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Priest-Penitent Privilege Statutes: Dual Protection in the Confessional

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COMMENT

PRIEST-PENITENT PRIVILEGE STATUTES: DUAL PROTECTION IN THE CONFESSIONAL

Society traditionally regards certain relationships as confidential and accords them special protection at law.[1] One such protection is the testimonial privilege, which prohibits one or both of the parties from testifying in court regarding certain communications between them.[2] Historically, courts have extended this testimonial privilege to the priest-penitent relationship.[3] As few cases involving issues of priest-penitent privileged communications reach the appellate level, it is difficult to comprehend fully the vast number of priest-penitent issues that actually arise.[4] The significance of and need for the privilege is reflected by the fact that all fifty states and the District of Columbia have enacted statutes recognizing the privilege.[5]

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1. *See generally Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450 (1985) (explaining the history and development of legal relationships pertaining to certain types of relationships under American law).

2. *See generally* SCOTT N. STONE & RONALD S. LIEBMAN, TESTIMONIAL PRIVILEGES (1983) (discussing the elements and applications of the testimonial privilege); 8 JOHN H. WIGMORE, EVIDENCE § 2285 (McNaughton Rev. 1961) (listing the conditions necessary to invoke the privilege); Thomas G. Krattenmaker, *Interpersonal Testimonial Privileges Under the* Federal Rules of Evidence*: A Suggested Approach*, 64 GEO. L.J. 613 (1976) (analyzing how federal courts should confront the policy problems related to confidential communications).

3. *See, e.g.*, Totten v. United States, 92 U.S. 105, 107 (1875) (establishing that the priest-penitent relationship is entitled to protection). This Comment uses the term "priest" to encompass not only priests, but also other types of religious figures, such as rabbis and ministers. *See infra* notes 62-70 and accompanying text (discussing the multiple religious figures protected by priest-penitent statutes).

4. Seward P. Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 58-59 (1963) (stating that it is difficult to determine the number of priest-penitent privilege issues that have arisen because they rarely reach the appellate level).

5. For the purposes of this Comment, the word "state" includes the District of Columbia. Because very few priest-penitent cases reach the appellate level, lower courts must rely exclusively on their state statutes to determine whether a communication is privileged. A court's interpretation of the statute can have a significant impact on the priest, the communicant, and the institution of the church. *See infra* notes 60-101 (discussing judicial interpretations of the states' statutes).

Each state legislature takes a different approach to the construction of its priest-penitent statute. These statutes can be divided into three groups based on whether the priest, the penitent, or both hold the privilege. In the first group, the penitent has the right to assert the privilege and to prevent a priest from disclosing the covered communication.[6] The state legislatures that grant the right to assert the privilege to the penitent recognize that there is a human need to disclose certain information to priests in confidence.[7] These statutes grant the penitent the discretion to assert the privilege and, if asserted, prevent a priest from testifying and disclosing a confidential communication.[8]

In the second group, the priest holds the privilege and may assert his or her right not to make a disclosure.[9] Nevertheless, the state legislatures in this group also recognize the human need to make confidential disclosures to a priest.[10] The privilege is granted to priests, however, to protect the priest from having to violate the discipline of his or her church that

6. ALASKA R. EVID. 505; ARIZ. REV. STAT. ANN. § 13-4062 (1989 & Supp. 1990); ARK. R. EVID. 505 (Michie 1987); COLO. REV. STAT. § 13-90-107(c) (1987 & Supp. 1989); CONN. GEN. STAT. ANN. § 52-146(b) (West Supp. 1991); DEL. R. EVID. 505; D.C. CODE ANN. § 14-309 (1989); FLA. STAT. ANN. § 90.505 (West 1979 & Supp. 1992); HAW. R. EVID. 506; IDAHO CODE § 9-203(3) (1990); IOWA CODE ANN. § 622.10 (West 1950 & Supp. 1990); KAN. STAT. ANN. § 60-429 (1983); KY. REV. STAT. ANN. § 421.210(4) (Michie/Bobbs-Merrill 1972 & Supp. 1990); LA. REV. STAT. ANN. § 15:477 to :478 (West 1981 & Supp. 1991); ME. R. EVID 505; MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1986 & Supp. 1991); MINN. STAT. ANN. § 595.02(1)(c) (West 1988); MO. ANN. STAT. § 491.060(4) (Vernon 1952 & Supp. 1991); MONT. CODE ANN. § 26-1-804 (1989); NEB. REV. STAT. § 27-506 (1989); NEV. REV. STAT. ANN. § 49.255 (Michie 1986 & Supp. 1990); N.H. REV. STAT. ANN. § 516:35 (Supp. 1990); N.M. R. EVID. 11-506; N.Y. CIV. PRAC. L. & R. 4505 (McKinney 1963 & Supp. 1991); N.C. GEN. STAT. § 8-53.2 (1986 & Supp. 1990); N.D. R. EVID. 505; OKLA. STAT. ANN. tit. 12, § 2505 (West 1980 & Supp. 1991); OR. REV. STAT. § 40.260 (1989); PA. CONS. STAT. ANN. § 5943 (1982 & Supp. 1994); R.I. GEN. LAWS § 9-17-23 (1985); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985 & Supp. 1990); S.D. CODIFIED LAWS ANN. §§ 19-13-16 to -18 (1987); TENN. CODE ANN. § 24-1-206 (1980 & Supp. 1990); TEX. R. CRIM. EVID. 505; UTAH CODE ANN. § 78-24-8(3) (1987 & Supp. 1991); WASH. REV. CODE ANN. § 5.60.060(3) (West 1963 & Supp. 1991); W. VA. CODE § 57-3-9 (Supp. 1991); WIS. STAT. ANN. § 905.06 (West 1975).

7. *See infra* note 107 and accompanying text (quoting Trammel v. United States, 445 U.S. 40 (1979), in which the Court recognizes a need for the privilege).

8. *See infra* note 103-07 and accompanying text (discussing possible reasons underlying a penitent-only privilege).

9. CAL. EVID. CODE § 1034 (West 1966 & Supp. 1994); GA. CODE ANN. § 38-419.1 (Harrison 1981 & Supp. 1989); ILL. ANN. STAT. ch. 110, para. 8-803 (Smith-Hurd 1984); IND. CODE ANN. § 34-1-14-5 (Burns 1986 & Supp. 1990); MD. CTS. & JUD. PROC. CODE ANN. § 9-111 (1989); MICH. STAT. ANN. § 27A.2156 (Callaghan 1986 & Supp. 1991); MISS. CODE ANN. § 13-1-22 (Supp. 1991); N.J. STAT. ANN. § 2A:84A-23 (West 1976); VT. STAT. ANN. tit. 12, § 1607 (1973); VA. CODE ANN. § 8.01-400 (Michie 1984 & Supp. 1991); WYO. STAT. § 1-12-101(a)(ii) (1988 & Supp. 1991).

10. *See infra* note 119 and accompanying text (discussing the need to protect the priest to preserve relationships that society regards as confidential).

may require or encourage such confidential communications.[11] In the third group, which encompasses only two states,[12] the state legislatures grant the privilege to both the priest and the penitent, allowing either to refuse to disclose or to prevent the other from disclosing the communication.[13]

A penitent-only or priest-only privilege statute narrows testimonial privileges, and prevents the development of a per se rule of privilege for every communication made between a priest and a penitent.[14] Granting the right to assert the privilege to only one party in the religious communication, however, may infringe on the other party's right to the free exercise of religion, thus bringing the single-party protection statute into conflict with the First Amendment.[15] Conversely, a dual-protection statute where both the priest and the penitent may invoke the privilege avoids a First Amendment violation because neither party will be required by the state to disclose a communication that his or her religion maintains as confidential.[16] Nonetheless, dual-protection statutes are criticized because they may create a per se rule of privilege, which would broaden the privilege to encompass almost all communications made to a cleric.[17] Narrowly drawn statutes that specifically define the type of com-

11. *See infra* note 120 and accompanying text (discussing religions that have confidential communications as part of their beliefs or practices).

12. ALA. CODE § 12-21-166 (1986 & Supp. 1990); OHIO REV. CODE ANN. § 2317.02(c) (Anderson 1991).

13. ALA. CODE § 12-21-166; OHIO REV. CODE ANN. § 2317.02(c). The Alabama statute provides that when a person makes a confidential communication to a priest that meets the statutory requirements, "either such person or the clergyman shall have the privilege . . . to refuse to disclose and to prevent the other from disclosing anything said by either party during such communication." ALA. CODE § 12-21-166(b).

Similarly, the Ohio statute states that a priest has the right to assert the privilege, but a "clergyman, rabbi, priest, or minister may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of his sacred trust." OHIO REV. CODE ANN. § 2317.02(C).

14. *See infra* notes 222-45 and accompanying text (rejecting the criticism that a dual-privilege statute would create a per se rule of privilege, which would encompass all communication between a priest and a penitent).

15. *See* U.S. CONST. amend. I. The First Amendment provides, in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id.*; *see infra* notes 184-208 and accompanying text (discussing the First Amendment issues raised by the singular-protection priest-penitent statutes).

16. *See infra* notes 246-68 and accompanying text (discussing an ideal statute that would not violate either party's First Amendment right to the free exercise of religion).

17. *See infra* note 214 and accompanying text (explaining the argument against broad privileges). A dual-protection statute is broader than a singular-protection statute, contrary to the general rule of keeping privileges narrow. *See* New Jersey v. Szemple, 622 A.2d 248, 249 (N.J. Super. Ct. App. Div. 1993) (stating "that privileges preventing disclosure of relevant evidence are not favored"), *aff'd*, 640 A.2d 817 (N.J. 1994). The Superior Court of New Jersey interpreted its priest-penitent privilege statute as protecting only the

munication protected and the context within which the communication must be made, however, will prevent a per se rule of privilege for any communication made to a religious figure.[18] Such statutes balance the state's interest in the ascertainment of evidence at trial with the individual's right to the free exercise of religion.[19]

This Comment analyzes the issues associated with the priest-penitent privilege. First, this Comment examines the origins of the privilege in the Code of Canon Law, federal law, and state common law. Next, this Comment reviews the development of the categories of priest-penitent statutes that are based on whether the priest, the penitent, or both may invoke the privilege. This Comment then surveys the priest-penitent statutes and addresses the issues arising from state court interpretations of these statutes. Finally, this Comment analyzes each statutory group and determines that statutes that grant the privilege to only the priest or to only the penitent fail in light of constitutional precepts. This Comment proposes that a dual-privilege statute would reflect legislative intent and would strike a proper balance between the ascertainment of evidence in a criminal trial and the protection of confidential communications that society regards as necessary for the free exercise of religion.

I. Sources of the Priest-Penitent Privilege

A. The Code of Canon Law

Although the priest-penitent privilege was not recognized at common law,[20] courts often were confronted with the issue.[21] Nondisclosure of communications between a Catholic priest and a penitent is deeply rooted in the traditions of the Roman Catholic Church.[22] Under the Roman Catholic Church's Code of Canon Law (Code), it is a crime for a

priest from testifying. *Id.* at 252-53. The court based its decision on its perception that testimonial privileges promote the suppression of the truth. *Id.* at 249-50.

18. *See infra* notes 222-45 and accompanying text (outlining restrictions that could be placed on the statutory privilege to avoid establishing a per se rule of privilege for all religious communications).

19. *See infra* notes 246-68 (explaining the ideal priest-penitent privilege statute).

20. 8 Wigmore, *supra* note 2, § 2394, at 869; Reese, *supra* note 4, at 56.

21. *See* Erwin S. Barbre, Annotation, *Who is "Clergyman" or the Like Entitled to Assert Privilege Attaching to Communications to Clergymen or Spiritual Advisers*, 49 A.L.R. 3d 1205 (1973) (discussing the numerous cases dealing with the nature and extent of the priest-penitent privilege, despite the fact that the privilege was not recognized at common law); *see also* Reese, *supra* note 4, at 56-59 (stating that the recent enactment of priest-penitent privilege statutes demonstrates the need to recognize a privilege).

22. *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, 29-33 (1991). The priest-penitent privilege "has been recognized in the Code of Canon Law, and these roots support the duty of clergy to maintain the confidentiality of communications made

priest to disclose any information acquired from a confession, which is punishable by excommunication.[23] A priest has a reciprocal obligation to hear confessions when reasonable or necessary, while a penitent has an obligation to confess any serious sins at least once per year.[24] The Code penalizes both the priest who violates the Seal of the Confessional and the penitent who does not confess serious sins.[25]

The conflict between protecting the church's[26] interest in maintaining confidentiality of spiritual relationships and in protecting the state's interest in accessing evidence in criminal trials arose out of Canon Law.[27] Prior to the enactment of statutes recognizing the privilege, trial judges reached inconsistent decisions because of the absence of reported case law on the issue in both the state and federal courts.[28]

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during religious practices despite the threat of criminal prosecution." *Id.* at 30-33 (footnote omitted).

23. 1983 CODE c.983, § 1 ("The sacramental seal is inviolable. Accordingly, it is absolutely a wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion.").

24. *Id.* c.986, c.989. The Code provides that priests are obliged to hear confessions when the penitent reasonably requests to be heard, *id.* c.986, § 1, or in times of urgent necessity, such as danger of death. *Id.* c.986, § 2. The Code also requires each member to confess serious sins at least once per year after he reaches the age of discretion. *Id.* c.989.

25. *Id.* c.916 & c.1388, § 1. These canons provide for excommunication of a priest who directly violates the secrecy of the confessional, while a person who consciously fails to confess is prohibited from receiving the Eucharist prior to confessing grave sins. *Id.*

26. The term "church," for the purposes of this article, encompasses the religious institutions of any denomination.

27. *See* O'Brien & Flannery, *supra* note 22, at 29-31 (stating that the duty of priests to maintain the confidentiality of religious communications despite the threat of criminal prosecution is rooted in Canon Law). Many unreported cases concerning the priest-penitent privilege issues exist, and these cases alarm the clergy of many denominations. Reese, *supra* note 4, at 59. Professor Reese quotes the Minutes of the United Lutheran Church in America:

> The Seal of Confession. During the last few years concern has been growing in church circles over the right and power of the courts of law to compel pastors to disclose confidential information given them in the course of their professional service. The fact that in two relatively recent cases clergymen were called upon to give such testimony has highlighted the issue.

Id. at 59 n.19 (quoting Minutes of the United Lutheran Church in Am., 22nd Biennial Convention 1960, at 802).

28. *Compare* New York v. Phillips (N.Y. Ct. Gen. Sess. 1813), *reprinted in* WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA 52, 111 (1974) (1813) (upholding the privilege in the absence of a statute where a Catholic priest refused to testify as to the identity of a thief who returned stolen goods, because even though the government had a legitimate need and the authority to compel testimony, it could not overcome the need to maintain the relationship between priests and penitents) *with* New York v. Smith, 2 City Hall Recorder 77 (1817), *reprinted in* SAMPSON, *supra*, at 111 (the same court denying the privilege to a Protestant Minister because the Protestant church does not require confession).

B. The Privilege Under Federal Law

The historical roots of the priest-penitent privilege in the religious context support the recognition of the privilege in the legal context. As early as 1875, the Supreme Court acknowledged the existence of the privilege of the confessional.[29] The Court suggested that disclosing matters that the law itself regards as confidential would violate public policy.[30] Thereafter, federal courts recognized the existence of a priest-penitent privilege even in the absence of statutory or common law guidance.[31]

The rationale behind the recognition of a priest-penitent privilege was that federal courts realized a social and moral need to preserve certain confidential relationships. The priest-penitent relationship is analogous to spousal, attorney-client, and doctor-patient relationships.[32] Federal courts also recognize the privilege's nexus to the free exercise of religion.[33] In the absence of an act of Congress and in light of federal court decisions, the Supreme Court held that the privilege of witnesses shall be governed by the principles of the common law in light of "reason and

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29. *See* Totten v. United States, 92 U.S. 105, 107 (1875). The Court held:

> It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional. . . .

Id.

30. *Id.* (analogizing the privilege of the confessional to the privilege between husband and wife, attorney and client, and doctor and patient).

31. *See, e.g.*, McMann v. Securities & Exchange Comm'n, 87 F.2d 377, 378 (2d. Cir.) (acknowledging the existence of traditional privileges concerning communications such as "a client, a penitent, a patient or a spouse"), *cert. denied*, 301 U.S. 684 (1937); *In re* Verplank, 329 F. Supp. 433, 435 (C.D. Cal 1971) (upholding a priest-penitent privilege in the absence of a statute because "modern law, nurtured in a climate of religious freedom and tolerance, has given sanction to such a privilege"); United States v. Keeney, 111 F. Supp. 233, 234 (D.D.C. 1953) (indicating the existence of the priest-penitent privilege), *rev'd*, 218 F.2d 843 (1954).

32. Many priest-penitent statutes are similar to the attorney-client, the doctor-patient, and spousal privilege statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4062 (1989 & Supp. 1993) (including the various privileges within the same statute); IDAHO CODE § 9-203(3) (1990) (same); IND. CODE ANN. § 34-1-14-5 (Burns 1986 & Supp. 1990) (same); IOWA CODE ANN. § 622.10 (West 1950 & Supp. 1990) (same); MINN. STAT. ANN. § 595.02 (West 1988 and Supp. 1994) (same); MO. ANN. STAT. § 491.060 (Vernon 1952 & Supp. 1994) (same); UTAH CODE ANN. § 78-24-8 (1992 & Supp. 1994) (same); WYO. STAT. § 1-12-101(a) (1994) (same).

33. *See, e.g.*, *Verplank*, 329 F. Supp. at 437-38 (stating that when there is an encroachment upon a First Amendment freedom based upon an investigatory need, the government has the burden of demonstrating a compelling interest that cannot be achieved by any other means).

experience."[34] This flexible interpretation of the common law by the Supreme Court enabled courts to uphold claims of a priest-penitent privilege based on societal norms and accepted beliefs.[35]

C. The Privilege Under the State Statutes

New York passed the first priest-penitent privilege statute in 1829.[36] By 1991, every state had enacted a statute protecting priest-penitent communications.[37] Each state's statute refers to a religious figure as the party receiving the communication.[38] The statutes generally describe the type

34. Wolfle v. United States, 291 U.S. 7, 12 (1934) (affirming that "the competence of witnesses in criminal trials in the federal courts . . . are governed by common-law principles as interpreted and applied by the federal courts in the light of reason and experience").

35. *See Verplank*, 329 F. Supp. at 435. The United States District Court for the Central District of California relied on the principles of "reason and experience" and held that draft counseling services provided by a clergyman are privileged. *Id.* at 435-36. The court adhered to the Supreme Court's policy of development and adaptation to modern circumstances when considering a claim of privilege. *Id.* at 435. Other courts have balanced the benefit of preserving confidences against the need to ascertain evidence in deciding whether to grant the privilege. *See, e.g.*, Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir. 1958). The United States Court of Appeals for the District of Columbia Circuit held that the defendant's admission to a Lutheran minister that she had left her children chained in her home while she was absent, after he had urged her to confess her sins, was a privileged communication. *Id.* at 277. The court of appeals explained that the balancing method used to recognize a priest-penitent privilege was based upon "reason and experience." *Id.* at 279-80. The court found that the disclosure of the communication resulted in an injury to the priest-penitent relationship that outweighed the benefit of admitting the evidence at trial. *Id.* at 280; *see also* Funk v. United States, 290 U.S. 371, 383 (1933) (denying a privilege to a spouse by rejecting the traditional reasons for disqualifying a wife as a witness and instead applying a contemporary public policy rationale). The Supreme Court discussed the competency of witnesses and concluded that the common law principles are not immutable, but rather are flexible in the absence of congressional legislation. *Id.*

36. *See* Reese, *supra* note 4, at 64. As the first priest-penitent privilege statute, the New York law served as a model for many of the statutes that were subsequently enacted. *See id.* (stating that the first priest-penitent statute enacted by New York was not an ideal model).

37. The wording of the various statutes tends to be similar. *See supra* notes 6, 9, 12 (listing each state's priest-penitent statute).

38. *See, e.g.*, ARK. CODE ANN. § 16-41-505 (Michie 1994) (defining a clergyman as "a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him"); CONN. GEN. STAT. ANN. § 52-146b (West 1991 & Supp. 1994) (including "a clergyman, priest, minister, rabbi or practitioner of any religious denomination accredited by the religious body to which he belongs"); FLA. STAT. ANN. § 90.505 (West 1994) (specifying that "[a] 'clergyman' is a priest, rabbi, practitioner of Christian Science, or minister of any religious organization or denomination usually referred to as a church, or an individual reasonably believed so to be by the person consulting him").

of communication covered by the privilege[39] and define the requisite context in which this communication must be made to be privileged.[40]

Few state appellate cases examining priest-penitent issues exist to define specifically the privilege.[41] Therefore, construction of these statutes is important because lower state courts must rely exclusively upon statutory interpretation[42] in deciding whether a privilege should be recognized in particular cases. A common approach taken by the lower federal courts is one of strict construction.[43] As a result, the slightest variation in the wording of the fifty-one statutes can drastically affect the relations between priests, penitents, and churches.[44] These statutes can be divided into three general groups based on who holds the privilege.[45]

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39. *See, e.g.*, KAN. STAT. ANN. § 60-429(5) (1983) (including within the privilege penitential communications that are defined as communications between a penitent and a regular or duly ordained minister of religion seeking to obtain "God's mercy or forgiveness for past culpable conduct"); NEB. REV. STAT. § 27-506 (1989) (stating that "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"); OKLA. STAT. ANN. tit. 12, § 2505 (West 1980 & Supp. 1991) (same).

40. *See, e.g.*, D.C. CODE ANN. § 14-309 (1989) (protecting the disclosure of any communication "made to [the priest], in his professional capacity in the course of discipline enjoined by the church or other religious body to which he belongs"); R.I. GEN. LAWS § 9-17-23 (1985) (mandating the communication to be "properly entrusted to [the priest] in his professional capacity, and necessary and proper to enable him to discharge the functions of his office in the usual course of practice or discipline").

41. *See* Reese, *supra* note 4, at 58-59 (discussing the lack of reported appellate cases addressing the priest-penitent issues).

42. *Id.* at 58 (stating that in the few priest-penitent privilege "cases that have reached the appellate courts, those courts had to deal exclusively with the interpretation of the statutes of their respective states").

43. *See* CLINTON DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 9 (1958) (stating that "[t]he policy of the statutory privilege has generally been approved, but the courts will strictly construe such statutes" (footnote omitted)); 81 AM. JUR. 2D *Witnesses* § 514 (1992) (stating that "[t]he tendency of the courts is toward a strict construction of [priest-penitent] statutes and, generally speaking, only those communications are privileged which are made under the exact conditions enumerated in the statutes" (footnote omitted)); *see also* 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 58.01 (5th ed. 1992) (explaining strict constructionist approach and the factors that determine whether a statute will be construed liberally or strictly).

44. *See* Reese, *supra* note 4, at 60 (describing how the statutes affect the security of both the priest and the penitent when assured their communications are protected by law). Professor Reese notes that clearly worded statutes benefit the judiciary because trial judges are not put in the position of forcing a priest to choose between testifying or being held in contempt of court. *Id.* at 60.

45. Determining who holds the privilege is important because this person may assert the privilege, thus preventing a priest from disclosing a communication. *See, e.g.*, New Jersey v. Szemple, 622 A.2d 248, 255-56 (N.J. Super. Ct. App. Div. 1993) (outlining who holds the privilege in the fifty-one priest-penitent statutes), *aff'd*, 640 A.2d 817 (N.J. 1994).

1. *Privilege Held by the Communicant*

In thirty-eight states, the communicant holds the privilege.[46] Two variations generally arise in this type of statute. First, several statutes grant the privilege to the penitent, but allow the priest to assert it on behalf of the communicant.[47] Second, other statutes grant the privilege to the communicant by prohibiting the priest from testifying unless the communicant consents or waives his or her right to invoke the privilege.[48] The effect of statutes that include a waiver provision, however, is to remove the privilege from the communicant.[49]

2. *Privilege Held by the Priest*

In eleven states, the priest holds the privilege.[50] These statutes provide that a priest cannot be forced to testify to matters related to a confession or communication made confidentially by a person seeking spiritual advice or consolation.[51] The choice to invoke the privilege lies with the priest.[52] Some statutes provide that a member of the clergy, who need not be a party to the case, may refuse to disclose a penitential communication if he or she asserts the privilege.[53] Thus, such statutes explicitly state that the priest has the privilege.[54]

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46. *See supra* note 6 (listing 38 communicant-privilege statutes).

47. These state legislatures include: Alaska, Arkansas, Delaware, Florida, Hawaii, Kansas, Maine, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wisconsin. *See supra* note 6 (listing the state statutes that grant the right to assert the privilege to the communicant, including the states that also allow the priest to assert the privilege on the communicant's behalf).

48. These states include: Arizona, Colorado, Connecticut, the District of Columbia, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, and Washington. *See supra* note 6.

49. *See, e.g.*, New Hampshire v. Melvin, 564 A.2d 458, 458 (N.H. 1989) (holding that the defendant waived the right to invoke the privilege because he made the statements in the presence of the minister's wife).

50. *See supra* note 9 (listing the states that grant the privilege to the priest).

51. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 9-111 (1989). The Maryland statute exemplifies the general wording of such statutes, providing "[a] minister of the gospel, clergyman, or priest of an established church of any denomination may not be compelled to testify on any matter in relation to any confession or communication made to him in confidence by a person seeking his spiritual advice or consolation." *Id.*

52. *See* New Jersey v. Szemple, 622 A.2d 248, 256-57 (N.J. Super. Ct. App. Div. 1993) (examining all state priest-penitent privilege statutes to determine whether the priest, the penitent, or both hold the privilege), *aff'd*, 640 A.2d 817 (N.J. 1994).

53. *See, e.g.*, CAL. EVID. CODE § 1034 (West 1966 & Supp. 1990) (providing that "a clergyman, whether or not a party, has a privilege to refuse to disclose a penitential communication"); MD. CTS. & JUD. PROC. CODE ANN. § 9-111 (1989) (providing that a priest "may not be compelled to testify," thus giving the choice to invoke the privilege to the priest).

54. CAL. EVID. CODE § 1034; MD. CTS. & JUD. PROC. CODE ANN. § 9-111.

3. *Privilege Held by Both the Priest and the Communicant*

In two states, Alabama and Ohio, both the priest and the communicant hold the privilege.[55] The Alabama statute extends the right to assert the privilege to both the priest and the penitent.[56] Thus, either the communicant or the clergyperson holds the privilege "to refuse to disclose and to prevent the other from disclosing" the communication in a legal or quasi-legal proceeding.[57] Similarly, the Ohio statute grants the privilege to both the priest and the penitent, although the priest's right is limited.[58] If the penitent consents to disclosure, the priest may assert the privilege only to avoid testifying if such disclosure would be "in violation of his sacred trust."[59]

II. Judicial Interpretation of the State Statutes

Within the three statutory groups, several frequently litigated issues can be difficult for a trial judge to decide based solely on statutory interpretation.[60] Priest-penitent privilege statutes generally address three elements: the religious figure protected by the privilege, the type of communication protected by the privilege, and the requisite context in which the communication was made to be privileged.[61]

A. Types of Religious Figures Covered

The first issue addressed is whether the privilege encompasses a particular religious figure. Some statutes list particular clergymen who are in-

55. Ala. Code § 12-21-166 (1986 & Supp. 1990); Ohio Rev. Code Ann. § 2317.02(c) (Anderson 1991); *see supra* note 44 (discussing a New Jersey Supreme Court case in which the court determined who holds the privilege in each of the 51 statutes).

56. Ala. Code § 12-21-166. The statute provides in part:

> If any person shall communicate with a clergyman in his professional capacity and in a confidential manner (1) to make a confession, (2) to seek spiritual counsel or comfort, or (3) to enlist help or advice in connection with a marital problem, either such person or the clergyman shall have the privilege, in any legal or quasi legal proceeding, to refuse to disclose and to prevent the other from disclosing anything said by either party during such communication.

Id. § 12-21-166(6).

57. *Id.*

58. Ohio Rev. Code Ann. § 2317.02(C). The statute provides in part that a priest shall not testify as to a religious communication unless "by express consent of the person making the communication, except when the disclosure of the information is in violation of his sacred trust." *Id.*

59. *Id.*

60. *See generally* 81 Am. Jur. 2d *Witnesses* §§ 515-520 (discussing the elements of the privilege and the various factual and legal issues that arise).

61. *See supra* notes 6, 9, 12 (listing the state statutes).

cluded in the privilege by title,[62] while others are less specific.[63] The New Jersey statute, for instance, includes "a clergyman, minister or other person or practitioner authorized to perform similar functions."[64] This provision, however, does not define or identify specifically who qualifies as a "clergyman." Instead, the New Jersey legislature left the issue of who can be categorized as an "other person or practitioner authorized to perform similar functions" to judicial discretion.[65]

Under this statute, the Superior Court of New Jersey, in *In re Murtha*,[66] held a nun in contempt of court for refusing to testify, finding that she was not included within the privilege.[67] In determining whether a nun could claim the privilege, the court examined Catholic doctrine and practice, the nun's actual functions, and prior case law.[68] Unable to cite specific interpretational guidelines, the court found that the nun was not included within the statutory definition of "clergyman."[69] The court may have issued a clearer decision had the statute specifically listed the religious persons covered by the privilege.[70]

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62. *See, e.g.*, FLA. STAT. ANN. § 90.505(I)(a) (West 1992) (defining a "clergyman" to include "a priest, rabbi, practitioner of Christian Science, or minister of any religious organization or denomination usually referred to as a church"); W. VA. CODE § 57-3-9 (Supp. 1991) (stating that "[n]o priest, nun, rabbi, duly accredited Christian Science practitioner or member of the clergy authorized to celebrate the rites of marriage in this state . . . shall be compelled to testify").

63. *See, e.g.*, IDAHO CODE § 9-203(3) (1990) (defining the religious figure as "[a] clergyman or priest"); NEV. REV. STAT. ANN. § 49.255 (Michie 1986 & Supp. 1990) (same).

64. N.J. STAT. ANN. § 2A:84A-23 (Supp. 1960).

65. *Id.*; *see also* New Jersey v. Szemple, 622 A.2d 248, 254 (N.J. Super. Ct. App. Div. 1993) (discussing the Bigelow Commission study on reforming New Jersey's rules of evidence, noting that the only change was to broaden the holder of the privilege to include any " 'other person or practitioner authorized to perform similar functions' " (quoting N.J. R. EVID. 29)), *aff'd*, 640 A.2d 817 (N.J. 1994).

66. *In re* Murtha, 279 A.2d 889 (N.J. 1971).

67. *Id.* at 893 (denying a testimonial privilege to a nun because she could not demonstrate that she was a person or practitioner authorized to perform functions similar to a priest or clergyman, as mandated by the statute).

68. *Id.* at 892-93. The court found no privilege for the nun in Catholic doctrine or practices, nor in textual or decisional authority. *Id.*

69. *Id.* at 892 (explaining that the statute was broadened in 1947 to include any " 'other person or practitioner authorized to perform similar functions' " of any religion, but noting that it remains unclear whether a nun was intended to be included (quoting N.J. R. EVID. 29)).

70. *See supra* note 61 (providing examples of state statutes that explicitly define who is a priest within the privilege). The court would have reached a different holding in *In re Murtha* under the West Virginia statute. The West Virginia statute specifically includes a "nun" within the statutory privilege; therefore, the court could have easily granted Sister Mary the privilege not to testify. *See* W. VA. CODE § 57-3-9 (Supp. 1994).

B. Types of Communication Covered

A second issue arising out of the interpretation of the three statutory groups is the significance of the type of communication covered by the privilege. Some statutes specify that the privilege protects the disclosure of "confessions."[71] These statutes are written narrowly and may be interpreted to encompass only those communications of a penitential nature.[72] Most statutes, however, apply the privilege more broadly to encompass any "confidential communication."[73]

In 1983, Alabama's Court of Criminal Appeals held, in *Lucy v. Alabama*,[74] that the trial court properly admitted a cleric's testimony regarding his non-penitential communications with the defendant.[75] In *Lucy*, the defendant, after stabbing his girlfriend, ran to the cleric's home to hide from police.[76] Upon the cleric's request, the defendant relinquished the knife he was carrying and admitted that he had stabbed his girlfriend.[77] In deciding whether the defendant's admission was privileged, the court reviewed the statutory language, which required the communication to be a "confession," and ruled that the facts of the case did not support a finding that the defendant's confession was penitential.[78]

An example of a statute with a more broadly covered communication is the South Carolina statute that protects from disclosure "any confidential

71. *See, e.g.*, MICH. COMP. LAWS. ANN. § 600.2156 (West 1986) (providing that "[n]o Minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination"). The statutes that require a "confession" contain wording similar to the Michigan statute. *See, e.g.*, UTAH CODE ANN. § 78-24-8(3) (1987 & Supp. 1991) (stating that a priest cannot "be examined as to any confession made to him").

72. *See* Lucy v. Alabama, 443 So. 2d 1335, 1341 (Ala. Crim. App. 1983) (discussing that under the Alabama statute a communication "must be penitential in character so as to fit within those provisions providing for privileged communication of 'confessions' ").

73. *See, e.g.*, ARK. CODE ANN. § 16-41-101 (Mitchie 1992) (protecting confidential communications defined as communications "made privately and not intended for further disclosure"); IOWA CODE ANN. § 622.10 (West 1950 & Supp. 1990) (including within the privilege "any confidential communication"); S.C. CODE ANN. § 19-11-90 (Law Co-op. 1976) (protecting as privileged "any confidential communication properly entrusted to him in [a priest's] professional capacity").

74. 443 So. 2d at 1335.

75. *Id.* at 1341 (construing the statute strictly and requiring the communication be penitential in nature to be privileged).

76. *Id.* at 1338.

77. *Id.*

78. *Id.* at 1341 (defining a "confession" as a " 'penitential acknowledgement to a clergyman of actual or supposed wrongdoing while seeking religious or spiritual advice, aid, or comfort' " (quoting Annotation, *Matters to Which the Privilege Covering Communications to Clergyman or Spiritual Adviser Extends*, 71 A.L.R. 3D 794, 808 (1976)).

communication properly entrusted" to the priest.[79] The party asserting the privilege must show that the communication meets the specific conditions of the statute.[80] The South Carolina Court of Appeals, in *Rivers v. Rivers*,[81] held that the priest-penitent privilege applied to communications made to an ordained minister who provided marriage counseling.[82] The court considered the facts and circumstances surrounding the marriage counseling to find that communications made during the course of counseling were "confidential communications" that were protected under the statute.[83] Courts, however, will not extend a per se rule of privilege to all communications made to clergymen.[84]

C. The "Role" of the Clergyperson

A communication must satisfy a third requirement to be privileged within the meaning of the statutes. The communication must be made to a priest acting in his or her "professional character in the course of discipline enjoined by the church to which he belongs."[85] Courts will examine the rules and practices of the church to determine whether the communication was made to the priest in such a capacity.[86] Even if the religious person fits squarely within the statutory definition of a clergyman, courts nevertheless may find that the clergyman did not receive the communication in his or her professional capacity.

To avoid establishing a per se rule of privilege for all communications made to a cleric, courts have narrowly interpreted which clergy actions

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79. S.C. CODE ANN. § 19-11-90.

80. *See, e.g.*, Rivers v. Rivers, 354 S.E.2d 784, 787 (S.C. Ct. App. 1987) (stating that "the burden of showing the facts required to establish the clergyman-penitent privilege rests on the party objecting to the disclosure of the communication").

81. *Id.* at 784.

82. *Id.* at 788 (finding that marital counseling was a proper function of the Methodist minister and the confidentiality of those communications should be maintained).

83. *Id.* (ruling that a minister did not have to testify concerning marriage counseling sessions after the court's finding that those sessions were confidential communications).

84. *See, e.g.*, Lucy v. Alabama, 443 So. 2d 1335, 1341 (Ala. Crim. App. 1983) (denying a privilege because the communication was not found to be confidential); Bottoson v. Florida, 443 So. 2d 962, 965 (Fla. 1983) (holding that two written statements to a minister that were also intended to be communicated to the State Attorney's Office were not confidential nor privileged under the statute), *cert. denied*, 469 U.S. 873 (1984).

85. UTAH CODE ANN. § 78-24-8(3) (1987 & Supp. 1991); *see supra* notes 6, 9, 12 (listing other states that limit the privileged communications in this manner, but not including Maryland, Georgia, Kansas, and Vermont).

86. *See generally* 81 AM. JUR. 2D. *Witnesses* § 515 (1992) (addressing communication within the discipline of church or denomination rules or practice). To recognize a privilege, courts examine the course of discipline as evidenced both by the rules and practice of the church and by some other religious duty of the clergy. *Id.* Only communications made in the course of discipline of the church are privileged. *Id.*

will activate the privilege.[87] In *Magar v. Arkansas*,[88] the Arkansas Supreme Court refused to recognize a privilege and to suppress the defendant's confession to a cleric because the cleric testified that confession was not a tenet or practice of his church.[89] The defendant in *Magar* was charged with sexually abusing three boys under the age of fourteen.[90] A cleric, with whom the defendant had prior counseling sessions, confronted the defendant with the allegations.[91] The court focused on the fact that the cleric sought out the defendant.[92] In such an accusatory situation where the defendant had not sought spiritual counseling or guidance, the court could not find that the defendant's admission was a confidential communication made to the cleric in his professional capacity as a spiritual adviser.[93]

Courts also analyze the specific role of the religious person at the time of the communication.[94] In *Easley v. Texas*,[95] the Texas Court of Appeals

87. *See, e.g.*, Louisiana v. Mayer, 589 So. 2d 1145, 1148 (La. Ct. App. 1991) (denying a privilege to defendant's confession to a minister that he shot his wife because the court found that the defendant spoke to the minister as his friend rather than a spiritual adviser); Masquat v. Maguire, 638 P.2d 1105, 1106 (Okla. 1981) (holding that a patient's communication to a nun was not privileged because the patient had consulted the nun in her role as a hospital administrator); Fahlfeder v. Pennsylvania, 470 A.2d 1130, 1133 (Pa. Commw. Ct. 1984) (holding that communications to a reverend in a state institution were not privileged because the reverend's role was that of a volunteer or auxiliary supervisor, not a confidant or confessor).

88. 826 S.W.2d 221 (Ark. 1992).

89. *Id.* at 222. The court held that the communications were not privileged after examining the role of the clergyman at the time of the communication. *Id.* The court considered factors such as the confession was not a tenet of the church, the pastor had the discretion to keep evidence of a crime confidential, and most importantly, the defendant had not sought out the pastor for spiritual counseling. *Id.*

90. *Id.*

91. *Id.* at 222-23 (finding that because the reverend had sought out the defendant with the allegations, the defendant was not seeking spiritual counseling).

92. *Id.* at 223 (contrasting this situation to cases where the privilege was upheld because the defendant had sought spiritual advice from a clergyman with the reasonable expectation that the communications would be kept confidential).

93. *Id.*

94. *See, e.g.*, Bonds v. Arkansas, 837 S.W.2d 881, 884 (Ark. 1992) (refusing to grant the privilege where the defendant made statements to his employer who was also a minister because "the communication was not made to [the minister] in his capacity as a spiritual advisor"); Fahlfeder v. Pennsylvania, 470 A.2d 1130, 1133 (Pa. Commw. Ct. 1984) (stating that unless the defendant could demonstrate that the role of the minister "was that of confessor or confidant, the admissions sought to be excluded did not fall within the protection of [the statute]"); Easley v. Texas, 837 S.W.2d 854, 856 (Tex. Ct. App. 1992) (finding that defendant's letters were not privileged because they "were not written to the pastor in his professional character as spiritual adviser").

95. *Easley*, 837 S.W.2d at 856. Similarly, the Commonwealth Court of Pennsylvania in *Fahlfeder*, 470 A.2d at 1130, denied the privilege to a defendant who made incriminating statements to a cleric functioning as a volunteer assisting in rehabilitation and parole. *Id.* at 1133. The court found that the communication was not per se privileged because the

refused to recognize the privilege raised by a defendant who was attempting to suppress two letters she had written to a pastor because they were not written to the pastor in his professional capacity as a spiritual adviser.[96] The defendant, who was charged with murder, urged the pastor in the two letters to provide her with an alibi and threatened to reveal the truth about their personal relationship if he refused.[97] The court of appeals strictly construed the statute, refusing to recognize a per se rule of privilege because the letters were "open threats."[98] The court ruled that the privilege covers only those communications made to a priest in his professional capacity.[99]

III. Analysis of the Priest-Penitent Statutes

The unanimous adoption of priest-penitent statutes by all states demonstrates more than the mere acceptance of the privilege; it emphasizes the necessity of codifying the privilege. Few state appellate cases involve priest-penitent issues.[100] Thus, courts often rely exclusively on the state statutes to resolve priest-penitent issues.[101] The major distinction between these statutes is to whom the privilege is granted: the priest, the penitent, or both. In determining whether this distinction should remain, these priest-penitent privilege statutes must be examined in light of practical justifications, constitutional implications, and societal acceptance and effects.

Pennsylvania statute mandated that the communication be made to the reverend in the course of his pastoral duties. *Id.* at 1132-33. The court stated that "[c]learly, this provision of the Code does not prohibit *all* testimony by members of the clergy. Rather, it is limited to information told in confidence to them in their role as confessor or counselor." *Id.* at 1133.

96. *Easley*, 837 S.W.2d at 855; *see also* Tex. R. Crim. Evid. 505. Under the rule, "a person has the privilege to prevent the disclosure of a confidential communication by the person to a clergyman in his professional character as spiritual adviser." *Id.*

97. *Easley*, 837 S.W.2d at 855.

98. *Id.* at 856.

99. *Id.* The court of appeals relied on the statute when deciding whether the communication was privileged because there were no reported decisions on the issue in Texas. *Id.* The court found the privilege to be broad in Texas because the communication does not have to be penitential in nature. *Id.* However, it did not find the defendant's letters to be privileged. *Id.* For a conversation or a letter to a clergyman to be privileged, it must be made to the religious figure in his professional capacity. *Id.* In this case, the letters that threatened the pastor were not written to him in such a capacity. *Id.*

100. *See* Reese, *supra* note 4, at 58.

101. *Id.*

A. Singular-Protection Statutes

1. Reasoning Underlying the Communicant's Privilege

Thirty-eight statutes grant the right to invoke the priest-penitent privilege to the communicant.[102] Several considerations underlie the justifications for granting the privilege solely to the communicant. First, it is asserted that the penitent feels secure when confiding in a priest for spiritual aid and guidance,[103] that the church is a protected institution, and that the penitent believes that his or her communications are privileged.[104] Thus, the penitent is granted the privilege because it is unrealistic for her to know, prior to engaging in confidential communications with a priest, the state's law regarding the state's power to compel a priest to testify about religious communications.[105] Further, the penitent requires protection from a priest who may decide to disclose a priest-penitent communication.[106] This reasoning demonstrates the general acceptance of the human need to disclose certain information to priests in confidence.[107]

Such statutes are flawed, however, because the priest is not equally protected.[108] Statutes granting the privilege to the communicant acknowledge that the penitent needs greater protection than the priest because priests are bound by church doctrines and will not testify to

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102. *See supra* note 6 (listing the states that grant the right to assert the privilege to the communicant).

103. *See* Reese, *supra* note 4, at 60 (discussing the need of the penitent to feel secure when seeking spiritual aid and comfort); *see supra* notes 9, 46-47 (discussing the misconception that communications made to priests are always protected by law).

104. *See* Reese, *supra* note 4, at 60 (explaining that despite being deeply rooted in American jurisprudence, it is difficult to determine the rationale behind the priest-penitent privilege statutes).

105. *See, e.g.*, New Jersey v. Szemple, 622 A.2d 248, 258 (N.J. Super. Ct. App. Div. 1993) (Stein, J., dissenting), *aff'd*, 640 A.2d 817 (N.J. 1994). The dissent in *Szemple* criticized "the majority's holding that the clergy member is the exclusive possessor of the priest-penitent privilege," and noted that it will "come as news to many that matters confided in private to a clergy member have all the security of things said to the bartender at the local corner tavern." *Id.*

106. If the right to assert the privilege is granted to the priest rather than to the penitent, the penitent is left to rely on the priest's judgement. *Id.* This may chill the tradition of disclosing confidential information to clergymen. *Id.* (stating that "people who confess such things as criminal conduct or marital infidelity expect that the clergy-recipient can, at his or her whim, reveal the confidence to others: police, family members, for that matter anyone to whom the clergy member desires").

107. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 51 (1980) (stating that "[t]he priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return").

108. *See infra* note 111 and accompanying text (discussing situations in which the priest is not protected by the privilege).

confidential communications regardless of statutory dictates.[109] Even if church policy forbids a priest from disclosing information regarding certain communications, a priest still may be required by state law to reveal confidences if the penitent does not assert the privilege.[110] Consequently, this leaves the priest with a choice: to testify, to violate church doctrine, and to incur church punishment; or to refuse to testify and risk being held in contempt of court.[111]

Perhaps state legislatures anticipated that the penitent always would assert the privilege, thus eliminating the need to broaden the privilege to include the priest.[112] Priest-penitent cases, however, frequently involve the issues of waiver and consent.[113] Many priest-penitent statutes pro-

109. *See* Reese, *supra* note 4, at 81 (stating that "[p]eople take for granted they have the complete right to talk to their ministers" in confidence and that "[m]ost clergy will not testify concerning confidential communications regardless of whether there is a statutory privilege"); *see also supra* note 6 (listing the state statutes that provide the penitent with greater protection than the priest by granting the right to assert the privilege to the penitent only).

110. *See, e.g.*, IOWA CODE ANN. § 622.10 (West 1950 & Supp. 1990) (providing that the privilege "shall not apply to cases where the party in whose favor the [prohibition] is made waives the rights conferred"); *see also* Perry v. Arkansas, 655 S.W.2d 380, 381 (Ark. 1983) (holding that the defendant waived his right to have communications made to a minister kept confidential after he disclosed such communications to others); Kansas v. Andrews, 357 P.2d 739, 744 (Kan. 1960) (holding that the privilege is waived when the defendant discloses the communications to third parties), *cert. denied*, 368 U.S. 868 (1961).

111. *See, e.g.*, Massachusetts v. Kane, 445 N.E.2d 598, 604 (Mass. 1983) (holding a Catholic priest in contempt for refusing to testify even after the defendant waived his rights under the priest-penitent statute); De'Udy v. De'Udy, 495 N.Y.S.2d 616, 619 (N.Y. Sup. Ct. 1985) (holding that the penitent is the holder of the privilege and to waive the privilege would compel "the clergy to testify to that which is no longer cloaked with statutory protection [and that] [t]he information imparted in sacred trust is thus reduced to the mundane and ordinary intelligence which the witness, albeit a clergyman, may not withhold on pain of judicial sanction"); *see also* Reese, *supra* note 4, at 81 (stating that when a clergyman is faced with such a choice, "[h]e would refuse, face contempt charges, and imprisonment"). *But see* Pennsylvania v. Musolina, 467 A.2d 605, 611 (Pa. 1983) (ruling that a priest did not have to testify even though the defendant disclosed the religious communication in his confession to the State).

112. *See* New Jersey v. Szemple, 622 A.2d 248, 255-57 (N.J. Super. Ct. App. Div. 1993) (interpreting the 51 priest-penitent statutes and finding that the majority of legislatures grant the right to assert the privilege exclusively to the penitent), *aff'd*, 640 A.2d 817 (N.J. 1994).

113. There are many cases in which the communicant discloses the confidential communication to a third party while the priest maintains the confidentiality. *See, e.g.*, Perry v. Arkansas, 655 S.W.2d 380, 381 (Ark. 1983) (denying the privilege when the defendant disclosed the communication to the minister's wife); Kansas v. Andrews, 357 P.2d 739, 743 (Kan. 1960) (holding that the defendant waived the privilege when he made a written confession to police officers and statements to others disclosing the information communicated to the minister), *cert. denied*, 368 U.S. 868 (1961); *De'Udy*, 495 N.Y.S.2d at 617 (stating that the minister advised the court that notwithstanding a waiver of the privilege by husband and wife, he asserted an independent privilege against giving testimony).

vide that a priest may not disclose confidential communications without the penitent's consent to the disclosure.[114] Yet the penitent may waive the right to the privilege by disclosing the information regarding the communication to a third party.[115] If the communicant discloses the communication to a third party or otherwise waives his right to assert a privilege,[116] the priest is left unprotected and may be forced to testify in violation of religious doctrine.[117]

2. *Reasoning Underlying the Priest's Privilege*

Eleven statutes grant the right to assert the privilege to the priest.[118] This protects and preserves the confidential relationship between the priest and the penitent by recognizing the human need to make confidential disclosures to religious figures and receive consolation in return.[119] In certain religions, confidential communications between priest and penitent constitute a fundamental aspect of the church discipline.[120] When available to the priest, the privilege protects the priest in situations that require or encourage such confidential communications as part of church

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114. *See, e.g.*, IDAHO CODE § 9-203(3) (1990) ("A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him . . . .").

115. *See, e.g.*, *De'Udy*, 495 N.Y.S.2d at 616 (holding that a clergyman who refused to testify after a communicant waived the privilege in open court did not have an independent privilege absent a statutory grant); *Musolina*, 467 A.2d at 610 (holding that no privilege existed because the defendant disclosed the communications made to a priest in his confession to the State).

116. *See supra* note 110 (discussing cases where the defendant waived the privilege).

117. *See infra* note 120 (discussing religious doctrines in which testifying to a confidential communication in open court would be a violation).

118. *See supra* note 9 (listing states that grant the right to assert the privilege to the priest).

119. *See* Trammel v. United States, 445 U.S. 40, 51 (1980) (defending the existence of the priest-penitent privilege as necessary to accommodate the need for confidence and trust in priest-penitent relations); California v. Edwards, 203 Cal. App. 3d 1358 (1988) (stating that "[j]ustification for the privilege is grounded on societal interests in encouraging the penitential communication and development of religious institutions by securing the privacy of penitential communications"), *cert. denied*, 489 U.S. 1027 (1989); New Jersey v. Szemple, 622 A.2d 248, 258 (N.J. Super. Ct. App. Div. 1993) (Stein, J., dissenting) (stating that the priest-penitent privilege is "designed to protect and preserve the confidential relationship between clergy and penitent"), *aff'd*, 640 A.2d 817 (N.J. 1994).

120. *See supra* notes 22-25 and accompanying text (discussing the role of confidential communications in the discipline of the Catholic Church). Other religions require that certain religious communications be kept confidential. The Anglican Communion, which includes the Episcopal Church, has an " 'absolute obligation not to reveal anything said by a penitent using the Sacrament of Penance.' " Reese, *supra* note 4, at 68 n.58. Protestant ministers also are required to maintain the confidentiality of communications made to them. *See* Reese, *supra* note 4, at 68-69 (referring to a policy statement of an American Lutheran Church).

practice.[121] In affording priests protection from disclosure of confidential communications that are part of the church practice, the state is not infringing on the priest's free exercise of religion guaranteed by the First Amendment.[122] State statutes fail to recognize, however, that the penitent also must have the right to invoke the privilege to preserve his or her right to the free exercise of religion.[123]

B. Constitutional Analysis of Singular Protection Priest-Penitent Statutes

The principal disadvantage of a priest-penitent statute that grants the privilege to either the priest or the penitent is the potential violation of one party's right to the free exercise of religion. A statute violates the Free Exercise Clause of the First Amendment if it imposes an unconstitutional burden upon a religious practice.[124] In determining whether a statute imposes such a burden, the Supreme Court focuses on whether the belief or practice in question is characterized as religious and whether that belief or practice is burdened by the governmental action.[125] The mere fact that the government enacts a law that is inconsistent with an individual's religious beliefs does not, however, abridge an individual's right to the free exercise of religion.[126] An individual claiming a free exercise violation must show that he or she cannot comply with the law while remaining faithful to his or her religious beliefs.[127] Serious constraints upon religion arise when a state makes illegal an action or inac-

121. *See* Reese, *supra* note 4, at 69-70.

122. *See infra* notes 184-208 and accompanying text (discussing First Amendment issues that arise out of the singular-protection statutes).

123. *See supra* note 120 (discussing religions that encourage or require certain confidential communications within their practices or beliefs).

124. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 934 (1989) (analyzing the "burden" requirement for an infringement on the free exercise of religion).

125. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 833-35 (1989); Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981); *see also* John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713 (discussing the sincerity of the religious belief requirement).

126. Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (stating that "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature"); *see infra* notes 165-83 and accompanying text.

127. *See* McGowan v. Maryland, 366 U.S. 420, 429-30 (1961) (holding that the appellants did not have standing to make a free exercise claim because they did not show that the Sunday Closing Law burdened their religious freedoms); Africa v. Pennsylvania, 662 F.2d 1025, 1036 (3d Cir. 1981) (finding that a prison did not have to provide a prisoner with a special diet because his beliefs were not religious), *cert. denied*, 456 U.S. 908 (1982); United States v. Kuch, 288 F. Supp. 439, 445-46 (D.D.C. 1968) (denying a free exercise

tion required by one's religion.[128] A state may not burden an individual's right to the free exercise of religion unless the state action is justified as the least restrictive means of achieving a compelling state interest.[129]

1. Sherbert v. Verner

In 1963, the United States Supreme Court, in *Sherbert v. Verner*,[130] adopted a three-prong test to determine whether a state regulation had unconstitutionally burdened an individual's right to the free exercise of religion.[131] First, a court must determine whether the relevant state regulation burdens the free exercise of religion.[132] If a burden exists, the state must demonstrate that a compelling state interest supports the statute. Finally, the state must establish that no alternative forms of regulation exist to accomplish that interest.[133]

In *Sherbert*, the Supreme Court ruled in favor of a Seventh Day Adventist who claimed that the State violated her free exercise rights when the State denied her unemployment benefits because she refused to work on Saturday, the sabbath day of her faith.[134] To be eligible for unemployment benefits, a claimant must be willing to accept employment when offered by the employment office or an employer.[135] The Court found that the State of South Carolina had imposed an unconstitutional burden

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exemption to a defendant who failed to demonstrate that she used marijuana in conjunction with her religious beliefs).

128. *See* Lupu, *supra* note 124, at 933-34. Professor Lupu explained that while an outright prohibition of one's religious practice or beliefs is an illegal burden, the burden could be defined even more broadly to include government action that caused increases in expenses, discomfort, or difficulty of religious life. Congress recognized the existence of such a broad burden in the Religious Freedom Restoration Act of 1993. It explained that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2(a)(2), 107 Stat. 1488, 1488; *see infra* notes 177-83 for further discussion of the Act.

129. *See infra* note 182 (quoting the Religious Freedom Restoration Act of 1993, which reinstated the compelling interest test after *Smith*).

130. 374 U.S. 398 (1963).

131. *Id.* at 403-10 (balancing the severity of the burden on the free exercise of religion, with the importance of the state interest, and with the existence of alternative means to satisfy the state interest).

132. *Id.* at 403.

133. *Id.* at 406; *see also* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 883 (1990) (stating that the Court has "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation").

134. *Sherbert*, 374 U.S. at 410. The Court explained that the appellant was fired by her employer because she would not work on Saturday, the sabbath day of her faith. *Id.* at 399. As a result, she was unable to receive unemployment compensation under South Carolina law because her failure to work on Saturday was without good cause. *Id.* at 401.

135. *Id.* at 400-01.

on her right to the free exercise of religion.[136] The Court reasoned that the statute was unconstitutional because the South Carolina Unemployment Compensation Act effectively pressured her to abandon her religious practice.[137] Next, the Court considered whether some compelling state interest justified this burden upon religion.[138] The State argued that the statute promoted the state interest of preventing people who refused to work on Saturdays for religious reasons from filing fraudulent claims.[139] Such claims, the State argued, diluted the unemployment compensation fund.[140] The State failed, however, to demonstrate more than the mere possibility that unemployed people filed fraudulent claims based upon religious objections to avoid working on Saturdays.[141] The Court suggested that the State needed to show a more compelling interest, and if it had done so, under the final prong of the test, it then would have needed to prove that no alternative forms of regulation would have achieved this interest.[142]

2. Wisconsin v. Yoder

In 1972, the Supreme Court further expanded the *Sherbert* standard by adding an inquiry into the sincerity of the asserted religious belief in *Wisconsin v. Yoder*.[143] In *Yoder*, Amish parents claimed that Wisconsin's compulsory school attendance law violated their right to the free exercise of religion.[144] The Court first inquired into the sincerity of the claimants'

136. *Id.* at 404. The Court held that the challenged law forced the appellant to make a choice that put "the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.*

137. *Id.* The Court explained that the statute "forces [appellant] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.*

138. *Id.* at 409.

139. *Id.* at 407.

140. *Id.*

141. *Id.* at 406 (holding that "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation' " (alteration in original)).

142. *Id.* at 407 (holding that "even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the [State] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights" (footnote omitted)).

143. 406 U.S. 205, 215-16 (1972) (finding that beliefs must be religious, not personal or philosophical).

144. *Id.* at 207-09 (discussing the Amish parents' claim that the Wisconsin compulsory school attendance law, which required children to attend school up until age 16, violated their free exercise of religion because of the detrimental impact that compulsory high school attendance would have on the survival of the Amish).

religious beliefs.[145] Finding the Amish parents' beliefs to be sincere, the Court used the *Sherbert* balancing test to uphold the parents' free exercise challenge.[146] Wisconsin asserted that universal compulsory formal education for children up to age sixteen was necessary to produce self-reliant, self-sufficient, and effective participatory citizens.[147] The Court, however, found that the original state interest was to prohibit child labor.[148] Using the *Sherbert* test, the Court ruled that the state interest in compulsory school attendance of Amish children did not substantially effectuate either of these interests.[149] The Court held that the First Amendment prohibited Wisconsin from requiring the Amish to comply with the compulsory formal education law.[150]

3. Thomas v. Review Board

In 1981, in *Thomas v. Review Board*,[151] the Supreme Court adopted the "least restrictive means" test as the controlling standard of judicial review for free exercise claims.[152] Under this test, a claimant must satisfy two of the four prongs of the test before the Court will address a free exercise violation.[153] First, a claimant must prove that the beliefs allegedly threatened are religious and are sincerely held.[154] Second, these

145. *Id.* at 215-17 (stating that the Court must determine whether the Amish beliefs and mode of life are inseparable, interdependent, and rooted in religious belief).

146. *Id.* at 214-15 (holding that a state's substantial interest in education is unquestioned, but nevertheless outweighed by the Amish interest in the free exercise of religion).

147. *Id.* at 219-22. Wisconsin argued that compulsory education "is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Id.* at 221. Wisconsin also argued that education "prepares individuals to be self-reliant and self-sufficient participants in society." *Id.*

148. *Id.* at 228 (discussing the rationale behind the 16-year education requirement as originating from a desire to provide educational opportunities and to prevent children under that age from being employed in undesirable conditions).

149. *Id.* at 222-29. The Court found that "accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship." *Id.* at 234.

150. *Id.* (holding that because "the Religion Clauses in our constitutional scheme of government, we cannot accept a *parens patriae* claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable applications as that urged by the State").

151. 450 U.S. 707 (1981).

152. *Id.* at 718 (holding that a "state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest").

153. *Id.* at 713-16 (stating that the Free Exercise Clause only protects religious beliefs that are burdened by a governmental action, thus a claimant must make the initial showing of a belief rooted in religious beliefs that is burdened).

154. *Id.* at 716 (focusing on the sincerity of the religious belief, not the accuracy of the belief because the "[c]ourts are not arbiters of scriptural interpretation").

religious beliefs must actually be burdened by the state regulation.[155] If the claimant satisfies these two components, the state must identify a compelling interest that justifies the burden upon the claimant's religion.[156] Finally, the state must prove that the burden is the least restrictive means of achieving that interest.[157]

In *Thomas*, the Court held that Indiana's denial of unemployment compensation benefits to a Jehovah's Witness, who terminated his employment because he could not participate in the production of weapons, violated his First Amendment right to the free exercise of religion.[158] The Court found that the petitioner sincerely believed that his religion required him to terminate his employment.[159] The Court next found that the State's denial of unemployment compensation was a burden upon the free exercise of religion because a person may not be compelled to choose between the exercise of a First Amendment right and receipt of an otherwise important benefit.[160]

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155. *Id.* at 716-18. The Court explained that when the state pressures an individual to modify his conduct and to violate his religious beliefs so that he may receive an important benefit, the state has imposed an unconstitutional burden upon the free exercise of religion. *Id.* at 717-18.

156. *Id.* at 718-19.

157. *Id.*; Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb (Supp. 1994)). Congress enacted this Act to protect the free exercise of religion. *Id.* § 2(a), 107 Stat. at 1488. Congress reinstated the compelling interest test for balancing religious freedom and governmental interests, after the *Smith* decision eliminated this test in 1990. *Id.* § 2(b)(1), 107 Stat. at 1488. The Act provides in part:

> (a) In General.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Exception.—Government may substantially burden a person's free exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id. § 3, 107 Stat. at 1488-89.

158. *Thomas*, 450 U.S. at 719 (holding that the state interests advanced were not "sufficiently compelling to justify the burden upon Thomas' religious liberty").

159. *Id.* at 713-16. The Court held that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Id.* at 715-16. The Court also held that "[t]he narrow function of the reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion." *Id.* at 716.

160. *Id.* at 717-18 (stating that a law burdens an individual's right to the free exercise of religion when it puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs").

Upon satisfying the first two prongs of the least restrictive means test, the burden shifted to the State to demonstrate a compelling state interest in denying the benefits and to establish that the denial was the least restrictive means of achieving that interest.[161] The Court found that Indiana enacted its unemployment compensation disqualification provision to avoid greater unemployment resulting from people leaving their jobs for religious beliefs and to avoid inquiries by employers into an individual's religious beliefs.[162] The Court concluded, however, that these interests were not compelling enough to justify the burden upon the Jehovah's Witnesses.[163] The Court held that Indiana's unemployment compensation scheme was not the least restrictive means of achieving these interests.[164]

4. Employment Division, Department of Human Resources v. Smith

In 1990, the Supreme Court held that the Free Exercise Clause permits a state to enforce a neutral, generally applicable law in *Employment Division, Department of Human Resources v. Smith*.[165] In *Smith*, the respondents, two members of the Native American Church, were fired from their jobs for using the controlled substance peyote.[166] The Employment Division denied their claim for unemployment compensation[167] because they had been fired for misconduct.[168] In *Smith*, the respondents contended that their religious beliefs compelled them to use the drug peyote, thus placing them beyond the reach of a criminal law that was not specifi-

161. *Id.* at 716-19. The Court explained that an infringement upon a religious practice does not result in an automatic exemption. *Id.* The state has the opportunity to justify the infringement by making a showing that the law facilitates a compelling state interest and that it is the least restrictive means of achieving it. *Id.* at 717-18.

162. *Id.* at 718-19.

163. *Id.* at 719. The Court stated that "[t]here is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create 'widespread unemployment,' or even to seriously affect unemployment." *Id.* The Court also found that there is no "reason to believe that the number of people terminating employment for religious reasons will be so great as to motivate employers to make such inquiries." *Id.*

164. *Id.* (finding that neither interest was "sufficiently compelling" to outweigh the burden on the free exercise of religion).

165. 494 U.S. 872, 878-79 (1990).

166. *Id.* at 874. The respondents were fired from their jobs at a private drug rehabilitation organization because they ingested the hallucinogen peyote at a Native American Church ceremony. *Id.*

167. *Id.* In order to be eligible for unemployment benefits, a claimant must not have been terminated for "misconduct." *Id.* The Employment Division determined that respondents were fired for misconduct and thus, were ineligible for benefits. *Id.*

168. *Id.*

cally directed at their religious practice.[169] The Court refused to use the compelling state interest test derived from *Sherbert* to decide whether the government act that burdened religion was justified because it found that the test was inapplicable to an across-the-board criminal prohibition on a particular form of conduct.[170] The Court stated that if it applied the *Sherbert* test in this case, it would be establishing constitutionally required religious exemptions from every conceivable civic obligation.[171] As a result, the Court eliminated the requirement that the state justify laws that burden religion when the law is neutral toward religion and applicable to all.[172] The Court justified the abandonment of the "compelling state interest test" by recognizing that a state must be able to enforce generally applicable criminal laws regardless of their effects on religious beliefs.[173]

The Court, however, recognized that there are cases in which the First Amendment prohibits application of a neutral, generally applicable law to religiously motivated conduct.[174] These cases involve the application of the First Amendment in conjunction with other constitutional protections, such as communicative or parental rights.[175] In *Smith*, the respondents did not assert that the government action regulated communication of religious beliefs.[176]

In response to *Smith*, Congress passed the Religious Freedom Restoration Act of 1993.[177] The Act reinstates the compelling state interest test

169. *Id.* at 879 (asserting their right to the free exercise of religion under the First Amendment and basing their claim on the decisions in *Sherbert* and *Thomas*).

170. *See id.* at 884-90.

171. *Id.* at 888-89.

172. *Id.* at 883-85; *see also* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

173. *Id.* at 885.

174. *Id.* at 881.

175. *Id.* (citing cases where the First Amendment free exercise claim was asserted in conjunction with freedom of the press, freedom of speech, or rights of parenthood claims).

176. *Id.* This Comment takes the approach that singular-protection priest-penitent statutes would regulate a communicative right. One party would not be able to practice a communicative aspect of his or her faith.

177. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb (Supp. 1994)).

This Comment argues that *Smith* does not apply to a priest-penitent privilege statute, even absent the enactment of the Religious Freedom Restoration Act, because the priest-penitent statutes are not neutral and generally applicable criminal laws.

Another factor that distinguishes the priest-penitent statutes from the *Smith* decision, and other cases where the Court upheld the challenged statute, is that the religious conduct being regulated is illegal in itself. The Court upheld statutes that prohibit drug use or the practice of polygamy because these are criminal acts, which are offensive to society. *Id.* at 878-80. The religious conduct that is regulated in the priest-penitent statutes, confidential communications made to a clergyperson, is not prohibited by law. *Smith* also may be distinguishable as an attempt to deal with a severe social problem, rather than a landmark in

developed in *Sherbert* and *Yoder*, guaranteeing "its application in all cases where free exercise of religion is substantially burdened."[178] Congress clarified that even "neutral" laws toward religion may be a burden on religion.[179] Congress found that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[180] In restoring the tests of *Sherbert* and *Yoder*, the Act sets forth a two-part test that the state must meet to justify a substantial burden upon religion.[181] First, there must be a compelling state interest in imposing the burden.[182] Furthermore, the burden on religion must be the least restrictive means of achieving that interest.[183]

C. Priest-Penitent Privilege Statutes and Free Exercise Decisions

Statutes that protect only one party to the priest-penitent relationship may violate the First Amendment right to the free exercise of religion under Supreme Court tests that evolved since the *Sherbert* decision in 1963.[184] Since the *Sherbert* decision in 1963, the Court has developed a compelling state interest test that strikes a balance between religious freedom and competing state interests.[185]

First Amendment case law. Mary Ann Glendon, *Religion & the Court: A New Beginning?*, FIRST AMENDMENT LAW HANDBOOK 407, 416 (1992-93 ed.).

178. § 2(b)(1), 107 Stat. at 1488 (citations omitted). The Act states that one of its purposes is "to restore the compelling state interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.*

179. *Id.* Congress found that "laws neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2(b)(2), 107 Stat. at 1488.

180. *Id.* § 2(a)(4), 107 Stat. at 1488.

181. *Id.* § 3, 107 Stat. at 1488-89. The Act states that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *Id.* § 3(a), 107 Stat. at 1488. Congress makes an exception to this rule if the government meets the "compelling governmental interest" and "least restrictive means" tests. *Id.* § 3(b), 107 Stat. at 1489.

182. *Id.* § 3(b)(1), 107 Stat. at 1489.

183. *Id.* § 3(b)(2), 107 Stat. at 1489.

184. *See supra* notes 143-64 and accompanying text (outlining the Supreme Court's analysis of a free exercise claim in *Yoder* and *Thomas*, two important decisions evolving from *Sherbert*); *see also* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 888-89 (1990) (holding that it would not apply the *Sherbert* test to establish exemption from a generally applicable criminal law).

185. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. at 1488. Congress, in response to the *Smith* decision in 1990 eliminating the compelling state interest test, passed the Religious Freedom Restoration Act of 1993 to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* § 2(b)(1), 107 Stat. at 1488 (citations omitted); *see also* Douglas Laycock, *Free Exercise and*

1. Violation of the Sherbert *Three-Prong Test*

The priest-only and penitent-only statutes violate the Free Exercise Clause under the *Sherbert* three-prong test.[186] Under the first prong of the *Sherbert* test, the Court has found a burden upon religion when the law effectively pressures an individual to forgo a religious practice.[187] The same result occurs under the singular-protection priest-penitent statutes, as religious beliefs and practices are burdened when a priest or penitent is required to choose between criminal prosecution and forsaking a religious duty.[188]

Under the second *Sherbert* prong, although the state may validly argue that it has a compelling interest in ascertaining evidence in a criminal trial, that interest is contradicted by granting a privilege to only half of a confidential relationship.[189] Although the state's interest in disclosing the communication is for the ascertainment of the truth at trial, evidence of a confidential communication may not be reliable.[190] If a confessor knows that a statement made to a priest could be used at trial, he or she might intentionally make inaccurate or misleading statements.[191]

Finally, under the third *Sherbert* factor, the Court determines whether viable alternatives exist to satisfy the state's interest.[192] In *Sherbert*, the Court rejected the unemployment compensation statute because it found that the state's secular objective could be achieved through means other

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the Religious Freedom Restoration Act, 62 FORDHAM L. REV. 883, 895 (1994). This Comment discusses how the Religious Freedom Restoration Act creates a statutory right to the free exercise of religion. *Id.* The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb (Supp. 1994)), allows people, even religious minorities, "to practice their faith and not merely to think about it or believe in it." Laycock, *supra*, at 895.

186. *See supra* notes 131-33 and accompanying text (explaining the *Sherbert* three prong test).

187. *See supra* note 134-36 and accompanying text (explaining how the Court found an unconstitutional burden in *Sherbert*).

188. *See* Lupu, *supra* note 124, at 932-41 (discussing generally how a burden is defined).

189. New Jersey v. Szemple, 622 A.2d 248, 249-56 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 640 A.2d 817 (N.J. 1994).

190. *See Szemple*, 622 A.2d at 254 n.5 (noting that "[d]ue to the belief in the usual truthfulness of facts told during the confession, the testimony of a clergyman concerning the confession might be given too much weight in reaching a finding").

191. *Id.* (noting that "[s]tatements in confessions could be inaccurate, and could be intended to mislead, if an unscrupulous confessant thought the statements could be used later in a trial").

192. Sherbert v. Verner, 374 U.S. 398, 407 (1963) (explaining that it is "incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights" (footnote omitted)); *see supra* note 142 and accompanying text (discussing that under *Sherbert*, the state is required to demonstrate that no alternatives to the infringement upon the free exercise of religion exist).

than the enforcement of the challenged law.[193] In the priest-penitent context, there are many other forms of investigation that the state may use to ascertain evidence in a criminal trial as alternatives to requiring a priest to violate the discipline of his church.[194]

Singular-protection statutes also may fail under the expanded *Sherbert* test from *Yoder*.[195] *Yoder* adds an inquiry into the sincerity of the burdened religious belief.[196] Sincerity must be proved before the court examines an alleged First Amendment violation.[197] As in *Yoder*, the priest or penitent challenging the privilege statute must show that the religiously based refusal to testify and disclose the confidential communication is more than a matter of personal preference, but is one of religious conviction.[198] In most of these situations, the sincerity of the religiously based refusal to testify can be proven by examining the written doctrine of the church or by hearing oral testimony of a priest of the faith in question.[199] Once the sincerity has been proved, the court will then proceed with the *Sherbert* analysis.[200]

2. *Violation of the Least Restrictive Means Test*

The constitutionality of singular-protection statutes also is questionable under the least restrictive means standard of review set out in *Thomas*.[201] Under this analysis, the party claiming the constitutional violation must

193. *Sherbert*, 374 U.S. at 407.

194. The state should use other investigative techniques, such as trying to locate and interview other competent witnesses. The Supreme Court has considered conflicts between investigatory needs and First Amendment freedoms. *See* De Gregory v. Attorney Gen. of New Hampshire, 383 U.S. 825, 830 (1966) (holding that the State's interest in protecting itself against subversion was too remote to override First Amendment guarantees); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963) (stating that the State must demonstrate an overriding and compelling interest to justify a substantial abridgement of the First Amendment right to the free association).

195. *See supra* notes 143-50 (explaining the test developed in *Yoder*).

196. *See supra* note 143 and accompanying text (explaining how *Yoder* expanded the *Sherbert* test by adding an inquiry into the sincerity of the religious belief).

197. *See supra* note 145 and accompanying text (discussing the determination of sincere religious beliefs as a prerequisite to a free exercise claim).

198. *See supra* note 143 and accompanying text (discussing the requirement that the challenged state action burden a religious belief, not merely a personal or philosophical belief).

199. *See infra* notes 237-40 and accompanying text (discussing the use of written doctrine or oral testimony to prove that confidential communications are sincere beliefs of particular religions).

200. *See* Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972) (deciding to determine whether the law burdened the free exercise of religion, examining the state's interests, and deciding whether any alternatives existed).

201. *See supra* note 152 and accompanying text (explaining when a state is justified in infringing upon an individual's free exercise of religion).

prove that his or her beliefs are religiously and sincerely held.[202] Written or oral testimony may be used to demonstrate that his or her sincerely held religious belief or practice dictates the nondisclosure of the communication at issue.[203] If the priest or penitent makes such a showing, it is likely that he or she also will be able to establish the existence of a burden on the free exercise of religion by proving that he or she has been forced to choose between being criminally prosecuted for not testifying or forsaking a religious belief by testifying.[204]

After the priest or penitent meets these two requirements, the burden shifts to the state to demonstrate a compelling interest, justifying the burden imposed upon religious communications between priest and penitent.[205] This can be done by presenting evidence at trial.[206] The state must further demonstrate, however, that requiring the unprotected priest or penitent to testify is the least restrictive means of achieving the state interest.[207] This final prong will be difficult for the state to prove because it must show that it has exhausted all other means of evidence gathering and that requiring the priest or penitent to testify in violation of his or her First Amendment rights is the least restrictive means of ascertaining necessary information.[208]

IV. A DUAL-PROTECTION PRIEST-PENITENT STATUTE: A MODEL FOR THE STATE LEGISLATURES

Recognition of the existence of a priest-penitent privilege is not disputed. The historical roots of the privilege in both a religious[209] and a

202. *See supra* note 161 and accompanying text (articulating the least restrictive means test developed in *Thomas*).

203. *See infra* notes 237-40 (discussing how a priest or penitent can demonstrate that nondisclosure of a communication is a sincerely held religious belief or practice).

204. Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (stating that a burden exists when the state puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs").

205. *See supra* note 157 (discussing how Congress reinstated the compelling state interest test in the Religious Freedom Restoration Act of 1993).

206. *See, e.g.*, *In re* Verplank, 329 F. Supp. 433, 437-38 (C.D. Cal. 1971) (holding that the government interest in ascertaining evidence does not override the defendant's First Amendment rights because the government failed to show a compelling need for the information).

207. *See supra* note 181 and accompanying text (explaining how a state may justify an infringement upon an individual's First Amendment right to the free exercise of religion).

208. *Thomas*, 450 U.S. at 718 (explaining that " '[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion' " (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (alteration in original)).

209. *See supra* notes 22-26 and accompanying text (explaining that the confidentiality of the priest-penitent relationship is deeply rooted in Canon Law).

legal[210] context clearly indicate that society accepts that certain confidential relationships should be maintained.[211] The controversy, however, involves the validity of the fifty-one statutes that have been enacted.[212] Judges rely exclusively on state statutes when deciding priest-penitent privilege issues, and the consequences of their decisions extend beyond the question of admissibility of testimony at trial to the implication of First Amendment rights.[213] A court must balance the accused's rights to a confidential relationship with his or her clergymen against the state's interest in a criminal trial.[214] State legislatures should amend these statutes to guide trial judges in deciding priest-penitent issues while, more importantly, complying with First Amendment precepts.[215]

One improvement that states may consider is the adoption of a dual-protection statute that would grant the privilege to both the priest and the penitent. Dual-protection statutes have been criticized, however, on the premise that their excessive breadth will result in a per se rule of privilege for all communications made between a priest and penitent.[216] Yet legislatures have imposed limitations upon the scope of the statutes in an effort to narrow the privilege ensuring that not every communication is privileged.[217] These statutes define which types of priests may be included within the privilege, the type of communication protected, and the context within which the communication must be made for the court to uphold a privilege.[218] An ideal statute grants the privilege to both the

210. *See supra* notes 28-34 and accompanying text (discussing the early recognition of a priest-penitent privilege by the federal courts).

211. The fact that all 50 states and the District of Columbia have enacted statutes recognizing the privilege reflects this notion. *See* New Jersey v. Szemple, 622 A.2d 248 (N.J. Super. Ct. App. Div. 1993) (reviewing and comparing all 51 statutes), *aff'd*, 640 A.2d 817 (N.J. 1994); *supra* notes 6, 9, 12 (listing the 51 priest-penitent statutes).

212. *See supra* notes 184-208 and accompanying text (discussing the First Amendment issues that arise out of the priest-penitent statutes).

213. *See supra* notes 124-76 and accompanying text (discussing Supreme Court free exercise of religion decisions that could have implications on priest-penitent privilege issues).

214. *See supra* note 194 (discussing Supreme Court cases that balance the state's right to ascertain evidence at trial against the defendant's First Amendment rights).

215. *See infra* notes 247-68 and accompanying text (describing an ideal priest-penitent statute that guides trial judges in deciding priest-penitent issues as well as protects the individual's right to the free exercise of religion).

216. *See* New Jersey v. Szemple, 622 A.2d 248, 248, 249-50 (N.J. Super. Ct. App. Div. 1993) (noting that the negative effects of privileges as " 'inhibitive; rather than facilitating the illumination of truth, they shut out the light' " (quoting New Jersey v. Schreiber, 585 A.2d 945, 945 (N.J. 1991)), *aff'd*, 640 A.2d 817 (N.J. 1994).

217. *See supra* notes 6, 9, 12. Many of the statutes are narrowed by requiring the priest and the communication to fit within the specific definitions.

218. *See, e.g.*, ALA. CODE § 12-21-166 (1986 & Supp. 1990); COLO. REV. STAT. § 13-90-107(c) (1987 & Supp. 1989); GA. CODE ANN. § 38-419.1 (Harrison 1981 & Supp. 1989);

priest and the penitent to preserve each individual's First Amendment right to the free exercise of religion.[219] The definition of a priest must be sufficiently broad to avoid bias toward one religion over another.[220] Moreover, the ideal statute should be narrowly drawn so that the type of communication protected is one made to the priest within the course of the discipline of his or her church.[221] A sufficiently narrow limitation on the scope of the protected communication would prevent development of a per se rule of privilege. This ideal statutory structure would establish a proper balance between the church's interest in maintaining confidential communications and the state's interest in presenting relevant evidence in criminal proceedings.

A. Appropriate Restrictions

Statutes in states that grant the right to assert the privilege to both the priest and the penitent require that the priest asserting the privilege be covered under the particular statutory definition of a "priest."[222] Thus, these statutes must be sufficiently broad to include all religious figures to avoid Establishment Clause violations.[223]

N.J. STAT. ANN. § 2A:84A-23 (West 1976); OHIO REV. CODE ANN. § 2317.02(c) (Anderson 1991); PA. CONS. STAT. ANN. § 5943 (1982 & Supp. 1991); TENN. CODE ANN. § 24-1-206 (1980 & Supp. 1990).

219. *See* ALA. CODE § 12-21-166; OHIO REV. CODE ANN. § 2317.02(c).

220. *See infra* note 222 and accompanying text (discussing the proper definition of a priest within an ideal statute).

221. *See infra* notes 222-45 (discussing the appropriate restrictions on the types of communications protected by the priest-penitent statutes).

222. *See* Michael C. Smith, *The Pastor on the Witness Stand: Toward A Religious Privilege in the Courts*, 29 CATH. LAW., Winter 1984, at 1, 7-10 (analyzing judicial interpretations of the word "clergy" in state statutes); *see also In re* Murtha, 279 A.2d 889, 893 (N.J. Super. Ct. App. Div. 1971). Under the New Jersey statute, for instance, the Superior Court of New Jersey held that a nun could not assert the privilege. *Id.* at 893. The court interpreted the statute to exclude a nun from qualifying as "a clergyman or minister, but any 'other person or practitioner authorized to perform similar functions,' " stating that competency of a witness should be the rule and incompetency the exception. *Id.* at 892 (quoting N.J. R. EVID. 29). The court strictly construed the statute in determining whether a particular religious figure qualified to assert the privilege. *Id.*

223. If a court recognizes a priest-penitent privilege in one case and refuses it in another, there may be a violation of the Establishment Clause. *See* U.S. CONST. amend. I, cl. 2. The goal of the Establishment Clause is to ensure that the government maintains "benevolent neutrality" with respect to religion. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970). Because the Establishment Clause prohibits church-state involvement, justiciable issues generally arise when there is government sponsorship of religion, government financial support of religion, active government involvement in religious activities, or official preference of one denomination over another. *Id.* at 667-72; Larson v. Valente, 456 U.S. 228, 246 (1982) (stating that any law granting a denominational preference is subject to strict scrutiny). Courts have applied several tests to distinguish government involvement with religion that violates the church-state separation principle from government involve-

These statutes also require that the communication fit within statutory definitions, before upholding a privilege.[224] Generally, these definitions require that the communication be confidential.[225] For example, in *Lucy v. Alabama*,[226] the Alabama Court of Criminal Appeals refused to recognize a per se rule of privilege because the communications were not confidential.[227] Similarly, in *Bottoson v. Florida*,[228] the Supreme Court of Florida refused to recognize a per se rule of privilege where the communication was not "confidential" under the conditions of the Florida statute.[229] In both *Lucy* and *Bottoson*, the courts strictly construed the statutes and did not provide priest-penitent communications with an automatic privilege.[230]

Finally, courts must examine the circumstances surrounding each case to determine whether the communication was religiously motivated and whether it was made to the priest in his or her professional character within the course of discipline of the church.[231] Such communications are not privileged merely because they are directed toward a religious figure; rather they must be religiously motivated.[232] State courts frequently deny the privilege when the communication is made to a religious person acting outside his role as a religious person.[233] Furthermore, to be privi-

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ment that does not. *See id.* at 250-55; Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (noting that "[f]irst, 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' " (citation omitted)).

224. *See* Reese, *supra* note 4, at 67-73 (explaining legislative restrictions on the type of communication that is protected by a statutory privilege).

225. *Id.* at 68-69.

226. 443 So. 2d 1335 (Ala. Crim. App. 1983).

227. *See supra* notes 74-78 and accompanying text (discussing the facts of *Lucy* that led the court to decide that the communications were not privileged).

228. 443 So. 2d 962 (Fla. 1983), *cert. denied*, 469 U.S. 873 (1984).

229. *Id.* at 965. In *Bottoson*, the defendant, who was charged with first degree murder, requested to meet with a minister to help him negotiate a plea. *Id.* The defendant handed the minister two written statements: a confession and a request for leniency. *Id.* The court held that because the defendant intended for these statements to be communicated to the State Attorney's Office, which was a third party, the communications were neither confidential nor privileged under the statute. *Id.*

230. *Id.*; *Lucy*, 443 So. 2d at 1341.

231. *See supra* notes 71-101 (discussing the types of communication that are covered by the priest-penitent privilege).

232. *See* Pennsylvania v. Patterson, 572 A.2d 1258, 1265 (Pa. Super. Ct. 1990) (denying the privilege because "the circumstances in which the statements were made were such that they were not religious, in that nothing spiritual or in the nature of forgiveness ever was discussed"), *appeal denied*, 592 A.2d 1299 (1991).

233. *E.g.*, Bonds v. Arkansas, 837 S.W.2d 881, 884 (Ark. 1992). The Supreme Court of Arkansas held that the privilege did not extend to a communication when a minister telephoned an individual as an employer, not as a minister. *Id.* at 884. The court refused to recognize a per se rule of privilege when the communication was not made to the minister

leged communication must be made to the priest in his or her "professional capacity."[234]

Restricting the privilege to communications made to a priest who is acting within the scope of the discipline of the church further limits a court's discretion in applying the privilege.[235] In determining whether the privilege is justified, the court will compare the facts and circumstances surrounding the communications to the written and unwritten disciplines of the church[236] to find whether communications were religiously motivated and within the practice of the church.[237] The objectivity of this analysis is obscured, however, when the relevant denomination does not have written disciplines or established requirements for the priest and penitent.[238] In the absence of a written church discipline, courts have considered the testimony of a priest of the particular denomination with regard to the doctrines of his church.[239] Consequently, state courts re-

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acting as a spiritual adviser. *Id.*; *see also* Fahlfeder v. Pennsylvania, 470 A.2d 1130, 1132-33 (Pa. Commw. Ct. 1984). The Commonwealth Court of Pennsylvania denied a priest-penitent privilege where the defendant, who was charged with violating parole, made incriminating statements to a reverend. *Id.* These statements were not privileged because the reverend was acting as a volunteer or auxiliary supervisor to assist in rehabilitation and parole, rather than acting as a confessor or confidant. *Id.*

234. *See* ALA. CODE § 12-21-166 (1986 & Supp. 1990).

235. *See supra* notes 85-101 and accompanying text (discussing the clergyman's role as a limit on the privilege).

236. *See infra* notes 237-40 and accompanying text (discussing several religions that have either written or unwritten disciplines to which a court can look to determine if a communication was made in the course of discipline of the church).

237. A penitent speaking to a Roman Catholic priest in a confessional, for example, would qualify as a privileged communication made to a priest while in the course of discipline of the Catholic Church. Under such circumstances, both the priest and penitent are under an obligation regarding the sacrament of confession under Canon Law. 1983 CODE c.986, § 1, c.989. The priest must hear the confession and respect it with absolute secrecy, while the penitent is obliged to confess serious sins to a priest. 1983 CODE c.983, § 1. Because these requirements are codified in the canons, they clearly guide courts in determining whether the priest was acting in his professional capacity. *See* Mullen v. United States, 263 F.2d 275, 277 (D.C. Cir. 1958) (discussing how priest-penitent privilege issues are clearer where the relationship is that of a priest and a penitent and the priest is bound to silence by the discipline and laws of his church).

238. *See* Smith, *supra* note 222, at 13-14 (discussing how "[t]he presence of denominational discipline as to secrecy of confessions, or other confidential matters, may be crucial to recognition of the privilege by secular courts").

239. *See, e.g.*, Magar v. Arkansas, 826 S.W.2d 221, 222 (Ark. 1992) (hearing the testimony of a reverend that confession was not a tenet of his church); Illinois v. Diercks, 411 N.E.2d 97, 101 (Ill. App. Ct. 1980) (stating that the defendant failed to establish that disclosure of the confession "would be enjoined by the rules or practices of the Baptist Church"); Oregon v. Cox, 742 P.2d 694 (Or. Ct. App. 1987) (hearing a Mormon minister's testimony that "he had a duty under the discipline of the church not to disclose confidential communications made to him").

peatedly have denied the privilege to members of a denomination where a priest testified that confession is not a tenet of their church.[240]

Because most statutes only require the communication to be confidential and not penitential, courts also analyze whether certain confidential communications fall within the discipline of the church.[241] Courts have upheld a privilege not to testify with regard to communications made during counseling sessions when the counseling was conducted under the auspices of the church.[242]

Dual-protection statutes are further supported by society's general acceptance of protecting communications.[243] Society recognizes the human need to disclose certain communications to priests in confidence.[244] Even prior to the enactment of privilege statutes, courts generally acknowledged the need for certain confidential relationships and recognized a priest-penitent privilege based on that need.[245] Dual-protection statutes properly reflect society's desire to preserve these confidential relationships.

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240. *See, e.g.*, *Magar*, 826 S.W.2d at 222 (hearing the testimony of a reverend of the New Life Christian Fellowship that "confession is not a tenet of his church and keeping evidence of a crime confidential is within the discretion of the pastor"); *Diercks*, 411 N.E.2d at 101 (holding that "[w]hen the clergyman does not object to testifying, the burden is on the person asserting the privilege to show that disclosure is enjoined by the rules or practices of the relevant religion"); Kansas v. Andrews, 357 P.2d 739, 743 (Kan. 1960) (hearing the testimony of a Baptist minister "that there was no course of discipline in the Baptist church by which a member thereof was enjoined to confess his sins to a minister of the church"), *cert. denied*, 368 U.S. 868 (1961). The *Magar* court denied the privilege to a defendant convicted of first degree sexual abuse after confessing to a reverend at the church of the New Life Christian Fellowship. *Magar*, 826 S.W.2d at 222. The reverend testified that confession was not a tenet of his church. *Id.* He also told the court that keeping communications confidential was within the discretion of each pastor and not required by the church. *Id.* As a result, the court found that the communication had not been made within the discipline of the church. *Id.* at 222, 223.

241. *E.g.*, United States v. Gordon, 493 F. Supp. 822 (N.D.N.Y. 1980), *aff'd*, 655 F.2d 478 (2d Cir. 1981); Rivers v. Rivers, 354 S.E.2d 784, 788 (S.C. App. 1987); Masquat v. Maguire, 638 P.2d 1105 (Okla. 1981).

242. *Rivers*, 354 S.E.2d at 787-88. The Court of Appeals of South Carolina in *Rivers* affirmed the lower court's decision in applying the priest-penitent privilege to confidential communications made to a Methodist minister providing marriage counseling. *Id.* at 787-88. The court examined the functions of an ordained Methodist minister. *Id.* at 788. It found that marriage counseling was a common church practice and that it was within church tradition to keep such communications confidential. *Id.* The court, after considering the discipline of the church, was able to protect the free exercise of religion without granting a per se rule of privilege. *Id.*

243. *See supra* notes 1-3 and accompanying text (discussing society's general acceptance of affording certain relationships with special protection at law).

244. *See supra* note 106.

245. *See supra* notes 28-30 and accompanying text (discussing federal cases in which the priest-penitent privilege was recognized even in the absence of a statute).

B. Modeling the Priest-Penitent Privilege on the New Jersey and Alabama Statutes

A combination of certain provisions from the Alabama[246] and the New Jersey[247] privilege statutes will produce an excellent model for state legislatures seeking to provide trial judges with guidance in deciding priest-penitent issues in the absence of case law. This combination properly balances the state's interest in the ascertainment of evidence at trial and the individual's First Amendment right to the free exercise of religion. The Alabama statute properly grants the right to assert the privilege to both the priest and the penitent.[248] This preserves the fundamental First Amendment right to the free exercise of religion for both parties.[249] Because both the priest and the penitent independently may assert the privilege, one party will be protected even if the other party consents to the disclosure of the communication. This prevents a situation in which the penitent waives the privilege and the priest is forced to testify because he or she did not have an independent privilege.[250] As a result, the priest's right to the free exercise of religion would be preserved because he or she would not be forced to choose between violating religious doctrine through disclosure and facing criminal prosecution for refusing to testify.[251]

A dual privilege also respects the penitent's right to the free exercise of religion. Without an independent privilege granted to the penitent, he or she would have to rely on the priest to maintain confidentiality.[252] This

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246. ALA. CODE § 12-21-166(b) (1986) (granting the privilege to both the priest and the penitent by stating "either such person or the clergyman shall have the privilege, in any legal or quasi legal proceeding, to refuse to disclose and to prevent the other from disclosing anything said by either party during such communication").

247. N.J. STAT. ANN. § 2A:84A-23 (West 1976). The New Jersey statute provides, in part:

> a clergyman, minister or other person or practitioner authorized to perform similar functions, of any religion shall not be allowed or compelled to disclose a confession or other confidential communication made to him in his professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which he belongs. . . .

Id.

248. *See supra* note 13 (quoting the Alabama statute).

249. *See supra* note 215 and accompanying text (discussing how dual-protection statutes avoid violating the First Amendment).

250. *See supra* notes 113-17 and accompanying text (addressing the ways a penitent may waive the privilege).

251. *See* Lupu, *supra* note 124, at 953-60 (explaining how, in light of Supreme Court decisions, a burden is determined in free exercise cases).

252. *See supra* notes 102-17 (discussing the rationale for granting the right to assert the privilege to the penitent).

burdens the penitent's religious beliefs and practices involving confidential communications because of his or her fear of disclosure.[253]

Similarly, the New Jersey statute includes three elements designed to ensure that the statute is broad enough to protect First Amendment rights, yet narrow enough to prevent a per se rule of privilege for any communication made between a priest and a penitent.[254] First, the New Jersey statute includes a broad definition of who is considered a priest under the statute.[255] This definition is broad enough to include many religious figures because: it includes all religions rather than naming specific denominations,[256] it leaves some discretion to the trial judge to decide whether a person meets this statutory definition,[257] and, more importantly, it does not favor one denomination over another.[258]

Second, the New Jersey legislature properly included parameters of the types of communications that would be covered by the privilege,[259] stating that "a confession or other confidential communication" is protected.[260] This definition is appropriately broader than some statutes that apply the privilege strictly to confessions. It protects religions that do not participate in confession, but recognizes other confidential communications as part of the religious practice.[261] The statute also is sufficiently narrow, however, in that it gives the trial court some discretion in deciding whether a communication is confidential.[262] As a result, allowing courts to consider the circumstances of each case in deciding whether the communication is confidential will prevent the development of a per se

253. *See* Reese, *supra* note 4, at 81. Professor Reese asserts if the penitent is unable to confide in his pastor without the fear of disclosure, "the work of the church would be greatly hampered and a purely secular society would be well on its way." *Id.*

254. N.J. STAT. ANN. § 2A:84A-23 (West 1976).

255. *Id.* The statute applies to "a clergyman, minister or other person or practitioner authorized to perform similar functions, of any religion." *Id.*

256. N.J. STAT. ANN. § 2A:84A-23; *see supra* note 199 and accompanying text (discussing the New Jersey statute's broad definition of the religious figure).

257. *See supra* note 253.

258. N.J. STAT. ANN. § 2A:84A-23; *see, e.g.*, Larson v. Valente, 456 U.S. 228 (1982) (emphasizing that the Establishment Clause prohibits any law that grants a denominational preference); *see also supra* note 200 (discussing the possible Establishment Clause issues).

259. N.J. STAT. ANN. § 2A:84A-23 (protecting "a confession or other confidential communication").

260. *Id.*

261. *See supra* notes 74-78 (discussing cases in which courts recognized a privilege for a non-penitential confidential communication).

262. N.J. STAT. ANN. § 2A:84A-23; *see supra* note 77 (giving examples of some state statutes that define the privileged communication as "confidential," rather than "penitential").

rule of privilege for all communications between a priest and a penitent.[263]

Finally, New Jersey's statute defines the context within which the confession or confidential communication to the covered religious person must be made.[264] The statute requires that it be made to a priest "in his professional character, or as a spiritual adviser in the course of discipline or practice of the religious body."[265] This definition serves three purposes. First, it narrows the privilege to fit within the constraints of the First Amendment by protecting only activity within the scope of church discipline.[266] Second, it precludes the development of a per se rule of privilege by requiring the communication to be within certain specifications.[267] Finally, it guides the court in making its decision by allowing it to examine specifically the beliefs and practices of the particular religion.[268] The court can review the written doctrines and unwritten practices of the specific denomination to determine whether the communication is covered by the statute.

A combination of the Alabama and New Jersey privilege statutes presents an excellent model for an ideal priest-penitent statute. The Alabama statute complies with the First Amendment by granting the privilege to both the priest and the penitent, while the New Jersey statute includes three elements to guide trial judges in making their decisions, thus preventing development of a per se rule of privilege.

V. Conclusion

The most effective priest-penitent statute will grant the right to assert a testimonial privilege to both the priest and the penitent to avoid violations of the First Amendment right to the free exercise of religion. The definition of a priest should be broad enough to grant judges the discretion to determine who will be protected without favoring one religion

263. *See supra* note 83 and accompanying text (discussing cases in which the court denied a privilege because the communication was not found to be confidential).

264. N.J. Stat. Ann. § 2A:84A-23.

265. *Id.*

266. *See supra* notes 231-36 (discussing how restricting the circumstances within which the communication must be made protects the individual's First Amendment right to the free exercise of religion by allowing the court to consider an individual's religious obligations before ruling on whether an individual can be compelled to testify).

267. *See supra* notes 231-40 (discussing how limiting privileged communications to those made to a priest in his professional character and in the course of discipline of the church prevents the development of a per se rule of privilege for all communications made to a religious figure).

268. *See supra* notes 235-40 (explaining how judges can look to the written and unwritten beliefs and practices of a particular church in determining whether a communication should be privileged).

over another. Furthermore, covered communications should be limited to those that are within the scope of the church discipline to preclude the development of a per se rule of privilege. A properly drafted statute will provide the trial judge with a formula for properly balancing the state's interest in ascertaining evidence at a criminal trial with the church's interest in maintaining the confidential relationships necessary to the free exercise of religion.

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