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CONFIDENTIALITY IN THE CHURCH OF THE TWELVE STEPS

*George J. Barry**

INTRODUCTION

Every state in the nation, as well as the U.S. territories of Guam, Puerto Rico and the Virgin Islands, currently recognizes a need to protect the confidential communications between a person and his or her spiritual advisor.¹ With no basis in state common

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¹ State statutes designating specific religious leaders to whom the religious privilege applies seem unavailing in light of courts' expanding view of the type of organizations that qualify as a religion or a religious organization. *See, e.g.*, *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068, 1075 (2d Cir. 1996) (holding that Alcoholics Anonymous is a religious organization for the purpose of applying the Establishment Clause). The variations range from the vague, "[a] member of the clergy or other minister of any religion," MINN. STAT. § 595.02 (2001), to the exclusive, "any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister," GA. CODE ANN. § 24-9-22 (2001), to the commendable, but laughable, "minister of the gospel, priest of the Catholic Church, rector of the Episcopal Church, ordained rabbi, or regular minister of religion of any religious organization or denomination usually referred to as a church," TENN. CODE ANN. § 24-1-206 (2001).

The term "spiritual advisor" is commonly used in the privilege statutes to describe the job of the sacerdotal functionaries of the various religions. *See* N.Y. C.P.L.R. 4505 (McKinney 2001). For example, the New York statute states, "Unless the person confessing or confiding waives the privilege, a

law,² this recognition has assumed statutory form,³ creating what

clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his *professional* character as *spiritual advisor*.” *Id.* (emphasis added). This note, therefore, adopts the term “spiritual advisor” to be used interchangeably with “clergy” to represent the person performing a particular spiritual service within the context of a religious organization that recognizes that person as one capable of performing such services.

² See, e.g., *Keenan v. Gigante*, 390 N.E.2d 1151, 1154 (N.Y. 1979) (noting that the privilege did not exist at common law and holding that communications between a prisoner and a priest are not protected by statutory privilege when the testimony of the priest would not “jeopardize the atmosphere of confidence and trust which allegedly enveloped the relationship” between the priest and the communicant); Claudia G. Catalano, Annotation, *Subject Matter and Waiver of Privilege Covering Communications to Clergy Member or Spiritual Adviser*, 93 A.L.R.5th 327 (2001) (noting that state courts have unanimously acknowledged that the religious privilege did not exist at common law).

³ ALA. CODE § 12-21-166 (2001); ALASKA R. EVID. 506 (Michie 2001); ARIZ. REV. STAT. § 12-2233 (2001); ARK. CODE ANN. § 16-41-101 (Michie 2001); CAL. EVID. CODE §§ 1033 (providing privilege to penitent) (Deering 2001), 1034 (providing privilege to clergy) (Deering 2001); COLO. REV. STAT. § 13-90-107 (2001); CONN. GEN. STAT. § 52-146b (2001); DEL. R. EVID. 505 (2001); FLA. STAT. ch. 90.505 (2001); GA. CODE ANN. § 24-9-22 (2001); 6 GUAM CODE ANN. § 503 (2001); HAW. R. EVID. 506 (2001); IDAHO CODE § 9-203 (Michie 2001); 735 ILL. COMP. STAT. 5/8-803 (2001); IND. CODE ANN. § 34-46-3-1 (Michie 2001); IOWA CODE § 622.10 (2001); KAN. STAT. ANN. § 60-429 (2001); KY. R. EVID. 505 (Michie 2001); LA. CODE EVID. ANN. art. 511 (West 2001); ME. R. EVID. 505 (West 2001); MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2001); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 2001); MICH. COMP. LAWS § 600.2156 (2001); MINN. STAT. § 595.02 (2001); MISS. CODE ANN. § 13-1-22 (2001); MO. REV. STAT. § 491.060 (2001); MONT. CODE ANN. § 26-1-804; NEB. REV. STAT. § 27-506 (2001); NEV. REV. STAT. ANN. § 49.255 (Michie 2001); N.H. REV. STAT. ANN. § 516:35 (2001); N.J. STAT. ANN. § 2A:84A-23 (West 2001); N.M. R. EVID. § 11-506 (Michie 2001); N.Y. C.P.L.R. 4505 (McKinney 2001); N.C. GEN. STAT. § 8-53.2 (2001); N.D. R. EVID. 505 (2001); OHIO REV. CODE ANN. § 2317.02 (Anderson 2001); OKLA. STAT. tit. 12 § 2505 (2001); OR. REV. STAT. § 40.260 (2001); PA. CONS. STAT. § 5943 (2001); P.R. R. EVID. 28 (2001); R.I. GEN. LAWS § 9-17-23 (2001); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 2001); S.D. CODIFIED LAWS § 19-13-17 (Michie 2001); TENN. CODE ANN. § 24-1-206 (2001); TEX. EVID. CODE ANN. § 505 (2001); UTAH CODE ANN. § 78-24-8 (2001); VT. R. EVID. 505 (2001); 4 V.I. CODE ANN. §

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is commonly referred to as the “priest-penitent,”⁴ “clergy-penitent,”⁵ or simply “religious”⁶ privilege. The federal government also recognizes a religious privilege. Declining to codify the privilege explicitly,⁷ Congress instead adopted Federal

857 (2001); VA. CODE ANN. § 8.01-400 (Michie 2001); WASH. REV. CODE § 5.60.060 (2001); W. VA. CODE § 57-3-9 (2001); WIS. STAT. § 905.06 (2001); WYO. STAT. ANN. § 1-12-101 (Michie 2001).

⁴ See, e.g., ALA. CODE § 12-21-266 (2001).

⁵ See, e.g., IOWA CODE § 622.10 (2001).

⁶ See, e.g., DEL. R. EVID. 505 (2001).

⁷ The Supreme Court proposed a statutory privilege to Congress as Federal Rule of Evidence 506, which failed to pass. CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 26 FEDERAL PRACTICE AND PROCEDURE § 5611 (1992). The rule stated the following:

a) Definitions. As used in this rule:

(1) A “clergyman” is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

PROPOSED FEDERAL RULES OF EVIDENCE WITH SUPREME COURT ADVISORY COMMITTEE REPORT, HR 5463 JUDICIARY COMMITTEE REPORT, AND AMENDMENTS TO FEDERAL RULES OF CIVIL AND CRIMINAL PROCEDURE 84 (John R. Schmertz, Jr., ed., 1974) [hereinafter PROPOSED FEDERAL RULES OF EVIDENCE]. When proposed Rule 506 was before Congress for a vote, it foundered without much debate; however, while in the drafting stages, Arkansas Senator John L. McClellan (D) submitted a letter objecting to the proposed rule’s broad definition of clergyman. WRIGHT & GRAHAM, *supra*, § 5611. In response to his objections, which are thought by some to have been motivated by racism, the advisory committee altered the language of its note

Rule of Evidence 501, which enables the federal judiciary to create evidentiary privileges “in the light of reason and experience.”⁸ Although Rule 501 prompted expeditious development of a religious privilege,⁹ the federal judiciary had

following the text of the rule to narrow the application of the privilege. *Id.* The note reads in pertinent part:

[I]t is not so broad as to include all self-denominated “ministers.” A fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis.

PROPOSED FEDERAL RULES OF EVIDENCE, *supra*, at 84-85; *see also In re Grand Jury Investigation*, 918 F.2d 374, 385 n.13 (adopting rejected Rule 506’s definition of clergy and limiting the privilege in a similar fashion). Ultimately, Congress rejected Rule 506, along with seven other specific evidentiary privileges, including the attorney-client privilege, psychotherapist-patient privilege, and “husband-wife” privilege, and three general rules proposed by the Court. *See generally* PROPOSED FEDERAL RULES OF EVIDENCE, *supra*.

⁸ FED. R. EVID. 501 (2002). Rule 501, enacted in 1974, states the following:

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

Id.

⁹ *United States v. Luther*, 481 F.2d 429, 432 (9th Cir. 1973) (interpreting proposed Rule 506 to determine that a member of the clergy must be a natural person and not a corporation); *In re Verplank*, 329 F. Supp. 433, 436 (C.D. Cal. 1971) (determining that non-ordained counselors, recruited by a minister who was ordained by the United Presbyterian Church and was employed to counsel students about the Vietnam War draft, fell within the definition of clergy under proposed Rule 506).

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already recognized the privilege, or a variation thereof, long before Congress had addressed the issue.¹⁰

Of the various evidentiary privileges in existence (e.g., attorney-client, doctor-patient, and psychotherapist-patient), the religious privilege has been the least controversial and most widely accepted.¹¹ Nevertheless, the privilege has not been entirely free from controversy, and it has evolved through the relatively sparse caselaw on both the state and federal levels to protect communications meeting three general requirements:¹² (1) the person communicating with her spiritual advisor must do so with a reasonable expectation of confidentiality;¹³ (2) the spiritual advisor must be, or reasonably be thought by the communicant to

¹⁰ See *Totten v. United States*, 92 U.S. 105, 107 (1875) (stating that public policy would not permit at trial the disclosure of the “confidences of the confessional”); *McMann v. Sec. & Exch. Comm’n*, 87 F.2d 377, 378 (2d Cir. 1937) (recognizing “penitential” communications as privileged).

¹¹ See, e.g., *In re Grand Jury Investigation*, 918 F.2d at 381 (“The history of the proposed Rules of Evidence reflects that the clergy-communicant rule was one of the least controversial of the enumerated privileges, merely defining a long-recognized principle of American law.”); JOHN HENRY WIGMORE, 5 A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2396 (2d ed. 1923) (noting that Jeremy Bentham, “the greatest opponent of privileges,” supported the religious privilege).

¹² Some opinions have recognized a fourth requirement, that the communication be penitential or confessional in nature, as may be required by the ecclesiastical doctrine of a particular religion. See, e.g., *People v. Edwards*, 248 Cal. Rptr. 53 (Cal. Ct. App. 1988) (holding that confidential communication between criminal defendant and Episcopalian priest was not privileged when not of a penitential nature); *State v. Buss*, 887 P.2d 920 (Wash. Ct. App. 1995) (“Washington’s statutory privilege only applies if Buss’ statements were a confession in the course of discipline enjoined by the church.” (internal citations and ellipsis omitted)). This requirement is largely rejected by more recent decisions; courts have expanded the privilege to apply broadly to communication reasonably expected to remain confidential. See, e.g., *In re Grand Jury Investigation*, 918 F.2d at 386 (noting that the religious privilege has evolved from protecting private confessions to encompassing a wide range of communications with clergy); *State v. Martin*, 975 P.2d 1020 (Wash. 1999) (abrogating *Buss*, 887 P.2d 920).

¹³ See *In re Grand Jury Investigation*, 918 F.2d at 386 (holding that the presence of a third party does not defeat the reasonable expectation of privacy when the third party is necessary for the furtherance of the communication).

be,¹⁴ a member of the clergy;¹⁵ and (3) the spiritual advisor must be acting in his or her professional capacity.¹⁶

Courts have addressed, though not fully answered, questions regarding each of these requirements.¹⁷ The least litigated issue is what qualifications are necessary to be considered a spiritual advisor as required by state statutes and federal courts.¹⁸ In most cases, a person's status as spiritual advisor is assumed.¹⁹ This assumption likely stems from a common understanding that most people claiming the privilege are attempting to protect information revealed to recognized leaders of widely accepted religions.²⁰ Thus, courts need only address this issue when the

¹⁴ Most statutes granting the religious privilege protect communicants who may have been misled into believing the person with whom they were communicating was a spiritual advisor to whom the privilege applied. *See, e.g.*, IDAHO CODE § 9-203 (Michie 2001); N.M. R. EVID. § 11-506 (Michie 2001); N.Y. C.P.L.R. 4505 (McKinney 2001).

¹⁵ *See In re Verplank*, 329 F. Supp. 433, 436 (C.D. Cal. 1971) (invoking the religious privilege to protect speech between college students and counselors providing spiritual counseling during the Vietnam War draft when the counselors had been appointed by an ordained minister of the United Presbyterian Church working as a college chaplain).

¹⁶ *See United States v. Gordon*, 493 F. Supp. 822, 823 (N.D.N.Y. 1980) (holding communication with a priest acting in the capacity of a member of a corporation's board of directors not privileged); *State v. Barber*, 346 S.E.2d 441, 445 (N.C. 1986) (finding that a *de facto* clergyman was not acting in professional capacity during a casual conversation with a friend).

¹⁷ *See generally In re Grand Jury Investigation*, 918 F.2d 374 (determining whether communication with a clergy member was confidential when in the presence of a third party); *see also Gordon*, 493 F. Supp. at 823 (holding that a priest was not acting in his "spiritual capacity" when discussing business matters with the defendant); *In re Verplank*, 329 F. Supp. at 436 (noting that, while ordination might not be required for a person to qualify as a clergy member, "the person to whom the status is sought to be attached [must] be regularly engaged in activities conforming at least in a general way with those of . . . an established Protestant denomination, though not necessarily on a full-time basis") (citing proposed Rule 506 advisory committee's note).

¹⁸ WRIGHT & GRAHAM, *supra* note 7, § 5613.

¹⁹ *Id.*

²⁰ Despite the recognition and acceptance of numerous religions within the United States, the majority of statutes creating the religious privilege

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status of the spiritual advisor is tenuous at best.²¹

In *Cox v. Miller*,²² the United States District Court for the Southern District of New York squarely addressed the issue of who qualifies as a spiritual advisor.²³ The court found that New York's religious privilege shields communications within the self-help setting of Alcoholics Anonymous ("A.A."),²⁴ and its reasoning will likely protect communication within numerous organizations adopting A.A.'s hugely successful "Twelve Steps" to recovery.²⁵ In its opinion, the court explicitly determined that A.A. members are spiritual advisors as that term is used and

identify spiritual advisors as "clergy" or "clergymen" and limit their explicit definition of those terms to ministers, priests, and rabbis. *See, e.g.*, ARK. CODE ANN. § 16-41-101 (Michie 2001). This note assumes the lists of statutorily denoted religious leaders are not exhaustive. The few cases discussing the issue support such an assumption. *Compare* Reutkemeier v. Nolte, 161 N.W. 290, 293 (Iowa 1917) (holding that elders of a Presbyterian church constituted clergy), *with* Rutledge v. State, 525 N.E.2d 326, 328 (Ind. 1988) (holding that a member of the Gideons, a religious organization of business people who hand out free Bibles, who was teaching prisoners about the Bible was not clergy). Furthermore, this note proposes to expose the privilege's limitations when a person's status as a spiritual advisor is suspect.

²¹ *See, e.g.*, Eckmann v. Bd. of Educ., 106 F.R.D. 70, 72-73 (E.D. Mo. 1985) (holding that a nun who was recognized by the Catholic Church as holding the position of "spiritual director" was clergy for privilege purposes); Manous v. State, 407 S.E.2d 779, 782 (Ga. Ct. App. 1991) (holding that a psychic was not a clergy member regardless of any self-characterization as a spiritual advisor); State v. Alspach, 524 N.W.2d 665, 668 (Iowa 1994) (holding that the defendant failed to prove his brother was a member of the clergy despite his view that his brother was a spiritual advisor); *Rutledge*, 525 N.E.2d at 328 (holding that a member of the Gideons was not clergy).

²² 154 F. Supp. 2d 787 (S.D.N.Y. 2001).

²³ *See infra* Part I.C (discussing *Cox*, 154 F. Supp. 2d 787).

²⁴ *See* N.Y. C.P.L.R. 4505 (McKinney 2001).

²⁵ According to the most recent information released by A.A., as of Jan. 1, 2002, its membership comprised 100,766 groups containing a total of more than 2,000,000 individuals, with approximately 1,162,112 members in the United States. Alcoholics Anonymous, *Membership*, at http://www.alcoholics-anonymous.org/english/E_FactFile/M-24_d4.html (last visited Apr. 2, 2002). A.A. acknowledges that the strictures of anonymity and the general lack of formal organization complicate attempts to maintain accurate statistical records. *Id.*

defined in the statute.²⁶ In so doing, the court extended both the New York statutory privilege and the federal common law privilege beyond what “the light of reason and experience”²⁷ could ever possibly have revealed.

Part I of this note includes a discussion of the formation of A.A. and the judicial recognition of A.A. as a religious organization.²⁸ In addition, Part I briefly introduces the *Cox* decision.²⁹ Part II explores the *Cox* reasoning in depth, revealing the factual and legal flaws pervading the court’s decision. These flaws help bring to light two primary reasons why the religious privilege, absent legislative approval, has no place in the A.A. setting: (1) despite its designation as a religious organization, A.A. does not fit within the framework of the religious privilege; and (2) public policy cannot endorse a judiciary willing to put the addiction recovery interests of a criminal confessor above those of his or her fellow recovering confidant. Part III addresses the concerns of the critics who support expanding the religious privilege to encompass A.A. and demonstrates that their arguments are replete with speculation and unsupported by

²⁶ N.Y. C.P.L.R. 4505 (McKinney 2001).

²⁷ FED. R. EVID. 501 (2001).

²⁸ Currently, the Second and Seventh Circuits are the only federal circuits to have recognized A.A. or groups adopting A.A.’s principles as religious organizations for the purpose of determining whether the Establishment Clause permits the government to compel attendance at those organizations’ meetings. *See Warner v. Orange County Dep’t of Prob.*, 115 F.3d 1068 (2d Cir. 1996) (discussed *infra* Part I.B); *Kerr v. Farrey*, 95 F.3d 472, 480 (7th Cir. 1996) (holding that Narcotics Anonymous is a religious organization). The issue, therefore, is far from settled and beyond the scope of this note. Nevertheless, the author accepts the Second and Seventh Circuits’ conclusion, which has been welcomed by some commentators. *See, e.g.*, Derek P. Apanovitch, Note, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785 (1998) (discussing the various religious aspects of A.A.); Rachel F. Calabro, Note, *Correction Through Coercion: Do State Mandated Alcohol and Drug Treatment Programs in Prisons Violate the Establishment Clause?*, 47 DEPAUL L. REV. 565 (1998) (arguing that A.A.’s adoption of traditional religious concepts qualifies the organization for Establishment Clause protection).

²⁹ *Cox v. Miller*, 154 F. Supp. 2d 787 (S.D.N.Y. 2001)

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science.³⁰ This note concludes that protecting communication within A.A. by expanding religious privileges, an extreme solution for a virtually non-existent problem, is unnecessary in light of the protection provided by the Free Exercise Clause of the United States Constitution.³¹

I. ESTABLISHING THE CHURCH OF THE RECOVERING ALCOHOLIC

A.A. takes no official position on public issues.³² Despite being the subject of several court opinions, A.A. has adhered to this principle and has refrained from issuing an official statement challenging or praising the judicial portrayals or the consequences arising therefrom.³³ In order to understand A.A., it is, therefore, necessary to explore the history and principles guiding the development and survival of what is arguably the world's largest self-help organization.³⁴ Following a discussion of

³⁰ See generally Thomas J. Reed, *The Futile Fifth Step: Compulsory Disclosure of Confidential Communications Among Alcoholics Anonymous Members*, 70 ST. JOHN'S L. REV. 693 (discussing various rationales, including the expansion of the religious privilege, for protecting confidential speech within A.A.); Jessica G. Weiner, Comment, "And the Wisdom to Know the Difference": Confidentiality vs. Privilege in the Self-Help Setting, 144 U. PA. L. REV. 243 (1995) (arguing in favor of an evidentiary privilege to protect speech within A.A.); see also *infra* Part III (discussing critics' views).

³¹ U.S. CONST. amend. I.

³² See ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., TWELVE STEPS AND TWELVE TRADITIONS 176 (soft-cover edition 1981) [hereinafter TWELVE STEPS AND TWELVE TRADITIONS] (stating, as A.A.'s tenth tradition, "Alcoholics Anonymous has no opinion on outside issues; hence the A.A. name ought never be drawn into public controversy").

³³ *Id.* ("As by some deep instinct, we A.A.'s have known from the very beginning that we must never, no matter what the provocation, publicly take sides in any fight, even a worthy one."); see also Jim Fitzgerald, *Judge Voids Manslaughter Conviction*, AP ONLINE, Aug. 2, 2001, available at 2001 WL 25489398 (stating that an A.A. spokesman said that A.A. would not comment on the Cox decision); Frank J. Murray, *Courts Hit Sentencing DWIs to A.A., Fault Religious Basis*, WASH. TIMES, Nov. 4, 1996, at A10, available at 1996 WL 2970041 (stating that A.A. would not comment on various courts' opinions finding that the organization was religion-based).

³⁴ See *supra* note 25 (noting A.A.'s size in terms of members).

A.A.'s history is a description of the Second Circuit opinion that designated A.A. a religious organization and an introduction to the case that inspired this note.

A. Alcoholics Anonymous: Laying the Groundwork

Although its history extends back before its official creation,³⁵ A.A.'s present-day roots began to form when Bill Wilson met Dr. Bob Smith; both were professionals desperately seeking refuge from alcoholism.³⁶ Together, applying principles adopted from other recovery groups, they began to create what would become A.A.'s doctrinal foundation.³⁷ Dr. Smith and Mr. Wilson oversaw the establishment of three A.A. groups, one located in Akron, another in Cleveland, and the third in New York City.³⁸ Central to the groups' existence was the belief that the members needed to (1) acknowledge a lack of control over their lives and their alcohol problem, (2) recognize that they were at the lowest point in their lives, (3) turn their lives over to a "higher power,"³⁹ and (4) believe that these steps would eventually lead to a life of sobriety.⁴⁰ These four core beliefs evolved into the now-popular "Twelve Steps,"⁴¹ first published in the 1939 book

³⁵ See Reed, *supra* note 30, at 708-14 (discussing, *inter alia*, the history of A.A.).

³⁶ See ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., ALCOHOLICS ANONYMOUS, xv-xvii (3d ed. 2001) [hereinafter ALCOHOLICS ANONYMOUS].

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 25.

⁴⁰ See Reed, *supra* note 30, at 708-14 (discussing, *inter alia*, the history of A.A.).

⁴¹ TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 5-9. A.A.'s Twelve Steps are as follows:

1. We admitted we were powerless over alcohol—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 understood him.

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“Alcoholics Anonymous,”⁴² which were meant as suggestions for alcoholics trying to recover.⁴³ In 1950, A.A.’s organizers adopted the “Twelve Traditions”⁴⁴ as principles guiding the

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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 of character.
 7. Humbly asked 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.
 10. Continued to take personal inventory and when we were wrong 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 us 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.

Id.

⁴² ALCOHOLICS ANONYMOUS, *supra* note 36.

⁴³ *Id.* at 59.

⁴⁴ See TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 9-13.

A.A.’s Twelve Traditions are as follows:

1. Our common welfare should come first; personal recovery depends upon A.A. unity.
2. For our group purpose there is but one ultimate authority—a loving God as He may express Himself in our group conscience. Our leaders are but trusted servants; they do not govern.
3. The only requirement for A.A. membership is a desire to stop drinking.
4. Each group should be autonomous except in matters affecting other groups or A.A. as a whole.
5. Each group has but one primary purpose—to carry its message to the alcoholic who still suffers.

organization itself.⁴⁵ While the founders intended the Twelve Steps to guide an individual member to recovery, the Twelve Traditions served to guide an individual in contributing to A.A.'s overall success and survival.⁴⁶ They were not, however, established or subsequently interpreted as a strict set of rules.⁴⁷ Rather, like the Twelve Steps, the Twelve Traditions were unenforceable guidelines for the individual members whose own interests A.A. was meant to serve.⁴⁸

We believe there isn't a fellowship on earth which lavishes more devoted care upon its individual members; surely there is none which more jealously guards the individual's right to think, talk, and act as he wishes. No A.A. can compel another to do anything; nobody can be punished or expelled. Our Twelve Steps to recovery are

6. An A.A. group ought never endorse, finance, or lend the A.A. name to any related facility or outside enterprise, lest problems of money, property, and prestige divert us from our primary purpose.

7. Every A.A. group ought to be fully self-supporting, declining outside contributions.

8. Alcoholics Anonymous should remain forever nonprofessional, but our service centers may employ special workers.

9. A.A., as such, ought never be organized; but we may create service boards or committees directly responsible to those they serve.

10. Alcoholics Anonymous has no opinion on outside issues; hence the A.A. name ought never be drawn into public controversy.

11. Our public relations policy is based on attraction rather than promotion; we need always maintain personal anonymity at the level of press, radio and films.

12. Anonymity is the spiritual foundation of all our traditions, ever reminding us to place principles before personalities.

Id.

⁴⁵ *Id.* at 18.

⁴⁶ *Id.* at 129; see also ALCOHOLICS ANONYMOUS, *supra* note 36, at xix (describing the rationale that led to the adoption of the Twelve Traditions as the need to develop "principles by which the A.A. groups and A.A. as a whole could survive and function effectively").

⁴⁷ TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 129.

⁴⁸ *Id.*

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suggestions; the Twelve Traditions which guarantee A.A.'s unity contain not a single "Don't." They repeatedly say "We ought . . ." but never "You Must!"⁴⁹

B. Problematic Reasoning Spawns a Religion

A.A. views itself as a secular organization.⁵⁰ It is not affiliated with, nor does it endorse, any religion or religious group.⁵¹ Indeed, theists and atheists can apply A.A.'s principles.⁵² Regardless, the judicial community has begun viewing A.A. as a religious organization.⁵³

⁴⁹ *Id.*

⁵⁰ See, e.g., ALCOHOLICS ANONYMOUS, *supra* note 36, at xx ("Alcoholics Anonymous is not a religious organization."); *44 Questions*, pamphlet P-2, at 19 (Alcoholics Anonymous World Services, Inc., 1952) ("A.A. is not a religious society."); *This is AA*, pamphlet P-1, at 7 (Alcoholics Anonymous World Service, Inc., 1984) ("We are not reformers, and we are not allied with any group, cause, or religious denomination.").

⁵¹ See *supra* note 44 (stating A.A.'s sixth tradition).

⁵² See TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 27 ("You can, if you wish, make A.A. itself your higher power.").

⁵³ See, e.g., *Griffin v. Coughlin*, 673 N.E.2d 98, 101-05 (N.Y. 1996) (holding that a prison requiring inmates to attend a rehabilitation program that incorporated A.A. and N.A. in order to receive various benefits constituted an excessive entanglement in religion); *In re Garcia*, 24 P.3d 1091, 1094 (Wash. Ct. App. 2001) (holding that A.A.'s religious content precludes the government from coercing an inmate to attend A.A. meetings). It is not clear whether courts adopting this view have technically designated A.A. as a religion, as opposed to simply a secular organization incorporating spiritual ideals into its suggestions for achieving sobriety. For example, in *Warner v. Orange County Dep't of Prob.* the Second Circuit refers to A.A.'s "substantial religious component," 115 F.3d 1068, 1070 (2d Cir. 1996), "religion-infused meetings," *id.* at 1074, and "religious exercises," *id.* at 1075. The court also referred to A.A. as a "religious program," *id.*, and describes A.A. meetings as "intensely religious events." *Id.* Additionally, the *Warner* court distinguished between A.A. meetings and a public school offering a commencement prayer. *Id.* at 1076. A subsequent Second Circuit case interpreted *Warner* as having characterized A.A. as a religion. See *DeStefano v. Emergency Hous. Group*, 247 F.3d 397, 407 (2d Cir. 2001) (upholding the district court's finding, which was based on *Warner*, that A.A. is "a religion for Establishment Clause purposes") (internal quotations omitted). The *Cox*

Most cases holding that A.A. is a religious organization involve a prisoner or probationer bringing suit on the grounds that the government required him or her to attend A.A. meetings⁵⁴ or meetings of other recovery programs adopting

court shared this view. *Cox v. Miller*, 154 F. Supp. 2d. 787, 792 (S.D.N.Y. 2001) (“Our Court of Appeals has subsequently held in the context of an Establishment Clause case that A.A. is a religion . . .”). This note accepts, for now, the *Cox* court’s interpretation, but utilizes the term “religious organization” when referring to A.A.

Presently, not all courts addressing the issue agree that A.A. is a religious organization. *See, e.g.*, *Boyd v. Coughlin*, 914 F. Supp. 828, 833 (N.D.N.Y. 1996) (“The mere reference to spirituality, or the use of terms that may be commonly associated with religion, without more, cannot change the character of A.A. or N.A. . . . from that of aiming to treat chemically dependent individuals to that of advancing or inhibiting religion as a principal or primary purpose.”); *Jones v. Smid*, No. 4-89-CV-20857, 1993 WL 719562, at *4 (S.D. Iowa, Apr. 29, 1993) (holding that A.A.’s religious content does not transform it into a religious organization); *Salaam v. Collins*, 830 F. Supp. 853, 863 (D. Md. 1993) (classifying A.A. as a “secular self-help . . . organization[]”); *Stafford v. Harrison*, 766 F. Supp. 1014, 1016-17 (D. Kan. 1991) (holding that A.A.’s spiritual content and reference to a “Higher Power” are not sufficient to deem A.A. a religion; therefore, requiring an inmate to attend meetings of program based on A.A. did not violate the Establishment Clause); *Youle v. Edgar*, 526 N.E.2d 894, 899 (Ill. App. Ct. 1988) (dismissing an argument that A.A. is a “quasi-religious organization,” noting that “[t]he primary function of Alcoholics Anonymous is to cope with the disease of alcoholism”); *State v. Boobar*, 637 A.2d 1162, 1169-70 (Me. 1994) (holding that the religious privilege is inapplicable to A.A. communication).

In addition, some opinions raise the issue but fail to reach a definitive decision. *See O’Connor v. State*, 855 F. Supp. 303, 307-08 (C.D. Cal. 1994) (noting A.A.’s “religious overtones” but never making clear whether the court viewed A.A. as a religious organization for Establishment Clause purposes, emphasizing that the “‘principal and primary effect’ of encouraging participation in A.A. is not to advance religious belief but to treat substance abuse”) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

⁵⁴ *DeStefano* represents the exception. 247 F.3d 397. This case was brought in the Second Circuit after *Warner*, which initially deemed A.A. a religious organization. *See Warner*, 115 F.3d 1068. The plaintiff in *DeStefano*, then mayor of Middletown, N.Y., sued as a taxpayer on the grounds that the state was funding a private alcoholic treatment facility that incorporated A.A. meetings into its program. *DeStefano*, 247 F.3d at 401.

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principles similar or identical to the Twelve Steps.⁵⁵ For example, in *Warner v. Orange County Department of Probation*,⁵⁶ the Second Circuit held that a probationer could not be compelled to attend A.A. meetings against his will when he had no foreknowledge of A.A.'s "intensely religious events"⁵⁷ and he had not waived his objection to attending the meetings.⁵⁸ As support for its unilateral transformation of A.A. into a religious organization,⁵⁹ the Second Circuit cited the various

The court upheld *Warner* but found that the state funding of a large, purely secular alcohol treatment program that merely incorporated A.A. as a part of the program did not, by itself, violate the Establishment Clause of the U.S. Constitution. *Id.* at 408-09.

⁵⁵ See *Kerr v. Farrey*, 95 F.3d 472, 480 (7th Cir. 1996) (holding that N.A. is a religious organization). Although A.A. is not affiliated with any other organization, it cooperates with those wishing to adopt A.A.'s methods to combat addiction. See, e.g., *supra* note 44 (quoting A.A.'s sixth tradition); *Information on Alcoholics Anonymous*, form F-2 (Alcoholics Anonymous World Service, Inc. 1999). For example, Narcotics Anonymous ("N.A.") has adapted A.A.'s Twelve Steps and Twelve Traditions to conform to its own mission. See The Toronto Area of Narcotics Anonymous, *Twelve Steps of Narcotics Anonymous*, at <http://www.torontona.ca/12%20steps.htm> (last visited Feb. 21, 2002); The Toronto Area of Narcotics Anonymous, *Twelve Traditions of Narcotics Anonymous*, at <http://www.torontona.ca/12%20traditions.htm> (last visited Feb. 21, 2002).

⁵⁶ 115 F.3d 1068.

⁵⁷ *Id.* at 1075.

⁵⁸ *Id.* at 1074.

⁵⁹ The term "unilateral" serves a dual purpose. First, although the Second Circuit was not the first to hold that a twelve step program constituted a religious organization for Establishment Clause purposes, it was the highest federal court to apply that distinction specifically to A.A. The Seventh Circuit, in *Kerr v. Farrey*, had already determined that Narcotics Anonymous was a religious organization. 95 F.3d at 480. *Kerr* addressed an inmate's claim that the state had violated his constitutional rights by coercing him to attend N.A. meetings. *Id.* at 473. The court found that the meetings centered on N.A.'s own version of the Twelve Steps, which, nearly identical to A.A.'s, included references to God. *Id.* at 474. The court stated that regardless of one's interpretation of God, N.A. had incorporated into its program a "religious concept of a higher power." *Id.* at 480. The state, therefore, could not coerce prisoners to attend N.A. meetings. *Id.* Second, the term "unilaterally" is used here to draw attention to the fact that the Second Circuit, while appearing to

references within the Twelve Steps to “God” or a “Higher Power,”⁶⁰ as well as the Southern District of New York’s factual findings that the A.A. meetings at issue incorporated “Christian”⁶¹ prayers.⁶² The court did not indicate which factor was decisive—the references to God or the use of prayer. Consequently, it is not clear whether the court viewed the language of the Twelve Steps alone as sufficient for A.A. to qualify as a religious organization, or whether something more, such as the incorporation of prayer, is necessary.

Although the Second Circuit has not clarified the issue, were it to do so it would likely find that the Twelve Steps language alone is insufficient to deem A.A. a religious entity. The *Warner* court quoted passages from the Twelve Steps,⁶³ but it is not clear that the court did anything more than selectively choose only

act on A.A.’s behalf by affording a special degree of constitutional protection, operated without any input by A.A., which has always adhered to the view that it is a secular organization. *See supra* note 50 (referring to the various statements A.A. has made regarding its secular nature).

⁶⁰ *Warner*, 115 F.3d at 1070. The court noted that A.A.’s second, third, fifth, sixth, seventh, and eleventh steps contain either or both references. *Id.*; *see also supra* note 41 (listing the Twelve Steps).

⁶¹ *Warner*, 115 F.3d at 1070; *see also Warner v. Orange County Dep’t of Prob.*, 870 F. Supp. 69, 71 (S.D.N.Y. 1994) (describing the “Lord’s Prayer” as being “specifically Christian”). The meetings Warner attended began with the “Serenity Prayer,” which the district court determined was “non-denominational.” *Id.* It states, “Lord, grant me the serenity to accept the things that I cannot change, the courage to change the things I can, and the wisdom to know the difference.” *Id.* Additionally, the district court found that the meetings ended with the “Lord’s Prayer.” *Id.* The King James version of the Bible translates the Lord’s Prayer:

Our Father which art in heaven, Hallowed be thy name.

Thy kingdom come, Thy will be done in earth, as *it is* in heaven.

Give us this day our daily bread.

And forgive us our debts, as we forgive our debtors

And lead us not into temptation, but deliver us from evil: For thine is the kingdom, and the power, and the glory, for ever. Amen.

Matthew 6:9-13.

⁶² *Warner*, 115 F.3d at 1070.

⁶³ *Id.*

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those passages supporting its view that A.A. is a religious organization.⁶⁴ If this is true, the case sets an unnerving precedent. While judicial interpretation of an organization's doctrine might be necessary to draw legal conclusions, the judiciary should in so doing ensure that the process is a diligent effort to uncover the truth.⁶⁵ Applying standards similar to canons of statutory interpretation, a court should necessarily extend its investigation beyond the ambiguous verbiage of the Twelve Steps in order to give effect to A.A.'s intent.⁶⁶ Consequently, the court would find that A.A. considers it appropriate to look to the organization itself as one's "Higher Power."⁶⁷ Thus, within the A.A. framework, the terms "Higher Power" and "God" assume entirely generic characteristics.⁶⁸ Mere reference to a Higher

⁶⁴ *Id.*

⁶⁵ *See* *Nix v. Whiteside*, 475 U.S. 157, 174 (1986) (describing the U.S. "system of justice" as "dedicated to a search for truth"); *see also* *United States v. Roberson*, 859 F.2d 1376, 1378 (9th Cir. 1988) (stating that federal courts "construe evidentiary privileges narrowly" because they "obstruct the search for truth"); *In re Cueto*, 554 F.2d 14, 15 (2d Cir. 1977) ("[T]he public has a right to every person's evidence. There are a small number of constitutional, common-law and statutory exceptions to that general rule, but they have been neither 'lightly created nor expansively construed, for they are in derogation of the search for truth.'") (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

⁶⁶ *See, e.g., New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U.S. 656, 662 (1875) ("Statutes must be interpreted according to the intent and meaning of the legislature.").

⁶⁷ TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 27.

⁶⁸ *See* AMERICAN HERITAGE DICTIONARY 756 (3d ed. 1996) (defining "generic" as "relating to or descriptive of an entire group or class; general"). In this context, since one following the Twelve Steps can view either one's interpretation of God or the A.A. group itself as one's higher power, then in the A.A. framework, the A.A. group would be analogous to God. In religious terms, it would be difficult, if not impossible, to draw an acceptable comparison between the A.A. group and a divine entity. Since both can be considered as one's higher power, however, it would seem that to the recovering alcoholic following A.A.'s guidelines, either God or the A.A. group would serve generally as a source, beyond the individual, to which one looks for strength and guidance. *See* Richard D. Land & Michael K. Whitehead, *Do Students Have a Prayer After Lee v. Weisman*, 6 U. FLA. J.L.

Power or God within the Twelve Steps, without more, is hardly sufficient to label A.A. a religious organization, lest the Twelve Steps become to the twenty-first century what the “neck verse” was to the seventeenth.⁶⁹

& PUB. POL’Y 231, 245 (1994) (referring to “a generic ‘brand-X’ God”); Melissa M. Weldon, *Honoring the Spirit in the Law: A Lawyer’s Confession of Faith*, 26 FORDHAM URB. L.J. 1167, 1167 (1999) (describing both “higher power” and “God” as “generic terms”).

⁶⁹ The term “neck verse” refers to the test once utilized in England to determine whether a criminally accused person was a member of the clergy and, thus, deserving of the “benefit of clergy,” which precluded administration of the death penalty. HAROLD POTTER, POTTER’S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 362-63 (A.K.R. Kiralfy ed., 1958). Until the early eighteenth century, benefit of clergy was conferred upon only those who could read, the presumption being that clergy were the only literate members of society. See Sir Frank Kermode, *Justice and Mercy in Shakespeare*, 33 Hous. L. Rev. 1155, 1163 (1996). To establish literacy, the court required an accused to read or recite a particular biblical verse. POTTER, *supra*, at 362. As the literacy rate increased, however, and knowledge of the verse became widespread, the neck verse became unreliable, eventually serving to aid even those who were prohibited by law from becoming ordained. *Id.*

Had the *Warner* court determined that the mere presence of words evoking the concept of “God” within the credo or doctrine of an organization was, by itself, enough to label that organization religious, the Establishment Clause would take on new meaning. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O’Connor, J., concurring) (referring to the United States’ adoption of “‘In God We Trust’ on coins, and opening court sessions with ‘God save the United States and this honorable court’” as “government acknowledgements of religion,” as opposed to endorsement of religion). In *Lynch*, the Court held that a city’s inclusion of a Nativity scene within its Christmas display did not constitute government endorsement or advancement of religion and, thus, violate the Establishment Clause when the purpose and the overall effect of the display were secular. *Id.* at 681-83. The Court noted that the display, aside from the Nativity scene, also included “a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads ‘Seasons Greetings’” *Id.* at 671. The court went on to say the following:

It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this

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As the Second Circuit stated in *Warner*, however, something more was present at the meetings the plaintiff attended—Christian prayers.⁷⁰ This appears to have tipped the scales in favor of recognizing A.A. as a religious organization.⁷¹ But, the *Warner*

country by the people, by the Executive Branch, by the Congress, and the courts for two centuries, would so “taint” the City’s exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings. If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

Id. at 686. Later holding that a county and city’s display depicting the Nativity violated the Establishment Clause, the Court, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, interpreted *Lynch* to require an evaluation of the setting of the religious symbol. 492 U.S. 573, 598 (1989). The display at issue in *County of Allegheny* contained only the Nativity scene encased in a “floral frame.” *Id.* at 599. It follows that the *Warner* court would be compelled to view the religious references within A.A.’s Twelve Steps in relation to their “setting,” as the Supreme Court did in *County of Allegheny*, before determining that A.A. is a religious organization. *Id.* Otherwise, any organized group could conceivably incorporate the concept of God, even superficially, within its bylaws or motto, and enjoy the constitutional status of a religious organization. Such a course would render the Establishment Clause as meaningless as the neck verse, which was abolished in 1707. *See POTTER, supra*, at 363.

⁷⁰ *Warner*, 115 F.3d at 1075.

⁷¹ *Id.* Looking beyond the Twelve Steps, the *Warner* court stated the following:

The A.A. program to which Warner was exposed had a substantial religious component. Participants were told to pray to God for help in overcoming their affliction. Meetings opened and closed with group prayer. The trial judge reasonably found that it “placed a heavy emphasis on spirituality and prayer, in *both* conception *and in practice*.” We have no doubt that the meetings Warner attended were intensely religious events.

Id. (emphasis added). In a footnote following the above passage, the *Warner* court noted that the district court had focused much of its attention on the prayers at the A.A. meetings in question. *Id.* n.6.

court disregarded the fact that each of the 100,766 A.A. groups currently operating worldwide is entirely autonomous,⁷² needs only two people to exist⁷³ and completely controls the content and format of its meetings.⁷⁴ Thus, the Second Circuit's determination that, as a matter of law, A.A. in its entirety is a religious organization sweeps aside one of the crucial support structures enabling A.A. to exist and succeed—its anti-dogmatism.⁷⁵ Despite the label affixed by the Second Circuit, A.A. continues to hold itself out as a loosely organized secular society comprised of groups of alcoholics gathered for the sole purpose of removing alcohol from their lives.⁷⁶

⁷² See *supra* note 44 (quoting A.A.'s fourth and seventh traditions).

⁷³ See TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 146-47. A.A.'s sponsorship method and tradition four suggest that at least two people are necessary to form a "group." See *id.* There are, however, "lone" members who maintain contact with the General Service Office in New York. *This Is AA*, *supra* note 50, at 19. Furthermore, A.A.'s explanation of tradition three states that a person is a member of A.A. if she "says so." TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 139. The desire to stop drinking is the only requirement. *Id.*

⁷⁴ TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 146 ("[E]very A.A. group can manage its affairs exactly as it pleases.").

⁷⁵ A complete analysis of the *Warner* decision is beyond the scope of this note. While the author does not entirely agree with the Second Circuit's decision, he does accept the decision's precedential value in recognizing A.A. as a religious organization.

⁷⁶ See Alcoholics Anonymous, *Defining "Alcoholics Anonymous,"* at http://www.alcoholics-anonymous.org/english/E_FactFile/M-24_d3.html (last visited Mar. 9, 2002). The web site describes A.A. in the following terms:

Alcoholics Anonymous is a fellowship of men and women who share their experience, strength and hope with each other that they may solve their common problem and help others to recover from alcoholism.

The only requirement for membership is a desire to stop drinking. There are no dues or fees for A.A. membership; we are self-supporting through our own contributions. A.A. is not allied with any sect, denomination, politics, organization or institution; does not wish to engage in any controversy; neither endorses nor opposes any causes. Our primary purpose is to stay sober and help other alcoholics achieve sobriety.

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C. The Sheep Follows the Shepherd Down the Slippery Slope

By extending New York's religious privilege to protect communications within A.A., the Southern District of New York offers a glimpse of the potentially far-reaching problems that will inevitably arise from the Second Circuit's *Warner* decision.⁷⁷ On December 6, 1994, Paul Cox was convicted of a double homicide he had committed six years before in Westchester County, N.Y.⁷⁸ In 1988, Mr. Cox, after an evening of heavy drinking, entered his former childhood residence and repeatedly stabbed Shanta Chervu and her husband Lakshman Rao Chervu with one of their own kitchen knives.⁷⁹ A palm print and a fingerprint were the only pieces of physical evidence left at the scene of the crime.⁸⁰ Despite committing the acts in what he later claimed was the midst of an alcoholic blackout, Mr. Cox had the wherewithal to dispose of the weapon and his bloody clothes upon returning home, where he lived with his parents.⁸¹ The crime remained unsolved for several years.⁸²

In 1990, Mr. Cox began attending A.A. meetings.⁸³ During the course of his recovery, Mr. Cox revealed to "at least eight fellow A.A. members" his belief that he had killed the Chervus.⁸⁴ He later claimed that his blackout on the night of the murders prevented him from knowing for a fact that he was the killer.⁸⁵

Alcoholics Anonymous can also be defined as an informal society of more than 2,000,000 recovered alcoholics in the United States, Canada, and other countries.

Id.

⁷⁷ Cox v. Miller, 154 F. Supp. 2d 787, 792 (S.D.N.Y. 2001); Warner v. Orange County Dep't of Prob., 115 F.3d 1068 (2d Cir. 1996).

⁷⁸ Cox v. Miller, 154 F. Supp. 2d at 788.

⁷⁹ *Id.*

⁸⁰ *Id.* at 789.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 789-90.

⁸⁵ *Id.*

Still, he made no effort to dispel the uncertainty.⁸⁶ Among those in whom Mr. Cox confided his secret was Ms. H,⁸⁷ who lived with Mr. Cox and attended A.A. meetings with him.⁸⁸ After Mr. Cox told Ms. H of his questionable past, Ms. H divulged this information to her psychologist, who then advised her to seek the advice of counsel.⁸⁹ On the advice of her attorney, Ms. H then told the district attorney what she knew.⁹⁰ The law enforcement authorities questioned the other A.A. members and, based on the information gained, established the probable cause necessary to arrest Mr. Cox.⁹¹ Mr. Cox was charged with and convicted of

⁸⁶ *Id.*

⁸⁷ *See id.* at 790 (noting that the prosecutor and the trial court maintained the anonymity of the testifying A.A. members by identifying them by the first letter of their last name).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Although this note focuses on the *Cox* court's determination that communication within A.A. is privileged, the *Cox* opinion is troubling for other reasons. Ultimately, the court granted Mr. Cox *habeas corpus* based on its finding that Mr. Cox's fingerprints, procured solely as a result of probable cause established by the compelled statements of his fellow A.A. members, were, thus, wrongfully obtained. *Cox*, 154 F. Supp. 2d at 792, 793. Because the fingerprint and palm print Mr. Cox left behind were the only pieces of physical evidence linking him to the crime, the court determined that without that evidence law enforcement would have been unable to establish the probable cause necessary to arrest Mr. Cox in the first place. *Id.* Consequently, the court held that the evidence should have "been suppressed as 'fruit of the poison tree.'" *Id.* (quoting, without attribution, *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

Justice Frankfurter, in *Nardone*, first coined the poetic metaphor to which the *Cox* court referred. *Nardone*, 308 U.S. at 341. Since then, the term has been used to illustrate the principle that information gathered from evidence wrongfully obtained is tainted and, thus, inadmissible. *See, e.g.*, *Florida v. White*, 526 U.S. 559, 565-66 (1999) (holding that a warrantless search did not violate the criminal defendant's Fourth Amendment rights and, thus, the evidence obtained therefrom was not tainted); *Harrison v. United States*, 392 U.S. 219, 222 (1968) (holding that a criminal defendant's testimony was tainted, and thus inadmissible, when "impelled" by the desire to overcome the effects of illegally obtained confessions); *People v. Powers*, 732 N.Y.S.2d 779, 780 (N.Y. App. Div. 2001) (holding that "oral admission" offered by a

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manslaughter in the first degree and sentenced to a maximum of fifty years in prison.⁹² The Appellate Division of the New York Supreme Court affirmed the conviction,⁹³ and the Court of Appeals of New York denied Mr. Cox leave to appeal.⁹⁴ Mr. Cox then petitioned the U.S. District Court for the Southern District of New York for a writ of *habeas corpus* on the grounds that, *inter alia*, law enforcement authorities had no probable cause to arrest him absent the A.A. members' testimony, use of which Mr. Cox claimed violated his constitutional rights under the First and Fourteenth Amendments.⁹⁵ Specifically, Mr. Cox

criminal defendant after police searched his apartment pursuant to a warrant that was later found invalid was admissible). This principle was, perhaps, first elucidated by Justice Holmes, who wrote, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used *at all*." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (emphasis added). Regarding an exception to the rule, Justice Holmes continued, "[T]his does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Id.* Whether the "fruit of the poison tree" principle applies to privileged communication, however, is unclear. At least one court has observed that "no court has ever applied this theory to *any* evidentiary privilege." *United States v. Marashi*, 913 F.2d 724, 731 n.11 (9th Cir. 1990) (refusing to address a claim that evidence allegedly procured as the result of violations of the spousal privilege should be suppressed); *see also* *United States v. Squillacote*, 221 F.3d 542, 560 (4th Cir. 2000) (discussing and quoting *Marashi* with approval). For support, the *Marashi* court looked to *United States v. Lefkowitz*, which stated in a footnote that information obtained indirectly from privileged communication, when the privilege was not constitutionally grounded, such as the marital privilege, would not be considered tainted. *Marashi*, 913 F.2d at 731 n.11. *See Lefkowitz*, 618 F.2d 1313, 1319 n.8 (9th Cir. 1980). The *Cox* court's summary disposition of the matter, therefore, was disingenuous, and the issue, though beyond the scope of this note, is ripe for the picking.

⁹² *Cox*, 154 F. Supp. 2d at 788; *see also* N.Y. PENAL LAW § 125.20 (Consol. 2002) (defining and proscribing first degree manslaughter).

⁹³ *People v. Cox*, 696 N.Y.S.2d 177 (N.Y. App. Div. 1999).

⁹⁴ *People v. Cox*, 728 N.E.2d 985 (N.Y. 2000).

⁹⁵ *See* U.S. CONST. amend. I; U.S. CONST. amend. XIV. The First

argued that communication with A.A. members was confidential and protected by New York's religious privilege.⁹⁶ Based on the Second Circuit's holding that A.A. is a religious organization,⁹⁷ the district court concluded that the Establishment Clause could not sustain applying the religious privilege to other established religions and not A.A., a judicially established religion.⁹⁸ Consequently, the court granted Mr. Cox his writ, though it withheld issuance until the Second Circuit could review the district court's decision.⁹⁹ Presently, the judicially established church of A.A. still stands, and the *Cox* opinion will surely serve as a measuring stick to see how far the Second Circuit will allow the *Warner* opinion to slide down the slippery slope.¹⁰⁰

II. WHY LAW AND POLICY MUST REMOVE THE GAG FROM A.A.

The *Cox* decision is the first in the nation to apply the

Amendment of the U.S. Constitution, ratified in 1791, reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The Fourteenth Amendment, ratified in 1868, reads, in pertinent part, as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

⁹⁶ *Cox*, 154 F. Supp. 2d at 790.

⁹⁷ *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068 (2d Cir. 1996).

⁹⁸ *Cox*, 154 F. Supp. 2d at 792 ("There is no principled basis for a court to hold that A.A. is a religion for Establishment Clause purposes, and yet that disclosure of wrongs to a fellow member as ordained by the Twelve Steps does not qualify for purposes of a privilege granted to other religions similarly situated.").

⁹⁹ *Id.* at 793.

¹⁰⁰ *Warner*, 115 F.3d 1068.

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religious privilege to communication within A.A.¹⁰¹ Given that numerous organizations have adopted A.A.'s Twelve Steps,¹⁰² it is likely that they will be recognized as religious organizations as well.¹⁰³ Consequently, if the *Cox* opinion is accepted, the religious privilege would also apply to these groups. This must not happen. The *Cox* decision is based on faulty factual analysis and legal reasoning, and public policy demands that the religious privilege not be extended to communications between A.A. members.¹⁰⁴

¹⁰¹ *Cox*, 154 F. Supp. 2d 787.

¹⁰² Although this list is not exhaustive, examples of organizations adopting variations of A.A.'s Twelve Steps include the following: Cocaine Anonymous, Cocaine Anonymous World Services, *12 Steps & 12 Traditions of C.A.*, at <http://www.ca.org/12and12.html> (last visited Mar. 2, 2002); Co-Dependents Anonymous, *The Twelve Steps of Co-Dependents Anonymous*, at <http://www.codependents.org/codal2st.html> (last visited Mar. 2, 2002); Crystal Meth Anonymous, *The Twelve Steps of Crystal Meth Anonymous*, at <http://www.crystalmeth.org/aboutCMA.htm> (last visited Mar. 2, 2002); Debtors Anonymous, *12 Steps of Debtors Anonymous*, at <http://www.debtorsanonymous.org/steps.html> (last visited Mar. 2, 2002); Emotions Anonymous, *The Twelve Steps of Emotions Anonymous*, at <http://www.mtn.org/EA/Steps.html> (last visited Mar. 2, 2002); Gamblers Anonymous, *The Recovery Program*, at <http://www.gamblersanonymous.org/recovery.html> (last visited Mar. 2, 2002); Marijuana Anonymous, *The Twelve Steps of Marijuana Anonymous*, at <http://www.marijuana-anonymous.org/Pages/12steps.html> (last visited Mar. 2, 2002); Narcotics Anonymous, *supra* note 55; Nicotine Anonymous, *The Twelve Steps of Nicotine Anonymous*, at http://www.nicotine-anonymous.org/pamphlet/english/2001_12steps.html (last visited Mar. 2, 2002); Overeaters Anonymous, *The Twelve Steps*, at <http://www.overeatersanonymous.org/12steps.htm> (last visited Mar. 2, 2002); Sexaholics Anonymous, *The Twelve Steps of Sexaholics Anonymous*, at <http://www.sa.org/steps/> (last visited Mar. 2, 2002); Sexual Compulsives Anonymous, *The Twelve Suggested Steps of SCA*, at <http://www.sca-recovery.org/Steps.html> (last visited Mar. 2, 2002); and Survivors of Incest Anonymous, *The Twelve Steps*, at <http://www.siaawso.org/12steps.htm> (last visited Mar. 2, 2002).

¹⁰³ See, e.g., *Kerr v. Farrey*, 95 F.3d 472, 480 (7th Cir. 1996) (holding that N.A. is a religious organization).

¹⁰⁴ See *infra* Part II.B (discussing the policy implications of the *Cox* decision).

A. Dismantling Cox

The district court's decision in *Cox* is flawed for a number of reasons. It not only mischaracterizes A.A.'s structure and methods, but it also completely overlooks a Supreme Court limitation on the judiciary's ability to develop evidentiary privileges, thus ignoring the obvious boundaries of the religious privilege.¹⁰⁵ Similarly, although the court quotes the New York statute granting the religious privilege,¹⁰⁶ it then misinterprets a New York decision in order to circumvent the explicit legislative requirements.¹⁰⁷ As a result, the *Cox* court establishes a precedent with no legal, logical or social support whatsoever.

1. Misunderstanding A.A.

The *Cox* opinion makes several statements describing A.A. in a way that could only have resulted from misunderstanding the organization and the principles that have ensured its survival and notable success.¹⁰⁸ Although it is questionable whether and how far courts should delve into a particular organization's doctrine, the Second Circuit's opinion in *Warner* established precedent for doing so, at least with respect to determining whether an organization is, in fact, religious.¹⁰⁹ The *Cox* court followed the Second Circuit's example, even to the extent of not fully analyzing A.A.'s doctrine before arriving at its unfortunate conclusion.¹¹⁰

¹⁰⁵ See *infra* Part II.A.3 (discussing the restraints on the federal judiciary in developing evidentiary privileges).

¹⁰⁶ *Cox*, 154 F. Supp. 2d at 790; see also N.Y. C.P.L.R. 4505 (McKinney 2001). The New York statute requires a communication to be of a confessional or confidential nature revealed to a member of the clergy who is acting in her professional capacity as a spiritual advisor. *Id.*

¹⁰⁷ See *People v. Carmona*, 627 N.E.2d 959 (N.Y. 1993). See *infra* Part II.A.2 (discussing the *Cox* court's application of *Carmona*).

¹⁰⁸ See *supra* note 25 (noting A.A.'s size in terms of members).

¹⁰⁹ *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068, 1070 (2d Cir. 1996) (discussing the references to "God" in the Twelve Steps).

¹¹⁰ See *Cox*, 154 F. Supp. 2d at 789.

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Beginning with the statement “*initially* A.A. was a self-help group which *did not* consider or represent itself as an established religion, but helped many Alcoholics, *who continued to belong to and worship with their own churches or other religious groups while belonging to A.A.*,”¹¹¹ the *Cox* court reveals all too quickly the inadequacy of its inquiry. The quoted sentence implies two false facts: (1) A.A. now considers itself to represent a religion, and (2) A.A. members are necessarily religious and affiliated with a church. These are boldly inaccurate assumptions. While some courts may have intervened to dub A.A. a religious organization,¹¹² A.A. has always held itself out as secular and has never endorsed any religion.¹¹³ Furthermore, the members of A.A. do not necessarily belong to a religious organization, as A.A. welcomes anyone seeking sobriety regardless of his or her theological beliefs.¹¹⁴ Thus, the district court’s initial

The Twelve Steps must be accomplished one by one, beginning with the first step. A new member will be sponsored and assisted by one or more existing members of the organization. Members interact on a first name basis only. The entire relationship is both anonymous and confidential. Members are forbidden from telling outside statements made at a meeting. The eighth step requires the new member to have “made a list of all persons we had harmed and became willing to make amends to them all.” Step five, preliminary to step eight, required that the new member have “admitted to God, to ourselves, and to another human being the exact nature of our wrongs.”

Id. (quoting the Twelve Steps) (alterations in original). It is interesting to note that, while the district court treated A.A.’s Twelve Steps as though they were binding on the members and enforced by the organization, the fact that Mr. Cox revealed his secret to no fewer than *eight* fellow A.A. members, as opposed to simply “another human being,” as the court emphasized, seems not to have caused the court any hesitation. *Cox*, 154 F. Supp. 2d at 789-90.

¹¹¹ *Id.* at 789 (emphasis added).

¹¹² See *supra* note 53 (discussing cases that have found A.A. to be a religious organization).

¹¹³ ALCOHOLICS ANONYMOUS, *supra* note 36, at xx; *44 Questions*, *supra* note 50, at 19; *This Is AA*, *supra* note 50, at 7.

¹¹⁴ See TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 139; see also *supra* Part I.B (discussing the gradual judicial perception of A.A. as a religious organization despite A.A.’s contrary position and its provision of interpretive guidance for atheist members).

characterization is clearly incorrect.

Having set the pace, the *Cox* court stays on a misguided course throughout its opinion, stating that A.A. members are “forbidden” from revealing statements made at the meetings,¹¹⁵ that A.A. “impos[ed]” its discipline on Mr. Cox,¹¹⁶ and that the organization requires the Twelve Steps to be followed in a particular manner.¹¹⁷ Although anonymity might be a driving force behind A.A.’s success, as with the other traditions, the extent to which A.A. members maintain anonymity is entirely self-determined.¹¹⁸ A.A. makes no demands; therefore, it cannot *forbid* its members from discussing the meetings or the information conveyed therein.¹¹⁹ Similarly, A.A. lacks the desire and the authority to impose itself on anyone.¹²⁰ Nor does A.A. attempt to dictate to members how they must work through the Twelve Steps.¹²¹ Rather, A.A. expressly states that individuals

¹¹⁵ *Cox*, 154 F. Supp. 2d at 789.

¹¹⁶ *Id.*

¹¹⁷ *Id.* (“The Twelve Steps must be accomplished one by one.”).

¹¹⁸ See TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 184. The anonymous nature of A.A. was initially meant to protect alcoholics who, for various reasons, wanted to conceal their association with the group. *Id.* Hence, A.A. members refer to one another by only their first name and last initial. *Understanding Anonymity*, pamphlet P-47, at 10 (Alcoholics Anonymous World Services, Inc., 1981). For example, A.A. literature refers to one of its cofounders, Mr. Wilson, as Bill W. See, e.g., *id.* at 7. Mr. Wilson and Dr. Smith were aware of the consequences being labeled an alcoholic could have on businesspeople, professionals, and those desiring to maintain a particular social status. *Id.* at 5. In the 1930s and 40s, when A.A. was a fledgling organization and the disease of alcoholism was not well understood, people were wary of the social stigma of being associated with an organization for recovering alcoholics. *Id.* at 5-7. Although much more is now known, A.A.’s principle of anonymity is still important in light of the social stigma that persists today. *Id.*; see also *supra* note 44 (quoting A.A.’s twelfth tradition).

¹¹⁹ TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 129 (“No A.A. [sic] can compel another to do anything; nobody can be punished or expelled.”).

¹²⁰ *Id.*

¹²¹ See 44 *Questions*, *supra* note 50, at 16 (“The absence of rules, regulations, or musts is one of the unique features of A.A. as a local group

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should accomplish the steps in whatever manner they feel comfortable.¹²² A.A.'s Twelve Steps and Twelve Traditions are merely suggestions for those seeking sobriety.¹²³ A member has no obligation to A.A., legal or otherwise, other than those she may create for herself.¹²⁴ Consequently, the A.A. member is—or was, before *Cox*—free to tell the world everything that happened at the meetings.¹²⁵ Although the member who does this may not feel welcome at future meetings with the same group, any effort to exclude her would violate many, if not all, of A.A.'s principles.¹²⁶

and as a worldwide fellowship.”).

¹²² *Id.*

¹²³ See TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 129. Although theoretically true, A.A.'s explanation of tradition one states that A.A. members will eventually come to realize on their own that the steps are necessary for the alcoholic's survival. *Id.* at 130-31.

¹²⁴ *Id.* at 129.

¹²⁵ *Id.* The *Cox* opinion strips A.A. members of their ability to participate in the criminal justice system by reporting known criminal activity as is expected of responsible citizens. See *infra* Part II.B (discussing the policy implications of the *Cox* decision). The psychological effects of this judicial segregation could cost recovering alcoholics their sobriety. See, e.g., Kathleen T. Brady & Susan C. Sonne, *The Role of Stress in Alcohol Use, Alcoholism Treatment, and Relapse*, 23 ALCOHOL RES. & HEALTH, No. 4, 263-71 (1999) (noting a relation between the physiological effects of stress, social factors and alcohol relapse); James R. McKay, *Studies of Factors in Relapse to Alcohol, Drug and Nicotine Use: A Critical Review of Methodologies and Findings*, 60 J. OF STUD. ON ALCOHOL, No. 4, at 566 (1999) (stating that the various methodologies all conclude that, *inter alia*, interpersonal and emotional issues contribute to relapse).

¹²⁶ See generally TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32. One of the underlying principles of A.A. is the acceptance of flawed individuals. *Id.* at 139. A.A. explains tradition three:

A.A. is really saying to every serious drinker, “You are an A.A. member if *you* say so. You can declare yourself in; nobody can keep you out. No matter who you are, no matter how low you've gone, no matter how grave your emotional complications—even your crimes—we still can't deny you A.A.”

Id. Thus, A.A. serves as a den of equality, where persons admittedly at the lowest point in their lives can seek the support of others without fear of being judged. *Id.* Breaching an obligation some members may view as sacred

2. Cox Misinterprets the New York Court of Appeals

Beyond mischaracterizing A.A., the *Cox* opinion overstates the applicability of the New York decision in *People v. Carmona*.¹²⁷ In *Carmona*, the New York Court of Appeals discussed the applicability of the religious privilege to communications between the defendant, who was a confessed killer, and two ministers.¹²⁸ Without making reference to the religion practiced by the ministers who had spoken to the defendant, the *Carmona* court discussed the evolution of the religious privilege, stressing its modern-day application to communications taking place beyond the realm of the Catholic confessional.¹²⁹ The *Carmona* court stated that the privilege applies to confidential communication with ministers of all religions, and that the only test for determining whether the communication is privileged is “whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance.”¹³⁰ The status of the ministers in *Carmona*, however, was never in question; therefore, the issue was neither discussed nor dismissed as unnecessary.

In contrast, the chief issue before the *Cox* court was whether A.A. members are “professional . . . spiritual advisor[s]”¹³¹ as required by New York’s religious privilege.¹³² The district court in *Cox* quoted *verbatim* much of the *Carmona* court’s discussion,

arguably would only serve as a symptom of a member’s illness. *Id.* at 141. “[E]xperience taught us that to take away any alcoholic’s full chance was sometimes to pronounce his death sentence, and often to condemn him to endless misery. Who dared to be judge, jury, and executioner of his own sick brother?” *Id.*

¹²⁷ 627 N.E.2d 959 (N.Y. 1993).

¹²⁸ *Id.*

¹²⁹ *Id.* at 961.

¹³⁰ *Id.* at 962.

¹³¹ N.Y. C.P.L.R. 4505 (McKinney 2001).

¹³² *Id.* The lack of treatment afforded the issue, however, suggests otherwise. See *infra* II.A.4 (discussing the *Cox* court’s conversion of A.A. in order to apply the religious privilege).

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relying heavily on the usurped text and little else.¹³³ In doing so, the *Cox* opinion ultimately afforded too much weight to a largely inapposite case.¹³⁴

¹³³ See *Cox v. Miller*, 154 F. Supp. 2d at 791 (S.D.N.Y. 2001). The *Cox* court quoted the following passage from *Carmona*:

Although often referred to as a “priest-penitent” privilege, the statutory privilege is not limited to communications with a particular class of clerics or congregants. Nor is it confined to “penitential admission[s] . . . of a perceived transgression” or “avowals made ‘under the cloak of the confessional.’” On the contrary, in enacting CPLR 4505, the Legislature intended to recognize “the urgent need of the people to confide in, without fear of reprisal, *those entrusted with the pressing task of offering spiritual guidance*” without regard to the religion’s specific beliefs or practices. While the privilege may have “ha[d] its origins in the Roman Catholic sacrament of Penance, in which a person privately confesses his or her sins to a priest [and t]he priest is enjoined by *Church law . . . to maintain the confidentiality of the confession*,” the New York statute is intentionally aimed at all *religious ministers* who perform “significant spiritual counseling which may involve disclosure of sensitive matters.” Indeed, the drafters of the current codification struck the concluding phrase from the predecessor provision, which made the privilege applicable to communications made “in the course of discipline, enjoined by the rules or practice of the religious body to which he belongs” because the phrase was ambiguous and rendered it “doubtful whether the rule applies to any confessions other than those to a Catholic priest.” Accordingly, what is more appropriately dubbed the “cleric-congregant” privilege is applicable to ministers of all religions, most of which have no ritual analogous to that of the Catholic confession. Despite the concurrence’s “four canon” analysis, New York’s test for the privilege’s applicability distills to a single inquiry: whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance.

Id. (internal citations omitted) (emphasis added).

¹³⁴ See generally *Carmona*, 627 N.E.2d 959. More recent New York cases demonstrate that *Carmona* did not eliminate the requirement that the communication be made to a member of the clergy as the *Cox* court implies. See, e.g., *Lightman v. Flaum*, 761 N.E.2d 1027, 1031 (N.Y. 2001) (noting that New York’s religious privilege “applies to confidential communications made by congregants to clerics of all religions”) (citing *Carmona*, 627 N.E.2d 959).

3. Testimonial Privileges Should Be Strictly Construed

The *Cox* opinion disregards the limitations the Supreme Court has placed on the federal judiciary's ability to develop evidentiary privileges.¹³⁵ In *Trammel v. United States*,¹³⁶ the Supreme Court

¹³⁵ See generally *Cox*, 154 F. Supp. 2d 787. The *Cox* opinion quotes N.Y. C.P.L.R. 4505 and discusses one New York case addressing the statute. *Id.* at 790-91. The district court, however, made no reference to Federal Rule of Evidence 501, which provides the federal judiciary the ability to create and develop evidentiary rules "[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court." FED. R. EVID. 501. Nor did the court address Federal Rule of Evidence 1101(c), which states, "The rule with respect to privileges applies at all stages of actions, cases, and proceedings." FED. R. EVID. 1101(c); see also FED. R. EVID. 1101(c) advisory committee's note (stating that "singling out the rules of privilege for special treatment, is made necessary by the limited applicability of the remaining rules"). The conclusion that the *Cox* court should have incorporated federal law into its opinion is further supported by *Duckworth v. Owen, II*, a case in which the Supreme Court denied certiorari to a state prisoner convicted of state crimes who claimed that the Seventh Circuit, in an unpublished opinion, erred in holding that the Federal Rules of Evidence, and not a particular state's (in that case, Indiana's) evidentiary rules, apply in a federal *habeas* decision. 452 U.S. 951, 951 (1981). Although the Supreme Court's denial contains no textual material, the dissenting opinion is enlightening. See *id.* at 951 (Rehnquist, J., dissenting). Noting that whether the federal rules of evidence applied in this case was the only question presented, the dissent states, "No one would disagree with the conclusion of the Court of Appeals that Indiana rules of evidence do not apply in a federal habeas proceeding." *Id.* at 953 (emphasis added); see also *Procella v. Beto*, 319 F. Supp. 662, 670 (S.D. Tex. 1970) (noting, in a case involving a state prisoner convicted of state crimes, that "federal evidentiary rules govern federal *habeas corpus* hearings"). In a case with issues similar to *Cox*, *Edney v. Smith*, Judge Jack Weinstein reviewed a state prisoner's petition for *habeas corpus* grounded on a claim that the trial court violated his Sixth Amendment rights by allowing his psychiatrist to testify against him. 425 F. Supp. 1038 (E.D.N.Y. 1976). The petitioner argued that the court violated the state physician-patient privilege, which he claimed was of a constitutional nature. *Id.* at 1039. Noting that the privilege did not exist at common law but that most states had adopted the privilege, Judge Weinstein looked to federal law regarding the physician-patient privilege to determine whether the petitioner's claim had merit. *Id.* at 1039-45.

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curtailed the right of a husband to prevent his wife from voluntarily testifying against him by claiming spousal privilege.¹³⁷ In so doing, the Court described the restraint courts should exercise in the development of evidentiary privileges:

Testimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence. As such, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally

Not only did the *Cox* court fail to address the applicable federal statutory guidelines, the court also failed to address the primary Supreme Court decision that limits judicial involvement in the creation or expansion of evidentiary privileges. *See Trammel v. United States*, 445 U.S. 40, 50 (1980) (admonishing federal courts to narrowly construe evidentiary privileges). Furthermore, the *Cox* court made no indication whatsoever as to the standard of review the court was applying. *See generally Cox*, 154 F. Supp. 2d 787.

¹³⁶ 445 U.S. 40 (1980).

¹³⁷ Prior to 1980, *Hawkins v. United States* was the controlling case with respect to the federally established spousal privilege. *Trammel*, 445 U.S. at 41, 42 (calling for a re-examination of *Hawkins*); *see also Hawkins*, 358 U.S. 74 (1958). In *Hawkins*, the Court acknowledged the longstanding common-law rule that husbands and wives were incompetent to testify either for or against one another. *Id.* at 74, 75. The Court then pointed out that *Funk v. United States* had altered the common law rule somewhat by allowing spouses to testify *for* each other. *Hawkins*, 358 U.S. at 76; *see also Funk*, 290 U.S. 371 (1933). The *Hawkins* Court stated, however, that *Funk* did not alter the rule that spouses could not testify *against* one another. *Hawkins*, 358 U.S. at 76. Upholding this rule and refusing to distinguish between compelled and voluntary testimony, the Court held that in the interest of protecting the sanctity of marriage, one spouse would not be permitted to testify even voluntarily against the other. *Id.* Despite government arguments that a marriage involving a spouse willing to testify against the other was already doomed, the Court refused to allow government action to catalyze divorce and stated that "adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage." *Id.* at 78. Noting both the state legislative trend of altering the spousal privilege to allow spouses to voluntarily testify against one another and the accepted state practice of offering a spouse immunity from prosecution for testifying against the other spouse, the *Trammel* Court modified *Hawkins* to allow spouses to voluntarily testify against one another. *Trammel*, 445 U.S. at 53.

predominant principle of utilizing all rational means for ascertaining the truth.¹³⁸

Not only did the *Cox* opinion fail to address the *Trammel* decision, the district court also ignored the principle adopted therein by the Supreme Court. Had the district court made any effort to “strictly construe[]” New York’s religious privilege as *Trammel* requires,¹³⁹ it could not have determined that the members of A.A. qualify as clergy. Even ignoring other jurisdictions’ applications of the privilege, which might also have persuaded the court to alter its course, it would be difficult to argue that the New York legislature would consider A.A. members clergy when it expressly requires Christian Science practitioners to be “duly accredited” for the privilege to apply.¹⁴⁰ Rather than follow legislative limitations and realism to their logical ends, however, the district took it upon itself to ordain more than a million unsuspecting A.A. members.¹⁴¹

4. Forcing a Square Peg into a Round Hole

The *Cox* court applied *Carmona* in an effort to circumvent the statutory requirement that the person with whom the communication is made be a “clergyman, or other minister of any religion or duly accredited Christian Science practitioner.”¹⁴² This requirement, however, is not completely ignored. The district court satisfied itself by finding, without explanation, that members of A.A. are “ordained by the Twelve Steps” and that “all members exercise the office of clergyman.”¹⁴³ Thus, the court found that the Establishment Clause, which at a minimum

¹³⁸ *Id.* at 50.

¹³⁹ *Id.* *Trammel* requires federal courts to consider whether expanding the particular privilege would serve a “public good transcending the normally predominant principle” of discovering the truth. *Id.* This note concludes that expanding the religious privilege to speech within A.A. causes more public harm than good.

¹⁴⁰ N.Y. C.P.L.R. 4505 (McKinney 2001).

¹⁴¹ See *supra* note 25 (noting A.A.’s size in terms of members).

¹⁴² N.Y. C.P.L.R. 4505 (McKinney 2001).

¹⁴³ *Cox v. Miller*, 154 F. Supp. 2d 787, 792 (S.D.N.Y. 2001).

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prohibits the government from preferring one religion over another, requires the religious privilege to apply to A.A. just as it applies to the “traditionally recognized forms” of religion.¹⁴⁴

The *Cox* court characterizes A.A. members as clergy in order to apply the religious privilege, yet fails to clearly elucidate its rationale for doing so.¹⁴⁵ Like a parent arguing with a child, the court supports its position with an unarticulated, “because I said so.” Any effort to explain further would have revealed the court’s unjustifiable reasoning. The court proceeds as follows: (1) assuming a communication occurs with the requisite reasonable expectation of confidentiality, the religious privilege protects communication with a Catholic priest acting in his professional capacity;¹⁴⁶ (2) the government cannot show a preference for Catholicism, a “traditional” form of religion, over A.A., an organization newly designated as religious;¹⁴⁷ therefore, (3) the religious privilege must apply to A.A.¹⁴⁸

Viewed separately, each point lacks controversy. The first, however, that the privilege applies to a priest acting in his

¹⁴⁴ *Id.* Interestingly, the *Cox* court notes that “it is possible as a matter of Constitutional law to have and to practice a religion without having a clergyman as such, or where all members exercise the office of clergyman” *Id.* at 787. Although this might be correct, research has yet to reveal any statute granting the religious privilege or any court applying the religious privilege when the communication concerned someone who was not a member of the clergy. The religious privilege, therefore, should not apply when the religion recognizes no spiritual leaders. Perhaps this is why the *Cox* court determined, without hinting to its rationale, that A.A. falls into the latter category. *Id.* Even if the court had offered an explanation, it would still be hard pressed to find support for its assumption that the privilege would apply to all members of a religion that viewed each member as clergy. See *In re Grand Jury Investigation*, 918 F.2d 374, 385 n.13 (3d Cir. 1990) (“[W]e do not intimate that the privilege should be interpreted to comprehend communications to and among members of sects that denominate each and every member as clergy.”).

¹⁴⁵ See *Cox*, 154 F. Supp. 2d at 792.

¹⁴⁶ *Id.* at 790 (noting that the New York statutory privilege “has its historical origin in the Roman Catholic church”).

¹⁴⁷ *Id.* at 792.

¹⁴⁸ *Id.*

professional capacity, does not lead logically to the second, that the privilege applies to a particular religion. Rather, the first point demonstrates that the privilege applies to communication with a particular individual who is recognized by a religious institution as one qualified to offer spiritual advice.¹⁴⁹ In other words, the fact that the privilege would apply to qualified communication with a priest demonstrates the religious privilege's *individual* applicability. Communication with a Catholic priest is protected, as is communication with a cleric within the Protestant, Jewish, and Muslim religions.¹⁵⁰ To then conclude the privilege applies to Catholicism, Protestantism, Judaism and Islam and, therefore, must apply to A.A. without reference to anyone recognized by A.A. as a spiritual advisor converts the privilege from a principle applying individually to one having an organizational application. If this were true, the privilege would expand uncontrollably, applying not only to the priest, but also to the church secretary or perhaps even to communication between two parishioners. This not only defeats the limiting principle adopted by the Supreme Court in *Trammel*, but it also diminishes the authority of the fifty state legislatures, each of which have adopted a definition of clergy that requires more than a mere desire to lend a sympathetic ear.¹⁵¹

¹⁴⁹ All of the statutory religious privileges apply to persons within religions, not religions categorically. *See supra* note 3 (citing state statutes conferring the religious privilege).

¹⁵⁰ *See supra* note 1 (discussing legislative attempts to enumerate the leaders of religions to whom the religious privilege would apply).

¹⁵¹ *See, e.g.*, CAL. EVID. CODE § 1033 (Deering 2001) (defining clergy as "a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization"); CONN. GEN. STAT. § 52-146b (2001) (limiting Connecticut's privilege to confidential communication with "a clergyman, priest, minister, rabbi or practitioner of any religious denomination accredited by the religious body to which he belongs who is settled in the work of the ministry"); OR. REV. STAT. § 40.260 (2001) (defining a clergy member as "a minister of any church, religious denomination or organization or accredited Christian Science practitioner who in the course of the discipline or practice of that church, denomination or organization is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of that church,

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Judicial interpretations of the religious privilege also support the notion that more is needed for a person to qualify as clergy.¹⁵² Although they have been unwilling to identify any specific requirements, courts should limit the application of the religious

denomination or organization, has a duty to keep such communications secret”).

¹⁵² In *In re Verplank*, a California district court found that communication between college students and counselors qualified for the religious privilege. 329 F. Supp. 433, 436 (C.D. Calif. 1971). A minister ordained by the United Presbyterian Church who had been hired to counsel students regarding the Vietnam draft had recruited non-ordained counselors to assist him with what became an overly burdensome task. *Id.* at 434-36. To determine whether the privilege protected communication between the students and the non-ordained counselors, the court looked to the advisory committee’s notes for proposed Federal Rule of Evidence 506 and found that the non-ordained counselors’ work conformed sufficiently with that of an ordained minister of an “established Protestant denomination to the extent necessary to bring [the counselors] within the privilege covering communication to clergymen.” *Id.*; see also PROPOSED FEDERAL RULES OF EVIDENCE, *supra* note 7, at 84. In *Rutledge v. State*, the Supreme Court of Indiana refused to apply the privilege when the communication in question occurred between an inmate and a member of the Gideons, an organization of businessmen who passed out Bibles. 525 N.E.2d 326 (Ind. 1988). The Gideon member in this case regularly spoke with inmates about the Bible and “being forgiven for their sins.” *Id.* at 327. The makeup of the organization and the fact that it was not affiliated with any church were the chief factors persuading the court that the privilege was inapplicable. *Id.* at 328. The Supreme Court of Iowa, in *Reutkemeier v. Nolte*, determined that confidential communication with the elders of a Presbyterian church was privileged. 161 N.W. 290 (Iowa 1917). The elders, the court found, held a position within the church equal to that of the minister, who was also an elder. *Id.* at 292-94. Elected by the members of the congregation, the church elders were together responsible for governing the church affairs and were often called to carry out duties of the minister when no acknowledged minister was available. *Id.* at 293. These characteristics proved persuasive. *Id.* The Iowa Supreme Court later refused to apply the privilege to communications that transpired between a criminal defendant and his brother, despite the defendant’s claim that he looked to his brother for spiritual guidance. See *State v. Alspach*, 524 N.W.2d 665 (Iowa 1994). The court found that the brother did not qualify as clergy, regardless of the defendant’s perceptions. *Id.* at 668; see also *Manous v. State*, 407 S.E.2d 779, 782 (Ga. Ct. App. 1991) (finding that a self-proclaimed psychic was not a member of the clergy as defined by Georgia’s religious privilege).

privilege to situations involving a cleric who is recognized by the religious organization to which that person belongs as one qualified to provide spiritual guidance.¹⁵³

Perhaps recognizing this, the *Cox* court was compelled by its desired outcome to determine that A.A. members are clergy.¹⁵⁴ Again, this conclusion ignores many of A.A.'s defining characteristics. The central A.A. organization recognizes no leaders.¹⁵⁵ A.A. has no formal structure other than its services

¹⁵³ See, e.g., *Reutkemeier*, 161 N.W. at 292-94 (examining the literature and doctrine of the Presbyterian Church to determine if the church viewed the elders as clergy to whom the religious privilege applies). Furthermore, such a requirement is implied by the various statutory definitions of spiritual advisors. See, e.g., ALA. CODE § 12-21-166 (2001) (defining "clergyman" as "any duly ordained, licensed or commissioned minister, pastor, priest, rabbi or practitioner of any bona fide established church or religious organization and shall include and be limited to any person who regularly, as a vocation, devotes a substantial portion of his time and abilities to the service of his respective church or religious organization"); HAW. R. EVID. 506 (2001) ("A member of the clergy is a minister, priest, rabbi, Christian Science practitioner, or other similar functionary of a religious organization . . ."); 735 ILL. COMP. STAT. 5/8-803 (2001) (defining clergy as "a clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs"); N.Y. C.P.L.R. 4505 (McKinney 2001) (requiring, for purposes of the religious privilege, Christian Science practitioners to be "duly accredited"); R.I. GEN. LAWS § 9-17-23 (2001) (prohibiting a "duly ordained minister of the gospel, priest, or rabbi" from revealing confidential communications).

¹⁵⁴ The *Cox* court's grossly inaccurate description of A.A. and its holding without reasoning that A.A. members are "ordained" by the Twelve Steps lead to this observation. See *Cox*, 154 F. Supp. 2d 787, 792 (S.D.N.Y. 2001); see also *supra* Part II.A.1 (discussing the *Cox* court's factual findings with respect to A.A.'s relationship with its members).

¹⁵⁵ See *supra* note 44 (stating A.A.'s ninth tradition, which allows for the creation of "service boards or committees"); see also *The A.A. Group*, pamphlet P-16, at 23 (Alcoholics Anonymous World Services, Inc., 1990) (describing the members of these committees as "officers" who are "usually . . . chosen by the group for limited terms of service. As Tradition Two reminds us, 'Our leaders are but trusted servants; they do not govern.' These jobs may have titles. But titles in A.A. do not bring authority or honor; they describe services and responsibilities.").

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board,¹⁵⁶ no requirements for either individual members or the groups' internal leaders other than the desire to recover from alcoholism,¹⁵⁷ no training of any sort for anyone within the organization,¹⁵⁸ and, most importantly, no recognition by the organization of any individual in a position to provide counseling, spiritual or otherwise, other than to offer personal experience to help guide others to sobriety.¹⁵⁹ It is clear,

¹⁵⁶ See TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 146-49.

¹⁵⁷ *Supra* note 44 (stating A.A.'s third tradition). Although A.A. suggests that a member wishing to sponsor another alcoholic first attain several months of sobriety, there are, in fact, no requirements or restrictions with respect to who can become a sponsor. See *Questions and Answers on Sponsorship*, pamphlet P-15, at 10 (Alcoholics Anonymous World Services, Inc., 1983). "There is *no* superior class or caste of sponsors in A.A. *Any* member can help the newcomer learn to cope with life without resorting to alcohol in any form." *Id.* at 13.

¹⁵⁸ *Id.* at 10.

An A.A. sponsor does not provide any such services as those offered by a social worker, a doctor, a nurse, or a marriage counselor. A sponsor is simply a sober alcoholic who helps the newcomer solve one problem: *how to stay sober*.

And it is not professional training that enables a sponsor to give help—it is just personal experience and observation.

Id.

¹⁵⁹ *Id.* A.A. has grown through the years partly as a result of its founders' belief that once A.A. members achieve sobriety, they should help others reach the same goal. See *supra* note 41 (stating A.A.'s twelfth step). This method evolved into what A.A. now refers to as "sponsorship." See generally *Questions and Answers on Sponsorship*, *supra* note 157. A.A. describes sponsorship as "an alcoholic who has made some progress in the recovery program shar[ing] that experience on a continuous, individual basis with another alcoholic who is attempting to attain or maintain sobriety through A.A." *Id.* at 7. At first glance, the support provided by a sponsor may appear to parallel that of a clergy member. The guidance sponsors provide, however, is severely curtailed by two limiting factors. Sponsors receive no formal training whatsoever in either alcohol recovery or spiritual matters. *Id.* And, although sponsors may share the same end—sobriety—their spiritual beliefs may differ greatly from those to whom they provide help, as membership mandates only the desire to stop drinking and does not depend on any particular religious beliefs. See *supra* note 44 (stating A.A.'s third tradition).

therefore, that an A.A. member is not qualified by A.A. to provide spiritual guidance.¹⁶⁰ Furthermore, since A.A. membership requires neither sobriety nor adherence to the Twelve Steps, finding that A.A. members are somehow ordained is puzzling, to say the least.¹⁶¹

The *Cox* decision must falter beneath the weight of appellate level scrutiny. Its perception of A.A. is misguided at best, as is its interpretation of the New York Court of Appeals' *Carmona* decision.¹⁶² These initial misunderstandings and an obviously scattered rationale led the district court to ordain A.A. members, burdening them with an unsolicited privilege, the breadth of which now conflicts with Supreme Court and state legislative dictates.

B. A Legal Crack in A.A.'s Foundation

The impact the *Cox* decision will have on A.A. members should give any advocate of A.A. and similar groups cause for concern. First, the *Cox* court erects yet another barrier between

Sponsors are struggling with their own sobriety and are under no obligation to work through the Twelve Steps before sponsoring another member, though A.A. does *encourage* sponsors to first become sober. *Questions and Answers on Sponsorship*, *supra* note 157, at 13-14. Yet, no matter how long a sponsor may be sober, A.A. recognizes that even sponsors, by the very nature of alcoholism, are at risk of slipping from sobriety. *See, e.g.*, TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 113-14 (discussing the danger of relapse that accompanies many of life's disappointments). The organization, therefore, incorporates what it calls the "24-hour plan," which reminds alcoholics of their powerlessness and discourages even members who have long been sober from making claims of future sobriety. *This is AA*, *supra* note 50, at 14. The "24-hour plan" encourages members to focus only on staying sober for the next twenty-four hours. *Id.*

¹⁶⁰ A situation where an individual A.A. group looks to a particular member as a spiritual leader would serve as a better example of when the religious privilege might apply. Nonetheless, the district court in *Cox* did not limit its opinion to particular cases. *See generally* *Cox v. Miller*, 154 F. Supp. 2d 787 (S.D.N.Y. 2001).

¹⁶¹ TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 139. ("The only requirement for A.A. membership is a desire to stop drinking.").

¹⁶² *People v. Carmona*, 627 N.E.2d 959 (N.Y. 1993).

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alcoholics and active participation in society, which is already complicated by the unpopular social stigma accompanying alcoholism.¹⁶³ It accomplishes this by forcing upon them a “privilege” that prevents A.A. members from testifying to information gained within the A.A. setting and precludes law enforcement from utilizing any information provided voluntarily by A.A. members.¹⁶⁴ Thus, A.A. members are prohibited from carrying out duties commonly associated with being a good citizen.¹⁶⁵ Second, the court creates what some jurisdictions have deemed a fiduciary relationship,¹⁶⁶ the breach of which can result

¹⁶³ TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 184-87 (stating that part of the reason anonymity is so important to members is a fear of the social stigma that might be attached); *see also Understanding Anonymity*, *supra* note 118, at 5-6 (discussing the need for anonymity).

¹⁶⁴ *Cox*, 154 F. Supp. 2d at 792-93 (holding that the evidence gathered from the information the A.A. members provided should have been suppressed).

¹⁶⁵ *See Roberts v. United States*, 445 U.S. 552, 557 (1980) (“The citizen’s duty to raise the hue and cry and report felonies to the authorities was an established tenet of Anglo-Saxon law at least as early as the 13th Century.”) (internal quotations omitted); *Roviaro v. United States*, 353 U.S. 53, 59 (1957) (noting that the government’s ability to conceal an informer’s identity is necessary in light of citizens’ duty “to communicate their knowledge of the commission of crimes to law-enforcement officials”); *United States v. Jefferson*, 252 F.3d 937, 940 (7th Cir. 2001) (“[C]itizens have an obligation to communicate their knowledge of the commission of crimes to law enforcement officials.”); *Lightbourne v. Dugger*, 829 F.2d 1012, 1020 (11th Cir. 1987) (noting “the duty that is imposed upon all citizens to report criminal activity”); *United States v. Cowan*, 396 F.2d 83, 87 (2d Cir. 1968) (“It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.”) (quoting *Miranda v. State of Arizona*, 384 U.S. 436, 477-78 (1966)) (internal quotations omitted). *But see United States v. Zimmerman*, 943 F.2d 1204, 1214 (10th Cir. 1991) (“It is well established that a person who sees a crime being committed has no legal duty to either stop it or report it.”).

¹⁶⁶ *See, e.g., BLACK’S LAW DICTIONARY* 626 (6th ed. 1990) (defining “fiduciary or confidential relation” as broadly “embracing . . . technical fiduciary relations and . . . informal relations which exist wherever one person trusts in or relies upon another” and stating that “[s]uch relationship arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely

in civil liability.¹⁶⁷ Consequently, the *Cox* court has determined

personal”).

¹⁶⁷ By determining that A.A. members are clergy, the *Cox* court also sets a precedent for other jurisdictions to impose civil liability on either A.A. members whose breach of confidentiality is considered a breach of a fiduciary duty or possibly on A.A. itself. *See, e.g.*, *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 430-32 (2d Cir. 1999) (upholding the trial court’s finding of a fiduciary relationship between the plaintiff and the Diocese and holding that the First Amendment does not bar claims against religious organizations for breach of fiduciary duties); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 338 (5th Cir. 1998) (holding that the First Amendment does not bar claims against clergy for either malpractice or breach of fiduciary duties); *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1061-62 (N.D. Iowa 1999) (stating that whether a spiritual counselor has a legally cognizable fiduciary duty “depends upon factual circumstances, not upon professional standards of conduct for the average reasonable member of the clergy” and holding that breach of fiduciary duty claims against clergy are not “barred *ab initio*”).

Although these cases arise in the context of claims of sexual abuse, at least one court has acknowledged the possibility of a duty arising from a breach of confidentiality. *See F.G. v. MacDonnell*, 696 A.2d 697 (N.J. 1997). The plaintiff in *F.G.* brought claims against a church rector and his assistant. *Id.* at 699-700. Like the courts above, the claim against the church rector arose from allegations of sexual misconduct. *Id.* at 700. The claim against the rector’s assistant, also a member of the clergy, however, concerned a letter he published detailing the facts of the relationship between the plaintiff and the rector and circulated to the members of the congregation. *Id.* The plaintiff claimed she had revealed the details to the assistant rector in confidence. *Id.* at 701. The court held that, generally, the First Amendment does not bar a claim against a clergy member for breach of fiduciary duties. *Id.* at 703. Thus, the court upheld the claim against the rector for breach of fiduciary duties with respect to the sexual relationship. *Id.* at 705. Furthermore, the *F.G.* court held that the claim against the assistant for breach of confidentiality would stand if the trial court could determine the existence of a breach by referring to nonreligious, “neutral principles.” *Id.* *But see* *Lann v. Davis*, 793 So. 2d 463, 465-66 (La. Ct. App. 2001) (holding that a claim against a clergy member for breach of fiduciary duty equated to a claim for clergy malpractice and, as such, was barred by First Amendment); *Teadt v. Lutheran Church Mo. Synod*, 603 N.W.2d 816, 822-24 (Mich. Ct. App. 1999) (refusing to create a fiduciary duty for clergy, stating that such a duty would be impossible to define); *Lightman v. Flaum*, 761 N.E.2d 1027, 1032 (N.Y. 2001) (holding that New York’s religious privilege did not create a fiduciary duty); *Langford v. Roman Catholic Diocese of Brooklyn*, 705 N.Y.S.2d 661, 662 (N.Y. App.

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that alcoholic criminals who wish to unburden their souls have a greater right to recover from their affliction than do those alcoholics in whom the criminals wish to confide. *Cox* allows alcoholics to reveal their criminal secrets to fellow alcoholics who might not be psychologically capable of maintaining a relationship requiring confidentiality.¹⁶⁸ This could prove instrumental to recovering criminals, whose unburdened consciences are free to focus on remaining sober, yet detrimental to recovering confidants.¹⁶⁹ Thus, *Cox* turns on its head the principle that those who fail to live by society's standards sacrifice their interests in freedom to forward the interests of the

Div. 2000) (holding that the First Amendment barred claims against clergy for breach of fiduciary duties, which the court equated to malpractice); *Hawkins v. Trinity Baptist Church*, 30 S.W.3d 446, 453 (Tex. App. 2000) (holding that the First Amendment barred courts from establishing a fiduciary duty owed by clergy members).

¹⁶⁸ See *Cox*, 154 F. Supp. 2d at 790. The facts of *Cox* demonstrate the plausibility of an A.A. confidant who is unable to carry the burden of confidentiality encouraged by A.A. *Id.* Ms. H, struggling with what Mr. Cox had told her, felt compelled to reveal the information to her own psychologist. *Id.* Thus, it follows that if the criminal A.A. member divulges criminal secrets to a non-criminal A.A. member precluded by law from revealing this information, the criminal A.A. member is, arguably, benefited by unburdening his soul while the non-criminal A.A. member must bear the weight of harboring knowledge of the confessor's crimes. See generally Julie D. Lane & Daniel M. Wegner, *The Cognitive Consequences of Secrecy*, 69 J. PERSONALITY & SOC. PSYCHOL. 237 (1995) (discussing the psychological effects of harboring secrets).

¹⁶⁹ As if overcoming alcoholism were not difficult enough, the confidant struggling with her own sobriety now must either sacrifice her civic duty to disclose criminal activity or face potential civil liability should she be unable to carry out the duty created by *Cox*. See *supra* note 167 (discussing decisions finding a clergy fiduciary duty). Such a psychological dilemma may well undermine the recovering alcoholic's sobriety. See, e.g., Brady & Sonne, *supra* note 125; Sandra A. Brown et al., *Severity of Psychosocial Stress and Outcome of Alcoholism Treatment*, 99 J. ABNORMAL PSYCHOL. 344, 344-48 (1990) (distinguishing between the effects of severe and mild stress on the ability of the alcoholic to remain abstinent and finding, *inter alia*, that alcoholics who relapsed after treatment had experienced more severe stress than the subjects who did not relapse); McKay, *supra* note 125, at 566.

non-criminals in attaining a crime-free society.¹⁷⁰ Public policy cannot support the proposition that criminals have a superior interest in sobriety than non-criminals.¹⁷¹

By expanding the religious privilege to communication within A.A., the *Cox* court usurped the A.A. member's control over her own recovery.¹⁷² If *Cox* is persuasive, A.A. members in jurisdictions recognizing a spiritual advisor's fiduciary relationship will no longer decide for themselves whether to maintain the confidential relationships encouraged by A.A.¹⁷³ Largely as a result of A.A.'s unwillingness to apply pressure to its members and its support of individual autonomy,¹⁷⁴ A.A.'s methods have been "extremely successful internationally, [resulting in] more than a million members in the United States alone."¹⁷⁵ Now, the responsibility to maintain confidentiality has been forced upon them by a decision that is overly confident in an alcoholic's ability to maintain both confidentiality and sobriety.

A person afflicted with the disease of alcoholism always risks

¹⁷⁰ Imprisonment is a key method for protecting society from those who commit criminal acts. See U.S. Dep't of Justice Bureau of Justice Statistics, *Jail Statistics*, <http://www.ojp.usdoj.gov/bjs/jails.htm> (last visited Feb. 23, 2002) (stating that the nation's local jails held 621,149 prisoners in mid-2000); see also Dep't of Justice Bureau of Justice Statistics, *Prison Statistics*, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited Feb. 23, 2002) (stating that as of December 31, 2000, 1,381,892 prisoners were under the control of the federal or state prison systems).

¹⁷¹ Were this not true, the criminal justice system would transmogrify; for if criminals have a greater interest in sobriety, it follows that they have a superior interest in liberty as well. See *supra* note 170 (stating the number of criminals being held in local jails and state and federal prisons).

¹⁷² See *supra* Part II.A (discussing A.A.'s relationship with its members).

¹⁷³ See *supra* note 167 (discussing cases finding a fiduciary duty for clergy).

¹⁷⁴ TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 173 ("Neither its General Service Conference, its foundation board, nor the humblest group committee can issue a single directive to an A.A. member and make it stick, let alone mete out any punishment.").

¹⁷⁵ *Cox v. Miller*, 154 F. Supp. 2d 787, 789 (S.D.N.Y. 2001).

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drinking again.¹⁷⁶ Medical studies on alcoholism have shown that stress is a major factor contributing to a recovering alcoholic's slip from sobriety.¹⁷⁷ Of course, every alcoholic is different. Some may be able to handle a lot of stress.¹⁷⁸ Others may slip easily from sobriety as the result of simple, day-to-day pressures.¹⁷⁹ The act of keeping a secret itself may serve as the proverbial straw.¹⁸⁰ The law has now determined that all alcoholics within A.A. are capable of coping with the stress of knowing and not being able to reveal that a fellow member has committed atrocities for which they have not been held accountable.¹⁸¹ Prior to *Cox*, A.A. encouraged confidentiality but never guaranteed it; therefore confidentiality could never be

¹⁷⁶ See, e.g., Billie Jay Sahley & Katherine M. Birkner, *Alcoholism and Its Treatment*, TOWNSEND LETTER FOR DOCTORS AND PATIENTS, July 1, 2000, at 62 ("The greatest majority of alcoholics cannot become social drinkers again because they tend to relapse into heavy drinking.").

¹⁷⁷ See Brady & Sonne, *supra* note 125; Brown et al., *supra* note 169; McKay, *supra* note 125.

¹⁷⁸ See Brady & Sonne, *supra* note 125.

¹⁷⁹ See *id.*

¹⁸⁰ See Lane & Wegner, *supra* note 168, at 239.

Thought suppression and intrusive thoughts occur cyclically, each in response to the other. Secrecy sets the stage for the formation of a feedback system in which each attempt to suppress the secret produces intrusive thinking of that very secret, which in turn engenders increased efforts at thought suppression. This process can quickly turn into a self-sustaining cycle in which obsessive preoccupation with thoughts of the secret develops. Once this preoccupation cycle is set into motion, moreover, removing secrecy from the equation will not necessarily stop the obsessive preoccupation with the secret. After the person has identified the thought of a secret as intrusive and unwanted, suppression can maintain the intrusiveness (and the intrusiveness can maintain the suppression). Secrecy's cognitive consequences may persevere long after the secrecy itself is gone.

Id.

¹⁸¹ *Supra* note 168 (discussing the potential psychological impact the *Cox* decision could have on non-criminal alcoholics attempting to recover through A.A.).

reasonably expected.¹⁸² That fact by itself should preclude expanding the religious privilege to A.A.¹⁸³

The law now, in effect, demands that members of A.A. guarantee confidentiality and, as a result, has determined that the criminal's interest in sobriety supercedes that of the non-criminal A.A. member.¹⁸⁴ Public policy cannot tolerate such a distortion of the legal system. It is also quite possible that A.A., as it has existed since 1939, will be unable to tolerate the pressure now being applied as a matter of law. This result would certainly prove harmful to society's interests, contravening both utilitarian principles¹⁸⁵ and Supreme Court precedent.¹⁸⁶ Applying the

¹⁸² Not only would the Constitution leave the law powerless to force a religion to guarantee confidentiality, but the fact that a person in such a situation could have no expectation of confidentiality also would mandate against applying the religious privilege, which requires just such an expectation. *See United States v. Wells*, 446 F.2d 2, 4 (2d Cir. 1971) (upholding the trial court's decision to admit into evidence an inmate's letter to a priest when the letter contained no indication that it was meant to remain confidential).

¹⁸³ Although the parameters of the privilege vary somewhat from state to state, each statute granting the privilege requires an expectation of confidentiality. *See supra* note 3 (listing the state statutes).

¹⁸⁴ *See supra* notes 168-69 and accompanying text.

¹⁸⁵ *See, e.g., In re Grand Jury Investigation*, 918 F.2d 374, 383 (3d Cir. 1990) (“[T]he privilege protecting communications to members of the clergy, like the attorney-client and physician-patient privileges, is grounded in a policy of preventing disclosures that would tend to inhibit the development of confidential relationships that are socially desirable.”); *see also* J.S. MILL, UTILITARIANISM 55 (Roger Crisp ed., Oxford University Press 1998) (1863) (“The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.”). In his introductory analysis of Mill's work, Roger Crisp summarizes the Greatest Happiness Principle by explaining that “the ultimate end is the greatest balance of pleasure over pain, to be assessed by competent judges. This being the end of human action, it is also the end of morality, which consists of those rules that will best further the end.” *Id.* at 37. John Henry Wigmore's four criteria for protecting confidential communications, discussed *infra* Part III, which have been applied in numerous jurisdictions, are described as utilitarian. *See, e.g., Am. Civil Liberties Union of Miss., Inc. v. Finch*, 638 F.2d 1336, 1344 (5th Cir. 1981) (“This Court adopted Wigmore's

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religious privilege to A.A. communication, therefore, is unsupported by both law and public policy.

III. RESPONDING TO CRITICS

Supporters of expanding the religious privilege to A.A. generally invoke Dean Wigmore's criteria for recognizing an evidentiary privilege.¹⁸⁷ They also argue that A.A. members essentially function as clergy and, therefore, deserve similar treatment.¹⁸⁸ Finally, some have expressed concern that without the protection of the religious privilege A.A. will suffer by becoming an easily accessible law enforcement tool.¹⁸⁹ While this

classic utilitarian formulation of the conditions for recognition of a testimonial privilege in *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970)."); *Marshall v. Spectrum Med. Group*, 198 F.R.D. 1, 4 (D. Me. 2000) (stating that when determining whether information is privileged "this court must consider Wigmore's classic utilitarian formulation"); *see also Developments in the Law: Privileged Communications: II. Modes of Analysis: The Theories and Justifications of Privileged Communications*, 98 HARV. L. REV. 1471, 1472 (1985) (describing Wigmore's criteria as "essentially utilitarian" and describing the utilitarian approach as "assert[ing] that communications made within a given relation should be privileged only if the benefit derived from protecting the relation outweighs the detrimental effect of the privilege on the search for truth"). Wigmore was dean of faculty at Northwestern University School of Law from 1901 to 1929. WILLIAM R. ROALFE, JOHN HENRY WIGMORE 45-184 (1977). His treatise on evidence, which laid the foundation for modern evidentiary law, was first published in 1904 and "was promptly recognized as an outstanding publication . . ." *Id.* at 77. "[A]nd Wigmore quickly rose from the rank of a promising but somewhat obscure scholar and teacher to the rating of one of the great masters of the law." *Id.* at 79 (inner quotations omitted).

¹⁸⁶ *See supra* Part II.A.3 (discussing *Trammel v. United States*, 445 U.S. 40 (1980)).

¹⁸⁷ *See generally* Reed, *supra* note 30; Weiner, *supra* note 30.

¹⁸⁸ *See generally* Reed, *supra* note 30; Weiner, *supra* note 30.

¹⁸⁹ *See* Jimmy Breslin, *Without a Shield, A.A. May Not Survive*, *NEWSDAY*, June 14, 1994, at A2 (quoting an A.A. member, identified only as a priest, as stating after Mr. Cox's conviction, "As I understand it, they subpoenaed people for a double homicide. That's rare. But once you make Alcoholics Anonymous people talk about one thing, what is to stop the authorities from deciding that they can come around for anything, an income

fear is not entirely irrational, expanding the religious privilege is excessive and ultimately unnecessary in light of the constitutional protection afforded all religious organizations.

A. *Dean Wigmore's Criteria Fail to Support Protecting A.A. Communication*

Dean Wigmore identified four criteria he viewed as necessary to establish an evidentiary privilege:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.¹⁹⁰

In the A.A. context, however, attempting to apply the four criteria requires a level of speculation that could not be tolerated in light of the public policy argument discussed in Part II. First, whether an expectation of confidentiality can exist within A.A. is highly uncertain.¹⁹¹ The organization imposes no consequences on

tax case.”). Another rationale proffered is that the information conveyed in A.A. and similar self-help settings is protected by the penumbral right to privacy. See Reed, *supra* note 30, at 746-51; Weiner, *supra* note 30, at 267-70.

¹⁹⁰ 8 J.H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (McNaughton rev. 1961).

¹⁹¹ As has already been noted, A.A. has no authority over its members, who are free to follow or dismiss A.A.'s suggestions. See TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 173. “Groups have tried to expel members, but the banished have come back to sit in the meeting place, saying ‘This is life for us; you can’t keep us out.’” *Id.* Nowhere in the Twelve Steps or Twelve Traditions is the word or concept of confidentiality mentioned. See

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individuals for failing to follow its suggestion that communication be considered confidential.¹⁹² Nor should society assume that alcoholics, by attending A.A. meetings, are willing to subject themselves to the responsibilities that accompany the confidential relationship.¹⁹³

Next, it is unclear whether the expectation of confidentiality is necessary for the relationships within A.A. to survive. Although some evidence suggests that people are more honest when guaranteed confidentiality, A.A. has never guaranteed confidentiality;¹⁹⁴ therefore, it cannot be argued that a lack of such a guarantee would negatively affect A.A.'s membership or effectiveness.¹⁹⁵ In fact, it is equally reasonable to assume that the members of A.A. require and relish the freedom from the responsibility of having to harbor the knowledge of the criminal deeds of another.¹⁹⁶ The founders of A.A. recognized the need to not pressure the alcoholic.¹⁹⁷ The law, far less knowledgeable in such matters, is in no position to determine otherwise.

Regarding the fourth criterion, prohibiting A.A. members

supra note 41 (listing A.A.'s Twelve Steps); *see also supra* note 44 (listing A.A.'s Twelve Traditions).

¹⁹² TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 173.

¹⁹³ *See supra* Part II.A.1 (discussing A.A.'s relationship with its members).

¹⁹⁴ *See supra* note 191 (discussing A.A.'s lack of authority over its members); *see also* Alcoholics Anonymous, *The Importance of Anonymity*, at http://www.alcoholics-anonymous.org/english/E_FactFile/M-24_d9.html (last visited Feb. 23, 2002) ("An A.A. member may, for various reasons, 'break anonymity' deliberately at the public level. Since this is a matter of individual choice and conscience, the Fellowship as a whole obviously has no control over such deviations from tradition.").

¹⁹⁵ Furthermore, there is equally compelling evidence that some secrets are better unrevealed. *See* Anita E. Kelly & Kevin J. McKillop, *Consequences of Revealing Personal Secrets*, 120 PSYCHOL. BULL., No. 3, 450-65 (stating that revealing secrets, which is largely considered therapeutically beneficial, may actually damage the confessor when the secret revealed causes the confidant to react negatively).

¹⁹⁶ *See supra* note 191 (discussing A.A.'s lack of authority over its members).

¹⁹⁷ *See* TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 32, at 129 (stating that A.A. has no rules).

from revealing knowledge of criminal behavior would actually prove harmful to recovering alcoholics, who may be emotionally unable to handle the burden the religious privilege places on them. The privilege, therefore, actually injures those the *Cox* court may have been trying to protect. Any injury that may result to the personal relationship between A.A. members can hardly compare. Compounded with the barrier evidentiary privileges place between courts and the truth they seek, it is difficult to see any benefits arising from imposing the religious privilege on A.A. members.

Ultimately, the third criterion is the only one that survives analysis. It would be difficult, if not impossible, to argue that A.A. does not benefit society. Although A.A. keeps no detailed records of membership, the organization claims to have millions of members throughout the world.¹⁹⁸ Alcoholism is a source of crime, misery, and physical illness that can lead to self-destruction and death.¹⁹⁹ Likewise, alcoholism poses enormous economic costs on society.²⁰⁰ Because A.A. reduces those costs while imposing no realizable social costs of its own, society should “sedulously foster[]” A.A. and the relationships that develop therein.²⁰¹ Nevertheless, the satisfaction of this criterion alone cannot justify applying the religious privilege to communications within A.A.²⁰²

¹⁹⁸ See *supra* note 25 (noting A.A.’s size in terms of members).

¹⁹⁹ See Jill Neimark et al., *Back from the Drink*, PSYCHOL.TODAY, Sept. 1994, at 46 (stating that in the United States each year, 40,000 people die from alcoholism and that alcoholism is implicated in 30% of suicides overall and 46% of suicides among teenagers).

²⁰⁰ *Id.* (stating that the monetary costs to the country are \$80 billion annually).

²⁰¹ *Id.*; see also J.H. WIGMORE, *supra* note 190, at § 2285.

²⁰² J.H. WIGMORE, *supra* note 190, at § 2285.

Only if these four conditions are present should a privilege be recognized. That they are present in most of the recognized privileges is plain enough; and the absence of one or more of them serves to explain why certain privileges have failed to obtain the recognition sometimes demanded for them.

Id.

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*B. Courts Do Not Adhere to the Functionalist Approach*²⁰³

Commentators also argue that the religious privilege should apply to A.A. based on the purpose A.A. members serve each other.²⁰⁴ Since A.A. members provide essentially the same service as clergy members, the argument goes, A.A. members should enjoy a similar right to privileged communication.²⁰⁵ In addition to the myriad reasons why A.A. members are not the equivalent of clergy,²⁰⁶ the functionalist approach, in light of the Supreme Court's ruling in *Trammel*, suffers from a more obvious deficiency—the proverbial slippery slope. That is to say, accompanying the functionalist rationale is the potential for burdensome litigation seeking to further expand the privilege. For example, litigants have already tried to argue—unsuccessfully—that the religious privilege applies to a psychic or to family members to whom a person may look for spiritual guidance.²⁰⁷ If the religious privilege did apply to such relationships, one could then argue, for example, that the lawyer-client privilege should apply to a criminal seeking legal advice from a bail bondsman. Such arguments would burden the courts tremendously by forcing them to create exceptions in order to administer justice, when, as *Trammel* clarifies, the administration of justice is the rule and protected communication the

²⁰³ See AMERICAN HERITAGE DICTIONARY, *supra* note 68, at 734 (defining “Functionalism” as follows: “(1) The doctrine that the function of an object should determine its design and materials; (2) A doctrine stressing purpose, practicality, and utility.”).

²⁰⁴ See Reed, *supra* note 30, at 737 (analogizing A.A. members and clergy); Weiner, *supra* note 30, at 270-72 (discussing “the functionalist rationale” for extending the religious privilege to A.A.).

²⁰⁵ See *supra* note 204 (citing commentators proffering this view).

²⁰⁶ See *supra* Part II.4 (distinguishing A.A. members from members of the clergy).

²⁰⁷ See *Manous v. State*, 407 S.E.2d 779, 782 (Ga. Ct. App. 1991) (holding that the religious privilege did not apply to communication between a criminal defendant and his psychic); *State v. Alspach*, 524 N.W.2d 665, 668 (Iowa 1994) (holding that a criminal defendant's brother did not qualify as clergy despite defendant's view of his brother as a spiritual advisor).

exception.²⁰⁸

C. Extending the Privilege Is Unnecessary

Finally, creating explicit legal protection for speech within A.A., although already shown to violate public policy, is a drastic and unnecessary solution to a problem not yet proven to exist. In addition to the utilitarian and functionalist positions discussed,²⁰⁹ some believe that the *Cox* trial exemplifies the abuse that will result without the privilege.²¹⁰ Although Ms. H voluntarily approached the district attorney to reveal the information Mr. Cox had told her, the others within Mr. Cox's A.A. group were forced to testify.²¹¹ Critics arguing for application of the religious privilege to A.A. claim that such a measure is necessary to prevent prosecutors from abusing their position by subpoenaing A.A. members and compromising A.A. confidentiality.²¹² Yet, in their haste, these critics forget about Ms. H and other A.A. members whose dedication to maintaining the confidential relationships encouraged by A.A. is secondary to their psychological well-being.²¹³ Furthermore, the six-and-a-half-year interim between Mr. Cox's conviction, which was reported nationwide,²¹⁴ and his grant of *habeas corpus* offered no

²⁰⁸ See *supra* Part II.A.3 (discussing *Trammel v. United States*, 445 U.S. 40 (1980)).

²⁰⁹ See *supra* Parts III.A-B (discussing and dismissing the various rationales for extending the religious privilege to communication within A.A.).

²¹⁰ See *supra* note 189 (noting the alarmist concern that failure to protect communication within A.A. will result in the organization's demise).

²¹¹ See *Reed*, *supra* note 30, at 700 (stating that the *Cox* conviction was the first incident where A.A. members were compelled to testify).

²¹² See *supra* note 189 (noting the alarmist concern that failure to protect communication within A.A. will result in the organization's demise).

²¹³ *Cox v. Miller*, 154 F. Supp. 2d 787, at 790 (S.D.N.Y. 2001) (stating that Ms. H first revealed to her psychologist the information Mr. Cox had told her).

²¹⁴ See, e.g., Geraldine Baum, *Whether in a Support Group, Therapy or Church, People Seek Comfort in Anonymous Confession*, L.A. TIMES, June 24, 1994, at E1; Editorial, *Confidentiality Not Guaranteed in All Kinds of*

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indication that the critics' concerns of overzealous, encroaching prosecutors are remotely realistic.²¹⁵

Nevertheless, the possibility of a situation like *Cox* arising again is not beyond comprehension, and the social benefits A.A. confers certainly weigh in favor of protecting those A.A. members who view confidentiality as fundamental to their recovery.²¹⁶ Clearly, extending the religious privilege to A.A. risks compromising the spirit of freedom and autonomy ingrained in nearly every aspect of one of the world's most successful self-help organizations.²¹⁷ Conversely, absent the privilege, A.A. members remain free from the pressures the privilege creates, free to focus on becoming and remaining sober and, if they so choose, free to preserve the confidential, anonymous relationships encouraged by A.A.²¹⁸ Assuming the Second and Seventh Circuit decisions recognizing twelve step programs as religious organizations are upheld and found persuasive elsewhere,²¹⁹ the Constitution will protect A.A. members from abusive law enforcement.²²⁰

Therapy Sessions, DAYTON DAILY NEWS, June 18, 1994, at 14A; Bruce Frankel, *Drunken Stupor Turns Deadly/A.A. Confession Raises Questions of Confidentiality*, USA TODAY, June 8, 1994, at 2A; Jan Hoffman, *Faith in Confidentiality of Therapy Is Shaken*, N.Y. TIMES, June 15, 1994, at A1.

²¹⁵ See Reed, *supra* note 30, at 700 (stating that the *Cox* conviction was the first incident where A.A. members were compelled to testify). Research has thus far uncovered no other cases where A.A. members were forced to testify or where law enforcement officials were accused of infiltrating A.A. meetings.

²¹⁶ See *supra* Part III.A (discussing Dean Wigmore's criteria for establishing an evidentiary privilege).

²¹⁷ See *supra* Part I.A (discussing the history of A.A.).

²¹⁸ See *supra* note 118 (discussing the theory behind A.A.'s principle of anonymity).

²¹⁹ See *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068 (2d Cir. 1996); *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996).

²²⁰ See, e.g., *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); see also, *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972) (holding that the state could not compel defendants, Amish parents, to send their children to school past the eighth grade when such practice violated their

The Free Exercise Clause of the Constitution prevents courts from compelling A.A. members to testify with respect to information revealed in the practice of their “religion.”²²¹ This is true to the extent that the government has no compelling interest *and* cannot accomplish its ends through a means tailored to protect fundamental First Amendment rights.²²² In *Wisconsin v. Yoder*, the Supreme Court stated, “Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”²²³ Relying on the Constitution will not only protect A.A. members in a fashion similar to the religious privilege, but it also will protect those A.A. members who long to be free from the restraints the religious privilege imposes.²²⁴

religious beliefs).

²²¹ U.S. CONST. amend. I; *see supra* note 53 (discussing cases equating A.A. with religion).

²²² *See supra* note 220 (citing cases discussing government infringement of the free exercise of religion).

²²³ *Yoder*, 406 U.S. at 215.

²²⁴ Obviously, not every member is dedicated to the principle of confidentiality within A.A. That is not to say that no A.A. members adhere to a self-imposed obligation to maintain the confidential relationship out of a belief that it is fundamental to the practice of A.A.’s Twelve Steps and Twelve Traditions. In *Thomas*, the Supreme Court addressed a similar situation. 450 U.S. 707. The plaintiff in *Thomas* was a Jehovah’s Witness who had been employed in the steel industry. *Id.* at 710. Originally, he had been involved in the fabrication of sheet steel. *Id.* But when the company he worked for closed his division, Mr. Thomas was transferred to a division requiring him to participate in the manufacturing of tank turrets for the military. *Id.* According to Mr. Thomas, his religion would not permit him to contribute directly to the manufacture of armaments, though he felt that he could be involved in the production of materials that may find their way to military use more indirectly. *Id.* at 711. Not all within his religion were in agreement. *Id.* at 710. A fellow Jehovah’s Witness had told Mr. Thomas that working on weapons did not violate his religion’s doctrine. *Id.* Mr. Thomas was nonetheless convinced, and his convictions caused him to ask to be laid off. *Id.* When this request was refused, he quit and sought unemployment benefits. *Id.* The matter found its way to the Supreme Court of Indiana, which held that a denial of benefits did not violate the Free Exercise Clause when the belief claimed to have been infringed was nothing more than a “personal philosophical choice.” *Thomas v. Review Bd. of the Ind. Employment Sec.*

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CONCLUSION

Although the *Cox* opinion will not likely be affirmed on appeal and Mr. Cox will remain in prison to pay for his crimes, the district court's bewildering decision provides a glimpse of what the future may hold for A.A. and other groups adopting the Twelve Steps. The legal system seems increasingly intent on viewing A.A. as a sectarian organization.²²⁵ While the *Warner* and *Farrey* decisions arguably are the grossest examples of the establishment of religion, they seem less so when confined to their facts.²²⁶ Although the Second Circuit in *Warner* distinguished between the religious events at A.A. and a prayer at a high school graduation, it would be wise for the court to readdress this aspect and reconsider its position.²²⁷ Analogizing A.A. meetings that incorporate religious aspects with a public school attempting to incorporate a prayer would result in less confusion while reaching the identical end sought, preventing the government from endorsing religion in the broadest sense of the

Div., 391 N.E.2d 1127, 1131 (Ind. 1979). Reversing the Indiana court's decision, the Supreme Court held, *inter alia*, that it was not necessary for Mr. Thomas' belief to comport with the beliefs of other Jehovah's Witnesses for his belief to rise to a religious status. *Thomas*, 450 U.S. at 715, 716.

Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.

Id.

²²⁵ See *supra* Part I.B (discussing the gradual judicial perception of A.A. as a religious organization despite A.A.'s contrary position and its provision of interpretive guidance for atheist members).

²²⁶ See *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068 (2d Cir. 1996); *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996).

²²⁷ *Warner*, 115 F.3d at 1076 (citing *Lee v. Weisman*, 505 U.S. 577 (1992), which found that non-sectarian prayer given at a public high school graduation violated the Establishment Clause).

word.²²⁸

Whether the Second or Seventh Circuits do ultimately limit their views on this issue, the fact remains that the religious privilege is inapplicable in the A.A. context.²²⁹ Although the courts may choose to maintain the view that A.A. is a religion, it should be viewed as a religion without recognized leaders or spiritual advisors.²³⁰ In light of congressional and Supreme Court limitations on the development of evidentiary privileges and common sense reading of state religious privileges, unless the various legislatures decide otherwise, protecting communication within A.A. should be left to the Constitution's Free Exercise Clause. The *Cox* court chose to ignore Congress and the Supreme Court, and its application of New York law was disingenuous, to say the least. Furthermore, its effects could be disastrous for the millions of people whose very survival depends on A.A. The *Cox* opinion should, therefore, serve the legal community not as a persuasive argument or precedent, but as a mistake not to be repeated.

²²⁸ *Weisman*, 505 U.S. at 589 (“The First Amendment’s Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.”).

²²⁹ *See supra* Parts II-III (discussing the numerous reasons why the religious privilege should not be extended to communication within A.A.).

²³⁰ *See supra* Part II.A.4 (distinguishing between A.A. members and members of the clergy).