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Shawn P. Bailey

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How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege

In 1813, a New York court ruled that the Free Exercise Clause prohibited the state from compelling a Catholic priest to disclose information learned in a confidential confession.¹ This decision to preserve the clergy-penitent privilege² on constitutional grounds³ is the central feature of one of the great stories concerning church and state in America. Daniel Phillips had knowingly received stolen goods.⁴ Following the tenets of the Roman Catholic Church, Phillips confessed to Father Kohlman. Determined to right the wrong, Phillips later delivered the goods to Father Kohlman who then returned them to the original owner. Apprised of these events by the original owner, the state subpoenaed Father Kohlman to testify regarding Phillips before a grand jury. To prevent Father Kohlman from being forced to choose between an obligation to God and an obligation to the state, the *Phillips* court ruled that “[t]he only course is, for the court to declare that he shall not testify or act at all.”⁵ This conflict

1. *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813) was not officially published. The case is abstracted at *Privileged Communications to Clergymen*, 1 W. L.J. 109 (1843) [hereinafter *Privileged Communications to Clergymen I*], and at *Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955) [*Privileged Communications to Clergymen II*]. Although more difficult to encounter, the complete unofficial report from which the above abstracts were drawn was published as WILLIAM SAMPSON, *THE CATHOLIC QUESTION IN AMERICA* (Da Capo Press 1974) (1813).

2. Although the phrase “privilege protecting confidential communications with clergy” is more legally correct (acknowledging that the privilege must protect confidential communications with clergy in a way that does not favor one religion over another to avoid Establishment Clause problems), this Comment shall use the less burdensome “clergy-penitent privilege” for the sake of consistency with existing scholarship.

3. See *People v. Phillips*, (N.Y. Ct. Gen. Sess. 1813) at 112–13; *Privileged Communications to Clergymen*, *supra* note 1, at 207 (“Suppose that a decision of this court, or a law of the state should prevent the administration of [a basic Protestant sacrament] . . . , would not the constitution be violated, and the freedom of religion be infringed? Every man who hears me will answer in the affirmative. Will not the same result follow, if we deprive the Roman [C]atholic of one of his ordinances?”).

4. See SAMPSON, *supra* note 1, at 4–5. The brief summary of the facts provided here is taken entirely from Sampson.

5. See *Privileged Communications to Clergymen II*, *supra* note 1, at 203; see also *Privileged Communications to Clergymen I*, *supra* note 1, at 112.

between the state's coercive power to collect evidence and the right to maintain confidential certain religious communications lies at the center of every challenge to the clergy-penitent privilege. The holding in *People v. Phillips* is significant because it reflects an important early understanding of the phrase "free exercise of religion." The essential aspect of this understanding was that the First Amendment guaranteed state accommodation of religious behavior that may not conform to generally applicable law.⁶ A second legal basis that the *Phillips* court could have relied on is also important. If understood as a structural restraint on governmental power, the Establishment Clause also could have required the *Phillips* court to prevent state interference with Father Kohlman's confidential communications.⁷

Although *Phillips* represents a triumphant early moment for religious freedom in America, its influence has been limited. The Supreme Court has not decided whether either of the First Amendment religion clauses requires maintenance of the clergy-penitent privilege. Still, confidential communications with clergy have generally been protected under state law, much like the attorney-client privilege.⁸ However, as all fifty states have enacted mandatory abuse-reporting laws,⁹ the status of such privileges has been called into question. The seriousness of a single incident of child abuse is unquestionable; national child abuse rates¹⁰ are therefore a cause for great concern. Unfortunately, concern over child abuse has fueled an attempt to undermine the clergy-penitent privilege. To justify their assault on a basic religious freedom, those who advocate abrogation of the clergy-penitent privilege imply that policy-makers must choose either to uphold the clergy-penitent privilege or effectively combat

6. See discussion *infra* Part III.A.1. See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

7. See discussion *infra* Part III.A.2. See generally Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998).

8. See generally MCCORMICK ON EVIDENCE §§ 72-77 (John W. Strong ed., 5th ed. 1999); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE ch. 5 (1999).

9. For a summary of the several states' abuse-reporting laws, see National Clearinghouse on Child Abuse and Neglect Information, *Overview of Child Abuse and Neglect State Statute Elements, Reporting Statutes*, at <http://www.calib.com/nccanch/statutes/index.cfm#Laws> (Jan. 31, 2002).

10. The U.S. Department of Health and Human Services estimated that 270,000 children were victims of physical or sexual abuse in 1999. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, ADMIN. OF CHILDREN AND FAMILIES, CHILD MALTREATMENT 1999: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM ch. 2.2 (2001).

child abuse.¹¹ Framing the issue in such terms is an attempt to leverage the appropriate emotional response to a vile crime like child abuse against a religious liberty interest that may seem less urgent.

Still, one can fully condemn child abuse while defending the clergy-penitent privilege. However persuasive it may be, the binary approach suggesting that one must either choose between the privilege or child abuse prevention is simplistic and ultimately flawed. First, such an approach implies that, compared to the state, clergy are unconcerned when it comes to child abuse prevention. Contrary to this implication—and despite the rare case involving an abusive clergy member¹²—it seems reasonable to assume that both clergy and the state are deeply concerned about the well-being of children. Second, this approach proposes a probable non-solution: abrogation of the clergy-penitent privilege is not likely to diminish child abuse.¹³ Third, adopting this approach ignores the fact that alternative means, such as traditional law enforcement methods and less controversial reporting requirements, remain intact to enforce child abuse laws.¹⁴ Finally, the claim that one must choose between the clergy-penitent privilege and child abuse prevention fails to acknowledge that clergy-penitent communication may effectively combat child abuse.¹⁵ Considering these points—and the religious significance of the practice of confidential confession¹⁶—abrogation of the clergy-penitent privilege through abuse-reporting laws should be a cause for great concern.

Drawing a comparison between the clergy-penitent and attorney-client privileges, this Comment will demonstrate that if anything, the clergy-penitent privilege merits more protection from abrogation than the attorney-client privilege. Part I of this Comment will sum-

11. See, e.g., Karen L. Ross, *Revealing Confidential Secrets: Will it Save Our Children?*, 28 SETON HALL L. REV. 963, 998–99 (1998) (assuming a significant conflict between evidentiary privileges and child abuse prevention, and concluding that abrogation of privileges is necessary to prevent child abuse).

12. Accounts of abusive clergy members are far too common. See, e.g., Fox Butterfield, *Two Priests Who Abused Boys in Maine Are Removed*, N.Y. TIMES, Mar. 10, 2002, § 1, available at <http://www.nytimes.com/2002/03/10/national/10PRIE.html>. Still, this Comment assumes that such predators are relatively uncommon in relation to the many thousands of clergy members of every religion who live up to the high standards they teach.

13. See *infra* text accompanying notes 105–07.

14. See *infra* text accompanying notes 104 and 171.

15. See *infra* notes 101–02 and accompanying text.

16. See *infra* text accompanying notes 70–76 and 185.

marize current state laws regarding mandatory abuse-reporting and compare the effect these laws have had on the clergy-penitent and attorney-client privileges. Part II of this Comment will analyze the clergy-penitent and attorney-client privileges in relation to the traditional rationales for evidentiary privileges to assess whether the current difference in status between the two privileges relates to a difference in value or importance. Part III will analyze the clergy-penitent and attorney-client privileges' respective claims to protection under the Constitution. Finally, Part IV will look beyond the traditional rationales and constitutional arguments to consider some alternative explanations for the current difference in status between the clergy-penitent and attorney-client privileges.

I. THE EFFECT OF ABUSE-REPORTING LAWS

While child abuse is not a new problem, taking child abuse seriously may be considered relatively new.¹⁷ The Children's Bureau of the United States Department of Health, Education, and Welfare promulgated the first model abuse-reporting laws in 1963.¹⁸ By 1967, all fifty states had adopted abuse-reporting laws.¹⁹ These laws were initially narrow in scope, requiring only physicians to report suspected child abuse.²⁰ However, as the federal government offered grants to states that enacted more expansive abuse-reporting laws,²¹ most states enacted expansive laws to qualify themselves for the federal funds. The stated purpose for abuse-reporting laws is to protect children from the harm associated with child abuse.²² Abuse-reporting laws generally impose both a duty to report and criminal penalties or potential civil liability on those who fail to comply.

17. See Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 726 (1987).

18. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, *THE ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD* (1963).

19. See Mitchell, *supra* note 17, at 727.

20. *Id.*

21. See Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101-5107 (1995)).

22. See, e.g., CONN. GEN. STAT. ANN. § 17a-101 (Lexis 2001) (imposing duty to report to "protect children whose health and welfare may be adversely affected through injury and neglect"). Professor Mitchell observes that every state's abuse-reporting law is based on the same objective. See Mitchell, *supra* note 17, at 725 ("Every state has a statute aimed at discovering and stopping child abuse.") (footnote omitted).

Despite some basic similarities, significant variation between the abuse-reporting laws of the several states raises a variety of concerns.²³ One of the more troublesome problems with abuse-reporting laws is vague language. Of the fifty-one statutes under consideration, eighteen name any “individual,” “person,” or “other person” as a mandatory reporter.²⁴ Using such universal language without specific guidance as to its effect on preexisting law, many abuse-reporting laws leave considerable uncertainty as to their intended effect on evidentiary privileges.²⁵ Still, a significant number of reporting laws are clear about their effect on otherwise privileged communications regarding abuse.²⁶

A. Reporting Laws and the Clergy-Penitent Privilege

The effect on the clergy-penitent privilege achieved by the statutory schemes of the several states may be considered in four basic categories: (1) complete abrogation; (2) conditional preservation; (3) complete preservation; and (4) uncertain. Statutes enacted in nine states achieve a complete abrogation of the clergy-penitent privilege in relation to the duty to report suspected abuse.²⁷ Statutes enacted in eighteen states have imposed a conditional duty to report

23. Such concerns involve various attempts to define clergy, ambiguity regarding whether one or both parties to a privileged communication may invoke the privilege, and constitutionally questionable attempts to limit or extend the privilege.

24. See DEL. CODE ANN. tit. 16, § 903 (Lexis 2000); FLA. STAT. ANN. § 39.201 (Lexis 2000); IDAHO CODE § 16-1619(a) (Lexis 2000); IND. CODE ANN. § 31-33-5-1 (Lexis 2000); KY. REV. STAT. ANN. § 620.030(1) (Lexis 2001); MD. CODE ANN., FAM. LAW § 5-704(a)(1) (Lexis 2001); MISS. CODE ANN. § 43-21-353 (Lexis 2001); NEB. REV. STAT. ANN. § 28-711(1) (Lexis 2001); N.H. REV. STAT. ANN. § 169-C:29 (Lexis 2000); N.J. STAT. ANN. § 9:6-8.10 (Lexis 2001); N.M. STAT. ANN. § 32A-4-3(A) (Lexis 2001); N.C. GEN. STAT. § 7B-301 (Lexis 2000); OKLA. STAT. ANN. tit. 10, § 7103 (A)(1) (Lexis 2000); R.I. GEN. LAWS § 40-11-3(a) (Lexis 2001); Act of June 7, 2001, sec. 1, 2001 Tenn. Pub. Acts 351 (to be codified at TENN. CODE ANN. § 37-1-403); TEX. FAM. CODE ANN. § 261.101(a) (Lexis 2000); UTAH CODE ANN. § 62A-4a-403(1) (Lexis 2001); WYO. STAT. ANN. § 14-3-205(a) (Lexis 2001).

25. See *infra* notes 30 and 37 and accompanying text.

26. See, *e.g.*, *infra* note 27 and accompanying text.

27. See CONN. GEN. STAT. ANN. §§ 17a-101, -103 (Lexis 2001); MISS. CODE ANN. § 43-21-353 (Lexis 2001); N.H. REV. STAT. ANN. §§ 169-C:29, -C:32 (Lexis 2000); N.C. GEN. STAT. §§ 7B-301, -310 (Lexis 2000); OKLA. STAT. ANN. tit. 10, §§ 7103, 7113 (Lexis 2000); R.I. GEN. LAWS §§ 40-11-3, -11 (Lexis 2001); TENN. CODE ANN. § 37-1-411 (Lexis 2001); Act of June 7, 2001, sec. 1, 2001 Tenn. Pub. Acts 351 (to be codified at TENN. CODE ANN. § 37-1-403); TEX. FAM. CODE ANN. § 261.101 (Lexis 2000); W. VA. CODE ANN. §§ 49-6A-2, 7 (Lexis 2001).

abuse subject to a clergy-penitent privilege limited by various terms.²⁸ Statutes enacted in four states specifically preserve the clergy-penitent privilege without express limits.²⁹ Since their statutes do not name clergy as reporters nor comment on the effect of a broad duty to report, the status of the clergy-penitent privilege in relation to abuse reporting is uncertain in the remaining nineteen states and the District of Columbia.³⁰ In some of these states the strength of the clergy-penitent privilege presumably allows clergy to refrain from reporting child abuse.³¹ On the other hand, the strength of the language found in the abuse-reporting statutes of other states

28. See ARIZ. REV. STAT. ANN. §§ 8-805, 13-3620 (Lexis 2000); CAL. PENAL CODE §§ 11165.7, 11166 (Lexis 2001); FLA. STAT. ANN. §§ 39.201, .204 (Lexis 2000); IDAHO CODE §§ 16-1619, -1620 (Lexis 2000); IND. CODE ANN. §§ 31-32-11-1, 31-33-5-1, -2 (Lexis 2000); LA. CODE OF JUV. PROC. ANN. art. 603(13), 609(A)(1), 610(F) (Lexis 2000); Act of June 1, 2001, sec. 5, 2001 Me. Laws 345 (Lexis) (to be codified at ME. REV. STAT. ANN. tit. 22, § 4011); MD. CODE ANN., FAM. LAW §§ 5-704, -705 (Lexis 2001); MINN. STAT. ANN. § 626.556 (Lexis 2000); Act of April 1, 2001, sec. 4, 2001 Mont. Laws 311 (Lexis) (to be codified at MONT. CODE ANN. § 41-3-201); NEB. REV. STAT. ANN. §§ 28-711, -714 (Lexis 2001); NEV. REV. STAT. ANN. §§ 432B.220, .250 (Lexis 2001); N.J. STAT. ANN. §§ 9-6-8.10 (Lexis 2001); N.D. CENT. CODE § 50-25.1-03 (Lexis 2001); Act of April 23, 2001, sec. 148, 2001 Ore. HB 2609 (Lexis) (to be codified at OR. REV. STAT. § 419B.005); Act of April 23, 2001, sec. 149, 2001 Ore. HB 2609 (Lexis) (to be codified at OR. REV. STAT. § 419B.010); 23 PA. CONS. STAT. ANN. § 6311 (Lexis 2001); UTAH CODE ANN. § 62A-4a-403 (2001); WYO. STAT. ANN. §§ 14-3-205, -210 (Lexis 2001).

29. See DEL. CODE ANN. tit. 16, § 909 (Lexis 2000); KY. REV. STAT. ANN. § 620.050(2) (Lexis 2001); S.C. CODE ANN. § 20-7-550 (Lexis 2000); WASH. REV. CODE ANN. § 26.44.060(3) (Lexis 2001).

30. See ALA. CODE §§ 26-14-10, 26-14-3 (Lexis 2001); ALASKA STAT. §§ 47.17.020, .060 (Lexis 2001); ARK. CODE ANN. § 12-12-507 (Lexis 2001); COLO. REV. STAT. ANN. §§ 19-3-304, -311 (Lexis 2000); D.C. CODE ANN. §§ 4-1321.02, .05 (Lexis 2001); GA. CODE ANN. § 19-7-5 (2000); HAW. REV. STAT. ANN. §§ 350-1.1, 350-5 (Lexis 2000); 325 ILL. COMP. STAT. ANN. 5/4 (Lexis 2001); IOWA CODE ANN. § 232.74 (Lexis 2001); Act of May 7, 2001, §§ 1-2, 2001 Ia. HF 680 (Lexis) (to be codified at IOWA CODE. § 232.69); KAN. STAT. ANN. § 38-1522 (Lexis 2000); MASS. GEN. LAWS ANN. ch. 119, §§ 51A, 51B (Lexis 2001); MICH. COMP. LAWS ANN. §§ 722.623, .631 (Lexis 2000); MO. ANN. STAT. §§ 210.115, .140, 568.110 (Lexis 2000); N.M. STAT. ANN. §§ 32A-4-3(A), -5(A) (Lexis 2001); N.Y. SOC. SERV. LAW § 413 (Lexis 2001); OHIO REV. CODE ANN. § 2151.421 (Anderson 2001); S.D. CODIFIED LAWS §§ 26-8A-3, -15 (Lexis 2001); VT. STAT. ANN. tit. 33, § 4913 (Lexis 2001); VA. CODE ANN. §§ 63.1-248.3, 11 (Lexis 2001); WIS. STAT. ANN. § 48.981 (Lexis 2000).

31. See, e.g., N.Y. C.P.L.R. § 4505 (Lexis 2001) (“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.”).

in the uncertain category may suggest that abrogation was intended.³²

B. Reporting Laws and the Attorney-Client Privilege

The effect on the attorney-client privilege achieved by the statutory schemes of the several states may be considered in the same four categories employed above: (1) complete abrogation; (2) conditional preservation; (3) complete preservation; and (4) uncertain. Only two states seem to have abrogated the attorney-client privilege whenever it would conflict with a duty to report.³³ Three other states impose a duty to report only when that knowledge is obtained outside of the attorney-client relationship.³⁴ Seventeen states have expressly preserved the attorney-client privilege.³⁵ Of these, eight states have preserved the attorney-client privilege exclusively while apparently abrogating all other privileges.³⁶ Due to ambiguous statutory language, the effect of abuse-reporting statutes on the attorney-client privilege is uncertain in the remaining twenty-nine states and the District of Columbia.³⁷ However, the attorney-client privilege is customarily

32. *See, e.g.*, ALA. CODE §§ 26-14-3, -10 (Lexis 2001).

33. *See* MISS. CODE ANN. § 43-21-353 (Lexis 2001); TEX. FAM. CODE ANN. § 261.101 (Lexis 2000).

34. *See* NEV. REV. STAT. ANN. § 432B.220 (Lexis 2001); OHIO REV. CODE ANN. § 2151.421(A)(2) (Anderson 2001); Act of April 23, 2001, sec. 149, 2001 Ore. HB 2609 (Lexis) (to be codified at OR. REV. STAT. ANN. § 419.010).

35. *See* ALA. CODE § 26-14-10 (Lexis 2001); ARIZ. REV. STAT. ANN. § 8-805(B) (Lexis 2000); DEL. CODE ANN. tit. 16, § 909 (Lexis 2000); FLA. STAT. ANN. § 39.204 (Lexis 2000); IDAHO CODE § 16-1620 (Lexis 2000); KY. REV. STAT. ANN. § 620.050(2) (Lexis 2001); MD. CODE ANN., FAM. LAW § 5-705(a)(2) (Lexis 2001); MICH. COMP. LAWS ANN. § 722.631 (Lexis 2000); MO. ANN. STAT. § 210.140 (Lexis 2000); N.H. REV. STAT. ANN. § 169-C:32 (Lexis 2000); N.C. GEN. STAT. § 7B-310 (Lexis 2000); N.D. CENT. CODE § 50-25.1-10 (Lexis 2001); R.I. GEN. LAWS § 40-11-11 (Lexis 2001); S.C. CODE ANN. § 20-7-550 (Lexis 2000); WASH. REV. CODE ANN. § 26.44.060(3) (Lexis 2001); W. VA. CODE ANN. § 49-6A-7 (Lexis 2001); WYO. STAT. ANN. § 14-3-210 (Lexis 2001).

36. *See* ALA. CODE § 26-14-10 (Lexis 2001); FLA. STAT. ANN. § 39.204 (Lexis 2000); MICH. COMP. LAWS ANN. § 722.631 (Lexis 2000); MO. ANN. STAT. § 210.140 (Lexis 2000); N.H. REV. STAT. ANN. § 169-C:32 (Lexis 2000); N.C. GEN. STAT. § 7B-310 (Lexis 2000); R.I. GEN. LAWS § 40-11-11 (Lexis 2001); W. VA. CODE ANN. § 49-6A-7 (Lexis 2001).

37. *See* ALASKA STAT. §§ 47.17.020, .060 (Lexis 2001); ARK. CODE ANN. § 12-12-507 (Lexis 2001); CAL. PENAL CODE §§ 11165.7, 11166 (Lexis 2001); COLO. REV. STAT. ANN. §§ 19-3-304, -311 (Lexis 2000); CONN. GEN. STAT. ANN. §§ 17a-101, -103 (Lexis 2001); D.C. CODE ANN. § 4-1321.02, .05 (Lexis 2001); GA. CODE ANN. § 19-7-5 (Lexis 2000); HAW. REV. STAT. ANN. §§ 350-1.1, 350-5 (Lexis 2000); 325 ILL. COMP. STAT. ANN. 5/4 (Lexis 2001); 720 ILL. COMP. STAT. ANN. 5/11-20.2 (Lexis 2001); IND. CODE ANN. §§ 31-32-11-1, 31-33-5-1, -2 (Lexis 2000); Act of May 7, 2001, §§ 1-2, 2001 Ia. HF 680 (Lexis)

strong in many of the “uncertain” states.³⁸ In fact, Professor Mosteller has argued that state legislatures did not intend to abrogate the attorney-client privilege through abuse-reporting laws.³⁹ Considering Mosteller’s argument, the strength of the attorney-client privilege in many states, and the lack of reference to attorneys in many abuse-reporting laws, there appears to be a strong presumption that abuse-reporting laws do not abrogate the attorney-client privilege.⁴⁰

C. Attorneys Protected, Clergy Neglected

Summarizing the preceding discussion, the following table facilitates comparison of the effect that abuse-reporting laws have had on the attorney-client and clergy-penitent privileges.

(to be codified at IOWA CODE § 232.69); IOWA CODE ANN. § 232.74 (Lexis 2001); LA. CODE OF JUV. PROC. ANN. art. 603(13), 609(A)(1), 610(F) (Lexis 2000); Act of June 1, 2001, sec. 5, 2001 Me. Laws 345 (Lexis) (to be codified at ME. REV. STAT. ANN. tit. 22, § 4011); MASS. GEN. LAWS ANN. ch. 119, §§ 51A, 51B (Lexis 2001); MINN. STAT. ANN. § 626.556 (Lexis 2000); MISS. CODE ANN. § 43-21-353 (Lexis 2001); Act of April 1, 2001, sec. 4, 2001 Mont. Laws 311 (Lexis) (to be codified at MONT. CODE ANN. §41-3-201); NEB. REV. STAT. ANN. §§ 28-711, -714 (Lexis 2001); N.J. STAT. ANN. § 9:6-8.10 (Lexis 2001); N.M. STAT. ANN. §§ 32A-4-3(A), 5(A) (Lexis 2001); N.Y. SOC. SERV. LAW § 413 (Lexis 2001); OKLA. STAT. ANN. tit. 10, §§ 7103, 7113 (Lexis 2000); 23 PA. CONS. STAT. ANN. § 6311 (Lexis 2001); S.D. CODIFIED LAWS §§ 26-8A-3, -15 (Lexis 2001); Act of June 7, 2001, sec. 1, 2001 Tenn. Pub. Acts 351 (to be codified at TENN. CODE ANN. § 37-1-403); TENN. CODE ANN. § 37-1-411 (Lexis 2001); UTAH CODE ANN. § 62A-4a-403 (Lexis 2001); VT. STAT. ANN. tit. 33, § 4913 (Lexis 2001); VA. CODE ANN. §§ 63.1-248.3, .11 (Lexis 2001); WIS. STAT. ANN. § 48.981 (Lexis 2000).

38. *See, e.g.*, GA. CODE ANN. § 24-9-21 (Lexis 2001) (providing broad privilege for “communications between attorney and client”).

39. *See* Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 223–24 (1992). Mosteller argues that expansions of the attorney-client privilege to legislative and administrative proceedings and the principle that “an attorney may not defeat the privilege indirectly by transmitting a statement regarding a client’s confidential communication through a third party,” suggest that the attorney-client privilege maintains client communications confidential despite abuse-reporting laws. *Id.* at 228–29.

40. *See id.* at 273 (concluding that “with the possible exception of one state, the legislation does not indicate any intention to abrogate the attorney-client privilege as it has been historically interpreted”) (footnotes omitted).

	Attorney-Client Privilege	Clergy-Penitent Privilege
Privilege Abrogated	2	9
Partial Abrogation	3	18
Privilege Maintained	17	4
Uncertain	28 + DC	19 + DC

In light of how many states have sought to protect or abrogate the clergy-penitent and attorney-client privileges, the manner and extent of the abuse-reporting laws' unequal effect on these privileges becomes readily apparent. Perhaps most striking is the number of states that have expressly preserved the privileges. While seventeen states have preserved the attorney-client privilege without additional limits,⁴¹ only four states have preserved the clergy-penitent privilege without imposing additional limits.⁴² This difference in protection presumably reflects a significant amount of concern in state legislatures for the attorney-client privilege and relatively little concern for the preservation of the clergy-penitent privilege. Also notable is the difference between the abuse-reporting laws that partially abrogate the privileges at hand. Eighteen states limit the clergy-penitent privilege to various degrees while claiming to preserve it.⁴³ In contrast, three of the four states that name attorneys as mandatory reporters preserve the confidentiality of communications with clients.⁴⁴ In other words, these three states impose an essentially meaningless duty on attorneys to report, since it only applies to information not obtained from clients.

The number of states that have abrogated the attorney-client and clergy-penitent privileges is also significant. While abuse-reporting laws apparently abrogated the clergy-penitent privilege in nine states,⁴⁵ the attorney-client privilege has been abrogated in only two states.⁴⁶ It is notable that the two states (Mississippi and Texas) that abrogated the attorney-client privilege are among the states that also

41. *See supra* note 35.

42. *See supra* note 29.

43. *See supra* note 28.

44. *See supra* note 34.

45. *See supra* note 27.

46. *See supra* note 33.

abrogated the clergy-penitent privilege.⁴⁷ Assuming that both the attorney-client and clergy-penitent privileges merit continued existence, the Texas and Mississippi abuse-reporting laws are the worst conceived of all. For what it is worth, however, the Texas and Mississippi abuse-reporting laws at least appear even-handed.⁴⁸ The remaining seven states that abrogated the clergy-penitent privilege have done so while simultaneously preserving the attorney-client privilege.⁴⁹ In contrast, no state has expressly preserved the clergy-penitent privilege while abrogating the attorney-client privilege. This difference in the number of states abrogating the attorney-client and clergy-penitent privileges represents a particular assault on the clergy-penitent privilege.

The numbers involved in these three points of comparison obviously represent only a small part of the total number of states. It is important to bear in mind that the abuse-reporting laws in twenty-nine states are unclear as to how they affect the attorney-client privilege,⁵⁰ while the abuse-reporting laws in nineteen states are unclear as to how they affect the clergy-penitent privilege.⁵¹ Therefore, it seems reasonable to view the reporting laws that actually define how they affect the attorney-client and clergy-penitent privileges as an indication of how unclear abuse-reporting laws are likely to be understood to affect evidentiary privileges in the future.

Disparate treatment of the attorney-client and clergy-penitent privileges in relation to abuse-reporting laws is also apparent when examining current statutory schemes of individual states. The eight states that preserve only the attorney-client privilege⁵² provide perhaps the most striking example of such divergent treatment. The

47. *See supra* notes 27 and 33.

48. *See* TEX. FAM. CODE ANN. § 261.101(c) (Lexis 2000) (“The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy. . . .”); MISS. CODE ANN. § 43-21-353 (Lexis 2001).

49. *See* CONN. GEN. STAT. ANN. §§ 17a-101, -103 (Lexis 2001); N.H. REV. STAT. ANN. §§ 169-C:29, C:32 (Lexis 2000); N.C. GEN. STAT. §§ 7B-301, -310 (Lexis 2000); OKLA. STAT. ANN. tit. 10, §§ 7103, 7113 (Lexis 2000); R.I. GEN. LAWS §§ 40-11-3, -11 (Lexis 2001); TENN. CODE ANN. § 37-1-411 (Lexis 2001); Act of June 7, 2001, sec. 1, 2001 Tenn. Pub. Acts 351 (to be codified at TENN. CODE ANN. § 37-1-403); W. VA. CODE ANN. §§ 49-6A-2, -7 (Lexis 2001).

50. *See supra* note 30.

51. *See supra* note 37.

52. *See supra* note 36.

statutory schemes of these states vary by the means in which they treat differently the clergy-penitent and attorney-client privileges. Statutes enacted in Alabama, Michigan, and Missouri specifically abrogate some privileges while expressly preserving only the attorney-client privilege.⁵³ Such a failure to deal with the clergy-penitent privilege in either a negative or positive manner while addressing other privileges seems to reflect indifference toward the clergy-penitent privilege. Statutes enacted in Florida, North Carolina, and Rhode Island impose a universal duty to report that exclusively preserves the attorney-client privilege.⁵⁴ Such a scheme seems to suggest particular concern for the attorney-client privilege and general indifference toward all other privileges. Statutes enacted in New Hampshire and West Virginia name clergy as mandatory reporters while preserving exclusively the attorney-client privilege.⁵⁵ These states seem to have made the policy judgment in unambiguous terms that the attorney-client privilege merits protection while the clergy-penitent privilege (among others) does not. Consideration of the legislative history behind these statutory schemes would presumably lend support to the preceding inferences regarding the policy judgments underlying these statutes; such a study, however, is beyond the scope of this Comment. At this point, it is sufficient to demonstrate that a significant number of state legislatures have simultaneously preserved the attorney-client privilege and destroyed the clergy-penitent privilege in relation to abuse-reporting laws.

II. KEEPING WITH TRADITIONAL RATIONALES

Evidentiary privileges were initially justified as a means of preserving the honor of those entrusted with confidential communications.⁵⁶ The honor justification was abandoned relatively early, and in no uncertain terms.⁵⁷ A utilitarian justification for

53. See ALA. CODE § 26-14-10 (Lexis 2001); MICH. COMP. LAWS ANN. § 722.631 (Lexis 2000); MO. ANN. STAT. § 210.140 (Lexis 2000).

54. See FLA. STAT. ANN. § 39.204 (Lexis 2000); N.C. GEN. STAT. § 7B-310 (Lexis 2000); R.I. GEN. LAWS § 40-11-11 (Lexis 2001).

55. See N.H. REV. STAT. ANN. § 169-C:32 (Lexis 2000); W. VA. CODE ANN. § 49-6A-7 (Lexis 2001).

56. See JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286 (John T. McNaughton rev. ed. 1961) (“In the trials of the 1600s, the obligations of honor among gentlemen . . . were often put forward as a sufficient ground for maintaining silence.”).

57. See *id.* § 2286 n.16 (quoting Hill’s Trial, 20 How. St. Tr. 1362 (1777)) (“[I]f this point of honour was to be so sacred . . . the most atrocious criminals would every day escape

evidentiary privileges has been more significant and lasting than the honor justification.⁵⁸ Authors have also articulated a rights-based justification claiming that evidentiary privileges are required by conceptions of privacy or autonomy.⁵⁹ The following analysis will refer to the utilitarian and privacy or autonomy-based justifications to assess whether the current difference in status of the clergy-penitent and attorney-client privileges may be attributed to valid judgments regarding their underlying value.

A. Confidentiality and Maximization

Professor John H. Wigmore defined the utilitarian justification for evidentiary privileges in his influential treatise on evidence.⁶⁰ According to Wigmore, consideration of evidentiary privileges should “start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional.”⁶¹ Therefore, Wigmore argued, individuals may refuse to produce evidence only “when the benefit gained by exacting [evidence] would in general be less valuable than the disadvantage caused.”⁶² In *Trammel v. United States*,⁶³ the Supreme Court acknowledged these basic premises for the utilitarian justification of evidentiary privileges.⁶⁴ In *Trammel*, a utilitarian analysis led the Court to limit the right to withhold evidence under the spousal privilege to the witness-spouse.⁶⁵ State courts have likewise acknowledged the underlying basis of the utilitarian justification, and have generally sought to limit the application of most privi-

punishment; and therefore it is that the wisdom of the law knows nothing of that point of honour.”).

58. See *infra* Part III.A.

59. See *infra* Part III.B.

60. See WIGMORE, *supra* note 56, § 2192.

61. *Id.*

62. *Id.*

63. 445 U.S. 40 (1980).

64. *Id.* at 50 (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)) (stating privileges “must be strictly construed and accepted ‘only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth’”).

65. *Id.* at 52–53. The Court reasoned that “[w]hen one spouse is willing to testify against the other in a criminal proceeding,” the social benefit that the privilege was meant to preserve (“marital harmony”) is probably already beyond preservation. *Id.* at 52.

leges.⁶⁶ Wigmore argued that an evidentiary privilege should only be recognized under the utilitarian justification if the following four prerequisites were met:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one in which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.⁶⁷

Rather than consider the cost imposed on particular individuals before a court in litigation, Wigmore intended the fourth criteria to entail a balancing analysis between the overall benefit derived from the preservation of confidential communications against the overall cost of maintaining a privilege to the legal system.⁶⁸ Although this analysis has been criticized as blind to individual concerns, it has also been praised for striking a balance between society's long-term interest in the discovery of evidence *and* the interests supporting the maintenance of evidentiary privileges.⁶⁹ The following analysis will focus on the costs and benefits related to the clergy-penitent and attorney-client privileges in the terms of Wigmore's four criteria.

1. Utility and the clergy-penitent privilege

a. Confidentiality. An expectation of confidentiality accompanies communications between clergy and those who confess or seek similar counseling. In some cases, this expectation is reinforced by strict church-imposed confidentiality rules. The rules governing the Seal of the Confession found in the Catholic Code of Canon Law provide

66. See *Guillen v. Pierce County*, 31 P.3d 628, 641 (Wash. 2001); *People v. Hamacher*, 438 N.W.2d 43, 56-57 (Mich. 1989) (Boyle, J., dissenting).

67. WIGMORE, *supra* note 56, § 2285 (citation omitted).

68. See *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1473 (1985) [hereinafter *Developments*].

69. *Id.* at 1473-74.

one example. According to canon law, “The Sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion.”⁷⁰ The 1917 Code provided that the confessor was to “diligently take care” not to betray the penitent.⁷¹ However, the 1983 revised Code of Canon Law reflects increased emphasis on confidentiality, providing that “it is absolutely wrong for a confessor in any way to betray the penitent.”⁷² Furthermore, the Code of Canon Law provides that “[a] confessor who directly violates the sacramental seal incurs [an automatic] excommunication reserved to the Apostolic See; he who does so only indirectly is to be punished according to the gravity of the offense.”⁷³ Another example of such confidentiality rules comes from The Church of Jesus Christ of Latter-day Saints (“LDS Church”). Confession of serious sins in confidential interviews is a central requirement of the LDS Church.⁷⁴ Confession may alert church authorities that disciplinary action, such as excommunication, is necessary.⁷⁵ “The bishop is expected to keep confidential the confession of the transgressor” according to LDS Church policy.⁷⁶

Adherents to a religion that has not devised strict confidentiality rules may also seek private spiritual counsel “in a confidence that [what they say] will not be disclosed.”⁷⁷ Such an individual is likely to expect that discussion of personal problems with a religious authority is completely confidential. Furthermore, many different aspects of such a discussion would tend to confirm this expectation of privacy. Confirmation of an expectation of privacy might come from communication in a private location, assurances of confidentiality, or

70. 1983 CODE c.983, § 1.

71. 1917 CODE c.889, §§ 1–2.

72. 1983 CODE c.983, § 1.

73. 1983 CODE c.1388, § 1. For additional discussion of the Seal of the Confession, see Raymond C. O’Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating That Clergy Report Child Abuse*, 25 LOY. L.A. L. REV. 1, 31–32 (1991).

74. See SPENCER W. KIMBALL, *THE MIRACLE OF FORGIVENESS* 179 (3d ed. 1993). “The confession of . . . major sins to a proper Church authority is one of those requirements made by the Lord. . . . This procedure of confession assures proper controls and protection for the Church and its people and sets the feet of the transgressor on the path of true repentance.” *Id.*

75. See *id.* at 325 (discussing duty of certain authorized church leaders to initiate official action “in cases which warrant either disfellowshipment or excommunication”).

76. *Id.* at 334.

77. WIGMORE, *supra* note 56, § 2285; see also *supra* text accompanying note 67.

the absence of a warning that the communications are not confidential.⁷⁸ Where church-imposed rules of confidentiality do not apply, the analysis may require additional factual consideration on a case-by-case basis. Concerned that such a system would be abused, some states have determined that the clergy-penitent privilege does not apply to communications made outside of a formal confessional or similar confidential spiritual counseling. This policy implicitly excludes communications made in the company of third persons or clergy observations made in a non-confidential setting.⁷⁹ While some may go too far, such limitations may be necessary to ensure that the clergy-penitent privilege does not provide undue protection to criminals.

b. Is confidentiality essential? Confidentiality is “essential to the full and satisfactory maintenance of the relation”⁸⁰ between clergy and penitent. First, fear that a clergy member may be compelled to reveal the content of confidential communications would be a significant deterrent to those seeking to confess sins or receive similar spiritual counseling.⁸¹ Since shame and fear already function as significant internal deterrents to the potential penitent, fear that communications with clergy would not remain confidential is particularly likely to deter spiritual counseling. If fear of non-confidentiality causes would-be penitents to completely avoid spiritual counseling, the clergy-penitent relation is obviously damaged. Furthermore, laws that interfere with the clergy-penitent privilege force clergy members to choose between loyalty to God and the state.⁸² While this choice may cause some clergy members to violate spiritual laws, the quality of devotion that leads to a life of religious service is more likely to

78. See *Developments, supra* note 68, at 1475.

79. See, e.g., MICH. COMP. LAWS § 600.2156 (Lexis 2001) (“No minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.”); see also Mitchell, *supra* note 17, at 747–55.

80. See *supra* text accompanying note 63.

81. See Mitchell, *supra* note 17, at 812 (“If, to comply with statutory reporting requirements, clergy begin to disclose otherwise confidential information, the expectation of secrecy will be destroyed. In the short run, confiders will feel betrayed; in the long run, they are likely to stop confiding in the clergy.”).

82. See Lennard K. Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 13 REGENT U. L. REV. 145, 168 (2000) (“There are laws that some people believe are greater than the state. Such is the situation with the Catholic priest threatened with automatic excommunication if he violates the confessional seal.”).

lead clergy members to choose God over the state. If such defiance leads to the imprisonment of the clergy member,⁸³ the clergy-penitent relationship would obviously be degraded.

Claims that people generally seek spiritual counsel from clergy members without any knowledge of the clergy-penitent privilege⁸⁴ gravely underestimate how quickly most religious communities would communicate the fact that Father Jones or Pastor Green has been subpoenaed to testify or imprisoned.⁸⁵ While the state may successfully violate the religious liberties of the first person whose secrets it seeks to discover from a clergy member, the remainder of that religious community would become acutely aware that the clergy-penitent privilege has been significantly limited or destroyed.⁸⁶

*c. Public sentiment.*⁸⁷ In his treatise on evidence, Wigmore hinted that lack of public support explains the absence of the clergy-penitent privilege in English and early American common law.⁸⁸ While this may be accurate, nonexistence of the clergy-penitent privilege in a society with few confidential clergy-penitent communications sheds little light on the current situation. The fact that all fifty states and the District of Columbia have enacted statutes ensuring the place of the clergy-penitent privilege demonstrates public approval of the privilege.⁸⁹ Additional public approval of the clergy-penitent privilege may be found in federal law: the clergy-penitent privilege has been recognized “in light of reason and experience”⁹⁰ in federal common law.⁹¹ Rather than reflecting public disapproval, the

83. See *infra* note 85.

84. See MUELLER & KIRKPATRICK, *supra* note 8, at 320–21.

85. See Mitchell, *supra* note 17, at 723–24 (discussing case of Pastor John Mellish, a Nazarene minister put in jail for refusal to divulge information learned from a confession); O’Brien & Flannery, *supra* note 73, at 1–2.

86. See *Developments*, *supra* note 68, at 1475 (“[K]nowledge of a privilege may not so much encourage communications as knowledge of its absence would deter them. Thus, the relevant question is not whether too few people know of a privilege, but whether enough people would become aware of (and act on) its absence.”) (footnotes omitted).

87. It is unclear why public disapproval would justify non-recognition of a socially beneficial privilege. Thus, the third of Wigmore’s prerequisites may not merit considerable weight in comparison with the other three criteria. See *supra* note 67.

88. See WIGMORE, *supra* note 56, § 2396.

89. See WILLIAM HAROLD TIEMANN & JOHN C. BUSH, *THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW* 102 (3d ed. 1989).

90. See *infra* note 122 and accompanying text.

91. See *In re Grand Jury Investigation*, 918 F.2d 374, 384–85 (3d Cir. 1990); *United States v. Dube*, 820 F.2d 886, 889–90 (7th Cir. 1987).

current threat to the clergy-penitent privilege⁹² probably stems from other, less democratic influences.⁹³

d. Costs and benefits. The benefits society enjoys from the clergy-penitent privilege outweigh the limitation it imposes on the state's power to collect evidence. Since gathering empirical evidence to support or refute this claim is probably impossible,⁹⁴ this conclusion follows from a few general observations. Although the estimated social cost of the clergy-penitent privilege is presumably significant,⁹⁵ this cost is probably not as great as one might first expect. This is so because the cost of a privilege (measured in undiscoverable evidence) would not properly include information that would not exist but for that privilege.⁹⁶ Thus, the evidence-gathering panacea in which clergy members serve the state as informants is imagined; the cost imposed on society by the clergy-penitent privilege consists only of information that would be volunteered to clergy in the absence of the clergy-penitent privilege.

Balanced against these costs, the sustained legitimacy and eminently positive social behavior that the state derives from the clergy-penitent privilege carry considerable weight. Perhaps more than any other privilege, the clergy-penitent privilege protects communications that are likely to be withheld from the state even in the face of serious legal consequences. One author illustrates this situation by alluding to Antigone's decision to simultaneously obey the gods and disobey King Creon.⁹⁷ In such circumstances, attempts to compel

92. See *supra* Part I.

93. See *infra* Part IV.

94. See *Developments, supra* note 68, at 1474 (pointing out that "no solid empirical data exists to support the estimates of either critics or proponents as to either the costs or the benefits of privileges"). This lack of empirical evidence on either side is likely to persist due to the presumably insurmountable difficulty inherent in proving the non-occurrence of an event: "the extent to which people would communicate in the absence of the privilege." *Id.* at 1477.

95. Wigmore hinted at the potential costs imposed on society by evidentiary privileges when he stated that "[t]he whole life of the community, the regularity and continuity of its relations, depends upon the coming of the witness." WIGMORE, *supra* note 56, § 2192.

96. See *Developments, supra* note 68, at 1477 ("Because at least some evidence presumably exists only because a privilege encouraged its creation, the unavailability of such evidence cannot properly be deemed a cost of having the privilege.") (footnotes omitted).

97. Whitaker, *supra* note 82, at 168. "Nor did I deem that your decrees were of such force that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of today or yesterday, but from all time . . ." *Id.* (quoting SOPHOCLES, *Antigone*, in THE COMPLETE PLAYS OF SOPHOCLES 119 (Sir Richard Claverhous Jebb trans., Moses Hadas ed. 1967)).

clergy to reveal the content of confidential communications may lead to highly visible spectacles of clergy imprisonment⁹⁸ without actually providing more evidence available to society. Standing alone, the will to defy a legal requirement on the part of some members of society does not justify an exception to that requirement. However, when imposing specific duties, the state must consider its general ability to ensure compliance. In addition to broad public disapproval, episodes of clergy imprisonment may cause public doubts about the state's ability to compel compliance to rules of evidence.⁹⁹ Such disapproval and doubts may diminish the state's ability to operate in other less controversial areas.¹⁰⁰ Therefore, by maintaining the clergy-penitent privilege, the state sustains its own legitimacy.

Society also benefits from the clergy-penitent privilege as individuals improve their lives in the process of confidential confession and similar spiritual counseling with clergy. When effective, such confession and counseling instills in penitents a sense of responsibility, provides penitents with the encouragement to abandon behavior that is condemned by church and state alike, and in the process, imparts moral understanding that leaves penitents better than they were before committing the acts that caused them to seek clergy assistance in the first place.¹⁰¹ Confidential confession or counseling with clergy may be particularly effective because people longing to improve their behavior willfully submit themselves to it (rather than being compelled as in the case of state-imposed rehabilitation). Confidential confession or counseling may also be particularly effective because it motivates penitents through reference to deeply held religious beliefs and the related moral imperatives—a means of motivating desirable behavior generally not available to the state. Thus, to the extent that confidential confession and counseling lead people to overcome abusive behavior, the clergy-penitent privilege is consistent with the goal

98. *See supra* note 85.

99. *See Developments, supra* note 68, at 1498–1500. (“According to the image theory, courts and legislatures have established the existing set of privileges because they minimize possible embarrassment to the legal system.”). *Id.* at 1498–99.

100. *See id.*

101. This sentence reflects the goals of confidential communications between clergy and penitents in general. For obvious reasons, it is difficult to assess the effectiveness of clergy-penitent communications. Furthermore, any state evaluation as to the effectiveness of clergy-penitent relation would presumably be suspect. *See Mitchell, supra* note 17, at 765. (“[C]ourts are . . . unqualified and in principle disqualified from establishing criteria to assess the quality of clergy-confider consultations.”). *Id.*

of preventing child abuse.¹⁰² The cumulative result of many people's efforts to overcome their harmful behavior through confidential communications with clergy will naturally translate into broad social benefits.

Contrary to these conclusions, some may argue that abuse-reporting laws generate more utility than does preserving the clergy-penitent privilege. While successful efforts to preserve child health and safety¹⁰³ would provide significant and tangible benefits to society, the question remains whether abrogation of the clergy-penitent privilege is necessary to protect children. Traditional methods of law enforcement remain intact for the enforcement of child abuse laws. Reporting requirements that are less controversial and arguably more appropriate for their purpose, such as those requiring physicians to report,¹⁰⁴ also remain intact. To claim that abrogation of the clergy-penitent privilege generates more utility than preservation of that privilege also assumes that such abrogation is an effective means of gathering information about abuse. Although it is not possible to prove one way or the other,¹⁰⁵ abrogation of the clergy-penitent privilege is probably not an effective means of gathering information about abuse for two reasons. First, even facing imprisonment, many religious leaders are not likely to disclose confidential information learned in confession or similar counseling.¹⁰⁶ Second, abrogation of the clergy-penitent privilege through an abuse-reporting law will almost certainly deter potential abusers from confessing.¹⁰⁷ Thus, the benefits society derives from the preservation of the clergy-penitent privilege outweigh any benefits that might be derived from abrogation of that privilege.

2. *Utility and the attorney-client privilege*

a. Confidentiality. As with the clergy-penitent privilege, rules of confidentiality support the expectation of confidentiality in an attorney-client relationship. Rules of professional conduct impose on at-

102. See O'Brien & Flannery, *supra* note 73, at 51 ("The child's best interest may actually be furthered by maintaining the privilege. Thus, there is a false conflict between the state's goal and the religious practice because both can work toward the same end.").

103. See *supra* note 22 and accompanying text.

104. See *supra* text accompanying note 20.

105. See *supra* note 94.

106. See *supra* notes 82–83, 97–99 and accompanying text.

107. See *supra* note 81; *infra* note 161 and accompanying text.

torneys a duty not to disclose a client's "confidential information."¹⁰⁸ In addition, these rules provide that attorneys who violate the duty of confidentiality shall be subject to discipline.¹⁰⁹ Although supported by rules of professional conduct, the expectation of confidentiality is far from unlimited in the attorney-client relationship. The attorney-client privilege protects the communications of those seeking legal advice with the intent to comply with the law.¹¹⁰ As far as it functions correctly, the crime-fraud exception¹¹¹ ensures that the attorney-client privilege does not create a shield for those who seek legal advice to determine whether an illegal plot is likely to succeed. The privilege may also be waived through disclosure.¹¹² In addition, it is important to note that some information protected by the privilege may be discovered from sources other than the attorney or client.¹¹³

b. Is confidentiality essential? Similar to the clergy-penitent privilege, confidentiality is "essential to the full and satisfactory maintenance of the relation"¹¹⁴ between attorney and client. The attorney-client privilege encourages individuals who are uncertain about the legality of their actions to seek legal advice. If such uncertain individuals anticipate that their attorney will be compelled to reveal the content of client consultations, these individuals are more likely to act without consultation.¹¹⁵ Such diminished consultation could significantly limit the effectiveness of an attorney-client relationship.

108. MODEL CODE OF PROF'L RESPONSIBILITY Canon 4-101 (1995); MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1995).

109. See *supra* note 108.

110. See *Developments, supra* note 68, at 1507 ("[T]he attorney-client privilege protects the client's ability to pursue his own goals within the confines of the law.").

111. The attorney-client privilege does not cover communications regarding future or ongoing crimes or frauds. See *In re Antitrust Grand Jury*, 805 F.2d 155, 162 (6th Cir. 1986) (stating reasons for the attorney-client privilege "are completely eviscerated when a client consults an attorney not for advice on past misconduct, but for legal assistance in carrying out a contemplated or ongoing crime or fraud").

112. The attorney-client privilege may be waived by any disclosure of privileged information. See *United States v. Bump*, 605 F.2d 548, 551 (10th Cir. 1979) (waiving privilege when attorney gave information acquired from client to government); *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (waiving privilege even though disclosure was inadvertent).

113. See *Developments, supra* note 68, at 1479.

114. WIGMORE, *supra* note 56, § 2285; see also *supra* text accompanying note 67.

115. *In re Grand Jury Proceeding*, 898 F.2d 565, 569 (7th Cir. 1990) (interfering with the privilege "will have a grave effect on our justice system as clients, knowing that their confidential communications may be subject to disclosure, will eventually be less than candid with their attorneys or will consider foregoing legal advice altogether").

The partial or complete abrogation of the attorney-client privilege would also cause a potential chilling of attorney tenacity.¹¹⁶ Without the protection of a privilege, attorneys would be forced to balance conflicting duties: the duty to obtain complete information, which may involve considerable effort on the part of the attorney, and the duty to testify about client communications in court.¹¹⁷ These conflicting duties may lead attorneys to obtain less than complete information from their clients—another situation that would constitute a degradation of the attorney-client relationship.

c. Public sentiment. Popular support for the attorney-client privilege may be inferred from its sustained existence in state and federal law. Since its recognition as a common-law principle, the attorney-client privilege has played a significant role in state law.¹¹⁸ The attorney-client privilege was also recognized early and interpreted broadly in federal courts.¹¹⁹ Still, the 1972 decision of Congress to reject the proposed version of Article V of the Federal Rules of Evidence¹²⁰ highlights the tension between attorney self-interest and popular support for the attorney-client privilege. A major concern of the opponents to the eventually rejected version of Article V was that the advisory committee (a drafting body composed entirely of attorneys) had conceived of an extensive attorney-client privilege while giving minimal attention to other privileges and failing to even mention privileges for some professions that had previously been protected.¹²¹ Rather than approve this system, Congress provided that evidentiary privileges would “be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.”¹²²

d. Costs and benefits. The societal benefits derived from the attorney-client privilege outweigh the costs it imposes. Since it cannot

116. See *Developments, supra* note 68, at 1476–77.

117. See *Id.*

118. See Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1069–91 (1978).

119. See, e.g., *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826) (“The general rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time.”).

120. See generally MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* §§ 501.1–513.1 (4th ed. 1996).

121. See *Developments, supra* note 68, at 1468–69.

122. FED. R. EVID. 501.

be established or refuted by empirical evidence,¹²³ a few observations will demonstrate this point. The costs associated with the attorney-client privilege may be reasonably characterized as substantial.¹²⁴ However, as with the clergy-penitent privilege, this cost is not as great as it may at first seem.¹²⁵ The benefits generally considered to outweigh the cost of unavailable evidence refer to the role of attorneys in ensuring the effective operation of the United States legal system. This rationale has been stated in various ways. In *Ford Motor Co. v. Leggat*,¹²⁶ the Supreme Court of Texas stated that “[t]he purpose of the privilege is to ensure the free flow of information between attorney and client, ultimately serving the broader societal interest of effective administration of justice.”¹²⁷ The effective operation of the legal system is presumably what the Supreme Court had in mind in *Upjohn Co. v. United States*¹²⁸ when it reasoned that “sound legal advice or advocacy serves public ends and . . . such advice or advocacy depends upon the lawyer’s being fully informed by the client.”¹²⁹ For better or worse, the prevailing “instrumental” understanding of attorneys in the adversarial system may increase the significance of the attorney-client privilege. The instrumental view of attorneys asserts that the legal system functions best when attorneys pursue stated client interests without concern for related moral or social implications.¹³⁰ Thus, the attorney-client privilege is a necessary condition for an attorney to function as a fully zealous instrument in the hands of a client.

123. See *supra* note 94.

124. See *supra* note 95.

125. See *supra* note 96; *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (“Application of the attorney-client privilege . . . puts the adversary in no worse position than if the communications had never taken place.”); *Developments, supra* note 68, at 1507–08 (“[T]o the extent that the privilege induces a client to reveal information to his attorney, it keeps from the court only sources of information that would not exist without the privilege.”).

126. 904 S.W.2d 643 (Tex. 1995).

127. *Id.* at 647 (citations omitted).

128. 449 U.S. 383 (1981).

129. *Id.* at 389.

130. See ANTHONY T. KRONMAN, *THE LOST LAWYER* 122–24 (1993). “The narrow view insists that a lawyer is merely a specialized tool for effecting his client’s desires. It assumes that the client comes to his lawyer with a fixed objective in mind. The lawyer then has two, and only two, responsibilities: first, to supply his client with information concerning the legal consequences of his actions, and second, to implement whatever decision the client makes, so long as it is lawful.” *Id.* at 123.

3. *What analysis under the utilitarian framework reveals*

Under the test proposed by Wigmore, some similarly compelling grounds justify the legal recognition of the clergy-penitent and attorney-client privileges. Communications between clergy and penitents and attorneys and clients are both accompanied by a significant expectation of confidentiality.¹³¹ Also, forcing either an attorney or a member of the clergy to act as an informant for the state would be likely to render “full and satisfactory maintenance of the relation between the parties” impossible.¹³² In addition, public support of these privileges can be inferred from their continued existence in state and federal law.¹³³ While both privileges merit preservation due to the significant social benefits they provide, a side-by-side comparison of these benefits reveals that their value to society is not identical.

The heightened value of the social utility provided by the clergy-penitent privilege may be appreciated in light of a simple hypothetical. Assume an individual consults both an attorney and a member of the clergy regarding behavior that is both legally and morally suspect. While the attorney will address the client’s legal concerns, the member of the clergy will address the moral or spiritual well-being of the penitent. Although the attorney will facilitate an efficient and fair disposition of any legal problems, she is not likely to concern herself with the underlying causes of the behavior that made legal representation necessary in the first place. In contrast, the cleric specifically addresses the underlying causes to help the penitent overcome them. To state the point differently, resolution of legal problems, although important, should not be valued above a lasting moral change in an individual that may prevent many (potentially more serious) legal problems in the future.

Since the clergy-penitent privilege’s justification under Wigmore’s analysis is stronger than that generally asserted in defense of the attorney-client privilege, the current difference in status between the attorney-client and clergy-penitent privileges cannot be explained on utilitarian grounds. The hypothetical referred to above could in-

131. This is so notwithstanding the fact that the clergy member’s duty of confidentiality, based on a God-ordained rule, is not exactly comparable to professional codes of ethics. *See supra* notes 70–76, 108–09 and accompanying text.

132. WIGMORE, *supra* note 56, § 2285; *see supra* Parts II.A.1.b and II.A.2.b.; *see also supra* text accompanying note 67.

133. *See supra* Parts II.A.1.c and II.A.2.c.

volve an individual who fears that his behavior constitutes abuse. If such an individual had the misfortune of living in a state that had simultaneously abrogated the clergy-penitent privilege and maintained the attorney-client privilege, he would be placed in a precarious position.¹³⁴ The absurdity of providing for the solution of legal problems, but not the underlying causes of harmful behavior, highlights the grave fallacy of the current attack on the clergy-penitent privilege.

B. You Have the (Privacy) Right to Remain Silent

Some authors have argued that evidentiary privileges are justified because an individual right to privacy makes forced disclosure of confidential communications morally wrong regardless of the benefits to society.¹³⁵ One author describes evidentiary privileges under a rights regime as “a right to be let alone, a right to unfettered freedom . . . from the state’s coercive or supervisory powers.”¹³⁶ Despite these arguments, courts have been reluctant to adopt the privacy rationale for evidentiary privileges.¹³⁷ The privacy rationale’s apparent threat to the status quo under the utilitarian rationale may explain this reluctance. Another possible explanation is that the privacy rationale does not avoid the problems of the utilitarian rationale, the claims of some authors¹³⁸ notwithstanding. This is so because the judicial preservation of a privilege on privacy grounds still requires a judge to balance the individual’s privacy interest against the societal interest in obtaining evidence.¹³⁹ Either way, the privacy rationale’s underlying argu-

134. See Mosteller, *supra* note 39, at 266:

The folly of preferential treatment for attorneys may readily be seen by imagining a scenario in which a lawyer has secured the confidential admission of her client regarding past abuse. She wishes to advise the client to seek treatment in hopes of preventing future abuse, but understands that any other professional to whom the client is referred will be required to report the prior conduct if disclosed during therapy. In that situation, preserving the privilege for the lawyer alone has limited utility and little theoretical cogency.

135. See, e.g., Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 89 (1973) (“[I]t is not a farfetched view that personal evidentiary privileges go to the heart of the modern American citizen’s need for a right of privacy.”); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956).

136. Louisell, *supra* note 135, at 110–11.

137. See MCCORMICK ON EVIDENCE, *supra* note 8, § 72.

138. See Louisell, *supra* note 135, at 111 (claiming that the Wigmore prerequisites lead to conclusions that are “sometimes highly conjectural and defy scientific validation”).

139. See *Developments*, *supra* note 68, at 1482–83. “Because of this balancing, the privacy

ment remains persuasive because it elevates the discussion of confidential communications to individual and group rights to meet the challenge of increasing government interference. Since the privacy rationale's inherent persuasiveness may lead it to provide the basis for future legislation or judicial decisions, it merits consideration in relation to the clergy-penitent and attorney-client privileges.

Since they both concern activities that are highly personal, the clergy-penitent and attorney-client privileges appear to satisfy the fundamental requirement for protection under the privacy rationale. However, the strength of the privacy rationale for the clergy-penitent or attorney-client privileges may be distinguished by the nature of the communications they protect. When an individual seeks legal advice, she seeks to obtain knowledge regarding her legal relation to the state or other individuals.¹⁴⁰ Thus, confidential attorney-client communications allow individuals to order their legal relations without surrendering to the state or other individuals a significant advantage. In contrast, an individual seeks to confess to a member of the clergy due to concern for her relationship with God. Thus, confidential clergy-penitent communications allow individuals to order their spiritual lives without state interference. The state must concern itself with its legal relation to individual citizens and the legal relations of its individual citizens. Therefore, the attorney-client privilege creates privacy in an area of public concern. Since the state has no interest in regulating an individual's relationship with God, the clergy-penitent privilege maintains privacy in an eminently private area. Whereas it protects an activity that is inherently more private, the clergy-penitent privilege claims stronger support from the privacy rationale than does the attorney-client privilege. Thus, the privacy rationale does not justify the trend of abrogation of the clergy-penitent privilege and preservation of the attorney-client privilege.

III. CONSTITUTIONAL GUARANTEES

Supreme Court acknowledgement of a constitutional basis for the clergy-penitent and attorney-client privileges remains limited. Still, consideration of the clergy-penitent and attorney-client privi-

rationale is just as indeterminate as the traditional [utilitarian] justification." *Id.* at 1483.

140. See Charles Fried, Correspondence, *The Lawyer as Friend*, 86 YALE L.J. 573, 586 (1977) (arguing that it is "immoral for society to constrain anyone from discovering what the limits of its power over him are").

leges in light of the Constitution of the United States provides another useful framework for the evaluation of the current status of these privileges in relation to abuse-reporting laws.

A. The Clergy-Penitent Privilege and the Religion Clauses

Although the Supreme Court has not addressed whether the Religion Clauses of the First Amendment¹⁴¹ protect the clergy-penitent privilege from state interference, it has expressed significant approval of the privilege in several opinions.¹⁴² The following provides an overview of the arguments that should persuade the Court to protect the clergy-penitent privilege under the First Amendment.

1. The Free Exercise Clause

Whether the Free Exercise Clause requires the existence of the clergy-penitent privilege may hinge on the test articulated in *Employment Division v. Smith*.¹⁴³ Under *Smith*, a particular law does not violate the Free Exercise Clause if it is a “valid and neutral law of general applicability.”¹⁴⁴ Abuse-reporting laws that impose either a universal¹⁴⁵ or otherwise very broad duty to report would probably be upheld under *Smith*’s neutral and general applicability requirements. However, the lack of neutrality and general applicability of abuse-reporting laws that single out clergy as mandatory reporters while maintaining the confidentiality of other comparable communications¹⁴⁶ may be found to violate the Free Exercise Clause.

Under *Smith*, the Supreme Court may still be compelled to apply

141. The First Amendment states in relevant part: “Congress shall make no law respecting an establishment of religion . . . or abridging the free exercise thereof.” U.S. CONST. amend. I.

142. *See, e.g.*, *Trammel v. United States*, 445 U.S. 40, 51 (1980) (“The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”); *United States v. Nixon*, 418 U.S. 683, 709 (1974) (“[G]enerally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence.”); *Totten v. United States*, 92 U.S. 105, 107 (1875) (“[P]ublic 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 . . . suits cannot be maintained which would require a disclosure of the confidences of the confessional.”).

143. 494 U.S. 872 (1990).

144. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

145. *See supra* text accompanying notes 47–48.

146. *See supra* text accompanying note 49.

the Free Exercise test first articulated in *Sherbert v. Verner*¹⁴⁷ if a Free Exercise claim is combined with a claim based on another constitutional right.¹⁴⁸ Possible “hybrid”¹⁴⁹ claims could combine a Free Exercise claim with claims under the First Amendment’s free speech and association provisions or the Fourteenth Amendment’s protection of liberty under the Due Process Clause.¹⁵⁰ In *Roberts v. United States Jaycees*,¹⁵¹ the Supreme Court declared that “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends”¹⁵² is implicit in the First Amendment. Under the *Roberts* analysis,¹⁵³ clergy members and penitents arguably engage in expressive association through the clergy-penitent relationship.¹⁵⁴ Since it is likely to degrade or completely deter confession,¹⁵⁵ abrogation of the clergy-penitent privilege probably constitutes a violation of the right to expressive association. The Supreme Court may also find a liberty interest in clergy-penitent communications that merits protection under the Due Process Clause. Summarizing decades of jurisprudence, the Court declared that substantive due process protection is afforded to rights and interests that are both “deeply rooted in this Nation’s history and tradition”¹⁵⁶ and carefully described.¹⁵⁷ While

147. 374 U.S. 398 (1963).

148. *Smith*, 494 U.S. at 881.

149. *Id.* at 882.

150. The Fourteenth Amendment states in relevant part: “nor shall any State deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, § 1.

151. 468 U.S. 609 (1984).

152. *Id.* at 622.

153. To determine if a group is protected by the right recognized in *Roberts*, the Court first determines if the group engages in “expressive association.” See *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). This right “is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.” *Id.* Second, the Court analyzed the facts to determine if the challenged state action violated the right to expressive association. *Id.* at 650–56. The *Roberts* court defined violation of the right of expressive association as “intrusion into the internal structure or affairs of an association.” 468 U.S. at 623.

154. For example, in Christ-centered religions, confession and similar counseling involves expression of beliefs regarding the need to repent and the possibility of one’s sins being forgiven through Jesus Christ.

155. See *supra* note 81; *infra* note 161 and accompanying text.

156. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

157. See *id.* at 721.

careful description should pose no problem, the clergy-penitent privilege's undisputed place in American history and tradition¹⁵⁸ should ensure its protection under the Due Process Clause.

If the Court were to acknowledge that abrogation of the clergy-penitent privilege provides a basis for a valid hybrid claim, it would proceed to ask whether the law in question imposed an undue "burden" on the free exercise of religion, whether the law was justified by a "compelling state interest," and whether it used the least restrictive means available to achieve that interest.¹⁵⁹ Under the *Sherbert* test, the claimant would rely on specific religious teachings or rules¹⁶⁰ to demonstrate the religious significance of confession or similar spiritual counseling in the church involved. The Court is likely to acknowledge the existence of a religious belief when an individual has confessed sins to a clergy member believing such confession had religious significance. Next, the claimant would present evidence regarding diminution of trust between clergy and penitents and the resulting deterrence of confession¹⁶¹ to demonstrate that abrogation of the clergy-penitent privilege has imposed a significant burden on religious belief. The Court is likely to acknowledge that actual deterrence of confession "impede[s] the observance of one or all religions"¹⁶² and therefore constitutes a significant burden on the Free Exercise of religion.

Since child abuse is a serious problem in the United States,¹⁶³ child abuse prevention is undoubtedly a compelling state interest. At this point however, the question remains for the Court whether this state interest is sufficiently compelling to justify interference with the clergy-penitent privilege. The Court's characterization of the reli-

158. This Comment has touched only briefly on the history of the clergy-penitent privilege (*see supra* notes 88–91). For a comprehensive treatment of the clergy-penitent privilege's history, see Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95 (1983).

159. *Sherbert v. Verner*, 374 U.S. 398, 403, 406–07; *see also* *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

160. *See supra* notes 70–76 and accompanying text.

161. *See* *Mockaitis v. Harclerod*, 104 F.3d 1522, 1530 (1997) (The court stated that "knowledge, belief, or suspicion that freely-confessed sins would become public would operate as a serious deterrent to participation in the sacrament and an odious detriment accompanying participation [by penitent]. When the prosecutor asserts the right to tape the sacrament he not only intrudes upon the confession taped but . . . he invades their free exercise of religion.").

162. *Sherbert*, 374 U.S. at 404 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)).

163. *See supra* note 10.

gious and governmental interests under consideration may determine the outcome of this part of the analysis.¹⁶⁴ If the Court avoids tilting the scales in either direction,¹⁶⁵ the outcome of this balancing test could conceivably go either way. Of course, identification of a compelling government interest does not end the analysis. Before engaging in a full least-restrictive-means analysis, the Court should determine whether the means employed by the state are viable at all.¹⁶⁶ In the case at hand, the Court should ask whether abrogation of the clergy-penitent privilege merits consideration as a viable “means” of preventing child abuse.¹⁶⁷ Since it is impossible to prove that abrogation of the clergy-penitent privilege will prevent child abuse,¹⁶⁸ the Court should not simply assume that abrogation achieves such an outcome. Instead, the Court could be persuaded at this point that abrogation of the clergy-penitent privilege is an ineffective¹⁶⁹ or counterproductive means¹⁷⁰ of protecting children or that alternative means exist to ensure child health and safety.¹⁷¹ If it were to determine for any of these reasons that the abrogation of the clergy-penitent privilege is not a viable means to achieve the state’s purpose, the Court would probably conclude that the Free Exercise Clause requires the continued existence of the clergy-penitent privilege. While the Court could adopt the preceding argument, some authors have discussed plausible ways in which the Court could fail to afford such protection to the clergy-penitent privilege under the Free Exer-

164. See Mitchell, *supra* note 17, at 807–10.

165. See *id.* at 808. Mitchell points out that the issue could be framed “as a balancing of the cleric’s right to keep secrets” against the state’s interest “in protecting abused children.” *Id.* Similarly, the issue could be framed as a balancing between a “cleric’s right to the free exercise of religion” and a state’s interest in pursuing one of many law enforcement strategies. *Id.*

166. See *id.* at 810–18.

167. See *id.*

168. See *supra* note 94 and accompanying text.

169. See *supra* notes 105–07 and accompanying text; Mitchell, *supra* note 17, at 811–15. Here Mitchell argues that clergy have “a good argument that the state stands to gain no additional information from requiring objecting clergy to report.” Mitchell, *supra* note 17, at 812.

170. See *supra* notes 101–02 and accompanying text; Mitchell, *supra* note 17, at 818 (“[M]andating clergy reports is counterproductive to the state’s goal of protecting children. If the prospect of disclosure will deter people from approaching clergy for help, the choice is not between help from the state and help from clergy, it is between help from clergy and no help at all. By discouraging persons from seeking private help, reporting requirements may preclude some troubled people from seeking any help at all.”) (citations omitted).

171. See *supra* text accompanying note 104; Mitchell, *supra* note 17, at 815–16 (“Other persons, for example, are required to report suspected cases of child abuse and can do so without offense to their religious beliefs.”).

cise Clause and the compelling government interest/least-restrictive-means test.¹⁷²

The possibility (under either *Smith* or *Sherbert*) that the Constitution does not prohibit forcing clergy to choose between working as state informants and imprisonment demonstrates the inadequacy of the jurisprudential tests that the Supreme Court has superimposed on the Free Exercise Clause. The situation at hand demonstrates how these tests function like crude simplifications, providing states with simple formulas (legislate in general terms or identify a compelling government interest) guaranteed to insulate legislation from Free Exercise scrutiny. In contrast to the current situation, the *Phillips* court in 1813¹⁷³ recognized, consistent with the Founders' understanding of the words "free exercise of religion,"¹⁷⁴ that the First Amendment guaranteed state accommodation of the clergy-penitent privilege. As Professor McConnell points out, the language of the First Amendment was informed by the founding generation's interest in freedom to worship and not just freedom from state-imposed worship.¹⁷⁵ This understanding of the phrase "free exercise of religion" supports constitutionally mandated maintenance of the clergy-penitent privilege today. The Court may not avoid ruling on the constitutionality of the clergy-penitent privilege forever. Forced to deal with the constitutionality of the clergy-penitent privilege, the Supreme Court would have an opportunity to devise an analysis based on the historical understanding of the Free Exercise Clause; an analysis that requires lawmakers on every level to do more than seek

172. See, e.g., Ross, *supra* note 11, at 985–95; Ronald J. Columbo, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 235–36 (1998).

173. See *supra* notes 1, 3–5 and accompanying text.

174. See McConnell, *supra* note 6, at 1512:

[T]he evidence suggests that the theoretical underpinning of the free exercise clause, best reflected in Madison's writings, is that the claims of the "universal sovereign" precede the claims of civil society, both in time and in authority, and that when the people vested power in the government over civil affairs, they necessarily reserved their unalienable right to the free exercise of religion, in accordance with the dictates of conscience. Under this understanding, the right of free exercise is defined in the first instance not by the nature and scope of the laws, but by nature and scope of religious duty. A religious duty does not cease to be a religious duty merely because the legislature has passed a generally applicable law making compliance difficult or impossible.

175. See *id.* at 1516–17 (concluding that the understanding that Free Exercise guaranteed "the freedom to follow religious dogma" distinguished the understanding of those "who provided the political muscle for religious freedom in America" from Locke and Jefferson's enlightenment understanding of Free Exercise).

the shelter from Free Exercise scrutiny that *Smith* or even *Sherbert* provide.

2. *The Establishment Clause*

At first glance, state abrogation of the clergy-penitent privilege may seem to raise only Free Exercise issues. However, since it constitutes government interference with church autonomy, such abrogation also raises serious Establishment Clause issues. According to Professor Esbeck, the Establishment Clause is best understood as a structural restraint on government interference in areas that are reserved exclusively to religion.¹⁷⁶ Among many other arguments in support of his thesis,¹⁷⁷ Professor Esbeck demonstrates how the Supreme Court has applied the Establishment Clause as a structural restraint on government power.¹⁷⁸ For example, the Court exempted parochial schools from compliance when unemployment compensation taxes and mandatory collective bargaining laws would have interfered with church autonomy as it relates to employment practices.¹⁷⁹ While it would not change the outcome of many Establishment Clause claims, this understanding would affect cases in which state regulation imposes a burden on church autonomy.¹⁸⁰

Thus, the current analysis would consist of determining whether abrogation of the clergy-penitent privilege would amount to a state intrusion into the “sphere of autonomy”¹⁸¹ reserved for religion by the Establishment Clause. In general terms, this sphere of autonomy includes “ecclesiastical governance, the resolution of doctrine, the

176. See Esbeck, *supra* note 7, at 10–11.

177. For example, Esbeck argues that the Court’s relaxation of standing requirements in Establishment Clause cases illustrates that the central concern in such cases is not the vindication of individual religious rights, but limitation of government intrusion into areas reserved exclusively for church action. See *id.* at 33–40. Esbeck’s other supporting arguments relate to remedies (see *id.* at 40–42), church autonomy (see *id.* at 42–58), and the nondelegation rule (see *id.* at 58–60).

178. See *id.* at 44–45 (citing cases to demonstrate that the court has identified at least four categories of government activity that the Establishment Clause forbids).

179. See *id.* at 78–79 (citing *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780–81 (1981) (regarding unemployment taxes) and *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (regarding mandatory collective bargaining laws)).

180. See *id.* at 77 (“[R]egulatory burdens that touch on matters in the religious domain . . . violate no-establishment. This is so, not as a matter of group or associational rights, but as a matter of government exceeding its jurisdiction as limited by the Establishment Clause.”).

181. *Id.*

composing of prayers, and the teaching of religion.”¹⁸² “[T]he admission, guidance, expected moral behavior, and excommunication of church members,”¹⁸³ a specific area within this sphere, is particularly relevant in relation to the question at hand. For many, confession is an ordinance, or is closely related to sacramental ordinances, of the highest religious significance.¹⁸⁴ Confession or similar spiritual counseling also involves significant religious instruction.¹⁸⁵ Beyond this, confession of certain sins can result in church disciplinary action, such as excommunication.¹⁸⁶ Since abrogation of the clergy-penitent privilege will deter confession,¹⁸⁷ it would necessarily interfere with church autonomy as it relates to religious ordinances, instruction, and church disciplinary action. Accepting Esbeck’s thesis, the Establishment Clause would not tolerate this outcome. Although unnecessary under the structural restraint analysis, this conclusion can be stated in the terms of the generally acknowledged Establishment Clause test.¹⁸⁸ Thus, even if based on a secular purpose, abrogation of the clergy-penitent privilege would clearly inhibit religion while increasing government entanglement in the areas of religious ordinances, instruction, and church disciplinary action. Forced to rule on the issue, the Court arguably should acknowledge under the structural restraint analysis—or at least *Lemon*—that the Establishment Clause limits the power of the state to interfere with the clergy-penitent privilege.

182. *Id.* at 10–11.

183. *Id.* at 45 n.175 (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871) for the proposition that “there is no court jurisdiction as to church discipline or the conformity of members to the standard of morals required of them”).

184. For example, Roman Catholics consider confession a necessary ordinance, while confession for members of the LDS church is part of a repentance process that requires the observance of a separate ordinance (the Sacrament of the Lord’s Supper) to receive forgiveness for sins.

185. *See supra* note 154.

186. *See supra* note 75 and accompanying text.

187. *See supra* notes 81 and 161 and accompanying text.

188. In *Lemon v. Kurtzman*, 403 U.S. 602, 612–14 (1971), the Supreme Court determined that a law does not violate the Establishment Clause if: (1) it is based on a “secular legislative purpose”; (2) its effect “neither advances nor inhibits religion”; and (3) it does not entail “excessive government entanglement with religion.”

B. The Attorney-Client Privilege and the Fifth and Sixth Amendments

One author has observed that “[a]lthough often associated with constitutional rights . . . most of the breadth and sweep of the attorney-client privilege is without constitutional protection.”¹⁸⁹ In *Fisher v. United States*,¹⁹⁰ the Supreme Court ruled that the Fifth Amendment right against compelled self-incrimination¹⁹¹ does not prevent the state from compelling an attorney to divulge confidential client information.¹⁹² The *Fisher* court reasoned that requiring an attorney to reveal information that the client voluntarily gave to the attorney did not compel the accused in any way.¹⁹³ Furthermore, the *Fisher* court determined that documents compelled from an attorney “contain[ed] no testimonial declarations” by the accused and therefore failed to qualify under another key aspect of the Fifth Amendment’s right against compelled self-incrimination.¹⁹⁴ In contrast, the Sixth Amendment’s right to effective assistance of counsel¹⁹⁵ is generally taken to require some degree of confidential consultation with an attorney.¹⁹⁶ Still, the Supreme Court has not provided much detail regarding the scope of the privilege required by the right to effective assistance of counsel. Furthermore, the Sixth Amendment’s coverage is limited: it applies only to criminal proceedings and only after the formal accusation of a suspect.¹⁹⁷ Therefore, except in the case of formally accused criminal defendants, the Constitution does not prevent legislative limitation of the attorney-client privilege.¹⁹⁸

189. Mosteller, *supra* note 39, at 269. For a more in-depth treatment of the constitutional status of the attorney-client privilege, see Mosteller, *supra* note 39, at 269–72.

190. 425 U.S. 391 (1976).

191. The Fifth Amendment states in relevant part: “[no person] shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V.

192. *Fisher*, 425 U.S. at 402.

193. *Id.* at 397.

194. *Id.* at 409.

195. The Sixth Amendment states in relevant part: “[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI.

196. See *United States v. Henry*, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting) (“[T]he Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney.”); *Weatherford v. Bursey*, 429 U.S. 545, 552 (1977).

197. See *Moran v. Burbine*, 475 U.S. 412, 432 (1986) (stating that the right to effective assistance of counsel only applies after the initiation of adversarial proceedings); *Kirby v. Illinois*, 406 U.S. 682, 688–89 (1972) (stating that the right to effective assistance of counsel applies only when judicial proceedings have been initiated by “formal charge, preliminary hearing, indictment, information, or arraignment”).

198. See Mosteller, *supra* note 39, at 272 (concluding that “[t]he attorney client privilege

IV. ALTERNATIVE EXPLANATIONS FOR THE CURRENT SITUATION

While nothing in the preceding constitutional analysis justifies the current situation, the arguments in support of the clergy-penitent privilege¹⁹⁹ suggest that it merits more constitutional protection than does the attorney-client privilege. Similarly, since it provides greater social utility²⁰⁰ while protecting an inherently more private interest,²⁰¹ the clergy-penitent privilege should, if anything, hold a stronger position than the attorney-client privilege in the laws of the several states. Since the current trend contradicts all of these conclusions, it is necessary to look beyond the traditional rationales and constitutional arguments to consider alternative explanations for the current situation.

A. Attorney Self-Interest

The difference in status between the clergy-penitent and attorney-client privileges may be explained by the fact that judges and many legislators are attorneys.²⁰² In one sense, this is neither controversial nor surprising. Education and livelihood in the law should compel lawyers to protect a privilege that is probably essential to the sound operation of the legal system.²⁰³ The influence of attorney self-interest is not confined to the law of evidentiary privileges; such influence probably accounts for the rule that attorneys are paid first in bankruptcy proceedings,²⁰⁴ or the unusually high standards of proof applied in attorney malpractice cases.²⁰⁵ Like the attorney-client privilege, these legal rules are probably justified by legitimate concerns. However, attorney self-interest becomes a problem if it leads to the neglect of other important interests. One can easily imagine how such neglect may account for the destruction of the clergy-penitent

as it applies to reporting of child abuse . . . depends largely upon the good judgment of legislatures and their determination of sound social policy”).

199. *See supra* Part III.A.

200. *See supra* Part II.A.3.

201. *See supra* Part II.B.

202. *See* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE § 5472 (1986) (discussing attorney self-interest and the attorney-client privilege).

203. *See supra* Part II.A.2.d.

204. *See* DAVID G. EPSTEIN ET AL., BANKRUPTCY § 7-11 (1993).

205. *See* JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 266 (9th ed. 1994).

privilege. Attorneys engaged in lawmaking may simply put forth more effort to protect the attorney-client privilege than the clergy-penitent privilege. To such attorneys, challenges to the attorney-client privilege probably seem much more urgent than challenges to clergy-penitent privilege. And faced with pressure to abrogate evidentiary privileges in the legislative process, such attorneys may respond by sacrificing the clergy-penitent privilege (among others) so long as the attorney-client privilege is maintained. Since many of the clergy-penitent privilege's beneficiaries are not entrusted with making and applying the law, those who are so entrusted should concern themselves more with the preservation of the clergy-penitent privilege.

B. Legislation That Appears to Help

Another explanation for the status of the clergy-penitent and attorney-client privileges in relation to abuse-reporting laws is the temptation to legislate in broad strokes when faced with a problem like child abuse. Dealing with child abuse on the state level raises difficult questions about how a state may pursue the interests of children while not impeding private institutions (families, churches, therapists, etc.) that are probably much better suited to care for children. Rather than address this question, abuse-reporting laws rely on the troubling presumption that the state must get involved. This is troubling because clergy-penitent communications may diminish child abuse.²⁰⁶ Thus, legislators truly concerned about child-abuse prevention should be cautious about interfering with clergy-penitent communications—and should be suspicious of any claim that abrogation of the clergy-penitent privilege will actually prevent child abuse.²⁰⁷ Absent other justifications to interfere with long-established privileges, it is conceivable that such legislators are motivated by a desire to appear “tough on crime.” After all, from the standpoint of one seeking reelection, the actual effect of a law may seem less important than how voters perceive the legislator's intentions.

206. *See supra* notes 101–02 and accompanying text.

207. *See supra* notes 105–07 and accompanying text.

C. Suspect Assumptions About Clergy

Finally, each decision to abrogate the clergy-penitent privilege through an abuse-reporting law implies the judgment that clergy members have nothing to contribute in the effort against child abuse. Of course, there is no reasonable basis to presume the incompetence of clergy or the competence of the state in relation to abuse prevention. Much to the contrary, it seems reasonable to presume that the bureaucratic machinery of the state will rarely deliver the kind of thoughtful, individualized care that clergy provide when voluntarily contacted by individuals seeking to improve their lives.²⁰⁸ Beyond this, starting with a presumption that members of the clergy are incompetent to deal with serious problems is comparable to an assessment regarding the validity of a religious belief or practice. Such assessments have no place in the law.²⁰⁹ The scrutiny that they would invite forces express government assessments of religion below the surface of legal rhetoric. For this reason, lawmakers should give serious consideration to the unspoken judgments that may lie beneath a particular decision to abrogate the clergy-penitent privilege.

V. CONCLUSION

While the attorney-client privilege remains strong, the clergy-penitent privilege has been abrogated to a significant degree through abuse-reporting laws. This has happened even though constitutional arguments and analysis under the traditional justifications for evidentiary privileges suggest that, if anything, the clergy-penitent privilege merits more protection than does the attorney-client privilege. The Supreme Court should hold that both religion clauses of the First Amendment forbid government interference with the clergy-penitent privilege. Still, the Supreme Court may fail to live up to the standard set by *People v. Phillips*.²¹⁰ Regardless, the opportunity to solve the problem posed by the attack on the clergy-penitent privilege currently remains with the states. Attorney self-interest, hollow attempts to appear effective, and hostility to religion may explain the current

208. See *supra* notes 101–02 and accompanying text; see also *supra* note 12.

209. See *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (“[I]t is no business of courts to say . . . what is a religious practice or activity.”).

210. See *supra* notes 1, 3–6.

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situation. State lawmakers should strive to overcome these influences as well as any others that prevent them from giving the clergy-penitent privilege the place it deserves in the law.

Shawn P. Bailey

