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THE HISTORY AND CURRENT STATUS OF THE CLERGY-PENITENT PRIVILEGE

Jacob M. Yellin*

I. INTRODUCTION

The issue of whether a minister has the right to refuse to testify under oath relative to communication with a client is not a recent one. With the first recorded case having taken place under James I, it is clear that the right of a minister to refuse to testify was first questioned many centuries ago. In the United States, a New York court first dealt with this issue in 1813.

Despite the long history of the minister's privilege and its early treatment in the United States, relatively few cases have

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1. For the purposes of this paper the term “minister's privilege,” “clergyman's privilege,” or simply “the privilege” all refer to the right of a clergyman of any denomination to remain silent and refuse testimony. No denominational differentiation is meant by the term “minister,” unless used in combination with “priest,” “rabbi,” or unless specifically stated. Otherwise “minister” is here used as a generic term meaning member of the clergy of any faith or religious community. Priest is meant to indicate, unless otherwise stated, an ordained clergyman of the Catholic faith. Similarly “rabbi” is used, unless otherwise stated, as a term meaning an ordained clergyman of the Jewish faith. The privilege of a clergyman not to testify about privileged communications has been known by different names throughout its history. The privilege has been called “priest-penitent,” “confessor,” “clergyman’s,” “minister’s,” etc.

Also, the use of the masculine gender (i.e., clergyman) is not meant to indicate reference to only a male. There are, of course, many female members of the clergy in various denominations. Rather the use of the masculine gender is used for convenience and ease of syntax, especially since all the privilege statutes in the United States (with the exception of Kansas) use that gender. Statements, however, are meant to apply to female members of the clergy as well.

2. Client and penitent will be used interchangeably in this paper.

3. Trial of Henry Garnet, 2 Howell's State Trials 218 (1606).

4. People v. Phillips, N.Y. Ct. Gen. Sess. (1813). (This case was not officially reported, but an “editor's report” of the case is abstracted in 1 W. L.J. 109 (1843), quoted in Privileged Communications to Clergymen, 1 CATH. LAW. 198 (1955). [hereinafter cited as Privileged Communications]).

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considered it. Thus, for example, a review of the American, Decennial, and General Digests from 1658 through 1980 reveals that there exist approximately seventy reported cases on the privilege. Compare that figure to the approximately 122 reported cases in California alone through 1963 on the attorney-client privilege, and it is clear that the minister's privilege has not been the subject of extensive appellate litigation.

This article will trace the history of the minister's privilege through the common law and in the United States. It will then consider the development of this privilege in the United States during the nineteenth and twentieth centuries; the policy of the privilege; and the statutory status of the privilege in the various states. The limits of the clergyman's right to refuse testimony regarding private communications, as well as the varied and specific requirements for the privilege to be invoked in the various jurisdictions, will then be considered.

Finally, various factors will be analyzed among the different statutory formulations for the clergy privilege, and a recommended model statute will be proposed. This article will not consider the constitutionality of the minister's privilege although the constitutional implications of various requirements may be generally discussed. While the entire issue of the constitutionality of the privilege is an interesting and absorbing subject, it is not within the scope of this article.

II. THE HISTORY OF THE MINISTER'S PRIVILEGE BEFORE THE REFORMATION

In considering the common law history of the minister's privilege, a distinction must be made between the period before the Protestant Reformation and the period after it.

5. 50 Am. Dig. Witnesses § 777 (Century ed. 1904); 20 Am. Dig. Witnesses § 215 (Decennial ed. 1910); 23 Am. Dig. Witnesses § 215 (2d Decennial ed. 1922); 28 Third Decennial Dig. Witnesses § 215 (1938); Fifth Decennial Dig. Witnesses § 215 (1949); Sixth Decennial Dig. Witnesses § 215 (1958); Seventh Decennial Dig. Witnesses § 215 (1968); Eighth Decennial Dig. Witnesses § 215 (1978); 1 West's Gen. Dig. Witnesses § 215 (Fifth Ser. 1977); 3 id. at § 215; 4 id. at § 215; 9 id. at § 215; 10 id. at § 215; 11 id. at § 215; 17 id. at § 215 (Fifth Ser. 1980); 18 id. at § 215; 23 id. at § 215; 26 id. at § 215 (Fifth Ser. 1981).
The privilege as it developed before the Reformation will be first considered.

The roots of the minister's privilege can be traced to the dictates of the early Christian Church which required that parishioners regularly confess their misdeeds to a priest.8 Historical records accurately demonstrate that the courts of England were greatly influenced by common law and were staffed by bishops and clerics, so that there is little doubt of the congruence of early common law and church law.9

Early legal records in Anglo-Saxon England prior to the Norman conquest do not specifically delineate the privilege of a priest to keep matters of the confessional confidential. Yet these records do clearly recognize the merit of confession. The Anglo-Saxon laws of Edward the Elder (921-24), son of Alfred the Great, state: "And if a man guilty of death . . . desires confession let it never be denied him."10 The secular laws of King Canute (1017-35) repeat the identical provision.11 King Ethelied, who preceded King Canute, proclaimed a similar provision in his laws: "And let every Christian man do as is needful to him: let him strictly keep his Christianity and accustom himself frequently to [confess]: and fearlessly confess his sins."12 Thus, the desirability of confession was recognized

8. The early Christian church cells were comprised of small groups of people who met regularly—often secretly. The order of worship was, first of all, self-disclosure and confession of sin, called exomologesis. This was followed by appropriate announcement of penance, pleas for forgiveness, and plans for making restitution. A final period of friendly fellowship (koinonia) closed the meeting. This general formula continued until the Council of Nicaea, A.D. 325, when Constantine took over the church for all Roman citizens. To make it acceptable, however, he replaced the requirement of open personal disclosure with private confession to a priest. Private confession to a priest at least once a year was . . . obligatory in the thirteenth century. Luther dispensed with closed confession for Protestants; the Catholics continued it.


11. Id.

12. Id. at 36.
very early in English history. While there is no provision dictating that the confession and its secrecy be honored by the court, it is reasonable to conclude that secular law so held, given the close relationship between canon and common law.\textsuperscript{13}

After the Norman Conquest in 1066, the English councils continued to express their approval of the inviolability of confessions. The following passage is from the laws of Henry I (1100-35):

Priests should guard that they not reveal to acquaintances or strangers what has been confessed to them by those who come for confession; for if they do it, even in good faith, they will be sentenced to live all the days of their life as an honorless pilgrim.\textsuperscript{14}

Canons which recognize the secrecy of the confession are also found in the provincial canons of Oxford held in 1222 and in the twenty-first canon of the Lateran Council, declared in 1215.\textsuperscript{18} Since, as stated previously, the common law reflected the laws of the Church it is certain that the secrecy of confession was recognized by English law after the Norman Conquest.

[But this] recognition [of the secrecy of the confession] would not have rested on any principle of immunity from disclosure of confidential communications made to clergymen. It would have rested on the fact that confession was a sacrament, that the doctrine of the Church laid it down

\textsuperscript{13} As one author notes:
The very close connexion [sic] between the religion of the Anglo-Saxons and their laws, many of which are purely ordinances of religious observance enacted by the State, the repeated recognition of the supreme jurisdiction of the pope, and the various instances of the application in the Church of England of the laws of the Church in general lead conclusively to the opinion that the ecclesiastical law of the secrecy of confession was recognized by the law of the land in Anglo-Saxon England.
Nolan, supra note 9, at 649.

\textsuperscript{14} 2 W. Best, \textit{The Principles of the Law of Evidence} 991 (2d ed. 1882). [hereinafter cited as \textit{Best on Evidence}]. Quoted in W. Tiemann, supra note 10, at 36. Similarly, in 1220, the Council of Durham declared:

A priest shall not reveal a confession—let none dare from anger or hatred or fear of the Church or of death, in any way to reveal confessions, by sign or word, general or special, as [for instance], by saying, "I know what manner of men ye are," under peril of his Order and Benefice, and if he shall be convicted thereof he shall be degraded without mercy.
Nolan, supra note 9, at 650.

\textsuperscript{15} Nolan, supra note 9, at 649, \textit{construed} in Tiemann, supra note 10, at 37.
as a necessity, that both king and people practiced it in some degree of faithfulness and that the practice was wholly a matter of spiritual discipline on which the church had declared the law of absolute secrecy.\footnote{16} An Irish court decision in 1945\footnote{17} reviewed the history of the minister's privilege and concluded: "I have no doubt the seal of the confessional was respected in the courts of England before the Reformation . . . and its recognition before the Norman Conquest seems to be proved."\footnote{18}

There also exists an old statute which involved the minister's privilege. The \textit{Articuli Cleri}\footnote{19} is the first known statute to deal with this privilege, and the only recorded statute of the English Parliament on this topic. It was enacted in 1315 during the reign of Edward II. Part of the statute reads: "It also pleases our Lord the King that felons and approvers be able to confess their misdeeds to the priest . . . ."\footnote{20} This statute is occasionally referred to by contemporary commentators as proof that English parliamentary law recognized the inviolability of the Confessional. The true meaning of the statute, however, is uncertain and furnishes no concrete evidence on the privilege itself.\footnote{21}

There is, however, an English case, decided before the Reformation, which seems to indicate that the minister's privilege did not exist in that period. In \textit{Garnet's Case},\footnote{22} Father Garnet had been the spiritual adviser to Guy Fawkes and others allegedly involved in the infamous gunpowder plot to assassinate James I. The plot failed and Father Garnet, called to testify regarding his knowledge of the plot, refused to give any information on any conversations which he may have had.
with the conspirators. Father Garnet was tried and com-
mmanded by the court to disclose any knowledge of the matter
which he possessed. Garnet refused, denying even to state
whether the knowledge of the matter which he possessed had
been garnered through the confession or outside of it. He was
tried and found guilty by the jury, after only fifteen minutes
deliberation, of "having knowledge of a treasonous plot with-
out disclosing it, though not participating in the plot or ap-
proving it." Father Garnet is now considered by the church
to be a martyr of the seal of the confession. This would then
seem to suggest that the English court did not recognize the
clergy privilege.

The value of Garnet's Case in demonstrating that there
was no pre-Reformation privilege is open to question however.
Wigmore quotes a different version of Garnet's Case:

[T]he [E]arl of Nottingham asked him if one confessed
this day to him, that to-morrow [sic] morning if he must
conceal it. Whereupon Garnet answered that he must
conceal it, but the questioners did not attempt to compel
a disclosure of the confessional's secrets.

In addition, Sir Edward Coke maintained that the privilege
did exist in pre-Reformation England, but did not apply in
the case of treason. It is therefore possible that, even if Gar-
net was held in contempt for failing to reveal confidential in-
formation, this was so only because the offense involved was
indeed treason. It also follows then that the privilege could
well have existed in instances when treason was not involved.
It is therefore difficult to conclude much about the minister's
privilege from Garnet's Case despite all the attention afforded
it by legal writers. What remains, however, is a virtual consen-
sus of opinion that the clergy privilege did exist in England

23. Probably for misprision of treason, although it is unclear from the case
itself.
24. Hogan, supra note 9, at 11-12 (citing 1 & 2 Phil. & M., ch. 10, § 8 (1554); 4
W. BLACKSTONE, COMMENTARIES *119.
25. Hogan, supra note 9, at 11 (citing Pollen, Garnet, 6 CATH. ENCYCL. 386
(1913)).
26. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2394, at 869 n.1 (McNaughten rev.
1961).
27. "And so it was resolved in the case of Henry Garnet . . . superior of the
Jesuits in England, who would have shadowed his treason under the privilege of con-
fession . . . ." 2 E. COKE, INSTITUTES *629, quoted in 2 BEST ON EVIDENCE supra note
14, § 584 (J. Morgan ed. 1876); also quoted in Hogan, supra note 9, at 9 n.27.
before the Reformation.

III. THE PRIVILEGE IN ENGLAND AFTER THE REFORMATION

While the privilege may have existed in the common law of England before the Reformation, the virtually unanimous opinion is that the privilege ceased to exist after the Reformation. To understand the reason for this shift it is necessary to analyze the Anglican Church’s position on confession, and the religious transformation in England in the fifteenth century.

During the fifteenth century a shift in England occurred between the predominant Roman Catholic faith and the still nascent but fast growing Anglican Church. Initially, the Anglican Church recognized, at least by implication, the seal of confession. The Communion Office of the Anglican Church contained these words:

And if there be any of you whose conscience is troubled or grieved in anything, lacking comfort or counsel, let him come to me, or to some other discreet and learned priest, taught in the law of God, and confess and open his grief secretly, that he may receive such ghostly counsel, advice and comfort, that his conscience may be relieved, and that of us (as of the ministers of God and of the Church) he may receive comfort and absolution, to the satisfaction of his mind, and avoiding of all scruple or doubtfulness.

Thus, confession still existed in the Anglican Church but was now voluntary and not compulsory. If the penitent chose to make confession, however, he was still assured that such confession would be protected by the minister’s privilege.

30. W. Tiemann, supra note 10, at 43.
31. Id. Best wrote:

It follows, then, that not only was there nothing in the change which took place at the Reformation to alter the case as to the privilege attaching to confession, but that there was, on the contrary, an express recognition of it by statute. For of course the recognition of confession implies, in the absence of anything to the contrary, the recognition of its secrecy, because such was the common law rule; and if it were otherwise,
The importance of the confession in the Anglican Church gradually began to diminish. In canon 113 of the Anglican canons of 1603, the sacrament of confession is afforded inviolability, but an exception was made. Where the crime was so serious that even knowledge of it by another person made that other person subject to capital punishment if he did not reveal it, the privilege ceased.\textsuperscript{32}

As the Anglican Church rose in prominence and became, after the Reformation, the pre-eminent church in England, the rite of confession became diminished in importance. Auricular confessions, as has been previously stated, became voluntary and less frequent.\textsuperscript{33} It is therefore concluded by some writers that the Reformation and the commensurate rise of Protestantism in England, resulted in the loss of the minister's privilege.\textsuperscript{34}

Others believe, however, that the privilege continued to exist for some years after the Reformation. Wigmore, for example, concludes that only after the restoration of the monarchy in 1660, was the privilege no longer recognized.\textsuperscript{35} Black-

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175 Eng. Rep. 935 (1930) (citing 1 \textsc{Best on Evidence} supra note 14, § 596 (J. Morgan ed. 1876)), noted in W. Tiemann, supra note 10, at 44.

32. Canon 113 provides in part:

Provided always, \(\text{t}hat\) if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him: we do not in any way bind the said minister by this our Constitution, but do strictly charge and admonish him, that he do not at any time reveal and make known to any person whatsoever any crime or offense so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called in question for concealing the same) under pain of irregularity.

Nolan, supra note 9, at 655 (quoting Protestant Church of England Canon 113 (1603)) (emphasis added).

33. D. Jones, supra note 8, at 9.

34. For example, Douglas Jones states:

For Protestants one of the results of the Reformation was the elimination of the requirement for private confessions before a priest, though Protestants stress that no Christian is excused from the Biblical requirement to confess one's sins to God. As England gradually became predominantly Protestant, her converts also gradually drifted away from strong Catholic influence, and one of the major changes regarding the clergy was the loss of the priest-penitent privilege.

\textit{Id.} at 11.

35. "But since the Restoration, and for more than two centuries of English
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stone, in his classic commentary on the common law, makes no mention of the minister's privilege. What is certain is that at least after the Reformation the common law of England no longer recognized the minister's privilege. There is in fact a long line of British cases which deny the privilege. In 1693 Lord Chief Justice Holt implied that while communication with an attorney or scrivner is privileged, conversation with a parson is not. In Wilson v. Rastall J. Buller stated: "I take the distinction to be now well settled, that the privilege extends to those three enumerated cases [of counsel, solicitor, and attorney] at all times, but that it is confined to these cases only." In R. v. Hay, a priest refused to reveal the identity of a person from whom he had received a watch alleged to have been stolen. J. Hill sentenced the witness for contempt, denying the existence of any privilege. In Normanshaw v. Normanshaw, an action for divorce on the grounds of adultery, a Vicar refused to disclose the substance of an admission made to him. The court stated that each case must be judged on its merits, but "it was not to be supposed for a single moment that a clergyman had any right to withhold information from a court of law." In addition, other post-Reformation cases have denied the privilege.

Thus, there seems little doubt that a minister in post-Reformation England did not have a privilege against testifying. In present day England the law remains that a minister has no right to refuse disclosure of confidential communications: "Confessions made to a minister of religion under the seal of secrecy are not privileged from disclosure." The privi-
lege, however, has long been recognized by statute on the continent. Typical of such statutes is the Austrian one which, as amended, reads: "The following persons must not be examined as witnesses, lest their testimony be void: 1) ministers in regard to facts that were communicated to them either during confession or under the seal of secrecy." Other European countries also recognize the minister's privilege. Various countries have, however, afforded differing treatment to the privilege, so that no definite pattern can be discerned.

IV. THE DEVELOPMENT OF THE MINISTER'S PRIVILEGE IN THE U.S.

The first case in the United States which dealt with the minister's privilege was *People v. Phillips*, decided in 1813 by the New York Court of General Sessions. Phillips, charged with recovering stolen goods, testified under oath that he had made restitution of the property to his pastor. When the pastor was called to testify he refused, stating that: "All his knowledge respecting this investigation, is derived from his functions as a minister of the Roman Catholic Church, in the administration of penance, one of their seven sacraments; and

46. *Id.* at 57 n.9 (quoting Austrian C.P.P. Civ. § 151 (1873)).
48. An interesting and unusual application of the minister's privilege, which developed in medieval France, is worth noting here. While the writer is unable to determine the precise details of this privilege, called the *moniterre*, it was in essence a process of obtaining information helpful in solving crimes, while simultaneously protecting confidential sources. When a serious crime would be committed in a French village, the local priest would announce in church the nature of the crime, and solicit witnesses to the event. These witnesses, who could perhaps provide useful information to apprehend the perpetrators of the crime, would give this information to the priest in the confessional. The priest would then transmit it to the local constabulary, omitting the identity of the informer. Thus valuable information could be provided to the police without jeopardizing the source of the information and also protecting the minister's privilege. This was a unique application of the minister's privilege in that it served to facilitate disclosure of information, rather than the usual process in which disclosure is inhibited. (The *moniterre* was orally described to the writer by B. Schwartzbach, Professor of French Literature at Brooklyn College, in New York, N.Y. It is also described in Simon, *Dictionnaire des Science Ecclesiastiques* (1960), a copy of which was not available to the writer).
49. This case was not officially reported, but an "editor's report" of the case is abstracted in 1 W. L.J. 109 (1843), quoted in *Privileged Communications*, supra note 4, at 199.
that he is bound by the canons of his church, and by the oblig-
ations of his clerical office, to the most inviolable se-
crecy. . . .” The court concluded that a priest should not be
compelled to reveal that which he had heard in the admin-
istration of the sacrament of Penance.51

Interestingly, the Phillips court did not base its holding
on policy grounds, i.e., it is in the public interest to encourage
confidential communications between clergymen and client.
Rather, the court concluded that forcing a priest to violate the
secrecy of the confessional would violate the free exercise of
religion.52 The Phillips court suggested that since a Catholic
priest, rather than a clergyman of any other denomination,
was involved, forcing him to violate his sacramental confes-
sional would violate his religious liberties.53

Four years later, however, another New York court de-

50. Privileged Communications, supra note 4, at 200.
51. Id. at 201.
52. The exact words of the court illustrate its deep concern for the affect on the
free exercise of religion which denying the privilege would effect:

It is essential to the free exercise of a religion, that its ordinances
should be administered—that its ceremonies as well as its essentials
should be protected. The sacraments of a religion are its most important
elements. . . . Secrecy is of the essence of penance. The sinner will not
confess, nor will the priest receive his confession, if the veil of secrecy is
removed: To decide that the minister shall promulgate what he receives
in confession, is to declare that there shall be no penance; and this im-
portant branch of the Roman Catholic religion would be thus
annihilated.

Id. at 207.
53. Id. The Phillips Court examined the history of the privilege in England at
common law, and inter alia its status in Ireland. The court declared itself “shocked”
by the denial of the privilege to priests in England. It found that Catholic history in
Ireland was “unfortunate”, and concluded that Irish law could be of no influence on
American law, where Catholics were involved:

The Catholic has been disenfranchised of his civil rights, deprived of his
inheritance, and excluded from the common rights of man; statute has
been passed upon statute, and adjudication has been piled upon adjudica-
tion in prejudice of his religious freedom. The benign spirit of toler-
ance, and the maxims of an enlightened policy, have recently amelio-
rated his condition, and will undoubtedly, in process of time, place him
on the same footing with his Protestant brethren; but until he stands
upon the broad pedestal of equal rights, emancipated from the most un-
just thraldom we cannot but look with a jealous eye upon all decisions
which fetter him or rivet his chains.

Id. at 206. It is difficult to determine from the this discussion whether the privilege
would have applied had the clergyman been Protestant. Indeed the court appeared to
be more concerned with avoiding the persecution of Catholics than with applying the
laws of evidence.
nied the existence of the privilege. In People v. Smith, the defendant was charged with murder, and his minister was called to testify regarding "certain confessions made by the prisoner to him while confined in the prison in this village." The court distinguished Phillips by stating that there the minister was a Catholic priest bound to the rules of the Catholic church. The Smith court concluded that in the case at hand, however, the minister was Protestant and thus not bound by the seal of the confessional. It then ordered him to testify.

Partially in reaction to Smith the New York State legislature enacted the first statute in the United States dealing with the minister's privilege. The statute read: "No minister of the gospel, or priest of any denomination whatsoever, 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." This statute, al-

54. N.Y. City Hall Rec. 77 (1817). Not officially reported, but an "editor's report" of the case is quoted in Privileged Communications, supra note 4, at 209.
55. Privileged Communications, supra note 4, at 210.
56. The court stated:

By the established canons, or ordinances of that church, confessions are to be made by the members, at least once a year, to the priest, in private; . . . According to the rules and ordinances of the church, the priest is forbidden to divulge these confessions; and the witness declared that no consideration whatsoever, not even the most severe punishment, would induce him to depart from the established ordinances of the church.

Id. at 211 n.2.
57. Id. at 211. In an ironic end to this case, the minister did testify for the prosecution. The defendant was nevertheless found not guilty. The judge then admonished the defendant:

[N]otwithstanding their verdict, I consider you . . . a guilty man. Upon an ancient grudge you considered yourself justified in doing what you have done; and the jury have [sic], I fear, confirmed your false and fatal judgment. But, beware—you have not yet escaped. Believe me, your most awful trial is yet to come. You are now an old man, and your days must be few in this world, and you will shortly be compelled to appear before another court, where there is no jury but God himself—Unless. you repent, and devote your future life to humble atonement of your guilt, your condemnation . . . is certain.

Id. at 212 (emphasis added). One can only assume, since the defendant's prior "confession" resulted in testimony against him at trial, that the judge was suggesting a "private" atonement in the future. Or perhaps the judge would have preferred, based on his differentiation between Catholic and Protestant clergymen, that the defendant become wiser, and limit his future confessions to Catholic priests.

though poorly drafted, nevertheless greatly influenced the drafting of minister's privilege statutes in many states.\textsuperscript{59}

In 1875, the United States Supreme Court considered the unrelated matter of whether the government was bound to a contract for confidential services made during war time.\textsuperscript{60} The government argued that allowing the suit to be tried would result in disclosure of national secrets which would seriously damage the national security. The court then stated that public policy would forbid the maintenance of any suit, if such suit 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."\textsuperscript{61}

In dictum the Court continued: "On this principle, suits cannot be maintained which would require a disclosure of the confidence of the confessional . . . ."\textsuperscript{62} While such dictum cannot, of course, be construed as establishing a conclusive precedent, it does indicate, however, that this country's highest court looked with favor upon the minister's privilege. This recognition was being accomplished in the general absence of statute, and despite the general notion at the time that such a privilege did not exist at common law.

The privilege was not, however, recognized in all circumstances. In \textit{People v. Gates}\textsuperscript{63} it was held that statements made to a clergyman were not privileged if they were not made to him in his professional character. Similarly in \textit{Commonwealth v. Drake}\textsuperscript{64} a defendant's penitential communication made to other members of his church was held not privileged.\textsuperscript{65}

When the privilege was denied to clergymen they were often compelled to testify despite personal, moral, and religious objections. As a result, pressure began to be exerted by religious groups on the legislatures of many states to enact statutes authorizing a minister's privilege. By 1955 thirty

\textsuperscript{59.} Reese, \textit{supra} note 45, at 57.
\textsuperscript{60.} \textit{Totten v. United States}, 92 U.S. 105 (1875).
\textsuperscript{61.} \textit{Id.} at 107.
\textsuperscript{62.} \textit{Id.}
\textsuperscript{63.} 13 Wend. 311 (N.Y. Sup. Ct. 1835).
\textsuperscript{64.} 15 Mass. 161 (1818).
\textsuperscript{65.} There are only a very limited number of nineteenth century cases dealing with the privilege. Such cases that this writer has been able to identify are \textit{In re Toome's Estate}, 54 Cal. 509 (1880); \textit{State v. Brown}, 95 Iowa 381, 64 N.W. 277 (1895); \textit{Knight v. Lee}, 80 Ind. 201 (1881); \textit{Gilloley v. State}, 58 Ind. 182 (1877); \textit{Dahlev v. State}, 22 Ind. App. 383, 53 N.E. 850 (1899).
states had enacted such statutes, while Pennsylvania seemed to recognize the privilege without benefit of statute. From 1955 to 1963 fourteen more states enacted minister's privilege statutes. Today forty-six states and the District of Columbia have enacted such statutes, with Alabama and New Hampshire having enacted them in 1979, and Pennsylvania, Illinois, and Hawaii having recently repealed their statutes.

V. The Policy of the Privilege

The general legal notion is that, for the adversary process to be most effective, it is vital that the legal inquisitor have the right to obtain testimonial evidence from all sources. Thus every person possessing the capacity to understand the nature and obligation of an oath may be properly called upon to testify in all matters. Our legal system has, however, recognized


67. Privileged Communications, supra note 4, at 213 n.6 (citing In re Shaeffer's Estate, 52 Dauphin Co. Reports 45 (Pa. 1942)) (although the Shaeffer court denied the privilege, it implied that communications which were penitential in nature would be accorded the privilege).


two classes of witnesses that are excluded from the obligation to give testimony.

The first class is composed of those, who, because of tender age, or deficient mental faculties, are considered incompetent and are thus deemed not qualified to testify. The second class is composed of those who because of privilege are not permitted—or, alternatively, not required—to testify. Examples of such privileged persons are psychotherapists, attorneys, spouses and physicians. The legal system has concluded that it is improper to compel the testimony of such individuals, despite the potential hindrance to the adjudicatory process.

Privileged communication between a minister and a client, as has been previously stated, is now recognized by statute in forty-seven states. There have been various reasons proposed for conferring a privileged status on this type of communication. First, it is often stated that protecting the privacy of the conversation between minister and penitent is in the general interests of society. By encouraging people who are burdened with feelings of guilt or remorse to reveal their inner thoughts to a person of God we facilitate "socially desirable confidential relationships." It follows, therefore, that not recognizing this privilege would result in potential penitents, aware of the possible disclosure of their misdeeds, refraining from consulting clergymen for spiritual guidance. The result would then be that society as a whole would suffer by losing the benefits of spiritual confidence and counsel of

70. Reese, supra note 45, at 56.
71. See, e.g., CAL. EVID. CODE §§ 980, 1014 (West 1966); CAL. EVID. CODE §§ 954, 994, 1014 (West Supp. 1982).
72. As one commentator notes:
   It is the historic judgment of the common law, as it apparently is of European law and is generally in western society, that whatever handicapping of the adjudicatory process is caused by recognition of the privileges, it is not too great a price to pay for secrecy in certain communicative relations. . . .
73. Ponder, Will Your Pastor Tell?, LIBERTY, May-June, 1978, at 2, 3. See also the preamble to the statute conferring the minister's privilege in Mississippi: "Whereas, the emotional, mental and spiritual health of many of our citizens depends upon the free and confidential access to their clergymen or spiritual advisers; Now, therefore, [B]e it enacted by the Legislature of the State of Mississippi." (emphasis added) Miss. CODE ANN. § 13-1-22 (Supp. 1982).
the clergyman.\textsuperscript{74}

Another reason for according ministers the privilege is that we are, in fact, recognizing the inevitable, that ministers will refuse to testify, despite the potential punitive sanctions the court may impose. Members of the clergy, it is asserted, would rather risk the punitive powers of the courts than disregard basic religious doctrines, which may result in greater punishment, albeit perhaps only of the spiritual variety:

Generally ministers will not testify, regardless of what the trial judge says or does to them.

The Catholic priest, for example, would be subject to excommunication for breaking the seal of the confessional. From this viewpoint, the court's penalty is to be preferred to his church's penalty. Many Protestant denominations take an equally dim view of ministers who violate confidentiality.\textsuperscript{75}

It follows, therefore, that the courts cannot, in effect,

\textsuperscript{74} This was perhaps most eloquently expressed in People v. Phillips: [W]hen a man under the agonies of an afflicted conscience and the disquietudes of a perturbed mind, applies to a minister of the Almighty, lays bare his bosom filled with guilt, and opens his heart black with crime, and solicits from him advice and consolation, in this hour of penitence and remorse, and when this confession and disclosure may be followed by the most salutary effects upon the religious principles and future conduct of the penitent, and may open to him prospects which may bless the remnant of his life, with the soul's calm sunshine and the heart-felt joy, without interfering with the interests of society, surely the establishment of a rule throwing all these pleasure prospects into shade, and prostrating the relation between the penitent and the comforter, between the votary and the minister of religion, must be pronounced a heresy in our legal code.

Unreported case reprinted in Privileged Communications, supra note 4, at 204.

This writer found it fascinating that Reese, in his seminal article on the minister's privilege, proposes this "societal benefit" theory as a valid reason for the existence of the privilege. Yet he states:

On the other hand, it is doubtful whether the needs of the individual would be carried so far as to extend it to the well-known Negro group which call themselves "Muslims," even though they might refer to their organization as a church. Very few people would want a statute that would extend the privilege to some of the pietistic groups who have revived the pattern of early church life, in which the gathered community of believers is itself the receiver of confession and the proclaimer of forgiveness and absolution.

Reese, supra note 45, at 82 n.98. Should, in fact, a penitent approaching a "Muslim" [sic] minister be excluded from the protection of confidentiality? Or indeed, is one man's religion another's "pietistic group?" See discussion on this topic in the recommendations section infra note 231 and accompanying text.

\textsuperscript{75} Ponder, supra note 73, at 3.
compel the minister to testify, and it is thus better for all concerned to avoid requiring him to do so in the first instance.\textsuperscript{76}

Ministers also are often not called upon to testify because it is uncomfortable for a judge to attempt to compel a minister to violate a deeply felt religious belief. It is highly probable, in addition, that assessing punitive measures against a recalcitrant priest, rabbi, or minister will raise the ire of the community and bring down the wrath of public opinion on the judge. Judges may consider that the interests of the judicial system, and the public perception of justice in our society, would be best served by allowing ministers to avoid testimony.

The legislature, sensitive to public sentiment and to the judge's dilemma, will thus often enact a statute which allows the clergyman not to testify. An excellent example is provided by an unpublished case, \textit{Van Sant v. Ross.}\textsuperscript{77} In \textit{Van Sant}, a Delaware police detective sued his mother-in-law for the alienation of affection of his wife. The plaintiff subpoenaed the Rev. Percy F. Rex, an Episcopal Rector, to testify about conversations that he, the plaintiff, had had with the Rector. The plaintiff submitted an affidavit stating that he waived his right to assert any privilege,\textsuperscript{78} and requested that the Rector testify. The Rector refused, stating that the waiver would not excuse his religious requirement that confidential communications not be disclosed.\textsuperscript{79} The trial judge took the matter under

\textsuperscript{76} This theory may, however, not withstand close scrutiny when one considers that many state statutes allow the penitent to waive the privilege. A minister may thus still be compelled to testify, through the waiver of the penitent, even if the former's religious scruples would forbid such testimony. If the purpose of the privilege is to avoid compelling the minister, since potential punishment would not encourage his testimony, then he should not be compelled to testify even where waiver is made by the penitent. (In fact, however, some states do \textit{not} require a minister to testify even if the penitent waives the privilege. \textit{See}, e.g., \textit{Cal. Evid. Code} § 1034 (West 1966)). Thus perhaps the rationale that "the minister won't testify anyway" would apply in these states, while the states requiring the minister to testify in the presence of a waiver would use other justifications for the minister's privilege.

In addition, there are instances where the court's punitive sanctions have indeed "encouraged" a recalcitrant minister to testify. \textit{See}, e.g., \textit{People v. Smith}, unreported case, reprinted in \textit{Privileged Communications}, supra note 4, at 209.

\textsuperscript{77} Unpublished decision \textit{discussed in} Reese, supra note 45, at 55. (In fact many, if not most, of the cases which involve the minister's privilege never reach the appellate level) \textit{Id.}

\textsuperscript{78} At that time Delaware did not have a minister's privilege statute.

\textsuperscript{79} The Rector said:

I hope to establish a precedent. If I testify, then one precedent is estab-
advisement, reserving decision on whether to hold the Rector in contempt.

The specter of this clergyman, a "pillar of the community," being thrown in jail for upholding his cherished religious beliefs caused a great deal of controversy in Delaware. Before the judge could decide the contempt issue, the Delaware legislature enacted a minister's privilege statute. Public pressure to permit a minister to preserve the confidentiality of his conversations has in fact been the impetus for the enactment of other such statutes. In fact, the legislature may be doing nothing more than recognizing the implicit practice of trial attorneys. An attorney often will not attempt to compel testimony from a reluctant minister. An attempt to force him to testify, and certainly to attempt to invoke the court's threat of punitive sanctions, would be in contravention of the community spirit—and may in fact bring the wrath of the jury to bear upon that attorney's client.

Another argument advanced in favor of the minister's privilege is that compelling a clergyman to disclose confidential communication, where such disclosure would violate that clergyman's religious beliefs, is prohibited by the first amendment's free exercise clause. This theory has not been given great weight by legal theoreticians (in fact the opposite has been suggested—that the privilege violates the establishment clause). Despite the uncertainty of this constitutional argument, it has been widely felt that it is against the interests of a free pluralistic society, and the spirit of religious freedom, to compel a minister to violate his religious beliefs.

If we decide that the witness shall testify, we prescribe a course of conduct by which he will violate his spiritual duties, subject himself to temporal loss, and perpetrate a deed of infamy. If he commits an offense against religion;
if he is deprived of his office and of his bread, and thrown forlorn and naked upon the wide world, an object for the hand of scorn, to point its slow and moving finger at, we must consider that this cannot be done without our participation and coercion. 88

It has also been asserted that denying the privilege would greatly hamper the activities of religious groups, with deleterious effects on our society. "If the privilege were taken away and the confidential nature of penitential communication violated and disregarded, the work of the church would be greatly hampered and a purely secular society would be well on its way." 84 Thus, the minister's privilege, in effect, allows religious institutions to fulfill their mission without the damaging interference which would result if privacy—an essential element of church activity—were to be compromised.

Bentham, considered "the greatest opponent of privilege," 85 has nevertheless acknowledged that the minister's privilege deserves recognition. Wigmore, in his treatise, details four "canons" by which the appropriateness of any privileged communication should be tested. 86 In summary, these are: 1) Does the communication originate in a confidence or secrecy?; 2) Is confidentiality of communication essential to the relationship?; 3) Does the relationship deserve recognition and countenance?; and 4) Would the injury to this relationship by compulsory disclosure be greater than the benefit to justice? Wigmore concludes that based on these four factors: "[The minister's] privilege has adequate grounds for recognition." 87

In summation, then, though many courts have concluded that it did not exist at common law, forty-six states have enacted such privilege statutes. The privilege has the following policy justifications: 1) encouraging penitential communication is in society's best interest; 2) in most cases, compelling a minister to testify will still not secure his testimony; 3) public displeasure of judicial punishment of a clergyman for his maintaining deeply held religious beliefs impels the legislature to allow him to avoid testimony; and 4) society's interest in

83. Privileged Communications, supra note 4, at 203.
84. Ponder, supra note 73, at 3.
86. Id. at 878.
87. Id.
assuring the development of religious institutions would be damaged if the privacy of penitential communications were not respected. Wigmore states that this privilege meets his four basic requirements, and Bentham, an opponent of privilege in general, concedes that this privilege is warranted.

VI. THE DEFINITION OF "CLERGY" UNDER THE STATUTES

Since the minister's privilege in England ceased to exist after the Reformation, it is generally considered not to be part of the common law.\(^8\) Thus the privilege, if it exists at all in the United States, must be a creation of statute. Forty-six states and the District of Columbia currently have statutes which provide for confidentiality of communication to a clergyman.\(^8\) These statutes are not identical and often provide varying treatment of the privilege. First considered is the precise delineation of those to whom the privilege will apply. Indeed the various statutory schemes use different words or phrases to describe such a person. The different descriptions used are (note that one statute may include several different

\(^8\) See *supra* notes 26-31 and accompanying text.


Much of the information in notes 89-109 is contained in D. Jones, *supra* note 8, at 21-22. The writer has updated and modified it for inclusion in this article.
terms in its coverage):

Clergyman\textsuperscript{90}

Member of the clergy\textsuperscript{91}

Clergy of any organization or denomination usually referred to as a church\textsuperscript{92}

Clergy of a religion authorized to perform a marriage ceremony\textsuperscript{93}

Priest or Priest of the Catholic Church\textsuperscript{94}

Priest of the Greek Orthodox Catholic Faith\textsuperscript{95}

\begin{footnotesize}
\begin{itemize}
\item[91.] N.D. R. EVID. 505 (1981); OR. REV. STAT. § 44.040 (1979).
\item[92.] FLA. STAT. ANN. § 90.505 (West 1979).
\item[93.] D.C. CODE ANN. § 14-309 (1981).
\item[95.] GA. CODE ANN. § 38-419.1 (1981).
\end{itemize}
\end{footnotesize}
Minister
Minister of the Gospel
Protestant minister of the Gospel
Duly ordained minister of religion
Regular minister of religion
Ordained or licensed minister
Any Christian or Jewish minister by whatever name called
Rabbi
Christian Science Practitioner


Religious practitioner\textsuperscript{106}
Rector of the Episcopal Church\textsuperscript{106}
Other similar functionary of a religious organization\textsuperscript{107}
Other person serving in a similar capacity (to that of a clergyman)\textsuperscript{108}
Other person or practitioner authorized to perform similar functions (to those of clergy).\textsuperscript{109}

The above list is indicative of the difficulty involved in defining clergyman for the purpose of inclusion within the privilege. It is a question with which legislative bodies have struggled. The courts, on the other hand, have given little consideration to construing the definition of a clergyman. There are very few cases in which a court has been asked to decide who is a clergyman entitled to assert the privilege. The few cases that have considered this issue have approached it from the viewpoint of inquiring not whether the affected person was a minister or not—that is generally conceded—but, rather, whether the particular clergyman belongs to a church which requires him not to reveal confidential communications.\textsuperscript{110} There are no cases in which a person who claimed to be a clergyman was denied the privilege due to a court decision that he was not covered by that state’s statutory definition of clergy.

In addition, the courts have considered the question of whether persons who do not themselves claim to be ministers are nevertheless entitled to the privilege. At least two cases have concluded that one does not even have to be ordained to come within the purview of the privilege.\textsuperscript{111} In one case, mem-

\textsuperscript{111} See infra notes 165-73 and accompanying text.
bers of a counselling staff of an ordained minister, who themselves were not ordained, were nevertheless considered ministers, since they were working under the direction of an ordained minister. Whether other courts, especially in states with narrowly drawn statutes, would so hold is open to question. Yet the Mississippi legislature dealt with an analogous question by including in its statute the unique provision that "a clergyman's secretary, stenographer or clerk shall not be examined without the consent of the clergyman concerning any fact, the knowledge of which was acquired in such capacity."112

Courts have reached different conclusions on whether the privilege applies to elders or deacons of a church. In Reutkemeier v. Nolte113 it was held that elders of a Presbyterian church were included in a statute which granted the privilege to "ministers of the gospel." While in Knight v. Lee114 the court concluded that an elder and deacon of the Christian Church acting on behalf of the Church pastor was not covered by the minister's privilege.115

The outer limits of the definition of clergyman are not yet clearly delineated. Thus the question remains, for example, whether Christian Science practitioners are ministers for the purpose of privilege statutes. Of course, in determining whether any person is included within the privilege it is necessary to closely scrutinize the details of that particular jurisdiction's statute. California defines clergyman as "a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization."116 Compare that wording with the Alabama statute's more restrictive description which defines clergyman as:

Any duly ordained, licensed or commissioned minister, pastor, priest, rabbi or practitioner of any bona fide established church or religious organization and shall include and be limited to any person who regularly, as a vocation, devotes a substantial portion of his time and abilities to the service of his respective church or religious

113. 179 Iowa 342, 161 N.W. 290 (1917).
114. 80 Ind. 201 (1881).
115. Id. at 203. For a full discussion of the definition of a clergyman for the purpose of privilege statutes, see Annot., 49 A.L.R.3d 1205 (1973).
The New Hampshire code is much broader in defining a clergyman only as "a priest, rabbi or ordained minister of any church or a duly accredited Christian Science practitioner. . . ." A Christian Science practitioner would then clearly be included in New Hampshire, probably also included in California, while in Alabama it remains an open question.

There are a number of other questions which await further elucidation by the courts. Are part-time ministers clergymen? In fact some denominations (e.g., Christian Science) prefer their ministers to be only part-time. Yet the Alabama code defines a minister as one devoting a substantial portion of his time to the service of his respective church. While no case has yet dealt with this issue, many clergymen responding to the pressures of an inflationary economy are accepting employment outside the church or synagogue. Would such employment mean that those clergymen are no longer entitled to the minister's privilege, even for legitimate church-related activities?

Is there an age requirement for ministers? Most statutes do not contain any reference to an age requirement. Yet, there are some denominations that have designated children to fulfill the role of minister and who regularly preach at church revival meetings. Again, the courts have not spoken on this issue. While it is hard to see how a court could find that all Jehovah's Witnesses are ministers, that denomination does so allege. One state implicitly considered this problem.

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119. Ala. Code § 12-21-166 (Supp. 1982). This "full-time" requirement raises intriguing possibilities. There are a fair number of Catholic priests engaged in full-time teaching (many on law faculties). Is such a priest disqualified from claiming the privilege, even for statements made to him in the confessional, because he is not devoting "substantial . . . time" to the church? The issues raised here will be further discussed in the "Recommendations" section, infra notes 236-38 and accompanying text.
120. However, Tennessee and Virginia define a clergyman as one over the age of eighteen. Tenn. Code Ann. § 24-1-206 (1980); Va. Code § 8-01-400 (1977).
121. Reese, supra note 45, at 66-67 n.43 (citing Qualified to Be Ministers, Watchtower Bible and Tract Society 256 (1955)).
122. Jehovah's Witnesses constitute a society of ministers. . . . He has been "called" to the ministry by his fellow believers and the Witnesses resent very deeply the fact that the persons whom they have called to the ministerial office are refused the recognition and denied the privi-
and expressly excluded such persons. Pennsylvania's statute, since repealed, excepted "clergymen or ministers who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers."

The entire issue of alternative religious groups is also one upon which the courts have not spoken in the context of the minister's privilege. Many statutes use language which seems to apply only to religions that are of Judaeo-Christian origin. Such statutes would pose no problem when applied to ministers, priests or rabbis of "established" religions. How is a minister of the Moslem faith, or even of the Unification Church, to be treated under such a statute? The Georgia statute, for example, states that,

> every communication ... made ... to any Protestant minister of the Gospel, or to any priest of the Roman Catholic faith, or to any priest of the Greek Orthodox Catholic faith, or to any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called, shall be deemed privileged.

This statute would seem clearly to exclude the aforementioned clergy.

Aside from any potential constitutional limitations on the religion clauses, there seems to be no valid reason to exclude such groups in view of the policy of the privilege. If we wish to encourage people to bare their souls in the search for spiritual comfort, is not a Moslem believer to be given the same opportunity? Does not society equally benefit when a Unification Church member confesses to his clergyman and receives "the soul's calm sunshine, and the heartfelt joy of confession?"

To this date there are no judicial pronouncements in this
area. In any case, as previously mentioned, there would seem to be grave constitutional concerns with, for example, excluding a Moslem priest from the privilege while extending that same right to a Catholic priest or rabbi. The definitive judicial consideration of these restrictive delineations of a clergyman is yet to be pronounced.

VII. THE REQUIREMENT THAT THE COMMUNICATION BE MADE TO A MINISTER IN HIS PROFESSIONAL CHARACTER

While generally communication to a minister is privileged in those states that recognize the privilege, not all statements made to a clergyman are privileged. Clearly, for instance, conversations with a minister of an informal nature, relating to a clergyman’s hobby would not be protected. Virtually all states include a requirement in their respective statutes that the communication in question be made to the minister in “his professional character.” The courts have consistently given this requirement a very broad reading and have excluded communications that were not made to a clergyman in his professional capacity.

An Iowa court held that a minister summoned by a doctor to act as an interpreter could testify about that conversation, since the minister had not served in his professional character, but merely as an interpreter. Further, testimony of a priest as to his services as a notary on a deed was also held not privileged since the priest was not acting as a spiritual adviser but rather as a notary public. In State v. Berry, the court faced the question of whether communication was made to a clergyman in his role as a minister. The


130. 324 So.2d 822 (La. 1975).
defendant came to the minister's sister's apartment to pawn a
watch. After the sister refused, the defendant spoke to the
minister and in the course of negotiations with him for a loan,
the defendant implied that he had killed the owner of the
watch. The court held that the communication was not privi-
leged since it was not made to the minister in his professional
character.

Sometimes the line is blurred between the "professional
character" requirement and the requirement that the purpose
of the conversation at issue be the search for "religious or
spiritual" advice. It appears that courts will sometimes con-
sider only those conversations made for the purposes of seek-
ing spiritual or religious comfort to be ones that are within
the professional character of a clergyman. Thus a Minnesota
court in a recent decision, State v. Black,\textsuperscript{131} held that a defen-
dant who, while in pre-trial confinement, asked a prison chap-
lain to phone his friends outside the jail, was not entitled to
assert the privilege. "Defendant claims that because he was
seeking the aid of [the chaplain], his communication is privi-
leged. However, the wording of the statute indicates that reli-
gious or spiritual modifies advice, aid, or comfort, not just ad-
vice. Thus, the aid requested of [the chaplain] must be
religious aid to be privileged.\textsuperscript{132}"

Very closely related to the "professional character" re-
quirement is the common statutory provision that the com-
munication in question be penitential in character. In a recent
and highly publicized case,\textsuperscript{133} a New York court denied the
privilege for failure to meet this requirement. The defendant,
a Roman Catholic priest who was also a New York City coun-
cilman, was held in contempt for refusing to answer questions
prepared by a grand jury panel. The grand jury was investi-
gating alleged abuses in city jails, whereby certain persons
were being given preferential treatment because of their affili-
ation with organized crime. The grand jury solicited the
priest's testimony about a communication that he had had
with corrections officials, in reference to placing a prisoner in
a work-release program. The priest based his refusal to answer
on the minister's privilege. The New York Court of Appeals

\textsuperscript{131} 291 N.W.2d 208 (Minn. 1980).
\textsuperscript{132} Id. at 216.
upheld the priest's ten day jail sentence for contempt. It held that "[t]he priest-penitent privilege arises not because statements are made to a clergyman. Rather, something more is needed . . . . [I]t is only confidential communications made to a clergyman in his spiritual capacity which the law endeavors to protect." Other cases have consistently given a wide construction to the requirement that the communication be penitential in character and have denied the privilege.

One court, however, has held that statements made in the course of draft counseling were penitential in nature and made to the clergyman in his professional capacity. The court found that since a draft registrant's relationship with the selective system involves "very deep and intimate spiritual and moral considerations" such communication is properly within the scope of the privilege. It is worth noting that the court based its holding in part on the Proposed Rules of Evidence. The provisions relating to the minister's privilege were, however, not finally enacted into law. Instead the adopted rule provides that privileges, in general, "shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience."

In addition it must be noted that this was a Viet Nam era decision (1971), which perhaps explains this court's unique holding. It is arguable that in 1971, draft counseling was part of a clergyman's professional activities. The case may indicate that the "professional character" of a minister may not be immutable. It is therefore possible that depending on the social climate and political atmosphere at a given time, a minister's

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134. Id. The concurring and dissenting opinion by J. Kupferman, in which he took a rather different approach, is worth noting. In quoting Matthew 23:21 and Luke 20:25 ("Render therefore unto Caesar the things which are Caesar's") he stated, "Nevertheless, I would reduce the commitment as a matter of discretion to one day. The principle having been established, no purpose would be served by a longer period of incarceration."

135. See, e.g., In re Koelher's Estate, 162 Kan. 395, 176 P.2d 544 (1947) (statement made to a priest while he was acting as a witness to a will held not privileged); Burger v. State, 238 Ga. 171, 231 S.E.2d 769 (1977) (statement made to a minister as a friend rather than a clergyman held not privileged).


professional activities may change. Nevertheless, the clear direction of judicial opinion is to contract, rather than expand, the legitimate sphere of the professional character of clergymen.

A. Marriage Counseling

Perhaps no area falls more clearly within the clergymen's professional character than marriage counseling. Couples experiencing marital difficulties often visit their pastor for aid, guidance, and spiritual direction. In this process they may well reveal their most intimate personal and family problems. It would therefore seem likely that there would be little question that statements made during pastoral marriage counseling would be privileged.

Various courts that have ruled on this issue have produced different results. A California court indicated that marital counseling communication was not privileged, while a New York court, with a substantially similar fact situation and statute, held that it was. In holding that it was privileged, the New York court looked at the expectation of the parties and concluded that both parties would not have met with the rabbi if they had not fully expected their communication to remain immune to judicial investigation. The California court, however, closely examined the California statute, found marriage counseling not to be covered, and thus declared, in dictum, that conversation in the course of marriage counseling was not privileged. Other courts have similarly divided on this issue.

In considering the policy of the privilege, marital communications should be privileged since it is in the interest of society to encourage persons to seek spiritual guidance in solving marital problems. The family, as the revered basic structure of society, should be given every opportunity to be sal-

141. See, e.g., the following cases which found that the privilege does apply to marital counseling; Pardie v. Pardie, 158 N.W.2d 641 (Iowa 1968); Le Gore v. Le Gore, 31 Pa. D. & C.2d 107 (1963); People v. Pecora, 107 Ill. App. 2d 283, 246 N.E.2d 865, cert. denied, 397 U.S. 1028 (1969) (clergyman refused to testify in murder trial of husband, whom the clergyman had counseled about marital problems). But see In re Shaeffer's Estate, 52 Dauphin Co. Reports 45 (Pa. 1942) (privilege denied).
CLERGY-PENITENT PRIVILEGE

vaged—including the opportunity to consult a minister, with the confidence that any conversation in that consultation will forever remain privileged.142 From the perspective of the minister, marital counseling is a legitimate exercise of pastoral duties which should warrant the protection of the privilege equal to any other communication. In fact, certain religious denominations, the Episcopal Church for example, require a minister to actively engage in marriage counseling.143

Perhaps in recognition of the importance of maintaining the confidentiality of marital counseling, several statutes explicitly include it in their minister's statute. Thus, for example, Alabama specifically enumerates in its definition of privileged communication the situation where one approaches a clergyman "to enlist help or advice in connection with a marital problem."144 Delaware was the first state in the United States to specifically enumerate marital counseling as a privileged activity by enacting a statute which reads: "No priest . . . shall be examined . . . with respect to any communication made to him in his professional capacity, by either spouse, in connection with any effort to reconcile estranged spouses . . . ."145 These statutes accurately reflect that marital counseling is a legitimate exercise of the minister's function and therefore unquestionably deserving of the shield of confidentiality. There is no reason why psychologists and psychiatrists may counsel couples with full assurance of confidentiality, while clergymen doing similar work do not enjoy the same protection. It remains to be seen whether courts in those states whose privilege statutes do not specifically delineate

142. Counseling in general has been widely recognized to be included in the minister's privilege. Yet marital counseling, as opposed to personal counseling, has not been universally recognized as being privileged. The writer has found no commentator who discusses this disparity. Yet it is fascinating to consider why, in light of so many court decisions emphasizing the importance of the family unit, counseling relating to preserving that unit has achieved only a limited privilege.

143. As one commentator notes:

Many churches, either by written or unwritten church discipline, require marriage counseling as is required in the Episcopal Church by Canon 16, § 6(c) which reads: "when marital unity is imperilled by dissension, it shall be the duty of either or both parties, before contemplating legal action, to lay the matter before a Minister of this Church; and it shall be the duty of such minister to labor that the parties may be reconciled."

Reese, supra note 45, at 72.


marital counseling will adopt this enlightened interpretation of penitential communication. This is one area of the privilege that is undoubtedly destined for future litigation, especially considering the increasing divorce rate in the United States.

VIII. THE "DISCIPLINE ENJOINED" REQUIREMENT

Twenty-one states and the District of Columbia have a provision in their statutes which requires that in order for a communication to a clergyman to be privileged, it must be made in the course of discipline enjoined by the rules of practice of his church. This requirement has spawned much litigation to delineate its exact parameters. Different courts have construed it in vastly different ways, with the general tendency being to interpret this clause so as to exclude many statements made to clergymen. Thus an Arkansas court held that:

The communications that are made privileged by this statute are those which are made in the course of discipline by reason of the rules of the religious denomination . . . . Before the statements or confessions made to a minister of the gospel or priest of any denomination can be held to be inadmissible, it must appear from the evidence that they were made to such minister or priest . . . because enjoined by the rules of discipline or practice of such religious denomination.

146. See, e.g., CAL. EVID. CODE § 1032 (West Supp. 1982).
147. See generally Note, "Is There a Time to Keep Silence?", supra note 28.
149. The "he" or "his" church generally refers to the clergyman, and not the penitent. Yet, statutes are not uniformly clear. Some statutes, however, make it very clear that the church discipline requirement applies to the minister and not to the penitents. Representative is the California statute which states that a penitential communication is one made to a clergyman, "who, in the course of discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communication and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret." CAL. EVID. CODE § 1032 (West 1966) (emphasis added).
Other courts have also broadly interpreted the "discipline enjoined" clause, with the result that the privilege has been denied. In an Ohio case,\textsuperscript{151} the plaintiff claimed to be the widow of the decedent while the defendant estate claimed that the decedent was in fact single. At issue was the admissibility of certain statements relating to a church census made to a priest by the decedent while the former had been in decedent's home. It was alleged that the decedent had stated to the priest, in the course of conversation, that he, the decedent, "had been single all his life." The court ruled that the statements were admissible since they had not been made "in the understood pursuance of that church discipline giving rise to confessional relations, and therefore, . . . were not privileged and that the privilege applied in particular to confessions of sin only, not to communications of other tenor."\textsuperscript{152}

A similar rationale obtained in the California case of \textit{Simrin v. Simrin}.\textsuperscript{153} The plaintiff husband attempted to modify the custody provisions of an impending divorce decree. The defendant wife called as a witness a rabbi who had acted as a marriage counselor for the couple. The rabbi declined to testify. The wife waived her privilege, but the husband did not, claiming that the communication was privileged by virtue of the minister's privilege. The court, in dictum, stated that the communication was not privileged since the privilege "is limited to confessions in the course of discipline enjoined by the church. It would wrench the language of the statute to hold that it applies to communications made to a religious or spiritual advisor acting as a marriage counselor."\textsuperscript{154} The court felt that marriage counseling was not "a discipline enjoined by the church," and thus the privilege of confidentiality did not extend to statements made to a minister in the course of the counseling relationship.

It is worthwhile to closely analyze this "discipline enjoined" requirement, for the issues involved may result in unusual—and unexpected—consequences. Does that clause

\textsuperscript{151} In re Estate of Soeder, 7 Ohio App. 2d 271, 220 N.E.2d 547 (1966).
\textsuperscript{152} Id. at 303, 36 Ohio App. 2d at 421, 220 N.E.2d at 568-69.
\textsuperscript{153} 233 Cal. App. 2d 90, 43 Cal. Rptr. 376 (1965).
\textsuperscript{154} Id. at 94, 43 Cal. Rptr. at 378-79. Despite this interpretation the court did not compel the rabbi to testify. It held that an agreement entered into by the couple with the rabbi prior to counseling, wherein the marital partners agreed not to call the rabbi as a witness was not void against public policy and upheld it.
mean the penitent must make a statement to a clergyman that is *permitted* by the church to which he (the clergyman) belongs? Or must there be a *religious obligation* on the penitent to confess his sins to a clergyman?

An Arkansas court in *Sherman v. State*,\(^\text{155}\) held that only those statements made by virtue of religious obligation were privileged. In *Sherman*, a defendant charged with rape had sent a letter to his minister (Protestant) asking for prayer and implying his guilt. The court held that the minister's privilege did not apply since

the statute does not apply unless the confession is made "in the course of discipline enjoined by the rules of such denomination."\(^\text{156}\) . . . There is no evidence in this case that there is any discipline or rule or practice of the church to which appellant and his pastor belonged which enjoins upon its members the duty to make a confession of sins.

A similar result is suggested by one of the first cases in the United States to ever consider the privilege.\(^\text{157}\) The court did not allow a Protestant minister to claim the privilege. It distinguished that case from a previous one involving a priest, stating that in the former case, "by the established canons, or ordinances of that church, confessions are made by the members at least once a year, to the priest in private."\(^\text{158}\)

The implication of such a holding, were it to be applied ubiquitously, is truly confounding. There are indeed few religious denominations that require formal confession, and it would then be only members of those denominations who would be privileged—and only when making "confessions" to clergymen of those denominations.

The Catholic Church certainly requires confession of its adherents, as the following excerpt from a book on Catholic doctrine indicates:

> Why, confession was known even in Old Testament times. It was *the sacrament of Penance* which Christ instituted. But the practice of confession of sin was even

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155. 170 Ark. 148, 279 S.W. 353 (1926).
156. *Id.* at 149, 279 S.W. at 354 (quoting Alford v. Johnson, 103 Ark. 236, 237, 146 S.W. 516, 517 (1912)), quoted in Reese, *supra* note 45, at 67 n.48.
158. *Id.* at 211 n.2.
then a condition for forgiveness. We read in the book of Numbers V, 5-7: "And the Lord spoke to Moses, saying: 'When a man or woman shall have committed any of all the sins that men are wont to commit . . . they shall confess their sin and restore the principal itself, and the fifth part over and above, to him against whom they have sinned . . .'"

That is the way in which the Church has always believed and acted, for Christ made it an important matter. The confession of mortal sin is a requirement for eternal salvation.\(^{180}\)

The Lutheran Church also seems to require confession.\(^{180}\) The Episcopal Church similarly, although having no requirement for periodic confession, does require marriage counseling.\(^{181}\)

Were the discipline enjoined clause to be interpreted as the Sherman court did, it would seem that only members of the aforementioned religions would be entitled to assert the minister's privilege.\(^{182}\) Even in those denominations questions exist. Catholic doctrine, for example, only requires that confession be made once a year. Would the second confession be held not privileged? One can imagine a district attorney scouring the country in search of a priest to whom a recalcitrant witness had made a prior confession in order to prove that the "second confession" was not mandatory and therefore not privileged. Consider also statements made just prior

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159. F. NOLL, FATHER SMITH INSTRUCTS JACKSON (no date) quoted in Jones, supra note 8, at 9 (emphasis in the original). See also Codex Juris Canonici, canon 906 (1918), which requires that the communicant attend the Sacrament of Penance once a year.

160. The Augsburg Confession, Eleventh article states: "Of confession, they teach, that Private Absolution ought to be retained in the churches, although in confession an enumeration of all sins is not necessary. For it is impossible according to the Psalm: 'Who can understand his errors?' (Psalm 19:12)." J. NEVE, THE AUGSBURG CONFESSIO 10 (1914), quoted in W. TIEMANN, supra note 10, at 151.

161. See supra notes 142-46 and accompanying text. See also W. TIEMANN, supra note 10, at 68 n.55.

162. In fact, yet another fascinating question exists. Many churches have provisions for church trials, where a church member is summoned to testify, and is required to do so at the threat of some great spiritual harm. Should the testimony at such a trial be considered to be mandated by the discipline of the church, similar to compulsory confession in the Catholic Church? An Iowa court held that such testimony in a trial before the elders of the Presbyterian Church was privileged. In that case a fourteen-year-old girl was called and testified before a "court" of two Presbyterian elders, in reference to alleged sexual relations with a man. That testimony was held privileged in a later civil trial of a claim by the girl's father against the man. Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917).
to confession. Let us assume that a penitent says to a priest "Father, I have done a terrible deed and want to confess." They then repair to the confessional where the priest hears the confession. Since the Roman Catholic Church only requires that the secrecy of the seal of confession be applied to the sacrament of confession, it would seem that these introductory words would not be privileged. A priest, therefore, while he could not be called to testify to that which was said during confession, might be forced to testify to the preliminary words. "Ordinary" counseling and marriage counseling (other than those denominations which require marriage counseling, e.g., the Episcopal Church) would not be privileged since it is not mandated by the church. Additionally, most Protestants, Jews, and members of nonreligious groups would not be entitled to the privilege since they have no mandatory "confession."

Perhaps because the above difficulties can result from interpreting the "discipline enjoined" requirement restrictively, few courts have so done. Some courts have found that those words mean only that the clergyman—as opposed to the penitent—must have an obligation to keep the communications silent. This, however, does not completely solve the problem, for there are few denominations which have formal requirements that their ministers do not reveal confidential communications.

The Catholic Church, however, does have such a formal requirement. It not only requires confession as a sacrament, but also recognizes that the contents of that confessional are inviolate and must never be repeated under any circumstances. Few Protestant denominations have explicit re-

163. No state has a statutory provision which explicitly deals with this issue. Puerto Rico, however, states that one may not compel testimony from a clergyman "as to information obtained by him from a person about to make a confession and received in the course of preparation for such confession" (emphasis added). P.R. LAWS ANN. tit. 32, § 1734 (1954).

164. The Protestant churches have no mandatory requirement for penitential or counsel-seeking communications within a specified time period, but it is understood that when the need arises a communicant ought to seek spiritual aid and counsel from his minister. Reese, supra note 45, at 68. In consulting doctrinal rulings of Judaism and non-Judeo-Christian faiths, the writer could find no denomination which requires mandatory "confession" to the clergy. 4 NEW CATH. ENCYCL. 134 (1967).

165. Historically and theologically, then, the seal means the inviolable obligation to avoid all use of confessional knowledge that would lead directly or indirectly to the identification and betrayal of the penitent.
quirements that ministers keep their private communications confidential. The American Baptist Convention has included the following statement in their ministerial code of ethics: "I will hold as sacred all confidences shared with me." The Lutheran Church, in its twenty-second Biennial Convention report in 1960 stated that:

In keeping with the historic discipline and practice of the Lutheran Church and to be true to a sacred trust inherent in the nature of the pastoral office, no minister of the United Lutheran Church in America shall divulge any confidential disclosure given to him in the course of his care of souls or otherwise in his professional capacity, except with the express permission of the person who has confided in him or in order to prevent the commission of a crime.

**Kinds of Violation.** There is direct violation when the penitent is clearly identified and is betrayed in relation to matters revealed by him in confession. It is not necessary that the penitent be named; equivalent identification entails direct violation. There is indirect violation of the seal when, even though no betrayal is intended, confessional matter is disclosed in such circumstances that there is a danger that the penitent can and may be identified and betrayed. Such is the case, for instance, if a sin is mentioned without indicating the penitent, or if a penitent is indicated without mentioning sin, when there is a danger that a third party will come to the conclusion that a specific penitent has confessed a specific sin.

4 New Cath. Encycl. 134 (1967). See Canon 889 (The Seal of the Confessional) § 1, quoted in 4 Augustine, Code of Canon Law 300 (3d rev. ed. 1925) ("The sacramental seal is inviolable, and hence the confessor shall be most careful not to betray the penitent by any words or sign, or in any other way for any reason whatsoever.") See Canon 2369 which reads that the confessor "who dares to break the seal of confession directly remains under excommunication reserved modo specialissimo to the Apostolic See." Latin original translated in Hogan, supra note 9, at 3-4. This has been judicially noticed by the District of Columbia which has stated: "Was the disclosure of appellant to the minister a confidential confession to a spiritual adviser? The answer would be clearer were the relationship of priest and penitent involved where the priest is known to be bound to silence by the discipline and laws of his church. Mullen v. United States, 263 F.2d 275, 277 (D.C. Cir. 1959) (emphasis added). See also In re Verplank, 329 F. Supp. 433 (C.D. Cal. 1971); Angleton v. Angleton, 84 Idaho 184, 370 P.2d 788 (1962).


167. The United Lutheran Church, Minutes of the Twenty-Second Biennial Convention of the United Lutheran Church of America 277, 758 (1960) quoted in W. Tiemann, supra note 10, at 52.

The Presbyterian Church has no explicit requirement that conversations be kept confidential, although it is generally so understood and practiced by its clergy. Interview with Professor John Irvine, Registrar of The San Francisco Theological Seminary (April 30, 1982).
Most Protestant denominations, however, do not have formal rulings which mandate professional secrecy. Nor do Rabbis have such explicit provisions. The vast majority of ministers, due to personal conscience and the realization that their effectiveness as clergy members would be destroyed, operate under a self imposed duty of confidentiality.168

Thus even interpreting the "discipline enjoined" clause only to mean that the minister must have an obligation to keep the communication confidential is not a panacea. The re-

Note that it is virtually impossible to review all church rulings, resolutions, conference reports and recommendations of the various denominations dealing with the obligation of confidentiality. The problem becomes even more difficult when one realizes that while national religious bodies may not issue rulings on this matter, local or regional groups may. Thus, for instance, the Presbytery of Newark, New Jersey, passed a resolution:

That all information or knowledge of whatsoever nature imparted, confided or discussed with a clergyman of this presbytery in his official role, whether as an advisor, confidant or counselor, shall be construed as strictly confidential and thus a privileged communication.

W. Tiemann, supra note 10, at 28. Does this qualify as a provision enjoining that, by the discipline of the church, a Presbyterian minister must keep communications confidential? Or is that true only of those ministers in the Newark Presbytery?

In addition, some denominations have in their ministers association code of ethics a provision mandating secrecy. An example is the Unitarian Church. Interview with Bob Lehman, Pastor of the First Unitarian Church in San Jose, California (May 4, 1982). A Unitarian minister is, however, not required to belong to the ministers' association and thus is not necessarily bound by its code of ethics. Does a provision in the code of ethics qualify under the discipline enjoined requirement?

No court has spoken on these issues. What is clear is that most Protestant denominations and branches of the Jewish faith do not have a written formal requirement of confidentiality. See infra note 168 and accompanying text.

168. Jones, supra note 8, at vi-vii states:

Such stringent rules are not written into the discipline of most Protestant denominations and other religious groups. However, the vast majority of ministers labor under at least an implied restriction and feel that the betrayal of a confidence would be tantamount to the destruction of their effectiveness as members of the clergy. Thus, while the religious organizations to which many ministers belong do not have specific canons or rules regarding the safeguarding of confidential information shared with clergy, the question of revealing or not revealing information received in confidence involves the matter of conscience as well as the matter of a relationship with the courts.

Reese, however, believes that Protestant clergy have an "understood" requirement of confidentiality:

The ministers of most Protestant churches likewise are obligated to keep confidential the communications revealed to them in their ministerial capacity. Although many denominations have not spelled out the precise description or definition of their discipline, their uncodified discipline or practice is as binding on them as though it were written.

Reese, supra note 45, at 69.
sult may still be that only denominations with requirements of confidentiality are entitled to the privilege. This interpretation could raise serious first amendment establishment and free exercise of religion questions since it may require a court to minutely examine the doctrine, rulings, and holdings of specific denominations to determine whether it has a formal requirement of secrecy. It would seem much more appropriate for a court to take judicial notice of the fact that it is common knowledge that all clergymen do perceive themselves to have a moral and ethical obligation to keep private matters secret, and not require formal denominational dicta. 169

The most common judicial interpretation has been that the “discipline enjoined” clause does not go so far as to be limited to those churches that have formal secrecy requirements. An example of this is an often-quoted, well known Minnesota case, In re Swenson, 170 which has been called “the most liberal judicial construction of a privileged communication statute.” 171 The court held that:

The “discipline enjoined” includes the “practice” of all clergymen to be trained so as to advance such “discipline”, to be alert and efficient and submissive to duty, to concern themselves in the moral training of others, to be as willing to give spiritual aid, advice, or comfort as others are to receive it, and to be keenly concerned in reformatory methods of correction leading towards spiritual confidence. . . . [T] is sufficient whether such “discipline” enjoins the clergyman to receive the communication or whether it enjoins the other party, if a member of the church, to deliver the communication. Such practice makes the communication privileged, when accompanied

169. Most clergy will not testify concerning confidential communications regardless of whether there is a statutory privilege. They are bound by an overpowering discipline that dictates the strictest standards of conduct concerning the maintenance of the inviolability of the confidential communication made to them in their ministerial capacity. This is just as true of most Protestant clergy as it is of the Roman Catholic . . . . People take for granted they have the complete right to talk to their ministers penitentially in confidence. “Whether it is the law or not . . . . people have the right to go to an ordained clergyman and tell their troubles without fear. This is the refuge of people in trouble, acknowledged by all men of good-will.”

Reese, supra note 45, at 81 n.96 (citing THE LIVING CHURCH, July 23, 1961, at 6).

170. 183 Minn. 602, 237 N.W. 589 (1931).

171. Reese, supra note 45, at 68.
by the essential characteristics, though made by a person not a member of the particular church or of any church.\textsuperscript{172}

Also, in an emphatic acknowledgement of the desirability of encouraging confidential communications, the court found that the legislative intent was to give a broad interpretation to the privilege:

If we are to construe this statute as meaning that the only "confession" that is privileged is the compulsory one under the rules of the particular church, it would be applicable only, if our information is correct, to the priest of the Roman Catholic Church. Certainly the Legislature never intended the absurdity of having the protection extend to the clergy of but one church. . . . We are of the opinion that the "confession" contemplated by the statute has reference to a penitential acknowledgement to a clergyman of actual or supposed wrongdoing while seeking religious or spiritual advice, aid, or comfort, and that it applies to a voluntary "confession" as well as to one made under a mandate of the church. The clergyman's door should always be open; he should hear all who come regardless of their church affiliation.

The statute has a direct reference to the church's "discipline" of and for the clergyman and as to his duties as enjoined by its rules or practice. It is a matter of common knowledge, and we take judicial notice of the fact, that such "discipline" is traditionally enjoined upon all clergymen by the practice of their respective churches. Under such "discipline" enjoined by such practice all faithful clergymen render such help to the spiritually sick and cheerfully offer consolation to suppliants who come in response to the call of conscience. . . .\textsuperscript{178}

The Swenson court's interpretation has gradually become the dominant one, as recent court decisions tend to look with less rigor at the "discipline enjoined" requirement. Thus a New York court stated, in dictum, that in addition to confessions which are enjoined by religious doctrine, voluntary confessions are also included under the minister's privilege.\textsuperscript{174}

\textsuperscript{172} 183 Minn. at 604-05, 237 N.W. at 591.
\textsuperscript{173} Id. at 603-05, 237 N.W. at 590-91.
\textsuperscript{174} In re Fuhrer, 100 Misc.2d 315, 419 N.Y.S.2d 426 (1979).
The court stated that to come within the protection of the privilege, the communication must only have been made with the "purpose of seeking religious counsel, advice, solace, absolution or ministration." Another court held that the only requirement for the privilege to obtain is that communications be made with the expectation that they would be confidential. The cases which have denied the privilege have generally done so because the communication was not made to a clergyman in his professional character, and not because the communication failed to satisfy the "discipline enjoined" requirement.

In analyzing the statutes we find that a majority of statutes do not have a "discipline enjoined" clause, but are content to require something less than a denominational requirement of secrecy for the privilege to obtain. Maine, for example, requires only that one communicate with a clergyman "(2) . . . privately . . ., (b) . . . in his professional character as spiritual advisor." Perhaps even more telling is that Arkansas, the state whose courts had rendered the interpretation of the "discipline enjoined" clause most unfavorable to the maintenance of the privilege, has since modified its statute to obviate that requirement. Arkansas requires only that "(2) a communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication." Even New York, which had the first United States statute on the privilege—and whose statute served as a model for other states—has abandoned the "discipline enjoined" requirement. In addition, the three most recent statutes en-

175. Id. at 320, 419 N.Y.S.2d at 431 (citing United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1972)).
180. N.Y. Civ. Prac. Law § 4505 (McKinney Supp. 1982). The New York statute now reads: "Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor."

Mention should here be made of the Texas statute which requires that:

No ordained minister, priest, rabbi or duly accredited Christian Science practitioner of an established church or religious organization shall
acted on the privilege have all drastically modified this requirement.\textsuperscript{181} Also, Alaska and Ohio, both of which had “discipline enjoined” clauses in their statutes, have recently amended their statutes and have excluded that clause.\textsuperscript{182}

It would seem reasonable to assume that courts—and state legislatures—do not wish to find themselves in the uncomfortable position of scrutinizing doctrine to determine what the discipline of a particular group is. The clause is falling into gradual disuse, although it cannot be totally disregarded. There is no assurance that a future court will not strictly apply this requirement and require just such scrutiny.

be required to testify in any action, suit, or proceeding, concerning any information which may have been confidentially communicated to him in his professional capacity under such circumstances that to disclose the information would violate a sacred or moral trust, when the giving of such testimony is objected to by the communicant; provided, however, that the presiding judge in any trial may compel such disclosure if in his opinion the same is necessary to a proper administration of justice.

\textsuperscript{181} N.H. REV. STAT. ANN. \textsection 516:35 (Supp. 1981) (effective August 10, 1979) requires only that a clergyman “shall not be required to disclose a confession or confidence made to him in his professional character as spiritual adviser.” (emphasis added). In Alabama a communication is confidential when “a person communicates with a clergyman in his professional capacity and in a confidential manner.” ALA. CODE \textsection 12-21-166 (Supp. 1982) (effective June 7, 1979). Mississippi states that “a communication is ‘confidential’ if made privately and not intended for further disclosure except in furtherance of the purpose of the communication.” MISS. CODE ANN. \textsection 13-1-22 (Supp. 1982) (effective July 1, 1978).

\textsuperscript{182} ALASKA R. OF CT., R. OF EVID. 506 (1982); OHIO REV. CODE ANN. \textsection 2317.02 (Page 1981).
Perhaps only then will its constitutional implications be decided.

IX. WHO MAY CLAIM THE PRIVILEGE

The minister's privilege protects the minister from forced disclosure of confidential communications. The question remains whether the privilege belongs to both the minister and the penitent, or the penitent alone. If a minister refuses to testify based on religious beliefs and yet the penitent waives the privilege, may the minister be forced to testify?

The general tenor of statutes conferring other privileges—such as the attorney-client or physician-patient—is that the privilege does not belong to the attorney or physician, but rather to the client. Yet there is a valid reason for reaching a different result in the case of the minister's privilege. Many ministers believe it to be a religious obligation to maintain the secrecy of penitential communication despite the willingness of the penitent to allow disclosure. In addition, it has been suggested that allowing a clergyman to testify when a privilege is waived may lead to abuse of that privilege.

The privilege waiver could also be the instrument of abuse by a scheming, wilful, and debased person. He could confess a number of different versions to a number of different priests and then waive the privilege for the one who best suited his purpose but not waive it for the priests who would not serve his purpose.

The statutes of the various states do indeed resolve this question in different ways. In California, the minister's privilege is actually two separate privileges, one belonging to the priest and the other to the penitent. New Hampshire, however, grants the privilege only if "the person confessing or confiding [does not] waive the privilege." These statutes illustrate the dichotomous ways this issue is resolved in various states. As the states are roughly evenly divided on the ques-

183. See supra notes 165-69 and accompanying text.
184. Reese, supra note 45, at 85.
185. "[A] penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege." CAL. EVID. CODE § 1033 (West 1966).
186. "[A] clergyman, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege." Id. at § 1034.
tion, no general statement can be made as to who holds the privilege. Rather, the statutes must be consulted.

Ohio's statute, unusual in this regard, states "[T]he 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." Thus Ohio allows the minister to claim the privilege even if waived by the penitent, if the minister would violate a sacred trust by testifying. This seems to be a compromise position, which may represent the fairest answer to the problem from the point of view of the clergyman.

The issue of waiver is further complicated in those states which vest the right to assert the privilege solely in the penitent where the privilege is asserted by one spouse but not the other, and both have engaged in joint marital counseling with a minister. Assuming the clergyman has no religious restriction on revealing communications on which the privilege has been waived, what is he to do? Will the court hold him bound by the waiver? Or is he bound by the spouse still asserting the privilege? Again the answer is unclear. The Delaware statute specifically addresses this problem. It reads: "No priest . . . shall be examined . . . (3) [W]ith respect to any communication made to him, in his professional capacity, by either spouse, in connection with any effort to reconcile estranged spouses, without the consent of the spouse making the communication."

In states which have not been so explicit in delineating the spousal waiver provisions, it is left to the courts to determine the exact parameters of the privilege. One state has gone so far as to extend the privilege to allow one spouse to prohibit not only the clergyman but the other spouse as well from disclosing "in any legal or quasi-legal proceeding, . . . anything said by either party during such communication." This is a clear minority position but may in fact indicate a trend to give greater protection to communication with a clergyman.

191. Note also that the Alabama statute delineates that the privilege applies in "legal or quasi legal proceeding." Id. This is defined in a previous part of that same
X. THE PRIVILEGE IN THE FEDERAL COURTS

Thus far, this article has considered the application of the minister’s privilege in state courts. It remains, therefore, to consider whether the privilege would apply in federal courts. On February 6, 1959 Senator Keating of New York introduced S 965, designed to afford a privilege to clergymen testifying in federal courts and before Congress. He proposed amending the United States Code to include the following provision:

1826. Privilege of clergymen and news reporters.
(1) A clergyman, or other minister of any religion, shall not be allowed in any court of the United States to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body to which he belongs.193

The bill, however, died in committee.193 Similar bills were also introduced in the House on January 27, 1959, but no action was taken on those bills either.194

The clergymen's privilege was first recognized in the federal courts in 1875.195 The Supreme Court, in dictum, stated that there is a general principal 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 . . . .”196 The Court found that a suit could not be maintained which “would require a disclosure of the confidences of the confessional . . . .”197

Before the enactment of the Federal Rules of Evidence one writer concluded:

statute as “[A]ny proceeding, civil or criminal, in any court, whether a court of record, a grand jury investigation, a coroner's inquest and any proceeding or hearing before any public officer or administrative agency of the state or any political subdivision thereof.” Id. This is not typical, as most statutes do not clearly indicate in what type of proceeding the privilege can be asserted. Minimally, the privilege applies to both criminal as well as civil cases before trial courts. However, in those states which do not list the specific types of legal proceedings to which the privilege applies, the extent of the privilege cannot be specifically determined. Since the privilege statutes are invariably in the parts of the code dealing with evidence, presumptively the privilege would have as broad or as narrow an application as the evidence code does. See Reese, supra note 45, at 73-74.

193. Id. at 115.
194. Id.
196. Id. at 107.
197. Id.
A federal court testing the constitutionality of the priest-penitent privilege probably would be testing a privilege created by a state. The federal court in any civil action probably will be required to adopt a state statutory priest-penitent privilege or will treat any relevant state grant of the privilege as substantive rather than procedural and therefore probably will adopt a state privilege under the Erie doctrine.198

The proposed federal rules of evidence included a specific provision for the minister's privilege. That section provided in part:

(1) A "clergyman" is a minister, priest, rabbi, or an individual reasonably believed so to be by the person consulting him. . . .
(b) . . . . A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.199

Rule 506, however, was deleted when the Federal Rules of Evidence were finally adopted. Instead, Rule 501 was adopted which provides that:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.200

Thus the federal courts, at least in civil actions, would be applying the state privilege statutes where an element of the claim or defense is determined by state law. In cases, however, where a federal privilege is involved the privilege at common law should be interpreted "in light of reason and experi-

198. Stoyles, supra note 7, at 29-30.
ence."\textsuperscript{201} In interpreting this standard the court in \textit{Mullen v. United States}\textsuperscript{202} considered Rule 26 of the Federal Rules of Criminal Procedure (which contains the same language as the Federal Rules of Evidence, e.g., privileges should be "interpreted in light of reason and experience") and concluded that reason and experience call for recognition of the minister's privilege. A similar result was reached in \textit{In Re Verplank},\textsuperscript{203} where the court considered the claims of the clergy privilege in the light of Rule 26 and of the Federal Rules of Criminal Procedure, and concluded that the privilege should apply.\textsuperscript{204}

One factor which needs to be considered in evaluating \textit{Verplank} is that the court placed some significance on the fact that proposed Rule 506 contained a provision for clergy privilege. However, the \textit{Verplank} decision was handed down before the rejection of proposed Rule 506 and the adoption of the Federal Rules of Evidence. It is thus possible that a federal court today—after rejection of Rule 506—might not find the privilege to apply. Yet this result is not likely because the \textit{Mullen} and \textit{Verplank} courts found the privilege to exist chiefly on the basis of Rule 26 of the Federal Rules of Criminal Procedure. Both courts found the "light of reason and experience" dictates upholding the privilege. It therefore seems clear that the minister's privilege should apply in federal courts as well.\textsuperscript{205}

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201. \textit{Id.}, \textit{e.g.}, \textit{United States v. Webb}, 615 F.2d 828 (9th Cir. 1980).
204. \textit{Id.} at 435.
205. United States military courts also recognize a clergy privilege as is stated in the manual for court martial:

A privileged communication is a communication made as an incident of a confidential relation which it is the public policy to protect. Since public policy is involved, evidence of such a communication should not be received unless it appears that the privilege has been waived by the person or government entitled to the benefit of it or that the evidence comes from a person or source not bound by the privilege.

b. CERTAIN PRIVILEGED COMMUNICATIONS . . .

(2) \textit{Communications between . . . penitent and clergyman. . .} Also privileged are communications between a person and a chaplain, priest, or clergyman, or assistant or other agent thereof, of any denomination made in the relationship of penitent and chaplain, priest or clergyman, either as a formal act of religion or concerning a matter of conscience . . . the person entitled to the benefit of the penitent and clergyman privilege is the penitent. A communication made . . . by a penitent to a clergyman is not within these privileges if it was made intending that it be passed on to someone outside the privileged relationship, nor is a
XI. THE LIMITS OF THE PRIVILEGE

There are few privileges that are absolute. A privilege, whether it be attorney-client or physician-patient, is afforded to a witness on the theory that the benefit to society is greater in allowing him not to testify. The attorney-client privilege, for example, does not give the attorney the right to protect or conceal intent to commit a crime. Thus the law balances the harm which accrues to society by excluding potentially helpful testimony against the benefits of so doing. Where the scale tips in favor of exclusion, a privilege is recognized. It is, however, recognized that certain factors, when present, require that the privilege not apply. It is therefore necessary to consider whether there are circumstances that would mitigate against recognizing the minister's privilege.

Would the privilege be held to apply where a minister becomes aware, in a confidential communication from a penitent, of threatened harm? Is there a duty imposed by law on clergymen to reveal privileged communication in order to avoid harm to innocent parties? There are no recorded decisions considering these issues, and thus it is prudent to examine other privileges to attempt to understand how a court would rule on the minister's privilege in such circumstances.

Wigmore suggests four conditions that should be considered to determine whether a class of communication should be privileged. At common law the attorney-client and husband-wife privileges were recognized—others were not. Yet

communication between . . . penitent and clergyman within these privileges if to the knowledge of the . . . penitent it was made in the presence of someone outside the privileged relationship capable of understanding the communication. A person interpreting the communication as the agent of either party thereto and an agent of the . . . clergyman is not outside the privileged relationship.

Manual for Court-Martial United States, Article 151 (rev. ed. 1969). An excerpt from the Air Force regulations gives a good view of how the individual services have interpreted the above statute:

The disclosure of a privileged communication between penitent and clergyman (chaplain) should not be required or permitted unless the person who is entitled to the benefit of the privilege consents to the disclosure of the communication or has otherwise waived the privilege.

Air Force Regulation 265-1, sec. 6, para. 126, quoted in Jones, supra note 8, at 62.


208. Id. See supra text accompanying note 86.
state legislatures have considered other situations and have decided that other relationships are also worthy of wearing the mantle of confidentiality. Examples of other privileged relationships are those of the physician-patient and psychotherapist-patient. There are, however, situations where societal interest dictates that the privilege not apply.

The California Supreme Court in the landmark case *Tarasoff v. Board of Regents of the University of California* considered whether a psychotherapist had a duty to disclose a patient's statements which threatened a third person. Relying on California Evidence Code § 1024, the court stated:

[W]e recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy (citations omitted), and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault.

The court concluded that the psychotherapist privilege should not there be recognized.

The public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.

Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure

209. See Cal. Evid. Code § 994 (West Supp. 1982) which states that a “patient . . . has a privilege to refuse to disclose, and to prevent another from disclosing a confidential communication between patient and physician. . . .” See also Cal. Evid. Code § 1014 (West Supp. 1982) which states that a “patient, . . . has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist. . . .” Note, the California Supreme Court in *Tarasoff v. Board of Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), equated the lack of privilege with the psychotherapists' duty to reveal the communication. Thus it may be stated with some certainty that if a certain communication would be held unprivileged—because it presented a threat of harm to a third person—then that clergyman would have a duty to reveal that communication.


212. 17 Cal. 3d at 442, 551 P.2d at 349, 131 Cal. Rptr. at 27.
to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest.818

It would seem therefore that the clergy privilege should be similarly limited. A clergyman should, like the psychiatrist in Tarasoff, be required to disclose confidential communications when harm to innocent parties is threatened and imminent. The same societal considerations that dictated non-recognition of the privilege in Tarasoff, would reasonably dictate its denial where a clergyman is involved. Yet the California legislature did enact section 1024214 which specifically denies the privilege to a psychotherapist in those circumstances where there is a threat of harm to another. Significantly, as has been previously stated here, the Tarasoff court relied heavily on that statute in denying confidentiality. There is, however, no equivalent provision in the California code dealing with the clergy privilege. No exception is listed which denies a clergyman the privilege where harm is threatened. Thus—while one could predict, based on Tarasoff, that a privilege would be denied in such circumstances—it is possible the court would conclude the absence of an express statutory exclusion for the

213. Id. This argument has even more force when one realizes that psychoanalysis and pastoral counseling share many similarities. Thus it has been written that “the Roman Catholic Church is beginning to suspect a certain ‘rivalry’ between the practice of psychoanalysis and that of confession. The authorities of that Church have thought it wise to issue certain warnings.” E. GerGren, The Psychology of Confession 16 (1975).

Another writer, in comparing the healing effects of the military chaplain with the psychologist has stated that:

An effort has frequently been made at “team ministry” or “team healing”. Recognizing that there are the psychological, biological, and spiritual sides to people, hospitals are often employing chaplains and psychologists to work side by side. Industries are beginning to do the same. The military chaplains and psychologists no longer see themselves as part of separate “corps” to whom people may run in times of crises, but as significant contributors to a healthy lifestyle of individuals within the structured military society.


214. CAL. EVID. CODE § 1024 (West 1966).
clergy privilege indicates the legislature intended the privilege to apply even when harm is threatened.

It may also be instructive to examine another leading case dealing with the psychotherapist's right of confidentiality. In *McIntosh v. Milano*, the court considered the obligation of a psychotherapist to reveal confidential communication to the potential victim of threatened harm. It concluded that there is a duty of disclosure if an imminent danger to the patient or society exists. In such a case "considerations of confidentiality have no over-riding influence . . . ." The court relied on an article by a leading psychiatrist, the implications of which bear heavily on the question of whether a clergyman would be faced with a similar duty.

In an article by Dr. Eric A. Plaut, "A Perspective on Confidentiality," he specifically states that the confidential privilege of a psychiatrist is not total. He compares the situation of the psychiatrist and the patient with the priest-penitent relationship and distinguishes them on the basis of an interesting correlation with "civil authority":

"As the Watergate incident has demonstrated, there is no such thing as total confidentiality under American Law, not even under executive privilege. However, the courts have traditionally been extremely reluctant to have a priest divulge material from the confessional. This priest-penitent relationship has not been subject to the large number of limitations placed the confidentiality of the psychiatrist-patient relationship. Underlying this distinction is the separation of church and state specified in the Constitution. With the interesting exception of the marriage ceremony, the clergyman has no civil authority whatever. It is this absence of civil authority which allows for the almost total confidentiality of the priest-penitent relationship. Conversely, psychiatrists have extensive civil authority, e.g., in circumstances involving abortions, personal injury suits, commitment procedures, and not-guilty-by-reason-of-insanity pleas. So long as we retain civil authority, our claim to confidentiality will always be subject to compromise."

If courts are guided in the future by the Dr. Plaut's the-

216. Id. at 493, 403 A.2d at 513.
217. Id. (citations omitted) (emphasis added).
ory, then it would seem that the clergyman who lacks "civil authority" would not be required to disclose confidential communication where harm is threatened.

Examination of the doctrine of representative denominations indicates that some do recognize exceptions to the privilege while at least one may not. The Lutheran Church states in its By-Laws that:

No minister of the Lutheran Church in America shall divulge any confidential disclosure given to him in the course of his care of souls or otherwise in his professional capacity . . . except with the express permission of the person who had confided to him or in order to prevent the commission of a crime.218

The College of Chaplains in its Code of Ethics states that its members must observe the "seal of confession" without any exception.219 That same code, however, states that "confidential information is only to be revealed when it is assumed that greater health for individuals can be achieved by such revelation." Similarly, American Baptist policy recognizes that confidentiality is not absolute—but may be abridged when "conscience so requires."220

The Catholic Church position seems less flexible:

The seal of confession must always be meticulously safeguarded and observed in regard to all matters that come under it. The law of the seal admits of no excusation. No cause, however great, whatever the circumstances, will

218. By-Laws of the Lutheran Church of America, quoted in Jones, supra note 213, at 15.
220. Id. The implications of this statement go beyond anything the writer has suggested heretofore. It seems that the provision allowing (requiring?) disclosure of confidential communications, "when greater health for individuals can be achieved by such revelation," means more than merely allowing disclosure when the client threatens harm. Perhaps a clergyman, hearing a private confession of immoral and unlawful activity, would conclude that punishment—and even imprisonment—would "help" the confessor by allowing him to expiate his guilt and atone for his sins. If the term "greater health" is to be taken at face value, it would seem that a clergyman in such a situation would be permitted (and perhaps even required) to reveal the contents of that confession to the authorities. Such a result would be truly anomalous and certainly wrench the meaning of "confidential communications."
221. Interview with Professor Douglas Sharp of the American Baptist Seminary of the West (May 4, 1982).
justify its violation. The seal is inviolable. . . .

However, even the Catholic Church recognizes that a professional secret—as opposed to that uttered under the seal of confession—should be revealed in certain circumstances: “The common teaching of the moralists is that the obligation of professional secrecy ceases whenever this measure is urgently necessary for warding off a serious evil (damnum grave) from the common welfare.” It therefore seems that Catholic doctrine would not permit the revealing of information gained in the confessional, under any circumstances—even in order to prevent harm to third persons. However, that which is told to a priest outside the confessional—but still with the expectation of “professional secrecy” would not be privileged in like circumstances.

It is difficult to reach a firm conclusion on the limit of the clergy privilege. There are factors, such as the calculus of the societal benefit-harm approach, which dictate that the clergy privilege be treated similarly to other professional privileges—like the psychotherapist’s privilege—and thus be denied where harm is threatened to a third person. There are other factors, however, which differentiate the clergy privilege from the other privileges.

In fact many denominations would concur that in such a case the confidence should be broken. Yet for Catholic priests at least, it would seem that information garnered in the confessional may never be released. Would a court require a priest to disclose such communication? Would he, or any other clergyman, be held liable in tort for not disclosing such communication to a third party who is later attacked by the penitent? It appears that the societal harm-benefit analysis suggests that a clergyman would have a duty to reveal privileged communications in such circumstances. Yet the definitive answer must await further judicial pronouncement.

224. Examples are: (1) The “civil authority” distinction discussed supra notes 216-17 and accompanying text, (2) Most physician and psychotherapist privileges have statutory exceptions where a realistic and imminent threat of harm as to third persons are made to the former; see, e.g., Cal. Evid. Code § 1024 (West 1966), and (3) The clergy privilege may involve the restrictions of the Establishment and Free Exercise clauses, while the other privileges clearly do not.
225. Also remaining to be considered are the related questions of whether the
not suggested that a cleryman be required to disclose all threats of harm to third persons. Rather what is considered is whether, when a cleryman is of the firm belief that a penitent who threatens harm has the means and intent to effect his designs, he must reveal that communication.

XII. CONCLUSIONS AND RECOMMENDATIONS

Counseling—the giving of advice and comfort to religious adherents—is a common and accepted practice of virtually all faiths and denominations. The cleryman is often the one to whom an individual, burdened by feelings of guilt and remorse, can turn to for comfort and spiritual strength. As one writer has said, pastoral counseling is a process of confession, which leads to benefits both for the penitent and society: “Much pastoral counseling involves processes that could properly be called confession, leading toward processes that could be called forgiveness, reconciliation or absolution.”226 Clergy-men are often the last resort for troubled individuals whose financial limitations may prevent them from seeking psychiatric or psychotherapeutic assistance. The cleryman is as available as the nearest church, or synagogue, and will generally not ask an individual whether his health insurance is in order before undertaking counseling. Further, many individuals will feel comfortable discussing intimate problems with a minister, rabbi, or priest with whom they have a relationship, while they may be reticent to “bare their souls” to a stranger—though he may be a licensed psychiatrist. The clergy-penitent relationship therefore should be encouraged, and the confidentiality of that relationship should be insured. It is with this perspective that the following specific recommendations are made.

Marital counseling is an important and vital part of a minister’s role. The basic family structure is being eroded by

privilege would apply in the following circumstances: (1) Where during the course of the interview the penitent threatens the cleryman and (2) where the penitent threatens harm to himself (e.g., a threat of suicide). Must the cleryman keep such statements confidential? In the first situation it would seem that the same result would obtain where a third party was threatened, since there is no solid reason to favor the life of a third party over that of the cleryman. In the second case, however, a different result may be suggested, since here the societal harm-benefit calculus is different, and there is no threat to innocent third parties.

226. Reese, supra note 45, at 84 n.101 (quoting R. E. Elliot, Guilt and Forgiveness, Perkins School of Theology).
many factors, including the pressures and rigors of modern society. The preservation of that structure is important to the continued vitality of American society. A couple having difficulty in their marriage will often consult their minister and seek his experience and guidance to ameliorate their situation. Yet this can only be assured when each party knows that his or her most intimate discussions will be kept confidential. In some instances acts which are considered criminal offenses by the state are revealed.  

It is therefore essential that the right to confidentiality in marriage counseling be recognized. A model for the protection of confidentiality of marital counseling could be the former Delaware statute which reads:

No priest, clergyman, rabbi, practitioner of Christian Science, or other duly licensed, ordained or consecrated minister of any religion shall be examined in any civil or criminal proceedings in the courts of this state:

. . . (3) With respect to any communication made to him in his professional capacity, by either spouse, in connection with any effort to reconcile estranged spouses, without the consent of the spouse making the communication.

All states should adopt this formulation and extend the privilege to marital counseling, for, as previously indicated, it is in society’s best interest to do so.

Many states have the “traditional” wording requiring a confession be made to a clergyman in his professional capacity in the course of discipline enjoined by the rule and practice of the religious body to which he belongs. Most modern statutes, however, have deleted the “discipline enjoined” requirement and have instead used terminology such as “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,” or prohibit disclosure of a confession or confidence “made to him in his professional character as spiritual advisor.” The requirement that the communication be made to a clergyman in his professional ca-

Capacity is sound and should be retained. Anything less may lead to unwarranted abuses. There is little to commend allowing the privilege where one speaks to a minister as a friend, say at a picnic or sports event, without intending that the clergyman listen or respond as a religious functionary. That requirement is thus justified. The same, however, cannot be said of the "discipline enjoined" requirement.

The courts should not involve themselves in the doctrine and polity of various religious groups to determine the exact parameters of each discipline. Aside from the potential constitutional difficulties involved in such analyses, the statutes should properly take notice—as did the court in Swenson\textsuperscript{231}—that the sharing of confidences with a minister is a legitimate and common practice of all churches and religious denominations. It is not the function of the legislature to scrutinize the tenets of religious groups to determine its specific sacraments and doctrines. Whether one's religious denomination so requires, or whether a clergyman is bound by the formal dictates of his church to protect that confidence, is irrelevant. It is in the interests of society to foster open and free communications between penitent and clergyman. The confidentiality of that relationship should still be protected.

It is also worthwhile to consider the presence of third persons and its effect on the privilege. Generally the presence of third parties essential to the communications does not void the privilege. Also, those third parties may claim the privilege in their own right. However, an express provision to that effect may serve a useful purpose. The Mississippi statute adds the provision that "(4) A clergyman's secretary, stenographer or clerk shall not be examined without the consent of the clergyman concerning any fact, the knowledge of which was acquired in such capacity."\textsuperscript{232} This provision resolves a potential problem and should be preserved. In order to avoid any ambiguity it would, however, be helpful to supplement the above provision, with the stipulation that this section would not apply where the clergyman dies or becomes mentally incapacitated.\textsuperscript{233}

Another factor that needs to be addressed is the require-

\textsuperscript{231} In re Swenson, 183 Minn. 602, 237 N.W. 589 (1931).
\textsuperscript{232} Miss. Code Ann. § 13-1-22 (Supp. 1982).
\textsuperscript{233} This recommended stipulation would avoid the potential problem where the clergyman's consent could not be given because of his death or mental incapacity.
ment of "communication" itself. Must it be oral? Must it be in person? One court has held that the privilege did not apply to a letter sent to a minister asking for "prayers." Yet it is possible that one may feel so guilt-ridden and abashed about an act committed that one would not communicate face-to-face with a minister but rather write a letter. Are there not the same benefits to society from a written confession as an oral one? What of a "confession of sin" over the telephone? Perhaps one is ill and confined to a hospital bed and telephones his clergyman. This may very well be the time when one needs spiritual guidance the most. Does that not also deserve the protection of confidentiality? Observations of a clergyman should also be privileged. One court has indicated by implication that only communication to a clergyman is privileged—and not observations by a clergyman in the course of that communication. That would seem to be an anomalous and unreasoned result. The act of spiritual guidance and comfort must be unfettered by such an artificial distinction. Often the tone of voice or movement of hands may better express the penitent's feelings than words spoken. A rule dictating that clergymen not be questioned as to the contents of the communication but allowing questions about their observations would be unreasonable.

Written records of a clergyman may also frequently contain the results of confidential communications or relevant suggestions by that clergyman to deal with the penitent's problem. Making public such records might cause serious damage to the penitent and might prevent others from seeking help for fear they too will not be protected. Such records should remain privileged.

It is therefore recommended that the model statute include a provision which protects (1) any form of communication directed to a clergyman in his professional capacity whether that be by telephone, telecommunication, letter or any other means of communication; (2) all observations of clergymen made during the course of any privileged communication (defined elsewhere); and (3) all records relating to confidential communications made in the course of or as a result of confidential communication.

The definition of clergyman is a difficult matter. Perhaps the most effective way to recommend a model statute is to analyze what it should not be. Kansas gives the privilege to a "duly ordained regular minister of religion." Duly ordained minister of religion is defined as:

(a)(1) person who has been ordained, in accordance with the ceremonial ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his or her regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization. . . .

Further, "regular minister or religion" is defined as:

(2) One who as his or her customary vocation preaches and teaches the principles of religion of a church, religious sect, or organization of which he or she is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister; (3) the term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his or her church, sect, or organization. . . .

This is unsatisfactory in many ways. First, it requires that the minister have as his "regular and customary vocation" the preaching and teaching of religion. Presumably this would exclude any part-time minister. In addition, ordained faculty members of seminaries may not be included. What about full-time hospital chaplains? Or military chaplains?

237. Id.
Many churches, which are too large to be effectively guided by one pastor, frequently hire a retired minister to assist the regular minister. This retired clergyman does all the tasks of a clergyman—yet he only works part-time. The policies behind the privilege suggest no reason why the above mentioned persons should be excluded from its protection.

Even more noteworthy is the fact that some denominations (e.g., Christian Science and the Church of Jesus Christ of the Latter Day Saints) dictate that, with few exceptions, their clergy not be full-time. They too should not be excluded. Therefore, a statute which defines clergymen as does the Kansas statute should be avoided.

The denominational identification of the clergyman also poses problems. Georgia, for example, limits its statutes to "any Protestant minister of the Gospel, or to any priest of the Roman Catholic faith, or to any priest of the Greek Orthodox Catholic faith, or to any Jewish Rabbi, or to any Christian or Jewish minister, by whatever name called. . . ." This is unsatisfactory since communication with a Buddhist monk, a Moslem priest or even perhaps a Unitarian minister would not be privileged. While Georgia was probably trying to deal with—and exclude—the "mail-order minister," i.e., the alleged fraudulent clergyman, the solution may in fact create more problems than it solves.

Connecticut's statute affords the privilege to "a clergyman, priest, minister, rabbi, or practitioner of any religious denomination accredited by the religious body to which he belongs who is settled in the work of the ministry." What does settled in the work of the ministry mean? Again, is a part-time or retired minister covered? Such formulations are equally unsatisfactory.

Is there an age requirement for ministers? Tennessee and Virginia establish the age of eighteen while other states do not. There are some denominations which have child evangelists below these ages, and presumably, since there is no basis for exception noted, they would be excluded. This properly should be a question for the church involved. In those churches where one is ordained at an earlier age, the privilege should exist as to such an individual as well. It is therefore

recommended that a privilege statute should not impose any limitation on clergymen (1) who practice their calling on less than a full-time basis, or (2) who are less than a specified age.

It is not suggested that the privilege be extended to all those who are self-ordained. Pennsylvania's statute (since repealed) provided that communications to all clergy were privileged "except clergymen or ministers who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen." On its face the statute sets forth a requirement of formal ordination. Yet the penitent should be allowed confidentiality when he speaks to one who acts or is recognized as a minister although he may not be formally ordained. Thus, if a church or religious community recognizes a person as their leader and pastor, then he should be allowed the privilege, even if not formally ordained.

The definition of "penitent" also needs to be elucidated. The Kansas statute defines a penitent entitled to claim the privilege as:

(a)(1) person who recognizes the existence and authority of God and who seeks or receives from a regular or duly ordained minister of religion advice or assistance in determining or discharging his or her moral obligations, or in obtaining God's mercy or forgiveness for past culpable conduct.

The Uniform Rules of Evidence in Rule 29(b) provides that: "'penitent' means a member of a church or religious denomination who had made a penitential communication to a priest thereof. . . ." These definitions of penitent are unsatisfactory. Is not an agnostic entitled to benefit from a minister's spiritual counseling? Should one be required to recognize "the existence and authority of God" to seek confidential guidance from a religious leader?

The requirement that the penitent be a member of the denomination whose religious leader he consults for the communication to be confidential may lead to undesirable results.

241. There are denominations which will recognize a person as a minister even without formal ordination, if a particular congregation so designates him by consensus. An example is the Unitarian Church. Interview with Bob Lehman, minister of the First Unitarian Church, San Jose, California (May 4, 1982).
A person may move to a new home in a different city, not yet be a member of any Church or Synagogue, and seek spiritual counseling from a local pastor. Or a Methodist may be unhappy with the advice of his pastor and decide to go to the local Baptist minister who has an excellent reputation for effective counseling. Should the aforementioned people not enjoy the privilege merely because they are not members of the minister's church?

Such a definition of "penitent" is unsatisfactory for it excludes from the mantle of confidentiality many situations that should be privileged. It is recommended that anyone who consults a minister in his professional capacity be entitled to claim the privilege.

In addition, the Texas provision that a judge may deny the privilege where the interests of justice so require is also unsatisfactory since it vests too much discretion in the judge. It also seems likely that it would often be impossible for the judge to determine whether the interests of justice dictate disclosure unless the contents of the communication were first revealed to the judge. This would destroy the necessary confidentiality of the clergy-penitent relationship.

In light of the above considerations and recommendations the following model statute is recommended for adoption in all jurisdictions:

No Clergyman shall be examined in any civil or criminal proceeding, or administrative hearing with respect to any communication made to that clergyman in his professional capacity:

(1) “Clergyman” is a spiritual leader in any faith so recognized by his denomination.

(2) “Communication” includes any manner or form of communication such as, but not limited to, letter or telephone. Observation and records of any “communication” shall also be included.

(3) A Clergyman’s secretary, stenographer, clerk or any other person necessary to effect the purpose of the communication shall not be examined without the Clergyman’s consent. The provision of this paragraph shall not apply should (1) the Clergyman die or become mentally incapacitated, and (2) the person making the communication consents to such examination.

(4) Both the persons making the communication and the Clergyman shall be holders of the privilege of this section.

(5) If the communication threatens harm to any person, the Clergyman may, but is not required to disclose the communication to avoid occurrence of that harm.

Such a statute would minimize constitutional objections while protecting the vital societal interests of the clergy-penitent relationship.