THE PRIEST-PENITENT PRIVILEGE: ITS CONSTITUTIONALITY AND DOCTRINE

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"If you will, be guilty of dishonoring laws which the gods have established in honor."[1]

Eternal laws sometimes clash with their temporal counterparts. This struggle between church and state can be said to be the most formative conflict of Western civilization. Antigone refused to obey Creon.[2] Thomas More would not bow to Henry VIII.[3] Harriet Tubman assisted escaped slaves despite the law.[4]

An echo of this church-state, eternal-temporal tension can be found in the priest-penitent privilege.[5] The Supreme Court has never directly addressed the privilege's constitutionality. The doctrine supporting the privilege has not yet been definitively settled.

This article espouses that the priest-penitent privilege's existence is better than its non-existence, that it is constitutional, and that it enjoys the support of many doctrines.

A brief history of the privilege precedes an analysis of its current state. Attention will be given to the constitutional controversy and the possible doctrines supporting the privilege.

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[1] SOPHOCLES, *Antigone*, *in* THE COMPLETE PLAYS OF SOPHOCLES 119 (Moses Hadas ed. & Sir Richard Claverhouse Jebb trans. 1967) (Antigone to Ismene). Antigone had decided to bury her brother in accordance with the laws of the gods despite an edict by King Creon, her uncle, that the rebellious nephew was to be left unburied; the punishment for burying him was to be death. *See* SOPHOCLES, *Antigone*, *in* THE OEDIPUS PLAYS OF SOPHOCLES 192 (Paul Roche ed. & trans., 1996). The effect of leaving the body unburied would be that the soul could not cross to the land of the dead. *See id.*

[2] *See id.* at 201.

[3] *See* ALISTAIR FOX, THOMAS MORE: HISTORY AND PROVIDENCE 179 (1983).

[4] *See* HENRIETTA BUCKMASTER, LET MY PEOPLE GO 213-16 (Univ. of S.C. Press 1992) (1941).

[5] For the purposes of this article, the priest-penitent privilege shall be referred to in its historical name since this name appears to be the most widely used. The privilege is called by several other names in order to either better describe the participants or keep from offending the ideologies and sensibilities of others.

I. HISTORY[6]

Most commentators grant the priest-penitent privilege's existence in the common law prior to the Reformation.[7] Lord Coke, writing in the early 1600s, opined that there was a priest-penitent privilege in the *Articuli Cleri* with an exception for treason.[8]

Law and religion were closely knit when the bishops and clerics staffed the English courts.[9] The history of the sacrament of confession is such that no one knows when it became a confidential act.[10] It is known, though, that confession remains confidential in the eyes of the Catholic Church in its 1983 Code of Canon Law by which a priest may not reveal the contents of one's confession upon pain of excommunication.[11] It seems unknown, as well, when the privilege as a legal concept appeared in England.[12]

While commonly accepted that the privilege existed in Catholic England, there is some disagreement as to how the priest-penitent privilege disappeared.[13] Understandably the privilege waned as the Anglican Church and other Protestant movements, which did not require auricular confessions, rose to prominence in England. Wigmore espouses that without question, after the restoration of the monarchy, no priest-penitent privilege existed at common law.[14] The common law, as understood by the American

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[6] Since there is a nearly definitive thesis on the topic of the history of the priest-penitent privilege, *see* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95 (1983), and a historical account by Wright & Graham, *see* 26 CHARLES A. WRIGHT & KENNETH A. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5612 (1992), this article will confine itself to a summary of the major points.

[7] *See* 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2394 (John T. McNaughton rev. 1961); Yellin, *supra* note 6, at 96. For a more complex view, see 26 WRIGHT & GRAHAM, *supra* note 6, § 5612.

[8] *See* 2 EDWARD COKE, INSTITUTES 629 (1628) (discussing Articuli Cleri, 1315, 9 Edw. 2, ch. 10, § 9 (Eng.)).

[9] *See* Yellin, *supra* note 6, at 97 (citing Edward A. Hogan, Jr., *A Modern Problem on the Privilege of the Confessional*, 6 LOY. L. REV. 1, 8 (1951)).

[10] A Papal letter by Leo I, in the fifth century, reveals confidentiality of confession as a long-held practice. *See* JOHN C. BUSH & WILLIAM H. TIEMANN, THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW 42 (3d ed. 1989).

[11] *See* 1983 CODE c.1388, § 1 ("A confessor who directly violates the seal of the confession incurs an automatic *latae sententiae* excommunication reserved to the Apostolic See; if he does so only indirectly, he is to be punished in accord with the seriousness of the offense."). Only five excommunications are reserved to the Holy See. *See* Teresa S. Collett, *Sacred Secrets or Sanctimonious Silence*, 29 LOY. L. A. L. REV. 1747, 1753 n.19 (1996).

[12] *See* 26 WRIGHT & GRAHAM, *supra* note 6, § 5612, at 35-41.

[13] *See* 26 *id.* at 41 (noting that the issue of the priest-penitent privilege "has never been decided in England" (citing STEPHENS, A DIGEST OF THE LAW OF EVIDENCE 171 (1876))).

[14] *See* Yellin, *supra* note 6, at 102-03 n.35.

colonists, makes no mention of the privilege, perhaps based on the great esteem in which Blackstone was held on this side of the Atlantic.

The first published American case on the topic was *People v. Phillips*.[15] In that case, publicized by an attorney arguing for the privilege,[16] the judge based the privilege in free exercise of religion.[17] While the First Amendment of the U.S. Constitution could not apply to the states,[18] the court found the communication protected in New York's version of the Free Exercise Clause.[19] The judge particularly noted the importance of the sacraments in the Catholic Church[20] and the damage that would have been done to the free exercise of religion if the priest were to disclose confidential communication.[21] The judge's conclusion was remarkable for the very modern manner in which he weighed the effects of accepting the privilege versus its absence.[22] It appeared that the judge was concerned, as well, with differentiating American law from that of Mother England.[23]

Four years later, another New York court denied the privilege to an Anglican priest based on the lack of a confessional requirement in the Anglican Church.[24] Due in part to this decision, New York passed the first priest-penitent statute in 1828.[25] This statute influenced the passage of priest-penitent statutes in other states.[26]

In *Totten v. United States*,[27] the U.S. Supreme Court in dicta stated that suits would not be maintained that required disclosure of the

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[15] N.Y. Ct. of Gen. Sess. (1813), *reprinted in Privileged Communications to Clergyman*, 1 CATH. LAW. 199 (1955) (holding that a priest cannot be compelled to disclose to a court that which has been confessed to him in the administration of the sacrament of penance).

[16] See Michael J. Callahan, *Historical Inquiry into the Priest-Penitent Privilege*, 36 THE JURIST 328 (1976), for an account of the lawyer involved in the case. The story is one of self-promotion and nationalism feeding on anti-monarchist sentiment. The attorney, who published the case from his notes, appeared *amicus curiae* in favor of the privilege. One may read the decision as published by the attorney in *Privileged Communications to Clergyman*, *supra* note 15, at 199.

[17] *See Phillips*, *supra* note 15, at 207.

[18] *See* Engel v. Vitale, 370 U.S. 421 (1962) (incorporating the First Amendment to apply to the several states as well as the federal government).

[19] *See* N.Y. CONST. art. XXXVIII (1771).

[20] For a more modern rendition of the sacrament's place in the Church, see CATECHISM OF THE CATHOLIC CHURCH Nos. 1117-21, at 33-41 (1994).

[21] *See Phillips*, *supra* note 15, at 207.

[22] *See id.*

[23] *See id.* at 206.

[24] *See* Yellin, *supra* note 6, at 106 n.54 (citing People v. Smith, N.Y. City Hall Rec. 77 (1817), *reprinted in* 1 CATH. LAW. 198 (1955)).

[25] *See* N.Y. REV. STAT. pt. 3, ch. 7, tit. 3, § 72 (1828).

[26] *See* Yellin, *supra* note 6, at 106-07.

[27] 92 U.S. 105 (1875).

confidences of the confessional.[28] Since that case, the Court has approved Proposed Federal Rule of Evidence 506, which is the current state of the federal common law on the priest-penitent privilege.[29] It is noteworthy that similar dicta exists in other federal cases.[30] While commentators have often repeated that there is no common law privilege, Wright & Graham state, "Perhaps it would be more accurate to say that the common law created something like a de facto privilege."[31]

II. CURRENT PRIVILEGE

A. Current State of the Federal Privilege

Federal privileges are granted in accordance with the Federal Rules of Evidence ("FRE"). The federal priest-penitent privilege is based on Proposed FRE 506.[32] The Supreme Court approved the rule, but Congress passed all-encompassing FRE 501, allowing privileges to be adapted with the times.[33]

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[28] *Id.* at 107.

[29] Though Proposed FRE 506 was not approved by congress, it is an accurate rendering of the current state of the privilege under federal common law. Proposed FRE 506 is subsumed in FED. R. EVID. 501. See *infra* note 32 for the text of PROPOSED FED. R. EVID. 506 (unenacted).

[30] *See, e.g.*, Yoder v. United States, 80 F.2d 665, 668 (10th Cir. 1935) ("The wisdom of the common law rules . . . held inviolate the confidence of a penitent in his priest."); *see also* United States v. Boe, 491 F.2d 970, 971 n.2 (8th Cir. 1974); United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971); McMann v. SEC, 87 F.2d 377, 378 (2d Cir. 1937).

[31] 26 WRIGHT & GRAHAM, *supra* note 6, § 5612, at 51.

[32] PROPOSED FED. R. OF EVID. 506 reads as follows:

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

[33] See H. R. REP. NO. 93-650, at 8 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082, which states that

> the Committee . . . left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard. . . . That standard . . . mandates the application of the principles of the common law as interpreted by the courts of the United States in the light of reason and experience.

B. In the Several States[34]

Because the entire concept of the priest-penitent privilege stems from the Catholic sacrament, the statutes establishing the privilege were largely designed with that sect's practice in mind. However, inspiration for recently revamped statutes comes from Proposed FRE 506. Thus, the state statutes, enacted in all fifty states and the District of Columbia, may be divided into roughly three groups: statutes that create a penitent's privilege, statutes that follow Proposed FRE 506, and "other" state statutes.

A large number of state privilege statutes create a penitent's privilege to gag the clergyman or a necessary third-party[35] from testifying about the communication.[36] This group of statutes makes the penitent the sole privilege-holder without allowing the priest to claim the privilege.

Another group of state priest-penitent privilege statutes, either in wording or in effect, follow Proposed FRE 506.[37] States that create the privilege beyond the penitent[38] typically find that their courts' interpretations match the proposed rule. In New York and Michigan, the

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[34] *See* Charles R. Steringer, Comment, *The Clergy-Penitent Privilege in Oregon*, 76 OR. L. REV. 173, 178 (1997) (providing a simplified categorization of state priest-penitent privilege statutes).

[35] A necessary third-party would be a translator, for example.

[36] The following is an example of this kind of state privilege statute:

> A clergyman, priest, minister, rabbi or practitioner of any religious denomination accredited by the religious body to which he belongs who is settled in the work of the ministry shall not disclose confidential communications made to him in his professional capacity in any civil or criminal case or proceedings preliminary thereto, or in any legislative or administrative proceeding, unless the person making the confidential communication waives such privilege herein provided.

CONN. GEN. STAT. ANN. § 52-146b (West 1991); *see also* ARIZ. REV. STAT. ANN. § 13-4062 (West 1989 & Supp. 1999); D.C. CODE ANN. § 14-309 (1995); IOWA CODE ANN. § 622.10 (West 1999); MASS. GEN. LAWS ANN. ch. 233 § 20A (West 1986 & Supp. 1999); MINN. STAT. ANN. § 595.02 (West 1988 & Supp. 2000); MONT. CODE ANN. § 26-1-804 (1999); NEV. REV. STAT. § 49.255 (2000); N.H. REV. STAT. ANN. § 516:35 (1997); N.C. GEN. STAT. § 8-53.2 (1999); OR. REV. STAT. § 40.260 (1997); 42 PA. CONS. STAT. ANN. § 5943 (West 1982); R.I. GEN. LAWS § 9-17-23 (1997); TENN. CODE ANN. § 24-1-206 (1980 & Supp. 1999); WASH. REV. CODE ANN. § 5.60.060(3) (West 1995 & Supp. 2000); W. VA. CODE § 57-3-9 (1997).

[37] *See* ARK. R. EVID. 505; ALA. R. EVID. 506; DEL. UNIF. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West 1999); HAW. REV. STAT. § 626-1 R. 506 (1995); IDAHO R. EVID. 505; KAN. STAT. ANN. § 60-429 (1994); KY. R. EVID. 505; LA. REV. STAT. ANN. § 511 (West 1995); ME. R. EVID. 505; MISS. CODE ANN. § 13-1-22 (1999); NEB. REV. STAT. § 27-506 (1995); N.M. STAT. R. ANN. § 11-506 (Michie 2000); N.D. R. EVID. 505; OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); S.D. CODIFIED LAWS § 19-13-16 to -18 (Michie 2000); TEX. R. EVID. § 505; UTAH R. EVID. 503; VT. R. EVID. 505; WIS. STAT. ANN. § 905.06 (West 2000). *See supra* note 32 for the text of Proposed FRE 506.

[38] That is, there is more than one holder or church discipline determining the privilege.

statutes will "not allow" a priest to testify regarding a confession or confidence.[39] In both states, the courts interpret the laws to mean that the penitent is the holder of the privilege, as in Proposed FRE 506.[40]

The third group of state privilege statutes is not really a group; these statutes are not easily categorized. The statutes identified *infra* highlight the significant differences between the various rules and Proposed FRE 506. Many states extend to the priest the ability to claim incapability to testify or illegality of testimony, or they lend a dual claim to the privilege. These statutes are generally older than Proposed FRE 506, but at least one[41] is a recent response to a state court ruling that narrowed the privilege.[42]

Some state statutes make the priest incapable of testifying.[43] Georgia's law limits the privilege to Christian ministers and Jewish rabbis.[44] Two states enacted statutes that specifically prevent their courts and governments from compelling clergy to testify on matters from confessions.[45] Four states enacted variations on the theme of a dual protection privilege. In these states, the privilege may be claimed by either the priest or the penitent,[46] or both may need to consent in order to waive the privilege.[47]

The state statutes that most radically depart from Proposed FRE 506 regard the privilege in terms of the church. Ohio's statute appears to be strictly a penitent privilege, except for its last clause: "however, the clergyman, rabbi, priest, or minister may testify by express consent of the person making the communication, except when the disclosure of the

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[39] MICH. STAT. ANN. § 27A.2156 (Law. Co-op. 1986); N.Y. C.P.L.R. 4505 (Consol. 1992).

[40] *See* People v. Lipsczinka, 180 N.W. 617 (1920); De'Udy v. De'Udy, 495 N.Y.S.2d 616, 619 (1985).

[41] *See* N.J. REV. STAT. ANN. § 2A:84A-23 (West 1994 & Supp. 1999).

[42] *See* State v. Szemple, 640 A.2d 817 (1994).

[43] *See* GA. CODE ANN. § 24-9-22 (Harrison 1998); MO. ANN. STAT. § 491.060 (1996). See also IND. R. EVID. 501, which is nearly a word-for-word copy of FED. R. EVID. 501. The Committee notes to Indiana's Rule 501 state that the statute incorporates the interpretations of privileges under Indiana common law. *See* IND. R. EVID. 501 advisory committee's note. As Rule 501 was enacted July 1, 1998, repealing IND. CODE ANN. § 34-1-14-5 (1985 & Supp. 1996), the courts have yet to make a determination of the priest-penitent privilege under IND R. EVID. 501.

[44] The naming of kinds of ministers could bring constitutional difficulties. *See* discussion *infra* Part III.A.2.

[45] *See* MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (1998); 735 ILL. COMP. STAT. ANN. 5/8-803 (West 1993 & Supp. 1999); *see also* People v. Burnidge, 664 N.E.2d 656 (Ill. App. Ct. 1996) (holding that the privilege belongs to the person making the statement and the clergyman).

[46] *See, e.g.*, ALA. R. EVID. 505; CAL. EVID. CODE §§ 1030-35 (West 1995).

[47] *See, e.g.*, COLO. REV. STAT. ANN. § 13-90-107 (West 1997), N.J. STAT. ANN. § 2A:84A-23 (West 1994 & Supp. 1999).

information is in violation of his sacred trust."[48] This appears to make the clergy a holder of the privilege, especially for Roman Catholic priests.

Wyoming's priest-penitent privilege statute is unique in that it seemingly places the privilege under the control of church bylaws or doctrine.[49] Among others not allowed to testify are "[a] clergyman or priest concerning a confession made to him in his professional character if enjoined by the church to which he belongs."[50]

Virginia also has a unique priest-penitent privilege, stating:

> No regular minister, priest, rabbi, or accredited practitioner over the age of eighteen years, or any religious organization or denomination usually referred to as a church, shall be required to give testimony as a witness or to relinquish notes, records or any written records or written documentation, in discovery proceedings in any civil action which would disclose any information communicated to him in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.[51]

The case law is clear that the state privilege in Virginia belongs to the priest's conscience.[52] This privilege, though, appears to apply only in civil matters.[53]

Privilege statutes are modified by court interpretations and the particular eccentricities of each state's citizens. Some states allow for religious marital counseling to be considered privileged (particularly in contemplation of divorce).[54] Other states extend the privilege when the penitent had reason to believe that speech was cloaked with privilege.[55] Tennessee proscribes clergy violation of the penitent privilege as a Class C Misdemeanor.[56]

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[48] OHIO REV. CODE ANN. § 2317.02(C) (Anderson 1995 & Supp. 1997).

[49] *See* WYO. STAT. ANN. § 1-12-101(a)(ii) (Michie 1999).

[50] *Id.*

[51] VA. CODE ANN. § 8.01-400 (Michie 1992 & Supp. 1999).

[52] *See* Seidman v. Fishburne-Hudgins Educ. Found., Inc., 724 F.2d 413 (4th Cir. 1984).

[53] *See* VA. CODE ANN. § 8.01-400.

[54] *See* S.C. CODE ANN. §19-11-90 (Law. Co-op. 1985); *see also* Rivers v. Rivers, 354 S.E.2d 784 (S.C. App. 1987) (placing marriage counseling squarely within the privilege).

[55] *See* ARK. R. EVID. 505; DEL. UNIF. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West 1999); HAW. REV. STAT. § 626-1 R. 506 (1995); KY. R. EVID. 505; LA. REV. STAT. ANN. § 511 (West 1995); ME. R. EVID. 505; N.M. STAT. R. ANN. § 11-506 (Michie 2000), N.D. R. EVID. 505; OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); W. VA. CODE § 57-3-9 (1997); WIS. STAT. ANN. § 905.06 (West 2000).

[56] *See* TENN. CODE. ANN. § 24-1-206 (1998 & Supp. 1999).

Over time, state statutes have broadened the definition of cleric as well as the scope of communication protected.[57]

III. CONSTITUTIONAL QUESTIONS[58]

Despite the fact that the priest-penitent privilege has been broadly accepted in the United States (and by the Supreme Court in Proposed FRE 506), publicists continue to question its constitutionality, viewing the Establishment Clause as the rock upon which it should shatter.[59] Favoring this view is the fact that the High Court has not directly considered the constitutionality of the priest-penitent privilege,[60] as well as continued questioning from McCormick[61] and Wright & Graham.[62]

Opposite the shoals of the Establishment Clause, the undertow of the Free Exercise Clause is equally powerful and may provide the privilege's constitutional basis. The analysis herein first addresses the establishment tests, and then addresses the free exercise tests.

A. The Reef of the Establishment Clause

The primary test[63] for Establishment Clause claims is aptly named the *Lemon* Test.[64] Other alternatives to the *Lemon* Test include the *Larson* Test[65] and the Historical Analysis Test.[66]

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[57] *See* 26 WRIGHT & GRAHAM, *supra* note 6, § 5612, at 49.

[58] *See* Lori L. Brocker, Note, *Sacred Secrets: A Call for the Expansive Application and Interpretation of the Clergy-Communicant Privilege*, 36 N.Y.L. SCH. L. REV. 455, 485 (1991) ("The clergy-communicant privilege has traditionally been asserted on public policy grounds."). Credit must be given for some of the headings of Part III to Jane E. Mayes, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern*, 62 IND. L. J. 397 (1986).

[59] *See* Mayes, *supra* note 58, at 397; *see also* 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 (1967).

[60] *But see* Totten v. United States, 92 U.S. 105 (1875) (containing dicta in favor of the privilege's constitutionality).

[61] *See* MCCORMICK ON EVIDENCE § 76.2 (John W. Strong ed., 5th ed. 1999).

[62] *See* 26 WRIGHT & GRAHAM, *supra* note 6, § 5612, at 58 ("If there are overarching principles that emerge from the opinions [on the First Amendment religion clauses] and are capable of certain application to the penitent's privilege, constitutional scholars do not seem to have discerned them.").

[63] For lack of a better description, I shall use "test," although that term is not always used by the courts. It should be noted that, when it comes to the Establishment and Free Exercise Clauses, the Supreme Court considers its tests as "guidelines." *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 359 (1975); Tilton v. Richardson, 404 U.S. 672, 678 (1971). Cases involving these clauses, although alleged to be decided on principle, are unique and, therefore, have no fixed rules.

[64] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

1. The *Lemon* Test

The *Lemon* Test was a summation of the Supreme Court's previous attempts to clarify its interpretation of the Establishment Clause. In *Lemon v. Kurtzman*,[67] the Court created a three-prong test for determining whether the Establishment Clause had been violated.[68] This test evaluates a law's purpose, its effect, and whether it causes an excessive government entanglement with religion.[69]

a. Purpose

The purpose prong asks whether the intent of a statute or governmental action is secular or religious.[70] A statute has a religious intent if drafted to endorse or disapprove of religion.[71] This determination might seem simple, but in many cases, it is difficult to ascertain.

A particular statute may *appear* to have a religious purpose such as busing students to parochial schools[72] or establishing or maintaining blue laws.[73] However, a court may determine that a valid secular intent for the statute exists because, for example, transportation includes all children or a blue law benefits the citizens generally.

At least one writer's view is that the priest-penitent privilege has no secular purpose because it serves only the religious and "is not extended to the general public."[74] This conclusion, though, does not consider a key question. Is there no secular purpose? When members of the public benefit from what is normally free access to the counseling of clergy, as opposed to the dollar-denominated counseling offered by psychotherapists, is there no secular purpose?[75] Justice Scalia questioned the New York assistant

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[65] *See* Larson v. Valente, 456 U.S. 228 (1982) (involving distinctions among religious organizations).

[66] *See* Marsh v. Chambers, 463 U.S. 783 (1983) (challenging the constitutionality of a Nebraska-paid chaplain for the Nebraska legislature).

[67] 403 U.S. 602.

[68] It should be noted that the Founders probably would not have created a test for determination of the states' violations of the Establishment Clause, as the Fourteenth Amendment, and its expansive interpretation, was not remotely envisioned. The Fourteenth Amendment did not come about until after the Civil War. *See* U.S. CONST. amend. XIV.

[69] *See Lemon*, 403 U.S. at 612.

[70] *See id.*

[71] *See* Stone v. Graham, 449 U.S. 39, 41 (1980).

[72] *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

[73] *See* McGowan v. Maryland, 366 U.S. 420 (1961).

[74] *See* Mayes, *supra* note 58, at 404.

[75] Can Bentham be wrong?

attorney general's statement that no public good was served when a religious group rented a school district's facilities:

> It used to be thought that religion— it didn't matter what religion— but some code of morality always went with it and it was thought that what was a God-fearing person might be less likely to mug me and rape my sister. That apparently is not the view of New York anymore. . . . Has this new regime worked very well?[76]

Scalia's sally, of course, is another way of asserting that a state has an interest in the morality of its citizens. A reply to this state interest would be to claim that the state is then *prescribing* religion. But the notion of the state *prescribing* religion is dependent upon how one views the privilege. That is, if one looks at the priest-penitent privilege as part of a whole set of privileges[77] that support the moral, therapeutic and privacy needs of the public, then the privilege appears like an accommodation of the religious person's choice as opposed to an endorsement of religion.[78] Indeed, a psychotherapist[79] serves a similar, albeit non-religious, purpose in counseling the client.[80]

While it may not be obvious that the priest-penitent privilege serves a secular purpose, an arguably similar purpose exists in other privileges.[81] Viewed in the context of the whole set of privileges, a secular purpose for the privilege may be open to question, but it is not unreasonable.[82]

> If in some shapes the revelation of testimony thus obtained would be of use to justice, . . . under the assurance of their never reaching the ears of the judge. Repentance, and consequent abstinence from future misdeeds of the like nature; repentance, followed even by satisfaction in some shape or other, satisfaction more or less adequate for the past: such are the well known consequences of the institution . . . .

4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 590 (David S. Berkowitz & Samuel G. Thorne eds., Garland Pub'g 1978) (1827).

[76] Oral Argument at 54, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993), *available in* 1993 WL 751851.

[77] The concept of the privilege viewed as part of a whole set of privileges with the attorney-client, doctor-patient, spousal, and psychotherapist will be addressed in Part IV. It shall be contended that viewing the privileges as a related whole does not require that they be considered entirely analogous, but it allows religious and non-religious access to counseling.

[78] *See* Girouard v. United States, 328 U.S. 61, 68 (1946).

[79] Note that the very root "psycho-" comes from Greek for "soul" [ψυχη]. *See* HENRY G. LIDDELL & ROBERT SCOTT, AN INTERMEDIATE GREEK-ENGLISH LEXICON FOUNDED UPON LIDDELL & SCOTT'S GREEK-ENGLISH LEXICON 903 (1989). It can be contended that, any time one deals with the soul, one is dealing with spiritual matters.

[80] It shall be contended that without the priest-penitent privilege, the state would be endorsing solely secular means of moral and therapeutic counseling.

[81] *See* discussion *infra* Part IV.

[82] *See* Brocker, *supra* note 58, at 480.

b. Effect

The question posed by the effect prong is a practical one: does the statute *in fact* endorse or disapprove of religion?[83] If so, then it is declared unconstitutional, unless it affects religion indirectly, remotely, or incidentally.[84]

This question is intertwined with the purpose prong: if there were a religious purpose, then there would probably be a violation in effect. On the other hand, if a secular purpose exists, but the privilege directly benefits religion, the privilege still appears unconstitutional.

The priest-penitent privilege undeniably benefits religion. But, does it *endorse* religion?[85] Perspective is a key factor. If the priest-penitent privilege is viewed independently from the other privileges, there would appear to be an endorsement of religion. If, however, it is viewed in context as part of a set of privileges, it merely appears to accommodate religious people rather than endorsing religion.[86]

c. Excessive Entanglement

The excessive entanglement prong considers the extent of entanglement between government and religion. The *Lemon* Test sets three criteria to *estimate* the constitutionality of the relationship of church and state: the character and purpose of the religious institution, the nature of the aid, and the resulting relationship.[87]

In *Lemon*, the state would have been required to maintain surveillance of a parochial school in order to determine that state funds were not being

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[83] *See Lemon*, 403 U.S. at 612.

[84] *See* Mayes, *supra* note 58, at 406 (citing Committee for Publ. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973)).

[85] *See* Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 1276 (2d ed. 1988). A benefit and an endorsement can be differentiated by the words themselves. An endorsement, with its roots in the word *indorsement*, means to give one's personal backing, such as a product endorsement or *indorsing* a check. *See* BLACK'S LAW DICTIONARY 548 (7th ed. 1999). A benefit is a simple good being bestowed. *See id.* at 151. An endorsement may be a benefit, but not all benefits are endorsements.

[86] The effects prong is the most difficult one for the priest-penitent privilege. Being that there is a direct, though intangible, benefit to religion in the privilege, one would need to look at the secular effects of the privilege (and view of the whole set of privileges) or rely upon the Free Exercise Clause for defense.

There could be an interesting set of arguments over the tangibility of the benefit to religion. This, though, seems a moot issue since many constitutional controversies are about such intangibles as "chills" on speech and association. In addition, it is beyond the scope of this paper to discuss the tangibility and intangibility of benefits in relation to the Constitution.

[87] *See Lemon*, 403 U.S. at 615. If the resulting relationship would be intrusive and/or lengthy, the statute likely would be unconstitutional. *See id.*

used for religious purposes.[88] The Court held the length of the relationship (multi-year oversight by the state) combined with the state's intrusiveness (regular state inspection of school practices) made the statute unconstitutional.[89]

The institution most directly benefited by the priest-penitent privilege, the Church, is innately religious,[90] making the privilege *suspect*.[91] Arguably the benefit to the religious institution is direct, though intangible.[92] However, the relationship between church and state need not be lengthy or terribly intrusive. Because of the nature of the privilege, the only state involvement occurs when the privilege is invoked. Accordingly, the judge need only inquire as to the nature of the communication. He would need only as much information as is necessary to determine whether the communication was privileged.[93]

The ephemeral intrusion of a court to determine whether a privilege exists is a far cry from the continuing administrative supervision required by the statute in *Lemon*.[94] So long as a court follows the same general inquiry as with the other privileges,[95] there is a simple determination, not an entanglement.[96] In contrast, without the protection of the privilege, "compelling clergy to testify could well be classified as a highly excessive and intrusive entanglement of government and religion."[97]

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[88] *See id.* at 616, 621.

[89] *See id.* at 615.

[90] This is as opposed to an organization like Catholic Charities or Habitat for Humanity which, though religious, is primarily a service organization.

[91] *See* Meek v. Pittenger, 421 U.S. 369 (1994).

[92] The benefit to the church of having the privilege is neither financial nor of any physical substance.

[93] This would require a court to determine whether the communication was intended to be confidential, was in the professional capacity of the priest, and was in a reasonably confidential setting. *See* PROPOSED FED. R. EVID. 506 (unenacted).

In federal courts, any investigation as to privilege must be in accordance with FED. R. EVID. 104(a). This is virtually the same kind of "entanglement" committed when a judge determines the status of a communication with an attorney, doctor, or psychotherapist. It is neither long nor intrusive. The court may take parties and witnesses into chambers in order to discover if the circumstances fit the privilege. See *infra* note 131 for a discussion of the psychotherapist privilege.

[94] In *Lemon*, the state administrators would have had to inspect the parochial school and its records and to make sure of its continued compliance so that it would not use state funds for religious purposes. *See* 403 U.S. at 619, 621.

[95] *See* discussion *infra* Part IV.

[96] Is there not the same kind of "entanglement" when a government verifies that an organization is religious for taxation purposes? *See Lemon*, 403 U.S. at 419, 421.

[97] Brocker, *supra* note 58, at 484.

2. The *Larson* Test

While the three prongs of *Lemon* were designed to determine whether the state had endorsed or disapproved of religion, the *Larson* Test was posited to determine whether the state preferred or disapproved of one religion over another.[98] If a statute prefers or disapproves of a specific religion, courts apply a strict scrutiny standard.[99] Thus, the state must show a compelling interest for the law in question to avoid unconstitutionality.[100]

While this test may apply to a few state priest-penitent statutes,[101] most priest-penitent privilege statutes (and Proposed FRE 506[102]) are so broadly written or interpreted that the privilege does not benefit or harm one religious group over another.

3. Historical Analysis

The Court, in its reluctance to apply a single Establishment Clause test,[103] chose a historical analysis when evaluating legislative chaplains.[104] Since many of the drafters of the Constitution were in the first Congress and voted to establish a paid legislative or Congressional chaplaincy, then they must not have seen a contradiction between the Establishment Clause and a paid chaplaincy.[105] Acceptance of a paid chaplaincy thus did not violate the Constitution.[106]

The fact situation in *Marsh v. Chambers*[107] was unusual because the chaplaincy existed from the first days of the republic.[108] Conversely, the priest-penitent privilege was first reported in the courts in 1813[109] and in statutes in 1828.[110] There is no jurisprudential basis, under the logic of *Marsh*, therefore, for supposing the privilege could be defended successfully by historic analysis.

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[98] *See* Larson v. Valente, 456 U.S. 228, 246-47 (1982).

[99] *See id.* at 246.

[100] *See id.* at 247.

[101] An example of a statute that may come under the scrutiny of the *Larson* Test is GA. CODE ANN. § 24-9-22 (1995), which names specific kinds of ministers for whom the privilege is valid, as opposed to a general description of clergy found in most statutory privileges.

[102] *See* PROPOSED FED. R. EVID. 506(a)(1) (unenacted).

[103] *See* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) ("[N]o fixed, *per se* rule can be framed.").

[104] *See* Marsh v. Chambers, 463 U.S. 783 (1983).

[105] *See id.* at 787-88.

[106] *See id.* at 793-94.

[107] 463 U.S. 783 (1983).

[108] *See id.* at 786-90.

[109] *See supra* note 15 and accompanying text; Brocker, *supra* note 58, at 459-60.

[110] *See supra* note 25 and accompanying text; Brocker, *supra* note 58, at 459-60.

4. Summary of the Establishment Clause Tests

The priest-penitent privilege is most vulnerable against Establishment Clause scrutiny when evaluated under the effect prong of *Lemon*. However, the current Court views *Lemon* as a guideline, not a litmus test.[111] The Court accepted the priest-penitent privilege in approving Proposed FRE 506. Finally, if the Court takes the view that the privilege is part of a whole set of privileges[112] whereby the religious individual is merely accommodated, as opposed to a full-fledged endorsement of religion, then the privilege could withstand an Establishment Clause challenge.

B. The Currents of Free Exercise[113]

Even if the statute is deemed unconstitutional due to the shoals of the Establishment Clause, the adjoining Free Exercise Clause may allow the privilege to avoid an Establishment Clause grounding.

Historically, the Court has used a strict scrutiny standard when analyzing the burden placed on an individual's religious belief.[114] In order for the statute to remain constitutional when this standard is applied, the government must have a compelling interest and show it is using the least restrictive means necessary.[115]

Recent judicial decisions, at least in Congress's eyes, have loosened this standard.[116] The legislative branch responded with the Religious Freedom Restoration Act (RFRA).[117] The Supreme Court declared RFRA

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[111] *See supra* note 63.

[112] *See* discussion *infra* Part IV.

[113] See BENTHAM, *supra* note 75, at 588, for the following assertion:

> I set out with the supposition, that in the country in question, the catholic religion was meant to be tolerated. But, with any idea of toleration, a coercion of this nature is altogether inconsistent and incompatible. In the character of penitents, the people would be pressed with the whole weight of the penal branch of the law: inhibited from the exercise of this essential and indispensable article of their religion: prohibited, on pain of death, from the confession of all such misdeeds as, if judicially disclosed, would have the effect of drawing down upon them that punishment; and so, in the case of inferior misdeeds, combated by inferior punishments.

[114] *See* Sherbert v. Verner, 374 U.S. 398, 401 (1963).

[115] *See id.*

[116] *See* Employment Div. v. Smith, 494 U.S. 872, 881 (1990). The Court, in a Scalia opinion, held that, if there were a strict scrutiny standard against religiously neutral laws in general, each man would be a law to himself. *See id.* at 879. Therefore, the Court rid itself of the strict scrutiny standard except when there is a combination of a violation of the Free Exercise Clause and another right. *See id.* at 881.

[117] 42 U.S.C. § 2000bb (1996). Through this statute, Congress sought to reimpose the strict scrutiny standard in free exercise cases.

unconstitutional in the summer of 1997.[118] Thus, the Court will likely continue to approach First Amendment cases under *Employment Division v. Smith*,[119] but, at its prerogative, the Court may evaluate controversies on a case-by-case basis.

Typically, free exercise questions arise from state action or statute, but in the case of the priest-penitent privilege, the controversy could originate from a lack of the privilege. In other words, the non-existence of the privilege opens the door for the claim that the privilege is necessary for the free exercise of religion.

1. Burden on Religion

In order to make a free exercise claim, there must be a burden on religious belief (for example, the lack of a priest-penitent privilege would be a burden on the exercise of religion).[120] In the single largest church body in America, the Roman Catholic Church, one of the seven sacraments is auricular confession.[121] Without assurance of confidentiality, the confession would be greatly burdened for everyone involved— the church, the priest, and the believer.[122] Confidence and candor would be missing from one of the church's basic functions. The removal or questioning of the priest-penitent privilege would no doubt inhibit the church's current practice, implicating the Free Exercise Clause.

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[118] *See* City of Boerne v. Flores, 521 U.S. 507 (1997). For an interesting essay of RFRA's demise, see Robert F. Drinan, *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 GEO. L.J. 101, 116 (1997).

[119] 494 U.S. 872 (1990).

[120] *See* Mayes, *supra* note 58, at 415. The concept of the disappearance of the privilege is contended to be a violation of free exercise. In *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997), an *amicus curiae* brief arguing for the privilege's constitutionality (and necessity) had backing from diverse religious groups, including the U.S. Catholic Conference, the National Council of Churches in the U.S.A., the Christian Legal Society, the Church of Jesus Christ of Latter-Day Saints, the Presbyterian Church (U.S.A), the American Jewish Congress, the Commission of Social Action of Reform Judaism, the Baptist Joint Committee on Public Affairs, and the Evangelical Lutheran Church in America.

[121] *See* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 20.

[122] See Anthony Cardinal Bevilacqua, *Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L.A. L. REV. 1733, 1741 (1996), which states that

> [f]rom the perspective of Roman Catholic laity, any movement towards compelling a priest to reveal confessional secrets in some instances, also poses a threat to the freedom of religious practice. The confidence with which communicants freely approach their ministers with confidential spiritual matters would be undermined . They would have uncertainties and anxieties concerning whether clergy are, or will be, required to reveal confidential spiritual communications in other matters in addition to the one for which they may be presently asked to do so.

2. Compelling State Interest

Once it is shown that a particular statute (or revocation of a statute) would place a significant burden on religion, the government must show that it has a compelling interest in order to avoid losing its case.[123] Not all burdens on religion are unconstitutional. States have compelling interests when it concerns public health, safety, and morals.[124]

In challenging the priest-penitent privilege, the state could argue that it has two interests at risk. First, the state could contend that the privilege exists at the cost of the general need for the truth before tribunals.[125] Second, depending on the circumstances, the state could also argue that third persons may be saved from harm.[126]

Courts would have to weigh the interest of the state versus the burden placed on religion.[127] In the course of this process, courts must determine the sincerity of the religious belief in order to estimate the burden of any restriction.[128]

The state's interest in truth-seeking resides in the courts because tribunals have a general responsibility to seek the truth while pursuing justice.[129] Privileges create exceptions from truth-finding. Good reasons exist for these exceptions,[130] but a very practical reason is the lack of evidentiary good to be gleaned from prying into penitential communications. Confessions disclosing criminal activity may simply cease. Despite the fact that statements against interest and statements by party-opponents are

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[123] It should be noted that, as a result of *Smith*, the compelling state interest standard may not apply as the court may view the religious objection to disclosure as an "incidental effect" of a "generally applicable law." 494 U.S. at 878. There are two suggestions to steer around this understanding that appears in *Smith* in Michael J. Mazza, *Should the Clergy Hold the Priest-Penitent Privilege?*, 82 MARQUETTE L. R. 171, 195-96 (1998).

[124] *See* Jacobsen v. Massachusetts, 197 U.S. 11 (1905); *see also* People v. Pierson, 68 N.E. 243 (1903).

[125] *See* Mayes, *supra* note 58, at 397.

[126] *See* Raymond C. O'Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating that Clergy Report Child Abuse*, 25 LOY. L.A. L. REV. 1, 18 (1991). This would be the case if one is considering that the priest has information (acquired through confession) regarding a possible child abuser and victim. The topic of child abuse reporting statutes has particular resonance since the last twenty years have produced extensive passage of new reporting requirements. Many of these statutes fail to limit the persons subject to reporting; some state reporting statutes could be interpreted to include exceptions to the attorney-client privilege and the priest-penitent privilege in the case of child abuse reporting. *See id.* at 22.

[127] *See* Mayes, *supra* note 58, at 412-13.

[128] *See id.*

[129] *See* Jaffee v. Redmond, 518 U.S. 1, 7 (1996). "[T]he public . . .has a right to every man's evidence." *Id.* at 9 (quoting U.S. v. Bryan, 339 U.S. 323, 331 (1950)).

[130] *See* discussion *infra* Part IV.

often admissible, it is not frequent that a reasonable man will commit these errors when he knows a court can compel disclosure. The benefit of disclosure is often minimal. On the other hand, confession of sin is arguably important to the penitent. Without the privilege, the penitent must choose between ignoring an important religious practice and self-incrimination. This greatly burdens the free exercise of religion.[131]

The state's strongest interest probably would be that of a third person's well-being.[132] The court will weigh the government's interest in protecting third parties against the burden placed on religion without confidentiality.[133] But even this interest in third-persons presupposes the trustworthiness of the spiritual communication.[134] One would not go to clergy in candor confessing a brutal crime if there were no expectation of confidentiality. In fact, the very reason the state or an adverse party would seek information from clergy is based on this candor produced by the historic confidentiality of the priest's office. In reality, a priest is likely to require that the penitent sinner admit his crimes to the authorities and restore the one sinned against in order to be given absolution. It is therefore quite possible that the search for truth is assisted, rather than hindered, by the priest-penitent privilege.

3. Least Restrictive Means

In addition to demonstrating a compelling interest, the state must achieve that interest in the least restrictive manner.[135] In the case of ascertaining the truth, apparently the only method to find the truth is to disclose the spiritual communication to the state. As an alternative, the state could simply carve out certain exceptions to the privilege. The exceptions could be similar to those of the attorney-client privilege. The attorney-client privilege, in some jurisdictions, has exceptions to the privilege when the attorney obtains knowledge of the client's future crimes,

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[131] See *Jaffee*, 518 U.S. at 11-12, where the Court used similar logic when determining the psychotherapist privilege:

> In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. . . . Without a privilege, much of the desirable evidence to which litigants such a petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being.

[132] *See generally* Mayes, *supra* note 58, at 416. An example of this could be in the matter of a serial murderer that confesses his continuing exploits. *See infra* note 168.

[133] *See Jaffee*, 518 U.S. at 7.

[134] *See* Brocker, *supra* note 58, at 481.

[135] *See* Thomas v. Review Bd., 450 U.S. 707 (1981).

furtherance of a crime or fraud, or reasonable belief in bodily harm.[136] The state may seek to limit the priest-penitent privilege in a like manner.

Once again, however, the argument as to a penitent's candor when communicating with the priest arises. If there are exceptions to priest-penitent confidentiality that the penitent cannot control, then it is likely that there will be less, if any, candor over the most sensitive topics. If disclosure is required, a penitent's candor would be based, in part, upon his ability to foresee possible disclosure. This foreseeability by the layman is the key to candor. Without complete assurance of confidentiality, complete candor cannot occur, and the confessional is severly limited.

C. Summary of the First Amendment Concerns

While the Supreme Court has not ruled on the subject of the priest-penitent privilege, it is not certain that the Court would find it constitutional. The argument that the privilege is a violation of the Establishment Clause appears simple. On the other hand, the arguments against an Establishment violation are more subtle and complex (even though there is nothing subtle about the burden that would be placed on religion if there were no privilege).

It is difficult to foresee the Court making a decision on the topic. Since *People v. Phillips*[137] in 1913, the highest that a priest-penitent privilege question has risen is to the Circuit Court of Appeals.[138] The privilege was approved as part of the Federal Rules of Evidence under the Burger Court, and the benefits to the state from the lack of the privilege seem meager compared to the burden that would be placed on religion.

It should be noted that if the Supreme Court considers the priest-penitent privilege, there may be disagreement as to who holds the privilege. Difficulties exist based on whether the privilege is solely the penitent's or whether it may extend to other parties, such as a clergy member. For example, in *Commonwealth v. Kane*[139] a priest was held in contempt when he refused to disclose the contents of a confession after the penitent had intentionally waived the privilege and called the priest for testimony.[140]

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[136] Proposed FRE 506 is an example of the attorney-client privilege with limitations. See *supra* note 32 for the text of PROPOSED FED. R. EVID. 506 (unenacted).

[137] N.Y. Ct. of Gen. Sess. (1813), *reprinted in Privileged Communications to Clergyman*, 1 CATH. LAW. 199 (1955); *see supra* notes 15-23 and accompanying text.

[138] *See, e.g.*, Mockaitis v. Harcleroad, 104 F.3d 1522 (9th Cir. 1997).

[139] 445 N.E.2d 598 (Mass. 1983).

[140] *See id.* at 603; *see also* Ronald J. Colombo, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 242-52 (1998) (addressing some of these thorns and proposing a clergy–penitent privilege with a testimonial accommodation in order to track a path of constitutionality).

IV. DOCTRINE

"The clergy-communicant privilege has traditionally been asserted on public policy grounds."[141] The reasoning has been that a greater public good is served by the privilege than by the evidence that would be acquired without it.[142]

> There are two basic forms of justification that have been used by the proponents of privileges. The first type is the instrumental justification; it assumes that a refusal to disclose information to a tribunal is bad and must therefore be justified as furthering some other social policy. . . . The other mode of justification is non-instrumental.[143]

Following a discussion of the classical, instrumentalist doctrine for privileges and the modern trend of privilege justification as a repugnant government intrusion into privacy, an additional discussion will follow of the rationales for the priest-penitent privilege. These additional rationales are the *Jaffee* Rationale,[144] Cardinal Bevilacqua's Theory,[145] the Web Theory,[146] and the *Antigone* Theory.[147] (The rationales are not all completely compatible.)

A. Justifications

1. Instrumental Approach

Wigmore penned the classic "four fundamental conditions" for the establishment of a privilege:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[148]

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[141] Brocker, *supra* note 58, at 485.

[142] *See id.*

[143] 23 WRIGHT & GRAHAM, *supra* note 6, § 5422, at 670-71.

[144] *See* Jaffee v. Redmond, 518 U.S. 1 (1996).

[145] *See* Bevilacqua, *supra* note 122.

[146] The "Web Theory" is a theory posited by the author of this article. The Web Theory is a name for the concept whereby one considers the whole set of privileges as part of a whole legal system protecting the rights of citizens in morality, therapy, legality, and privacy.

[147] The "Antigone Theory" is a rationale for the privilege based on the Sophoclean tragedy. *See supra* note 1.

[148] 8 WIGMORE, *supra* note 7, § 2285, at 527.

Wigmore asserts that the priest-penitent privilege can claim all four conditions, with the only condition open for debate being the third.[149] This instrumentalist approach appears to have been the general view of the Committee that wrote the Federal Rules of Evidence.[150]

2. Non-instrumental Approach

The Non-instrumental Approach is based on the concept that disclosure of the communication itself is wrong.[151] Most notable is the comparison to spousal privileges.[152] Traditionally, spousal privileges have been defended on the basis of the prevention of marital dissension and the repugnancy of requiring a person to condemn or be condemned by his spouse.[153] The same rationale applies to the priest-penitent privilege—disclosure is repugnant. This repugnancy can also be cited as a right to privacy.[154]

B. Alternative Doctrines

The following doctrines are not completely compatible. In addition, each raises natural questions regarding exceptions and analogies.

1. *Jaffee* Rationale

In *Jaffee v. Redmond*,[155] a case that questioned the existence of the psychotherapist-patient privilege under federal common law, the Supreme Court held that the United States acknowledged the existence of the psychotherapist-patient privilege in its common law.[156] Justice Stevens's rationale in *Jaffee* would be applicable to the priest-penitent privilege:

> For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which

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[149] *See id.*

[150] *See* 26 WRIGHT & GRAHAM, *supra* note 6, § 5612, at 79; FED. R. EVID. 506 advisory committee's note.

[151] *See* 26 WRIGHT & GRAHAM, *supra* note 6, § 5612, at 89. This is often the kind of justification for the privilege against self-incrimination. *See, e.g.*, U.S. CONST. Amend. V (protecting an individual's right against self-incrimination).

[152] *See* FED. R. EVID. 505.

[153] *See* 8 WIGMORE, *supra* note 7, § 2228, at 213-22; § 2241, at 254-56; *see also* FED. R. EVID. 505 advisory committee's note.

[154] *See generally* 8 WIGMORE, *supra* note 7, § 2394, at 873.

[155] 518 U.S. 1 (1996).

[156] *See id.* at 13.

> may exist are distinctly exceptional, being so many derogations from a positive general rule.[157]

Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."[158]

Because the psychotherapist-patient relationship was based on and could only be achieved through trust and confidence, the Court determined that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."[159]

The public good was better served with the privilege in place. In making this determination, the Court factored the citizens' mental health similarly to their physical health.[160] Additionally, the Court noted that the entire community may suffer if, for example, police officers were unable to receive effective counseling.[161]

The Court supported its position by pointing out that all fifty states and the District of Columbia had some form of psychotherapist-patient privilege.[162] It also noted that the Advisory Committee for the Federal Rules of Evidence had adopted the privilege.[163] In essence, the Court balanced the benefits of the privilege against the detriments of being without it.[164]

The justifications for the psychotherapist-patient privilege also apply to the priest-penitent privilege. All fifty states and the District of Columbia have enacted or recognized some form of the privilege. Further, the Advisory Committee also adopted the privilege. Finally, the good of having the privilege[165] substantially outweighs the harm of being without it.[166]

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[157] *Id.* at 9 (quoting U.S. v. Bryan, 339 U.S. 323, 331 (1950)).

[158] *Id.* (quoting Trammel v. United States, 445 U.S. 40, 50 (1979)).

[159] *Id.* at 10.

[160] *See id.* at 11.

[161] *See id.* at 11 n.10.

[162] *See id.* at 12. "Because state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Id.* at 13 (reiterating the language of FED. R. EVID. 501).

[163] *See id.* at 13-14.

[164] *See id.* at 11. This decision has been criticized for forming a privilege with only a balancing test. The first of the critics was Justice Scalia in his dissent. *See id.* at 18-36 (Scalia, J., dissenting).

[165] "The advantages of a temporal nature [from confidential penitential communications], which, in the countries in which this religious practice is in use, flow from it at present, would in a great degree be lost: the loss of them would be as extensive as the good effects of the coercion in the character of an aid to justice." BENTHAM, *supra* note 75, at 589-90.

2. The Cardinal's Theory

Cardinal Bevilacqua maintains that the Seal of the Sacrament of Penance has a dual purpose. It is designed for the individual penitent's privacy and is also a seal for the Sacrament of Penance itself. "Were the Sacrament rendered difficult or odious to the faithful they would be deterred from approaching it, thereby undermining the Sacrament itself to the great spiritual harm of the faithful, as well as to the entire Church."[167]

The Cardinal also writes, "[T]he good of religion prevails over the good of justice."[168] In the case where justice would not be done unless the priest discloses the contents of a confession, the Cardinal states, "While the seriousness of the obligation of protecting the privacy of the penitent cannot be diminished or underestimated, the obligation of religion, or the reverence due to the Sacrament of Penance, is by far a greater obligation of than of justice towards the penitent."[169] Based on the Cardinal's logic, there is no possible compelling state interest overriding the privilege because the lack of the privilege in any way would diminish the religion and deter many from a necessary part of the religion's tenets. Thus, the government would be excessively burdening free exercise.

In addition, the Cardinal allows for an alternate theory: "[t]hat which the priest learns in the confessional, he knows uniquely as the representative of God, and not at all through human knowledge or

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[166] "The advantage gained by the coercion [of disclosure]—gained in the shape of assistance to justice—would be casual, and even rare; the mischief produced by it, constant and all extensive." *Id.* at 589.

[167] Bevilacqua, *supra* note 122, at 1736.

[168] *Id.* at 1737. This concept of justice and even the health of individuals being secondary is best exemplified in this paragraph:

> In a much-publicized case in Langerberg, West Germany, several years ago, Jurgen Bartsch, a fifteen-year-old butcher's apprentice, confessed to his priest that he had committed murder. The priest attempted to persuade Bartsch to give himself up to the police. When he was unable to do so, the priest followed Roman Catholic church law requiring absolute confidentiality of the confessional and did not reveal information about the murder or Bartsch's intentions. Bartsch committed three more murders—all of them eleven-year-old boys, all of whom he subjected to sexual torture prior to killing them—before he was caught four years later.

Id. at 1753 (citing Margaret P. Battin, ETHICS IN THE SANCTUARY: EXAMINING THE PRACTICES OF ORGANIZED RELIGION, 21 (1990)). Bartsch confessed to seventy other attempts. *See id.* at 1754.

It should be noted that Cardinal Bevilacqua would probably not be making this argument on the subject of the Establishment Clause in today's courts.

[169] *Id.* at 1736.

communication; he should completely detach himself from such knowledge; it is as if he knows nothing."[170]

3. The Web Theory

Taking the professional privileges[171] as a whole system, the Web Theory argues that the priest-penitent privilege is constitutional as an accommodation to the religious. The theory holds that, while privileges are usually considered exceptions from the general rule that "every man's evidence" must be disclosed to a tribunal,[172] the professional privileges could be considered collectively as protecting individuals from the glare of public exposure. In addition, this set of privileges protects the physical, mental, and spiritual health and the legal status of the individual.

Combining the perspective of the professional privileges as a system with the fact that the psychotherapist-patient privilege and the priest-penitent privilege are quite similar, as each deals with affairs of the psyche,[173] it stands to reason that communications with a religious counselor deserve at least the same protections as communications with a non-religious counselor. It should be noted that more than forty percent of Americans who seek counseling initially consult a member of the clergy.[174]

The risk of the Web Theory, if used in court, is that its success depends upon perspective. From the advocate's perspective, he is using the Web Theory to argue for the religious purpose of the priest-penitent privilege. A court may see the argument from this perspective and raise Establishment Clause concerns. On the other hand, a court may not share the advocate's perspective but may see the argument in light of the other non-religious privileges and, thus, find it constitutional.[175]

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[170] *Id.* at 1735 (quoting the DICTIONARE DE DROIT CANONIQUE 41 (Raoul Naz ed., 1957)). By the manner in which the priest does not hear the confession in a human capacity, communication may be regarded as beyond the jurisdiction of the courts.

[171] The professional privileges considered above are the doctor-patient privilege, the psychotherapist-patient privilege, the priest-penitent privilege, and the attorney-client privilege.

[172] *Jaffee*, 518 U.S. at 9 (quoting U.S. v. Bryan, 339 U.S. 323, 331 (1950)).

[173] It should be noted, once again, that "psycho-" is the Greek root for "soul." *See* LIDDELL & SCOTT, *supra* note 79, at 93.

[174] *See* Brocker, *supra* note 58, at 455.

[175] The risks of this theory extend far beyond the constitutional realm. This rationale would cause some difficulty in answering how the privileges relate to one another. For example, should the priest-penitent privilege be subject to the exceptions of the attorney-client privilege? One can consider the child abuse reporting statutes— should they apply to all the privileges equally? Does it make a difference that certain professionals are better trained to detect child abuse?

4. *Antigone* Rationale

> [F]or it was not Zeus that had published that edict; not such are the laws set among men by the Justice who dwells with the gods below. Nor did I deem that your decrees were of such force that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of today or yesterday, but from all time . . . .[176]

Ultimately, government will recognize a priest-penitent privilege for reasons similar to the Sophoclean tragedy. There are laws that some people believe are greater than the state. Such is the situation with the Catholic priest threatened with automatic excommunication if he violates the confessional seal.[177] The state is limited to temporal punishment; the church has a slightly different authority.[178]

V. CONCLUSION

Both history and the law provide compelling arguments in favor of protecting the sacred privilege. Under current Establishment Clause jurisprudence, the privilege could encounter some rough waters. But if viewed in light of the Free Exercise Clause, the burden placed upon religion by a denial of the privilege would most likely be unacceptable to the Supreme Court. Different theories of justification for the priest-penitent privilege yield different reasons for supporting it. Whether looked at from an instrumentalist or non-instrumentalist viewpoint, under the *Jaffee* rationale, Cardinal Bevilacqua's theory, the Web Theory, or Antigone's dilemma, ample justification exists in the law for upholding the priest-penitent privilege.

Without the priest-penitent privilege, some religious men will refuse to bow to Caesar, and, in the process, embarrass the state. The privilege is a stark reminder of Western history's longest running conflict—that between the church and the state.

"So far me to meet this doom is trifling grief. . . . And if my present deeds are foolish in your sight, it may be that a foolish judge arraigns my folly."[179]

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[176] SOPHOCLES, *supra* note 1, at 127 (Antigone to Creon).

[177] *See* 1983 CODE c.1388, § 1.

[178] *See, e.g.*, *John* 20:23 ("Whose soever sins ye remit, they are remitted unto them; and whose soever sins ye retain, they are retained."); *Matthew* 16:19 ("[W]hatsoever thou shalt bind on earth shall be bound in heaven: and whatsoever thou shalt loose on earth shall be loosed in heaven.").

[179] SOPHOCLES, *supra* note 1, at 127 (Antigone to Creon).