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Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege

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FORGIVE US OUR SINS: THE INADEQUACIES OF THE CLERGY-PENITENT PRIVILEGE

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INTRODUCTION

One of the many common law rules to take hold in the United States is the "clergy-penitent" privilege.[1] An evidentiary rule, the clergy-penitent privilege protects from revelation evidence concerning a penitent's communication with his cleric. Simultaneously, the First Amendment to the Constitution addresses the interaction of church and state via the Establishment Clause and Free Exercise Clause, raising the following question: to what extent is the common law clergy-penitent privilege abrogated or expanded by the First Amendment?

This Note will demonstrate that, as understood by most courts and legislatures, the clergy-penitent privilege does not conform completely to the requirements of the First Amendment. As a result, the privilege at times violates the Amendment's Establishment Clause by unduly preferencing religion. Additionally, at other times the privilege's protections are insufficient, offending the notions of religious liberty and tolerance upon which both the First Amendment's Establishment Clause and Free Exercise Clause were built.

A vivid example of the inadequacies of the current system is provided in *Commonwealth v. Kane*.[2] In *Kane*, a Roman Catholic priest refused to testify to communications the defendant made to him, although the defendant had waived his rights to the privilege and consented to the disclosure of the communications in question.[3] The defendant's position was that he had confessed nothing inculpatory, and he wanted the priest to corroborate this.[4] The court held that the right to assert the privilege was the defendant's and that the priest's refusal to testify after the defendant's waiver was unlawful.[5] The

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1 I use the term "clergy-penitent" privilege, rather than the more traditional term "priest-penitent" privilege, because it provides a more accurate description of the privilege, which is nondenominational in nature.

2 445 N.E.2d 598 (Mass. 1983).

3 See id. at 602.

4 See id. at 603.

5 See id.

priest in *Kane* was held in contempt for refusing to violate the dictates of his religion, which forbade him from revealing the confidences made to him.[6] While the court correctly construed the clergy-penitent privilege statute[7] it was faced with, its decision makes clear the inadequacy of the privilege alone; under such a regime, clergy face court sanctions for adhering to the tenets of their faiths.

The solution to such problems lies in constructing a constitutionally sound clergy-penitent evidentiary privilege, while accommodating clergy whose religions prevent them from testifying under certain circumstances (hereinafter referred to as a "clergy testimonial accommodation"). A constitutionally sound privilege would allow penitents, and penitents alone, to bar the introduction of confidential statements made by them to members of the clergy. This privilege would extend to testimony from both the penitents themselves and others regarding the communications in question, and would be available to penitents regardless of their particular religious beliefs or obligations. A clergy testimonial accommodation would permit clergy, and clergy alone, to refrain from testifying to communications that their religions bind them to keep silent. This accommodation would operate regardless of the penitent's desires.

Part I of this Note will discuss evidentiary privileges in general and the clergy-penitent privilege in particular. Part II will examine the First Amendment's Establishment Clause and Free Exercise Clause and discuss religious accommodations. Part III will apply the common law principles discussed in Part I and the First Amendment principles discussed in Part II to the clergy-penitent privilege. This application will expose the inadequacies of the privilege as commonly understood. Thereafter, Part III will offer a clergy-penitent privilege and a clergy testimonial accommodation that are consistent with these principles and result in a regime of protection for clergy-penitent communication superior to the one currently in place.

I
EVIDENTIARY PRIVILEGES AND THE CLERGY-PENITENT PRIVILEGE

A. Evidentiary Privileges

Privileges are exceptions to the general duty of witnesses to testify, reflecting society's belief that some values are "sufficiently important . . . to outweigh the need for probative evidence."[8] Unlike other

[6] See id.

[7] See Mass. Gen. Laws Ann. ch. 233, § 20A (1962).

[8] Trammel v. United States, 445 U.S. 40, 51 (1980). See generally McCormick on Evidence § 72 (John William Strong ed., 4th ed. 1992).

evidentiary rules, privileges do not facilitate factfinding, but rather pose an obstacle to the factfinding process, justified on public policy grounds.[9] For this reason, experts generally agree that privileges should be cautiously promulgated and narrowly construed in order to minimize the burdens they impose upon the adjudicatory process.[10]

Originally grounded in the common law, most privileges have been codified by statute over time.[11] Privilege recognition has traditionally required, and continues to require, (1) an "'imperative need for confidence and trust'" between the communicants,[12] and (2) the promotion of "'public ends.'"[13] Consideration of these factors together answers the critical inquiry whether the relationship and communication in question are "sufficiently important" to justify an obstacle to the truth-seeking process. The fact that a communication

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9 See McCormick, supra note 8, § 72 (noting that privileges reduce information available to courts, thereby burdening the truth-seeking process).

10 See *Trammel*, 445 U.S. at 50-51 (1980) (noting that privileges "must 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'" (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting))); see also McCormick, supra note 8, § 74 (privileges should be construed "no more broadly than necessary to accomplish their basis purposes"); 8 John H. Wigmore, Evidence in Trials at Common Law § 2192 (McNaughton rev. vol. 1961) (privileges "should be recognized only within the narrowest limits required by principle").

11 See, e.g., Jaffee v. Redmond, 116 S. Ct. 1923, 1930 (1996) (discussing statutory recognition of psychotherapist privilege by states); see also McCormick, supra note 8, § 75 (discussing state codification of privileges).

12 *Jaffee*, 116 S. Ct. at 1928 (quoting *Trammel*, 445 U.S. at 51).

13 Id. at 1929 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). The traditional expression of the requirements needed for privilege recognition were set forth in 8 Wigmore, supra note 10, § 2285:

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

In recent times, privacy rationales have been advanced to justify the recognition of evidentiary privileges. See generally Modes of Analysis: The Theories and Justifications of Privileged Communications, in Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1471, 1481-83 (1985). Under the privacy rationale, a witness's privacy interest would be balanced against society's interest in compelling disclosure to ascertain the truth. Such an approach essentially reduces the analysis to a cost-benefit test, and readily folds into Wigmore's traditional approach and the approach taken by the Supreme Court in *Trammel*. See id.

was made in confidence, while necessary to a privilege's recognition, is not, by itself, a sufficient ground for such recognition.[14]

Once recognized, a privilege is defined by two variables: the parameters of the communication covered by the privilege and the identity of the party who possesses or "holds" the privilege.[15] The communication covered by the privilege is that which the privilege identifies as protected from revelation in court. The possessor or holder of the privilege is the person who has the authority to invoke the protection of the privilege.[16] Possession of a privilege vests in the person with the "interest or relationship fostered by the particular privilege," regardless of whether he is a plaintiff or defendant in the action at hand.[17] Thus, only the possessor of a privilege can invoke the privilege to preclude testimony, either his own or someone else's; the witnesses and parties to the lawsuit themselves have no say in the matter.

Most jurisdictions today recognize an array of privileges.[18] These include the most common privileges: the attorney-client privilege, the marital privilege, medical privileges, and the clergy-penitent privilege.

The attorney-client privilege is one of the oldest evidentiary privileges available, and its recognition as a privilege has never been questioned.[19] The privilege is held by the client and protects only communication regarding legal advice.[20] The privilege has been justi-

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14 See 8 Wigmore, supra note 10, § 2286.

15 See *Trammel*, 445 U.S. at 51; see also United States v. Harrelson, 754 F.2d 1153, 1167 (5th Cir. 1985).

> One who wishes to assert the attorney-client privilege bears the burden of proving . . . that the asserted holder of the privilege made the communications as to which the privilege is asserted to one acting as a lawyer, and that the communications were made for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.

Id. (citations and internal quotes omitted).

16 See McCormick, supra note 8, § 73.1.

17 Id. See, e.g., United States v. Schlette, 842 F.2d 1574, 1583 n.5 (9th Cir. 1988) (holding that psychotherapist-patient privilege could only be asserted by actual patient and not by government on his behalf).

18 Some of the privileges, however, fail to measure up to the requirements for privilege recognition indicated above. See Introduction: The Development of Evidentiary Privileges in American Law, in Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1454, 1457-58 (1985) (noting that certain modern privileges are "unsupported" by traditional common law justifications); McCormick, supra note 8, § 75 (same); 8 Wigmore, supra note 10, § 2286 (same). Medical privileges are often attacked on these grounds. See infra notes 27-31 and accompanying text.

19 See Attorney-Client Privilege, in Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1501, 1502-04 (1985) [hereinafter Attorney-Client Privilege] (summarizing history and discussing theories of attorney-client privilege).

20 See Fisher v. United States, 425 U.S. 391, 403 (1976) (noting that attorney-client privilege "protects only those disclosures necessary to obtain informed legal advice").

fied on both traditional grounds[21] and on the right of individuals to avoid self-incrimination.[22]

The marital privilege, like the attorney-client and clergy-penitent privileges, is a long recognized privilege under the common law.[23] The spouse who has been called as a witness holds the privilege, contrary to the usual rule of privilege possession that grants possessory interest in the person who bespoke the statements in question.[24] The privilege requires that the parties to the communication be legally married, and protects only communication that the married couple intended to remain confidential between them.[25] As with other privileges, the marital privilege is justified on both traditional and privacy grounds.[26]

The physician-patient privilege and its progeny (the psychotherapist-patient privilege, the social worker-client privilege, etc.) did not exist at common law.[27] Instead, the physician-patient privilege became the first statutorily recognized privilege in the United States when New York passed legislation covering it in 1828.[28] The patient possesses this privilege, which usually covers only his communication regarding medical treatment.[29] Although sometimes justified on

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21 That is, the privilege has been held to comport with the requirements set forth by Wigmore and more recently summarized by the Supreme Court in Trammel v. United States, 445 U.S. 40, 51 (1980). See supra note 13 (supplying the four traditional factors set forth by Wigmore).

22 See Attorney-Client Privilege, supra note 19, at 1502 (discussing Blackstone's support for attorney-client privilege on right to avoid self-incrimination).

23 See John C. Bush & William Harold Tiemann, The Right to Silence: Privileged Clergy Communication and the Law 47-54, 99 (3d ed. 1989) (discussing traditional common law privileges).

24 See *Trammel*, 445 U.S. at 53. This unorthodox variation arises from the unique historical development and modern day application of the privilege. Only the husband, who could bar his wife from testifying against him on the grounds that she had no separate legal existence, originally held the privilege. See id. at 44. In more modern times, the privilege has been granted to both husband and wife. See id. The Court in *Trammel* found it unreasonable to allow the privilege to operate as it had in the past, when a defendant-spouse (husband or wife) could prevent the witness-spouse from testifying, regardless of the witness-spouse's desire to testify. See id. at 51-52. Consequently, the Court vested possession of the privilege in the witness-spouse, who may freely choose whether to testify against the defendant-spouse. See id. at 53.

25 See SEC v. Lavin, 111 F.3d 921, 925 (D.C. Cir. 1997) (listing requirements for assertion of marital privilege).

26 See Graham C. Lilly, An Introduction to the Law of Evidence § 9.3 (2d ed. 1987) (discussing justifications for the spousal privilege).

27 See Medical and Counseling Privileges, in Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1530, 1530, 1532 (1985) [hereinafter Medical and Counseling Privileges] (discussing origins of physician-patient privilege).

28 See id. at 1532.

29 See Taylor v. REO Motors, Inc., 275 F.2d 699, 703 (10th Cir. 1960) (noting that only statements "'germane to the physician's diagnosis and treatment of the patient'" are covered by privilege (quoting Estate v. Davis, 212 P.2d 322, 328 (Kan. 1949))).

traditional grounds, medical privileges are more often attacked on these same grounds by critics who believe that the costs of the privileges outweigh their benefits.[30] Consequently, medical privileges are now defended mostly under a privacy rationale.[31]

B. The Clergy-Penitent Privilege

The clergy-penitent privilege, like the attorney-client and marital privileges, has its roots in English common law.[32] These roots can be traced from the canons of the Roman Catholic Church, which considered the seal of the confessional inviolate.[33] This privilege lost its recognition following the Protestant Reformation in England.[34] As a

30 See Medical and Counseling Privileges, supra note 27, at 1543-44.

31 See id. at 1544 ("With the erosion of support for the traditional utilitarian justification for the physician-patient privilege, an alternative justification for the . . . [medical privileges] has begun to emerge—one that defends the privileges as necessary to protect the privacy of the patient."). But see Jaffee v. Redmond, 116 S. Ct. 1923, 1928-30 (1996) (applying Wigmore's traditional utilitarian test in support of psychotherapist privilege).

32 See Bush & Tiemann, supra note 23, at 47-54, 99 (noting that traditional common law recognized clergy-penitent, attorney-client, and spousal privileges).

33 See id. at 48-49 (discussing "inviolability of the seal of confession" in Roman Catholicism). The Sacrament of Reconciliation (the requirement that Catholics confess their sins to their priests) and the secrecy surrounding the confessional, has been integral to Roman Catholic doctrine since the early days of the Church. See id. at 41-42 (discussing New Testament biblical origins of confession and notions of confessional secrecy within apostolic church). In the Fifth Century, Pope Leo I acknowledged the longstanding tradition of confessional secrecy and "'plainly and unequivocally demand[ed] only secret confession and strict silence on the part of the confessor.'" See id. at 42-43 (quoting Bertrand Kurtscheid, A History of the Seal of Confession 43-44 (1927)). This position was codified into the Canon Law by the Fourth Lateran Council in 1215, and remains a part of Roman Catholic Canon Law to this day: "The sacramental seal is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason." Id. at 44-45 (quoting 1983 Code c.983, § 1 for evidence of modern day use). See also Anthony Cardinal Bevilacqua, Confidentiality Obligation of Clergy From the Perspective of Roman Catholic Priests, 29 Loy. L.A. L. Rev. 1733, 1734 n.4 (1996) (noting codification of Church's "longstanding teaching and practice" regarding confessional secrecy in 1215). In England before the Reformation, there was a "very close connexion" between Church and State, and many laws were "purely ordinances of religious observance enacted by the State." Bush & Tiemann, supra note 23, at 48 (quoting Richard S. Nolan, The Law of the Seal of Confession, in 13 The Catholic Encyclopedia 649 (Charles G. Herbermann et al. eds., 1912)). Since Roman Catholicism was the national religion of England before the Reformation, the Catholic seal of the confessional naturally carried over into English common law, where the clergy-penitent privilege was recognized as absolute. See id. at 49.

34 See Bush & Tiemann, supra note 23, at 111 ("The commentators on the law of evidence generally agree that after the Restoration, the common law recognized no right of privileged communications to clergy."). The Crown's abandonment of Catholicism led English laws away from their Catholic foundations and influences. The Anglican Church, which supplanted the Roman Catholic Church, began this process with regard to the clergy-penitent privilege by holding, first, that confession was voluntary and, second, that exceptions existed to the seal of the confessional. This ultimately led to Parliament's decision to rescind the Seal of the Confessional in the Seventeenth Century, and the English courts dutifully ceased to recognize it. See id. at 55-59.

result, the common law that the United States inherited did not include the clergy-penitent privilege.[35] Ultimately, however, all fifty states and the federal government have come to recognize the privilege, although on different grounds.[36]

State courts recognized the clergy-penitent privilege first as mandated by the Constitution and subsequently via statutory enactment.[37] In the federal court system, the clergy-penitent privilege was recognized through the application of common law principles, a practice that was ultimately codified in the Federal Rules of Evidence.[38] Today every jurisdiction in the United States recognizes some form of the privilege;[39] the key variables upon which jurisdictions differ are

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35 See id. at 99, 102 (noting that America's inherited common law recognized only two privileges: attorney-client and spousal immunity).

36 See id. at 102 (noting that common law's refusal to recognize clergy-penitent privilege was overturned by statutory enactments in all 50 states); see also Mary Harter Mitchell, Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion, 71 Minn. L. Rev. 723, 739 (1987) (discussing federal courts' eventual recognition of clergy-penitent privilege based on common law principles).

37 See, e.g., People v. Phillips, N.Y. Ct. Gen. Sess. (unpublished 1813). In this seminal case, a New York court held that a Roman Catholic priest could not be compelled to testify about information he obtained through the Sacrament of Reconciliation on grounds that doing so would violate the Free Exercise Clause of the First Amendment. See Bush & Tiemann, supra note 23, at 116 (discussing *Phillips*); see also Mitchell, supra note 36, at 737-38 (discussing development of clergy-penitent privilege in New York and other states).

38 See Mullen v. United States, 263 F.2d 275, 280-81 (D.C. Cir. 1958) (Fahy, J., concurring) (recognizing existence of clergy-penitent privilege under common law); see also Totten v. United States, 92 U.S. 105, 107 (1875) (acknowledging existence of clergy-penitent privilege). In 1972, the Supreme Court approved, by a vote of 8-1, proposed Federal Rule of Evidence 506, which afforded federal recognition to the clergy-penitent privilege. See Mitchell, supra note 36, at 739. While Congress ultimately rejected Rule 506, see 26 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5611 (West 1992) (discussing statutory history of rejected rule 506), it eventually approved Rule 501, which permits federal courts to develop rules of privilege "governed by the principles of the common law . . . in the light of reason and experience," Fed. R. Evid. 501.

39 See Ala. R. Evid. 505; Alaska R. Evid. 506; Ariz. Rev. Stat. Ann. § 12-2233 (West 1994) (civil); id. § 13-4062(3) (West 1994) (criminal); Ark. R. Evid. 505; Cal. Evid. Code §§ 917, 1030-1034 (Deering 1986); Colo. Rev. Stat. § 13-90-107 (1987 & Supp. 1996); Conn. Gen. Stat. Ann. § 52-146b (West 1991); Del. R. Evid. 505; D.C. Code § 14-309 (Michie 1995); Fla. Stat. Ann. § 90.505 (West 1979 & Supp. 1991); Ga. Code Ann. § 38-419.1 (Harrison 1981 & Supp. 1989); Haw. R. Evid. 506; Idaho Code § 9-203(3) (Michie 1990 & Supp. 1997); 735 Ill. Comp. Stat. 5/8-803 (West 1992); Ind. Code Ann. § 34-1-14-5 (Michie 1986 & Supp. 1997); Iowa Code Ann. § 622.10 (West 1950 & Supp. 1997); Kan. Stat. Ann. § 60-429 (1965); Ky. R. Evid. 505; La. Code Evid. Ann. art. 511 (West 1995); Me. R. Evid. 505; Md. Cts. & Jud. Proc. Code Ann. § 9-111 (Michie 1989); Mass. Gen. Laws Ann. ch. 233, § 20A (West 1986); Mich. Comp. Laws §600.2156 (West 1986); Minn. Stat. Ann. § 595.02(1)(c) (West 1988 & Supp. 1998); Miss. Code Ann. § 13-1-22 (Supp. 1997); Mo. Ann. Stat. § 491.060(4) (West 1996); Mont. Code Ann. § 26-1-804 (1997); Neb. Rev. Stat. § 27-506 (1995); Nev. Rev. Stat. Ann. § 49.255 (1996); N.H. Rev. Stat. Ann. §§ 330-A:16-c, 516.35 (Michie 1997); N.J. Stat. Ann. § 2A:84A-23 (West 1994); N.M. R. Evid. 11-506; N.Y. C.P.L.R. 4505 (Consol. 1978); N.C. Gen. Stat. § 8-53.2 (Michie 1981); N.D. R. Evid. 505; Ohio Rev. Code Ann. § 2317.02(C) (Baldwin 1994); Okla. Stat. Ann. tit. 12, § 2505 (West

(1) the definition of clergy, (2) the scope of the communication that the privilege protects, and (3) the ownership of the privilege.

1. *Definition of Clergy*

Twenty-three states share essentially the same definition of clergy: "a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization."[40] The obvious effect of such a definition is to be as inclusive as possible, only requiring that the cleric is indeed a bona fide religious counselor. Twelve other states do not define clergy, but state merely that the clergy-penitent privilege applies to any "clergyman or priest."[41] The main problem with this latter approach is that it provides the courts little guidance regarding the issue of who is a cleric, which can generate needless litigation over this issue.

Fourteen states have chosen a less flexible approach, and restrict their definitions of clergy to members of "bona fide established church[es] or religious organization[s]" or a similar formulation.[42]

1993); Or. Rev. Stat. § 40.260 (1995); 42 Pa. Cons. Stat. Ann. § 5943 (West 1982); R.I. Gen. Laws § 9-17-23 (Michie 1997); S.C. Code §19-11-90 (Law Co-op. 1985 & Supp. 1990); S.D. Codified Laws Ann. §§ 19-13-16 to -18 (Michie 1995); Tenn. Code Ann. § 24-1-206 (Michie 1980 & Supp. 1997); Tex. R. Civ. Evid. 505, Tex. R. Crim. Evid. 505; Utah Code Ann. § 78-24-8(3) (Michie 1996); Vt. Stat. Ann. tit. 12, § 1607 (1973); Va. Code. Ann. § 8.01-400 (Michie 1992 & Supp. 1997); Wash. Rev. Code Ann. § 5.60.060(3) (West 1995 & Supp. 1998); W. Va. Code § 57-3-9 (Michie 1997); Wis. Stat. Ann. § 905.06 (West 1975); Wyo. Stat. Ann. § 1-12-101(a)(ii) (Michie 1997).

40 Cal. Evid. Code § 1030 (Deering 1986); see also Ark. R. Evid. 505; Conn. Gen. Stat. Ann. § 52-146b (West 1991); Del. R. Evid. 505; Haw. R. Evid. 506; 735 Ill. Comp. Stat. 5/8-803 (West 1992); Iowa Code Ann. § 622.10 (West 1950 & Supp. 1997); Ky. R. Evid. 505; La. Code Evid. Ann. art. 511 (West 1995); Me. R. Evid. 505; Md. Cts. & Jud. Proc. Code Ann. § 9-111 (Michie 1989); Mich. Stat. Ann. §27A.2156 (Callaghan 1986); Miss. Code Ann. § 13-1-22 (Supp. 1997); Neb. Rev. Stat. § 27-506 (1989); N.J. Stat. Ann. § 2A:84A-23 (West 1994 & Supp. 1997); N.M. R. Evid. 11-506; N.Y. C.P.L.R. 4505 (Consol. 1978); N.D. R. Evid. 505; Okla. Stat. Ann. tit. 12, § 2505 (West 1980 & Supp. 1991); S.D. Codified Laws Ann. §§ 19-13-16 to -18 (1987); Tex. R. Civ. Evid. 505; W. Va. Code § 57-3-9 (Michie 1997); Wis. Stat. Ann. § 905.06 (West 1993).

41 Ariz. Rev. Stat. Ann § 12-2233 (West 1994); see also Colo. Rev. Stat. § 13-90-107 (1987 & Supp. 1996); Idaho Code § 9-203(3) (Michie 1990 & Supp. 1997); Ind. Code Ann. § 34-1-14-5 (Michie 1986 & Supp. 1997); Minn. Stat. Ann. § 595.02(1)(c) (West 1988 & Supp. 1998); Mont. Code Ann. §§ 26-1-801, 26-1-804 (1989); Nev. Rev. Stat. Ann. § 49.255 (1996); Vt. Stat. Ann. tit. 12, § 1607 (1973); Wash. Rev. Code Ann. § 5.60.060(3) (West 1995 & Supp. 1998); Wyo. Stat. Ann. § 1-12-101(a)(ii) (Michie 1997).

42 Ala. R. Evid. 505; see also Fla. Stat. § 90.505 (West 1979 & Supp. 1991); Kan. Stat. Ann. § 60-429 (1965); Md. Cts. & Jud. Proc. Code Ann. § 9-111 (1989); Mass. Ann. Laws ch. 233, § 20A (West 1986); Mo. Ann. Stat. § 491.060(4) (West 1996); N.H. Rev. Stat. Ann. §§ 330-A:16-c, 516.35 (Michie 1997); N.C. Gen. Stat. § 8-53.2 (Michie 1981); Ohio Rev. Code Ann. § 2317.02 (Baldwin 1994); 42 Pa. Cons. Stat. Ann. § 5943 (West 1982); R.I. Gen. Laws § 4-17-23 (Michie 1997); S.C. Code § 19-11-90 (Law Co-op. 1985 & Supp. 1990); Tenn. Code Ann. § 24-1-203 (Michie 1980 & Supp. 1997); Va. Code. Ann. § 8.01-400 (Michie 1992 & Supp. 1997).

The effect of this is to limit the privilege to organized religion. Most restrictive is Georgia's definition, which is limited, facially at least, to Christian and Jewish clergy.[43] As this Note discusses later, it is proper to limit the clergy-penitent privilege to communications conducted with bona fide clergy, but it is not proper to specify the particular denominations of clergy covered by such privilege.[44]

2. Scope of Covered Communication

Half (twenty-five) of the clergy-penitent privilege statutes create a privilege covering "any confidential communication made to [a member of the clergy] in his professional character."[45] Such broad statutes encompass all confidential communication between a cleric and a penitent, so long as the cleric is listening to the penitent in his official capacity as a cleric. This definition does not require, however, that the communication in question be penitential in nature. Eleven states restrict the privilege to "statement[s] made to [clergymen] under the sanctity of a religious confessional" or statements made within the "course of discipline enjoined by [his] church."[46] Such a formulation serves to protect only penitential communication made pursuant to established denominational practices. Eight states and the District of Columbia occupy the area in between these two positions, extending the privilege to "any confidential communication" between a cleric and a communicant, provided that such communication is "necessary and proper to enable [the cleric] to discharge the func-

[43] See Ga. Code Ann. § 24-9-22 (Michie 1995) (definition of clergy limited to "any Protestant minister of the Gospel, or to any priest of the Roman Catholic faith, or to any priest of the Greek Orthodox Catholic faith, or to any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called").

[44] See infra Part III.A.1.

[45] Conn. Gen. Stat. Ann. § 52-146b (West 1991); see also Ala. R. Evid. 505; Del. R. Evid. 505; Ga. Code Ann. § 24-9-22 (Michie 1995); Haw. R. Evid. 506; La. Code Evid. Ann. art. 511 (West 1995); Me. R. Evid. 505; Md. Cts. & Jud. Proc. Code Ann. § 9-111 (Michie 1989); Mass. Ann. Laws ch. 233, § 20A (West 1986); Minn. Stat. Ann. § 595.02(1)(c) (West 1988 & Supp. 1998); Miss. Code Ann. § 13-1-22 (Supp. 1997); Mo. Ann. Stat. § 491.060(4) (West 1996); Neb. Rev. Stat. § 27-506 (1989); Nev. Rev. Stat. Ann. § 49.255 (Michie 1986 & Supp. 1990); N.H. Rev. Stat. Ann. §§ 330-A:16-c, 516.35 (Michie 1997); N.Y. C.P.L.R. 4505 (Consol. 1978); N.D. R. Evid. 505; Ohio Rev. Code Ann. § 2317.02(C) (Baldwin 1994); Okla. Stat. Ann. tit. 12, § 2505 (West 1993); 42 Pa. Cons. Stat. Ann. § 5943 (West 1982); S.C. Code § 19-11-90 (Law Co-op. 1985 & Supp. 1990); S.D. Codified Laws Ann. §§ 19-13-16 to -18 (Michie 1995); Tex. R. Civ. Evid. 505, Tex. R. Crim. Evid. 505; W. Va. Code § 57-3-9 (Michie 1997); Wis. Stat. Ann. § 905.06 (West 1993).

[46] Vt. Stat. Ann. tit. 12, § 1607 (1973); see also Ariz. Rev. Stat. Ann. § 12-2233 (West 1994); Idaho Code § 9-203 (Michie 1990 & Supp. 1997); 735 Ill. Comp. Stat. 5/8-803 (West 1992); Ind. Code § 34-1-14-5 (Michie 1986 & Supp. 1997); Kan. Stat. Ann. § 60-429 (1965); Mich. Comp. Laws § 600.2156 (West 1986); Mont. Code Ann. § 26-1-804 (1997); Wash. Rev. Code Ann. § 5.60.060 (West 1995 & Supp. 1998); Wyo. Stat. Ann. § 1-12-101 (Michie 1997).

tions of his office according to the usual course of practice or discipline of his church."[47] This approach preserves the requirement that the communication be made pursuant to some regular church practice, but eschews the requirement that the communication be made within the sanctity of a formal religious confessional. None of these approaches fully comports with the traditional understanding of privileges, since, as will be discussed later, they fail to inquire into the cleric's obligation to maintain the secrecy of the communication in question.[48] Only two states require such an obligation.[49]

3. *Holder of Privilege*

The overwhelming majority of jurisdictions recognize the penitent as the holder of the privilege.[50] However, four states have recognized dual ownership of the privilege, permitting the cleric to assert the privilege unilaterally.[51] As will be discussed in Part III, clergy ownership of the privilege is ordinarily inappropriate, even though a clergy testimonial accommodation would be fully appropriate.[52]

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Most clergy-penitent privilege statutes do not comport with the justifications discussed previously for privilege recognition.[53] While some of these statutes are merely unwise as a matter of policy, others arguably violate the Constitution. In fashioning a model clergy-penitent privilege in Part III, this Note will expound upon the defects highlighted above and discuss whether they present poor policy choices or constitutional violations. Central to this discussion, however, is an examination of the mandates and principles of the Constitution's religion clauses.

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47 S.C. Code § 19-11-90 (Law Co-op. 1985 & Supp. 1990); see also Colo. Rev. Stat. § 13-90-107 (1987 & Supp. 1996); D.C. Code Ann. § 14-309 (Michie 1995); Fla. Stat. Ann. § 90.505 (West 1979 & Supp. 1991); Iowa Code Ann. § 622.10 (West 1950 & Supp. 1997); N.J. Stat. Ann. § 2A:84A-23 (West 1994 & Supp. 1997); N.C. Gen. Stat. § 8-53.2 (Michie 1981); R.I. Gen. Laws § 9-17-23 (Michie 1997); Tenn. Code Ann. § 24-1-206 (1980 & Supp. 1997); Va. Code. Ann. § 8.01-400 (Michie 1992 & Supp. 1997).

48 See infra Part III.A.3. (discussing obligation of clergy to maintain secrecy as requirement of clergy-penitent privilege recognition).

49 Cal. Evid. Code §§ 912, 917, 1030-1034 (Deering 1986); Or. Evid. Code § 40.260 (1995); Or. R. Evid. 506.

50 Forty-six states plus the District of Columbia and the federal courts view the penitent as the sole holder of the clergy-penitent privilege. The four states that do not are Alabama, California, Colorado, and Ohio. See Ala. R. Evid. 505; Cal. Evid. Code § 1034 (Deering 1986); Colo. Rev. Stat. § 13-90-107 (1987 & Supp. 1996); Ohio Rev. Code Ann. § 2317.02 (Baldwin 1994).

51 See supra note 50.

52 See infra Parts III.A.4. and III.B.

53 See supra notes 12-13 and accompanying text.

II
THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT

A. The Free Exercise Clause

The Free Exercise Clause[54] of the First Amendment is implicated whenever government action adversely affects the practice of religion.[55] Since laws requiring witnesses to testify without excepting evidence gleaned from religious confessions may adversely affect the practice of engaging in such confessions, it is necessary to consider whether these laws violate the Free Exercise Clause.

Under *Employment Division, Department of Human Resources v. Smith*,[56] the Supreme Court explained that the Free Exercise Clause prohibits the government from (1) regulating one's "right to believe and profess" one's religious convictions, or (2) specifically targeting and regulating one's right to engage in religious activity, absent the showing of a compelling government interest pursued by the least restrictive means.[57] Conversely, "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice" do not violate the Free Exercise Clause, and thus do not need to rely on a compelling government interest pursued by the least restrictive means in order to survive constitutional scrutiny.[58] Under some circumstances, however, the Free Exercise Clause mandates that an exemption be granted to certain individuals from an otherwise valid, religion-neutral, generally applicable law.[59] Such exemptions are limited to those circumstances where an individual's free exercise of religion is implicated "in conjunction with other constitutional protections."[60] As the duty to testify is a generally applicable, religion-neutral law, it does not violate the Free Exercise Clause. As this duty does not implicate free exercise concerns in conjunction with

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[54] "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ." U.S. Const. amend. I (emphasis added).

[55] See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-34 (1993) (explaining applicability of Free Exercise Clause).

[56] 494 U.S. 872 (1990).

[57] See *Smith*, 494 U.S. at 877; see also *Church of Lukumi Babalu Aye*, 508 U.S. at 531-32 (1993) (applying *Smith* test in holding that ordinance directed at suppressing Santeria religious activity was not neutral and therefore violated the Free Exercise Clause).

[58] See *Smith*, 494 U.S. at 886 n.3.

[59] *Smith* recognized a "hybrid" category of situations under which the Free Exercise Clause mandated an exemption for religious practitioners. See *Smith*, 494 U.S. at 881. Such a hybrid occurs when the Free Exercise Clause is implicated "in conjunction with other constitutional protections." Id.

[60] Id.

other constitutional freedoms, the Free Exercise Clause does not demand the recognition of a clergy-penitent free exercise exemption.[61]

While *Smith* held that the Free Exercise Clause does not mandate exemptions from religion-neutral, generally applicable regulations, *Smith* did make clear that the First Amendment permits the promulgation of such exemptions by the legislature, known as "religious accommodations."[62] As with all other legislation, such accommodations must not violate the Establishment Clause if they are to be upheld as constitutional.

B. The Establishment Clause

The Establishment Clause[63] proscribes government legislation that either favors religion over nonreligion[64] or favors one particular denomination over another.[65] Either one of these Establishment Clause strictures can potentially invalidate a clergy-penitent privilege or testimonial accommodation. An overly broad privilege or accommodation, protecting religious communications generally, would run afoul of the Establishment Clause's mandate that the religious not be elevated to a preferred position over the secular; an overly narrow privilege or accommodation, protecting only those communications made to clergy of certain denominations, would violate the Establish-

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[61] Arguably, clergy-penitent communications touch upon speech and associational freedoms in conjunction with the Free Exercise Clause, and therefore qualify as a hybrid exception. However, most religious rituals implicate such freedoms, prompting Justice Souter to proclaim that the *Smith* Court's hybrid exception "would probably be so vast as to swallow the Smith rule." *Church of Lukumi Babalu Aye*, 508 U.S. at 567 (Souter, J., concurring). *Smith*'s reference to other freedoms must involve something more than mere implication, referring to those situations where other freedoms are directly abridged. Such an interpretation preserves the internal consistency of *Smith* and explains the precedent prompting the hybrid exceptions. As the rule compelling clergy and penitents to testify to confidential communications between them does not violate free speech and associational freedoms per se, the argument in favor of recognizing a constitutional free exercise exemption under the *Smith* hybrid exception fails.

[62] *Smith*, 494 U.S. at 890 (interpreting Free Exercise Clause to permit legislatively crafted exemptions to laws of general applicability). The Supreme Court invalidated Congress's attempt to overturn *Smith* via legislative enactment. See City of Boerne v. Flores, 117 S. Ct. 2157, 2161-62 (1997) (holding unconstitutional Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993), which mandated that state action that infringed upon individual's free exercise of religion be justified by "compelling government interest").

[63] "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I.

[64] See Larson v. Valente, 456 U.S. 228, 251-53 (1982) (discussing *Lemon* test, see Lemon v. Kurtzman, 403 U.S. 662 (1971), for determining whether laws that favor religion generally violate Establishment Clause principles).

[65] See id. at 244-47 (discussing principle of "denominational neutrality").

ment Clause's mandate that no particular denomination be elevated to a preferred position over other denominations.

While situations involving denominational preferences are rather easy to recognize, situations where legislation favors religion over nonreligion are much more difficult to identify. The *Lemon* test, articulated in *Lemon v. Kurtzman*,[66] provides the following guidelines for determining the legitimacy of a statute suspected of unconstitutionally favoring religion over nonreligion: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[67] A privilege or accommodation statute that fails this test is unconstitutional. As shall be demonstrated, a properly drafted clergy-penitent privilege and a properly drafted clergy testimonial accommodation would not violate the Establishment Clause.[68]

C. *Religious Accommodations*

The Supreme Court has indicated that there is "ample room" between the Free Exercise Clause and the Establishment Clause for government action evincing "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[69] Such action is referred to as the "accommodation" of religion.[70] Justice White's above-quoted language notwithstanding, in practice this "ample room" can be more accurately described as a precarious line, for the Court has been quick to find that government action regarding religion violates the Establishment Clause.[71]

An analysis of the case law suggests that only those accommodations that remove a government imposed burden that disproportionately impacts upon the sincere practice of one's religion are constitutional.[72] Put differently, the critical difference between a legit-

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[66] 403 U.S. 602 (1971).

[67] *Larson*, 456 U.S. at 252 (summarizing *Lemon* test) (quotations and citations omitted).

[68] See infra Parts III.A.-B.

[69] Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987).

[70] See id.

[71] See, e.g., Texas Monthly Inc. v. Bullock, 489 U.S. 1 (1989) (holding that statute exempting religious publications from sales tax violated Establishment Clause); Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (holding that statute permitting religious adherents to refuse to work on Sabbath violated Establishment Clause).

[72] The Supreme Court has declared repeatedly that the "'limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.'" *Amos*, 483 U.S. at 334 (1987) (quoting Waltz v. Tax Comm'n, 397 U.S. 664, 673 (1970)); see also *Bullock*, 489 U.S. at 18 n.8 ("[W]e in no way

imate religious accommodation and the illegitimate establishment of religion lies in the distinction between lifting a government imposed burden that particularly impacts a specific religious group and conferring on a particular religious group a special benefit to which all other groups (religious or nonreligious) have an equal claim.[73] An example of a legitimate accommodation would be permitting the religious use of alcohol in a jurisdiction that otherwise prohibits the use of alcohol.[74] While all who wish to consume alcohol would be affected by the prohibition, those who wish to consume alcohol for religious pur-

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suggest that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."). Therefore, although the Free Exercise Clause is limited to forbidding legislation that intentionally regulates religious practice or belief and limited to mandating exemptions from laws that implicate the Free Exercise Clause "in conjunction with other constitutional protections," Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 876-77, 881 (1990), religious accommodations reaching beyond these narrow parameters are permissible. However, Court precedent suggests that such accommodations may not reach far beyond these parameters and are indeed linked to the very conduct protected by the Free Exercise Clause. In *Amos*, the Court upheld the constitutionality of section 702 of the Civil Rights Act, which exempts religious organizations from Title VII's prohibition on employment discrimination. See *Amos*, 483 U.S. at 339. Two years later, in *Bullock*, the Court held unconstitutional a sales tax exemption exclusively for religious periodicals. See *Bullock*, 489 U.S. at 17.

The principle that emerges is the one stated above: accommodations that lift government imposed burdens disproportionately affecting religion are permissible; those that do not are impermissible. While a sales tax burdens the religious and nonreligious equally, laws forbidding religious discrimination in employment decisions do not. Language in each of these cases further supports this proposition. In *Bullock*, the Court noted that the tax exemption in question "did not remove a demonstrated and possibly grave imposition on religious activity sheltered by the Free Exercise Clause." Id. at 18 n.8. Conversely, the *Amos* Court found that the exemption in question served to "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335. In each of these cases, therefore, the Court examined the conduct protected by the Free Exercise Clause in order to determine whether accommodation could be possible. Thereafter, the court examined the disproportionality of the burdens placed upon such conduct to determine whether accommodation would be appropriate. A case that seems to violate this rule is Thornton v. Caldor, Inc., 472 U.S. 703 (1985), in which the Court held unconstitutional a statute that "guaranteed employees the right not to work on the Sabbath of their religious faith." Id. at 706 n.2. That case is readily distinguishable, however, on the grounds that the accommodation in question was not one from a *government* imposed burden, but rather a special private right created to be enforced against other private individuals and organizations. Had the *Thornton* decision been limited to an examination of state employment practices, the situation would be radically different.

[73] See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2492-93 (1994) (holding that "the Constitution allows the state to accommodate religious needs by alleviating special burdens . . . [but does not allow] an otherwise unconstitutional delegation of political power to a religious group"); cf. Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1282-1301 (1994) (proffering an "equal regard" approach to religious exemptions).

[74] See *Kiryas Joel*, 114 S. Ct. at 2495 (O'Connor, J., concurring).

poses would be disproportionately affected, and thus an accommodation for such use does not give preference to religion, but rather recognizes and seeks to correct this disproportionate impact.[75]

Accommodations that lift burdens disproportionately affecting religion serve, by definition, a "secular legislative purpose" per the first prong of the *Lemon* test.[76] Furthermore, such accommodations do not violate the second prong of the *Lemon* test, for they do not have as their primary effect the advancement of religion.[77] That is, the lifting of a burden that disproportionately affects religion does not advance religion, but rather serves to promote the equal treatment of religion.[78] The final prong of the *Lemon* test, forbidding excessive church-state "entanglement," requires a more fact specific analysis, and no blanket statement can be made regarding legislative accommodations and this prong.[79]

Finally, if an accommodation meets the *Lemon* requirements discussed above, it will not violate the Establishment Clause if it is facially neutral, even if in practice it benefits one denomination more than another.[80] Returning to the prohibition example used previously, "[a] state law prohibiting the consumption of alcohol may ex-

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[75] Cf. id. Many commentators insist that the First Amendment should apply to both religious and secular conscience. See, e.g., Tom Stacy, Death, Privacy, and the Free Exercise of Religion, 77 Cornell L. Rev. 490, 562-65 (1992) (arguing that Free Exercise Clause should apply to secularly motivated action regarding "religious questions" such as abortion and euthanasia). Under this formulation, a burden upon religious practice would not be considered disproportionately burdensome to that placed upon conduct motivated by deeply-held, secularly motivated values. Such an approach should be rejected, for it is inconsistent with both the Supreme Court's current direction and the framers' intent. See id. at 562 (noting Supreme Court's retreat from "a definition of religion that encompasses a nonbeliever's responses to quintessentially religious questions"); Michael W. McConnell, The Origins and Historical Understanding of the Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1488-1500 (1990) (noting that framers' deliberate use of term "free exercise of religion" over "rights of conscience" reflects intent to safeguard conduct motivated solely by religious concerns, which were held to be "of a different order" from the secular).

[76] *Amos*, 483 U.S. at 335 (noting that under *Lemon* "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions").

[77] See id. at 336-38.

[78] See Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989) (noting that accommodations do not violate Establishment Clause if they "were designed to alleviate government intrusions that might significantly deter adherents of a particular faith" from engaging in religious conduct pursuant to their faith).

[79] Cf. *Amos*, 483 U.S. at 339 (refusing to draw general inferences from accommodation's legitimate purpose and excessive entanglement prong of *Lemon*, despite having done so for inquiry into first two *Lemon* prongs).

[80] See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2495 (1994) (O'Connor, J., concurring) (explaining that permissible accommodations could serve to benefit only particular religious groups).

empt sacramental wines,"[81] even though such an exemption would only serve those denominations that employed sacramental wines. A state may not, however, "exempt sacramental wine use by Catholics, but not by Jews . . . . The Constitution permits *nondiscriminatory* religious practice-exemption[s], not sectarian ones."[82] Indeed, accommodations by their very nature often affect only some, and not all, denominations; however, the Court continues to declare that "'government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause.'"[83]

A separate question from the constitutional permissibility of religious accommodations is the policy issue of whether accommodations should be promulgated. Since the framers of the First Amendment intended religion to be accommodated to the fullest extent possible,[84] and the reasons behind this intent are as relevant and as forceful today as they were in 1789,[85] religious accommodations should be promulgated freely.

The religion clauses of the First Amendment embody the framers' intent to safeguard vigilantly religious liberty.[86] In addition to preventing the establishment or suppression of religion, the framers of the First Amendment aspired to create a government that readily accommodated religious practice.[87] This aspiration arose from an acknowledgment of America's heritage as a religiously diverse nation[88]

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[81] Id. at 2497 (O'Connor, J., concurring).

[82] Id. (citations and internal quotes omitted) (brackets in original).

[83] Id. at 2492 (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45 (1987)); see also Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990) (noting that while Free Exercise Clause does not compel recognition of religious exemption to state laws regulating use of peyote, it permits such exemptions if promulgated by legislature).

[84] See infra notes 86-87 and accompanying text.

[85] See infra notes 92-94 and accompanying text.

[86] See City of Boerne v. Flores, 117 S. Ct. 2157, 2185 (1997) (O'Connor, J., dissenting) ("The Religion Clauses of the Constitution represent a profound commitment to religious liberty.").

[87] See id. at 2175 (Scalia, J., concurring) (noting that framers believed "'proper' relationship between government and religion" was one where religion would be accommodated); id. at 2184 (O'Connor, J., dissenting) (noting that colonial governments freely granted religious accommodations and that framers shared belief that "government should do its utmost to accommodate religious scruples"); Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2502 (1994) (Kennedy, J., concurring) (noting that "'[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage'" (quoting Allegheny County v. ACLU, 492 U.S. 573, 657 (1989))).

[88] See McConnell, supra note 75, at 1475-80, 1513 (discussing framers' sensitivity to religious diversity of America). See generally Thomas A. Bailey, The American Pageant 22-43, 73-76 (3d ed. 1966) (discussing religious diversity of colonial America).

and from the framers' belief that under principles of natural law[89] it would be wrong for the state to interfere with one's manner of worship.[90] As James Madison proclaimed:

> "This duty [owed the Creator] is precedent both in order of time and degree of obligation, to the claims of Civil Society .... [E]very man who becomes a member of Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance."[91]

Modern America remains a land of great religious diversity, in large part due to its continued role as a beacon to those fleeing religious persecution around the globe.[92] Furthermore, the framers' understanding of natural law remains an insightful view of the human condition.[93] As such, the framers' reasons for desiring a government accommodating to the free exercise of religion continue to be persuasive.[94]

Application of the First Amendment requirements discussed above will demonstrate that a properly drafted clergy-penitent privilege and testimonial accommodation do not violate the Constitution.

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[89] Natural law

> denote[s] a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his *nature*, meaning by that word his whole mental, moral, and physical constitution.

Black's Law Dictionary 1026 (6th ed. 1990). For a fuller explanation of natural law, see generally Phillip Johnson, Some Thoughts on Natural Law, 75 Cal. L. Rev. 217 (1987).

[90] See McConnell, supra note 75, at 1497-99; see also Downes v. Bidwell, 182 U.S. 244, 282-83 (1901) (discussing natural rights origin of freedom of religion); Russell Kirk, Natural Law and the Constitution of the United States, 69 Notre Dame L. Rev. 1035, 1037-40 (discussing Constitution's natural law underpinnings).

[91] *Flores*, 117 S. Ct. at 2184 (O'Connor, J., dissenting) (quoting 2 Writings of James Madison 184-85 (G. Hunt ed., 1901)) (alterations in original).

[92] See Religious Persecution: Hearing on H.R. 1685 Before the House International Relations Comm., 105th Cong., 1997 WL 14150583 (Sept. 9, 1997) (statement of John Shattuck, Assistant Secretary of State) (testifying that U.S. remains committed to policy of providing asylum to those fleeing from religious persecution).

[93] See Kirk, supra note 90, at 1035-36 (commenting upon vibrancy of modern natural law scholarship).

[94] While the fear of interdenominational discrimination that originally motivated the framers may have lessened, the rise of secularist attitudes callously indifferent or outright hostile to religion in general provides ample evidence of the need to remain sensitive to and protective of the practice of religion. Such a scenario appeared in Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979, 979 (1994) (Thomas, J., dissenting from denial of cert.) (describing following facts: government forced landlord to rent apartments to unmarried couples, over his protestations that doing so would force him to violate his religion by facilitating sin of cohabitation).

Furthermore, fidelity to common law reasoning and the principles underlying the First Amendment leads to the conclusion that both the clergy-penitent privilege and testimonial accommodation should be recognized. Operating together, these two forms of protection for clergy-penitent communication produce a system that is more practical, more fair, and more constitutional in letter and in spirit than the system currently in place.

III
ANALYSIS AND APPLICATION

An examination of existing clergy-penitent privilege statutes and judicial decisions reveals that, as commonly understood, the clergy-penitent privilege does not always comport with the First Amendment. Furthermore, while the clergy-penitent privilege may oftentimes function as a testimonial accommodation, the "privilege" and the "accommodation" are not necessarily synonymous, exposing the need for a dual system of protection for clergy-penitent communication that recognizes both the clergy-penitent privilege and a testimonial accommodation. This Part will set forth a proper clergy-penitent evidentiary privilege and a proper clergy-penitent testimonial accommodation, and explain the differences between the two. It will conclude by examining the application and interplay of the privilege and the accommodation.

A. A Proper Clergy-Penitent Privilege

As with all other privileges, a proper clergy-penitent privilege statute must involve "an imperative need for confidence and trust"[95] and promotion of public ends and, of course, be tailored so as not to conflict with the Constitution. Following these parameters, the optimal clergy-penitent privilege statute would: (1) define "clergy" as those religious functionaries who are obliged by their religion to maintain the secrecy of confidential communications made to them; (2) be available to all penitents, regardless of whether the penitent is under an obligation to engage in such communication; (3) extend protection only to confidential communication between a penitent and a cleric made under a reasonable expectation of privacy; and (4) grant the possession of the privilege to the penitent.

Privileges that stray too far from this model are at best unwise and, in some cases, constitutionally suspect. Such privileges are unwise because they unnecessarily burden the truth-seeking function of

[95] See supra text acompanying notes 12-13.

the court; they are unconstitutional because they conflict with the Establishment Clause. Examples of this can be found in cases such as *Rivers v. Rivers*[96] and *In re Verplank*,[97] where the courts applied the clergy-penitent privilege to cover general counseling services offered by the clergy, despite the lack of any religious canons requiring the clergy in question to maintain confidentiality.[98] In the absence of such an obligation to maintain confidentiality on the part of the cleric, it is difficult to satisfy the "imperative need for confidence and trust" requirement of privilege recognition.[99] Thus, the privilege imposes a heavy burden upon the truth-seeking ability of the courts, unmatched by a relationship important enough to warrant such a burden. Furthermore, the privilege's justification is questionable in light of the fact that it does not conform to the confidentiality requirements traditionally demanded of privileges; without such a legitimate justification, the privilege arguably violates the Establishment Clause by unduly giving preference to religion over nonreligion.[100]

1. Definition of Clergy

The clergy-penitent privilege should extend only to those communications a person has with a bona fide cleric. This limitation arises from the purpose of the privilege and the principle that privileges are to be construed as narrowly as possible to achieve their purpose.[101]

The purpose of the clergy-penitent privilege is to foster communication between penitents and clergy by removing the threat of disclosure from such communications. As the Supreme Court noted in *Trammel v. United States*:[102] "The [clergy-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."[103] The reason such a relation should be fostered and why the injury that would inure to the relation by disclosure of the communications would be greater than the benefit gained by disclosure[104] was explained well by Jeremy Bentham:

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[96] 354 S.E.2d 784 (S.C. 1987).

[97] 329 F. Supp. 433 (C.D. Cal. 1971).

[98] See infra Part III.A.3.

[99] See supra text accompanying note 12.

[100] See infra Part III.A.3.

[101] See supra note 10 and accompanying text.

[102] 445 U.S. 40 (1980).

[103] Id. at 51.

[104] See supra note 13 (listing traditional utilitarian justifications for privilege recognition).

> The advantage gained by the coercion [of clergy-penitent testimony], gained in the shape of assistance to justice, would be casual and even rare; the mischief produced by it, constant and all extensive. . . . If in some shapes the revelation of testimony thus obtained would be of use to justice, there are others in which the disclosures thus made are actually of use to justice, under the assurance of their never reaching the ears of the judge. Repentance, and consequent abstinence from further 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 [clergy-penitent communication].[105]

As communications with nonclergy do not satisfactorily advance the aims of this privilege, such communication should not be within the privilege's purview.[106]

A broader definition of clergy would run contrary to the traditional, narrow form of evidentiary privileges and would impose costs upon adjudication not matched by its benefits. For example, a clergy-penitent privilege statute that defined clergy as "anyone willing to offer spiritual advice" would impose greater burdens on the adjudicatory process than the more narrowly tailored definition presented above and would not significantly further the societal goals behind the privilege's recognition.[107]

Conversely, an overly narrow definition of clergy could conflict with the Establishment Clause by favoring certain denominations over others. The Georgia statute provides an example of this, limiting its applicability 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

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[105] 4 Jeremy Bentham, Rationale of Judicial Evidence 589-91 (1827); see 8 Wigmore, supra note 10, § 2396 (adding that Bentham was ordinarily "the greatest opponent of privileges").

[106] Clergy are particularly suited to advancing the societal counseling interest central to the clergy-penitent privilege because of their general recognition as spiritual counselors and their training as such. See Daryl Koehn, Expertise and the Delegitimation of Professional Authority, 38 Am. Behavioral Scientist 990, 998 (1995) (indicating that seminarians "receive 'professional' training in counseling individuals"); Richard F. Mollica et al., A Community Study of Formal Pastoral Counseling Activities of the Clergy, 143 Am. J. Psychiatry 323 (1986) (discussing counseling attitudes and practices of clergy).

[107] Privileges adversely affect the ability of courts to ascertain accurately the truth, and it is axiomatic that the broader a privilege is, the narrower the range of evidence courts can examine in adjudicating. Offsetting these costs are the benefits that society realizes in fostering the communications protected by the privilege. The benefits, which the clergy-penitent privilege seeks to reap, are those flowing from the penitential communication of a wrongdoer to a cleric for the purposes of spiritual advice and guidance. Any expansion of the privilege, which causes it to protect communication outside of this, results in benefits to society that are questionable at best, although the costs of such expansion remain unquestionably high.

whatever name called . . . ."[108] Under this formulation, Christian and Jewish clergy are specifically favored over the clergy of other faiths, thereby violating the Establishment Clause.[109]

2. *Penitent's Obligation to Confess/Communicate*

Penitents should not be obliged to communicate with their clergy in order to invoke the clergy-penitent privilege.[110] None of the other evidentiary privileges mandate that the confidential communication engaged in be obligatory, and thus such a requirement should not apply to the clergy-penitent privilege. The implications of this, however, are that the penitent need not even be of the same religion as the cleric in question, nor a religious believer at all. Such implications are reasonable and desirable, for one need not believe in the efficacy of psychotherapy in order to invoke the psychotherapist privilege, nor the sanctity of marriage to invoke the spousal privilege. The focus of evidentiary privileges continually has been on the reasonable expectations of the communicant concerning the listener's ability to maintain confidentiality, and not upon the communicant's beliefs concerning other matters.

That the communicant need not be a religious believer does not conflict with the privilege's purpose of fostering relationships between individuals and spiritual advisors. As with the other privileges, the clergy-penitent privilege embodies society's value judgment that clergy are in a position to dispense beneficial advice that promotes "public ends" when approached by the confessor of a wrongdoing.[111] There is no reason to believe that the social utility of such beneficial advice would only be realized when offered to religious believers; by freely deciding to engage in communication with a cleric, the penitent is obviously open to the prospect that such discussion might be in his best interests and is therefore unlikely to be entirely immune to the salutary effects of such communication. If the penitent happens to disagree with the cleric's advice or refuses to follow it, this too should have no effect on the operation of the privilege, as one need not agree with or follow the advice of one's doctor, psychotherapist, or attorney

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[108] Ga. Code Ann. § 24-9-22 (1995).

[109] See Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994) (holding that Establishment Clause forbids legislation which favors one denomination over another); see also supra notes 80-83 and accompanying text.

[110] See, e.g., Kohloff v. Bronx Sav. Bank, 233 N.Y.S.2d 849, 850 (Civ. Ct. 1962) (holding that clergy-penitent privilege is available "even though the penitent is not a member of the church to which she seeks spiritual advice").

[111] See supra text accompanying notes 12-13; see also supra note 105 and accompanying text.

to invoke the privileges corresponding with communications to such persons.

Furthermore, a decision to limit the clergy-penitent privilege to only communications between religiously motivated practitioners and clergy would violate the Establishment Clause by granting religiously motivated communicants opportunities and protections not afforded secularly motivated communicants.[112] This exemplifies the importance of distinguishing the clergy-penitent privilege from the clergy testimonial accommodation. The accommodation by definition treats religious and nonreligious individuals differently; indeed, religious accommodations are promulgated to address the different effects a law may have on religious adherents. Conversely, evidentiary privileges claim no such purpose for their justification and cannot distinguish between religious and nonreligious claimants.[113]

3. *Confidentiality*

Confidentiality is the first element justifying a privilege's recognition,[114] and the privilege could not attach to communication made in the presence of third parties. Similarly, if the circumstances of the communication indicate a lack of concern with maintaining confidentiality, the privilege could be deemed waived.[115]

The confidentiality requirement imposes further limits on the privilege: only that communication which a cleric is prohibited by the dictates of his religion from disclosing should be deemed privileged. In the absence of such an obligation on the part of the cleric, the privilege's claimant (the penitent) cannot argue that confidentiality was both expected and necessary. One of the major differences between confidential communication in general and privileged confidential communication is that the latter usually contains some sort of guarantee of confidentiality which the former does not. For example, a promise by a friend to keep one's communication confidential is only that: a naked, unenforceable promise and nothing more. Such com-

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112 In the absence of a clergy-penitent privilege, a religious accommodation for religiously motivated penitents could be promulgated. By definition, this accommodation would apply only to religiously motivated penitents, contrary to the application of the clergy-penitent privilege. Such an accommodation would parallel that presented in this Note for clergy. See infra Part III.B.

113 Cf. Mueller v. Allen, 463 U.S. 388, 397 (1983) (holding tax deduction for religiously affiliated private school expenses legitimate secular purpose because "the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools").

114 See supra note 12 and accompanying text.

115 See, e.g., United States v. Salerno, 505 U.S. 317, 323 (1992) (noting how "exposing privileged evidence" can abrogate privilege).

munication is not privileged. However, a promise by a physician, psychotherapist, or attorney to keep one's communication confidential is more than a mere personal promise, but rather a promise backed by professional obligations enjoining such confidentiality.[116] In fact, of the most widely recognized privileges, only the husband-wife privilege does not explicitly contain this characteristic.[117] While this does not mean that all communications in which the parties professionally guarantee their promise to maintain confidentiality are privileged, it does suggest that communications lacking such a guarantee of confidentiality cannot be considered privileged. As only those communications in which secrecy on the part of the cleric is required by the dictates of the cleric's religion satisfy this requirement, only those communications ought to be considered privileged.[118]

Eckmann v. Board of Education[119] is an example of a court mistakenly applying the privilege where there was no religious restriction enjoining the cleric in question from disclosing the communication. In *Eckmann*, the court extended the privilege to cover communications made to a Roman Catholic nun,[120] despite the fact that Roman Catholic nuns are powerless to hear confession; therefore, the Church's obligations to maintain the silence of the confessional were inapplicable to her. In contrast to *Eckmann*, *In re Murtha*[121] correctly noted the inapplicability of the privilege to nuns because there is nothing "in

116 See, e.g., Model Code of Professional Responsibility DR 4-101 (1981) (rule entitled "Preservation of Confidences and Secrets of a Client"); American Psychological Association, Ethical Principles of Psychologists and Code of Conduct, 47 Am. Psychologist 1597-1606 (1992) (rule regarding "Privacy and Confidentiality").

117 An argument could be made, however, that such a characteristic is present implicitly in the exchange of wedding vows; this would explain why the privilege is not extended to couples who live together, are "in love," or otherwise committed to each other without being formally married. See United States v. Byrd, 750 F.2d 585, 593 (1984) (noting how marital privilege is only available to couples in a "valid marriage"). Furthermore, the foundations of the privilege were property based, distinguishing it from all other privileges. See Trammel v. United States, 445 U.S. 40, 52 (1980) (noting that many foundations for traditional husband-wife privilege have "long since disappeared. Nowhere in . . . any modern societ[y] is a woman regarded as chattel or demeaned by denial of a separate legal identity.").

118 Inquiries into clergy obligations to maintain silence have been held not to violate the excessive entanglement prong of the *Lemon* test. See, e.g., In re Grand Jury Investigation, 918 F.2d 374, 387 n.21 (3d Cir. 1990) (noting that "ascertain[ing] the types of communications that the denomination deems spiritual and confidential is both a necessary and a constitutionally inoffensive threshold step in determining whether a privilege interdenominational in nature applies in light of the facts and circumstances of a particular case").

119 106 F.R.D. 70 (E.D. Mo. 1985).

120 See id. at 72.

121 279 A.2d 889 (N.J. 1971).

Catholic doctrine or practice" to indicate that confession to a nun could trigger the clergy-penitent privilege.[122]

Hawaii provides an example of a statute with the same mistake. Under this statute, all communications with clergy "made privately and not intended for further disclosure except to other persons present in furtherance of the communication" are deemed privileged.[123] As previously discussed, this serves to elevate religion over nonreligion by affording religious communication a preference to which it is not entitled, for it does not require that the cleric be bound to silence in order for the privilege to apply.[124]

4. Holder of Privilege

The clergy-penitent privilege should belong to the penitent, since his communication is what society wishes to encourage and protect. For this same reason, the client holds the attorney-client privilege,[125] and the patient holds the physician-patient privilege.[126] Some statutes, such as Alabama's, fail to realize this principle, which grants ownership of the privilege to both the penitent and the clergy.[127] As a privilege, the clergy ownership provision is ordinarily inappropriate for the reasons discussed below.[128]

B. The Clergy Testimonial Accommodation

Independent of the clergy-penitent privilege is the clergy testimonial accommodation. Statutory recognition of this accommodation would permit a religiously motivated cleric to refuse to testify in court on the ground that testifying would be against the dictates of his religion. Under a jurisdiction that only recognized a clergy-penitent privilege, clergy would not have this right for the reasons discussed previously: the clergy are not the holders of the clergy-penitent privilege because theirs is not the communication protected by the privilege.[129] While not constitutionally required,[130] this recognition is constitutionally permissible and is essential in order to remain faithful to the principles underlying the First Amendment.[131]

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122 Id. at 893.

123 Haw. R. Evid. 506.

124 See supra Part III.A.2.

125 See Lilly, supra note 26, § 9.5.

126 See Medical and Counseling Privileges, supra note 27, at 1534-36.

127 See Ala. R. Evid. 505.

128 See infra Part III.B.

129 See supra Part I.B.3.

130 See Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 879 (1990) (holding that Constitution does not require recognition of free exercise exemptions).

131 See supra Part II.C.

Under a testimonial accommodation, clergy could refuse to testify if their religions prevented them from doing so, regardless of the intentions of their penitents.[132] This divergence from the clergy-penitent privilege results from the different interests involved: that of accommodating the exercise of religion versus that of encouraging potential witnesses to seek counseling. In the latter case, the focus is on the penitent and his ability to obtain effective counseling; the personal interests of the particular counselor are irrelevant. In the former case, the focus is on protecting the free exercise of religion, an interest that does not depend upon one's role in a particular conversation, but rather upon one's claim that the state is interfering with the practice of religion. Therefore, unlike the clergy-penitent privilege, the clergy may invoke the testimonial accommodation, so long as clerics can show that testifying at trial would violate the dictates of their religion.

Although presented as an independent protection for purposes of clarity, the testimonial accommodation for clergy can be effected by merely amending existing clergy-penitent privilege statutes to recognize "dual ownership" of the privilege; that is, permitting both the cleric and the penitent to assert the statute's protections. While, conceptually, the cleric does not actually have the right to assert the privilege on his own behalf, the assertion of his testimonial accommodation is tantamount to the same thing if the privilege is properly crafted (i.e., limited to communications made to clergy who are religiously bound to maintain confidentiality).[133] Care must be taken in drafting such a statute, however, for a dual ownership provision by itself will be inappropriate if the rest of the statute is not so properly crafted. As noted previously, Alabama has such an inappropriate dual ownership statute.[134] The inappropriateness of the statute stems from the fact that the clergy ownership provision is not dependent upon a showing that compulsory testimony would prohibit the free exercise of the cleric's religion. California has adopted a superior "dual" privilege ownership approach, extending ownership of privilege to clergy as well as to the penitents, but defining clergy as only those who are bound by religious tenets to preserve the confidentiality

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132 See supra note 72 and accompanying text.

133 The only difference would be that most religious accommodations contain language permitting a "compelling interest" exception to the exemption. See, e.g., N.J. Stat. Ann. § 52:17B-88.2 (West 1996) (granting religious accommodation to those whose religions forbid autopsies, except in cases of "compelling public necessity"). Conversely, privileges are usually recognized as being absolute. See Jaffee v. Redmond, 116 S. Ct. 1923, 1932 (1996) (rejecting "balancing approach" to privilege recognition).

134 See supra note 127 and accompanying text.

of the communication,[135] thereby satisfying the prerequisite elements of a free exercise accommodation.[136]

A proper clergy testimonial accommodation would not violate the Establishment Clause for reasons discussed earlier: it removes a government imposed burden that disproportionately impacts upon the practice of particular religions.[137] While many might prefer not to testify at trial, the situation of a cleric who is prohibited from testifying by the dictates of his religion presents a different kind of burden. While the secular witness who testifies might face the unattractive prospect of embarrassment or inconvenience, the cleric prohibited from testifying faces the violation of his sacred duty. Accommodation of these religious obligations, therefore, does not grant preference to the cleric's interests, but rather addresses the disproportionately burdensome application of the law upon his practice of religion.[138]

C. *The Applications of a Proper Clergy-Penitent Privilege and Testimonial Accommodation*

Under a regime of properly promulgated and understood clergy-penitent privilege statutes and clergy testimonial accommodations, society would enjoy outcomes that are not only constitutionally sound, but that also satisfy generally held notions of fairness and common sense.[139]

Whenever a person turns to a cleric whose religious obligations enjoin him to silence, that person will be protected by the clergy-penitent privilege. If the cleric is not obliged to maintain silence then the confessor will not enjoy the privilege. This is intuitively attractive because it comports with expectations and with the notion that the law of privileges serves to recognize preexisting confidential relationships; its purpose is not to create new confidences where none existed previously, and the Establishment Clause will not permit the creation of new confidences on the basis of religion.

The religion of the confessor is immaterial; if the elements justifying the privilege's recognition have been satisfied, the privilege should attach. As society's determination that its troubled members should have counseling available to them—be it legal, psychological, or reli-

135 Cal. Evid. Code §§ 912, 917, 1030-34 (West 1996).

136 See supra note 72.

137 See supra part II.C.

138 See supra note 75 and accompanying text.

139 For a discussion of "fairness," see Stuart D. Poppel, Federalism, Fundamental Fairness, and the Religion Clauses, 25 Cumb. L. Rev. 247, 272-76 (1994-1995) (discussing "fundamental fairness" theories of religion clauses); Jon O. Newman, Comment, Rethinking Fairness: Perspectives on the Litigation Process, 94 Yale L.J. 1643, 1646-55 (1985) (discussing legal notions of "fairness").

gious—thus satisfying the "public ends" element,[140] the dispositive factor is whether the communication demands "an imperative need for confidence and trust."[141] A cleric who is not obliged to maintain confidentiality by the dictates of his religion should be treated like any other counselor in a similar situation, such as "parents, siblings, best friends and bartenders—none of whom [are] awarded a privilege against testifying in court."[142] Conversely, a cleric who is enjoined from breaching the confidentiality entrusted to him more closely resembles those counselors who do enjoy testimonial privileges, and he should likewise partake in this benefit.

Finally, regardless of the penitent's religious affiliation, a cleric who is barred by the dictates of his religion from revealing what he has been told by the penitent should retain an independent right to refrain from testifying. This is necessary to afford clergy the proper respect and toleration contemplated by the First Amendment.

CONCLUSION

Proper respect for common law reasoning and the principles behind the First Amendment to the Constitution compels the protection of clergy-penitent communication. For the benefit of penitents, this protection should take the form of a constitutionally sound clergy-penitent privilege. For the benefit of clergy, this protection must take the form of a religious accommodation, or a privilege taking into account the accommodation via a dual ownership provision.

However, while the Constitution probably does not require the protection of clergy-penitent communication, it does require that once protection is granted, it be neither too generous nor too parsimonious. The Establishment Clause will not tolerate legislation which either unduly preferences religion generally, or which picks and chooses specific denominational practices for special favor.

Unfortunately, misunderstanding persists regarding the contours of the clergy-penitent privilege under the Constitution, and legislatures give far too little consideration to religious accommodation concerns. As a result, clergy-penitent privilege statutes abound that unconstitutionally restrict their application to specific denominations, unconstitutionally extend their application to communications that ought not be protected, or are not complemented by accompanying religious accommodation legislation for the protection of the clergy.

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140 See supra text accompanying note 13.

141 See supra text accompanying note 12.

142 Jaffee v. Redmond, 116 S. Ct. 1923, 1934 (1996) (Scalia, J., dissenting) (criticizing recognition of psychotherapist privilege).

Until these shortcomings abate, defective and inadequate clergy-penitent privilege statutes will persist, and our deepest confidences, our adjudicatory processes, our ideals of religious liberty and toleration, and our Constitution itself will not be properly protected.