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Where There's Smoke, There's Fire (and Brimstone): Is It Time to Abandon the Clergy-Penitent Privilege

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WHERE THERE’S SMOKE, THERE’S FIRE (AND BRIMSTONE): IS IT TIME TO ABANDON THE CLERGY-PENITENT PRIVILEGE?

I. INTRODUCTION

Where there’s smoke, there’s fire. Throughout the country, victims have accused over 2,600 members of the Catholic clergy of sexual abuse. This number is only expected to rise.

Suspecting that the Catholic Church implemented an institutional cover-up of the abuse, prosecutorial agencies have begun attacking the problem from the top down. Thus far, judges have ordered dioceses in Boston and Los Angeles to release church files as part of legal discovery. Both dioceses refused to produce these files on the grounds that the clergy-penitent privilege protects the documents.

Public outrage over such institutional secrecy has created a social climate in which a reevaluation of the clergy-penitent privilege is in order.

1. A Dallas lawyer has begun to compile a database enumerating the names of all clergy members who have been accused of sexual misconduct. Although the database currently contains only 2,600 names, it is thought that there are three- to four-times as many clergy members who have actually been accused. Douglas J. Swanson, Church Abuse Focus of Database: Dallas Lawyer Completes National List of 2,600 ‘Priest Perpetrators’, DALLAS MORNING NEWS, Oct. 31, 2004, Metro at 1B; see also http://www.bishop-accountability.org (Apr. 20, 2005).

2. Swanson, supra note 1.


5. Archdiocese Documents, supra note 3. The documents were privileged because priests’ confessions to superiors are protected in the same manner as those made by layperson to priest.
is in order. Although a great deal of literature has questioned the clergy-penitent privilege in light of the current Catholic sex scandals, this paper will attempt to divorce the privilege from the current controversy and question its validity through a strictly doctrinal approach.

Part II begins by discussing privilege doctrine. It then delineates the scarce body of Supreme Court jurisprudence that specifically addresses the clergy-penitent privilege. It ends with a discussion of Trammel v. United States, and suggests that the Court’s rationale in abandoning the adverse spousal testimonial privilege in Trammel applies equally to the abolition of the clergy-penitent privilege.

Part III discuses Wigmore’s utilitarian rationale for adopting privileges. The rationale provides four factors that a court should consider when creating privileges. The section considers each factor in light of the clergy-penitent privilege and concludes that the privilege currently fails each one of the four conditions.

Part IV analyzes the clergy-penitent privilege in light of First Amendment jurisprudence. The section begins by establishing that the Free Exercise Clause does not protect the privilege. It concludes by asserting that the privilege in fact violates the Establishment Clause.

II. PRIVILEGES WITHIN THE CRIMINAL JUSTICE SYSTEM

A. Privileges, Generally

The Supreme Court, in United States v. Nixon, summarized the need for relevant evidence during criminal trials as follows: “We have elected to employ an adversary system of criminal justice in


which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive.\textsuperscript{9} The Court went on to state that, “[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts[,]” because “[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.”\textsuperscript{10} The Court emphasized that “[t]o ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.”\textsuperscript{11} After articulating this need for “every man’s evidence,”\textsuperscript{12} the Court went on to state that privileges should not be “lightly created nor expansively construed, for they are in derogation of the search for truth.”\textsuperscript{13}

Although the \textit{Nixon} Court emphasized that courts should not expansively construe testimonial privileges, congress took this mandate a step further. Congress rejected a set of proposed rules that would have codified testimonial privileges and, in doing so, acknowledged federal courts’ authority to “continue the evolutionary development of testimonial privileges,”\textsuperscript{14} by using their judicial “reason and experience.”\textsuperscript{15}

Put simply, it is insufficient to merely create a privilege and place it in a doctrinal closet; there must be a persuasive reason to continue upholding a privilege. Surprisingly, this evolutionary development has rarely—if ever—occurred in terms of the clergy-
penitent privilege. The Supreme Court has discussed the privilege on only three occasions and, on each occasion, the discussion appeared in dicta.\textsuperscript{16} Furthermore, lower federal courts offer little guidance on the issue.\textsuperscript{17} The clergy-penitent privilege has thus largely remained tucked away from judicial scrutiny.

\textbf{B. The Clergy-Penitent Privilege, Generally}

All fifty states have enacted some version of the clergy-penitent privilege.\textsuperscript{18} It was not until 1990 that a federal court fully explicated the privilege, however. In \textit{In re Grand Jury Investigation},\textsuperscript{19} the Third Circuit Court of Appeals declared that the privilege would “protect communications made (1) to a clergyperson (2) in his or her spiritual and professional capacity (3) with a reasonable expectation of confidentiality.”\textsuperscript{20}

The Third Circuit’s rationale for recognizing the privilege remains somewhat unsatisfactory. Instead of applying Wigmore’s criteria\textsuperscript{21} in recognizing the privilege, the court paid deference to the Federal Rules Advisory Committee’s opinion that the criteria “seem to strongly favor a privilege for confidential communications to clergymen.”\textsuperscript{22} The court went on to note that:

Both state and federal decisions have long recognized the

\begin{itemize}
\item \textsuperscript{16} See Totten v. United States, 92 U.S. 105, 107 (1876); Nixon, 418 U.S. at 709–10; Trammel, 445 U.S. at 51 (1980).
\item \textsuperscript{17} See infra Part II.B.
\item \textsuperscript{18} E.g., MCCORMICK ON EVIDENCE § 76.2, at 109 (John William Strong ed., 4th ed. 1992).
\item \textsuperscript{19} 918 F.2d 374 (1990). It has been referred to as “one of the most thorough discussion of the clergy-penitent privilege by a federal court.” Cassidy, supra note 6, at 1662.
\item \textsuperscript{20} \textit{In re Grand Jury Investigation}, 918 F.2d at 384.
\item \textsuperscript{21} (1) “The communication must initiate in a confidence that they [sic] will not be disclosed”; (2) “[t]his element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties”; (3) “[t]he relation must be one in which the opinion of the community ought to be sedulously fostered”; and (4) “[t]he 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.” 8 WIGMORE, EVIDENCE 2285, at 527 (McNaughton rev. ed. 1961); see infra Part III.
\item \textsuperscript{22} \textit{In re Grand Jury Investigation}, 918 F.2d at 384 (quoting Proposed Rules of Evidence for the United States Court and Magistrates, 56 F.R.D. 183, 247 (1973)).
\end{itemize}
privilege. The Supreme Court Rules Committee also recognized the privilege. That is doubtless because the clergy-communicant relationship is so important, indeed so fundamental to the western tradition, that it must be "sedulously fostered." Confidence is obviously essential to maintaining the clergy-communicant relationship. Although there are countervailing considerations, we have no doubt that the need for protecting the relationship outweighs them.23

Although the court claimed that it was engaging in the type of evolutionary development prescribed by Rule 501,24 in actuality, it merely complied with what others had done before it. As opposed to questioning why the privilege existed at all, it simply pointed to the fact that it had, essentially, always been there; instead of discussing the "countervailing considerations," the court accepted them at face value. The court's circular reasoning25 in this situation provides very little guidance on the privilege's doctrinal validity.

C. The Clergy-Penitent Privilege in Supreme Court Jurisprudence

Supreme Court jurisprudence concerning the privilege provides equally little guidance. The Supreme Court first mentioned the privilege in 1876 in Totten v. United States.26 The underlying case involved the disclosure of secrets during wartime. In an exceedingly short opinion, Justice Field made the following remarks:

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional

23. Id. (citation omitted).
24. Id. at 383.
25. The court's reasoning is similar to the typical chicken-egg quandary: Do courts recognize the privilege because it is important, or is the privilege important because courts choose to recognize it?
26. 92 U.S. 105 (1876).
advice, or of a patient to his physician for a similar purpose.
Much greater reason exists for the application of the
principle to cases of contract for secret services with the
government, as the existence of a contract of that kind is
itself a fact not to be disclosed.27

It was not until nearly a century later that the clergy-penitent
privilege reappeared within a Supreme Court decision. In Nixon, the
court considered the executive privilege and its application to
communications made during the course of the Watergate scandal.
In the midst of a discussion about the presumptive invalidity of
testimonial privileges, Chief Justice Burger noted:

The privileges referred to by the Court are designed to
protect weighty and legitimate competing interests. Thus,
the Fifth Amendment to the Constitution provides that no
man “shall be compelled in any criminal case to be a
witness against himself.” And, generally, an attorney or a
priest may not be required to disclose what has been
revealed in professional confidence. These and other
interests are recognized in law by privileges against forced
disclosure, established in the Constitution, by statute, or at
common law. Whatever their origins, these exceptions to
the demand for every man’s evidence are not lightly created
nor expansively construed, for they are in derogation of the
search for truth.28

Lastly, Trammel v. United States29 dealt with the adverse
spousal testimonial privilege. In an effort to juxtapose that privilege,
which the court felt was overly broad, with other testimonial
privileges, Chief Justice Burger stated:

No other testimonial privilege sweeps so broadly. The
privileges between priest and penitent, attorney and client,
and physician and patient limit protections to private
communications. These privileges are rooted in the
imperative need for confidence and trust. The priest-
penitent privilege recognizes the human need to disclose to
a spiritual counselor, in total and absolute confidence, what

27. Id. at 107.
are believed to flawed or thoughts and to receive priestly consolation and guidance in return.30

D. Trammel’s Rubric for Challenging a Privilege’s Validity

Given that the Supreme Court has rarely and disinterestedly discussed the privilege, Supreme Court jurisprudence is hardly an anchor upon which the privilege may persist, at least on a constitutional level. Although Trammel’s dicta superficially reinforces the privilege, Trammel’s holding and rationale provide an interesting rubric for challenging a privilege’s validity. It was this rubric that led the court to scrutinize and eventually abandon the adverse spousal testimonial privilege twenty-five years ago; it is this rubric that the court could realistically implement to abandon the clergy-penitent privilege today.

The Court in Trammel began by discussing Federal Rules of Evidence (FRE) 501,31 and stated that “[t]he Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials ‘governed by the principles of the common law as they may be interpreted... in the light of reason and experience.”32 The Judicial Conference Advisory Committee on Rules of Evidence had previously proposed Rule 505, which would have codified nine testimonial privileges, including the clergy-penitent privilege.33 But, “[i]n rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to ‘provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,’ and to leave the door open for change.”34 The Court similarly conceded that it could not “escape the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change.”35 In

30. Id. at 51.
32. Trammel, 445 U.S. at 47 (quoting FED. R. EVID. 501). Thus, FRE 501 empowers federal courts to create and abandon privileges as creatures of common law rather than statute.
33. Id. at 47.
34. Id. (citation omitted).
35. Id. at 48.
conclusion, the Court mandated that when "precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it."

This is precisely what the Court did. It noted that support for the privilege "had been eroded further" because the number of jurisdictions acknowledging the privilege had declined from thirty-one to twenty-four. The Court also emphasized "[s]cholarly criticism" of the privilege, which had "continued unabated." In other words:

Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice. When such a rule is the product of a conceptualism long ago discarded, is universally criticized by scholars, and has been qualified or abandoned in many jurisdictions, it should receive the most careful scrutiny. Surely "reason and experience" require that we do more than indulge in mere assumptions, perhaps naïve assumptions, as to the importance of this ancient rule..."

The Court's analysis in Trammel applies to the clergy-penitent privilege in several ways. First, the Court's discussion makes it clear that the law of privilege is flexible. As such, courts should be willing to entertain the idea of abandoning the clergy-penitent privilege.

Second, the Court made clear that privileges should not persist based on precedent alone; if societal progress renders a privilege's rationales outdated, then the privilege's recognition should cease. The clergy-penitent privilege did not exist at common law and first

36. Id. (quoting Francis v. Southern Pacific Co., 333 U.S. 445, 471 (1948)). Although the clergy-penitent privilege is statutory on a state level, it exists as a creature of common law on the federal level.

37. Id. at 48.

38. Id. at 50.

39. Id. at 54 n.1 (quoting Hawkins v. United States, 358 U.S. 74, 81–82 (1958)).

received judicial recognition in 1813. The New York Court of General Session declared that the clergy-penitent privilege was linked inextricably with the free exercise of religion because penitence is a sacrament of Roman Catholicism and "the sacraments of a religion are its most important elements." As will be discussed at length later in this paper, First Amendment jurisprudence has evolved over the past two-hundred years, and the scope of rights falling under the umbrella of "free exercise" has been significantly narrowed. Because the constitutional basis for the privilege has been rendered misplaced, the privilege largely persists because of its precedential value. The clergy-penitent privilege has become the very type of "ancient" rule that the Trammel Court warned against.

Third, Trammel stands for the proposition that the Supreme Court should pay deference to states' treatment of a given privilege when deciding whether to abandon it. In terms of the clergy-penitent privilege, states have begun chipping away at it, most notably by writing mandatory reporting statutes that explicitly abrogate the privilege. One author noted the irony in the fact that "states are narrowing the scope of the privilege in response to public outrage, when some states adopted the privilege amid public outrage in response to placing clergy members on the stand." Such state action may in fact be ironic, but it symbolizes a change in public perception that cuts against retaining the privilege. If states may create and limit privileges to correspond with ever-changing public opinion, such action indicates that the states are indulging in the sorts of "mere" and "perhaps naïve assumptions" that the Trammel Court proscribed.

Lastly, the Court suggested that scholarly criticism of a privilege should weigh in favor of abandoning it. As of today, scholars have

41. People v. Phillips was not officially published but was detailed in William Sampson, The Catholic Question in America (1974).
42. Id. at 111.
43. See infra Part IV.A.
44. For example, Massachusetts, Illinois, Mississippi, Colorado, and New York have added clergy to their mandatory reporting statutes. E.g., Pudelski, supra note 6, n.79.
45. See id. at n.82.
published roughly sixty works that analyze the privilege.47 Nearly

half of those articles appeared in the past five years. This is the sort of "unabated" scholarly debate to which the Trammel Court referred and, as such, should illustrate the privilege's current volatility.

Trammel's rubric applies to the clergy-penitent privilege in much the same manner as it applied to the adverse spousal testimonial privilege. This paper does not suggest that Trammel should be the sole basis on which to abandon the clergy-penitent


48. See Anderson, supra note 48; Beerworth, supra note 48; Lupu & Tuttle, supra note 6; Walsh, supra note 48; Pudelski, supra note 6; Schonbrun, supra note 48; Abrams, supra note 6, at 1203; Bader, supra note 48; Williams, supra note 48; Imwinkelried, supra note 48; Cassidy, supra note 6; Garber, supra note 48; Bailey, supra note 48; Barry, supra note 48; Woods, supra note 48; Odom, supra note 48; Cooper, supra note 48; Cohen, supra note 48; O'Malley, supra note 48; Schaefer & Bogaert, supra note 48; Thompson, supra note 48; Merlino, supra note 48; Gardner, supra note 48; Reich, supra note 48; Araujo, supra note 48; Whittaker, supra note 48; Kenney, supra note 48.

49. Trammel, 445 U.S. at 50.
privilege, however. *Trammel* is significant because it symbolizes a doctrinal "open door"; because the clergy-penitent privilege *does* share significant characteristics with the adverse spousal testimonial privilege, the Court should be willing to scrutinize and possibly abandon it.

III. THE UTILITARIAN RATIONALE
DOES NOT JUSTIFY RETAINING THE CLERGY-PENITENT PRIVILEGE

A. Introduction

On what grounds will such scrutiny occur? The most generally accepted rationale for the adoption of privileges, and the one recognized by the Supreme Court, is the utilitarian justification.\(^5\)

First proposed by John H. Wigmore,\(^5\)\(^1\) the utilitarian rationale suggests that "communications . . . should be privileged only if the benefit derived from protecting the relation outweighs the detrimental effect of the privilege on the search for truth."\(^5\)\(^2\) Wigmore delineated four conditions to assist in performing the balancing: (1) "[t]he communication must initiate in a confidence that they [sic] will not be disclosed";\(^5\)\(^3\) (2) "[t]his element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties";\(^5\)\(^4\) (3) "[t]he relation must be one in which the opinion of the community ought to be sedulously fostered"; and (4) "[t]he 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."\(^5\)\(^5\)

Wigmore made clear that all four conditions must be present in order for a privilege to be recognized.\(^5\)\(^6\) He went on to state, "[t]hat [the factors] are present in most of the recognized privileges is plain

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\(^{50}\) Cassidy, *supra* note 6, at 1632.

\(^{51}\) See 8 WIGMORE, *supra* note 21, at 527 (1961).


\(^{54}\) Id.

\(^{55}\) Id.

\(^{56}\) Id.
enough; and the absence of one or more of them serves why certain privileges have failed to obtain the recognition sometimes demanded for them." Although courts typically implement Wigmore’s rationale when considering whether to create new privileges, this paper will utilize it as a framework for critiquing the existing clergy-penitent privilege; a lack of a utilitarian justification for the privilege cuts against retaining it. As the discussion below illustrates, the clergy-penitent privilege appears to fail three—arguably four—of the utilitarian requirements.

B. The Communication Does Not Initiate in a Confidence That It Will Not Be Disclosed

In order for a privilege to remain valid, the communication that it protects must have initiated in a confidence that it would not be disclosed. Whereas Roman Catholics are bound by confidentiality, most other religious denominations do not have an official rule regarding privileged communications or even confidentiality, for that matter. The majority of individuals who enter into communications with clergy, therefore, do so without a guarantee of secrecy, privilege aside.

Research further suggests that the level of confidentiality one expects has relatively little bearing on one’s behavior. Several academics conducted studies to test the layperson’s expectation of confidentiality when communicating with an attorney or psychotherapist. These studies revealed that most individuals will

57. Id.
58. 8 WIGMORE, supra note 52, at 527 (1985).
59. Roman Catholic canon law makes it a crime “for a confessor in any way to betray a penitent by word or in any other manner or for any reason.” BUSH & TIEMANN, supra note 41 (quoting canon 1388, section 1). People v. Phillips involved confessions made to a Roman Catholic priest. Thus, at the time of the privilege’s inception, it did apply to the types of confidential communications to which Wigmore referred. Because the clergy-penitent privilege is no longer limited to auricular confessions, however, it has outgrown the first utilitarian condition.
60. E.g., Keel, supra note 48, at 702; see Cassidy, supra note 6, at 1641 (noting that most Protestant denominations and the Jewish tradition lack religious tenets that mandate professional secrecy).
61. E.g., Mitchell, supra, note 48.
disclose confidential information, regardless of whether they expect that information to be privileged. 62

Although the underlying studies did not deal specifically with the clergy-penitent privilege, several other authors have used this research in arguing against the privilege. 63 More importantly, however, the studies cast doubt on the fundamental presumptions underpinning the entire doctrine of privileges, including the clergy-penitent privilege. As evidence giant Edward J. Imwinkelried stated, “none of the studies lends any solid support to Wigmore’s generalization that without the assurance of confidentiality furnished by an evidentiary privilege, the average or typical layperson would not consult or confide,” and added, “The world does not appear to revolve around the courtroom to the extent that Wigmore assumed.” 64

This demonstrated sub-Wigmorean expectation of confidentiality suggests that the clergy-penitent privilege fails the first utilitarian condition.

C. The Element of Confidentiality
Is Not Essential to the Full and Satisfactory Maintenance of the Relation Between the Parties

The privilege fails the second condition on similar grounds. Without a general expectation of confidentiality, it is unsound to claim that such confidentiality is in fact “essential” to the full and satisfactory maintenance of the relationship between clergy-member and penitent.

In speaking out against the psychotherapist-patient privilege, Justice Scalia once asked, “how come psychotherapy got to be a thriving practice before the ‘psychotherapist privilege’ was invented?” 65 In speaking out against the clergy-penitent privilege, could not one equally ask, “how come religion got to be a thriving practice before the clergy-penitent privilege was invented?”

The United States’ religious demographics also suggest a lack of

63. See, e.g., Homer, supra note 48, at 730.
64. Imwinkelried, supra note 62, at 162.
necessity for the privilege: Given that there are more than twice as many Protestants, who generally lack a religious confidentiality policy, as there are Catholics in the United States, it would be somewhat overstating one's case to claim that religious relationships could not adequately survive without an element of confidentiality. The numbers indicate that such relationships do survive.

Whereas there are religions whose tenets are silent with regards to confidentiality, there are other religions that actually mandate disclosure. Such a predicament arose in Lightman v. Flaum. In *Lightman*, an Orthodox-Jewish woman sought marriage counseling from a rabbi. During the course of the meeting, she revealed to the rabbi that she had stopped "religious bathing" in violation of Jewish law. "Pursuant to Jewish law, [the rabbi] was obliged to relay this information to plaintiff's husband in order to prevent him from engaging in conjugal relations with his wife in violation of the Torah." This case provides an ideal example of how the clergy-penitent privilege is at times overly inclusive: it presumes that the underlying religion it is protecting actually professes confidentiality. In order to maintain a sound relationship with the husband, the rabbi in *Lightman* was religiously bound to disclose the wife's transgressions.

Although Catholicism does profess strict confidentiality, most religions do not, and some religions, as just illustrated, actually profess disclosure. As such, the element of confidentiality is not essential to satisfactorily maintain the relationship between a clergy-member and a penitent.

D. The Relation Is Not One in Which the Opinion of the Community Ought to Be Sedulously Fostered

"Sedulous" means "persevering and constant in effort or application." Thus, the third condition suggests that the clergy-

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66. See Cassidy, *supra*, note 6, at 1641.
69. *Id.* at 131.
70. *Id.* at 132.
penitent privilege should be retained only if the community perseveringly and uninterruptedly believes that the clergy-penitent relationship “deserves special solicitude.”

Far from sedulous, public support for clergy-members has ebbed and flowed over time. For example, confidence in clergy reached its peak in 1985, when “67% of Americans rated the clergy ‘very high’ or ‘high’ in honesty and ethical standards.” This figure dropped to 60% in 1988, and to 55% in 1990.

In 2002, 66% of the public stated that Protestant ministers “can be trusted,” whereas only 45% said the same of Catholic priests. This ranking symbolized a drop of fourteen percentage points in one year. Both groups of clergy were ranked lower than teachers, small business owners, youth sport coaches, and ordinary men or women: groups whose communications are not governed by an evidentiary privilege. As one advocate noted, “These figures are all the more remarkable, considering the efforts of President Bush and assorted politicians and clergy to rally the nation under the banner of religious faith . . . following September 11.”

Gallup conducted a more recent poll in 2005, asking individuals to rate honesty and ethical standards of individuals in different fields.

72. Mitchell, supra note 48, at 765.
73. See, e.g., John Dart, Clergy Seek Answers to Plunge in Public Image, L.A. TIMES, Oct. 9, 1992, at B4 (“polls have shown cyclical variations”).
75. Dart, supra note 73.
76. Id. Pharmacists bumped the clergy out of the top rank in 1988. Id.
77. Id.
79. Confidence in Catholic priests ranked at 59% in 2001. Id.
80. Id.
81. Id.
82. Id.
84. Id.
Only 54% of those polled stated “high” or “very high” in terms of clergy’s honesty and ethical standards. In fact, clergy ranked ten percentage points lower than teachers in this poll.

The past decade has also proved remarkable in light of Catholics’ tendencies toward (or rather, against) religious activities. An Irish poll revealed that 36% of Catholics stated that clergy sex abuse cases had negatively affected their religious practices. Of that 36%, more than one half stated a decline in attending mass. Furthermore, when asked whether they would trust new priests in their neighborhood, more Catholics than not stated they “would wonder” about the new priest’s trustworthiness.

This move away from religious practice has also reached our side of the pond. Religious advocates have noted that “the family drive to church for Saturday confession is now a thing of the past”. 53% of Catholics never or almost never practice confession. And “[t]his trend isn’t likely to reverse itself anytime soon.” The reason for this move away from confession is that Catholics “feel uncomfortable confessing their sins to a priest.” Confession has simply become an “endangered sacrament.”

Consequently, public support for the privilege has also ebbed and flowed. England failed to recognize such a privilege as did the United States until 1813. There then came a point where every state in the nation statutorily recognized some form of the clergy-

86. Id.
88. Id.
89. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. E.g., Mitchell, supra note 48, at 765.
96. See supra Part II.D. for a discussion of the privilege’s inception in American jurisprudence.
penitent privilege.\textsuperscript{97} Today, nearly half of the states have abrogated the privilege with their mandatory reporting statutes.\textsuperscript{98} Many of those states have left other privileges, such as the attorney-client privilege, unaffected.\textsuperscript{99} Such differential treatment may reflect an underlying lack of sympathy toward the clergy-penitent privilege when compared to other testimonial privileges.

Given the lengthy history of societal ambivalence toward both the privilege and the clergy, the relationship between clergy and penitent can hardly be labeled as one in which the community’s opinion has been sedulously fostered. It is volatile, subject to the public’s ever-changing whims and perceptions. The community’s opinion has fallen short of the utilitarian mandate that it be “persevering or constant in effort or application,” and thus fails the third utilitarian condition.

\textit{E. The Injury That Would Inure to the Relation by the Disclosure of the Communications May Not Be Greater Than the Benefit Thereby Gained for the Correct Disposal of Litigation}

The fourth condition required by the utilitarian rationale poses some academic difficulty because it is nearly impossible to gather empirical evidence to support or refute it;\textsuperscript{100} it consists of weighing soft variables. This section will thus consist only of a general

\begin{enumerate}
\item \textsuperscript{97} E.g., Cassidy, \textit{supra} note 6, at 1639.
\item \textsuperscript{99} Beerworth, \textit{supra} note 48, at 100 (referring to the laws of North Carolina, New Hampshire, Rhode Island, Tennessee, and West Virginia).
\item \textsuperscript{100} Bailey, \textit{supra} note 48, at 505.
discussion of the countervailing interests at stake.

As discussed previously, most religions lack a confidentiality policy.\textsuperscript{101} Although a strong public policy exists in favor of fostering spiritual counseling,\textsuperscript{102} there is some evidence to suggest that individuals will continue to consult religious advisors even without the privilege.\textsuperscript{103} Recent polls and anecdotes also suggest that fewer people are actually practicing confessional.\textsuperscript{104}

At the same time, there is a strong need "for every man's evidence."\textsuperscript{105} A complete evidentiary picture is essential both in individual cases and in upholding our adversarial legal system.\textsuperscript{106} Although it is impossible to reach a conclusion when assessing immeasurable variables, it is possible that the clergy-penitent privilege fails the utilitarian rationale's fourth condition.

IV. THE CLERGY-PENITENT PRIVILEGE VIOLATES THE FIRST AMENDMENT

The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."\textsuperscript{107} These two clauses, known as the Establishment Clause and Free Exercise Clause, respectively, create an inherent tension whereby the government must allow individuals to freely exercise their religious beliefs while simultaneously avoiding a state-sanctioned preference for religion.

The clergy-penitent privilege exemplifies the tension between the two clauses. Does the Free Exercise Clause require the government to protect confidential religious communications? Does the Establishment clause prevent the state from doing so? These questions will be explored below.

A. The Free Exercise Clause Does Not Require the Privilege

The New York Court of General Session relied upon the Free Exercise Clause as its basis for recognizing the clergy-penitent

\textsuperscript{101} See supra notes 59, 60.
\textsuperscript{102} See, e.g., Bailey, supra note 48, at 506.
\textsuperscript{103} See supra Part III.B.
\textsuperscript{104} See supra Part III.D.
\textsuperscript{106} See id.
\textsuperscript{107} U.S. CONST. amend. I.
privilege:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In this country... there is religious freedom guaranteed by the constitution, and consecrated by the social compact.

It is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected. To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman catholic religion would be thus annihilated.\textsuperscript{108}

The Court's reliance on the Free Exercise Clause in 1813 has proven to be unfounded, however. The Supreme Court has never ruled on the First Amendment's applicability to the clergy-penitent privilege,\textsuperscript{109} but the Court has stated that the Fifth Amendment privilege against self-incrimination is the only constitutionally-based privilege.\textsuperscript{110}

Moreover, current Free Exercise doctrine would comfortably support the privilege's abolition. In Employment Division v. Smith,\textsuperscript{111} the Court held that generally applicable and neutral laws do not offend the First Amendment, even if they have the incidental effect of burdening religion.\textsuperscript{112} The underlying case concerned the sacramental use of peyote, a hallucinogenic drug. Smith tested positive for use of the drug and the government denied him unemployment benefits on that ground. Smith claimed that in enforcing this administrative law, the government had violated his Free Exercise rights because he was using the drugs as part of his religious rituals. The Court found the unemployment statute to pass

\textsuperscript{108} SAMPSON, supra note 42, at 111.
\textsuperscript{109} See Branzburg v. Hayes, 408 U.S. 665, 689–90 (declaring that "the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination").
\textsuperscript{110} Id.; see also In re Williams, 152 S.E.2d 317, 325–25 (N.C. 1967) (stating that the Free Exercise Clause does not provide a clergy member with independent grounds for refusing to testify).
\textsuperscript{111} 494 U.S. 872 (1990).
\textsuperscript{112} See id. at 878.
constitutional muster and based its holding on the rationale that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs," and went on to state that, "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." One author, reiterating the Court's holding, noted that "Smith ... is ... merely a formal recognition of the Court's time-honored abhorrence of constitutionally protected 'lawlessness'—of the religious citizen becoming, in a sense, her own lawgiver due to some religious tenet or sacramental rite."

The abolition of the clergy-penitent privilege would fall squarely within Smith's rule. The duty to testify is generally-applicable and religiously-neutral obligation. It may, in cases of Roman Catholics, however, stand squarely in contradiction of religious practices, namely the sacraments of confessional and secrecy. As illustrated below, such contradiction with Catholic tenets is not constitutionally significant because it is merely an incidental effect of a neutral law.

The Court in Smith reaffirmed many of its former statements in Reynolds v. United States, a case that raised similar issues as those emanating from the clergy-penitent privilege. Reynolds involved a man who was charged with violating a Utah law prohibiting bigamy. He claimed exemption from the law on the grounds that his religious tenets—Mormonism—required him to have multiple wives lest he suffer "damnation in the life to come." Despite such severe religious consequences, the Court found no Free Exercise violation because to permit such religious exemption "would be to make the

113. Id. at 885 (quoting Reynolds v. United States, 98 U.S. 145, 145 (1879)).
114. Id. at 885–86 (quoting Reynolds, 98 U.S. at 145). Reynolds involved a man who was charged with violating a Utah law prohibiting bigamy. He claimed exemption from the law on the grounds that his religious tenets—Mormonism—required him to have multiple wives lest he suffer "damnation in the life to come." Reynolds, 98 U.S. at 161. Even with such severe religious consequences, the Court was not persuaded because to permit such religious exemption "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." Id. at 167.
115. Beerworth, supra note 48, at 75.
professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” 117

Most religious leaders would not face a predicament similar to that in Reynolds because most religions lack a confidentiality policy and, as such, do not reprimand clergy for revealing the content of communications made with penitents. Roman Catholicism, however, does proscribe revelation of confidential communications. Under Catholic canon law, “the confession is inviolable, no matter what civil law says or does not say.” 118 A direct violation of this rule “is punished by the *latae sententiae* excommunication of the priest, with remission reserved solely to the very highest authority in the church.” 119 In Reynolds, the petitioner faced the threat of damnation in his next life; in the Roman Catholic church, priests would face a milder threat of excommunication. In both cases, however, the party is elevating his religious tenets above those prescribed by U.S. law. Although the Constitution permits laws to accommodate religious beliefs and practices, it does not require it. 120 As such, abolition of the clergy-penitent privilege would pass constitutional muster in the same manner as proscribing polygamy did in Reynolds.

**B. The Privilege Violates the Establishment Clause**

Although the Constitution permits religious accommodations, those accommodations are still subject to the Establishment Clause’s confines. Establishment Clause jurisprudence largely consists of two competing theories: the separationist theory and the nonpreferentialist theory. The separationist theory views the Establishment Clause as, in the words of Thomas Jefferson, a “wall of separation” between church and state, such that it precludes the government from advancing or inhibiting religion in general. 121 In contrast, the nonpreferentialist theory centers on the idea that the government may provide aid to religion so long as it does not prefer certain religious groups over others in doing so. 122

117. *Id.* at 167.
118. BUSH & TIEMANN, *supra* note 41.
119. *Id.*
Whether one applies the separationist theory or the nonpreferentialist theory to test the clergy-penitent privilege’s validity, the result remains the same: the privilege violates the Establishment Clause.

1. The Separationist Theory

The Supreme Court articulated the primary test for Establishment Clause claims based on a separationist theory in Lemon v. Kurtzman. The test consists of three prongs: (1) whether the statute’s legislative purpose is secular; (2) whether the statute has the primary effect of advancing or inhibiting religion; and (3) whether the statute fosters excessive entanglement with religion. If the statute fails any of the three prongs, the Court will find it violates the Constitution. The clergy-penitent privilege clearly violates two—arguably three—of the Lemon test’s prongs and, as such, runs afoul of the First Amendment.

a. The statute’s legislative purpose is religious

"The First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." Interestingly, even proponents of the clergy-penitent privilege concede that it may have a religious purpose. Where a statute’s intent is religious, such intent involves the state in religious activities and, in turn, demonstrates a lack of secular purpose.

The New York Court of General Session’s purpose in initially recognizing the clergy-penitent privilege was to promote the sacrament of confession. Although the privilege now transcends the Roman Catholic religion, its purpose still remains to promote individuals’ religious freedoms. As one author succinctly framed the matter, “Since a clergyman-communicant privilege is available only

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dissenting) (stating that the Establishment Clause forbids “preference among religious sects or denominations”).
123. 403 U.S. 602 (1971).
124. Id. at 612.
125. Wallace, 472 U.S. at 56.
126. See, e.g., Whittaker, supra note 48, at 154 (stating that “a secular purpose for the privilege may be open to question”).
127. Wallace, 472 U.S. at 78.
128. See SAMPSON, supra note 42.
to religious persons and is not extended to the general public, the state makes clear its intent only to benefit religious groups."  

One could conceivably argue that the privilege’s purpose is to promote societal health and well-being, which flow from the ability to find solace in a religious leader. Such a purpose would appear to be secular. The Supreme Court has made clear, however, that Lemon’s first prong “is not a pushover for any secular claim.” In other words, although “the Court often does accept governmental statements of purpose... in those unusual cases...[where] the secular purpose [was] secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one.”

For example, in Santa Fe Independent School District v. Doe, the Supreme Court struck down a school’s policy of student led prayer prior to football games, despite the school’s stated secular purposes. One of such purposes was to “solemnize sporting events.” The Court found this purpose to be nothing more than a guise: “[T]he use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school.” This statement seems to suggest that an alleged secular purpose is nonetheless religious if it merely promotes a religious act through a secular vehicle.

Applying this reasoning to clergy-penitent privilege statutes implies that even if the stated purpose of the statute is, arguendo, to promote general societal health and well-being, using communications between the penitents and clergy to foster such societal health and well-being is problematic because it constitutes an intent to promote religion. The following syllogism illustrates this point: The state’s intent is to increase societal health and well-being. Communicating to a clergy-member increases societal health

130. McCreary County v. ACLU, 125 U.S. 2722, 2736 (2005).
131. Id.
133. Id. at 309.
134. Id.
and well-being. The state, therefore, has an intent to increase communications to clergy-members.

b. The statute has the primary effect of advancing or inhibiting religion

Although most statutes that have a religious purpose also have a religious effect, even statutes with secular purposes may be found to violate the Establishment Clause if their primary effect is to advance or inhibit religion. The Supreme Court struck down such a statute in Sloan v. Lemon. The statute in Sloan provided state reimbursement to parents whose children attended nonpublic schools (most of which were religious), without mandating how parents could spend such reimbursements. Although the court found the statute to have a secular purpose, the court nonetheless found the statute unconstitutional because of the program's religious "substance." The court reasoned that the state had "singled out a class of its citizens for a special economic benefit," and "Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions."140

Thus, even if one reaches the conclusion that the clergy-penitent privilege's intent is secular, the privilege is nonetheless unconstitutional because of its substance. Like the Sloan statute, clergy-penitent privilege statutes single out an individual class of citizens for a special benefit, albeit an intangible evidentiary benefit rather than an economic one. Such statutes also fundamentally preserve and support religion-oriented institutions, namely religions themselves.

On a more theoretical level, the clergy-penitent privilege places religion above judicial fact-finding processes. Although all privileges contravene the need for evidence in criminal proceedings, only the clergy-penitent privilege advances religion at the cost of

138. Id. at 829–30.
139. Id. at 832 (emphasis added).
140. Id. (emphasis added).
other societal goals. This type of advancement, in conjunction with a lack of a secular purpose, renders the clergy-penitent privilege constitutionally suspect.

c. The statute fosters excessive entanglement with religion

In order to determine whether the government entanglement with religion is excessive, it is necessary to “examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” Although the bulk of jurisprudence dealing with excessive entanglement has focused around government aid to parochial schools, the clergy-penitent privilege appears to violate the excessive entanglement prong.

First, the Supreme Court has held that if an institution is pervasively religious, any government benefit conferred therein is suspect. In terms of the clergy-penitent privilege, religious groups themselves are those that receive a benefit. By definition, such groups are pervasively religious.

Second, in allowing for a clergy-penitent privilege, the government is providing a type of aid that is largely immeasurable. One could argue that the government is primarily providing a psychic aid to religious groups. By deeming certain communications within those groups to be privileged, the government is facilitating religious worship and essentially alleviating some of the pressures that accompany confessions and

141. Several years ago, the Court suggested that it made for judicial efficiency to fold the entanglement inquiry into the primary effect inquiry because both rely on the same evidence. Zelman v. Simmons-Harris, 536 U.S. 639, 669 (2002). With that in mind, the third prong of the Lemon test essentially loops back into the second. As discussed above, because the clergy-penitent privilege appears to violate Lemon’s second prong, it will consequently violate the third prong as well, should the Court choose to follow this new reasoning.


145. Its immeasurability stems from the fact that most of the cases dealing with excessive entanglement concern monetary aid from the government, which is clearly measurable in dollars and cents.
spiritual counseling. Framed in this manner, the privilege aids religious groups by, as one author stated, "strengthening [the religion's] moral fiber."\textsuperscript{146}

Lastly, the Court disapproved of government aid requiring "comprehensive, discriminating, and continuing state surveillance" to uphold the First Amendment.\textsuperscript{147} In \textit{Lemon}, the Constitution would have required courts to monitor parochial teachers' secular classes to ensure that they were not polluted by religious values. This amounted to excessive entanglement. In the context of the clergy-penitent privilege, courts may need to inquire into religious entities' practices and beliefs when determining whether the privilege applies.\textsuperscript{148} Concededly, this does not rise to the level of entanglement portrayed in \textit{Lemon}.

It is certainly possible that the Court would not find excessive entanglement were it to scrutinize a clergy-penitent privilege statute under the \textit{Lemon} test. If the Court were to strike down such a statute, it would inevitably use one of \textit{Lemon}'s other prongs to do so.

2. The Nonpreferentialist Theory

The Court in Larson v. Valente declared, "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."\textsuperscript{149} State laws granting denominational preferences are thus subject to strict scrutiny.\textsuperscript{150} They must therefore be narrowly tailored and must further a compelling government interest, lest they violate the First Amendment.\textsuperscript{151}

A state's interest in promulgating a clergy-penitent privilege statute would likely be to promote societal health and well-being by protecting confidential communications. The problem arises,
however, when statutes confer the privilege's benefits onto certain religious groups but not others. For example, Vermont's statute only protects a "priest or minister of the gospel";\textsuperscript{152} Wyoming offers protection for "a clergyman or priest;"\textsuperscript{153} Georgia's statute limits the definition of clergy to "any Protestant minister of the Gospel, or to any priest of the Roman Catholic faith, or to any priest of the Greek Orthodox Catholic faith, or to any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called."\textsuperscript{154}

The problem arises when considering non-Western religions such as Buddhism or Islam or controversial religions such as Scientology, given that "Free exercise... can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations."\textsuperscript{155} By accounting for certain religions but not others, clergy-penitent privilege statutes fail strict scrutiny because they are not narrowly tailored; states with discriminatory statutes lack a legitimate state interest that would allow them to include certain religions at the exclusion of others.\textsuperscript{156} Thus, Larson's nonpreferentialist approach would strike down these laws as violating the First Amendment.

V. CONCLUSION

This author recognizes that the clergy-penitent privilege is largely caught in a Catch-22: Wigmore's utilitarian framework requires that the privilege apply only in situations where parties

\textsuperscript{152} VT. STAT. ANN. tit. § 12, 1607 (2004).
\textsuperscript{153} WYO. STAT. ANN. § 1-12-101(a)(ii) (2004).
\textsuperscript{154} GA. CODE ANN. § 24-9-22 (2004).
\textsuperscript{156} See In re Grand Jury Investigation, 918 F.2d 374, 385 n.14 (1990) (stating that "the prospect of restricting the privilege to Roman Catholic penitential communications raises serious first amendment concerns"); Mayes, supra note 128, at 410 ("If the state's interest in enacting the religious confidentiality statute is to protect confidential communication between clergymen and communicants and to encourage persons to seek spiritual guidance, a statute which prefers some religions over others does not effectively promote this interest. A discriminatory clergyman-communicant statute affords benefits to the favored religion which are not available to other denominations and, therefore, discourages confidential communication and religious counseling in minority denominations.").
expect privacy, whereas the Establishment Clause’s nonpreferentialist approach mandates that the privilege apply across all religions equally; the bases on which the privilege was first recognized are no longer doctrinally-sound; the doctrinally-sound reasons for retaining the privilege today can be incongruous to the goals of having the privilege at all. The clergy-penitent privilege has essentially been hoisted by its own petard.

While this situation is unfortunate, it should not justify retaining an anomalous privilege. Our legal framework is based upon *stare decisis*; it is based upon consistency; it is based upon resiliency. Continuing to uphold a privilege that undermines these fundamental principles is tantamount to deeming them worthless.

If ever there were a time to strike the privilege down, it is now. The current social climate surrounding the clergy-penitent privilege indicates that the time is ripe to reconsider the privilege’s validity. The time is also ripe in a legal sense, given the similarities between the current status of the clergy-penitent privilege and the status of the adverse spousal testimonial privilege at the time the Court abolished it. The clergy-penitent privilege lacks the utilitarian justifications that existed at the time of its inception and seemingly violates the Establishment Clause.

Given the social and legal climate, the Supreme Court will likely consider the clergy-penitent privilege’s doctrinal validity and constitutionality in the near future. Because the privilege operates on both the state and federal level, the Supreme Court will probably only have opportunity to consider the privilege’s validity if a party directly challenges its constitutionality.

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* J.D. Candidate May, 2006, Loyola Law School; B.A., Sociology, *summa cum laude* California State University, Los Angeles, June 2003. This piece is dedicated to Los Angeles County Deputy District Attorneys Bill Hodgman and Lydia Bodin, whose commitment to justice has inspired every page of this article. I thank Professor Alexandra Natapoff for her invaluable encouragement and editorial input. I extend kudos to Lauren Fujiu and the rest of the Loyola of Los Angeles Law Review for their hard work during this article’s production. Lastly, but most certainly not least, I thank my husband Glen for his belief in me.