 (West Supp. 2002). If the priest feels morally bound to disclose such a communication, even if it is in violation of Canon law, he may do so. The choice should be his, since the consequence in terms of religious penalty (excommunication) will inure to him and not to the parishioner.

communication made by the individual to a clergy member in his professional character as a spiritual advisor.

C. Who May Claim the Privilege:

Except as provided in subparagraph (D), the privilege under this rule may be claimed by the individual or the individual's guardian or conservator, or by the individual's personal representative if the individual is deceased. The clergy member who heard or received the confidential communication is presumed to have authority to claim the privilege on behalf of the individual in the absence of evidence to the contrary.

D. Exception:

There is no privilege under this statute for confidential communications other than penitential communications if the communication provides the clergy member with reasonable cause to believe that the individual communicating with him intends to commit a future criminal act causing death or serious bodily injury to a reasonably identifiable third person. Penitential communications revealing the penitent's intent to commit a future criminal act involving death or serious bodily injury to a reasonably identifiable third person shall be privileged, but this privilege shall be held by the clergy member, and may be waived by the clergy member without the consent of the individual.³³⁴

Pursuant to such a model statute, most private conversations with a clergy member which give the clergy member reasonable cause to believe that the confider intends to commit a serious violent crime in the future would not be privileged. For example, if a parishioner revealed to his minister continuing acts of child sexual abuse against a family member, or an intent to plant a bomb at his former place of employment, these conversations—even if made in private and for the purposes of spiritual guidance—would no longer be shielded from disclosure. The minister could reveal these conversations to authorities or the intended victim without fear of

334. Other than the exception, this model statute tracks the UNIF. RULES OF EVID. 505, NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS (Aug. 1974).

suit or censure, and authorities could thereafter subpoena the minister to testify about the conversations in a subsequent legal proceeding.

There are compelling policy reasons, however, for excluding sacramental confessions from this newly created "dangerous person" exception to the privilege, and for making those communications privileged at the option of the clergy member. First, as discussed below, clergy who practice sacramental confessions would have at least a colorable argument that if they were compelled to reveal confidential communications occurring in a confessional, their freedom to practice their religion would be impeded.³³⁵ It is certainly appropriate to be sensitive to possible constitutional challenges in drafting privilege statutes or interpreting common law doctrine, so as to avoid problems whenever possible.³³⁶ Moreover, because many Catholic priests would view their sacred obligations under Canon law to be paramount to their obligations under civil law, compelling them to testify about conversations pertaining to "future crimes" might be ineffective because they may choose to be held in contempt rather than violate the seal of the confessional. The specter of a priest being jailed for contempt for refusing to answer questions about what occurred in a confessional is extremely unappealing, and likely to undermine faith in the government. A priest who refuses to testify because he is following a sacred obligation and adhering to the dictates of a perceived higher moral authority could well be viewed as a martyr rather than as an unsympathetic contemnor of our justice system.

335. Robert L. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27, 51 (1967). A Catholic priest, unlike most other clergy, would face denunciation and excommunication if he were to violate the seal of the confessional, stripping him of his religious functions and making him incapable of continued membership in the Church. It is worth noting that the first case in America to recognize the priest-penitent privilege was *People v. Phillips*, and in that case, the court concluded that "free exercise" protections found in the state constitution prohibited the government from compelling a Catholic priest to answer questions about facts learned in a confessional setting. See *People v. Phillips*, 1 W.L.J. 109 (1843); see also *supra* notes 53-54 and accompanying text.

336. See, e.g., *Scott v. Hammock*, 133 F.R.D. 610, 615-17 (D. Utah 1990) (favoring a broad reading of state privilege statute); *Cook v. Carroll*, 1945 I.R. 515, 515-19 (Ire.) (deciding to depart from English common law and recognize privilege, due to Ireland's constitutional "special recognition" of Catholic faith and the "indefeasible right of the Irish people to develop its life in accordance with its own genius and traditions").

VII. CONSTITUTIONAL CONSIDERATIONS

My proposal distinguishes among religions, offering an exception to the privilege for certain communications pertaining to future crimes, and a privilege in the hands of the clergy for others, depending on the particular religious discipline and the context of the communication. Due to this distinction, it will be criticized on the grounds that it burdens the religious practices of some, and favors the practices of others.

At the outset, it should be noted that the form of distinction I propose is not altogether unique. At least three states have structured their exception to their child abuse reporting requirements in a way that distinguishes among the type of confidential spiritual counseling sessions at issue.³³⁷ In those three states, many confidential spiritual counseling sessions are not protected from mandated disclosure if they give rise to suspicions of child abuse, even though they would otherwise be subject to the testimonial privilege. These states essentially have recognized that the testimonial privilege has grown beyond its constitutional underpinnings, and have cut it back in the interests of public policy for certain forms of required reports, limiting it to a much narrower class of spiritual confidences.³³⁸ Only those clergy who have a colorable claim that their freedom of religious worship would be impeded by the reporting requirement are excused from the duty to do so. Creating a dangerous person exception that distinguishes between sacred and nonsacred communications would operate in much the same manner.

337. In Delaware, Louisiana, and Maryland, for example, the testimonial privilege is broad, and protects confidential communications for the purposes of spiritual advice or counseling in a manner consistent with Proposed Federal Rule of Evidence 506. *See* DEL. R. EVID. 505; LA. CODE EVID. ANN. art. 511 (West 1995); MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2002). The exception to the child abuse reporting requirement, however, is much narrower, mandating a report unless the clergy member learns about this child abuse in the course of a "sacramental confession," DEL. CODE ANN. tit. 16, § 909 (Supp. 2000); "confession or other sacred communication," LA. REV. STAT. ANN. art. 603 (West 1995); or from a communication "in the course of discipline enjoined by the church," where the clergy member is doctrinally bound to maintain secrecy, MD. CODE ANN., FAM. LAW § 5-705 (Supp. 2002). No reported cases in these jurisdictions have addressed a challenge to the states' mandated reporting statutes on Establishment Clause grounds.

338. *See supra* note 337.

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."³³⁹ The United States Supreme Court has held that the Fourteenth Amendment embraces both the Free Exercise Clause³⁴⁰ and the Establishment Clause,³⁴¹ making them applicable to the states. The religion clauses demand a cautious balance between tolerating religious belief on the one hand, and not promoting religion on the other.³⁴² The difficult challenge in First Amendment jurisprudence is to find a neutral course between the two religion clauses, "both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."³⁴³ If the government refuses to recognize the practices of religious organizations for fear of violating the Establishment Clause, it may impinge on a citizen's free exercise, and if it takes action to accommodate religious belief, it may be seen as promoting religion. Taken together, however, the religion clauses require at a minimum that the government not establish an official church, and that the government be neutral in its treatment of religions, not preferring or burdening one sect to the advantage or disadvantage of another. Through this lens, I will analyze the proposed dangerous person exception to determine whether it is likely to survive a constitutional challenge.

A. The Free Exercise Clause

The Free Exercise Clause prohibits the enactment of laws that suppress religious belief or practice.³⁴⁴ The central tenet of the Free Exercise Clause, as envisioned by the Founders, is that "the citizenry [should] be free from governmental pressure as to how they worship."³⁴⁵ It thus imposes at least two distinct but related restraints on governmental power: (1) the government may not compel its citizens to attend any particular place of worship, or

339. U.S. CONST. amend. I.

340. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

341. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

342. *Walz v. Tax Comm'r*, 397 U.S. 664, 669 (1970).

343. *Id.* at 668-69.

344. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

345. Nicholas Wolterstorff, *A Religious Argument for the Civil Right to Freedom of Religious Exercise, Drawn from American History*, 36 WAKE FOREST L. REV. 535, 543 (2001).

maintain any particular ministry against their free will; and (2) the government may not deprive any persons of the benefits of citizenship on account of their preferred religious belief or nonbelief.³⁴⁶

The First Amendment "embraces two concepts, freedom to believe and freedom to act."³⁴⁷ Whereas the freedom to believe is absolute and never subject to regulation, the government may in certain circumstances curtail the freedom to act.³⁴⁸ Laws that either directly or indirectly burden religiously motivated conduct implicate First Amendment concerns.³⁴⁹

For approximately twenty-seven years, the Supreme Court extended the highest level of constitutional protection to laws that burdened religiously motivated conduct.³⁵⁰ The Court applied a strict scrutiny analysis to laws that were facially neutral but which otherwise imposed a "substantial burden" on religious practices, and struck down those laws unless the government could show that it had a compelling interest in enacting the law, and that the means chosen for achieving that interest were narrowly tailored to meet the permissible objective.³⁵¹ In the 1990 case of *Department of Human Resources v. Smith*,³⁵² however, the Supreme Court lowered the standard of scrutiny applied to most free exercise challenges, ruling that in the absence of a constitutional claim in addition to the free exercise of religion, the government may apply "neutral" and "generally applicable" laws that burden or suppress religious practices without running afoul of the First Amendment.³⁵³ "[I]f prohibiting the exercise of religion ... is not the object of the [law] but merely the incidental effect of a generally applicable and

346. *Id.* at 539.

347. *See United States v. Ballard*, 322 U.S. 78, 86 (1944) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)).

348. *See Reynolds v. United States*, 98 U.S. 145, 168 (1879) (upholding polygamy convictions).

349. *See Sherbert v. Verner*, 374 U.S. 398 (1963).

350. *Id.* at 404-05.

351. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (striking down compulsory school attendance law as applied to Amish children beyond eighth grade).

352. 494 U.S. 872 (1990).

353. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

otherwise valid provision, the First Amendment has not been offended."³⁵⁴

Under the Supreme Court's current free exercise analysis, if a law is neutral and of general applicability, it need not be justified by a compelling governmental interest even if the law incidentally burdens a particular religious practice.³⁵⁵ A law failing to meet either of these two prerequisites, neutrality and general applicability, or a law that implicates constitutional protections in addition to those afforded by the religion clauses, will receive strict scrutiny.³⁵⁶

One important implication of *Smith* is that a state no longer needs a compelling interest in order to refuse to enact a religious exemption to an otherwise neutral and generally applicable law.³⁵⁷ This reasoning suggests that it may be constitutional to eliminate the clergy-penitent privilege altogether. Our justice system requires that all persons summoned to testify must give the finder of fact information in their possession bearing on the charge; privileges are limited, providing only narrow exceptions to this general requirement.³⁵⁸ If the state is not required to enact an exception to the criminal laws for the sacramental use of peyote,³⁵⁹ perhaps it is also not required to recognize an exception in its evidentiary rules for confidential communications with the clergy. Whereas the clergy-penitent privilege clearly is rooted in religious tolerance,³⁶⁰ several commentators have suggested that it may not be

354. *Id.* at 878.

355. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

356. *Id.*; see also *Smith*, 494 U.S. at 881 (discussing "hybrid" claims).

357. *Smith*, 494 U.S. at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."); see also *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding Religious Freedom Restoration Act unconstitutional as applied to states); cf. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (discussed *infra* notes 425-32 and accompanying text).

358. See *Branzburg v. Hayes*, 408 U.S. 665, 674 (1972).

359. *Smith*, 494 U.S. at 884-85.

360. "Realistically, the statutory privilege must be recognized as basically an explicit accommodation by the secular state to strongly held religious tenets of a large segment of its citizenry." *In re Lifschutz*, 467 P.2d 557, 565 (Cal. 1970) (holding that in *habeas corpus* proceeding brought by psychotherapist challenging order to produce evidence about prior treatment of patient-litigant, broad statutory privilege for clergyman and limited privilege for psychotherapist did not deny psychotherapist equal protection of laws where accommodation of religion was legitimate state interest).

constitutionally required.³⁶¹ And although the Supreme Court has never directly considered the constitutionality of the clergy-penitent privilege, it has stated in dicta that the only testimonial privilege for unofficial witnesses that is constitutionally based is the Fifth Amendment privilege against self-incrimination.³⁶² Even allowing for the Supreme Court's sometimes inscrutable First Amendment jurisprudence, if eliminating the clergy-penitent privilege *entirely* would not violate the Free Exercise Clause, it is difficult to discern how *retaining* the privilege curtailed only by a limited "future harms" exception could be construed to offend the same constitutional protection.³⁶³

361. Stoyles, *supra* note 335, at 51-52; Yellin, *supra* note 13, at 112. Mary Mitchell, in her groundbreaking 1987 work on child abuse, explored the First Amendment issues raised by designating clergy as mandated reporters and concluded that although there were strong arguments in favor of exempting privileged conversations, "[c]ase law provides little support for a free exercise grounding for the clergy privilege." Mitchell, *supra* note 47, at 796; *see also* W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all except in so far as essential operations of government may require it for the preservation of an orderly society, - *as in the case of compulsion to give evidence in court.*

Id. (Murphy, J., concurring) (emphasis added).

362. *Branzburg*, 408 U.S. at 689-90; *see also In re Williams*, 152 S.E.2d 317, 324-25 (N.C. 1967) (holding that a Baptist minister had no right to refuse to disclose contents of spiritual counseling sessions with parishioner where parishioner had waived privilege under state statute and finding that the Free Exercise Clause did not provide clergy member with independent grounds for refusing to testify); *cf. Fisher v. United States*, 425 U.S. 391 (1976) (holding that the Fifth Amendment does not bar enforcement of subpoena to attorney seeking taxpayer's records, where "testimony" in drafting papers preceded any governmental compulsion). Some commentators have suggested that the attorney-client privilege may be grounded in the "right to counsel" provision of the Sixth Amendment, at least in those circumstances where the government seeks to compel the attorney to produce evidence of communications made by a defendant to the attorney in order to aid the attorney in the preparation of the client's defense on pending criminal charges. *See, e.g., Mosteller, supra* note 29, at 270-72 nn.201-05.

363. The Supreme Court recognized in *Smith*, citing the unemployment cases, "that where the State has in place a system of individual exemptions, it may not refuse to extend [these exemptions] to cases of 'religious hardship' without [a] compelling reason." *Smith*, 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). As argued *supra*, however, the states do not have in place a testimonial privilege for conversations relating to future dangerous conduct; on the contrary, most if not all citizens are *required* to testify about such confidential communications if called upon to do so, and even the privileges for psychotherapists and attorneys are curtailed as to communications on these subjects. *See supra* Part V.

Moreover, a dangerous person exception would not substantially burden the religious practices of the faithful. Even under the public benefits cases predating *Smith*, "substantial" interference is viewed as a precondition to the invocation of First Amendment protection where the law regulates conduct and not belief.³⁶⁴ The Supreme Court has made it abundantly clear that no one is shielded entirely from every aspect of regulation that impinges in any way on their right to practice religion, however remote or incidental this burden may be.³⁶⁵ Nothing in the proposed dangerous person exception to the clergy-penitent privilege coerces or impedes any particular belief. Under the proposed exception, religious persons may still worship in the churches of their choice, visit the spiritual counselors of their choice, and disclose to those spiritual counselors the confidences of their choice. They are free to worship as they see fit or not to worship at all. The only "benefit" that is withdrawn by the exception is the benefit of talking to a clergy member about future violent conduct without fear that this statement will later be used in a court of law. It strains credulity to believe that a dangerous person exception to the privilege would chill the free exercise of religion by causing practitioners to modify their religious beliefs,³⁶⁶ or to cease engaging in spiritual counseling.³⁶⁷ It may cause the

364. See *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 717-19 (1981) (withholding unemployment benefits from Jehovah's Witness who quit job at munitions plant for religious reasons put "substantial pressure" on adherent to modify religious beliefs); *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963) (withholding unemployment benefits from person who refuses to take job that would require her to work on Saturdays constitutes a substantial infringement of First Amendment rights).

365. "[E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." *United States v. Lee*, 455 U.S. 252, 261 (1982) (holding that the imposition of social security tax on Amish employer did not violate Free Exercise Clause).

366. Under my proposal, neither the Catholic nor the non-Catholic has the benefit of confiding future dangerous intentions to their clergy member without fear of subsequent disclosure. For the non-Catholic, the conversation about future dangerous crimes is not privileged. For the Catholic, the conversation about a future crime, if it occurs in a confessional, is privileged, but only at the option of the priest. In confiding future criminal intentions, each parishioner therefore undertakes a substantial risk that his minister will reveal the communication to authorities. The proposed law therefore does not put any pressure on a worshiper to switch faiths. See *Thomas*, 450 U.S. at 717-18.

367. One study in the context of the psychotherapist-patient relationship found that the existence of an evidentiary privilege was not a factor in encouraging individuals to seek counseling. Daniel W. Shuman & Myron F. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 925 (1982). People

religiously observant to be less frank in their revelations to ministers about their intention to commit a future dangerous crime, but this is at most conduct "incidental" to religion,³⁶⁸ and not interference with a belief or practice central to religious doctrine.³⁶⁹ The mere fact that some ministers operate under professional norms of confidentiality does not make these religious rules,³⁷⁰ or render compliance with state mandated disclosure a burden on a religious practice.³⁷¹

Some may argue that the dangerous person exception proposed in this Article is not neutral within the meaning of *Smith*, because it draws distinctions between religions in terms of how the exception operates. However, a close reading of the Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*³⁷² suggests that nondifferentiation between religions is not required under *Smith* in order for a statute or regulation to meet the test of neutrality. In

seek counseling in order to get well; it may matter little to them in making this decision that the court may later protect or deny protection to their conversations with a doctor. *Id.* at 925-26. Similarly, parishioners seek spiritual counseling to achieve peace with themselves and with their God; it is difficult to imagine that a faithful person would forgo such counseling for fear that pieces of this confidence may later be used against them in court. At most they would withhold from the minister their intention to commit a future crime.

368. To have more than an "incidental" burden, the law must directly or indirectly make the believer's religious practices more difficult or more costly. See *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 392-95 (1990) (holding that the collection of sales tax on books sold by religious organization "impose[d] no constitutionally significant burden on appellant's religious practices or beliefs").

369. See *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (stating doubts about whether IRS disallowance of deduction for auditing and training sessions constituted a "substantial" burden on religious practices, where church did not proscribe the payment of taxes).

370. See Yellin, *supra* note 13, at 130-32.

371. Cf. *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 834-35 (1989) (holding that although free exercise claimant did not need to point to any tenet or teaching of an established religion that supported his claim to religious burden, he did need to establish that his conduct was rooted in religious belief). Assume, for example, that the state enacted a law that required all elementary school teachers in both public and private schools to hold a master's degree in education. Assume further that the Catholic Diocese within the state previously had enacted a requirement for its parochial schools that all elementary school teachers must hold a bachelor's degree. The state statute would clearly burden the parochial schools of the Diocese because it would require them to hire teachers with advanced degrees. But this would not be a burden on a "religious" practice of the church or its followers; rather, it would be a burden on the practical and secular means by which the church had chosen to advance its religious mission. See *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (distinguishing religious beliefs from beliefs which are "philosophical and personal").

372. 508 U.S. 520 (1993).

City of Hialeah, the Court struck down a city ordinance prohibiting the ritual slaughter of animals because it was clear that the ordinance was aimed at religiously motivated conduct.³⁷³ The Court stated that a law is not neutral "if the object of [the] law is to infringe upon or restrict [religious] practices."³⁷⁴ Creation of a dangerous person exception to the clergy-penitent privilege does not target a practice for special treatment because of its religious character, rather it targets a minister's decision to keep confidential his parishioner's intent to commit a future violent crime. Confidentiality is not a "religiously motivated" practice for most clergy,³⁷⁵ although it may be a pragmatic decision about how best to encourage frank communications with parishioners, or an ethical judgment about the duty of loyalty owed to those who put their faith and trust in the clergy, neither of these professional justifications for confidentiality are "rooted in religious belief."³⁷⁶ As one state court has noted in affirming a narrow construction of that state's clergy-penitent privilege statute in the face of a First Amendment challenge: "It is the right to exercise one's religion ... [that] is protected, not one's sense of ethics."³⁷⁷ And even if confidentiality were religiously motivated, the state would not target confidentiality *because of* its religious motivation, it would target confidentiality because of its effect on a vulnerable third party.³⁷⁸

373. *Id.* at 547.

374. *Id.* at 533.

375. Yellin, *supra* note 13, at 130-32. Professor Mitchell also suggested that confidentiality may be professionally recognized and encouraged by many religions, but this does not mean it rises to the level of a religious belief or practice for purposes of First Amendment analysis, except for those clergy members for whom it is specifically mandated under religious doctrines of their church. Mitchell, *supra* note 47, at 800.

376. *Yoder*, 406 U.S. at 215.

377. *In re Williams*, 152 S.E.2d 317, 325 (N.C. 1967) (declining to extend state testimonial privilege to Baptist minister who had counseled members of a family involved in a rape investigation, and rejecting the minister's free exercise challenge to this limited construction of state privilege law).

378. In discussing neutrality, the Court in *City of Hialeah* was concerned with two forms of motivation. *City of Hialeah*, 508 U.S. at 524, 533-34. First, the Court was concerned with the motivation of the legislature in enacting the prohibition. *Id.* at 533. The Court recognized that a law may lack facial neutrality because it applies in express terms only to religious practices, or it may lack neutrality due to a "covert" intent on the part of the legislature to "suppress[] ... particular religious beliefs." *Id.* at 534 (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986)). Second, the Court was concerned that "the object or purpose of [the] law" might be to prohibit only conduct which is religiously motivated, and not similar conduct motivated by secular interests. *Id.* at 524, 533.

Although churches that practice sacramental confessions are treated differently for purposes of this exception, this alone does not rob the proposed statute of neutrality.³⁷⁹ As Justice Souter stated persuasively in his *City of Hialeah* concurrence, a law may be formally neutral but substantively nonneutral if it does not take into account the differences among religions.³⁸⁰ Justice Souter pointed to an exemption that allowed for the sacramental use of wine during Prohibition as an example of a law that might appear to be biased in favor of certain religions on its face, but should be considered "neutral" for purposes of First Amendment analysis.³⁸¹ According to Justice Souter, the exemption for sacramental wine use "reflec[ts] nothing more than the governmental obligation of neutrality in the face of religious differences."³⁸²

What the Court meant by "general applicability" in *Smith* has been the subject of much disagreement.³⁸³ Whatever the precise contours of the requirement, however, the regulatory evil that the Court seemed most concerned about preventing was governmental action aimed only at religiously motivated conduct.³⁸⁴ Because in *City of Hialeah* the legislature devised mechanisms, both "overt" and "disguised," to prohibit only religiously motivated animal slaughter and not other forms of animal killing, for example

379. See Aviam Soifer, *Full and Equal Rights of Conscience*, 22 U. HAW. L. REV. 469, 482 (2000) (quoting James Madison's statements to Congress in support of the First Amendment: "nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed"). Soifer argues that "the protection of full rights of conscience" sometimes can be in direct conflict "with the protection of equal rights" of conscience because "[t]o treat everyone the same is to miss critical contextual differences." *Id.* at 499.

380. *City of Hialeah*, 508 U.S. at 562 (Souter, J., concurring) ("If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause's neutrality command; if the Free Exercise Clause, rather, safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality.").

381. *Id.* at 561 & n.2 (Souter, J., concurring).

382. *Id.* (Souter J., concurring) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972)).

383. *Dep't of Human Res. v. Smith*, 494 U.S. 872 *passim* (1990). Justice Kennedy, writing for the plurality in *City of Hialeah*, recognized that "[n]eutrality and general applicability are interrelated" concepts, and that "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *City of Hialeah*, 508 U.S. at 531. Justice Scalia was much more frank in his concurring opinion, suggesting "that the terms are not only 'interrelated,' they 'substantially overlap.'" *Id.* at 557 (Scalia, J., concurring).

384. *City of Hialeah*, 508 U.S. at 542-43 (finding that the First Amendment is violated "when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation").

hunting, or the slaughter of farm cattle, the ordinances had every appearance of selective application against Santeria worshippers alone.³⁸⁵

The duty to testify about confidential communications pertaining to future crimes, however, is not being bestowed uniquely upon religious clerics. All persons have this burden, including bartenders, hairdressers, best friends, and in many instances even psychotherapists and lawyers. The clergy-penitent privilege is itself an exception to a general testimonial duty borne by all; crafting an *exception* to this *exception* does not carve out religious conduct for special treatment. It returns the clergy to the position occupied by average lay people with respect to the duties owed to the state in this limited circumstance.

Even if a court were inclined to apply a *Sherbert* analysis to this exception to the privilege, either because the exception was determined not to be “neutral” and “generally applicable” or because it was determined to implicate a constitutional right to privacy as well as free exercise of religion,³⁸⁶ the law would still survive strict scrutiny. First, the state has a compelling interest in protecting its

385. *Id.* at 546-47.

386. A likely attack on any curtailment of the clergy-penitent privilege would be on grounds of privacy as well as free exercise. *See Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (recognizing that right of privacy afforded by Fourteenth Amendment's Due Process Clause encompasses both “interest in avoiding disclosure of personal matters” and “interest in independence in making certain kinds of important decisions”). *But see Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789, 797-98 (7th Cir. 1987) (finding no unconstitutional interference with privacy right by discipline of tenured school teacher for failing to report child abuse learned about in private counseling session). Moreover, the dicta in *Smith* regarding “hybrid” constitutional claims appears to be on unstable footing following the recent Supreme Court decision in *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, wherein the Court struck down a village ordinance requiring solicitors and canvassers to obtain permits prior to engaging in door-to-door solicitation. 122 S. Ct. 2080 (2002). Because the canvassing regulation covered both religious proselytizing and political speech, it seemed to implicate both the Free Speech and Free Exercise Clauses of the First Amendment. *See id.* at 2083. The Sixth Circuit held that the ordinance was “content neutral and of general applicability” and therefore subjected it to only intermediate scrutiny, concluding that the discussion of hybrid constitutional claims in *Smith* “was dicta and therefore not binding.” *Id.* at 2085-86. In reversing the court of appeals, the Supreme Court addressed the ordinance as a free speech problem and sidestepped this issue of whether the ordinance should be subject to strict scrutiny under *Sherbert*, stating: “We find it unnecessary ... to resolve that [standard of review] dispute because the breadth of speech affected by the ordinance and the nature of the regulation make it clear that the Court of Appeals erred in upholding it.” *Id.* at 2088.

citizens from dangerous individuals, avoiding serious bodily harm, and committing and/or prosecuting responsible parties when such harm cannot be avoided. The Supreme Court has recognized that public safety is a compelling state interest that may justify some curtailment of religious liberty.³⁸⁷ Second, the law is narrowly tailored to meet this public safety objective. The exception applies only if the clergy member has reasonable cause to believe that a parishioner in fact poses a serious threat to another individual; idle chatter or ungrounded fantasies of violent behavior will not give rise to the testimonial exception.³⁸⁸ Moreover, not every threatened crime or fraud will pierce confidentiality; only communications about future crimes exposing an identifiable third party to a realistic threat of death or serious bodily injury will vitiate the privilege. By carving out communications pertaining to the most serious future crimes, and by invoking the exception only when the communication gives the clergy member adequate cause to believe that such a crime is real and imminent, a state would be narrowly tailoring its privilege exception to meet a compelling and urgent need.

Several courts have upheld restrictions on religious liberty in similar contexts when necessary to promote the public welfare. For example, several state and federal courts have upheld mandated child abuse reporting statutes against constitutional challenge, ruling that the degree of intrusion on the privacy or free exercise rights of a professional required to report is more than justified by the state's compelling interest in protecting the health and safety of its children.³⁸⁹ In addition, the Pennsylvania Supreme Court rejected a free exercise challenge to a construction of its state privilege statute which required the Catholic Diocese to turn over to a defendant accused of murder the archived personnel records of

387. "The right to practice religion freely does not include liberty to expose the community ... to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (upholding child labor laws against free exercise challenge); see *Jacobson v. Massachusetts*, 197 U.S. 11, 31-32 (1905) (upholding compulsory vaccination law).

388. See *Harris*, *supra* note 253, at 46-48 (discussing reasonable belief standard for psychotherapist duty to warn).

389. *Pesce*, 830 F.2d at 798 (rejecting challenge by psychologist); *People v. Hodges*, 13 Cal. Rptr. 2d 412, 420-21 (1992) (rejecting challenge by church pastor); *People v. Cavaiani*, 432 N.W.2d 409, 412-13 (Mich. 1988) (rejecting challenge by psychologist).

the victim and priest.³⁹⁰ The church claimed that compliance with the subpoena would violate Canon law by interfering with the bishop's authority to shepherd priests in his charge.³⁹¹ The court ruled that even assuming that production of church personnel records would require the clergy to violate church doctrine and thereby substantially intrude upon their religious freedom, it furthered "a compelling governmental interest by the least restrictive means available."³⁹²

B. The Establishment Clause

Having its origins in the Virginia Bill for Religious Liberty,³⁹³ in turn heavily influenced by James Madison's *Memorial and Remonstrance Against Religious Assessments*,³⁹⁴ the primary goal of the Establishment Clause is to ensure our government's respect for religious diversity in America.³⁹⁵ At its core, the Establishment Clause prevents the government from sponsoring an official religion,³⁹⁶ from favoring one religion over another,³⁹⁷ from making religious observance compulsory,³⁹⁸ or from coercing citizens to attend a particular church, or any church at all.³⁹⁹ Although a strict separation between church and state is impossible,⁴⁰⁰ the goal of the

390. *Commonwealth v. Stewart*, 690 A.2d 195, 202 (Pa. 1997).

391. The Diocese cited *Canon 381*, arguing:

[a] bishop must be able to candidly discuss with a priest his character, talents, spiritual life, health, and pastoral or familial problems and concerns in order to be able to assign the priest to compatible duties and to provide him with appropriate guidance in the conduct of his affairs and ministry to the faithful.

Id. at 200-01.

392. *Id.* at 202.

393. The Virginia statute provided "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief." *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1946) (citing 12 HENING, STATUTES OF VIRGINIA 86 (1823)).

394. *Everson*, 330 U.S. at 12; see *McGowan v. Maryland*, 366 U.S. 420, 430 (1961).

395. See Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1598-99 (1989).

396. See *Walz v. Tax Comm'r*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring).

397. See *Everson*, 330 U.S. at 15.

398. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

399. See *McGowan*, 366 U.S. at 452.

400. See *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

Establishment Clause is to maintain governmental neutrality towards religion.⁴⁰¹

In attempting to enforce the First Amendment's primary objective of neutrality, the Court has been unwilling to confine itself to a single test,⁴⁰² noting that "the purpose [of the Establishment Clause] was to state an objective, not to write a statute."⁴⁰³ When the legislature enacts a law that aids or advances religion, such as in the tax exemption and public education cases, the Court has most frequently employed the multiple-part test enunciated in *Lemon v. Kurtzman*⁴⁰⁴ to assess the law's constitutionality. In addressing the public display of religious symbols and the practice of including prayer in public ceremonies, the Court has applied the "coercion test" of *Lee v. Weisman*.⁴⁰⁵ When the legislature has enacted a law that creates a denominational preference for or against a particular religion, the Court has applied the strict scrutiny analysis of *Larson v. Valente*.⁴⁰⁶ Which of these tests would be employed in reviewing an exception to the clergy-penitent privilege is highly debatable, but the "coercion" test of *Weisman* is an unlikely candidate because it has been used largely to assess the validity of religious observances in public settings, conduct not implicated by the clergy-penitent privilege.

Although acknowledging that *Lemon* is no more than a "helpful signpost[],"⁴⁰⁷ the Supreme Court has been somewhat consistent in analyzing Establishment Clause claims under this three-part rubric.⁴⁰⁸ Under this test, challenged state action will be upheld if it has a secular legislative purpose, has a primary effect that neither

401. See *Larson v. Valente*, 456 U.S. 228, 246 (1982); *Everson*, 330 U.S. at 18.

402. *Lynch*, 465 U.S. at 678.

403. *Walz v. Tax Comm'r*, 397 U.S. 664, 668 (1970).

404. 403 U.S. 602, 612 (1971).

405. 505 U.S. 577, 592-93 (1992); see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (striking down school district policy of permitting student led prayer at football games).

406. 456 U.S. 228, 260 (1982).

407. *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

408. Although not explicitly applying the *Lemon* test, the Supreme Court recently upheld an Ohio school voucher program against Establishment Clause attack, ruling that the program had both a secular purpose and a primary effect that did not advance or inhibit religion. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2465 (2002). In her concurring opinion, Justice O'Connor specifically applied the *Lemon* test to the voucher program at issue. *Id.* at 2476 (O'Connor, J., concurring).

advances nor inhibits religion, and does not foster excessive government entanglement with religion.⁴⁰⁹ In *Agostini v. Felton*, the Supreme Court modified the three-part *Lemon* test for public aid cases by collapsing the “entanglement” and “primary effects” tests into a single prong of the analysis.⁴¹⁰ Following *Agostini*, if either the purpose or the effect of the statute is to promote or impede religious belief, it will not withstand an Establishment Clause challenge.⁴¹¹

Courts will not strike down state regulations that incidentally burden or benefit one religion over another as long as the primary purpose of the regulation is secular.⁴¹² The creation of a “dangerous person” exception to the clergy-penitent privilege has two secular purposes. First, it will save potential victims from serious bodily injury or death by encouraging clergy members to warn these potential victims about demonstrably violent parishioners. Second, even if a warning is not given and the crime is not avoided, an exception to the privilege will promote public safety by preserving evidence for use at a later civil commitment hearing or criminal trial, thereby allowing the state to both segregate the dangerous individual and deter other would be wrongdoers. There is no overt or covert purpose behind the statute to discourage religious worship or spiritual counseling. In fact, if that happened it would be directly *contrary* to the rationale underlying the law: to encourage clergy members to report evidence of imminent danger which they receive in these sessions.

Carving out sacramental confessions for different treatment under the proposed exception also has a secular purpose: to avoid the unseemly and potentially polarizing effect of having a clergy member jailed for following what he perceives to be a sacred obligation. The Supreme Court has recognized that creating a religious exemption does not necessarily run afoul of the first prong

409. *Lemon*, 403 U.S. at 612-13.

410. 521 U.S. 203, 233 (1997).

411. *Id.* In the aid to private schools cases, the Court has concluded that the “genuinely independent and private choices of aid recipients” who use their public benefits at religious schools insulates a state scheme from having a “primary effect” that advances religion. *Zelman*, 122 S. Ct. at 2466 (citing *Witters v. Wash. Dep’t of Servs. for Blind*, 474 U.S. 481, 487 (1986)). There is no indication from the Court that this “private choice” requirement has any relevance to the second prong of the *Lemon* test outside of the government subsidy area.

412. *Lemon*, 403 U.S. at 612-13.

of the *Lemon* test.⁴¹³ Legislation that is aimed at alleviating governmental interference with religion is considered to have a secular purpose.⁴¹⁴ The state has an interest in avoiding unnecessary clashes with religious doctrine and leaving ample room for religious differences; this is not a religious purpose, but rather a secular goal which grows out of our country's rich and "happy tradition" of pluralism and respect for diversity.⁴¹⁵

In allowing an exemption to the state property tax for religiously held property, the Supreme Court in *Walz* recognized the stark tension in the religious exemption area between the Free Exercise Clause's admonition not to inhibit religion, and the Establishment Clause's admonition not to advance religion.⁴¹⁶ The delicate problem underlying whether and how to create a future crimes exception to the clergy-penitent privilege underscores the question of just how much "play in the joints"⁴¹⁷ there should be between the Free Exercise Clause and the Establishment Clause. If legislators attempt to craft a dangerous person exception to the clergy-penitent privilege, but seek to avoid inhibiting the religious practices of churches that practice sacramental confessions, they may be seen as "favoring" those religions. In the words of the Supreme Court in *Walz*, this requires lawmakers to "traverse [a] tight rope" between preserving autonomy and freedom of religious belief on the one hand, and avoiding any semblance of established religion on the

413. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 (1987) (upholding Title VII exemption for religious organizations); *Gillette v. United States*, 401 U.S. 437, 445 (1971) (upholding exemption from selective service law for those who are opposed to war on religious grounds, even though exemption was limited to those religious faithful who oppose all war, not those who oppose particular wars).

414. *Amos*, 483 U.S. at 335.

415. *Gillette*, 401 U.S. at 453 ("[I]t is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'" (quoting *United States v. Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting))).

416. *Walz v. Tax Comm'r*, 397 U.S. 664, 669 (1970). According to the Court:

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.... Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality.

Id.

417. *Id.*

other.⁴¹⁸ This is precisely the sort of balanced judgment, however, that the Supreme Court essentially encouraged legislatures not to shy away from in *Smith*, when it stated that a legislatively created exemption to the criminal law for the sacramental use of peyote would be permissible under the Establishment Clause, even though not judicially required under the Free Exercise Clause.⁴¹⁹

I do not argue that singling out certain religions, and perhaps most obviously the Roman Catholic Church, for special treatment under the proposed exception is constitutionally required. As argued above, it could well be entirely consistent with the Free Exercise Clause to eliminate the clergy-penitent privilege altogether, or to simply apply a "future harms" exception in the same manner to clergy of every faith. But the fact that a blanket future harms exception would be constitutionally permissible does not make it wise social policy. Requiring certain clergy to risk excommunication for violating church doctrine is simply too great a burden to impose on them by a society that purportedly tolerates religious freedom.⁴²⁰ Even if not required by the Free Exercise Clause, carving out an exception for sacramental confessions both promotes religious freedom and serves pragmatic ends.⁴²¹

418. *Id.*

419. *Dep't of Human Res. v. Smith*, 494 U.S. 872, 890 (1990) ("But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.").

420. See John H. Garvey, *An Anti-Liberal Argument for Religious Freedoms*, 7 J. CONTEMP. LEGAL ISSUES 275, 287 (1996) (positing religious justification for free exercise protection and arguing that only believers can claim rights to be exempt from general laws because only they believe that violating religious duties will expose them to transcendental harms).

421. It may be argued that conversations occurring in a sacramental confession should be included in the exception to the privilege, and that religions that practice sacramental confessions should be willing to face fine or imprisonment if they fail to disclose the communication, as the fair price to pay for adhering to their religious beliefs. "[T]rue religion could and would take care of itself. It should not be defended with anything but spiritual weapons." Soifer, *supra* note 379, at 475 (paraphrasing Roger Williams). But this argument about the corrosive effect of state aid on religious convictions minimizes the costs that society incurs in terms of disaffection and polarization whenever the state appears to be trampling religious freedoms, for example, by compelling a citizen against their will to choose between excommunication and compliance with civil law. Moreover, one purpose of the proposed exception is to encourage reporting prior to litigation in order to avoid bodily injury and death. It is simply much less likely that this instrumental objective will be achieved if revelation of a matter occurring in a confessional will subject the priest to excommunication from his church.

The Supreme Court has declined to take the position that a religious exemption enacted by the legislature is forbidden by the Establishment Clause unless mandated by the Free Exercise Clause.⁴²² In circumstances where a religious exemption is created legislatively rather than judicially, the exemption need not be enacted to relieve an *actual* burden on the constitutional right of free exercise, it may be adopted to relieve a *potential* burden on religious freedom.⁴²³

Assuming that a court were to view the proposed statute's treatment of sacramental confessions as an "exception" to the nonprivileged status of disclosures of intent to commit bodily harm made in other spiritual settings, then our difficult task is to determine whether this is a "permissive"⁴²⁴ or a "forbidden"⁴²⁵ exemption under current Supreme Court precedent. In *Texas Monthly, Inc. v. Bullock*,⁴²⁶ the Supreme Court struck down a Texas statute that provided an exception to the state sales and use tax for religious periodicals.⁴²⁷ The Court ruled that the statute violated the Establishment Clause, reasoning that the legislature's act in carving out the sale of religious magazines and books from a system of general taxation amounted to "state sponsorship of religious belief."⁴²⁸ In addressing when an exemption not required by the Free Exercise Clause will offend the Establishment Clause, the Court stated:

When government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot

422. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

423. See *East Bay Asian Local Dev. Corp. v. California*, 13 P.3d 1122 (Cal. 2000) (affirming legislative exemption to historic preservation law for religiously affiliated organizations).

424. See, e.g., *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (upholding religious exemption to Title VII); *Zorach v. Clauson*, 343 U.S. 306, 318-19 (1952) (upholding New York City's decision to release students early from public schools for religious instruction elsewhere); see also *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260, 264 (4th Cir. 1988) (relying on *Amos*, the Court held that a Virginia statute which exempted religiously affiliated child care centers from state licensing requirements did not violate the Establishment Clause).

425. See *Texas Monthly*, 489 U.S. at 18.

426. *Id.*

427. *Id.* at 18-19.

428. *Id.* at 15.

reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion ... [it] cannot but "convey a message of endorsement" to slighted members of the community.⁴²⁹

In the clergy-penitent context, neither of these two disqualifiers is present. First, allowing certain clergy the option of not revealing confidential communications pertaining to future crimes does not burden those who are compelled to do so. This is not a tax or a subsidy case, where relieving some citizens of a common burden, such as a financial responsibility, necessarily increases the burden on others.⁴³⁰ It is more like the school attendance exemption permitted in *Zorach*, where the Court found that allowing some students to leave early for religious instruction did not burden those who were left behind.⁴³¹ Moreover, the treatment of sacramental confessions in the proposed exception is indeed connected to a state-created deterrent to religious freedom. It is the state-created obligation to testify at judicial proceedings that poses a stark conflict with the seal of the confessional in the Roman Catholic Church. For both of these reasons, the statute proposed in this Article would satisfy the *Texas Monthly* standard for determining when a legislatively created religious exemption is permitted under the Establishment Clause. Rather than being an instance of the government putting its power, prestige, and financial support *behind* a particular religion,⁴³² this is simply an instance in which the government is *getting out of the way* of certain forms of religious observance.

Turning to the second prong of the *Lemon* test, the proposed exception does not have a "primary effect" that either advances or inhibits religion.⁴³³ It does not advance the Catholic faith or any

429. *Id.* at 15 (quoting *Amos*, 483 U.S. at 348).

430. When the alleged violation does not involve the expenditure of public funds sufficient to trigger taxpayer standing, a litigant seeking to challenge the deferential treatment for sacramental confessions within this exception would have to allege that the new rule of privilege caused him to suffer some personal injury. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 486 (1982). Such standing to raise this Establishment Clause issue may well be difficult to establish.

431. *Zorach v. Clanson*, 343 U.S. 306, 311-12 (1952).

432. *Engel v. Vitale*, 370 U.S. 421 (1962) (striking down recitation of Regents' Prayer in New York schools).

433. As argued in the Free Exercise Clause section above, the proposed exception does not

other religion that practices sacramental confessions because those clergy hold the privilege for communications pertaining to future violent crimes, and have an option of disclosing these communications without the consent of the parishioner. No religiously observant person is likely to choose which religion to follow based on this exception to the privilege, because whether they worship in a religion that practices sacramental confessions or one that does not, they cannot confide in their ministers an intent to commit a future violent crime without running the risk that this communication will later be revealed. Thus, no reasonable observer is likely to draw from these facts an inference that the state is endorsing one religion over another.⁴³⁴ It certainly leaves no greater impression of sponsorship or active involvement in religion than allowing religious organizations to meet in public school buildings,⁴³⁵ or permitting a special home-schooling exemption for the Amish.⁴³⁶

Finally, to the extent that it is still relevant after *Agostini v. Felton*,⁴³⁷ a dangerous person exception would not foster excessive government entanglement with religion. Some governmental involvement in religion may be necessary to assure religious freedom.⁴³⁸ "The test is inescapably one of degree."⁴³⁹ Government

substantially burden religious worship. In the absence of such burden, the "inhibition" prong of *Lemon* has not been met. The primary purpose of the Establishment Clause is to prohibit government endorsement of religion. Although the government may offend this principal by either favoring or disfavoring religious practices, where an "inhibition" is alleged, the "effects" prong of the *Lemon* test should require no lesser showing of a burden on religion than a free exercise claim. Otherwise, the Sunday closing laws and polygamy laws could have been struck down on grounds that they had the "effect" of inhibiting certain religious practices, without any showing that they actually violated the free exercise rights of Jews and Mormons, respectively. See *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961); *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

434. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2465 (2002) (quoting *Mitchell v. Helms*, 530 U.S. 793, 810 (2000)); see also *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 119 (2001) (stating that the "reasonable observer" test under endorsement inquiry looks to the concerns of the political community writ at large, and not to the perceptions of particular individuals or "isolated nonadherents").

435. *Good News Club*, 533 U.S. at 119.

436. *Wisconsin v. Yoder*, 406 U.S. 205, 235 n.22 (1972).

437. 521 U.S. 203 (1997).

438. Professor Tribe has posited a theory of free exercise predominance, suggesting that when the Establishment and Free Exercise Clauses clash, free exercise must win out. LAURANCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-8, at 1201-04 (2d. ed. 1988).

439. *Walz v. Tax Comm'r*, 397 U.S. 664, 668 (1970).

involvement will be considered excessive and will violate the entanglement inquiry when it leads to continuing surveillance of the religion,⁴⁴⁰ when it constitutes a delegation of political power to a group chosen according to religious criteria,⁴⁴¹ or when it requires the state to determine the validity of particular interpretations of those creeds.⁴⁴² Under the exception proposed in this Article, a court can determine whether the church at issue practices a sacramental form of absolution, and whether church doctrine requires its clergy to hear such communications and keep them secret, without engaging in an inquiry as to the validity of those religious beliefs. In determining whether the exception applies, a trial judge would not be testing truth or falseness of belief, but only determining what the beliefs are, and whether they are held in good faith. It remains up to the church to define the religious practices that they will follow; the only role of a court under the proposed exception is to determine what those practices are.⁴⁴³

This inquiry is no greater in kind or degree than the inquiry already undertaken by states that limit their clergy-penitent privilege to communications "in the course of discipline enjoined by the church,"⁴⁴⁴ or states that exclude from their child abuse reporting requirement a similarly narrow class of spiritual communications with clergy.⁴⁴⁵ The Third Circuit in the *In re Grand Jury Investigation* case recognized that a limited doctrinal inquiry into the practices of a particular faith for the purposes of applying an evidentiary privilege does not constitute an impermissible entanglement with religion: "[W]e believe that establishing the pastoral counseling practices of a particular denomination to ascertain the types of communications that the denomination deems spiritual and confidential is both a necessary and a constitutionally

440. *Id.* at 675.

441. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 705-06 (1994).

442. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

443. *See Reutkemeier v. Nolte*, 161 N.W. 290, 292 (Iowa 1917) (looking to church doctrine to determine whether church elders constituted ministers of the faith within meaning of state privilege statute); *State v. Martin*, 975 P.2d 1020, 1025-28 (Wash. 1999) (stating that in applying state clergy-penitent privilege, a court must inquire whether the church at issue practices confession and mandates secrecy, but it is still up to the church to define how it will practice its faith).

444. *See supra* note 75 and accompanying text.

445. *See supra* notes 337-38 and accompanying text.

inoffensive threshold step in determining whether a privilege interdenominational in nature applies.⁴⁴⁶

Even if the proposed exception satisfies the *Lemon* test, it may be struck down if it is viewed as discriminating between persons of different religious faiths. In *Larson*, the Court stated that the *Lemon* test was "intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions ... that discriminate *among* religions."⁴⁴⁷ Under *Larson*, courts must subject statutes that create a "denominational preference" to strict scrutiny, and strike them down unless narrowly tailored to further a compelling governmental interest.⁴⁴⁸ Critics of my proposal will argue that it impermissibly favors the Catholic, Lutheran, and Eastern Orthodox religions, and therefore that *Larson* should apply. Even if this is true, as argued above, the proposed statute meets a compelling state interest test. I do not concede, however, that the proposed exception creates a denominational preference in the first instance. The exception does not single out any particular religion by name, and its treatment of penitential communications does not apply to one religion only.⁴⁴⁹ All clergy who hear confessions in a sacramental setting hold the privilege for conversations pertaining to future violent crimes, just as in the Medicaid exemption cases⁴⁵⁰ all persons who objected to medical care for religious reasons were entitled to claim the RNCIS exemption.⁴⁵¹ The fact that the safe harbor for sacramental confessions applies to very few sects other than the Roman Catholic Church, just as the Medicaid exemption applied to

446. *In re Grand Jury Investigation*, 918 F.2d 374, 388 n.21 (3d Cir. 1990).

447. *Larson v. Valente*, 456 U.S. 228, 252 (1982).

448. *Id.* at 246-47. The *Larson* doctrine parallels equal protection analysis under the Fifth and Fourteenth Amendments, pursuant to which a law or regulation which singles out suspect classifications for disparate treatment will be subjected to strict scrutiny. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967). "Neutrality" for purposes of the Establishment Clause may thus "require[] an equal protection mode of analysis." *Walz v. Tax Comm'r*, 397 U.S. 664, 668 (1970) (Harlan, J., concurring).

449. *Children's Healthcare is a Legal Duty, Inc. v. Min de Parle*, 212 F.3d 1084, 1089, 1091 (8th Cir. 2000) (holding that provisions of Balance Budget Act of 1997 allowing persons who hold religious objections to health care to receive Medicaid assistance for nonmedical care at "religious non-medical health care institutions" did not violate the Establishment Clause, even though it primarily benefitted Christian Scientists).

450. *Id.* at 1091; see also *Kong v. Min de Parle*, 2001 WL 1464549, at *1 (N.D. Cal. Nov. 13, 2001).

451. *Children's Healthcare*, 212 F.3d at 1090-91.

very few religions other than Christian Scientists, is not alone sufficient to make the exception impermissibly discriminatory, given the concomitant secular justification for the statute.⁴⁵²

Moreover, the central evil that the Establishment Clause was designed to prevent is favoring or preferring one religion over another.⁴⁵³ In *Larson*, the state violated this maxim because the statute exempted certain religions from a substantial and onerous burden born by others.⁴⁵⁴ No substantial burden is lifted from the shoulders of any clergy members under the proposed law. Roman Catholic priests are not altogether relieved of the burden of testifying in court about a confidential communication pertaining to a future crime; they merely have the option of choosing not to do so if the conversation occurred in a sacramental setting.⁴⁵⁵ This poses for them a moral dilemma: follow the dictates of church doctrine or waive the privilege. Clergy members in churches that do not practice sacramental confession are not put to this difficult choice, rather, they are required to testify about conversations pertaining to future violent crimes when subpoenaed to do so. Which clergy member has the benefit and which has the burden? It might be argued that clergy who do not practice sacramental confessions have the benefit of not having to wrestle with a profoundly difficult moral choice. Although the priest has the benefit of autonomy and freedom

452. *Id.*

453. See *Larson*, 456 U.S. at 245; *Walz*, 397 U.S. at 669.

454. The statute invalidated in *Larson* required some religions to register with the Minnesota Department of Commerce, and to report annually the source and use of their funds. *Larson*, 456 U.S. at 230-31. Religions that received more than fifty percent of their donations from members or affiliated organizations were exempt from this reporting requirement. *Id.* at 231. The Court ruled that the benefit conferred by the exemption "constitute[d] a substantial advantage." *Id.* at 253.

455. Roman Catholic priests who learn about a parishioner's dangerous intentions in a spiritual counseling session outside of the confessional are treated exactly like ministers of other religions; that is, the communication is not privileged, and the priest can be compelled to reveal it. This status of nonsacramental communications comports with what many Roman Catholic priests would perceive as their ethical responsibilities in such instances.

[T]he Catholic Church recognizes that a professional secret—as opposed to that uttered under the seal of confession—should be revealed in certain circumstances: "The common teaching of the moralists is that the obligation of professional secrecy ceases whenever this measure is urgently necessary for warding off a serious evil"

Yellin, *supra* note 13, at 147 (quoting Robert E. Regan & John T. Maccartney, *Professional Secrecy and Privileged Communications*, 2 CATH. LAW. 3, 8 (1956)).

from government compulsion in making his choice, he also has the burden of a very difficult moral decision. Viewed in this light, the difference is not so significant that it should be perceived as discriminating between religions in any constitutionally significant way because the state is not imparting a benefit that society would recognize as amounting to governmental endorsement of one religion over another.⁴⁵⁶

A construction of *Larson* that prohibited legislatures from taking account of religious differences would hamstring their efforts to promote religious freedom within an ordered, safe, and just society. In the words of Justice Goldberg, sometimes it is necessary to "take cognizance of the existence of religion" in order to attain the fullest realization of religious liberty.⁴⁵⁷ When the clergy-penitent privilege is viewed as just one of a whole series of privileges for confidential communications, enactment of a future harms exception does not appear to single out religions for special burdens because it in fact attempts to treat clerics more like other professionals. When the treatment of penitential communications within this exemption is viewed against the backdrop of current law, it too does not resemble an endorsement of religion because it does not bestow upon clergy who practice sacramental confessions any benefit that they do not already enjoy under the status quo.

CONCLUSION

Clergy confidentiality is valued too highly and guarded too zealously when it conflicts with paramount social values, such as the right of an innocent third party to be free from serious bodily harm. Although it may be a challenge to draft a dangerous person exception that does not run afoul of the First Amendment, this struggle and the attendant debate are well worth the effort. It is time to consider seriously the societal costs of the clergy-penitent privilege and to discuss whether certain limitations on its

456. Although it may be argued that the differing treatment for different religious practices may itself engender divisiveness, the Supreme Court has ruled that the "political divisiveness" test for entanglement should not be applied to cases not involving a financial subsidy. See *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984).

457. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 305-06 (1963) (Goldberg, J., concurring).

application would better serve the public interest without compromising First Amendment values. Creating a limited exception to the privilege as described in this Article would be a modest step in the right direction.