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**COX V. MILLER: THE CLERGY PRIVILEGE AND
ALCOHOLICS ANONYMOUS**

Stacey A. Garber

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PREFACE

The Southern District Court of New York granted Paul Cox's request for a writ of habeas corpus on the ground that the New York State court failed to extend the clergy privilege to his confessions made to fellow Alcoholics Anonymous (AA) members.¹ In July 2002, the Second Circuit Court reversed the Southern District of New York Court's decision by holding, "even were the Establishment Clause to require that some communications between AA members in some circumstances be protected under New York's cleric-congregant privilege, Cox's communications in issue here do not qualify for such protection."² The Second Circuit held that Cox failed to establish that his communications with fellow AA members were made in order to seek spiritual guidance, and thus did not qualify for New York's clergy privilege.³ Although AA has been treated as a traditional religion for Establishment Clause analysis, the Second Circuit refused to analyze whether AA should be treated as a traditional religion for clergy privilege analysis.⁴ This note analyzes the general question the Second Circuit Court did not: Should communications between members of Alcoholics Anonymous qualify for the clergy privilege?

I. INTRODUCTION

Our justice system is based on the notion that a person is innocent until proven guilty.⁵ In order to ensure a fair and unprejudiced trial, the law of evidence sets limits on the information that can be admitted into a trial.⁶ Historically, society has valued the trust and confidentiality of certain relationships enough to allow certain individuals the right to refuse to offer testifying at trial.⁷ This right is known as privilege.⁸ By balancing the

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¹ Cox v. Miller, 154 F. Supp. 2d 787 (S.D.N.Y. 2001).

² Cox v. Miller, 296 F.3d 89, 92 (2d Cir. 2002).

³ *Id.* (citing the rationale from *People v. Carmona*, 627 N.E.2d 959, 962 (N.Y. 1993)). New York's clergy privilege only protects disclosures made "in confidence and for the purpose of obtaining spiritual guidance." *Carmona*, 627 N.E.2d at 962.

⁴ *Cox*, 296 F.3d at 109-10.

⁵ See U.S. CONST. amend. V-VI (describing the rights of United States citizens in criminal proceedings).

⁶ CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 871-73 (4th ed. 2000).

⁷ Raymond F. Miller, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771, 782 (1999).

privacy rights of certain relationships against the interests of courts to adjudicate fairly, the federal court system has recognized only nine narrowly tailored privileges.⁹

The United States Supreme Court established the criteria to carefully examine requests for new or expanded testimonial privilege.¹⁰ These criteria include: 1) balance of the societal importance and support of confidentiality for certain relationships versus the possible harm to the trial discovery process, 2) review of the Utilitarian function certain confidential relationships play in modern society, and 3) the States' recognition of privilege or special treatment of certain confidential relationships.¹¹ This cautious approach for establishing new or extending current privileges has been supported by at least one legal scholar in this area.¹²

Privileges are only useful when they are certain.¹³ Overly numerous or broad privileges could lead to conditional privileges that must be judged on a case-by-case basis.¹⁴ The United States Supreme Court holds that conditional privileges are equivalent to no privilege at all.¹⁵

With the above preamble in mind, this article seeks to examine whether disclosures made in compliance with the Twelve Steps of Alcoholics Anonymous (AA) meet the criteria for privilege. The Second Circuit Court of New York recently ruled on this matter but failed to answer the general privilege question.¹⁶ Paul Cox, convicted of two counts of manslaughter, sought to overturn his conviction on the claim that evidence presented against him was gained solely from communications made during his participation in AA.¹⁷ Mr. Cox contended these disclosures should have been privileged and thus inadmissible in court.¹⁸

Two privileges could arguably be applied to AA disclosures, the clergy privilege or the psychotherapy privilege.¹⁹ Cox argued the philosophy of AA, which requires that a person confess to God and another person of the

⁸ MUELLER & KIRKPATRICK, *supra* note 6, at 871.

⁹ 8 JOHN HENRY WIGMORE, EVIDENCE 2285 (John T. McNaughton ed., rev. ed. 1961); Miller, *supra* note 8, at 775-76.

¹⁰ Jaffee v. Redmond, 518 U.S. 1, 8-12 (1996).

¹¹ *Id.*

¹² 8 WIGMORE, *supra* note 9.

¹³ Jaffee, 518 U.S. at 18.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Cox v. Miller, 154 F. Supp. 2d 787 (S.D.N.Y. 2001).

¹⁷ *Id.* at 787-88.

¹⁸ *Id.* at 788.

¹⁹ Thomas J. Reed, *The Futile Fifth Step: Compulsory Disclosure of Confidential Communications Among Alcoholics Anonymous Members*, 70 ST. JOHN'S L. REV. 693, 701 (1996).

nature of their wrongs, fits the scope of the clergy privilege.²⁰ Both New York state law and the federal judiciary have recognized a clergy privilege that protects confidential communications to a member of the clergy in his professional capacity as a spiritual advisor.²¹ The New York district court held that the New York clergy privilege is meant to protect all religious communications.²² In addition, the Second Circuit has held that AA is a religion for Establishment Clause purposes.²³ Relying on these holdings, Cox asked the Second Circuit to rule that his communications to fellow AA members, which he intended to keep confidential, be treated as communications to spiritual advisors and thus be exempt from compelled discovery.²⁴

For the following reasons, Cox's argument to protect AA communications is unfounded. First, the broad analysis and policy for the Establishment Clause holdings do not apply to a privilege argument.²⁵ Second, AA disclosures fail the statutory and federal judiciary requirements for the clergy privilege.²⁶ Third, AA communications do not meet the criteria for extending a current privilege.²⁷ Fourth, granting privilege to AA members fails the necessary balancing tests and Utilitarian analyses.²⁸ For similar reasons, AA members do not warrant protection under the psychotherapy privilege either. The risk of over broadening privilege law would erode the authority of the judiciary to compel discovery and the current certainty of testimonial privilege. Cox's case did not meet the required burden for such extension.

²⁰ Cox, 154 F. Supp. 2d at 789-90.

²¹ N.Y. C.P.L.R. § 4505 (McKinney 2001); Trammel v. United States, 445 U.S. 40 (1980); *In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990).

²² Cox, 154 F. Supp. 2d at 791-92.

²³ Warner v. Orange County Probation Dept., 173 F.3d 120 (2d Cir. 1999).

²⁴ Cox, 154 F. Supp. 2d at 787-88.

²⁵ Vincent C. Alexander, *Practice Commentaries*, N.Y. C.P.L.R. § 4505 (2001).

²⁶ See generally N.Y. C.P.L.R. § 4505 (Supp. 2001); *In re Grand Jury Investigation*, 918 F.2d at 374.

²⁷ See generally *Jaffee v. Redmond*, 518 U.S. 1 (1996).

²⁸ *Id.*

II. BACKGROUND

A. *Privileges Generally*

The primary purpose of evidence law is to ensure accurate fact finding, and a fair trial.²⁹ Federal Rule of Evidence 401 states generally that all relevant evidence is admissible unless otherwise excluded by the constitution, statute or rule.³⁰ The law of privilege is one category of exclusions invoked to prohibit the admissibility and to protect certain information.³¹ The concept that the law should protect the communications of certain relationships comes from Roman law, where "the basis for exclusion (of testimony) was the general moral duty not to violate the underlying fidelity upon which the protected relationship was built."³² In early English law, honor among gentlemen gave rise to testimonial privilege.³³ In American law, Dean Wigmore, an expert on relationship-based privileges, proposed that there should be a limited number of privileges established by balancing the benefit of the relationship (e.g., attorney-client, psychotherapist-patient, clergy-penitent, etc.) and its fidelity against the possible harm or impairment of the litigants seeking information for their defense.³⁴ Privileges recognized at the state level are established by the state legislature or common law.³⁵

At the federal level, privileges are the product of common law.³⁶ In 1972, the Federal Rules of Evidence Advisory Committee and United States Supreme Court attempted to codify thirteen rules defining the evidentiary privileges applicable in federal courts.³⁷ After much debate, Congress rejected the Advisory Committee and Supreme Court's proposal and instead adopted a single rule stating that privileges should be continually created and modified by the federal courts in light of their reason and experience.³⁸ As a result, the federal courts have created nine

²⁹ MUELLER & KIRKPATRICK, *supra* note 6, at 871.

³⁰ FED. R. EVID. 401.

³¹ CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 269-70 (4th ed. 1992).

³² Miller, *supra* note 7, at 782.

³³ Miller, *supra* note 7, at 782. In 1776, the House of Lords established the first privilege available for the benefit of the communicant. *See* Duchess of Kingston's Case, 20 How. St. Tr. 586 (1776).

³⁴ 8 WIGMORE, *supra* note 9.

³⁵ Miller, *supra* note 7, at 772.

³⁶ Miller, *supra* note 7, at 772.

³⁷ Miller, *supra* note 7, at 773.

³⁸ Miller, *supra* note 7, at 774; Fed. R. Evid. 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme

(continued)

privileges.³⁹ *Shapiro v. United States* (proposed Rule 502) grants a privilege for required reports.⁴⁰ *Fischer v. United States* (proposed Rule 503) defines attorney-client privilege and protects confidential communications between a licensed attorney and client, conducted for the purpose of obtaining legal services.⁴¹ The Supreme Court in *Jaffee v. Redmond* (proposed Rule 504) recognized the psychotherapist-patient privilege.⁴² This privilege covers all statements made in confidence to a psychotherapist for the purpose of treatment.⁴³ *Trammel v. United States* (proposed Rule 505) outlines the marital privilege and allows a spouse called to testify to refuse to give testimony against the other spouse in criminal cases.⁴⁴ *In re Grand Jury Investigation* (proposed Rule 506) covers confessions between a penitent and clergy.⁴⁵ Other professional privileges (physician-patient, accountant-client, clergy-communicant) may exist in certain jurisdictions depending on case law, but have been declined recognition by the federal judiciary.⁴⁶ Political votes (proposed Rule 507) are privileged, although no case directly holds that it exists.⁴⁷ Intellectual property trade secrets (proposed Rule 508) are protected via *Davis v. General Motors Corp.*⁴⁸ *United States v. Reynolds* permits the federal government to hold a privilege (proposed Rule 509) to prohibit disclosure

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

³⁹ Eight of the current evidentiary privileges were part of U.S. common law prior to 1973. Only the psychotherapy privilege is new. Miller, *supra* note 7, at 775-76.

⁴⁰ *Shapiro v. United States*, 335 U.S. 1, 32 (1948).

⁴¹ *Fischer v. United States*, 425 U.S. 391 (1976). See also *Upjohn v. United States*, 449 U.S. 383 (1981).

⁴² *Jaffee v. Redmond*, 518 U.S. 1 (1996).

⁴³ *Id.* at 15.

⁴⁴ *Trammel v. United States*, 445 U.S. 40, 40-46, 53 (1980).

⁴⁵ *In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990).

⁴⁶ Miller, *supra* note 7, 776-77; *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992); *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972); *United States v. Arthur Young, Inc.*, 465 U.S. 805, 821 (1984); *Herbert v. Lando*, 441 U.S. 153, 175 (1979); *Wright v. Jeep Corp.*, 547 F. Supp. 871, 875 (E.D. Mich. 1982).

⁴⁷ Miller, *supra* note 7, at 776, n. 33.

⁴⁸ *Davis v. General Motors Corp.*, 64 F.R.D. 420, 422 (N.D. Ill. 1974).

of state secrets that may threaten national security.⁴⁹ *McCray v. Illinois* establishes protection for the identity of an informer (proposed Rule 510).⁵⁰ Finally, the privilege against self-incrimination is set out in the Fifth Amendment of the United States Constitution.⁵¹ The rationale for this privilege is our government's belief in an accusatorial, rather than an inquisitorial justice system.⁵²

B. Rationale and Scope of Clergy Privilege

All fifty states and the District of Columbia recognize a privilege for confessions or confidential communications to a clergy member.⁵³ The United States Supreme Court recognized the clergy privilege in *Trammel v. United States*, in 1980, by comparing it to the scope of the marital privilege.⁵⁴ "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."⁵⁵ The substance and limitations of the clergy privilege are outlined in *In re Grand Jury Investigation*.⁵⁶ Based on this and other federal case law, the clergy privilege protects confidential communications and disclosures made privately (are not intended for disclosure to persons outside the conversation), and made to the clergy in their professional capacity as spiritual advisor.⁵⁷ The privilege belongs to the communicant, but the clergyman may also assert the privilege on the communicant's behalf and refuse to testify.⁵⁸ In defining the scope of the privilege, the Third Circuit in *In re Grand Jury Investigation* also found that the clergy privilege which satisfied Dean Wigmore's balancing test: the benefit to society by fostering the clergy relationship outweighed the possible impairment of judicial fact finding.⁵⁹ The court also established that the presence of third parties does not destroy the privilege, so long as the communicant and spiritual advisor have a reasonable expectation of

⁴⁹ *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953).

⁵⁰ *McCray v. Illinois*, 386 U.S. 300, 312-13 (1967). For limitation of presidential privilege see *United States v. Nixon*, 418 U.S. 683, 706 (1974).

⁵¹ U.S. CONST. amend. V.

⁵² *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

⁵³ *Reed*, *supra* note 19, at 737.

⁵⁴ *Trammel v. United States*, 445 U.S. 40, 51 (1980).

⁵⁵ *Id.*

⁵⁶ *In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990).

⁵⁷ *Id.* at 380 (clergy includes minister, rabbi, priest or other similar person of a religious organization).

⁵⁸ *Id.*

⁵⁹ *Id.* at 383-84. The privilege was said to be "'indelibly ensconced' in American common law." *Id.* at 381 (quoting *United State v. Gillock*, 445 U.S. 360, 368 (1980)).

confidentiality.⁶⁰ Therefore, protection extends past the traditional confession circumstance.⁶¹ Disclosures made in group discussions or sessions with a spiritual advisor may be protected by privilege.⁶²

The State of New York has a statute establishing an evidentiary privilege for communications to the clergy.⁶³ New York Code section 4505 reads that "[u]nless 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 a spiritual advisor."⁶⁴ The Court of Appeals of New York has interpreted this statute.⁶⁵ First, in *Keenan v. Gigante*, the court ruled the existence of the clergy privilege could not shield a priest from answering a grand jury inquiry, because the information sought did not jeopardize the confidence or trust between the inmate communicant and the priest.⁶⁶ The court held that the key inquiry required to determine if the clergy privilege of section 4505 should apply, is whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance.⁶⁷ The court reasoned the policy behind the privilege is to encourage uninhibited communication in a relationship of trust.⁶⁸ Thus, it is not definitive that the disclosure is made to a member of the clergy, but rather that the information disclosed must be "under the cloak of the confessional or was in any way confidential" for the privilege to apply.⁶⁹ In *Keenan*, although some of the information disclosed was confidential, the nature of the grand jury inquiries did not violate the matters entrusted and were therefore not protected.⁷⁰

Similarly, in *People v. Carmona*, the New York Court of Appeals found the admission of clergy testimony regarding an inmate's penitent disclosures was harmless error.⁷¹ Although a prisoner's disclosures to the clergyman in an effort to obtain spiritual guidance were privileged, admitting the clergy's testimony was harmless because there was

⁶⁰ *Id.* at 386.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Cox v. Miller*, 154 F. Supp. 2d 787, 790 (S.D.N.Y. 2001).

⁶⁴ *Id.* (quoting N.Y. C.P.L.R. § 4505 (McKinney 2001)).

⁶⁵ *People v. Carmona*, 627 N.E.2d 959 (N.Y. 1993); *Keenan v. Gigante*, 390 N.E.2d 1151 (N.Y. 1979).

⁶⁶ *Keenan*, 390 N.E.2d at 1154.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *People v. Carmona*, 627 N.E.2d 959, 961 (N.Y. 1993).

substantial circumstantial evidence against the defendant that would have led to a conviction in the absence of the confession evidence.⁷² *Keenan* and *Carmona* are both examples of the New York Court of Appeals' refusal to extend the scope of the clergy privilege.⁷³

C. *Establishment and Extension of New Privilege*

As the law of privilege has evolved, the judiciary has been the primary force in defining and establishing privileges for the federal system, and the state legislatures have been the primary body establishing and defining privilege in the state system.⁷⁴ Rule 501, as adopted, rejects the proposal that federal privilege law should be primarily created by the legislature and instead directs the federal courts to continually develop and modify privileges through the common law.⁷⁵ In the last twenty-five years, the federal courts have confirmed nine privileges; required reports, attorney-client, husband-wife, clergy-penitent, political vote, trade secret, state secret and identity of informer and psychotherapist-patient.⁷⁶

Dean Wigmore, a leading scholar on privileges, wrote a treatise advocating a narrow and cautious approach to adopting or expanding privilege law.⁷⁷ Wigmore designed a four-part test to gauge the balance of societal, individual and legal interests.⁷⁸ All four parts must be met for a testimonial privilege to be valid.⁷⁹ First, the communication must originate in a setting that promotes and relies upon the understanding that the communication is confidential.⁸⁰ Second, the confidentiality must be essential to the maintenance and function of the communicants' relationship.⁸¹ Third, society must believe the communication of the relationship deserves protection from compelled disclosure.⁸² Fourth, the harm caused by a compelled disclosure must be greater than the benefit

⁷² *Id.* at 965-66.

⁷³ See *Carmona*, 627 N.E.2d at 959; and *Keenan v. Gigante*, 390 N.E.2d at 1151.

⁷⁴ The United States Congress adopted a single rule to govern the establishment of privileges, rather than the Supreme Court's proposed twelve rules outlining specific privileges. Miller, *supra* note 7, at 772-74.

⁷⁵ Miller, *supra* note 7, at 772-74.

⁷⁶ Miller, *supra* note 7, at 775-76; See also *supra* notes 39-50.

⁷⁷ See generally 8 WIGMORE, *supra* note 9.

⁷⁸ 8 WIGMORE, *supra* note 9, at 527.

⁷⁹ 8 WIGMORE, *supra* note 9, at 527.

⁸⁰ 8 WIGMORE, *supra* note 9, at 527.

⁸¹ 8 WIGMORE, *supra* note 9, at 527.

⁸² 8 WIGMORE, *supra* note 9, at 527.

gained for evidentiary purposes.⁸³ Many courts have applied this balancing test.⁸⁴

To decide whether AA communications warrant evidentiary privilege, it is important to understand the courts' rationale for establishing or extending privileges. For this reason, I will examine *Jaffee v. Redmond*, the case in which the U.S. Supreme Court recognized the psychotherapist-patient privilege.⁸⁵ The Court began by restating conclusions from its earlier decision in *Trammel v. United States*: "exceptions from the general rule disfavoring evidentiary privileges is justified when the benefit of the proposed privilege sufficiently outweighs the need for probative evidence."⁸⁶ Using "reason and experience" the Court found the need for confidence and trust between a psychotherapist and his patient met the balancing test.⁸⁷ The Court found it persuasive that all fifty states and the District of Columbia had enacted some form of privilege for psychotherapy.⁸⁸ The policy decisions of the states are one of the factors used to establish a new privilege or amend an existing one.⁸⁹ Certainly, denial of federal privilege in this circumstance would frustrate the states' laws to foster these confidential communications.⁹⁰ In addition, the nature of effective therapy depends on the trust built between the therapist and patient.⁹¹ Thus, the possibility of disclosure would impair chances of successful psychotherapy treatment.⁹² The Court primarily used a Utilitarian analysis by reasoning the need for counseling services is increasing; counseling fulfills an important and useful function in society,

⁸³ 8 WIGMORE, *supra* note 9, at 527.

⁸⁴ See *In re Hampers*, 651 F.2d 19, 22-23 (1st Cir. 1981) (applying the Wigmore test to uphold a qualified privilege for documents relating to sales tax); *ACLU v. Finch*, 638 F.2d 1336, 1344-45 (5th Cir. 1981) (applying Wigmore test to deny extension of a privilege for production of state sovereignty commission files); *Garner v. Wolfenbarger*, 430 F.2d 1093, 1100-02 (5th Cir. 1970) (adopting Wigmore test for testimonial privileges); *In re Matter of D.D.S.*, 869 P.2d 160, 164 (Ala. 1964) (holding that alcohol treatment privilege does not apply to child abuse case because it fails fourth Wigmore element); and *State v. Post*, 826 P.2d 172, 181 (Wash. 1992), modified by 837 P.2d 599 (Wash. 1992) (supporting privilege for confidential communications that meet first Wigmore element).

⁸⁵ *Jaffee v. Redmond*, 518 U.S. 1 (1996).

⁸⁶ *Id.* at 8-10.

⁸⁷ *Id.* at 10-11.

⁸⁸ *Id.* at 12.

⁸⁹ *Id.* at 12-13.

⁹⁰ *Id.* at 13.

⁹¹ *Id.* at 10.

⁹² *Id.*

and the approval of privilege for counseling communications encourages and supports the role of psychotherapy counseling in society.⁹³

In addition to recognizing the psychotherapy privilege, the *Jaffee* Court also extended the privilege to include licensed social workers.⁹⁴ The Supreme Court reasoned that the rationale for protecting communications with a psychiatrist or psychologists also applies to counseling by a licensed social worker.⁹⁵ The fact that social workers provide a significant amount of mental health treatment and the nonmaterial distinction between the types of counseling were also considered.⁹⁶ In general, the Supreme Court defined the *Jaffee* privilege according to professional qualifications of the counselor, rather than the type of counseling being practiced.⁹⁷ The privilege requires the therapist to be a licensed mental health professional, therefore confidential communications made to friends, family or others in an effort to gain support or help are not privileged.⁹⁸

Other courts have adopted or expanded the psychotherapist privilege using a similar rationale. In *Oleszko v. State Compensation Ins. Fund*, the Ninth Circuit held that communications between an employee, fellow employees and unlicensed counselors at a company's employee assistance program (EAP) were protected by the psychotherapist-patient privilege.⁹⁹ The court stated the rationale for extending the psychotherapist privilege to social workers also applied to unlicensed EAP counselors, because EAP counselors play an increasing and important role in mental health treatment.¹⁰⁰ Thus, a privilege for EAP counselors serves a Utilitarian function by encouraging employees to seek beneficial treatment. Additionally, EAP counselors offer assistance to those who may not otherwise be able to afford treatment.¹⁰¹ Although the EAP counselors are not licensed, they provide a similar service as a licensed counselor or serve as a liaison to a licensed therapist.¹⁰² In either case, the EAP counselors are privy to the same type of private information as a licensed therapist and

⁹³ *Id.* at 5-13; Christopher B. Mueller, *The Federal Psychotherapist-Patient Privilege After Jaffee: Truth and Other Values in a Therapeutic Age*, 49 HASTINGS L. J. 945, 946 (1998); See also Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597 (1980); CHARLES T. MCCORMICK, (3d ed. 1984).

⁹⁴ *Jaffee v. Redmond*, 518 U.S. 1, 15-17 (1996).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Mueller, *supra* note 93, at 949. See also *United States v. Schensow*, 942 F. Supp. 402, 406-07 (E.D. Wis. 1996).

⁹⁸ Mueller, *supra* note 93, at 955; *Jaffee*, 518 U.S. at 22.

⁹⁹ 243 F.3d 1154, 1157 (9th Cir. 2001).

¹⁰⁰ *Id.* at 1157-58.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1158.

rely on a trusting relationship to provide effective assistance.¹⁰³ To refuse privilege to these counselors, despite their roles as a member of a larger mental health team, would undermine the psychotherapy privilege.¹⁰⁴ Moreover, the court found support for their decisions in the fact that a number of states statutorily recognize a privilege for EAP personnel.¹⁰⁵

Two other courts have similarly extended the *Jaffee* privilege to unlicensed counselors.¹⁰⁶ In *Greet v. Zagrocki*, a district court in the Third Circuit ruled that EAP counselors were protected by the *Jaffee* privilege.¹⁰⁷ In *United State v. Lowe*, a district court in the First Circuit ruled rape crisis counselors who worked under the supervision of a licensed mental health professional were likewise protected by *Jaffee*.¹⁰⁸

Other courts have disagreed on similar facts. The Eighth Circuit in *Carman v. McDonnell Douglas Corp.* ruled that workplace ombudsman did not warrant the *Jaffee* privilege.¹⁰⁹ Apparently, workplace disputes did not have the same societal importance as mental health concerns protected by *Jaffee*. Likewise, the Seventh Circuit in *United States v. Schensow* refused to extend the psychotherapist privilege to volunteer telephone operators at Alcoholics Anonymous.¹¹⁰ The definitive reasons for these rulings included the lack of professional license or training, the volunteers did not purport to be counselors, and the communications were not held in a forum resembling a psychotherapy session.¹¹¹

At least two courts have limited the scope of the psychotherapist privilege by balancing the societal or legal need for disclosure with the patient's need for protection of confidential information.¹¹² The Sixth Circuit restricted application of the psychotherapist privilege in *In re Zuniga*.¹¹³ This court held that disclosure of a patient's identity and submission of claims to an insurance company were not within the scope of the psychotherapist-patient privilege.¹¹⁴ The court reasoned that according to Federal Rule of Evidence 501, the determination of whether the psychotherapist privilege applied was a matter of common law, and

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Greet v. Zagrocki*, No. 96-2300, U.S. Dist. LEXIS 18635 (E.D. Pa. Dec. 16, 1996); *United States v. Lowe*, 948 F. Supp. 97, 99 (D. Mass. 1996).

¹⁰⁷ *Greet*, U.S. Dist. LEXIS 18635, at *1.

¹⁰⁸ *Lowe*, 948 F. Supp. at 99.

¹⁰⁹ *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997).

¹¹⁰ *United States v. Schensow*, 151 F.3d 650 (7th Cir. 1998).

¹¹¹ *Id.* at 657.

¹¹² *Reed*, *supra* note 19, at 733-36.

¹¹³ *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983).

¹¹⁴ *Id.* at 642.

thus, application of the privilege was within the court's discretion in light of their reason and experience.¹¹⁵ By balancing the privacy interests of the patients and the need for compulsory disclosure, the court ruled that minimal harm would be done by releasing the patients' records to verify insurance billing, and that the grand jury's oath of secrecy would protect the patients' right to confidentiality.¹¹⁶

The Second Circuit similarly affirmed the contempt charge against a grand jury witness who refused to answer cross-examination questions regarding his mental health in *In re Doe*.¹¹⁷ The trial court judge ordered the witness's psychiatric records disclosing his long history of paranoia be released to the defendant.¹¹⁸ The Second Circuit affirmed this decision and held the determination of whether the psychotherapist privilege applied was a matter of common law.¹¹⁹ Although the Second Circuit generally recognizes the privilege, it held the key witness's right to privacy was sufficiently protected as long as the court reviewed the mental health records in camera prior to releasing the records to the defense.¹²⁰ This court's primary concern was unequal recognition of the psychotherapist privilege in state and federal courts.¹²¹

Despite the varied results of the above courts, the analysis used to determine whether a privilege should be expanded was largely the same. The courts considered whether the Wigmore test was met. Therefore, the courts questioned whether the societal importance of the specific communication outweighed the possible harm to judicial discovery.¹²² Privilege cases must also be examined in light of their Utilitarian function.¹²³ In addition, recognition of privilege for a relationship or communication by state law is an important determinant in extending a federal privilege.¹²⁴

¹¹⁵ *Id.* at 636.

¹¹⁶ *Id.* at 642.

¹¹⁷ 964 F.2d 1325, 1326 (2d Cir. 1992).

¹¹⁸ *Id.* at 1326-28. The widespread recognition of the psychotherapist-patient privilege in all fifty states demonstrates that judicial experience with the privilege has been favorable. *See id.* at 1328.

¹¹⁹ *Id.* at 1328-29.

¹²⁰ *Id.* at 1329.

¹²¹ *Id.* at 1328.

¹²² *See supra* notes 83-84.

¹²³ *See supra* notes 93, 101.

¹²⁴ *See supra* notes 88-89.

D. *Alcoholics Anonymous*

There are many counseling groups and organizations based on trust and communication. Yet no federal privilege exists to grant these groups protection via an evidentiary privilege.¹²⁵ One candidate group for evidentiary privilege is Alcoholics Anonymous (AA).¹²⁶ AA was established in 1935 in Akron, Ohio as a fellowship program to help people find and maintain sobriety.¹²⁷ The organization was founded on core beliefs that include reliance on a higher power, confession, inventory of personal character and faults, and dedication to help others.¹²⁸ These core beliefs are set out in the "Twelve Steps to Sobriety".¹²⁹

These steps are:

1. We admitted we were powerless over alcohol and that our lives had become unmanageable.
2. Came to believe that a Power greater than ourselves could restore us to sanity.
3. Made a decision to turn our will and our lives over to the care of God as we understand him.
4. Made a searching and fearless moral inventory of ourselves.
5. Admitted to God, to ourselves and to another human being the exact nature of our wrongs.
6. Were entirely ready to have God remove all these defects from our character.
7. Humbly ask Him to remove our shortcomings.
8. Made a list of all persons we had harmed, and became willing to make amends to them all.
9. Made direct amends to such people wherever possible, except when to do so would injure them or others.

¹²⁵ See *supra* notes 40-52 (outlining the current federal evidentiary privileges).

¹²⁶ *Cox v. Miller*, 154 F. Supp. 2d 787 (S.D.N.Y. 2001).

¹²⁷ Reed, *supra* note 19, at 710-11 (Bill Wilson patterned AA after the Calvary Oxford Group where he had found sobriety a year earlier); See also BILL WILSON, THE THREE LEGACIES OF ALCOHOLICS ANONYMOUS: RECOVERY, UNITY, SERVICE, ALCOHOLICS ANONYMOUS COMES OF AGE 49, 71-74 (Alcoholics Anonymous World Services Inc. ed., 1957).

¹²⁸ See Reed, *supra* note 19, at 709-11.

¹²⁹ Reed, *supra* note 19, at 712. See generally TWELVE STEPS AND TWELVE TRADITIONS (Alcoholics Anonymous World Services, Inc. ed. 1981).

10. Continued to take personal inventory and when we wronged promptly admitted it.

11. Sought through prayer and meditation to improve our conscious contact with God as we understood Him, praying only for knowledge of His will for and the power to carry that out.

12. Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.¹³⁰

Step five of the AA creed requires one to make confessions of personal wrongs in order to recover and maintain sobriety.¹³¹ Like disclosures to a psychotherapist, trust and confidence are needed for members to be honest and gain the full benefits of counseling.¹³² Steps eight and nine require the AA members to make amends and be responsible for their actions.¹³³ Sobriety is to be achieved by resolving issues created by addiction and by making a fresh start.

E. AA is a Religion for Establishment Clause Purposes

Multiple courts have held that AA is a religion for Establishment Clause purposes.¹³⁴ In *Griffin v. Coughlin*, the New York Court of Appeals held that a state prison could not make an inmate's eligibility for family visitation contingent on attendance of the prison's alcohol and drug treatment program that was based on the religious practices of AA.¹³⁵ This court found that the writings and practices of AA went beyond mere

¹³⁰ TWELVE STEPS AND TWELVE TRADITIONS (Alcoholics Anonymous World Services, Inc. ed., 1981)

¹³¹ *Id.*

¹³² ALCOHOLICS ANONYMOUS, THE STORY OF HOW MANY THOUSANDS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM 74 (3d ed. 1976).

¹³³ TWELVE STEPS AND TWELVE TRADITIONS (Alcoholics Anonymous World Services, Inc. ed., 1981).

¹³⁴ Warner v. Orange County Dept. 173 F.3d 120 (2d Cir. 1999); *Griffin v. Coughlin*, 673 N.E.2d 98 (N.Y. 1996); Yates v. Cunningham, 70 F. Supp. 2d 47 (D.N.H. 1999); DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397 (2d Cir. 2001); Ross v. Keelings, 2 F. Supp. 2d 810 (E.D. Va. 1998); Bausch v. Sumiec, 139 F. Supp. 2d 1029 (E.D. Wis. 2001). See generally James E. McBride, *Alcoholics Anonymous: Anonymous Theists? Griffin v. Coughlin and the Wall of Separation Between Church and State in the New York Prison System*, 19 CARDOZO L. REV. 1455 (1998). Although AA does not claim to be a religion, it was founded on religious principles of the Oxford Group that was centered on the belief that sobriety could be achieved by religious conversion. Reed, *supra* note 20, at 709.

¹³⁵ *Griffin v. Coughlin*, 673 N.E.2d 98, 99 (N.Y. 1996).

spirituality or open-mindedness.¹³⁶ Instead the court held that "adherence to the A.A. fellowship entails engagement in religious activity and religious proselytization" because the members are urged to believe in a higher power, communicate to God through prayer, and confess wrongs.¹³⁷ Therefore, the prison's mandate that inmates attend such sessions was an inducement of religious practice and thus a breach of the separation of church and state and the Establishment Clause.¹³⁸

Using a similar rationale, the Second Circuit in *Warner v. Orange County*, ruled the state probation board could not mandate AA attendance as terms of probation, because it violated the Establishment Clause.¹³⁹ In this case a repeat drunk driving offender, Robert Warner, brought suit against the Orange County Department of Probation alleging that the terms of his probation, requiring him to attend local Alcoholics Anonymous meetings, violated his constitutional rights because he was an atheist.¹⁴⁰ The Second Circuit court affirmed the lower court's decision that Warner could not, under the First Amendment's Establishment Clause, be required by a government entity to attend or participate in the religious exercises of Alcoholics Anonymous.¹⁴¹

The holdings of the *Griffin* and *Warner* courts have been distinguished by at least one Second Circuit court.¹⁴² In *DeStefano v. Miller*, the court refused to rule that a state-funded organization which offered AA programs violated the Establishment Clause.¹⁴³ The court held it was the state's compulsion of inmates to participate in AA in *Griffin* and *Warner* that was unconstitutional, not simply the fact that these state government facilities offered AA programs.¹⁴⁴ Thus, the use or mere encouragement of AA participation by a state-funded organization is not unconstitutional.¹⁴⁵

¹³⁶ *Id.* at 101.

¹³⁷ *Id.* at 103.

¹³⁸ *Id.* at 101.

¹³⁹ *Warner*, 173 F.3d at 120.

¹⁴⁰ *Id.* at 120.

¹⁴¹ *Id.* at 122.

¹⁴² *DeStefano v. Miller*, 67 F. Supp. 2d 274, 286, 287 (S.D.N.Y. 1999).

¹⁴³ *Id.* at 288.

¹⁴⁴ *Id.* at 287.

¹⁴⁵ *Id.* at 288.

III. DISCUSSION AND ANALYSIS: *COX V. MILLER*A. *Facts*

On January 1, 1989, Dr. and Mrs. Chervu were stabbed to death in their Larchmont, New York home.¹⁴⁶ There were no forensic clues to identify the attacker and the murder went unsolved.¹⁴⁷ In May 1993, the Larchmont police received information from an informant that Paul Cox was the perpetrator of the Chervu murders.¹⁴⁸ The police used the informant's information to discover evidence, including bloody clothes and a knife, that later lead to Cox's arrest and conviction.¹⁴⁹ Prior to the informant's phone call, the police had no suspicion of Cox or evidence to link him to the crime.¹⁵⁰

At trial, Cox learned that the informant was a fellow AA member who was present at a meeting when Cox confessed that he believed he murdered two people who lived in a house where he had lived as a child with his parents.¹⁵¹ Cox told his AA peers that after drinking heavily on New Year's Eve, he was on his way home when he wrecked his car near the Chervu home, stumbled to the house in a drunken blackout, broke in and killed Dr. and Mrs. Chervu.¹⁵² In all, six of Cox's fellow AA members were called to testify against him.¹⁵³

Cox was convicted of two counts of manslaughter.¹⁵⁴ Following his New York state conviction, Cox applied for a writ of habeas corpus, alleging that his conviction was erroneous because his AA disclosures should have been protected by the clergy privilege.¹⁵⁵ The Southern District of New York Court granted his writ, stating that,¹⁵⁶ the legal question of whether the clergy privilege could be

¹⁴⁶ *Cox v. Miller*, 154 F. Supp. 2d 787, 788 (S.D.N.Y. 2001).

¹⁴⁷ *Id.* at 789.

¹⁴⁸ *Id.* at 790.

¹⁴⁹ *Id.*

¹⁵⁰ *See id.*

¹⁵¹ *Id.* at 789-90.

¹⁵² *Id.*

¹⁵³ *Reed, supra* note 19, at 699.

¹⁵⁴ *People v. Cox*, 696 N.Y.S. 2d 177 (N.Y. App. Div. 1999). (The jury found Cox guilty of manslaughter rather than murder because they believed Cox to be under extreme emotional distress at the time of the crimes due to his state of intoxication and history of child abuse); *Reed, supra* note 19, at 700.

¹⁵⁵ *Cox v. Miller*, 154 F. Supp. 2d at 788.

¹⁵⁶ *See Griffen v. Coughlin*, 673 N.E.2d 98, 103 (N.Y. 1996) and *Warner v. Orange County*, 173 F.3d 120 (2d Cir. 1999). (Both courts held that state prisons who mandated or

(continued)

applied to AA disclosures had merit the Second Circuit had previously found AA to be a religion for Establishment Clause purposes because the Second Circuit had previously found AA to be a religion for Establishment Clause purpose.¹⁵⁷

B. *The New York District Court's Rationale*

The district court reasoned the admission of the AA disclosures would be grounds for reversible error: "The point is critical because but for the violation of §4505 the record is clear that the People would never have identified the fingerprint and palm print, which properly should have been suppressed as 'fruit of the poison tree.'"¹⁵⁸ The court also spoke to the broad scope of the clergy privilege under New York's § 4505.¹⁵⁹ The New York legislators drafted the clergy privilege to encompass all "significant spiritual counseling that may involve disclosure of sensitive matters."¹⁶⁰ In addition, the legislative history revealed that the drafters struck the original concluding phrase, which made the privilege applicable to communications made in the course of the discipline or practice of a religious body, for fear this would limit the privilege to Catholicism.¹⁶¹ The district court also articulated its view of the possible constitutional violation in the lower court's application of Section 4505.¹⁶² Since Section 4505 is meant to cover religious communications generally, if it can be shown that courts have applied the privilege only to the endorsement of traditionally recognized forms of religious expression over the less conventional religious expressions, there is a violation of the Establishment Clause.¹⁶³ The district court further admitted that it is possible to have and practice a religion without a designated clergy or where all members exercise the duty of the clergy by receiving confessions.¹⁶⁴ If AA is a religion whereby

compelled inmates to participate in AA violated the Establishment Clause, due to the religious nature of the group).

¹⁵⁷ *Cox*, 154 F. Supp. 2d at 292-93. (The court stated that despite the religious underpinnings of AA, if it were not for the Second Circuit's holding that AA is a religion for Establishment Clause purposes, it would find AA is not a religion but rather a self-help organization).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 791-92.

¹⁶⁰ *Id.* at 791.

¹⁶¹ *See id.* at 791.

¹⁶² *Id.* at 792.

¹⁶³ *Id.* at 791-92.

¹⁶⁴ *Id.* at 792.

its members serve as clergy for confessions and is thus recognized by the First Amendment, evidentiary privileges could also logically apply.¹⁶⁵

C. *Scope of Clergy Privilege*

In general, the rationale behind the federally recognized clergy privilege and the privilege described by New York statute Section 4505 is to allow persons to make confessions of wrongs as a means of spiritual cleansing, without fear of reprisal.¹⁶⁶ The privilege applies when a communication is given to a person as a spiritual advisor; there is no restriction on the type of religion.¹⁶⁷ In addition, the confession must be made with the expectation that it will be held in confidence.¹⁶⁸ The clergy privilege is not limited to communications with a particular class of clerics or congregants.¹⁶⁹ Nor is it confined to penitential admissions of a perceived transgression or avowals made under the cloak of the confessional.¹⁷⁰ Lawmakers and the judiciary intended to recognize the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance.¹⁷¹

D. *Arguments for Privilege*

1. *The AA philosophy fits the intent of the clergy privilege*

Cox can make an argument that AA communications fit the intent of New York Section 4505. The Twelve Step creed of AA outlines a path of religious conversion as a means to obtain sobriety.¹⁷² Step five requires members to confess past wrongs to God and to another member.¹⁷³ The fellowship of the meetings is primarily a forum for members to share their stories and make confessions as a means of spiritual cleansing.¹⁷⁴ AA's founding and current philosophies do not describe fellow members as spiritual advisors, but merely as individuals on a similar path to find sobriety.¹⁷⁵ However, the group nature of the AA confessions or spiritual advising alone does not destroy possible application of the clergy

¹⁶⁵ See *id.*

¹⁶⁶ *Keenan v. Gigante*, 390 N.E.2d 1151, 1154 (N.Y. 1979).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *In re Grand Jury Investigation*, 918 F.2d 374, 383-84 (3d Cir. 1990).

¹⁷² See *Reed*, *supra* note 19, at 709-12.

¹⁷³ See TWELVE STEPS AND TWELVE TRADITIONS (Alcoholics Anonymous World Services, Inc. ed., 1981).

¹⁷⁴ See *Reed*, *supra* note 19, at 712-13.

¹⁷⁵ See *Reed*, *supra* note 19, at 701-14.

privilege.¹⁷⁶ The *In re Grand Jury* court held that a confession need not be disclosed to a single individual (e.g., AA sponsor) to have protection under the clergy privilege.¹⁷⁷ However, only statements made in group discussions with spiritual advisors intended to be held confidential, are protected by the clergy privilege.¹⁷⁸ Thus, Cox's AA disclosures comply with some of the principles of the clergy privilege.

2. AA is a religion for the Establishment Clause

Moreover, Cox may also argue the Second Circuit's opinion in *Warner* and the New York Court of Appeals decision in *Griffin* both hold that AA includes religious practices and is therefore a religion for Establishment clause purposes.¹⁷⁹ These holdings bolster Cox's argument that AA members should be considered spiritual advisors under the clergy privilege. Nonetheless, for the following reasons, the elements used by the courts to find AA a religion for Establishment Clause issues do not justify coverage by the clergy privilege.

E. Arguments Against Privilege

1. Rationale and analysis of AA for Establishment Clause purposes is not applicable to privilege

The policy and rationale for protecting the First Amendment freedom of religion and separation of church and state is much broader than the policy and rationale for establishing and recognizing privileges.¹⁸⁰ The court in *Griffin* scolded the Appellate Division for examining the religious elements of AA too narrowly.¹⁸¹ The primary purpose of the First Amendment protection of religion is to prevent any state mandated or coerced religious affiliation.¹⁸² With this purpose in mind, the *Griffin* court advocated broad examination of the facts and ultimately ruled that AA is a religion because of its requirements of a belief in a higher power, prayer and confession.¹⁸³ The court did not want the state to compel nonbelievers

¹⁷⁶ See *In re Grand Jury Investigation*, 918 F.2d 374, 383-84 (3d Cir. 1990).

¹⁷⁷ *Id.* at 380.

¹⁷⁸ *Id.*

¹⁷⁹ *Warner v. Orange County*, 173 F.3d 120 (2d Cir. 1999); *Griffin v. Coughlin*, 673 N.E.2d 98 (N.Y. 1996).

¹⁸⁰ Alexander, *supra* note 25.

¹⁸¹ *Griffin*, 673 N.E.2d at 106.

¹⁸² *Lee v. Weisman*, 505 U.S. 577, 596 (1992) (holding that a public school could not provide for a nonsectarian prayer delivered by a clergy at graduation, and concluding that due to societal norms, participation in graduation, and thus the prayer, were not voluntary).

¹⁸³ *Griffin*, 673 N.E.2d at 106-07.

to attend or be subjected to religious practices against their will.¹⁸⁴ The *DeStefano* court agreed with this narrow reading of *Griffin* and *Warner*, and refused to prohibit a state-funded organization from offering AA programs where there was no showing of coercion.¹⁸⁵

In contrast, the primary purpose of the law of privileges is to protect the confidential nature of certain socially valuable relationships.¹⁸⁶ The rationale for the clergy privilege is to allow persons to be able to communicate freely with a person acting professionally as a spiritual advisor.¹⁸⁷ This rationale is not founded on concerns of loss of freedom or coercion by the government.¹⁸⁸ Therefore, the same broadness of analysis and scope of protection is not warranted. The precedent for courts in recognizing privileges show a much more narrow analysis and scope of protection than the Establishment Clause protection. Thus, the rationale and analysis used to define AA as a religion for Establishment Clause purposes are not applicable to defining AA for privilege purposes.¹⁸⁹

2. AA disclosures fail the statutory requirements for privilege

In addition, Cox's argument fails because it does not comply with the statutory language of Section 4505.¹⁹⁰ The New York statute and federally recognized clergy privileges include the requirement that the clergy privy to the communication be acting in their professional scope as a spiritual advisor at the time for the privilege to apply.¹⁹¹ AA members are not acting in a professional scope as members of the clergy during meetings, because they are not professional or ordained members of a clergy.¹⁹² The confessions of Cox and others at AA meetings are merely disclosures to peers.¹⁹³ Although the group nature of the confession does not destroy a

¹⁸⁴ *Id.* at 107-09 (citing the three-prong test in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1973)). (The three prongs of the *Lemon* test are: 1) the statute must have a secular purpose; 2) its principal or primary effect must neither advance or inhibit religion; and 3) the statute must not foster government entanglement in religion).

¹⁸⁵ *DeStefano v. Miller*, 67 F. Supp. 2d 274, 287 (S.D.N.Y. 1999). A commentator on N.Y.C.P.L.R. § 4505 agrees and states that a careful reading of *Griffin* and *Warner* show that their holdings relied not on the religious nature of AA, but rather the prison's encouragement of religious and spiritual ideals. "It seems a quantum leap to conclude that AA, because of such incorporation of religious precepts, is a 'religion' and that its members are 'clergymen' acting in a 'professional capacity' for the purposes of recognizing the privilege under CPLR 4505." Alexander, *supra* note 25.

¹⁸⁶ *Miller*, *supra* note 7, at 783.

¹⁸⁷ *Trammel v. United States*, 445 U.S. 40 (1980).

¹⁸⁸ *Id.*

¹⁸⁹ *See supra* notes 40-50.

clergy privilege, the lack of any ordained clergy should destroy any claim of privilege.¹⁹⁴ Just as there is no protection for communications between fellow congregants in a bible study, there should be no protection for communication between fellow AA members.¹⁹⁵ Despite the lack of privilege for religious peers, Cox may additionally argue the clergy privilege should be extended to AA confessions in the same way some courts have extended the psychotherapist privilege to non-licensed therapists.¹⁹⁶ These non-licensed personnel, however, were extended privilege because they were working as professional therapists or under the supervision of a licensed therapist.¹⁹⁷ Cox will need to overcome this distinction because neither criterion is met in his case: fellow AA members are not acting professionally as religious or counselor confidants or under the supervision of such a person.¹⁹⁸ Failure to meet this statutory element was the key determinant for the Second Circuit's 2002 decision to refuse privilege for Cox's AA disclosures.¹⁹⁹

3. *AA disclosures fail the U.S. Supreme Court's requirements for extended privilege*

Cox could also argue that the social value of AA as an alternative spiritual outlet warrants the extension the clergy privilege to include AA meetings. Judging this argument in the light of the precedent set by *Jaffee*, AA fails the necessary tests.²⁰⁰ The *Jaffee* court was convinced that the psychotherapy privilege should be extended to social workers because licensed social workers fulfill the same function as a psychologist or psychiatrist.²⁰¹ In addition, social workers were more available to treat the mental health issues of those of low or median incomes with the same counseling goals as the more expensive psychotherapy.²⁰² Finally, the

¹⁹⁰ See *Cox v. Miller*, 269 F.3d 89, 92 (2d Cir. 2002).

¹⁹¹ N.Y. C.P.L.R. § 4505; *In re Grand Jury Investigation*, 918 F.2d 374, 383-84 (3d Cir. 1990).

¹⁹² Reed, *supra* note 19, at 751.

¹⁹³ *Cox v. Miller*, 154 F. Supp. 2d 787, 790 (S.D.N.Y. 2001).

¹⁹⁴ *In re Grand Jury Investigation*, 918 F.2d at 380.

¹⁹⁵ See *supra* notes 40-52 (reciting the currently recognized federal privileges).

¹⁹⁶ See *Oleszko v. State Comp. Ins. Fund*, 243 F.3d 1154, 1157 (9th Cir. 2001); *Greet v. Zagrocki*, no. 96-2300 1996 U.S. Dist. LEXIS 18635 (E.D. Pa. Dec. 16, 1996); and *United States v. Lowe*, 948 F. Supp. 97, 99 (D. Mass. 1996).

¹⁹⁷ See *Oleszko*, 243 F.3d. at 1154; and *Greet*, U.S. Dist. LEXIS 18635.

¹⁹⁸ *Cox v. Miller*, 154 F. Supp. 2d 787 (S.D.N.Y. 2001).

¹⁹⁹ *Cox v. Miller*, 296 F.3d 89, 92 (2d Cir. 2002).

²⁰⁰ *Jaffee v. Redmond*, 518 U.S. 1 (1996).

²⁰¹ *Id.* at 16.

²⁰² *Id.*

Supreme Court was persuaded by the recognition of social workers in the states' statutory privileges.²⁰³ None of these elements are true of AA and religious clergy. AA's purpose and social function is not to fulfill the same social function as the mainstream, classically recognized religions. AA is not an alternative source of spiritual guidance or reprieve that is sought out because is it more accessible to those of modest economic means. Further, the states' statutory privilege for the clergy does not protect communications between members of the congregation (at a bible study, for instance).²⁰⁴ Thus, extension of the clergy privilege fails all elements recited in *Jaffee*. The social function of AA does not warrant an extension of clergy privilege to include non-professional members of religious affiliated organizations.

4. *AA disclosures fail the Wigmore balancing test*

In addition, AA disclosures do not meet the Wigmore balancing test for establishing or modifying a privilege.²⁰⁵ Wigmore's test requires four elements be met to justify a privilege: 1) the communication must originate in a setting which promotes and relies upon the understanding the communication is confidential; 2) the confidentiality must be essential to the maintenance and function of the communicants' relationship; 3) society must believe the communication of the relationship deserves protection from compelled disclosure; 4) the harm caused by a compelled disclosure must be greater than the benefit gained for evidentiary purposes.²⁰⁶ AA disclosures meet the first element but fail the last three.

Confidentiality and anonymity are core principles of AA and other Twelve Step groups. At AA meetings, signs display the motto "What you see here, what you hear her, when you leave here, let it stay here."²⁰⁷ Anonymity and confidentiality of AA allows the members to openly discuss their problems without fear of repercussions at their job, in their marriage, family, etc.²⁰⁸ Alcoholics Anonymous is a place for alcoholics to go and talk about what only other members will understand.²⁰⁹ This

²⁰³ *Id.* at 16-17.

²⁰⁴ *Id.*

²⁰⁵ *Oleszko v. State Comp. Ins. Fund*, 243 F.3d 1154 (9th Cir. 2001); Jennifer Sawyer Klein, "I'm Your Therapist, You Can Tell Me Anything": *The Supreme Court Confirms the Psychotherapist-Patient Privilege in Jaffee v. Redmond*, 47 DEPAUL L. REV. 701,713 (1998); Reed, *supra* note 19, at 722.

²⁰⁶ 8 WIGMORE, *supra* note 9, at 527.

²⁰⁷ Reed, *supra* note 19, at 741.

²⁰⁸ *See id.* at 742-43.

²⁰⁹ *See id.*

environment meets Wigmore's first element that the communication in question must originate in a setting that promotes confidentiality.

Although secrecy is integral to the group's function, a privilege that prevents accountability for one's actions is contrary to AA's Twelve Step philosophy. Steps eight and nine both speak of taking responsibility for harm caused and making amends if possible.²¹⁰ Being accountable to society for violating the law has a logical nexus to these steps. Therefore, a quest for a spiritual awakening through honesty to God, self and others should also include honesty to society and the law. Cleansing one's soul of past transgressions and making amends should include paying for all wrongs, such as crimes against society, not just the private or personal wrongs one chooses to pay for. If AA members are compelled to confess their wrongs, they should be equally compelled to face the appropriate consequences. For these reasons, the true AA philosophy is in conflict with Wigmore's second element that requires that confidentiality be essential to the relationship and group's mission. AA's function to help addicts find sobriety is not contingent upon privileged communications.

AA also fails the third element. There is no doubt that AA has helped thousands of people find sobriety and lead more productive lives.²¹¹ However, society has not indicated that it believes alcoholics should be given special legal treatment.²¹² The law does not recognize a testimonial privilege for any other peer relationship, or self-help group.²¹³ AA does not warrant an exception. Thus, AA fails the third requirement that society must believe the communication should be exempt from compelled evidence. There is no evidence that society places a higher value on AA than any other self-help group and therefore it does not merit protection from judicially compelled disclosures.

AA fails the fourth Wigmore element as well. There is no documented harm or reduced benefit of AA, past or present, because of a lack of testimonial privilege.²¹⁴ Without any showing of harm beyond a hypothetical injury to AA, the harm caused by compelled disclosure cannot outweigh the benefit gained by full access to information for accurate and efficient trials. The personal code of confidentiality among AA members is sufficient to maintain the group's function and success. There is no policy reason to extend a testimonial privilege to recovering addicts' disclosures that is not extended to any communication based on a personal confidence. The prevailing purpose of privilege law is to discover truth

²¹⁰ See <http://www.alcoholics-anonymous.org/> last visited Feb. 27, 2003.

²¹¹ Reed, *supra* note 19, at 743-44.

²¹² See *supra* notes 40-50 (noting that no privilege has been federally recognized for AA or any other Twelve Step program).

²¹³ *Id.*

²¹⁴ Reed, *supra* note 19, at 741-44.

and facts for justice.²¹⁵ Without documented injury or overwhelming policy considerations, the possible harm to AA's mission by the lack of legal privilege does not outweigh the benefit of access gained by legal fact-finders.

5. AA fails the Utilitarian calculus

Similar to the AA's failure to meet the Wigmore requirements, AA also fails the Utilitarian calculus used by many courts to justify privileges. There is no evidence that there is a population of addicts in society who refuse treatment because they do not want to confess crimes during AA meetings.²¹⁶ Thus, there is no reason to believe that granting a privilege for AA would foster a stronger or more productive movement of sobriety in America.

F. Summary of Analysis

As discussed above, Cox's argument that the clergy privilege should apply to AA disclosures is unfounded. Although courts have recognized AA as a religious practice to maintain separation of church and state, the same broad analysis and policy does not apply to recognizing AA disclosures as confidential clergy communications.²¹⁷ AA disclosures also fail the statutory and federal judiciary requirements for the clergy privilege.²¹⁸ Moreover, AA disclosures fail the Wigmore balancing test and Utilitarian calculus.²¹⁹

G. Compare and Contrast *State v. Boobar*

1. AA and the psychotherapy privilege

Although AA disclosures do not fit into the clergy privilege, one should consider whether the psychotherapist privilege could be applied to AA as a type of group therapy. Only one court has addressed this issue.²²⁰ In *State v. Boobar*, the Supreme Court of Maine considered whether AA disclosures qualify for protection under the *Jaffee* privilege.²²¹ Despite the fact that Maine recognizes a *Jaffee* privilege for communications between

²¹⁵ MUELLER AND KIRKPATRICK, *supra* note 6, at 871.

²¹⁶ Reed, *supra* note 19, at 714, 741-44 (according to AA, as of 1987, there were more than 73,000 autonomous AA groups and more than 1,500,000 members).

²¹⁷ Alexander, *supra* note 25.

²¹⁸ N.Y. C.P.L.R. § 4505 (McKinney 2001); Trammel v. United States, 445 U.S. 40 (1980); *In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990).

²¹⁹ See *supra* notes 205-216.

²²⁰ *State v. Boobar*, 637 A.2d 1162 (Me. 1994).

²²¹ *Id.*

therapist and patients in single or group sessions,²²² and despite the case law extending the *Jaffee* privilege to a non-licensed mental health worker,²²³ the Supreme Court of Maine refused to extend the psychotherapy privilege to Ronald Boobar's AA disclosures.²²⁴

2. *Boobar facts and court rationale*

In November 1988, Ronald Boobar, an alcoholic and drug addict, drove Rebecca Pelkey home from a bar.²²⁵ The next day the girl was reported missing and was subsequently found murdered.²²⁶ Police identified Boobar as the last person to see Rebecca alive.²²⁷ Soon after, Boobar disclosed to another AA member that he was a suspect in a murder case and that he was the last person to see Rebecca alive.²²⁸ Boobar was then arrested and while in jail confessed to a visiting AA group leader that he had killed Rebecca.²²⁹ Both AA members were called to testify against Boobar.²³⁰ Boobar's pretrial motion to suppress their statements based on the psychotherapy privilege was denied.²³¹ In addition to the testimony of Boobar's AA confidants, the State presented strong circumstantial evidence and physical evidence against Boobar.²³² Boobar was convicted of murder.²³³ The Supreme Court of Maine dismissed Boobar's motion to suppress the AA testimony by the psychotherapy privilege and upheld the lower court's conviction.²³⁴ The key criteria for the Maine court was that the AA members who received Boobar's confession were not licensed therapists or clergy, thus no privilege applied.²³⁵

²²² *Id.* at 1169.

²²³ *Oleszko v. State Comp. Ins. Fund*, 243 F.3d 1154, 1157 (9th Cir. 2001); *Greet v. Zagrocki*, no. 96-2300, 1996 U.S. Dist. LEXIS 18635 (E.D. Pa. Dec. 16, 1996); *United States v. Lowe*, 948 F. Supp. 97, 99 (D. Mass. 1996).

²²⁴ *Boobar*, 637 A.2d at 1162.

²²⁵ *Id.* at 1164.

²²⁶ *Id.*

²²⁷ *Id.* at 1165.

²²⁸ *Id.* at 1168. (It is not clear whether Boobar made his disclosure on the way to or at the AA meeting).

²²⁹ *Id.* at 1165, 1168. (AA member held meeting for Boobar in the jail, although it is not clear whether the admission was made during the context of the AA meeting.).

²³⁰ *Id.* at 1169.

²³¹ *Id.*

²³² *Id.* at 1165.

²³³ *Id.*

²³⁴ *Id.* at 1169.

²³⁵ *Id.* at 1169-70. (Boobar contended that he had a reasonable belief that either person was a therapist or clergy, but the court held there was no evidence that either AA

(continued)

3. *Distinctions between Cox and Boobar do not warrant privilege*

There are many factual distinctions between the *Boobar* and *Cox* cases. However, the nature of these differences does not warrant extension of a privilege for AA communications should not be extended. First, *Boobar* was a suspect in Rebecca's murder prior to any information from an AA member.²³⁶ In contrast, *Cox* was not a suspect in the Chervu murders until after his fellow AA member notified police of his confession.²³⁷ *Boobar* was linked to the murder of Rebecca by both physical and circumstantial evidence outside the AA members' testimony.²³⁸ Thus, the AA disclosures were not the critical evidence in the case. In contrast, police did not have evidence, physical or circumstantial, connecting *Cox* to the murders. All evidence, such as the bloody clothes and the murder weapon, used in the *Cox* trial was discovered as a result of the AA informant.²³⁹ Despite these differences, the analysis for granting a privilege is the same. The weight of the evidence derived from the disclosure is not an issue.²⁴⁰ No court has held that the nature or importance of the privileged information should be determined on a case-by-case basis and that the privilege should be granted only when the evidence is otherwise undiscoverable.²⁴¹ Under the Wigmore balancing test, the *Cox* facts may increasingly tip the balance against privilege in order to prevent harming the discovery process. Therefore, applying the rationale of the *Boobar* court to the *Cox* case, it seems clear that AA disclosures should not be granted evidentiary privilege under the psychotherapy privilege.²⁴²

Although the *Boobar* decision was made prior to the Supreme Court's decision in *Jaffee*, extension of the privilege to licensed social workers would not likely change this court's decision because the *Jaffee* court focused on the qualification of the people involved in the communication

member was fraudulently misrepresenting himself as a medical doctor or clergy, so this argument was moot.).

²³⁶ *Id.* at 1168.

²³⁷ *Cox v. Miller*, 154 F. Supp. 2d 787, 790 (S.D.N.Y. 2001).

²³⁸ *State v. Boobar*, 637 A.2d 1162, 1165 (Me. 1994).

²³⁹ *Cox*, 154 F. Supp. 2d at 790.

²⁴⁰ *See In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990) (defining scope and limitations of clergy privilege).

²⁴¹ *See id.*

²⁴² The *Boobar* Court also dismissed a plea that AA disclosures be privileged under the clergy privilege because the Maine Statute (M.R. Evid 505) requires that the privilege only apply to ordained members of the clergy. The AA members in question were not ordained clergy. *Boobar*, 637 A.2d at 1169.

as a key determinant.²⁴³ This is precisely the criterion the Maine court used in its analysis of the *Boobar* case.²⁴⁴ Privilege was denied because the AA members were not licensed social workers or mental health professionals.²⁴⁵

4. Recent cases also disqualify AA from the psychotherapy privilege

Applying the *Jaffee* rationale and the more recent cases such as *Oleszko*, *Greet*, and *Lowe*, that recognize a psychotherapist privilege for unlicensed counselors, Cox should not be able to suppress his AA disclosure under their rationale either.²⁴⁶ Using the analysis from above, AA still fails the Wigmore test;²⁴⁷ the harm to judicial discovery is not outweighed by an increased benefit to the AA program.²⁴⁸ Thus, despite the important social need and integral notion of confidentiality in the AA program, society has not demonstrated a desire to extend a privilege to addicts and other Twelve Step program participants that is not available to other self-help groups.²⁴⁹ In addition, the only binding authority on this issue for the Second Circuit is the Supreme Court.²⁵⁰ As previously stated, the Supreme Court in *Jaffee* focused on the qualification of the counselors.²⁵¹ The *Cox* communicants were not licensed counselors of any discipline, or at least were not functioning in such capacity when the disclosures were made.²⁵² The *Oleszko*, *Greet* and *Lowe* courts who extended the *Jaffee* privilege relied upon the Wigmore balancing tests and Utilitarian arguments to find that Employee Assistant Programs or rape crisis counselors under the supervision of a licensed mental health professions were covered by the psychotherapist privilege.²⁵³ An equal number of courts (*Carman*, *Schensow*, *Zuniga* and *Doe*) found that the psychotherapist privilege does not extend to unlicensed counselors.²⁵⁴ Given the failed Wigmore test and the binding precedent of the Supreme Court, it is unlikely the Second Circuit will grant or extend the psychotherapy privilege to protect Cox's AA disclosures.

IV. IMPLICATIONS OF EXTENDING PRIVILEGE

Extending the clergy or psychotherapy privilege to AA disclosures creates the risk that other privileges will be extended, thereby allowing confidentiality for private individuals to override the need of the judiciary to have the power to compel discovery of evidence.²⁵⁵ First, extending the clergy privilege to AA may lead to granting the privilege to other quasi-religious organizations.²⁵⁶ There are numerous other programs or groups that have recognized social value and include regular meetings, prayer and

²⁴³ MUELLER & KIRKPATRICK, *supra* note 6, at 949. See also *United States v. Schensow*, 942 F.Supp. 402, 406-07 (E.D. Wis. 1996).

²⁴⁴ *Boobar*, 637 A.2d at 1169.

²⁴⁵ *Id.*

a belief in God or Christian principles. Many of these groups also have a mentoring or counseling aspect. If AA disclosures were privileged, then arguments could also be made for groups like bible studies, Boy and Girl Scouts, and YMCA to also have clergy privilege rights. The above organizations all involve fellowship discussions where members may make confidential disclosures and later want to assert privilege.

There is also a risk of extending the privilege to non-ordained or spiritual advisors.²⁵⁷ Although there is some case law granting a privilege for non-licensed counselors, these individuals are often acting as liaisons to, or assistants for professionals, or they perform the same functions as licensed professionals. Society has not supported such a notion regarding non-ordained church representatives. The New York state statute and federal case law for the clergy privilege both support recognition for ordained clergy only.²⁵⁸ Other spiritual or life mentors, such as school counselors or fellow congregants, could argue for privilege if this distinction was eroded.

As stated previously, the rationale of extending privileges is based on the strict Wigmore test and Utilitarian principles. Loosening these tests and requirements could lead to extending all privileges. The spousal privilege could be widened to a family privilege covering parent-child

²⁴⁶ *Oleszko v. State Comp. Ins. Fund*, 243 F.3d 1154,1157 (9th Cir. 2001); *Greet v. Zagrocki*, no. 96-2300, 1996 U.S. Dist. LEXIS 18635 (E.D. Pa. Dec. 16, 1996); *United States v. Lowe*, 948 F.Supp. 97, 99 (D. Mass. 1996).

²⁴⁷ *See supra* notes 205-215.

²⁴⁸ *See supra* note 206.

²⁴⁹ *See supra* notes 40-50 (reciting the current testimonial privileges).

²⁵⁰ *Jaffee v. Redmond*, 518 U.S. 1 (1996).

²⁵¹ *MUELLER & KIRKPATRICK, supra* note 6, at 949. *See also* *United States v. Schensow*, 942 F. Supp. 402, 406-07 (E.D. Wisc. 1996).

²⁵² *Cox v. Miller*, 154 F. Supp. 2d 787, 790-91 (S.D.N.Y. 2001).

²⁵³ *Oleszko v. State Comp. Ins. Fund*, 243 F.3d 1154,1157 (9th Cir. 2001); *Greet v. Zagrocki*, no. 96-2300, 1996 U.S. Dist. LEXIS 18635 (E.D. Pa. Dec. 16, 1996); *United States v. Lowe*, 948 F.Supp. 97, 99 (D. Mass. 1996).

²⁵⁴ *See Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997); *United States v. Schensow*, 942 F.Supp. 402, 406-07 (E.D. Wisc. 1996); *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983); and *In re Doe*, 964 F.2d 1325,1326 (2d Cir. 1992).

²⁵⁵ *See Alexander, supra* note 25. (The *Cox* court's decision that privilege must be extended to include non-conventional organizations that include spiritual guidance provides "no logical limit" to the number of persons who may assert the privilege).

²⁵⁶ *See Alexander, supra* note 25.

²⁵⁷ *See Alexander, supra* note 25.

²⁵⁸ *See N.Y. C.P.L.R. § 4505* (McKinney 2001); and *In re Grand Jury Investigation*, 918 F. 2d 374, 383-84 (3d Cir. 1990).

communications. The spousal privilege could also be extended to include significant others. The attorney-client privilege could be extended to other professional relationships previously excluded from federal recognition such as physician-patient, accountant-client, or financial advisor-client.

In general, the risks of over-extending privileges threaten the discovery process and the authority of the judiciary to compel evidence for an accurate and just trial. Privileges should be construed narrowly to maximize the truth-seeking process for trials.²⁵⁹ In reality, few relationships so highly depend on confidential communications and privilege as to outweigh the disrupted discovery and the trial process. In addition, broad privileges could lead to qualified or conditional privileges judged on a case-by-case basis. As the Supreme Court stated in *Jaffee*, a conditional privilege is uncertain and is equivalent to no privilege at all.²⁶⁰ Such uncertainty also leads to unequal application and injustice. For these reasons, narrow and few privileges are best.

V. CONCLUSION

Cox's argument that the clergy privilege should apply to AA disclosures is unfounded. Although courts have recognized AA as a religious practice to maintain separation of church and state, the same broad analysis and policy does not apply to recognizing AA disclosures as confidential clergy communications.²⁶¹ Moreover, AA members are not ordained clergy and thus fail to meet the statutory and federal case law requirements for the clergy privilege.²⁶² AA disclosures fail to meet the Supreme Court's criteria for extending an established privilege.²⁶³ AA also fails the Wigmore balancing test and Utilitarian calculus.²⁶⁴ There is no evidence of overriding social value need for privileged AA communications. Therefore, despite the religious nature of AA, disclosures made during the group's meetings should not be granted evidentiary privilege. For similar reasons, the psychotherapy privilege is not applicable to AA disclosures either.

Extending either the clergy or psychotherapist privileges to encompass AA disclosures would set a dangerous precedent to broaden the protection for many other communications. Broad privileges would require more case-by-case analysis. The Supreme Court in *Jaffee* warned such privileges could lead to uncertain qualified privileges rather than the

²⁵⁹ See *Trammel v. United States*, 445 U.S. 40, 50 (1980).

²⁶⁰ *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996).

²⁶¹ See *Cox v. Miller*, 154 F. Supp. 2d 787, 788 (S.D.N.Y. 2001).

²⁶² See N.Y. C.P.L.R. § 4505; *Trammel v. United States*, 445 U.S. 40 (1980); *In re Grand Jury Investigation*, 918 F.2d at 374.

²⁶³ See *Cox v. Miller*, 154 F. Supp. 2d 787, 791-92 (S.D.N.Y. 2001).

²⁶⁴ See *id.*

current narrow and absolute privilege protection.²⁶⁵ Therefore justice is best served by maintaining the present scope of evidentiary privileges.

STACEY A. GARBER

²⁶⁵ *See id.*