BEYOND THE CONFINES OF THE CONFESSIONAL: THE PRIEST-PENITENT PRIVILEGE IN A DIVERSE SOCIETY

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I. INTRODUCTION

Confession has been a central feature of the Catholic sacrament since the Church's inception.[1] Not until the fifth century, however, did the Catholic Church recognize the validity of private confessions.[2] Before Pope Leo I decreed in 459 that most sins could be confessed in private, confessions were made in public.[3] Despite the Pope's decree, however, the complete demise of public confessions took hold slowly.[4] Not until the sixteenth century at the

1. *See* 4 E.F. LATKO, NEW CATHOLIC ENCYCLOPEDIA 132 (1967).

2. 1 HENRY CHARLES LEA, A HISTORY OF AURICULAR CONFESSION AND INDULGENCES IN THE LATIN CHURCH 21 (1968). Private confession was practiced in Rome during the time of Pope Leo I (A.D. 440-461). *See id.*; JOHN T. MCNEILL, A HISTORY OF THE CURE OF SOULS 98-99 (1951). Papal recognition of the secrecy of the confession was due in part to the fact that public readings of confessions led to the penitent's alienation and exposed him to danger from his enemies. Jeffery Warren Scott, State Mandatory Reporting of Child and Elder Abuse: A Challenge to the Privacy of Penitential Communications 75 (1991) (unpublished Ph.D. dissertation, Baylor University) (on file with Baylor University).

3. *See* 1 LEA, *supra* note 2, at 21, 182-83; 2 LEA, *supra* note 2, at 73.

4. *See* 1 LEA, *supra* note 2, at 183. Penitents did not follow the new rule as well as Pope Leo would have liked. *Id.* As a means of inducing more participation, in 470, a new pope, Pope Simplicius, set aside times in every church when priests would be available to take

Council of Trent did the church address the issue of whether the intervention of a priest was necessary for contrition. There the church ruled that a sinner may not receive a pardon without verbal confession to a priest, if one were available.[5] With confession to a priest as the only method of assuring pardon for sins, the use of the confessional became more common.[6]

The original purpose of confession was to prepare the penitent for communion by purifying the conscience and restoring the "holiness of life," which the commission of sin had removed.[7] An important component of the ritual was its secrecy, or what is called today the "seal of confession."[8] The ritual of confessing sins, however, existed before Christ in many cultures, including ancient Egypt, India, and China.[9] Confession serves similar goals in both Western and non-Western religions. By confessing, penitents eliminate the offensive features from themselves and restore the benefits they are to receive from their deity.[10] Confession is important in order to "make up for something done wrong, make oneself worthy of that which is desired, [and] rid oneself of any impurity that may be obstructing one's goals."[11]

Although confession survives in the Catholic Church, most Protestants regard auricular and private confession as unbiblical.[12] For Protestantism and Judaism, in which oral confession of sins is not a part of the sacrament, discussions with a minister or rabbi regarding past wrongs are, nonetheless, an important element of pastoral and rabbinical counseling.[13] Without trust between the clergyperson and the penitent, the "deep level of understanding

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confessions and perform baptisms. *Id.* This is the first evidence that churches were the location in which priests took confession. *Id.*

5. *Id.* at 212-15.

6. *Id.* at 215.

7. 4 N. HALLIGAN, NEW CATHOLIC ENCYCLOPEDIA 132 (1967).

8. 4 J.L. MCCARTHY, NEW CATHOLIC ENCYCLOPEDIA 133 (1967). According to the Catholic Canon Law the "sacramental seal is inviolable; it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason." 1983 CODE c.983, § 1, *reprinted in* THE CODE OF CANON LAW 691 (James A. Coriden et al. eds., 1985). If the priest reveals information obtained through confession in a way that reveals the penitent's identity, then the priest is punished by excommunication. *Id.* However, if the danger that the identity of the penitent will be revealed is small, then punishment is determined after considering the "seriousness of the offense." *Id.* Before the 14th century, secrecy was not an important component of confession. 4 LATKO, *supra* note 1, at 133. In fact, during the first four centuries, public confession was the normal means of confession. *Id.*

9. O. JOHN ROGGE, WHY MEN CONFESS 149 (1959). According to Rogge, confession of sin was practiced by many ancient cultures, including King Mursilis II (1334-1306 B.C.) of the Hittites, Theban inscriptions (c. 1300 B.C.) of the 19th dynasty in Egypt, Chinese emperors, and Buddhist monks. *Id.*

10. WILLIAM E. PADEN, RELIGIOUS WORLDS 138 (1988).

11. *Id.*

12. 3 THE NEW ENCYCLOPAEDIA BRITANNICA 527-28 (1991). According to many Protestant denominations, confession to a priest is unbiblical because "God alone can forgive sins." *Id.* In some Fundamentalist and Pentecostal churches, however, confession "remains an important part of the worship service." *Id.* at 527.

13. WILLIAM HAROLD TIEMANN & JOHN C. BUSH, THE RIGHT TO SILENCE 23 (1984).

necessary for good pastoral care" is impossible to achieve.[14] Although the priest-penitent privilege[15] originally sought to protect only those communications between a priest and penitent in the confessional,[16] today it is extended to protect private communications made to spiritual advisors, in general.[17] The original protection, afforded members of the Catholic religion, developed out of a belief that forcing a Catholic priest to testify would infringe on rights protected by the Free Exercise Clause.[18] Unlike other religions, Catholicism requires priests to remain silent regarding confessions made by parishioners.[19] Without a mandate to remain silent, however, the risk of violating the Free Exercise Clause by forcing a clergyperson to testify is reduced. In fact, some commentators believe that the Constitution does not require states to extend the privilege.[20] Thus, a different policy was necessary to justify it. Today, the privilege is justified, in part, on the grounds that the relationship between a member of the clergy and a parishioner is important and would be hampered if the state could intrude upon it. The constitutionality of such a privilege is questionable.[21] Despite any unconstitutional features, however, the privilege survives by the weight of its own inertia and is a well-accepted feature of American jurisprudence.[22] Like other privileges,[23] the priest-penitent

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14. *Id.* Most Protestant and Judaic clergy lack a written canon, which their Catholic counterparts possess, requiring the confidentiality of communications with members of their church or synagogue. *Id.* at 23-24. Furthermore, they lack any code of professional conduct, such as the type psychiatrists must follow, which forbids them from revealing confidences. *Id.* at 24. As a result, the relationship between a clergyperson and penitent could be compared to that of the common-law marriage, in the sense that the minister believes that the "pastoral relationship is sacred and its confidences should be cherished as surely as that tie which binds husband and wife." *Id.*

15. The use of the term "priest-penitent privilege" in this Note refers to communications between a religious advisor and a member of a religious organization, not only communications between a priest and a member of the Catholic Church. Other terms used by commentators and courts include "clergy-communicant privilege," "minister's privilege," "cleric-congregant privilege," "clergyman's privilege," and "believer-clergyman privilege."

16. See *infra* notes 36-43 and accompanying text for a discussion of the first United States case recognizing the priest-penitent privilege.

17. See *infra* note 48 for statutes of each state, each of which has broadened the privilege beyond conversations between a priest and a penitent in the confessional.

18. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). See *infra* notes 36-39 for the original justification for the priest-penitent privilege.

19. *See supra* note 8.

20. *See* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 112 (1983); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1560 (1985).

21. *See infra* Part VI; *see also* Jane E. Mayes, Note, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern*, 62 IND. L.J. 397, 408 (1987) (arguing that priest-penitent privilege statutes violate all three prongs of the *Lemon* test and thus unconstitutionally establish religion).

22. Every state today has a statute protecting communications between a member of the clergy and a parishioner. *See infra* note 48.

23. Other privileged relationships protected include relationships between spouses, attorney and client, doctor and patient, and psychotherapist and patient.

privilege rests on the axiom that it is "more desirable to risk concealment of the truth than to disrupt the values that the privilege supports."[24]

While the privilege has been extended to Protestantism and Judaism, it is less clear the extent to which courts will recognize the privilege when the context is a non-Western religion. Failing to interpret statutes broadly to include non-Western religions within their scope calls into serious question the constitutionality of these statutes. With this expansion of what was originally a privilege of penitents in the Roman Catholic Church, however, the original policies and concerns regarding infringements on constitutional rights become obscured, and the current policies justifying the privilege need re-evaluation. For example, what purpose do the states have in granting a religious privilege? Why should the states protect communications between clergy and penitent, yet not protect communications between people and their accountants, close family members, or counselors? If the answer is tradition, or the special role religion plays in American tradition, is this an appropriate answer in a secular society?

The next part of this Note will explore the origins and development of the priest-penitent privilege. In Part III, this Note will examine how different courts and state legislatures apply the priest-penitent privilege outside the confines of the traditional confessional setting. Part IV will then examine the problem the privilege poses in situations in which it forces courts to determine the religious nature of a sect, including an examination of the difficult problem of defining a church and a religion. The next Part will evaluate the constitutionality of the priest-penitent privilege under the traditional Establishment Clause test and current tests that are contenders to replace it. Finally, this Note will examine the policies that support the current privilege and evaluate whether these policies are sufficient to sustain the privilege in today's pluralistic and secular society.

II. THE PRIEST-PENITENT PRIVILEGE

A. *The Privilege in England*

Because the courts in early England were staffed by clerics and bishops, the common law was greatly influenced by church law.[25] One commentator maintains that this relationship led courts in early English history to honor the secrecy of the confessional.[26] The *Articuli Cleri*,[27] adopted in 1315, may be the first statute to ever address the priest-penitent privilege.[28] The statute included the following: "It also pleases our Lord the King that felons and approvers be able to confess their misdeeds to the priest."[29] This is not evidence of England's recognition of the privilege, although the statute is

24. People *ex rel.* Noren v. Dempsey, 139 N.E.2d 780, 783 (Ill. 1957).
25. Yellin, *supra* note 20, at 97.
26. *Id.* at 97-98.
27. Articuli Cleri, 8 Edw. 2, ch. 10, § 9 (1315) (Eng.), *cited in* Yellin, *supra* note 20, at 99.
28. Yellin, *supra* note 20, at 99.
29. *Id.*

often cited for that purpose.[30] The statute's true meaning is uncertain.[31] Although the priest-penitent privilege existed in England for some time,[32] the privilege was abandoned following the Reformation.[33] At common law, English law did not recognize the privilege,[34] and to this day, no modern English court has yet made such a recognition.[35]

B. *The Privilege in the United States*

One of the earliest United States cases recognizing the priest-penitent privilege was *People v. Phillips*,[36] a New York case in which a priest refused to reveal information expressed to him by a communicant during confession.[37]

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30. *Id.*

31. *Id.*

32. Yellin, however, submits that at least one case, *Garnet's Case*, 2 Howell's State Trials 218 (1606), indicates that English law may not have recognized the privilege before the Reformation. *Id.* In this case, a priest refused to reveal information regarding an infamous plot to assassinate James I, which may have been confessed to him by one of the conspirators. *Id.* at 99-100. The priest was found guilty of "having knowledge of a treasonous plot without disclosing it, though not participating in the plot or approving of it." *Id.* at 100. Yellin claims, however, that another account of the case suggests that the priest was not compelled to disclose the secret. *Id.* Nevertheless, the consensus among commentators is that the privilege existed in England before the Reformation. *Id.*

33. Scott, *supra* note 2, at 75. In the late 19th century, some segments of the Church of England proved hostile to the practice of private confession made to a priest. Nigel Yates, *'Jesuits in Disguise'? Ritualist Confessors and Their Critics in the 1870s*, 39 J. ECCLESIASTICAL HIST. 202, 202-03 (1988). One commentator has called the subject "one of the most explosive religious issues . . . of the late nineteenth and early twentieth centuries." *Id.* at 202. Deep, popular opposition to auricular confession from Victorian society outpaced even that from evangelicals who believed the practice was unscriptural. *Id.* at 203.

34. 4 JOHN HENRY WIGMORE, EVIDENCE § 2394 (1905).

35. *See* Normanshaw v. Normanshaw, 69 L.T.R. 468, 469 (C.A. 1893) (holding that a clergyman had no right to withhold information about a husband's adultery which was revealed to the clergyman in a private interview with the husband); Wheeler v. Le Marchant, 44 L.T.R. 632 (C.A. 1881) (stating that communications made by a penitent to a priest in the confessional were not protected). Wigmore states that "since the Restoration, and for more than two centuries of English practice, the almost unanimous expression of judicial opinion (including at least two decisive rulings) has denied the existence of the privilege." 4 WIGMORE, *supra* note 34, § 2394. *But see* Regina v. Hay, 175 Eng. Rep. 933 (Assizes 1860) (holding that sacramental confessions and quasi-sacramental confessions enjoyed a privilege as long as the communication was within the context of confession).

In 1991, the Canadian Supreme Court refused to recognize a common law privilege for communications between penitents and members of the clergy. Gruenke v. The Queen, [1991] 3 S.C.R. 263, 264 (Can.). However, two provinces, Quebec and Newfoundland, have provided the privilege by statute. *Id.* at 306.

36. This case was not officially reported, but it was abstracted at 1 W. L.J. 109 (1843), and another version was published at 1 CATH. LAW. 199 (1955).

37. 1 W. L.J., *supra* note 36, at 109. Two years earlier, the Massachusetts Supreme Court refused to recognize the privilege, claiming that fellow parishioners who heard the defendant's confession were bound as good citizens to reveal the information. Commonwealth v. Drake, 15 Mass. 161, 161-62 (1818).

In refusing to compel the priest to reveal the communication, the court claimed that:

> The benevolent and just principles of the common law, guard with the most scrupulous circumspection, against temptations to perjury, and against a violation of moral feeling; and what greater inducement can there be for the perpetration of this offence, than placing a man between Scylla and Charybdis, and in such an awful dilemma that he must either violate his oath, or proclaim his infamy in the face of day, and in the presence of a scoffing multitude?[38]

The court indicated that the basis of its ruling rested on the sacramental nature of confession in the Catholic Church.[39] The court stated that the Protestant Church had only two sacraments, Baptism and the Lord's Supper.[40] The court then speculated that if it were to offend one of *these* sacraments, it would surely infringe on the freedom of religion.[41] Therefore, the court argued that courts must respect the secrecy of the Catholic penance: "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 Catholic religion would be thus annihilated."[42] It is likely that the court in *Phillips* would have been unwilling to extend the privilege to non-Catholic religions in which violation of secrecy does not result in moral condemnation.[43]

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38. *Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 201-02 (1955). The court further stated that the common law would not place:

> the witness in such a dreadful predicament; in such a horrible dilemma, between perjury and false swearing: If he tells the truth he violates his ecclesiastical oath—If he prevaricates he violates his judicial oath—Whether he lies, or whether he testiffes [sic] the truth he is wicked, and it is impossible for him to act without acting against the laws of rectitude and the light of conscience.

Id. at 203.

39. 1 W. L.J., *supra* note 36, at 112.

40. *Id.*

41. *Id.*

42. *Id.* The court, however, did not believe that confession could be used for evil purposes. *Id.* The court described several instances in which the freedom of religion would not protect exercises of religious acts, viz., the practice of burning "widows on the funeral pile of a dead husband" or the practice of having plural wives. *Id.* These practices go unprotected because they run "counter to the fundamental principles of morality, and endanger the well-being of the State." *Id.* at 113.

43. The court stated that the priest is excused because of the "compunctious visitings of a wounded conscience, and the gloomy prospect of a dreadful *hereafter*." *Id.* at 112. The comment at the end of the case by the editor noted that the holding of this case was confined to Catholic priests. *Id.* at 113. According to the editor, the reason for excusing Catholic priests was: "Penance is one of the sacraments. Take away the seal of inviolable secrecy, and you destroy the efficiency of this sacrament. You thus assail a fundamental article of Catholic faith. And what then becomes of the religious liberty secured by the constitution?" *Id.*

Wigmore posited four fundamental prerequisites for granting an evidentiary privilege to a communication:

> (1) The communications must originate in a *confidence* that they will not be disclosed; (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties; (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[44]

In *In re Grand Jury Investigation*,[45] the Court of Appeals for the Third Circuit utilized these factors in recognizing the priest-penitent privilege.[46] The court's decision rested on the importance Western tradition places on the relationship between a clergyperson and a communicant, and the recognition that confidence is essential in maintaining that relationship.[47]

All fifty states have enacted statutes recognizing the priest-penitent privilege.[48] The statutes fall into three categories depending on which party

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44. 4 WIGMORE, *supra* note 34, § 2285. Another balancing test was proposed *in United States v. King*, which dealt with the issue of whether to recognize a state privilege in a federal court. United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y. 1976). The court balanced the following four factors:

> First, the federal government's need for the information being sought in enforcing its substantive and procedural policies; second, the importance of the relationship or policy sought to be furthered by the state rule of privilege and the probability that the privilege will advance that relationship or policy; third, in the particular case, the special need for the information sought to be protected; and fourth, in the particular case, the adverse impact on the local policy that would result from non-recognition of the privilege.

Id. The Court of Appeals for the Third Circuit considered these factors to be helpful. *See In re* Grand Jury Investigation, 918 F.2d 374, 384 n.12 (3d Cir. 1990). After considering the factors set out in *United States v. King* and by Wigmore, the court decided to recognize the priest-penitent privilege. *Id.* at 384.

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

46. *Id.* at 384.

47. *Id.* Recently, in *Jaffee v. Redmond*, a case in which the Court of Appeals for the Seventh Circuit joined with the Second and Sixth Circuits in recognizing a psychotherapist-patient privilege, the court used similar reasoning: "Reason tells us that psychotherapists and patients share a unique relationship, in which the patient's ability to communicate freely without the fear of public disclosure is the key to successful treatment." Jaffee v. Redmond, 51 F.3d 1346, 1355-56 (7th Cir. 1995), *aff'd*, 116 S. Ct. 1923 (1996).

48. ALA. CODE § 12-21-166 (1975); ALASKA R. EVID. 505; ARIZ. REV. STAT. ANN. § 13-4062 (West 1989); ARK. R. EVID. 505 (Michie 1987); CAL. EVID. CODE §§ 1030-1034 (West 1995); COLO. REV. STAT. § 13-90-107(c) (1987 & Supp. 1996); CONN. GEN. STAT. ANN. § 52-146b (West 1991); DEL. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West 1979 & Supp. 1997); GA. CODE ANN. § 38-419.1 (Harrison 1994); HAW. R. EVID. 506; IDAHO CODE § 9-203(3) (1990); ILL. COMP. STAT. ANN. 5/8-803 (West 1992); IND. CODE ANN. § 34-1-14-5 (Michie 1986 & Supp. 1996); IOWA CODE § 622.10 (1997); KAN. STAT. ANN. § 60-429 (1994); KY. REV. STAT. ANN. § 421.210(4) (Michie 1992); LA. CODE EVID. ANN. art. 511 (West 1995); ME.

holds the privilege.[49] Most state statutes grant the penitent the privilege, meaning the penitent can prevent the priest from disclosing any information revealed by way of the confession.[50] Other states place the privilege in the hands of the priest, who can thereby either assert the privilege or waive it.[51] Even fewer states place the privilege in the hands of both parties.[52] In these states, either the priest or the penitent can assert the privilege and prevent the disclosure from occurring.[53] The federal courts have also acknowledged the existence of the privilege in federal proceedings.[54] Congress failed to include

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R. EVID. 505; MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (1995); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1986); MICH. STAT. ANN. § 600.2156 (West 1986); MINN. STAT. ANN. § 595.02(1)(c) (West 1988); MISS. CODE ANN. § 13-1-22 (Supp. 1996); MO. ANN. STAT. § 491.060(4) (West 1996); MONT. CODE ANN. § 26-1-804 (1994); NEB. REV. STAT. § 27-506 (1989); NEV. REV. STAT. § 49.255 (1995); N.H. REV. STAT. ANN. § 516:35 (Supp. 1995); N.J. STAT. ANN. § 2A:84A-23 (West Supp. 1996); N.M. R. EVID. 11-506; N.Y. C.P.L.R. 4505 (McKinney 1992); N.C. GEN. STAT. § 8-53.2 (1995); N.D. R. EVID. 505; OHIO REV. CODE ANN. § 2317.02(C) (Anderson 1995); OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); OR. REV. STAT. § 40.260 (1995); 42 PA. CONS. STAT. ANN. § 5943 (West 1982); R.I. GEN. LAWS § 9-17-23 (1985); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985); S.D. CODIFIED LAWS §§ 19-13-16 to -18 (1995); TENN. CODE ANN. § 24-1-206 (Supp. 1995); TEX. R. CRIM. EVID. 505; UTAH CODE ANN. § 78-24-8(3) (1987); VT. STAT. ANN. tit. 12, § 1607 (1973); VA. CODE ANN. § 8.01-400 (Michie Supp. 1996); WASH. REV. CODE ANN. § 5.60.060(3) (West Supp. 1996); W. VA. CODE § 57-3-9 (Supp. 1996); WIS. STAT. ANN. § 905.06 (West 1993); WYO. STAT. ANN. § 1-12-101(a)(ii) (1988).

49. Julie Ann Sippel, Comment, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U. L. REV. 1127, 1128 (1994).

50. *Id.*

51. *Id.*

52. *Id.* at 1128-29. In *State v. Szemple*, the New Jersey Supreme Court held that an ambiguous New Jersey priest-penitent privilege statute conferred the privilege only on the clergyperson. State v. Szemple, 640 A.2d 817, 830 (N.J. 1994). In a letter to the New Jersey Senate, Governor Christine Todd Whitman argued that as a matter of public policy the privilege should rest with both the clergyperson and the penitent. Letter from Christine Todd Whitman, Governor of New Jersey, to the New Jersey Senate (1994), *reprinted in* N.J. STAT. ANN. § 2A:84A-23 (West Supp. 1995). The governor claimed that the penitent is entitled to "expect that his or her confidences will be maintained." *Id.* Five months following the decision in *State v. Szemple*, the New Jersey legislature passed an amended priest-penitent privilege statute, granting both parties the privilege. *See* John J. Montone, III, *In Search of Forgiveness:* State v. Szemple *and the Priest-Penitent Privilege in New Jersey*, 48 RUTGERS L. REV. 263, 310-11 n.318 (1995).

53. Sippel, *supra* note 49, at 1129.

54. *See, e.g.*, *In re* Grand Jury Investigation, 918 F.2d 374, 384 (3d Cir. 1990) (claiming that "American common law, viewed in the light of reason and experience . . . compels the recognition of a clergy-communicant privilege"); United States v. Dubé, 820 F.2d 886, 890 (7th Cir. 1987) (refusing to apply the privilege because conversations with the priest were not related to the defendant's spiritual confidences); Eckmann v. Board of Educ., 106 F.R.D. 70, 72 (E.D. Mo. 1985) (claiming that the privilege has "clearly been recognized by federal courts"). The Federal Rules of Evidence state that:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by

any specific privilege in the Federal Rules of Evidence.[55] By doing so, Congress chose "not to freeze the law of privileges"[56] but to allow for its common law development.[57]

More than fifteen years ago, in *Trammel v. United States*,[58] the United States Supreme Court addressed the issue of privileges in the context of the spousal privilege. The Court stated that privileges "contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'"[59] Therefore, privileges should be "strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[60] While the Court restricted the scope of the spousal privilege,[61] it endorsed the priest-penitent, attorney-client, and physician-patient privileges because they are limited to private communications.[62] The Court also addressed the priest-penitent privilege in the infamous case against President Nixon, *United States v. Nixon*,[63] in which President Nixon attempted to

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> the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

55. *See* FED. R. EVID. 501.

56. Trammel v. United States, 445 U.S. 40, 47 (1980). Congress rejected an earlier version of the rules that included nine privileges, in favor of the generic Federal Rule of Evidence 501, which represented an "affirmative intention not to freeze the law of privileges." *Id.*

57. The Supreme Court said that the Federal Rules of Evidence "acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials." *Id. See generally* JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE §§ 75-76.2 (4th ed. 1992) (discussing the source of privileges in general as well as the current Federal Rule of Evidence 501 and its effect on privilege in federal and state courts).

58. Trammel v. United States, 445 U.S. 40 (1980).

59. *Id.* at 50 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

60. *Id.* (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

61. *Id.* at 53 (concluding that the existing rule "should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely").

62. *Id.* at 51. The spousal privilege asserted in this case was not limited to private communications, but rather to any adverse spousal testimony, whether based on a private communication made between the couple or on a conversation made before a third party. *Id.* It should be noted that not all priest-penitent privilege statutes are restricted to "confidential" communications. Many statutes simply forbid the communication of information revealed to a member of the clergy in the context of a confession, or when seeking spiritual advice or comfort. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1986); MINN. STAT. ANN. § 595.02(1)(c) (West Supp. 1996).

63. United States v. Nixon, 418 U.S. 683 (1974).

prevent the disclosure of conversations between himself and his aides.[64] The Court stated that generally, "an attorney or a priest may not be required to disclose what has been revealed in professional confidence."[65] The Court then stated that:

> These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.[66]

III. APPLICATION OF THE PRIEST-PENITENT PRIVILEGE OUTSIDE THE CONFINES OF THE CONFESSIONAL

Traditionally, the priest-penitent privilege applied to communications made within the confines of the Catholic confessional.[67] Although the privilege may have been based originally on the secrecy required by the canons of the Catholic Church, the privilege currently rests, in large part, on the need for trust and confidentiality required for a successful counselor-counselee relationship.[68] Since *People v. Phillips*,[69] state legislatures have broadened the scope of the privilege,[70] and the definition of "confession" is no longer restricted to the Catholic model.[71] For example, courts have recognized the privilege in circumstances involving marriage counseling,[72] statements made about family problems,[73] discussions in the defendant's home,[74] and discussions in the clergyperson's home.[75]

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64. *Id.* at 686.

65. *Id.* at 709.

66. *Id.* at 709-10. The Court recognized that caution is required when deciding to extend a privilege. *Id.* at 710 n.18. The Court quoted Justice Frankfurter's dissent in *Elkins v. United States*, 364 U.S. 206, 234 (1960), in which he stated that allowing a witness to refuse to testify must have a "'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" United States v. Nixon, 418 U.S. at 710 n.18.

67. *See supra* notes 36-43 and accompanying text.

68. *See supra* text accompanying notes 13-14.

69. *See supra* note 36.

70. *See, e.g.*, CAL. EVID. CODE § 1030 (West 1995) (including minister, religious practitioner, or similar functionary of a church); N.H. REV. STAT. ANN. § 516:35 (Supp. 1995) (including rabbi or ordained or licensed minister of any church); N.Y. C.P.L.R. 4505 (McKinney 1992) (including clergyman, or other minister of any religion).

71. *See* Scott v. Hammock, 870 P.2d 947, 951 (Utah 1994) (concluding that "confession" extends beyond the "formal, specific type of religious practice, such as occurs in the Catholic Church").

72. *See* Kruglikov v. Kruglikov, 217 N.Y.S.2d 845, 846-47 (Sup. Ct. 1961) (holding that a conversation in a rabbi's study regarding the couple's reconciliation was privileged).

73. *See* Pardie v. Pardie, 158 N.W.2d 641, 645 (Iowa 1968) (concluding that a consultation with a pastor regarding family problems was a privileged communication).

74. *See* Scott v. Hammock, 870 P.2d at 956 (concluding that a communication was privileged, although held in a bishop's office and the defendant's home, when conversations

A. *Nontraditional Locations*

In a recent case, the Utah Supreme Court interpreted a century-old statute,[76] which stated the following: "A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs."[77] The defendant was charged with four counts of forcible sexual abuse against his adopted daughters.[78] Before the trial began, the defendant spoke with his bishop on three occasions, once in the bishop's office and twice at the defendant's home.[79] Nonetheless, and despite acknowledging that the conversations were not "penitential" in nature,[80] the court held that the conversations were protected by the priest-penitent privilege.[81] The court concluded that although the privilege does not depend on the conversation's penitential nature, it does require that the conversations "be made in confidence and for the purpose of seeking or receiving religious guidance, admonishment, or advice and that the cleric was acting in his or her religious role pursuant to the practice and discipline of the church."[82]

In other situations, however, courts have refused to recognize the privilege when the conversations were not penitential in nature.[83] For example, in *People v. Police*,[84] the court refused to extend the privilege when the minister, still in his clerical garb, visited a defendant in jail who was accused of killing

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were intended to be private, held at the bishop's request, and in the bishop's clerical role "with regard to spiritual or religious matters").

75. *See In re* Swenson, 237 N.W. 589, 591 (Minn. 1931) (concluding that a conversation at a clergyman's home was privileged when the penitent was seeking spiritual advice, talking to the clergyman in his professional capacity, and the communication was received in confidence).

76. UTAH CODE ANN. § 78-24-8(3) (1953) (enacted in 1870). This statute was superseded by Rule 503 of the Utah Rules of Evidence. *See* Scott v. Hammock, 870 P.2d at 950 n.2.

77. UTAH CODE ANN. § 78-24-8(3) (1953).

78. Scott v. Hammock, 870 P.2d at 949.

79. *Id.*

80. *Id.*

81. *Id.* at 956.

82. *Id.*

83. *See, e.g.*, United States v. Dubé, 820 F.2d 886, 890 (7th Cir. 1987) (concluding that a conversation was not privileged when the discussion was about the defendant's efforts to avoid paying taxes); United States v. Luther, 481 F.2d 429, 432 (9th Cir. 1973) (concluding that a conversation must be with a natural person, not a religious corporation, to be privileged); People v. Police, 651 P.2d 430, 431 (Colo. Ct. App. 1982) (concluding that the defendant's confession to the victim's minister father who visited the defendant in jail was not barred by privilege when the penitent was not dealing with the minister in his professional capacity); Angleton v. Angleton, 370 P.2d 788, 797 (Idaho 1962) (concluding that statements by a priest regarding conversations during a friendly meeting and when the party was not a member of the Catholic Church were not barred by privilege).

84. People v. Police, 651 P.2d 430 (Colo. Ct. App. 1982).

the minister's son.[85] The court stated that the defendant was not dealing with the minister in his professional character, in his role as a spiritual advisor, or in the course of the minister's discipline directed by his church.[86] Therefore, the lower court properly admitted the minister's testimony.[87] In *Christensen v. Pestorious*,[88] the Minnesota Supreme Court rejected an attempt by a defendant to prevent a member of the clergy from testifying about a conversation he had in a hospital room with a witness to a fatal car accident.[89] The court claimed that because the witness was not seeking spiritual advice or counsel, the conversation was not a privileged communication.[90] In *United States v. Dubé*[91] the defendant in a tax evasion case had previously consulted his minister regarding his efforts to avoid taxation.[92] The court rejected the defendant's attempt to use the privilege to block the minister's testimony, concluding that the defendant was not a "penitent seeking spiritual relief from his sins."[93] In *United States v. Luther*,[94] the Court of Appeals for the Ninth Circuit rejected an attempt by a defendant to claim that his "communications" with a religious corporation were privileged.[95] The defendant was attempting to prevent the Internal Revenue Service from forcing him to turn over church records that were the subject of an investigation of the corporation's past president.[96] The court concluded that the clergyperson must be a "natural person."[97] Nevertheless, courts have applied priest-penitent privilege statutes in ways inconsistent with the traditional policies that supported it. Today, courts examine the content of the communication rather than where the communication took place.

B. *Nontraditional Spiritual Advisors*

Many courts and statutes now extend the privilege to "spiritual advisors"[98] who would not be considered traditional clergy. In *Eckmann v.*

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85. *Id.* The Colorado statute stated that a "clergyman or priest shall not be examined without the consent of the person making the confession as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs." COLO. REV. STAT. § 13-90-107(1)(c) (1973).

86. People v. Police, 651 P.2d at 431.

87. *Id.*

88. Christensen v. Pestorious, 250 N.W. 363 (Minn. 1933).

89. *Id.* at 365.

90. *Id.*

91. United States v. Dubé, 820 F.2d 886 (7th Cir. 1987).

92. *Id.* at 890.

93. *Id.* at 889.

94. United States v. Luther, 481 F.2d 429 (9th Cir. 1973).

95. *Id.* at 432.

96. *Id.* at 431.

97. *Id.* at 432 (citing the Proposed Rules of Evidence for the United States Courts and Magistrates, Rule 506(a)(1)).

98. *See, e.g.*, FLA. STAT. ANN. § 90.505 (West Supp. 1997) (stating that a "person has a privilege to refuse to disclose . . . a confidential communication by the person to a member of the clergy in his or her capacity as spiritual advisor"); MO. ANN. STAT. § 491.060(4) (West 1996) (stating that the privilege extends to any "person practicing as a minister of the gospel,

Board of Education,[99] the court concluded that a communication to a Catholic nun was privileged to the extent that she was acting as a spiritual advisor.[100] In *In re Murtha*,[101] however, a New Jersey court refused to extend the privilege to a nun.[102] The New Jersey case involved a nun who declined to testify before a grand jury regarding communications made to her by a defendant in a homicide case.[103] The court in *Eckmann* distinguished *Murtha*, claiming that in *Murtha* the nun did not "perform the normal functions of a priest, did not conduct religious services, and had no powers or functions insofar as the Catholic Church was concerned."[104] The nun in *Eckmann*, on the other hand, performed priestly functions recognized by the Church.[105]

In *In re Verplank*,[106] a California federal district court extended the priest-penitent privilege to communications made between military draft counselors and counselees.[107] The case involved an attempt by the government to subpoena records and documents relating to a dentist who was assisting in draft evasion.[108] The minister, who was the director of the subpoenaed draft counseling service, invoked the priest-penitent privilege not only for conversations between counselees and himself, but also for conversations between counselees and his staff of counselors.[109] The court concluded that under the circumstances "it would appear that the activities of the other counselors at the McAlister Center conform 'at least in a general way' with a

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priest, rabbi . . . concerning a communication made to him in his professional capacity as a spiritual advisor"); NEB. REV. STAT. § 27-506(2) (1989) (stating that a "person has a privilege to refuse to disclose . . . a confidential communication by the person to a clergyman in his professional character as spiritual advisor"); *see also* Sanborn v. Commonwealth, 892 S.W.2d 542, 550 (Ky. 1994) (concluding that testimony was not privileged because the conversation was not made to the clergy when he was acting as a "spiritual advisor"); Nicholson v. Wittig, 832 S.W.2d 681, 687 (Tex. App. 1992) (holding that a communication between a hospital patient's wife and the hospital chaplain was privileged when chaplain was acting within his professional capacity as a "spiritual advisor").

99. Eckmann v. Board of Educ., 106 F.R.D. 70 (E.D. Mo. 1985).

100. *Id.* at 72. The Missouri statute the court used stated that the following persons are incompetent to testify: "Any person practicing as a minister of the gospel, priest, rabbi or other person serving in a similar capacity for any organized religion, concerning a communication made to him in his professional capacity as a spiritual advisor, confessor, counselor, or comforter." MO. REV. STAT. § 491.060 (1984).

101. *In re* Murtha, 279 A.2d 889 (N.J. Super. Ct. App. Div. 1971).

102. *Id.* at 893.

103. *Id.* at 890. At the time, the New Jersey Rules of Evidence stated that "a clergyman, minister or other person or practitioner authorized to perform similar functions, of any religion shall not be allowed or compelled to disclose a confession or other confidential communication made to him in his professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which he belongs." *Id.* at 891.

104. Eckmann v. Board of Educ., 106 F.R.D. at 73.

105. *Id.*

106. *In re* Verplank, 329 F. Supp. 433 (C.D. Cal. 1971).

107. *Id.* at 436.

108. *Id.* at 434.

109. *Id.*

significant portion of the activities of a minister of an established Protestant denomination."[110]

While draft counselors have been recognized for purposes of the privilege, psychics have not.[111] In *Manous v. State*,[112] the defendant claimed that the trial court erred when it allowed a letter into evidence which was written to a person whom the court described as a "spiritual advisor/psychic."[113] The appellate court refused to recognize this type of advisor as privileged under Georgia's priest-penitent privilege statute.[114]

With the establishment of L. Ron Hubbard's Church of Scientology and other nontraditional Western religions, the courts have been forced to determine whether these groups qualify as religions.[115] Although the Church of Scientology has not been the subject of a case involving the priest-penitent privilege directly, one New York court indicated in dicta that certain disclosures during an auditing process may have violated New York's priest-penitent privilege statute.[116]

Recently, several fringe religious organizations have dominated the American press. These groups have included the Branch Dividians, led by David Koresh,[117] Order of the Solar Temple, led by Luc Jouret,[118] and Supreme Truth, led by Shoko Asahara.[119] Each of these groups is part of a genre of "apocalyptic religions" which claim that the end of the world is

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110. *Id.* at 436. The court claimed that the staff does not need to be ordained ministers to benefit from the privilege. *Id.* In support of its decision, the court cited the Advisory Committee Note to Proposed Rule of Evidence 506: "fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of an . . . established Protestant denomination, though not necessarily on a full-time basis." *Id.*

111. Manous v. State, 407 S.E.2d 779, 782 (Ga. Ct. App. 1991).

112. Manous v. State, 407 S.E.2d 779 (Ga. Ct. App. 1991).

113. *Id.* at 782.

114. *Id.* The Georgia statute protects communication "made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jew minister, by whatever name called." *Id.*

115. *See, e.g.*, Church of Scientology v. Tax Comm'n, 477 N.Y.S.2d 263, 266 (Sup. Ct. 1984), *vacated*, 501 N.Y.S.2d 863 (App. Div.), *appeal dismissed*, 498 N.E.2d 438 (N.Y.), *appeal dismissed*, 503 N.E.2d 1375 (N.Y. 1986).

116. *Id.* at 267.

117. *See* Kenneth L. Woodward, *Children of the Apocalypse*, NEWSWEEK, May 3, 1993, at 30.

118. *See* Tom Post, *Mystery of the Solar Temple*, NEWSWEEK, Oct. 17, 1994, at 42. The group, known as the Solar Temple, gained notoriety in 1994 after many of its members in Switzerland and Canada were found either shot, asphyxiated, or burnt to death. *Id.* at 42-43. In one group, the dead bodies, dressed in ceremonial robes, were arranged in a circle with each member's feet pointing toward the center. *Id.* at 42.

119. *See* James Walsh, *Shoko Asahara: The Making of a Messiah*, TIME, April 3, 1995, at 30. In 1987, Asahara formed the Aum Shinrikyo religion. *Id.* at 31. Asahara led a diverse group of scientists, policeman, and former members of Japanese organized crime in a "doomsday cult," which Japanese authorities claim is responsible for releasing sarin gas into a Tokyo subway in 1995, killing twelve people and injuring more than 5000. *The Cult's Broad Reach*, NEWSWEEK, May 8, 1995, at 54, 54.

near. The prospect that "spiritual advisors" within such groups will claim that communications between themselves and their members are privileged poses a difficult question for courts: Are the leaders and other individuals within these groups "spiritual advisors"?[120] It would be difficult to argue that the main figures are not spiritual advisors. The followers of David Koresh saw him as God's prophet and their omnipotent parent.[121] Shoko Asahara refers to himself as "Today's Christ" and "the Savior of This Century."[122] Many followers of Luc Jouret were found dead in a room in which hung a picture of a Christlike figure that resembled Jouret.[123] Each of these men allegedly dabbled in criminal activity,[124] yet were able to clothe the activity in the guise of religious behavior. The problem for courts when dealing with these kinds of religious leaders, vis-à-vis the priest-penitent privilege, is great. When does spiritual advice end and begin? When a religious counselor instructs a follower to engage in criminal behavior, are these instructions protected by the priest-penitent privilege if given as spiritual advice? Current statutes may protect these types of communications.

Although it is difficult, if not impossible, to accurately foresee the religious movements in the offing, the future will likely bring unexpected variations of religious form. In the United States, the inability of institutional Christianity to adequately address the concerns of the twentieth century has resulted in its own decline and the growth of fundamentalism throughout the country.[125] Inevitably, religion changes form;[126] and as a result, more often courts will face the difficult task of evaluating the religious nature of groups claiming a religious bearing.

C. *Non-Western Religions*

It is unclear how the priest-penitent privilege would apply to non-Western religions, such as Islam, Buddhism, and Hinduism. While some state

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120. Another difficult question is whether these groups constitute "religious organizations." Many statutes grant the privilege to religious or spiritual advisors of a religious organization. *See, e.g.*, ALA. CODE § 12-21-166 (1975) (defining clergyman as a "licensed or commissioned minister, pastor, priest, rabbi or practitioner of any bona fide established church or religious organization"); NEB. REV. STAT. § 27-506 (1989) (defining clergyman as a "minister, priest, rabbi, or other similar functionary of a religious organization"). Most cults, including the Branch Dividians, see themselves as a family. Woodward, *supra* note 117, at 30.

121. Woodward, *supra* note 117, at 30.

122. Walsh, *supra* note 119, at 31. Asahara's religious community spread quickly after its founding—including strongholds in portions of the United States. *Id.*

123. Richard Lacayo, *In the Reign of Fire*, TIME, Oct. 17, 1994, at 59, 59.

124. *See, e.g.*, Post, *supra* note 118, at 44 ("Jouret and his accomplices . . . plead[ed] guilty to trafficking in firearms . . . ."); Walsh, *supra* note 119, at 31 ("[I]n 1982, . . . [Asahara] was arrested for selling fake cures."); Woodward, *supra* note 117, at 30 ("Koresh . . . took multiple wives . . . .").

125. *See* Jeffrey S. Victor, *Forecasting the Future of Religion: The Next 50 Years*, THE HUMANIST, May/June 1996, at 20, 21.

126. *See id.* at 21-22.

statutes define clergy broadly,[127] others restrict their definition to Western-style religious leaders.[128] Few cases involving non-Western religious followers invoking the privilege have reached the appellate level.[129] In *People v. Johnson*,[130] a New York supreme court refused to extend the privilege to communications between a defendant and members of his Muslim mosque, concluding that the defendant was not seeking religious counsel.[131] The court acknowledged, however, that confidential communications between a spiritual advisor of the Muslim faith and another Muslim may be privileged under certain circumstances.[132] The court believed that the communication in this case did not constitute "religious counsel, advice, solace, absolution or ministration."[133] In our increasingly pluralistic society, courts will be forced to evaluate the religious nature of particular sects, including the growing number of fringe religious groups having origins outside of Western-style religions, and decide whether religious leaders and followers of non-Western religions are entitled to the same privilege as religious leaders and followers of traditional Western religions.

IV. DIFFICULTIES IN DEFINING THE CHARACTERISTICS OF RELIGION

When courts are ultimately forced to determine whether statutes extend the privilege to non-Western and nontraditional religious groups, some will deny these groups the benefit of the privilege based on a narrow reading of their state's priest-penitent privilege statute. Many statutes today appear to protect conversations made only between members of Western religious groups.

A. *Who Is a "Clergyman"?*

Many state statutes can be broadly interpreted. One example is the Arizona priest-penitent privilege statute, which provides that "a clergyman or priest [shall not], without consent of the person making the confession, [be examined] as to any confession made to him in his professional character in

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127. *See, e.g.*, MO. ANN. STAT. § 491.060(4) (West 1996) (extending the privilege to communications made by a "minister of the gospel, priest, rabbi or other person serving in a similar capacity for any organized religion"); WIS. STAT. ANN. § 905.06(1)(a) (West 1993) (extending the privilege to communications made by "a minister, priest, rabbi, or other similar functionary of a religious organization").

128. *See, e.g.*, VT. STAT. ANN. tit. 12, § 1607 (1973) (extending the privilege to communications made by a "priest or minister of the gospel"); WYO. STAT. ANN. § 1-12-101(a)(ii) (Michie 1988) (extending the privilege to communications made by a "clergyman or priest").

129. *See* People v. Johnson, 497 N.Y.S.2d 539 (App. Div. 1985).

130. People v. Johnson, 497 N.Y.S.2d 539 (App. Div. 1985).

131. *Id.* at 540. The conversation, during which the defendant admitted to killing his wife, was not initiated by the defendant, but by members of the mosque. *Id.*

132. *Id.* at 539. In this case, the defendant was not seeking spiritual advice, nor did he show that the conversation was intended to be confidential. *Id.*

133. *Id.*

the course of discipline enjoined by the church to which he belongs."[134] The term "clergy" has traditionally referred to officials of Western religions. *Webster's Ninth New Collegiate Dictionary* defines clergy as "a group ordained to perform pastoral or sacerdotal functions in a Christian church."[135] *Webster's*, however, also defines clergy as "the official or sacerdotal class of a non-Christian religion."[136]

Few courts have attempted to provide definitions of clergy.[137] In 1990, the Court of Appeals for the Third Circuit embraced the definition provided by the Proposed Rule of Evidence 506(a)(1), in which "clergyperson" was defined as "a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him."[138] In an earlier decision, the Minnesota Supreme Court also provided an equally broad definition of clergy.[139] The court defined "clergyman" as the "spiritual adviser of any religion whether he be termed priest, rabbi, clergyman, minister of the gospel, or any other official designation."[140] In 1973, a New Jersey court consulted a 1966 copy of *Webster's* dictionary, which defined clergyman as "a member of the clergy: an ordained minister: a man regularly authorized to preach the gospel and administer its ordinances: one in holy orders."[141] Despite this narrow interpretation of the word, most courts today would probably adhere to the broader interpretation of the Minnesota Supreme Court.

B. *What Is a "Church"?*

The Arizona statute also requires the conversation be made to a "clergyman or priest . . . in the course of discipline enjoined by the *church* to which he belongs."[142] As with clergy, "church" may also be interpreted broadly to include non-Western religions. According to *Webster's*, church

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134. ARIZ. REV. STAT. ANN. § 13-4062 (West 1989).

135. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 248 (1985); *see also* BLACK'S LAW DICTIONARY 252 (6th ed. 1990) (defining clergy as "the whole of clergymen or ministers of religion").

136. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, *supra* note 135, at 248.

137. For an extensive look at who has been recognized as a "clergyman" for purposes of priest-penitent privilege statutes, see Erwin S. Barbre, Annotation, *Who Is "Clergyman" or the Like Entitled to Assert Privilege Attaching to Communications to Clergymen or Spiritual Advisers*, 49 A.L.R.3d 1205 (1973).

138. *In re* Grand Jury Investigation, 918 F.2d 374, 384 n.13 (3d Cir. 1990) (quoting proposed Rule of Evidence 506).

139. *In re* Swenson, 237 N.W. 589, 590 (Minn. 1931).

140. *Id.* The court rejected the notion that the privilege should apply only to Roman Catholic priests. *Id.* The court claimed that "[c]ertainly the Legislature never intended the absurdity of having the protection extend to the clergy of but one church." *Id.*

141. Borough of Cresskill v. Northern Valley Evangelical Free Church, 312 A.2d 641, 641 (N.J. Super. Ct. App. Div. 1973) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966)).

142. ARIZ. REV. STAT. ANN. § 13-4062 (West 1989) (emphasis added).

can refer to "the clergy or officialdom of a religious body."[143] The Internal Revenue Service has also been forced to define church for purposes of determining particular tax benefits.[144] In their attempts to define a church, the IRS and the courts have not focused on whether the religion is Christian, but have focused on factors not unique to Western religions, such as whether the group has a recognized creed or whether the group has a history and a sacred writing. In 1978, IRS Commissioner Jerome Kurtz identified fourteen criteria the IRS uses in determining whether an organization is a church:

> (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; (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.[145]

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143. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, *supra* note 135, at 240 (also defining "church" as "a building for public and esp. Christian worship" and "a body or organization of religious believers"). *Black's Law Dictionary*, however, focuses more on the Christian faith in its definition of church:

> In its most general sense, the religious society founded and established by Jesus Christ, to receive, preserve, and propagate His doctrines and ordinances. It may also mean a body of communicants gathered into church order; body or community of Christians, united under one form of government by the profession of the same faith and the observance of the same ritual and ceremonies; place where persons regularly assemble for worship; congregation; organization for religious purposes; religious society or body; the clergy or officialdom of a religious body.

BLACK'S LAW DICTIONARY 242 (6th ed. 1990).

144. An example of a tax provision involving churches is I.R.C. § 170(b)(1)(A) which states: "Any charitable contribution to (i) a church or a convention or association of churches . . . shall be allowed to the extent that the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year." I.R.C. § 170(b)(1)(A) (1994).

145. The Church of the Visible Intelligence that Governs the Universe v. United States, 4 Cl. Ct. 55, 64 (1983) (quoting IRS Commissioner Jerome Kurtz's remarks at the Practising Law Institute's Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), *reprinted in* Fed. Taxes (P-H) ¶ 54,820 (1978)). In *The Church of the Visible Intelligence that Governs the Universe*, the court held that the group was not entitled to the favorable tax benefits to which churches are entitled, due in part to the fact that the church had only three members. *Id.* at 65. The court stated that at a minimum, a church must include a "body of believers which assembles regularly to worship." *Id.* at 64.

Another court stated that the minimum requirement for an organization to be considered a church is that it include "a body of believers or communicants that assembles regularly in order to worship. Unless the organization is reasonably available to the public in its conduct of worship, its educational instruction, and its promulgation of doctrine, it cannot fulfill this associational role." American Guidance Found. v. United States, 490 F. Supp. 304, 306 (D.D.C. 1980).

With a broad interpretation of its essential terms, the Arizona statute and others like it[146] can include non-Western religions.

While the language in many priest-penitent privilege statutes allows a court to include non-Western religions, others include language that can be interpreted in no other way except to exclude non-Western religions from their scope.[147] For example, the Georgia priest-penitent privilege statute pro-

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The IRS, the Congress, and the courts have all avoided tackling the problem of defining church. The Church of the Visible Intelligence that Governs the Universe v. United States, 4 Cl. Ct. at 64. Although the Supreme Court held that "'church' in § 3309(b) must be construed . . . to refer to the congregation or the hierarchy itself" and not the building, it expressly disavowed "any intimations . . . defining or limiting what constitutes a church under FUTA or under any other provision of the Internal Revenue Code." St. Martin Lutheran Church v. South Dakota, 451 U.S. 772, 784, n.15 (1981).

In *Ideal Life Church v. County of Washington*, 304 N.W.2d 308 (Minn. 1981), the Minnesota Supreme Court was forced to decide whether a family that claimed it represented a religious organization and that claimed a home should be exempt from property taxes, constituted a church. The lower court used a factual analysis test, that is, an "analysis of all the facts and circumstances" of the particular case, to determine whether the group constituted a church. *Id.* at 315. Applying the factual analysis test, the lower court considered several facts that forced it to conclude that the group did not constitute a church. *Id.* Among those facts were that the primary purpose of the organization was tax avoidance, that the doctrines and beliefs of the church were intentionally vague, that members of the church continue to practice other religions, that the minister had no formal training as a minister, that the organization had no sacraments, rituals, or literature of its own, and that the meetings resembled social gatherings rather than religious worship. *Id.* In its brief, the county urged the court to adopt the lower court's test because it was based "upon *all* the relevant factors in each particular case, and will therefore avoid the dangers of making any one factor or set of factors completely determinative, resulting in either a too-narrow or overly-broad definition." *Id.* The Minnesota Supreme Court was persuaded to follow the lower court's analysis, claiming that the "multifactual analysis test is a workable formula for determining whether a 'church' qualifies as a tax exempt entity." *Id.* For a discussion of the use of "church" in the IRS Code, see generally, Charles M. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885 (1977).

146. *See, e.g.*, NEV. REV. STAT. § 49.255 (1994) (stating that "[a] clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character"); N.C. GEN. STAT. § 8-53.2 (1995) (stating that "[n]o priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action"); VA. CODE ANN. § 8.01-400 (Michie Supp. 1996) (stating that "[n]o regular minister, priest, rabbi, or accredited practitioner over the age of eighteen years, of any religious organization or denomination usually referred to as a church, shall be required to give testimony"); WASH. REV. CODE ANN. § 5.60.060(3) (West Supp. 1996) (stating that "[a] member of the clergy or a priest shall not, without the consent of a person making the confession, be examined as to any confession made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs").

147. *See* S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985) (stating that "no regular or duly ordained minister, priest or rabbi shall be required . . . to disclose any confidential communication properly entrusted to him in his professional capacity"); VT. STAT. ANN. tit. 12, § 1607 (1973) (stating that "[a] priest or minister of the gospel shall not be permitted to

tects communications "made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish Rabbi, or to any Christian or Jewish minister, by whatever name called."[148] A court would be unable to extend this statute, which restricts its scope to the major Western religions and their branches, beyond the scope of the major Western religions.

V. QUASI-WESTERN RELIGIOUS SECTS: WHAT IS A "RELIGION"?

The greatest challenge to courts in the near future may not be from claims of members of non-Western religions, but from the claims of members of quasi-Western religious sects, claiming privileges such as the priest-penitent privilege. Defining "religion" in our pluralistic society is no small task.[149] Experts in the field of religion are hard pressed to provide a hard and fast definition of religion. Instead, they can provide "characteristic elements and categories of structures" that are distinctively religious.[150] According to *The Encyclopedia of Religion*,[151] characteristics unique to religion include traditionalism, myth and symbol, concepts of salvation, sacred places and objects, rituals, sacred writing, a sacred community, and a sacred experience.[152]

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testify in court to statements made to him by a person under the sanctity of a religious confessional").

148. GA. CODE ANN. § 38-419.1 (Harrison 1994).

149. Many authors have explored this complex issue in the context of a First Amendment definition of religion. *See* Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1 (1991-92); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); C. John Sommerville, *Defining Religion and the Present Supreme Court*, 6 U. FLA. J.L. & PUB. POL'Y 167 (1994); Ben Clements, Note, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989); Steven D. Collier, Comment, *Beyond* Seeger/Welsh*; Redefining Religion Under the Constitution*, 31 EMORY L.J. 973 (1982); Richard O. Frame, Note, *Belief in a Nonmaterial Reality—A Proposed First Amendment Definition of Religion*, 1992 U. ILL. L. REV. 819; Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982); Sherryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301 (1984); David Young, Comment, *The Meaning of 'Religion' in the First Amendment: Lexicography and Constitutional Policy*, 56 UMKC L. REV. 313 (1988).

150. 12 THE ENCYCLOPEDIA OF RELIGION 286 (1987).

151. THE ENCYCLOPEDIA OF RELIGION (1987).

152. 12 *id.* at 286.

Traditionalism. Traditionalism refers to the desire of most religious groups to "look backward for origins, precedents, and standards." *Id.* at 287. In the context of Western religious groups this is not difficult to understand. Protestantism represents a desire to return to New Testament Christianity without Roman Catholic "accretions." *Id.* This phenomenon also appears in Eastern religions, such as Zen, which seeks to bypass scripturalism and return to the mind of the Buddha. *Id.*

Myth and Symbol. Myths represent stories conceived by groups as ways of explaining the operation of the world. *Id.* Because mere language is unable to convey adequately the

The framers of the Constitution generally subscribed to a theistic concept of religion.[153] Thomas Jefferson, however, appeared to define religion more broadly to include Jews, Christians, Muslims, Hindus, and even "infidels" of other denominations.[154] Of course, courts are also sometimes forced to address this difficult issue.[155] Recently, the Supreme Court evaluated religious claims in the context of substances and rituals that were

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ultimate questions that religion attempts to resolve, symbols are used to answer these questions. *Id.*

Concepts of Salvation. In the most basic sense, man seeks to "save" himself from perils such as starvation, from his enemies, and from being eaten by an animal. *Id.* The major religions of the world today focus also on "inner development, experiences, and values" which aim to "cultivate the inner life of prayer, faith, enlightenment, and purity of character." *Id.* at 288. Religious salvation tends to focus on the needs the culture believes are most important and tends to aim at "total, absolute, and sometimes transcendent fulfillment of human needs." *Id.*

Sacred Places and Objects. An important feature of religions is that in each there are spaces which are set apart from areas in the ordinary world. *Id.* These spaces are imbued with varying degrees of reverence, and often to enter one of these spaces, the religious person needs to take some action, such as removing shoes, bowing, fasting, or praying. *Id.* Generally there are also sacred objects, such as the Bible in Protestantism, the Torah in a synagogue, or large images of the Buddha in Buddhism. *Id.* at 288-89.

Rituals. Most rituals involve elements of order, and in some religions the ritual is highly standardized and elaborate. *Id.* at 289. Failure to follow the ritual perfectly will defeat the ultimate aim. *Id.* at 290.

Sacred Writings. In literate societies, religions set out the sayings of past holy men in writing. *Id.* In all major religions, there are a multitude of divisions that offer varying interpretations of the scripture. *Id.*

Sacred Community. A sacred community can involve the members of a religious order, but typically it represents the members of the direct religious community. *Id.* at 290-91. This definition, however, is predicated on Christianity's belief that nonbelievers are distinguishable from believers because religious faith is a choice made by an individual. *Id.* at 291. This concept is foreign to some Asian religions that do not emphasize doctrine and exclusiveness. *Id.*

Sacred Experience. Common to all religions are shared experiences by the individual members of a religious tradition. *Id.* In Christianity, these experiences include the feeling enjoyed when a prayer is answered, a sense of humility before the presence of the deity, or in some divisions of Christianity, the experience of speaking "in unknown tongues." *Id.*

153. Michaelson, *supra* note 149, at 317.

154. *Id.* Specifically, Jefferson included the "Jew, and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination." *Id.* (quoting Thomas Jefferson's Virginia Act for Establishing Religious Freedom *in* 1 THE WRITINGS OF THOMAS JEFFERSON 62 (P. Foud ed., 1892)). Michaelson claims that by including "infidels" and Hinduism, which represent polytheism and pantheism, a belief (for some) in an "impersonal, creative, and preserving force," Jefferson intended to "transcend theistic boundaries in ensuring religious liberty." *Id.* at 317-18 n.72.

155. The mere act of defining religion is highly problematic. Many authors have suggested that by defining religion, and the concomitant exclusion and inclusion that naturally result, the state has violated the Establishment Clause. *See, e.g.*, Ingber, *supra* note 149, at 240 (claiming that "any definition, by excluding from 'religion' that which does not fit into the defined category, must be constitutionally suspect"). Nevertheless, it is an exercise that seems inescapable. By merely recognizing a religion for the purpose of establishing its right to free exercise, the state has acted to define and include that religion.

generally proscribed, yet religiously mandated.[156] Claims by citizens attempting to avoid military service for religious purposes have also provided courts with the opportunity to address this thorny issue.[157]

In *United States v. Seeger*,[158] the Supreme Court attempted to set some parameters on what qualifies as a religion. The case involved a conscientious objector who attempted to avoid service in the military under an exemption for persons who "by reason of their religious training and belief" opposed the participation in war.[159] Congress defined "religious training and belief" as a belief in a "Supreme Being involving duties superior to those arising from any human relation."[160] The conscientious objectors in *Seeger* did not believe in a supreme being in the Western sense, but rather one defendant claimed he believed in a "Supreme Reality" and the other in a "universal power."[161] The Court concluded that by using the phrase "Supreme Being," Congress desired to include all religions and to exclude "political, sociological, and philosophical views."[162] The Court acknowledged that a belief in "god" can exist although the belief may not be consistent with traditional notions of a god "out there," but as "the ground of our very being."[163]

In *United States v. Ballard*,[164] individuals were charged with mail fraud when they distributed literature which the United States government claimed contained "fraudulent representations, pretenses and promises."[165] These

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156. *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993) (holding that a city ordinance that banned animal sacrifices was unconstitutional because it specifically targeted the Santeria religion). In this case, the Court examined the rituals, practices, and roots of the Santeria religion. *Id.* at 2222-23. The Court noted that the ritual of animal sacrifice was actually widely practiced in Judaism before the destruction of the second Temple. *Id.* at 2222; *see also* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (holding that the state could deny the plaintiffs their unemployment benefits without violating the Free Exercise Clause, when they were fired for violating "neutral" laws banning drug use, including using peyote for sacramental purposes related to a ceremony of the Native American Church).

157. *See, e.g.*, United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943) (holding that a defendant who failed to appear for induction into the Army for purposes of serving in World War II did not qualify as a conscientious objector because he "did not report for induction because of a compelling voice of conscience, which we should regard as a religious impulse"); Jones v. Mundy, 792 F. Supp. 1009, 1011-12 (E.D.N.C. 1992) (holding as proper a decision that a Marine corporal's moral and ethical opposition to the Persian Gulf War were neither sincere nor deeply held).

158. United States v. Seeger, 380 U.S. 163 (1965).

159. *Id.* at 164-65.

160. *Id.* at 165.

161. *Id.*

162. *Id.*

163. *Id.* at 180. The Court quoted from renowned theologian Paul Tillich, who claimed that the "God above the God of theism" is the "power of being, which works through those who have no name for it, not even the name God." *Id.* (quoting PAUL TILLICH, SYSTEMATIC THEOLOGY 12 (1957)).

164. United States v. Ballard, 322 U.S. 78 (1944).

165. *Id.* at 79. One of the statements alleged by the United States to be false was:

representations were made by members of a religious group, called "I Am."[166] The Supreme Court reversed the circuit court, which held that the truth of the group's religious doctrines should have been decided by the jury.[167] In disagreeing with the lower court, the Supreme Court maintained that:

> [freedom of religious belief] embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. . . . Men may believe what they can not prove. They may not be put to the proof of their religious doctrines or beliefs.[168]

Nevertheless, courts are often placed in the position of evaluating the religious nature of an organization. In *Founding Church of Scientology v. United States*,[169] the court faced the difficult question of determining whether the Church of Scientology was a religion.[170] The court concluded that the organization was a religion.[171] It based its decision, in part, on the fact that the church had ministers with legal authority to perform marriages and funerals, the church had a fundamental writing, which described man and his nature, and that the church was incorporated as a religion in the District of Columbia.[172] The court further claimed that although the Church of Scientology did not advocate the existence of a deity in the Western sense, this did not prevent it from being a religion.[173]

> that Guy W. Ballard, during his lifetime, and Edna W. Ballard, and Donald Ballard, by reason of their alleged high spiritual attainments and righteous conduct, had been selected as divine messengers through which the words of the alleged "ascended masters," including the alleged Saint Germain, would be communicated to mankind under the teachings commonly known as the "I Am" movement . . . .

Id. at 79-80.

166. *Id.* at 79.

167. *Id.* at 86.

168. *Id.*

169. Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969).

170. *Id.* at 1160. The court provided an overview of the principles which guide the Scientology movement. *See id.* at 1151-53. According to the court the movement is based principally on the writings of L. Ron Hubbard. *Id.* at 1151. "The basic theory of Dianetics is that man possesses both a reactive mind and an analytic mind." *Id.* According to the court, Dianetics is presented as a practical science which is able to cure many of man's ills. *Id.* "All mental disorders are said to be caused by 'engrams,' as are all psychosomatic disorders, and that concept is broadly defined." *Id.* (quoting L. RON HUBBARD, DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH 91-108 (1950)). Many of Scientology's followers began organizing themselves into formal religious bodies, which were supported by the founder. *Id.* at 1152.

171. *Id.* at 1160. In the same year this decision was made, the United States Court of Claims held that the Church of Scientology was *not* a religion for purposes of tax exemption under the Internal Revenue Code that required an organization to be exclusively operated for religious or educational purposes to receive the exemption. Founding Church of Scientology v. United States, 412 F.2d 1197, 1202 (Ct. Cl. 1969).

172. Founding Church of Scientology v. United States, 409 F.2d at 1160. It should be noted that the government did not resist the claim by the church that it was a religion. *Id.*

173. *Id.*

The IRS has perhaps been the most active governmental agency involved in determining the religious nature of particular organizations. In 1983, the Claims Court received a case brought by the Church of the Visible Intelligence that Governs the Universe.[174] The IRS refused to grant the organization the tax exemption reserved for "religious foundations"[175] for several reasons, which were included in a letter sent by the IRS to the group:

> [Y]ou have not yet begun to engage substantially in any proposed activities. . . . Moreover, since your founder, Mr. Rutherford, has sole authority and discretion over the operations of the organization, it is our conclusion that you have not established that you will be operated for public rather than private interests. . . . [Y]ou do not . . . perform any sacerdotal functions[,] do not have an established place of worship[,] . . . your ministers are not ordained and they have not followed any formal course of religious instruction. In addition, you have not established a definite and distinct legal existence, a formal code or doctrine and discipline, or a distinct religious history.[176]

The Claims Court ultimately held that the IRS should have granted the group the tax exemption for religious foundations.[177] The court stated that it would not hold a new religious organization to the same standard that it would hold an established religion.[178] Many current apocalyptic religions[179] do not share many of the features of established religions, such as a group of ordained clergy or a distinctive history or literature. Although these groups lack a distinctive history or literature, many of these groups claim roots in Christianity and claim the Bible as their scripture. David Koresh, a follower of the Christian Bible, believed that his seven children were to begin a new line of David.[180] Although Asahara's new religious organization was a mix of asceti-

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174. The Church of the Visible Intelligence that Governs the Universe v. United States, 4 Cl. Ct. 55 (1983).

175. *Id.* at 59. The statute exempts:

> [c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

I.R.C. § 501(c)(3) (1994).

176. The Church of the Visible Intelligence that Governs the Universe v. United States, 4 Cl. Ct. at 59.

177. *Id.* at 65.

178. *Id.* The court claimed, however, that "one man's publication of a newsletter and extemporaneous discussion of his beliefs, even when advertised, is not sufficient to constitute a church within the common understanding." *Id.*

179. *See supra* notes 117-24 and accompanying text.

180. Woodward, *supra* note 117, at 30.

cism and New Age religion, it borrowed significantly from Buddhism.[181] While each of these new religious sects border on the extreme edges of religious belief, they may be included in a broadening definition of religion, and thereby be entitled to enjoy the benefits granted mainstream religions.

VI. THE ESTABLISHMENT CLAUSE

In *Epperson v. Arkansas*,[182] in which the Supreme Court held that Arkansas could not forbid the teaching of evolution in public schools, the Court stated that the state must be "neutral in matters of religious theory, doctrine, and practice"[183] and may not "aid, foster, or promote one religion or religious theory against another."[184] In a more recent case, the Supreme Court ruled on the question of whether New York could create a special school district for a group of Hasidic Jews without violating the Establishment Clause.[185] While the Court held that the state law which granted the special school district violated the Establishment Clause,[186] the Court claimed that the state could provide "benevolent neutrality,"[187] in permitting "religious practice to exist without sponsorship and without interference."[188] The Court also said that the state "may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause."[189] The priest-penitent privilege represents such an "accommodation" of religion, and because the privilege was extended well beyond its original purpose of accommodating Catholic religious rules, states are not at liberty to include established Western religions and exclude sects that do not conform to this model. In rejecting New York State's attempt to establish a special school district for disabled children of Hasidic Jews, the Court claimed that New York acted unconstitutionally when it created a scheme from which benefits flowed to a single religion.[190]

Of course, courts that refuse to interpret statutes broadly to include non-Western religions, or those that choose to grant the privilege to only established Western religions while denying the privilege to others, risk interpreting the statutes unconstitutionally. A more difficult question is whether the priest-penitent privilege is per se unconstitutional; that is, even applying it to all religions equally, does it nonetheless violate the prohibition against establishment of religion. I will examine this question for the remainder of this Part of

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181. Walsh, *supra* note 119, at 31.
182. Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).
183. *Id.*
184. *Id.* at 104.
185. Board of Educ. v. Grumet, 114 S. Ct. 2481, 2484, 2492 (1994).
186. *Id.* at 2492.
187. *Id.* (quoting Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987)).
188. *Id.*
189. *Id.* (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987)).
190. *Id.* The Court further stated that aiding a religious group larger than this relatively small one would cause "no less a constitutional problem." *Id.*

the Note. It is not entirely clear which Establishment Clause test currently enjoys the support of a majority of the members of the Supreme Court. Therefore, I will examine the constitutionality of priest-penitent privilege statutes under the principal Establishment Clause test and the two leading candidates to replace it.

A. *The* Lemon *Test*

The Supreme Court has established a three-part test for determining whether the Establishment Clause[191] is violated.[192] In order for a statute to survive the test, first, it must "have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[193] Failure to pass one of these parts renders the statute unconstitutional. Although this test has been heavily criticized by many current members of the Court,[194] it is an important guide in determining if a government action violates the Establishment Clause.

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191. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

192. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

193. *Id.*

194. Chief Justice Rehnquist condemned the *Lemon* test in *Wallace v. Jaffree*, claiming that the test had "no more grounding in the history of the First Amendment than does the wall theory upon which it rests." Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting). Justice Scalia questioned the test in *Edwards v. Aguillard*, in which he doubted that the "purpose" requirement was a "proper interpretation of the Constitution." Edwards v. Aguillard, 482 U.S. 578, 613 (1987) (Scalia, J., dissenting). In a more recent decision, Justice Scalia again criticized the Court's reliance on the *Lemon* test, although he agreed with the Court's conclusion that a school district's allowing of a church to use school facilities after hours did not violate the Establishment Clause. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring). Justice Scalia wrote that he agreed with the "long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced." *Id.* at 2150. Justice O'Connor proposed a "clarification" of the *Lemon* test in *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). Justice Kennedy today supports the "coercion test," and has said that he does not believe the *Lemon* test should be the "primary guide" in this area. County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring). Scholars have said that whether the *Lemon* test is violated depends on the policy preferences of the justices. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 158 (2d ed. rev. 1994) (stating that "[w]hat counts . . . are the policy preferences of the individual judges"); 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 660 (2d ed. 1995) (stating that "whether governmental support of religion survives establishment clause objections depends on the policy goals of the majority on the Court").

Perhaps the major reason for the criticism of the *Lemon* test is that it is a single test which courts attempt to apply to different Establishment Clause issues. *See* Board of Educ. v. Grumet, 114 S. Ct. 2481, 2498-99 (1994) (O'Connor, J., concurring). A different test may be appropriate in different Establishment Clause contexts. *Id.* at 2499-500. Different situations may include cases in which the government provides special benefits or imposes special burdens on particular religions, or cases in which the government grants special powers to religious organizations. *Id.* While some situations may call for a determination of whether the

Under the first prong of the *Lemon* test, the state action must have a "secular legislative purpose."[195] The original purpose of priest-penitent privilege statutes was to protect the free exercise rights of members of the Catholic Church. Over time, however, the purpose of the privilege changed and now includes many Western religions, and depending on a court's interpretation, all religions. The Supreme Court has mentioned in dictum that the priest-penitent privilege exists because it represents a "public good," which transcends the normal desire of courts to obtain all relevant evidence available.[196] The Court failed to elaborate on exactly what "good" the privilege advanced. The Court of Appeals for the Third Circuit, however, said that the privilege exists because of the important place that the clergy-penitent relationship holds in the history of Western Civilization.[197] Although, over time, such a privilege obtains a "secular status" of sorts, the religious nature of the privilege, and the fact that it provides religion such an important exemption, leads to the inescapable conclusion that it lacks a secular legislative purpose.

In *Stone v. Graham*,[198] the Supreme Court struck down a Kentucky law that required the posting of the Ten Commandments in the classrooms of each of the state's public schools.[199] Kentucky claimed that the law survived the secular legislative purpose prong by accompanying each display of the Ten Commandments with a caption that read: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."[200] According to the Court, this "avowed" secular purpose was not sufficient to make the law constitutional when the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls [was] plainly religious in nature."[201] Given this analysis, the continued granting of a privilege to followers of religion would fail the first prong of the *Lemon* test, despite the stated secular purpose of promoting a "public good."

The second prong of the *Lemon* test requires that the primary effect of the state action "be one that neither advances nor inhibits religion."[202] The primary effect of the priest-penitent privilege is to provide an exemption to priests from testifying in a court regarding a confession made to the priest in the context of religious counseling. This privilege encourages defendants who may have committed a crime to seek spiritual guidance and absolution from the defendant's spiritual advisor. By providing such a privilege, the

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government is "endorsing" religion, others may call for a determination of whether the government is "coercing" a religious belief on particular individuals, or whether the government action is inhibiting a religious organization from fulfilling its religious requirements.

195. Lemon v. Kurtzman, 403 U.S. at 612.
196. Trammel v. United States, 445 U.S. 40, 50 (1980).
197. *In re* Grand Jury Investigation, 918 F.2d 374, 384 (3d Cir. 1990).
198. Stone v. Graham, 449 U.S. 39 (1980) (per curiam).
199. *Id.* at 39.
200. *Id.* at 41.
201. *Id.*
202. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

state allows an outlet to criminals to confess their crimes without risking disclosure of the confession in a courtroom, and by doing so in the context of religion, the state is advancing religion.[203] In *County of Allegheny v. ACLU*,[204] the Supreme Court held that by placing a crèche on the grand staircase in the Allegheny County courthouse, the county impermissibly conveyed the message of its support and approval of the Christian message.[205] Similarly, by granting an evidentiary privilege to followers of religion (and in certain states, only particular Western religions) the state is unmistakably conveying a message of support and approval.

According to the third prong of the *Lemon* test, a statute must not "foster an excessive government entanglement with religion."[206] In deciding whether the third prong is violated, we must examine the "character and purpose of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[207] The most obvious institutions benefited by the privilege are religious. Through this evidentiary exemption, the state is encouraging religious adherents to confess their sins, and utilize the religious structure to do so. This, in turn, suggests the state is sanctioning those religious institutions that enjoy the privilege. The nature of the aid that the state is providing religious institutions is significant. It provides the message that religious institutions are so important in society that the state will provide this exemption to those institutions. By granting the privilege to religious adherents, the legislatures are also requiring courts to evaluate the religious nature of organizations which claim a religious mandate. In many circumstances this evaluation is easy. In other circumstances, however, it may be more difficult to calculate.[208] In *Lemon*, the community supplemented teachers' incomes when they taught secular subjects in parochial schools.[209] The Court concluded that the surveillance required to ensure that teachers were not involving themselves in religious matters within the school resulted in "entanglement between church and state."[210] The significant entanglement

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203. By failing to recognize a privilege, however, one could argue that the state is "inhibiting" religion. An important component of Western religions is the importance placed on spiritual counseling between a member of the clergy and a parishioner. By failing to exempt counseling sessions between clergy and parishioner, the state is inhibiting the ability of clergy to assure parishioners that conversations between them will be strictly confidential, and in turn reducing the chances that a person will seek absolution and counseling from a member of the clergy.

204. County of Allegheny v. ACLU, 492 U.S. 573 (1989).

205. *Id.* at 599-600.

206. Lemon v. Kurtzman, 403 U.S. at 613.

207. *Id.* at 615.

208. See *supra* Part V for a discussion of the difficulty and complexity involved in determining whether a group constitutes a religion.

209. Lemon v. Kurtzman, 403 U.S. at 609-10.

210. *Id.* at 620-21. The Court in *Lemon* stated that a "comprehensive, discriminating, and continuing surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected." *Id.* at 619; *see also* Aguilar v. Felton, 473 U.S. 402, 404, 413-14 (1985) (holding that a New York program providing funds to pay salaries of public employees who taught in parochial schools impermissibly entangled church

between church and state caused when courts are forced to evaluate the religious nature of religious sects, vis-à-vis priest-penitent privilege statutes, might indicate an Establishment Clause violation.

Despite the entanglement of church and state that may result from these statutes, the Supreme Court indicated that some exemptions for religious organizations might cause less entanglement than they would without such an exemption.[211] In *Walz v. Tax Commission*,[212] New York provided property tax exemptions to religious organizations if the organization used the property exclusively for religious purposes.[213] A property owner brought suit, claiming that he was forced to indirectly support religious organizations by paying his own property taxes, and therefore the New York law violated the Establishment Clause.[214] The Court rejected this contention, claiming that by eliminating the tax exemption, the government's involvement would expand by way of forcing it to value church property, which might lead to tax liens and possibly tax foreclosures.[215] In this situation, the Court claimed that "[s]eparation . . . cannot mean absence of all contact."[216] Priest-penitent privilege statutes may also serve the goal of preventing greater entanglements between church and state than would result without them, namely, situations in which a court must force a religious leader to testify in open court or must hold a religious leader in contempt for failing to comply with the court's order to testify. Despite the great entanglements between church and state that priest-penitent privilege statutes present, courts would likely find that they do not violate *Lemon*'s third prong.[217] Still, however, a violation of only one prong of the *Lemon* test would invalidate a statute.

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and state when public authorities provided monitoring to ensure that religious matters were not a part of the classes the teachers taught); Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981) (claiming that a university which prohibited the religious use of its buildings would risk "entanglement" by being forced to determine which activities fell under the category and by being forced to continually monitor meetings); Meek v. Pittenger, 421 U.S. 349, 372 (1975) (claiming that the continuous surveillance required to ensure the religious neutrality of auxiliary teachers employed by the state to provide services in religious schools would impermissibly create administrative entanglements between church and state). ***But see*** Lynch v. Donnelly, 465 U.S. 668, 684 (1984) (holding that a city's purchase and display of a crèche did not involve administrative entanglements violative of the Establishment Clause when there was no indication that contact with church officials would be required, nor that expenditures for maintenance would be necessary).

211. *See* Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970) (claiming that New York property tax exemptions for religious organizations posed less risk of entanglement than would result if the exemption did not exist); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 331, 339 (1987) (holding that exemptions for religious organizations from laws prohibiting employment discrimination effectuate a "more complete separation of [church and state and avoid] . . . intrusive inquiry into religious belief").

212. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

213. *Id.* at 666.

214. *Id.* at 667.

215. *Id.* at 674.

216. *Id.* at 676.

217. ***But see*** Mayes, *supra* note 21, at 407-08 (arguing that the priest-penitent privilege violates all three prongs of the *Lemon* test, including the excessive entanglement prong).

B. *The Endorsement Test*

One of the competing tests to *Lemon* is the "endorsement test," advocated by Justice O'Connor in *Lynch v. Donnelly*.[218] The endorsement test represents a modification of the *Lemon* test. According to O'Connor's test, a state action is invalid if it violates either the purpose prong or the effect prong of *Lemon*. That is, the action is unconstitutional if its "actual purpose is to endorse or disapprove of religion," or despite the government's purpose, the action "in fact conveys a message of endorsement or disapproval."[219] In deciding whether the "purpose" of the state action is secular, the question is "whether the government intends to convey a message of endorsement or disapproval of religion."[220] In *Lynch*, O'Connor argued that by displaying a crèche along with other symbols of the Christmas holiday in a park, the city did not intend, nor effectively convey, a message of religious endorsement.[221] According to O'Connor, the general setting of the crèche—placed along with other symbols of the holiday—negated any message of endorsement that the crèche may portray.[222] In *County of Allegheny v. ACLU*, O'Connor further developed her endorsement analysis.[223] O'Connor stated that whether a state action endorses religion is a question of whether "a reasonable observer would view such long-standing practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time."[224]

Priest-penitent privilege statutes would likely withstand an Establishment Clause attack under the endorsement test. Although such an exemption appears unique, and therefore suggests an effective endorsement of religion, other relationships enjoy exemptions too. For example, most jurisdictions place attorney-client, doctor-patient, psychotherapist-patient, and spousal relationships beyond the risk of testifying as to information gleaned from their associations. While the *effect* of the privilege, however, may not be to endorse religion, the *purpose* of the privilege may lead to its unconstitutionality. The act of granting clergy an exemption from testifying in certain

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218. Lynch v. Donnelly, 465 U.S. 668 (1984). In *County of Allegheny v. ACLU*, 492 U.S. 573, 627-32 (1989) (O'Connor, J., concurring), Justice O'Connor provided a defense of the endorsement test against an attack from Justice Kennedy. In her concurrence, Justice O'Connor denied that the endorsement test reflects an "unjustified hostility toward religion," but rather argued that it recognizes that religious liberty is protected when the state refuses to endorse one religion or belief over another. *Id.* at 631.

219. Lynch v. Donnelly, 465 U.S. at 690. According to Justice O'Connor, "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688.

220. *Id.* at 691.

221. *Id.* at 692, 694.

222. *Id.* at 692.

223. County of Allegheny v. ACLU, 492 U.S. at 627-32.

224. *Id.* at 631. In his dissenting opinion, Justice Kennedy attacked the endorsement test as "flawed in its fundamentals and unworkable in practice." *Id.* at 669. (Kennedy, J., dissenting).

circumstances suggests a granting of special status to that group and to the relationship between clergy and penitent which other relationships do not enjoy. The search for the truth using the best evidence is of paramount importance in our legal system. By exempting clergy, the state is conveying a message that the religious relationship between a clergyperson and a penitent exceeds even the paramount goal of obtaining the best and most accurate evidence. Statutes that fail to include non-Western religions in their scope, however, would not pass constitutional muster under the endorsement test. By failing to include non-Western religions within a priest-penitent privilege statute, the state is conveying a message that it disapproves of some religious traditions and approves of others.

C. *The Coercion Test*

A "coercion test" was offered by both Justice Kennedy in his majority opinion in *Lee v. Weisman*,[225] and Justice Scalia in his dissent in the same case. In the case, a student brought suit after her school invited a rabbi to give the invocation and benediction during her school's graduation ceremony.[226] The Court refused to re-evaluate *Lemon*.[227] Nonetheless, Justice Kennedy did provide a small view of how he might frame a coercion test. Justice Kennedy claimed that at a minimum, "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[228] The Court held that by forcing, through public and peer pressure, middle school students to stand and remain silent during the rabbi's prayers, the school worked, at the least, an indirect coercion on the student.[229] Under Kennedy's coercion test, accepted national traditions that recognize existing religious symbols would be constitutional,[230] while actions intended to utilize the government's coercive powers to further religious interests would not be constitutional.[231] The coercion test advocated by Justice Scalia would not include coercion in indirect forms such as that represented by the facts in *Lee v. Weisman*. For Justice Scalia, a state violates the constitution only when it coerces a citizen with threat of law or civil penalty.[232]

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225. Lee v. Weisman, 505 U.S. 577 (1992). Justice Kennedy also expounded at length on the coercion test in *County of Allegheny v. ACLU*, 492 U.S. at 655-67 (Kennedy, J., dissenting).

226. Lee v. Weisman, 505 U.S. at 581.

227. *Id.* at 2655. Justice Kennedy wrote that, "[t]his case does not require us to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens." *Id.*

228. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

229. *Id.* at 2658.

230. County of Allegheny v. ACLU, 492 U.S. at 662-63 (Kennedy, J., dissenting).

231. *Id.* at 660. Examples of government conduct forbidden under Justice Kennedy's coercion test include, "compelling or coercing participation or attendance at a religious activity," "requiring religious oaths to obtain government office or benefits," or "delegating government power to religious groups." (citations omitted) *Id.*

232. Lee v. Weisman, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting).

Priest-penitent privilege statutes would likely survive scrutiny under any coercion test. Far from coercing religious beliefs, these statutes simply provide clergy an exemption from testifying in court regarding penitential communications made to a clergyperson during religious counseling. This would surely surmount the small hurdle posed by the coercion test. This test would also likely provide a safe haven to statutes that extend the privilege to the clergy of the main-line Western religions, while excluding non-Western religions.

Unless the government action, here a statute, represents a coercive mechanism tending to force individuals into a religious belief, the coercion test validates the government benefit. This fact militates against the use of this test in cases involving the priest-penitent privilege, cases in which the central question is not whether the government's action is holding individuals captive and forcing religious observance on them,[233] but rather whether the government's action tends to promote religion over irreligion or one religion over another.[234] The appropriate test in determining whether the priest-penitent privilege violates the Establishment Clause is the endorsement test. This test most effectively addresses the question of whether the government may grant benefits and shelter to religious belief. The priest-penitent privilege represents a benefit, in that it allows religious believers to confide in religious advisors about events for which the believer could be held criminally or civilly liable, and a shelter, in that the privilege denies the court the ability to acquire the information from the advisor. Unlike *Lee v. Weisman*, in which the government attempted to hold an audience captive to the religious beliefs of the school district,[235] the priest-penitent privilege is a benefit granted to religious organizations and is more analogous to *County of Allegheny v. ACLU*, in which the government displayed a créche and a menorah on government property during the holiday season.[236] Yet, even under an endorsement test analysis, the priest-penitent privilege is likely to withstand constitutional objections.[237]

VII. POLICIES

A state law which technically violates the Establishment Clause, yet continues to exist, usually has powerful policies supporting it. Strong policies of course do not reduce its unconstitutionality. When state laws are bolstered by powerful policy arguments or popular public opinion, however, courts are more likely to ignore their unconstitutional features.[238]

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233. *See id.*

234. *See* Larson v. Valente, 456 U.S. 228, 244 (1982); Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

235. *See* Lee v. Weisman, 505 U.S. at 630 (Souter, J., concurring).

236. County of Allegheny v. ACLU, 492 U.S. 573, 578 (1989).

237. *See supra* Part VI.B.

238. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896) (holding a Louisiana overturned law that required the separation of the two races in public accommodations did not violate the Fourteenth Amendment), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954); *see also* Bowers v. Hardwick, 478 U.S. 186, 190, 196 (1986) (holding that a Georgia

As previously noted, the priest-penitent privilege grew out of the need to protect the uniquely Catholic confessions made within a confessional, which Catholic priests were obligated by canon law to keep secret.[239] The original fear in compelling a Catholic priest to testify lay in the fact that he was caught "between Scylla and Charybdis,"[240] that is, between the law that compelled him to testify and the canon law that required him to remain silent. Naturally, the right the priest possessed to practice his religion freely was hampered by a law forcing him to disobey his religious oath.

Today, however, the privilege is extended to protect conversations between spiritual leaders of non-Catholic Western religious groups and followers of those religions. This change in policy is exemplified by one of the few cases involving a non-Western religion and the priest-penitent privilege, *People v. Johnson*, in which the court considered the question of whether communications between a criminal defendant and members of his Muslim mosque were privileged.[241] Although the court held that the communications were not privileged,[242] it recognized the application of the privilege in a non-Western context.[243] Therefore, while the earlier policy of protecting the Catholic priest's canonical duties was applicable only to Catholicism, the privilege as the courts apply it today is equally applicable to both non-Western and Western religions, as well as established and nascent Western religions.

Protestant clergy cannot claim that *religious law* prevents them from testifying. In a non-Catholic context, clergy claim that by forcing them to reveal private communications made by a parishioner, their effectiveness as a spiritual counselor is reduced by the fact that parishioners cannot trust their conversations will remain in the strictest confidence. This argument carries greater weight when made by Catholic clergy. Merely promising a penitent that a confession will be kept secret should not protect the communication. Often people make promises not to divulge information. *Their* promises, however, cannot withstand a court subpoena. The difference is simply that the context is religious. And, the Supreme Court has held that religions are not exempt from generally neutral laws.[244] Therefore, a non-Catholic member of the clergy cannot seek refuge in the Free Exercise Clause.

A more appropriate statute aimed at narrowing the scope of the privilege to exclude those religions that do not require confidentiality and including those that do require confidentiality may read as follows:

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law criminalizing sodomy did not violate a homosexual's right to privacy, and further stating that law is "constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed").

239. *See supra* note 8.

240. *See supra* note 38 and accompanying text.

241. People v. Johnson, 497 N.Y.S.2d 539, 539 (Sup. Ct. 1985).

242. *Id.* at 540.

243. *Id.* at 539.

244. *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (holding that the state could deny plaintiffs unemployment benefits without violating the Free Exercise Clause, when they were fired for violating "neutral" laws banning drug use, including using peyote for sacramental purposes related to a ceremony of the Native American Church).

> No member of the clergy of any religion will be compelled to testify regarding confidential communications made in the context of confession if the religious tenets of a clergyperson's religion prohibit under all circumstances disclosure of such communications.

Such a limited statute, however, may remain unconstitutional in its effect by limiting the privilege to members of the Catholic Church and similar groups.[245]

The central policy behind the privilege today is no longer to preserve the free exercise of religion that would be hampered if Catholic priests were forced, despite religious rules, to disclose confidential communications made within the confines of the confessional. Today, the most important and powerful justification for the privilege is that the community believes the relationship between priest and penitent is significant and worth fostering.[246] In *Trammel v. United States*, the Supreme Court stated that the priest-penitent privilege "recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[247] Other relationships which enjoy the same privilege, such as attorney-client and doctor-patient, also require sincerity and honesty to ensure that the professional objective can be achieved successfully. The fear is that people would not divulge information to clergy if they knew that the clergyperson could be compelled to testify about the contents of the confession. For this argument to be valid, however, most people would need to be aware of the privilege, or at least those who are committing crimes and confessing them to their clergy. One study done in the context of the psychotherapist-patient relationship revealed that the existence of the privilege did not encourage a greater number of people to seek psychotherapy, nor did it significantly enhance the therapy's effectiveness.[248] It can also be argued that by nurturing the priest-penitent relationship, society benefits by increased mental and physical health.[249]

Another policy behind maintaining the privilege is the concern that without it, courts would be embarrassed to hold clergy in contempt after they refuse to testify concerning penitential communications.[250] The judge's image after ordering members of the clergy to testify despite their deeply-felt religious convictions would suffer in the eyes of the public, as would the

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245. *See* 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, 61-62 (1967).

246. This is Wigmore's third prerequisite for determining whether a communication should be privileged. *See supra* text accompanying note 44.

247. Trammel v. United States, 445 U.S. 40, 51 (1980).

248. Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 924-26 (1982).

249. For this argument, 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, 767 (1987).

250. Yellin, *supra* note 20, at 111.

image of the entire judicial system.[251] Furthermore, without the privilege, prosecutors would be unlikely to issue subpoenas to priests who would likely risk going to jail before divulging confidential communications.

Public embarrassment should never be a justification for failing to gather the most accurate and complete information possible to facilitate the adjudication of a case. Public pressure should not prevent a judge from compelling a priest to testify, nor to prevent a prosecutor from issuing a subpoena for a priest's testimony. The goal of a fair trial based on all of the facts available is a goal which outweighs the desire to create a positive image for a judge or prosecutor in the eyes of the public. The jobs of a judge and prosecutor are not always easy. The objective and responsibility to seek justice, however, should outweigh any personal difficulties that might result from an unpopular opinion.

The Supreme Court stated that a fundamental principle of American jurisprudence is that "the public . . . has a right to every man's evidence."[252] Privileges run contrary to the desire of the judicial system to create a full record and to arrive at a correct and rational adjudication with the most accurate and complete information available. By exempting certain groups from testifying about particular information, society abandons this important goal and suffers as a result.

The privilege grants suspects who may have committed heinous crimes the opportunity to receive absolution without the consequences that such a confession usually entails—admissibility in court. The police cannot grant absolution. Therefore, the priest becomes the outlet for suspects with religious needs to satisfy the human desire to confide in someone regarding a matter of deep moral concern. The priest-penitent privilege creates an emotional refuge for suspects, at least suspects with a conscience, to obtain not only spiritual guidance, but emotional support and closure, regarding a possibly brutal or criminal episode in the individual's life. Society has no business providing this shelter to persons who have violated the law and who wish to avoid punishment. This principle applies equally to civil litigants. Civil litigants too may invoke the privilege to avoid possible liability when they have acted improperly. They, like criminal defendants, should not be allowed to hide behind a confession.

Other countries, including England, decline to provide clergy such a privilege and have demonstrated that Western judicial systems can manage in the absence of the privilege.[253] In a secular society, privileges are appropriate to those relationships most useful in ensuring an efficient and healthy society, and without which the relationship would be deleteriously affected. There is no evidence to suggest that religiously motivated people, who believe that absolution and counseling are important to their spiritual development and fortunes, would forgo counseling if they knew that their clergyperson could testify in court regarding the crime. Today, the typical function of confession is not absolution for sins committed. For many religions, this is for God to

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251. *Id.*
252. United States v. Bryan, 339 U.S. 323, 331 (1950).
253. *See supra* note 35.

provide.[254] In these situations, clergy can only provide religious counseling services.[255]

VIII. CONCLUSION

At the core of the Establishment Clause is the principle that the state may not favor one religion, nor one denomination, over another.[256] The failure of many statutes to extend the priest-penitent privilege to non-Western religions, and the possibility that courts in the future may fail to interpret unclear statutes broadly to include non-Western religions, presents a serious question as to the constitutionality of these statutes. State codes which contain priest-penitent privilege statutes that do not recognize non-Western religious faiths should be amended to better reflect the increased religious diversity of American society. Courts also have a role to play in ensuring that the followers of all religious faiths share equally in the privileges which the members of the mainstream American religions enjoy. While many priest-penitent privilege statutes were adopted in a different religious atmosphere than the United States enjoys today, most can be interpreted to extend the privilege beyond Catholicism, Protestantism, and Judaism.

A further issue is the question of whether such a privilege is necessary, or even beneficial. As demonstrated, such statutes would likely pass current tests advocated as replacements for the traditional *Lemon* test. Nevertheless, these statutes may not be a beneficial policy for a secular government to promote. It is not at all clear whether criminal suspects or civil defendants would be less inclined to confide in their religious leaders were the United States to abandon the privilege. Neither is it likely that the right to free exercise would be violated by abandoning it. Therefore, the United States should join other nations, including England, which have long abandoned this exemption, and allow clergy to testify, thereby promoting the important goal of ensuring a trial based on the most accurate evidence available.

Chad Horner

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254. *See supra* note 12.

255. Because some clergy only provide counseling, they could be treated like counselors. Clergy who are licensed psychotherapists could enjoy the privilege granted members of that profession. *See* Jaffee v. Redmond, 116 S. Ct. 1923, 1931 (1996) (holding that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure" under the federal rules of evidence).

256. *See* Larson v. Valente, 456 U.S. 228, 244 (1982) (stating that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another"); Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (stating that neither the Federal Government nor a state may "pass laws which aid one religion, aid all religions, or prefer one religion over another"); New Jersey Ass'n of Health Care Facilities v. State, 665 A.2d 399, 403 (N.J. Super. Ct. Law Div. 1995) (holding that when a state statute granted a certification exemption to nursing homes connected with a "well established religious body or denomination," it fostered an excessive entanglement between church and state, violating the Constitutional requirement of separation of church and state).