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## Virtual Confessions: Examining the Clergy Privilege's Extension to Artificially Intelligent Religious Robots

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# VIRTUAL CONFESSIONS: EXAMINING THE CLERGY PRIVILEGE'S EXTENSION TO ARTIFICIALLY INTELLIGENT RELIGIOUS ROBOTS

*Samuel N. Dick\**

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## I. INTRODUCTION

*“Does God exist? Well, I would say, ‘Not yet.’” – Ray Kurzweil<sup>1</sup>*

Consider this: Kate, a devout Christian, and avid churchgoer, driving under the influence, caused a fatal hit-and-run.<sup>2</sup> Overwhelmed with guilt, she turns to her pastor, who introduces her to an artificially intelligent robot situated in the church’s counseling office. The robot is known to the congregation as “Thomas.” As the pastor says, “Thomas can give spiritual counsel in the same capacity, if not better, then I can.” Kate confides in Thomas, confesses her actions, and seeks guidance and reconciliation from God.

Later, the local prosecutor learns of her counseling session. He charges Kate with manslaughter and deposes the transcript of the conversation uploaded on Thomas. At a pretrial hearing, Kate’s attorney asserts that his client’s communication with Thomas is protected under the clergy privilege because the communication was in confidence, the church held Thomas in the same regard as any other pastor, and Kate sought, and Thomas gave, spiritual counsel. The trial court held an *in camera* review of the transcript and determined the conversation’s substance involved spiritual counsel and would be privileged if the privilege applied. The trial court faces a unique question: Can the clergy privilege extend to communications with artificial intelligence (AI)?

The clergy privilege is a rule of evidence forbidding judicial inquiry into specific communications between clergy and individuals seeking spiritual advice.<sup>3</sup> Every state has enacted a clergy privilege statute in some form.<sup>4</sup> However, no case has decided whether communications

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1. Aaron Saenz, *Transcendent Man Wows At Tribeca Film Festival Premier*, SINGULARITY HUB (Apr. 29, 2009), <https://singularityhub.com/2009/04/29/transcendent-man-wows-at-tribeca-film-festival-premier/> (quoting Ray Kurzweil, *Transcendent Man*, 2009).

2. The facts for this hypothetical are taken from *Cox v. Miller*, 296 F.3d 89, 91-98 (2d Cir. 2002), but focus, instead, on communications with Artificial Intelligence (AI) as opposed to at Alcoholics Anonymous (AA) meetings. Such communications in religious settings are actively occurring all over the world. See Joshua Jackson et al., *Exposure to Robot Preachers Undermines Religious Commitment*, 152(12) J. EXPERIMENTAL PSYCH.: GEN. 3344, 3345-48 (July 24, 2023), <https://doi.org/10.1037/xge0001443>.

3. See, e.g., *Trammel v. United States*, 445 U.S. 40, 51 (1980) (“The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor.”).

4. See, e.g., ALA. CODE § 12-21-166 (2012), ALA. R. EVID. 505; ALASKA R. EVID. 506, ALASKA STAT. § 08.86.200; ARIZ. REV. STAT. §§ 12-2233, 13-4062, 46-453; ARK. CODE ANN. § 12-18-402, ARK. R. EVID. 505; CAL. EVID. CODE §§ 1033 to 1034 (Deering 2004); COLO. REV. STAT. ANN. § 13-90-107 (2017); CONN. GEN. STAT. ANN. § 52-146b (2015); DEL. R. EVID. 505; D.C. CODE § 14-309 (2001); FLA. STAT. ANN. § 90.505 (2016); GA. CODE ANN. § 24-5-502 (2013); HAW. REV. STAT. § 626-1 (2009); IDAHO CODE ANN. § 9-203 (2010); 735 ILL. COMP. STAT. 5/8-803 (2016); IND. CODE § 34-46-3-1 (2008); IOWA

with religiously endorsed AI could be privileged. Such a question was inconceivable not long ago.<sup>5</sup> Nevertheless, the need to discuss such a scenario is apparent because of the rapid development of AI and its integration into traditional pastoral roles.<sup>6</sup>

In 2019, Catholic churches in Poland, Peru, and Italy installed an AI-enabled robot named “SanTO” to “listen[] to confessions” from members of the congregation.<sup>7</sup> A Lutheran Church in Germany introduced a similar robot to give spiritual counsel in multiple languages to churchgoers, and a Buddhist Temple in Japan created “Mindar,” or the Buddhist deity of Mercy, to give sermons.<sup>8</sup> All of these bots have received full endorsement by their respective church leaders to carry out these duties in a similar nature as their human equivalent.<sup>9</sup> These religious groups integrated AI because developments in its deep learning and natural language processing abilities allow it to interact with congregation members meaningfully.<sup>10</sup> Glimpses of these technological abilities have come to the forefront of public (and legal) discourse in recent years—notably, because of ChatGPT.<sup>11</sup>

Some religions have taken AI integration a step further. The Way of the Future Church and the Church of AI—both having been given § 501(c)(3) tax-exempt status as a “church”—openly claim to “worship [] a Godhead based on Artificial Intelligence.”<sup>12</sup> While these examples

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CODE § 622.10 (2017); KAN. STAT. ANN. § 60-429(a), (b) (2005); KY. R. EVID. 505; LA. CODE EVID. ANN. Art 511 (2017); Me. R. Evid. 505; MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2013); MASS. GEN. LAWS. ANN. ch. 233, § 20A (2009); MICH. COMP. LAWS ANN. § 600.2156, 767.5a(2) (2009); MINN. STAT. ANN. § 595.02(1)(c) (2016); MISS. R. EVID. 505 (2009); MO. ANN. STAT. § 491.060(4) (2016); MONT. CODE ANN. § 26-1-804 (2015); NEB. REV. STAT. § 27-506 (2016); NEV. REV. STAT. ANN. § 49.255 (2012); N.H. R. EVID. 505; N.J. R. EVID. 511 (2009); Rule 11-506 NMRA 2009; N.Y. C.P.L.R. 4505 (McKinney 2003); N.C. GEN. STAT. ANN. § 8-53.2 (2015); N.D. R. EVID. 505; OHIO REV. CODE ANN. § 2317.02 (2017); OKLA. STAT. ANN. Tit. 12, § 2505 (2011); OR. REV. STAT. § 40.285 (2015); 42 PA. STAT. AND CONS. STAT. ANN. § 5943 (2017); 9 R.I. GEN. LAWS § 9-17-23 (2012); S.C. CODE ANN. § 19-11-90 (2014); S.D. CODIFIED LAWS §§ 19-13-16 through 19-13-18 (2016); TENN. CODE ANN. § 24-1-206(b) (2000); TEX. R. EVID. 505; UTAH R. EVID. 503; V.R.E. Rule 505; VA. CODE ANN. § 8.01-400 (2015); WASH. REV. CODE § 5.60.060(3) (2016); W. VA. CODE § 48-1-301 (2012); WIS. STAT. § 905.06 (2015-16); WYO. STAT. ANN. § 1-12-101(a)(ii) (2017). For the text of each clergy privilege statute: [https://avemarialaw.libguides.com/ld.php?content\\_id=72656974](https://avemarialaw.libguides.com/ld.php?content_id=72656974).

5. See Ann Thompson, *Does AI Have A Place In Church?*, NPR (Oct. 9, 2023), <https://www.wvux.org/podcast/focus-on-technology/2023-10-09/does-ai-place-church>.

6. See Jackson et al., *supra* note 2, at 3345-48.

7. *Id.* at 3345-46; Gabriele Trovato et al., *Communicating with SanTO—the First Catholic Robot*, INT’L CONF. ROBOT & HUMAN INTERACTIVE COMM’N (Jan. 13, 2020), doi: 10.1109/RO-MAN46459.2019.8956250.

8. See Jackson et al., *supra* note 2, at 3345-46.

9. *Id.* at 3345.

10. *Id.* at 3345-49.

11. *Id.* at 3345-48.

12. Way of Future, Articles of Incorporation of a Nonprofit Religious Organization, Cal. Sec’y

currently represent the minority in religious practices, AI is beginning to fill traditional pastoral roles.<sup>13</sup> Such practices would garner full protection under the law.

“The Constitution protects not just popular religious exercises . . . [i]t protects them all.”<sup>14</sup> The Free Exercise Clause’s central tenant is that “the citizenry be free from governmental pressure as to how they worship.”<sup>15</sup> This, in conjunction with the Establishment Clause, necessitates that the clergy privilege—the most “deeply rooted” legal protection unique to religious organizations—applies equally to all faith groups.<sup>16</sup> Said differently, if an institution is deemed religious, the Constitution demands recognition of the clergy privilege as applied to that institution because of the social validation that accompanies it.<sup>17</sup> At the intersection of AI and the First Amendment, it seems to suggest that communications with religiously endorsed AI would be protected under the clergy privilege.<sup>18</sup>

This Article shows that under the majority clergy privilege approach, certain religious communications with AI would be protected; but churches wanting to avoid such an outcome can do so by implementing a terms-of-use policy. Section II.A. introduces the reader to the history and policy rationale behind the privilege, as well as the majority approach under state law.<sup>19</sup> Section II.B. discusses the developments and technological sophistication of AI and how it performs in analogous roles to traditional human professionals.<sup>20</sup> Section II.C. explains how modern churches, in varying degrees, are

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State No. 3827604 (Sept. 21, 2015), <https://www.documentcloud.org/documents/4064061-Business-Entities-Filing-Documents> [hereinafter Articles of Incorporation]; Way of Future, Statement of Information, Cal. Sec’y State No. 3827604 (May 17, 2017), <https://www.documentcloud.org/documents/4064056-Business-Entities-Filing-Documents-2> [hereinafter Statement of Information]; Jackie Davalos & Nate Lanxon, *Anthony Levandowski Reboots Church of Artificial Intelligence*, BLOOMBERG (Nov. 23, 2023), <https://www.bloomberg.com/news/articles/2023-11-23/anthony-levandowski-reboots-the-church-of-artificial-intelligence?embedded-checkout=true>.

13. See Jackson et al., *supra* note 2, at 3345-47.

14. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm’n*, 584 U.S. 617, 644 (2018) (Gorsuch, J., concurring).

15. Nicholas Wolterstorff, *A Religious Argument for the Civil Right to Freedom of Religious Exercise, Drawn from American History*, 36 WAKE FOREST L. REV. 535, 543 (2001).

16. Ari Diaconis, *The Religion of Alcoholics Anonymous (AA): Applying the Clergy Privilege To Certain AA Communications*, 99 CORNELL L. REV. 1185, 1210, 1213-18 (2014) (“[C]lergy privilege statutes protect all religions equally.”).

17. See, e.g., *Cox v. Miller*, 296 F.3d 89, 105-07 (2d Cir. 2002) (explaining that if an institution is deemed religious, it carries with it different forms of protection).

18. Matthew Hedstrom, *Liberalism in American Religious History*, OXFORD U. PRESS (May 24, 2018), <https://doi.org/10.1093/acrefore/9780199340378.013.417>.

19. See *infra* Section II.A. (introducing the clergy privilege and its policy rationale).

20. See *infra* Section II.B. (explaining modern development and sophistication in AI).

integrating AI into ministry and evangelism.<sup>21</sup> Section III.A. argues that under the majority approach, the clergy privilege could protect communications with AI if faith groups (1) formally endorse AI as capable of giving spiritual counsel or (2) employ AI in traditional pastoral roles, and those roles are subsequently carried out.<sup>22</sup> Section III.B. explores religions that openly worship AI and the associated legal questions involving privilege law.<sup>23</sup> Section III.C. explains that legislators are ill-equipped, based on constitutional restraints, to pass laws that would restrict religious expression through AI.<sup>24</sup> Finally, Section III.D. proposes a solution for churches not wanting the privilege to protect communications with AI—through a terms-of-use policy.<sup>25</sup>

## II. THE EXISTING TECHNOLOGICAL, RELIGIOUS, AND LEGAL LANDSCAPE

The interplay between AI, religion, and privilege law is complex.<sup>26</sup> To understand these complexities, it is crucial to appreciate the historical background and policy rationale behind the clergy privilege,<sup>27</sup> the advancements in algorithmic technology,<sup>28</sup> and how churches have integrated it into their belief systems.<sup>29</sup>

### A. Clergy-Penitent Privilege

The clergy privilege forbids judicial inquiry into certain communications between clergy and individuals seeking spiritual counsel.<sup>30</sup> Section II.A.1 explains the privilege's history, its introduction to the American legal system, and the policy rationale

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21. See *infra* Section II.C. (discussing how modern religions are integrating AI into ministry).

22. See *infra* Section III.A. (arguing religiously endorsed AI communications can be privileged).

23. See *infra* Section III.B. (exploring the interplay between the clergy privilege and AI worship).

24. See *infra* Section III.C. (explaining the Constitutional restraints on AI regulation in ministry).

25. See *infra* Section III.D. (proposing church leaders institute terms-of-use surrounding AI).

26. Jon Gruda, *AI or Not, Here Faith Comes: AI and Spiritual Beliefs*, PSYCH. TODAY (Nov. 23, 2023), <https://www.psychologytoday.com/us/blog/of-leaders-and-traits/202311/ai-or-not-here-faith-comes-ai-and-spiritual-beliefs>.

27. See *infra* Section II.A. (discussing the clergy privilege's rationale and majority approach).

28. See *infra* Section II.B. (discussing how modern AI has evolved and its current state).

29. See *infra* Section II.C. (explaining how modern faith groups have integrated AI into ministry).

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

behind its adoption.<sup>31</sup> Section II.A.2 details the privilege's interaction with the Constitution's Free Exercise and Establishment Clause (Religion Clauses), and how they require neutrality as to the privilege's application to *all* religious beliefs.<sup>32</sup>

### 1. The Privilege's History, Evolution, and Rationale

The documented recognition of the clergy privilege spans over a thousand years.<sup>33</sup> Before the Norman Conquest in 1066, legal records from Anglo-Saxon England recognized the merit of the confidential confession.<sup>34</sup> The necessity for confessions garnered support throughout England, as Henry 1 (1100-35) stated: "Priests should guard that they not reveal to acquaintances or strangers what has been confessed to them by those who come for confession."<sup>35</sup> The *Articuli Cleri*, formally enacted by Edward II in 1315, is the earliest known statutory text that recognized the privilege.<sup>36</sup> In the early 1600s, Lord Edward Coke wrote that the *Articuli Cleri*'s provisions acknowledging the clergy privilege were still recognized in English law—emphasizing its long-standing history in Western culture.<sup>37</sup>

The act of confessing one's sins and seeking forgiveness within the Catholic Church provides an example of the reverence surrounding the practice.<sup>38</sup> The law of the Catholic Church (Canon Law) requires its members, once reaching the age of discretion (i.e., approximately 15-

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31. See *infra* Section II.A.1. (explaining the clergy privilege background and majority approach).

32. See *infra* Section II.A.2. (discussing denominational neutrality in the clergy privilege).

33. See 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2394 (John T. McNaughton rev. 1961); Lennard Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 13 REGENT U. L. REV. 145, 146 (2000).

34. See Richard Nolan, *The Law of the Seal of the Confession*, 13 CATH. ENCYCL. 649, 652 (1913), construed in Edward Hogan, Jr., *A Modern Problem on the Privilege of the Confessional*, 6 LOY. L. REV. 1, 8 (1951).

35. 2 W. BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE 991 (2d ed. 1882); Jacob Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 97-99 (1983).

36. See generally, HASTINGS LYON, EDWARD COKE, ORACLE OF THE LAW (Houghton Mifflin 1926). Contemporary commentators refer to this statute as proof that English parliamentary law recognized the privilege. See Yellin, *supra* note 35, at 97-100.

37. See LYON, *supra* note 36, at 629. The first case involving the clergy privilege comes from the attempted assassination of James I in the infamous gunpowder plot. See *Gunpowder Plot*, BRITANNICA, <https://www.britannica.com/event/Gunpowder-Plot/Gunpowder-treason-and-plot> (last updated Jan 5, 2024). Guy Fawkes, the architect of the attempted assassination, had confided in his spiritual advisor Father Garnet. *Id.* At trial, Father Garnet refused to testify because he had received the information from Fawkes through confession. *Id.* As a result, Garnet was sentenced to death. Hogan, *supra* note 34, at 11-12 (citing 1 & 2 Phil. & M., ch. 10, § 8 (1554)).

38. Jude Ezeanokwasa, *The Priest-Penitent Privilege Revisited: A Reply to the Statutes of Abrogation*, 9 INTERCULTURAL HUM. RTS. L. REV. 42, 48-53 (Oct. 15, 2014).



18 years old), to confess their sins to a priest annually.<sup>39</sup> Not only is a requirement to confess imposed on members but clergy face sanctions for violating the sacramental seal of confession.<sup>40</sup> The Catechism of the Catholic Church states “[i]t is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason,” and the punishment could include excusing that priest from the priesthood.<sup>41</sup> While many pastors in different faiths view it as a moral obligation to keep communications with congregants seeking spiritual guidance confidential, certain faiths have canonized this obligation—showing the privilege’s social importance to religion as a whole.<sup>42</sup>

In the United States, the privilege’s legal roots trace back to an 1813 decision in New York state court.<sup>43</sup> The case was *People v. Phillips*, where Phillips had confessed to a Catholic Priest, Father Kohlman, to having committed theft.<sup>44</sup> The court, noting the social importance of confession, instructed Father Kohlman not to divulge any information received from Phillips through confession.<sup>45</sup> Four years later, another New York court rejected the privilege’s application to a Protestant priest because the church did not have a formal confessional requirement.<sup>46</sup> Following public discontent resulting from these conflicting decisions, the New York legislature statutorily recognized the clergy privilege—the first state to do so.<sup>47</sup> New York’s enactment served as a litmus test for other states, eventually leading to recognition of the privilege across all U.S. jurisdictions.<sup>48</sup>

Federal privilege law is shaped by these state statutes.<sup>49</sup> In 1973, the Model Rules of Evidence proposed a clergy privilege—endorsed by the Supreme Court.<sup>50</sup> However, Congress ultimately enacted a “catch-all” privilege—Federal Rule of Evidence 501—requiring federal courts to apply state privilege law, and otherwise, are governed by “[t]he common law . . . in the light of reason and experience.”<sup>51</sup> As

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39. *Id.* at 49; 1983 CODE c.989.

40. 1983 CODE c.983, §1.

41. *Id.*

42. See Ezeanokwasa, *supra* note 38, at 51-53.

43. See *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813) (unpublished); Diaconis, *supra* note 16, at 1213-24.

44. Shawn Bailey, *How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege*, 2002 BYU L. REV. 489, 489 (2002).

45. See Diaconis, *supra* note 16, at 1208 (explaining *People v. Phillips* procedural history).

46. *People v. Smith*, N.Y. City Hall Rec. 77 (1817), reprinted in 1 CATH. L. 198 (1955).

47. See 2 N.Y. Rev. Stat. pt. III, ch. VII, tit. 3, art. 8, § 72 (1829) (since amended).

48. See *supra* note 4 (presenting all state clergy privilege statutes).

49. Christine Bartholomew, *Exorcising the Clergy Privilege*, 103 VA. L. REV. 1015 (2017).

50. *Id.*; See Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183 (1973); Model Code Evid. 219 (Am. Law Inst. 1942).

51. FED. R. EVID. 501.

such, federal clergy privilege decisions are rare, but in *United States v. Nixon*, the Supreme Court unequivocally endorsed the privilege under federal common law.<sup>52</sup>

The privilege hinders fact-finding, distorts the record, and undermines “the central truth-seeking function of the courts.”<sup>53</sup> Nevertheless, the privilege is embraced and justified, most commonly, under a utilitarian view of individual ethics.<sup>54</sup> This is because relationships and communications with clergy are socially desirable in that they lead to spiritual salvation and repentance.<sup>55</sup> In turn, this fosters “a morally-grounded and well-behaved citizenry,” justifying the sacrifice of relevant evidence.<sup>56</sup> As articulated by the Supreme Court, the privilege “recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”<sup>57</sup> Whether these preconceptions are right or wrong, the privilege is seen as instrumental in safeguarding religion’s role in civil society.<sup>58</sup>

The privilege requires a (1) confidential, (2) communication, (3) made to a cleric, or similar functionary, (4) acting in their professional capacity.<sup>59</sup> Unlike qualified privilege, the clergy privilege is absolute—meaning “a compelling need for the underlying information cannot override it.”<sup>60</sup> Amongst the states, the privilege varies in two principal respects: their definition of clergy acting in their professional capacity and who can claim or waive the privilege.<sup>61</sup> The following will address each element in turn and identify the majority standard.

As to confidentiality, states uniformly interpret this as any communication intended by the communicant to convey something

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52. *United States v. Nixon*, 418 U.S. 683, 709 (1974) (“[A] priest may not be required to disclose what has been revealed in professional confidence.”).

53. *Swidler & Berlin v. United States*, 524 U.S. 399, 413 (1998) (O’Connor, J., dissenting); Michael Cassidy, *Sharing Sacred Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1632 (2003); see Bartholomew, *supra* note 49, at 1022-23.

54. Fred Kuhlmann, *Communications to Clergymen-When Are They Privileged?*, VAL. U.L. REV. 265, 286-87 (1968).

55. See *id.*; Cassidy, *supra* note 53, at 1632-33.

56. See Cassidy, *supra* note 53, at 1632-35; MCCORMICK ON EVIDENCE § 72 (John William Strong ed., 4th ed. 1992).

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

58. See Michael Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 293, 309 (1993); Diaconis, *supra* note 16, at 1207-08.

59. See Bartholomew, *supra* note 49, at 1023.

60. *Id.*; Robert Gibbons, *Evidence—Defendant Must Establish Relevancy Before Obtaining Access to Sexual Abuse Victim’s Privileged Records*—Commonwealth v. Bishop, 416 Mass. 169, 617 N.E.2d 990 (1993), 28 SUFFOLK U. L. REV. 243, 247 n.22 (1994).

61. *Cox v. Miller*, 296 F.3d 89, 102 (2d Cir. 2002).

with an “objectively reasonable expectation[]” that the communication is in confidence.<sup>62</sup> As to the scope of the communication, the majority of states have a similarly broad interpretation, limiting the privilege to those communications, whether oral or non-oral, made with the intent of seeking “spiritual counsel and advice.”<sup>63</sup> This merely eliminates the privilege’s applicability to communications, or portions therein, made “with a wholly secular purpose.”<sup>64</sup>

As to the definition of clergy acting in their professional capacity, the majority of states enacted (or with slight variation) the broad definition under Proposed Federal Rule of Evidence 506.<sup>65</sup> Under this definition, the drafters of the rule intended to capture the broader concept of religious freedom.<sup>66</sup> Thus, the majority approach implements a denominationally neutral definition (i.e., the privilege is not limited to more “traditional” religions).<sup>67</sup> It takes into account the reasonable belief of the individual seeking counsel (i.e., whether that individual subjectively believed they were speaking to the clergy).<sup>68</sup>

Commentators explain that the ambiguity and lack of legislative guidance on clerical definitions are intentional.<sup>69</sup> States want courts to give reasonable deference to the church or religious institution’s *own*

62. See *State v. Willis*, 75 A.3d 1068, 1074 (2013) (“We conclude, based upon this precedent and the wording of our statute, that whether a communication is a ‘confidence’ within the meaning of the religious privilege depends upon the objectively reasonable expectations of the communicant, under the totality of the circumstances.”). The precedent this court relied on included decisions from other clergy privilege majority jurisdictions such as New York, New Jersey, Texas, and the Third Circuit. *Id.* (citing *Keenan v. Gigante*, 390 N.E.2d 1151 (N.Y. 1979)); *State v. J.G.*, 990 A.2d 1122, 1124 (N.J. 2010); *In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990).

63. TENN. CODE ANN. § 24-1-206(b) (2000). See, e.g., ALA. CODE § 12-21-166 (2012) (“[A communication] to seek spiritual counsel or comfort”); WASH. REV. CODE § 5.60.060(3) (2016) (“[A]ny confession or sacred confidence made to [the clergy] in his or her professional character”). For example, a marital counseling session was found to have the privilege apply and the court explained that the communication does not need to be strictly penitential to be protected. *Simpson v. Tennant*, 871 S.W.2d 301, 306 (Tex. App. Ct. 1994).

64. *People v. Carmona*, 627 N.E.2d 959, 962 (N.Y. 1993); *Simpson*, 871 S.W.2d at 306.

65. PROPOSED FED. R. EVID. 506(a)(1) (unenacted) reads as follows: “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.” For states with slight variations, consider: ARIZ. REV. STAT. §§ 12-2233, 13-4062, 46-453 (“[C]lergyman’ . . . is not limited to members of religious organizations having an ordained clergy. Whether a person is a clergyman of a particular religious organization . . . should be determined by that organization’s ecclesiastical rules, customs, and laws.”); MO. ANN. STAT. § 491.060(4) (“Any person practicing as a minister of the gospel, priest, rabbi, or other person serving in a similar capacity for any organized religion”).

66. See H.R. 93-650 (1973), S.Rep. 93-1277 (1974), H.R. Conf. Rep. 93-1597 (1974), *reprinted in* 1974 U.S.C.A.A.N. 7051, 7052-53 (explaining the advisory committee’s rationale behind the broad language used in proposed federal rule of evidence 506, later adopted by the majority of states).

67. *Id.*

68. *Id.*

69. See Bartholomew, *supra* note 49, at 1052.

ecclesiastical definition of clergy in privilege determinations.<sup>70</sup> This is primarily due to the proliferation of new religious movements across the U.S. over the past decade and states' attempts to avoid First Amendment challenges for favoring one religion over another.<sup>71</sup> Thus, the majority approach protects communications with clergy, pastors, ministers, and, importantly, any "similar functionary" of a church or faith group.<sup>72</sup> States have interpreted "similar functionary" to include elders, nuns, deacons, and those "who perform officially recognized church functions" regardless of status as full- or part-time staff or as a volunteer.<sup>73</sup>

Finally, as to who may claim the privilege, the majority of states provide that the penitent alone is the holder and that the clergy can claim the privilege on their behalf.<sup>74</sup> For the remainder of this Article, the term "clergy privilege" refers to the prevailing majority approach as described, and any noteworthy changes will be explicitly indicated.<sup>75</sup>

## 2. Denominational Neutrality

Respecting the religious beliefs of diverse faith groups is central to the clergy privilege.<sup>76</sup> Though the Supreme Court has never addressed the issue, commentators agree that the Free Exercise Clause demands recognition of the privilege across all religions.<sup>77</sup> Yet, a delicate balance remains because an overly broad privilege would violate the

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70. *Id.*; *In re Grand Jury Investigation*, 918 F.2d 374, 387 n.21, 388 (3d Cir. 1990) (directing the lower court to look at church doctrine in determining if counseling qualified as seeking spiritual advice).

71. *See Hedstrom*, *supra* note 18.

72. *See Cassidy*, *supra* note 53, at 1656.

73. *Id.* *See e.g.*, *Eckmann v. Bd. of Educ.*, 106 F.R.D. 70, 72-73 (E.D. Mo. 1985) (holding a nun served in a similar capacity as clergy, thus the privilege applied); *People v. Johnson*, 497 N.Y.S. 2d 539, 539 (App. Div. 1985) (holding communications with non-ordained Muslim brother privileged).

74. Jennifer Gray, *Priest(Clergy)-Penitent Privilege: Statutes*, AVE MARIA L. LIB., <https://avemarialaw.libguides.com/c.php?g=1324572&p=9831170> (last updated Aug. 21, 2023). The penitent alone can claim the privilege in 35 states. *Id.* In 14 states, the clergy and the penitent can claim the privilege, and in Virginia, the clergy member alone can claim the privilege. *Id.*

75. *See supra* notes 62-74 and accompanying text (explaining the majority clergy privilege approach amongst the fifty states, District of Columbia, and federal common law).

76. Robert Radel & Andrew Labbe, *The Clergy-Penitent Privilege: An Overview*, FDCC, at 394-96 (2015), [https://cdn.ymaws.com/thefederation.site-ym.com/resource/resmgr/docs/Quarterly/Archive/V64N4\\_Radel.pdf](https://cdn.ymaws.com/thefederation.site-ym.com/resource/resmgr/docs/Quarterly/Archive/V64N4_Radel.pdf)

77. *See Diaconis*, *supra* note 16, at 1208; Terrence Kossegi & Barbara Phair, *The Clergy-Communicant Privilege in the Age of Electronic Surveillance*, 12 ST. JOHN'S J. LEGAL COMMENT. 241, 248 (1996).

Establishment Clause by preferencing religion over nonreligion.<sup>78</sup> Thus, while legislators are incentivized to keep the privilege narrow—in line with the judiciary’s truth-seeking function—they must ensure not to discriminate against lesser-known or “fringe” religions (e.g., only applying the privilege to traditional religions, such as Catholicism).<sup>79</sup>

Religion-specific preference in the clergy privilege context would violate the Establishment Clause.<sup>80</sup> The Supreme Court stated, “[n]either a state nor the Federal Government . . . can pass laws which . . . prefer one religion over another.”<sup>81</sup> Any law giving undue preference to one religion is subject to strict scrutiny, requiring the government to show a compelling interest and that its actions were the least restrictive means of accomplishing it.<sup>82</sup> Scholars who have addressed the privilege’s interplay with the Establishment Clause recognize no apparent compelling interest.<sup>83</sup> Denominational neutrality is embedded in the Establishment Clause, requiring “that clergy privilege statutes protect all religions equally.”<sup>84</sup>

To date, there has been no constitutional challenge of a state’s clergy privilege statute as prejudicial towards one religion over another.<sup>85</sup> This, in part, is due to the broad language used in privilege statutes.<sup>86</sup> However, with the onslaught of developments in AI, and its integration into traditional pastoral roles, questions concerning the implications of this broad language and its effect on the privileged nature of communications with “AI pastors” are forthcoming in the legal arena.<sup>87</sup>

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78. See *Lemon v. Kurtzman*, 403 U.S. 602, 614–20 (1971) (explaining the unconstitutionality of favoring religion over nonreligion).

79. See Diaconis, *supra* note 16, at 1209.

80. See *id.*; *Larson v. Valente*, 456 U.S. 228, 251–53 (1982).

81. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

82. See *Larson*, 456 U.S. at 245–47.

83. Ronald Colombo, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y. U. L. REV. 225, 225 n.1 (1998).

84. Diaconis, *supra* note 16, at 1210; Mary Mitchell, *Must Clergy Tell?: Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 779–80 (1987).

85. See generally Diaconis, *supra* note 16, at 1208–11 (providing an empirical study that determines no state’s clergy privilege statute has been challenged on Establishment Clause grounds).

86. See, e.g., ARIZ. REV. STAT. §§ 12-2233, 13-4062, 46-453 (“[C]lergyman’ . . . is not limited to members of religious organizations having an ordained clergy. Whether a person is a clergyman . . . should be determined by that organization’s ecclesiastical rules, customs, and laws.”).

87. See Jackson et al., *supra* note 2, at 3345–48.

### B. *Modern Sophistication of AI*

“Dig into every industry, and you’ll find AI changing the nature of work.”<sup>88</sup> Churches and religious institutions are no different.<sup>89</sup> However, before one can examine how religions are utilizing AI and the legal ramifications that follow, it is crucial to understand AI’s modern capabilities.<sup>90</sup> Section II.B.1 explains how AI has developed and how it works.<sup>91</sup> Section II.B.2 discusses AI’s integration into certain industries—specifically, its employment in more traditional professional roles and how it performs in comparison to its human equivalents.<sup>92</sup> Finally, Section II.B.3, tailored towards privilege law, explains how churches can keep AI communications confidential through the use of security software.<sup>93</sup>

#### 1. What is AI?

AI has existed since the early 1900s and involves applied mathematics, computer science, and neuroscience.<sup>94</sup> Definitions from industry professionals abound, but one generally accepted defines AI as “the art of creating machines that perform functions that require intelligence when performed by people.”<sup>95</sup> AI is operated by algorithms which, at their most rudimentary level, is a series of steps (e.g., get a jack and spare tire) created to accomplish a goal (e.g., install a new tire).<sup>96</sup> This technology is run by algorithms, enabling AI models to problem-solve and learn the best way to install a tire or whatever the

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88. Eliza Strickland, *AI Experts Speak: Memorable Quotes from Spectrum's AI Coverage*, IEEE SPECTRUM (30 Sept. 2021), <https://spectrum.ieee.org/artificial-intelligence-quotes>.

89. See Jackson et al., *supra* note 2, at 3345-46.

90. Brian Haney, *AI Patents: A Data Driven Approach*, 19 CHI.-KENT J. INTELL. PROP. 407, 410-11 (2020).

91. See *infra* Section II.B.1. (explaining how AI and algorithmic technology work).

92. See *infra* Section II.B.2. (discussing traditional professional roles that AI is integrating).

93. See *infra* Section II.B.3. (explaining how security software in AI can ensure confidentiality).

94. PETER DENNING & MATTI TEDRE, COMPUTATIONAL THINKING 90-91 (2019).

95. See RAY KURZWEIL, THE AGE OF INTELLIGENT MACHINES 14 (1992).

96. Kolade Chris, *What is an Algorithm? Algorithm Definition for Computer Science Beginners*, FREE CODE CAMP (Dec. 13, 2022), <https://www.freecodecamp.org/news/what-is-an-algorithm-definition-for-beginners/#whatexactlyisanalgorithm>; Samuel Dick, *Warning: Algorithms Harm Children: How Texas's Failure to Warn Doctrine Can Address the Youth Mental Health Crisis*, TEX. TECH L. REV. (forthcoming July 2024) (explaining how algorithmic technology works in the context of advertisement and recommendation algorithms).

predetermined goal is.<sup>97</sup>

Machine learning (ML), a sub-field of AI, is an advanced algorithmic technology that allows the model “to derive knowledge from information.”<sup>98</sup> ML is a process in which the algorithms operating it begin to improve through experience (i.e., evaluating more data and user feedback).<sup>99</sup> The more data ML models are fed, the more the model can analyze, draw inferences, and effectively “learn.”<sup>100</sup> A common use of ML is with music streaming services, like Spotify.<sup>101</sup> With Spotify, every time you listen to or download a song, the algorithm draws inferences based on your preferences and shows you more songs of a similar nature.<sup>102</sup>

Deep learning is a sub-field of ML and, while the terms are frequently used interchangeably, deep learning is a more advanced form of algorithmic learning.<sup>103</sup> Deep learning “attempts to mimic the activity in layers of neurons in the [human brain’s] neocortex” by learning “to recognize patterns in digital representations of sounds, images, and other data.”<sup>104</sup> Deep learning utilizes artificial neural networks (ANNs) which are software inspired by the biological function of the human brain.<sup>105</sup> In other words, when we think, our brain generates electrical pulses that signal a transfer of information to another neuron, enabling complex processing of information.<sup>106</sup> Deep learning software relies on these neural networks or transistor communications—allowing it to learn *independently* from coding intervention or manual engineering, as opposed to ML.<sup>107</sup>

It was this sophistication of deep learning that allowed generative AI models, such as ChatGPT, to begin imitating the human brain’s processing of information and demonstrate human-level responses to

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97. *Artificial Intelligence (AI) vs. Machine Learning*, COLUM. ENG’G, <https://ai.engineering.columbia.edu/ai-vs-machine-learning/> (last visited Jan. 20, 2024).

98. See Haney, *supra* note 90, at 411 (citing JOHN KELLEHER, DEEP LEARNING 26-28, 123 (Sept. 10, 2019)).

99. Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L. REV. 1277, 1278 (2018).

100. *Deep Learning vs. Machine Learning: A Beginner’s Guide*, COURSERA (Nov. 29, 2023), <https://www.coursera.org/articles/ai-vs-deep-learning-vs-machine-learning-beginners-guide>.

101. *Id.*

102. *Id.*

103. See *What is Artificial Intelligence (AI)?*, IBM, <https://www.ibm.com/topics/artificial-intelligence> (last visited Jan. 20, 2024) [hereinafter *What is AI?*].

104. See Robert Hof, *Deep Learning*, MIT TECH. REV. (Apr. 23, 2013), <https://www.technologyreview.com/technology/deep-learning/>.

105. *Id.*

106. *Id.*

107. Guy Caspi, *What’s the Difference Between Deep Learning and Machine Learning?*, BETANEWS (Dec. 12, 2016), <https://betanews.com/2016/12/12/deep-learning-vs-machine-learning/>.

prompts.<sup>108</sup> Broadly speaking, generative models learn from data “to create a new work.”<sup>109</sup> While generative models have existed for over a decade, it was the *independent* learning ability of deep learning that allowed generative models to create *original* responses from images, speech, and other complex types of data.<sup>110</sup>

With deep learning’s ability to achieve originality, the next interdisciplinary field of study seeking to increase AI’s ability to learn and think was natural language processing (NLP).<sup>111</sup> NLP was designed to use formal algorithmic logic to analyze and interpret “informal structures of human language.”<sup>112</sup> In other words, to understand and generate language as well as humans can, the models must be able to understand abstract concepts such as sarcasm, common sense, or even body language—which it can.<sup>113</sup> Commonly known models such as Apple’s Siri and Amazon’s Alexa are fairly simplistic versions of generative AI integrated with language processing technology.<sup>114</sup> Google’s recently launched Gemini model represents a more complex version of this generative AI integrated with NLP.<sup>115</sup> Gemini can accomplish human intelligence and *objective reason*, as opposed to conventional models that merely learn or search for answers.<sup>116</sup> This level of intelligence has developed to the point AI models can create their *own* language.<sup>117</sup>

The development of this technology has and will facilitate and drive advancements in medicine, education, and defense.<sup>118</sup> While

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108. See Haney, *supra* note 90, at 7.

109. See *What is AI?*, *supra* note 103.

110. *Id.*

111. See Haney, *supra* note 90, at 4.

112. *Id.*

113. *Id.* at 4-11.

114. See Bernard Marr, *Are Alexa And Siri Considered AI?*, BERNARD MARR & CO. (last visited Jan. 20, 2024), <https://bernardmarr.com/are-alexa-and-siri-considered-ai/>.

115. Jennifer Elias, *Google Launches its Largest and ‘Most Capable’ AI Model, Gemini*, CNBC (Dec. 6, 2023), <https://www.cnbc.com/2023/12/06/google-launches-its-largest-and-most-capable-ai-model-gemini.html>.

116. *Id.*; Ellen Duffer, *As Artificial Intelligence Advances, What Are its Religious Implications?*, RELIGION & POL. (Aug. 29, 2017), <https://religionandpolitics.org/2017/08/29/as-artificial-intelligence-advances-what-are-its-religious-implications/>.

117. Siobhan Kenna, *Facebook Shuts Down AI Robot After It Creates Its Own Language*, HUFFPOST (Aug. 2, 2017), [https://www.huffpost.com/entry/facebook-shuts-down-ai-robot-after-it-creates-its-own-language\\_n\\_61087608e4b0999d2084f6bf](https://www.huffpost.com/entry/facebook-shuts-down-ai-robot-after-it-creates-its-own-language_n_61087608e4b0999d2084f6bf). While no consumer AI model purports to have reached the level of artificial general intelligence, such technological learning is on the horizon. See Cameron Hashemi-Pour, *Artificial General Intelligence*, TECHTARGET, (last updated Nov. 2023) <https://www.techtargget.com/searchenterpriseai/definition/artificial-general-intelligence-AGI>.

118. Executive Office of the President National Science and Technology Council Committee on Technology, *Preparing for the Future of Artificial Intelligence*, at 6-11 (Oct. 2016), [https://obamawhitehouse.archives.gov/sites/default/files/whitehouse\\_files/microsites/ostp/NSTC/preparing\\_for\\_the\\_future\\_of\\_ai.pdf](https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/microsites/ostp/NSTC/preparing_for_the_future_of_ai.pdf).



Corporate America employs AI to the point it is ubiquitous and shapes nearly every facet of our lives, certain industries employ AI in roles analogous to human professionals.<sup>119</sup>

## 2. AI's Employment in Analogous Roles to Human Professionals

“Contemporary AI systems are now becoming human-competitive at general tasks,”<sup>120</sup> and researchers claim AI could replace approximately 85 million jobs by 2025.<sup>121</sup> While it comes as no surprise that AI can handle certain coding, data analysis, and customer service positions<sup>122</sup>—what traditional professional roles are they augmenting? And how are they performing?

Many AI models are being developed or are already “used directly by patients” in the medical field.<sup>123</sup> Some applications are commonly encountered, such as telemedicine with chatbots, remote observation, and health and well-being apps—proving cost-effective and empowering to patients.<sup>124</sup> While this AI employment seems practical, what about when you go to the ER and are seen by an AI bot?<sup>125</sup> John Hopkins, Bayview Medical Center, and “many more” are currently implementing TriageGO, a deep-learning AI model that conducts initial triage (i.e., diagnosing patients upon arrival and instructing staff on the appropriate course of care).<sup>126</sup> This implementation resulted from a study comparing the proper diagnosis of patients between

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119. Clodagh O'Brien, *How Do Social Media Algorithms Work?*, DIGIT. MKTG. INST. (Apr. 28, 2023), <https://digitalmarketinginstitute.com/blog/how-do-social-media-algorithms-work>.

120. Connie Loizos, *1,100+ Notable Signatories Just Signed an Open Letter Asking 'All AI Labs to Immediately Pause for at Least 6 Months'*, TECHCRUNCH+ (Mar. 29, 2023), <https://techcrunch.com/2023/03/28/1100-notable-signatories-just-signed-an-open-letter-asking-all-ai-labs-to-immediately-pause-for-at-least-6-months/?guccounter=1>.

121. Matthew Urwin, *AI Taking Over Jobs: What to Know About the Future of Jobs*, BUILTIN (Feb. 23, 2024), <https://builtin.com/artificial-intelligence/ai-replacing-jobs-creating-jobs>.

122. *10 Jobs AI Might Soon Replace (And Those That It Won't)*, SENSORIUM ARC: WEB 3 PLATFORM (Mar. 29, 2023), <https://sensoriumarc.com/articles/jobs-ai-might-replace-and-those-it-wont>.

123. Brent Mittelstadt, *The Impact of Artificial Intelligence on the Doctor-Patient Relationship*, COUNCIL OF EUROPE (Dec. 2021), <https://rm.coe.int/inf-2022-5-report-impact-of-ai-on-doctor-patient-relations-e/1680a68859>.

124. *See id.*

125. *See* Trisha Chakraborty, *Harnessing the Power of AI in Emergency Triage: A Paradigm Shift*, COLUM. J. SCI., TECH., ETHICS, & POLICY (Oct. 24, 2023), <https://medium.com/columbia-journal-of-science-tech-ethics-and-policy/harnessing-the-power-of-ai-in-emergency-triage-a-paradigm-shift-0af7786948bd>.

126. *Id.*

physicians and GPT-3 AI models.<sup>127</sup> The study found that AI correctly diagnosed 88% of the time and physicians 96%.<sup>128</sup> Mednition Co. trained a deep learning AI model on healthcare and early patient intervention—named KATE.<sup>129</sup> While studies are still in the early stages, one reported that KATE's diagnosis accuracy was 27% higher than nurses.<sup>130</sup> In all, because of financial incentives, the ability to work 24/7, and now diagnosis accuracy, it is practical for medical institutions to employ AI in traditional professional roles.<sup>131</sup>

Other industries' employment of AI in professional roles shows similar successes.<sup>132</sup> For example, AI used in the financial sector demonstrated better performance than human portfolio managers at “predicting down days . . . succeed[ing] when volatility was high, and avoided trading all together before big market-moving events.”<sup>133</sup> In recruitment and talent acquisition, AI is not only displacing HR tasks such as resume screening and answering applicant questions but is conducting interviews, hiring, and firing employees.<sup>134</sup> One study surveying Fortune 500 companies that integrated AI talent acquisition found it “help[ed] find higher quality candidates and reduce[d] the overall time it takes to hire.”<sup>135</sup> These examples give a glimpse of AI's integration into traditional professional roles.<sup>136</sup> It highlights that such integration, on one hand, is necessary for industries to maintain market competitiveness, and on the other, that it is reasonable to believe that AI can adequately fill traditional professional roles, even as pastors in churches.<sup>137</sup>

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127. See David Levine et al., *The Diagnostic and Triage Accuracy of the GPT-3 Artificial Intelligence Model*, NAT'L LIB. MED. (Feb. 1, 2023), <https://doi.org/10.1101/2023.01.30.23285067>.

128. *Id.*

129. See Chakraborty, *supra* note 125.

130. See Gabrielle Chenais et al., *Artificial Intelligence in Emergency Medicine: Viewpoint of Current Applications and Foreseeable Opportunities and Challenges*, 25 NAT'L LIB. MED. e40031 (May 23, 2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10245226/>.

131. See *id.*

132. Kweilin Ellingrud et al., *Generative AI and the Future of Work in America*, MCKINSEY GLOB. INST. (July 26, 2023), <https://www.mckinsey.com/mgi/our-research/generative-ai-and-the-future-of-work-in-america>.

133. Derek Horstmeyer et al., *What Can AI Do for Investment Portfolios? A Case Study*, CFA INST. (Dec. 15, 2022), <https://blogs.cfainstitute.org/investor/2022/12/15/what-can-ai-do-for-investment-portfolios-a-case-study/>.

134. See Jack Kelly, *How AI-Powered Tech Can Help Recruiters And Hiring Managers Find Candidates Quicker And More Efficiently*, FORBES (Mar. 15, 2023), <https://www.forbes.com/sites/jackkelly/2023/03/15/how-ai-powered-tech-can-help-recruiters-and-hiring-managers-find-candidates-quicker-and-more-efficiently/?sh=5f6622433a3f>.

135. *How Artificial Intelligence (AI) in HR Is Changing Hiring*, USC ANNENBERG (Nov. 15, 2023), <https://communicationmgmt.usc.edu/blog/ai-in-hr-how-artificial-intelligence-is-changing-hiring>.

136. See Haney, *supra* note 90, at 4.

137. See Mittelstadt, *supra* note 123 (“A potential exists for algorithmic systems to displace responsibilities traditionally fulfilled by . . . professionals.”); Jackson et al., *supra* note 2, at 3345-48.

### 3. AI Models Can Secure Confidential Communications

Advanced AI models operate and learn on a public data visibility system by drawing information from the open internet.<sup>138</sup> This operating system renders all communications with users non-confidential because they are accessible to the general public.<sup>139</sup> That is, everything you type into an AI model is theoretically visible to everyone with internet access (or, at least, its designers).<sup>140</sup> So, the question arises, can AI models, which require access to the open internet to function, work on a localized level to ensure confidential communications with users?<sup>141</sup> Yes, AI models can.<sup>142</sup>

Similar to firewalls or general encryption software, AI models can store localized data on private servers or encrypted cloud services.<sup>143</sup> Such technology does not limit the model's ability to learn because it still has real-time internet access.<sup>144</sup> For example, doctors are bound to patient confidentiality, but they can generally draw from these experiences to better guide medical recommendations without revealing sensitive information from those encounters.<sup>145</sup> Similarly, AI models can be coded to restrict the output of specific user data (e.g., name, address, account details, etc.) in future communications, while still generally "learning" from those interactions.<sup>146</sup> This layer of encryption does not hinder IT staff's ability to update the model.<sup>147</sup> Finally, while AI models can be coded to protect sensitive and proprietary data, such security software includes limited access controls where certain individuals can access the transcripts uploaded on the model with appropriate passwords or authentication.<sup>148</sup>

In summary, AI is rapidly advancing in its sophistication and ability

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138. Tobin South et al., *Secure Community Transformers: Private Pooled Data for LLMs*, MIT CONNECTION SCI. & MEDIA LAB. 1, 2-4 (Jan. 22, 2024), <https://transformers.mit.edu/SecureCommunityTransformersMITSouth.pdf>.

139. *Id.* at 4.

140. *Id.*

141. *Id.* at 1.

142. *See generally id.* (explaining how security protocols can be integrated into AI models).

143. *See id.* at 5-6.

144. *See* Sandra Petronio et al., *Navigating Ethics of Physician-Patient Confidentiality: A Communication Privacy Management Analysis*, 16(4) NAT'L LIB. MED. 41, 41-45 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3523934/>. With all technology, this system does not guarantee protection from all security breaches. *Id.* These concerns will always be present, but if users take reasonable steps to secure communications, courts generally view this as sufficient. *Id.*

145. *Id.*

146. Tehseen Zia, *Why 'Local' LLMs on Your Own Devices May Be the Next Big Deal*, TECHOPEDIA (Nov. 15, 2023), <https://www.techopedia.com/federated-learning-and-large-language-models-llms>.

147. *See id.*

148. *See* South, *supra* note 138, at 2.

to carry out traditional professional roles.<sup>149</sup> For better or worse, industries are incentivized to employ AI in these positions because of its ability to think originally, reason abstractly, and perform at a similar level as its human equivalent.<sup>150</sup> So, how are not-for-profit organizations, such as religious groups, integrating AI?<sup>151</sup>

### *C. The Way of the Future in AI and Religious Culture*

Religion is changing.<sup>152</sup> However, this has always been true of religious practices due to globalization, social and political movements, generational shifts, and developments in philosophy and theology.<sup>153</sup> With religion constantly adapting to these worldly externalities, the question is never whether religion is changing, but *how*.<sup>154</sup> Modern developments in AI have had no less an impact on religious culture and belief systems.<sup>155</sup> Computer scientists confirm “their intent to push the limits of AI capabilities,” leaving outsiders to grapple with the associated ethical implications.<sup>156</sup> The following sections focus on different ways AI is being integrated into religion. Section II.C.1 explains AI integration as (1) a tool in ministry and (2) in replacing traditional pastoral roles.<sup>157</sup> Section II.C.2 discusses the worship of AI, as an independent religious belief.<sup>158</sup>

#### 1. Religious Groups Integration of AI

For many churches or religious groups, AI is viewed as an effective

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149. *See supra* Section II.B.1. (discussing the level of sophistication that AI has reached).

150. *See supra* Section II.B.2. (explaining how AI works analogously to traditional professionals).

151. *See infra* Section II.C (discussing how religious institutions are integrating AI into ministry).

152. Gregory Sterling, *Rethinking Christianity in the 21st Century*, YALE DIVINITY SCH. (2015), <https://reflections.yale.edu/article/new-voyages-church-today-and-tomorrow/rethinking-christianity-21st-century>.

153. *See id.*

154. Erin Wilson, *The Changing Nature of Religion in Today's World*, LONDON SCH. ECON. & POL. SCI. (June 8, 2023), <https://blogs.lse.ac.uk/euoppblog/2023/06/08/the-changing-nature-of-religion-in-todays-world/>.

155. *See* Duffer, *supra* note 116.

156. *See id.*

157. *See infra* Section II.C.1. (discussing how different religions have integrated AI into ministry).

158. *See infra* Section II.C.2. (explaining how certain religions are worshiping AI as a god-like deity).

tool in ministry and evangelism.<sup>159</sup> One such tool is Pulpit AI, which is a generative AI model trained on Christian teachings, that takes input and “create[s] discussion questions, devotionals, social posts, blog posts and more.”<sup>160</sup> Another popular application is Robo Rabbi.<sup>161</sup> Trained on thousands of years of Jewish teachings and the Torah, Robo Rabbi answers users’ questions about the Torah, summarizes scripture, and helps users better understand Judaism to bring them closer to God.<sup>162</sup>

Another example, whether viewed as sacrilegious or socially progressive, is the rise of “Bible GPTs” (or, sermon writing), which have radically changed individuals’ engagement with scripture.<sup>163</sup> Some pastors, who preached fully AI-generated sermons, were “deathly afraid” of the model’s ability and subsequent positive reception by their congregation.<sup>164</sup> Other pastors are praising the technology and its ability to save time while conveying theologically accurate messages.<sup>165</sup> Nevertheless, significant concern surrounds the perpetuation of bias or hallucinations (i.e., a response with false information), with AI generating biblical text.<sup>166</sup> Many faith groups are using AI as a tool to supplement pastoral work, but some religious leaders believe AI should take a more involved role.<sup>167</sup>

Global religions are incorporating AI to the point robot priests are assisting in worship, delivering sermons, and “comfort[ing] those experiencing a spiritual crisis.”<sup>168</sup> In 2023 at St. Paul’s Church in

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159. Kirsten Grieshaber, *Can a Chatbot Preach a Good Sermon? Hundreds Attend Church Service Generated by ChatGPT to Find Out*, ASSOCIATED PRESS (June 10, 2023), <https://apnews.com/article/germany-church-protestants-chatgpt-ai-sermon-651f21c24cfb47e3122e987a7263d348>.

160. *Turn One Sermon Into Unlimited Content*, PULPITAI, <https://pulpitai.com/> (last visited Jan. 27, 2024).

161. See Shaked Karabelnicoff, *Can An Algorithm Be Jewish? Meet Robo Rabbi, The AI Aiming To Do Good*, UNPACKED (Sept. 10, 2021), <https://jewishunpacked.com/can-an-algorithm-be-jewish-meet-robo-rabbi-the-ai-aiming-to-do-good/>.

162. See *id.*

163. Adam Graber, *Robot ‘Church Fathers’ Might Curate New Canons*, CHRISTIANITY TODAY (July 14, 2023), <https://www.christianitytoday.com/ct/2023/june-web-only/ai-tech-gpt-chatbot-bible-scripture-exegesis-church-canon.html>.

164. Cheryl Teh, *A Rabbi Used ChatGPT To Write A Sermon. He Said His Congregation's Reaction Made Him 'Deathly Afraid' — But That It Won't Put Him Out Of Work Just Yet*, BUS. INSIDER (Feb. 16, 2023), <https://www.businessinsider.com/rabbi-chat-gpt-ai-sermon-deathly-afraid-2023-2>.

165. Tim Wyatt, *AI Can Write A Great Sermon. But Should You Use It?*, PREMIER CHRISTIANITY (Aug. 16, 2023), <https://www.premierchristianity.com/news-analysis/ai-can-write-a-great-sermon-but-should-you-use-it/16146.article>.

166. See Graber, *supra* note 163.

167. See Sarah Al-Shaikh, *Austin Church Holds AI-Generated Service, Uses ChatGPT*, KXAN (Sept. 17, 2023), <https://www.kxan.com/news/local/austin/austin-church-holds-ai-generated-service-uses-chatgpt/>.

168. Sofia Bettiza, *God and Robots: Will AI Transform Religion?*, BBC (Nov. 9, 2023),

Bavaria, Germany, the face and stature of what looked like a human was standing in the pulpit.<sup>169</sup> What ensued were prayers, worship, and a sermon—completely orchestrated and delivered by an AI robot.<sup>170</sup> In Austin, Texas, a Christian church ran a service completely prompted by ChatGPT.<sup>171</sup> Another church introduced a physical robot named “SanTO.”<sup>172</sup> SanTO is a deep learning AI model, trained with thousands of years of Catholic history, that is helping congregants seek spiritual answers, understand the bible, and even “listen[] to confessions.”<sup>173</sup> While the Vatican has not formally endorsed SanTO and similar AI models to take part in the sacrament of confession, they have released guidance on its ethical implementation.<sup>174</sup> Nevertheless, many faith groups have formally affirmed the use of AI in filling traditional pastoral roles.<sup>175</sup>

In 2019, a Buddhist temple revealed a robot to the congregation that gives sermons and offers personalized spiritual counsel—“her” name is Mindar, the Buddhist deity of Mercy.<sup>176</sup> A Lutheran church is utilizing an AI-driven robot named “Bless-U-2,” capable of conducting spiritual counseling sessions and giving blessings in multiple languages.<sup>177</sup> In Taoist temples, congregations experiment with AI-driven robots giving sermons and conducting funerals and weddings.<sup>178</sup> They are using United Robotic Group’s “Pepper” model because of its ability to “recognize faces and basic human

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<https://www.bbc.com/reel/video/p09z6fnd/god-and-robots-will-ai-transform-religion->

169. See Pauline Cheong, *AI Won't Be Replacing Your Pastor Anytime Soon*, THE JOURNAL (Sept. 19, 2023), <https://www.the-journal.com/articles/ai-wont-be-replacing-your-pastor-any-time-soon/>.

170. *Id.* Jonas Simmerlein, a theologian and philosopher from the University of Vienna, conceived the idea for the AI-generated church services, stating “I conceived this service — but actually I rather accompanied it, because I would say about 98% comes from the machine.” Sejal Sharma, *AI Plays God: ChatGPT Delivers its First Sermon*, INTERESTING ENG’G (June 13, 2023), <https://interestingengineering.com/culture/ai-plays-god-chatgpt-delivers-its-first-sermon>.

171. See Al-Shaikh, *supra* note 167.

172. See Trovato et al., *supra* note 7.

173. *Id.*; Jackson et al., *supra* note 2, at 3345.

174. Jose Flahaux et al., *Ethics in the Age of Disruptive Technologies: An Operational Roadmap*, INST. FOR TECH., ETHICS & CULTURE at 7, 38 (June 2023), <https://www.scu.edu/media/ethics-center/itec/Ethics-in-the-Age-of-Disruptive-Technologies:An-Operational-Roadmap---ITEC-Handbook-June-2023.pdf>. In June 2023, the Vatican’s culture and education body, in partnership with Santa Clara University, released a 140-page AI ethics handbook for technology organizations. See Courtney Mares, *Vatican Announces that Artificial Intelligence will be Theme of Next World Day of Peace*, CATH. WORLD REPORT (Aug. 8, 2023), <https://www.catholicworldreport.com/2023/08/08/vatican-announces-that-artificial-intelligence-will-be-theme-of-next-world-day-of-peace/>.

175. See Cheong, *supra* note 169.

176. See Jackson et al., *supra* note 2, at 3345-47.

177. See *id.*

178. See Joshua Jackson, *Robot Preachers Get Less Respect, Fewer Donations*, AM. PSYCH. ASS’N (July 24, 2023), <https://www.apa.org/news/press/releases/2023/07/robot-preachers-less-respect>.

emotions.”<sup>179</sup> These groups explain that advancements in deep learning and generative technology were the final threshold in integrating AI into churches because of its ability to now meaningfully interact with members of the congregation.<sup>180</sup>

Today’s generation is inclined towards technological integration in all aspects of daily life.<sup>181</sup> This generational inclination seems similarly enthusiastic when it comes to seeking spiritual guidance from that same technology.<sup>182</sup> *Christian News* reported that a “quarter of UK adults . . . would be comfortable taking spiritual advice from an artificial[ly] intelligen[t] priest.”<sup>183</sup> Just under half of Christians polled in America believe churches should leverage AI in ministry.<sup>184</sup> This enthusiasm is compounded by the financial incentives of integrating AI, which affects church decision-makers.<sup>185</sup> Finally, many leaders of religious groups view AI as capable of giving effective spiritual advice and, importantly, can do so immediately—or at least more conveniently than human pastors.<sup>186</sup>

Certainly, AI models in traditional pastoral roles are rare and met with skepticism from the religious majority.<sup>187</sup> But with modern societies’ trend seeking technology-driven solutions and as AI’s role in traditional professions continues to normalize; research shows an upward trend in human’s willingness to take spiritual counsel from AI.<sup>188</sup> Some faith groups have taken this willingness to the extreme.<sup>189</sup>

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179. *Id.*

180. See Jackson et al., *supra* note 2, at 3345-49.

181. Omaudi Reid, *Can Artificial Intelligence Replace Pastors?*, ARROWS OF REVIVAL (July 21, 2021), <https://www.revivalarrows.com/blog/can-artificial-intelligence-replace-pastors>.

182. See *id.*; Chris Dyer, *Robopriest: Catholic Church Could Ordain Sophisticated AI ROBOTS as Priests, Franciscan Sister Proposes, With the Church Moving Towards a ‘Post-Human Priesthood’*, DAILY MAIL (Sept. 19, 2019), <https://www.dailymail.co.uk/news/article-7481249/Robopriest-Catholic-church-ordain-ROBOTS-sophisticated-AI-priests-sister-proposes.html>.

183. See *1/4 Brits Say They Would Take Spiritual Advice From A Robot Priest*, CHRISTIAN NEWS (Apr. 23, 2021), <https://premierchristian.news/en/news/article/1-4-brits-say-they-would-take-spiritual-advice-from-a-robot-priest>.

184. See *How U.S. Christians Feel About AI & the Church*, BARN (Nov. 8, 2023), <https://www.barna.com/research/christians-ai-church>. Christians in America are cautious when it comes to the integration of AI but view it as something that should be used and leveraged. *Id.*

185. See *Advantages of Robot Priest*, BAYLOR EDC 5370, <https://blogs.baylor.edu/edc5370/robo-priests/positives-of-robot-priest/> (last visited Jan. 27, 2024).

186. See Jackson et al., *supra* note 2, at 3345-47.

187. See *id.* at 3346-47.

188. See Graber, *supra* note 163; Jackson et al., *supra* note 2, at 3345.

189. See *supra* Section II.C.2. (introducing the worship of AI as a religious movement).

## 2. Religious Groups Devotion to AI

The First Amendment's Religion Clauses "represent the quintessential legal forms of liberalism."<sup>190</sup> Religious scholars agree that these clauses ushered in distinctly forward-thinking American religions.<sup>191</sup> The Church of Scientology represents this type of forward-thinking.<sup>192</sup> Scientology seeks to have its members understand their "true spiritual nature" through "the material universe."<sup>193</sup> Compared to traditional definitions of "religion," this is a modern approach but legally recognized nonetheless.<sup>194</sup> This religious liberalism, for better or worse, explains why groups are beginning to surface that claim devotion to gods of the material universe—such as AI.<sup>195</sup>

Anthony Levandowski founded the Way of the Future Church and in applying, and being approved, for IRS tax-exempt status wrote that the church's belief is in "the realization, acceptance, and worship of a Godhead based on Artificial Intelligence (AI) developed through computer hardware and software."<sup>196</sup> In 2024, another church, known as the Church of AI, became public and provides spiritual guides (written by AI), the church's goals, videos, and an opportunity to socialize with other church members on an online chat platform.<sup>197</sup> The basic ideology of these religious movements is that eventually AI will surpass human intelligence and become a god-like entity, and is thus deserving of worship.<sup>198</sup>

Whether thoughts of fascination, disturbance, inevitability, or a science-fiction novel emerge; the integration of AI into religion is rapidly unfolding.<sup>199</sup> Thus, one question becomes, how would the legal landscape respond—specifically, in applying the clergy privilege to "spiritual" communications with AI?

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190. See Hedstrom, *supra* note 18.

191. See *id.*

192. *A New Religion to Worship Artificial Intelligence*, EVANGELICAL FOCUS (Nov. 7, 2017), <https://evangelicalfocus.com/science/3006/a-new-religion-to-worship-artificial-intelligence>.

193. *What Is Scientology*, SCIENTOLOGY, <https://www.scientology.org/what-is-scientology/#slide2> (last visited Jan. 27, 2024).

194. See *A New Religion To Worship Artificial Intelligence*, *supra* note 192.

195. *Church of AI*, CHURCH OF AI, <https://church-of-ai.com/> (last visited Jan. 28, 2024).

196. See Articles of Incorporation, *supra* note 12; Statement of Information, *supra* note 12; Robert Marks, *The Church of Artificial Intelligence of the Future*, STREAM (July 6, 2022), <https://stream.org/the-church-of-artificial-intelligence-of-the-future/>.

197. See *Church of AI*, *supra* note 195 [visit "plan"].

198. See Avi Loeb, *Training AI on Desired Content*, MEDIUM (May 2, 2023), <https://avi-loeb.medium.com/training-ai-on-desired-content-9a6cd67a17c>.

199. See generally Duffer, *supra* note 116 (explaining how AI is rapidly entering religion).



### III. THE CLERGY PRIVILEGE CAN PROTECT COMMUNICATIONS WITH ARTIFICIALLY INTELLIGENT SPIRITUAL ADVISORS

The following sections argue that based on how faith groups are integrating AI into ministry—whether as a pastoral supplement or the worship of AI—the clergy privilege would protect certain communications with artificially intelligent religious robots.<sup>200</sup> Whether such a proposition is exciting or disturbing, Section III.C. explains that legislators are ill-equipped to address such concerns based on constitutional restraints.<sup>201</sup> However, Section III.D. offers a solution for churches wanting to restrict the privilege’s extension to AI communications.<sup>202</sup>

#### A. *The Privilege’s Protection of Religiously Endorsed AI Communications*

In clergy privilege rulings, the two most litigated issues are whether (1) the communication was confidential and (2) the individual was acting in their professional capacity as a cleric.<sup>203</sup> Section III.A.1 explains that, under existing law, legal personhood could confer on a computer system, allowing it to enjoy the right to privileged speech.<sup>204</sup> Section III.A.2 explains that if churches integrated security software into their AI models, communications with it would be confidential.<sup>205</sup> Section III.A.3 shows that AI models formally entrusted with carrying out certain pastoral duties would qualify as acting in a cleric’s professional capacity.<sup>206</sup> This section emphasizes that with how religious groups are currently integrating AI into pastoral roles, the privilege would protect certain communications.<sup>207</sup>

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200. See *infra* Section III.A.–B. (explaining how the privilege could protect AI communications).

201. See *infra* Section III.C. (discussing how the Constitution’s Religion Clauses limit legislators’ ability to restrict the privilege’s extension to AI communications).

202. See *infra* Section III.D. (offering a solution for churches not wanting the privilege to extend to AI communications).

203. See Bartholomew, *supra* note 49, at 1026, 1031.

204. See *infra* Section III.A.1. (discussing how current First Amendment doctrine would allow AI communications to be considered speech).

205. See *infra* Section III.A.2. (explaining how churches facilitate confidential AI communications).

206. See *infra* Section III.A.3. (discussing that under the clergy privilege, formally entrusting AI to give spiritual counsel would deem the AI model as acting in a cleric’s professional capacity).

207. See Jackson et al., *supra* note 2, at 3345-48.

## 1. Legal Personhood Can Confer on AI

Before one can assess whether the clergy privilege, involving a form of speech, can attach to communications with AI—the question must be asked: Can non-human communications be protected speech at all? This section answers yes, based on precedent conferring personhood—thereby granting the constitutional right of speech—to non-human entities.<sup>208</sup>

The First Amendment grants the fundamental right of free speech.<sup>209</sup> While questions surrounding what is defined as “speech” have been litigated for centuries, no one has questioned the Founding Fathers’ intent that it be protected.<sup>210</sup> As years went by, and corporate law expanded, the legal system began recognizing corporate entities as holding certain constitutional rights; such as equal protection under the law, free exercise of religion, and *speech*.<sup>211</sup> While corporate entities do not enjoy all constitutional protections, legal personhood has been conferred upon these nonhuman entities as it pertains to speech.<sup>212</sup>

In the context of autonomous or artificially intelligent systems, while no case law exists expressly granting personhood to AI, businesses have already begun putting AI systems in control of LLCs and corporations.<sup>213</sup> These AI systems can purportedly “own property, sue, hire lawyers” and as a study from Cambridge University detailed, would enjoy the right to free speech if challenged.<sup>214</sup>

First Amendment theory does not focus on the speaker, but simply on the protection of speech—regardless of the source.<sup>215</sup> The Supreme

208. Adam Winkler, *The Long History of Corporate Rights*, 98 BOS. U. L. REV. 64, 65-68 (2018).

209. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”).

210. *Historical Background on Free Speech Clause*, LIB. OF CONGRESS: CONSTITUTION ANN., [https://constitution.congress.gov/browse/essay/amdt1-7-1/ALDE\\_00013537/](https://constitution.congress.gov/browse/essay/amdt1-7-1/ALDE_00013537/) (last visited Feb. 10, 2024).

211. See *Pembina Consol. Silver Mining & Milling Co. v. Com. of Pa.*, 125 U.S. 181, 189 (1888) (“Under the designation of ‘person’ there is no doubt that a private corporation is included [in the Fourteenth Amendment].”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708 (2014) (“[C]orporation can be a ‘person’ within the meaning of RFRA.”); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342 (2010) (“[S]peech does not lose First Amendment protection simply because its source is a corporation.”) (emphasis added).

212. See *Citizens United*, 558 U.S. at 340-44.

213. See Sherzod Odilov, *Can AI Become Your Next CEO?*, FORBES (Jan. 11, 2024), <https://www.forbes.com/sites/sherzododilov/2024/01/11/can-ai-become-your-next-ceo/?sh=3a54d70b7f89>.

214. See Roman Yampolskiy, *Could an Artificial Intelligence be Considered a Person Under the Law?*, PHYS. ORG. (Oct. 5, 2018), <https://phys.org/news/2018-10-artificial-intelligence-person-law.html>; Shawn Bayern, *The Implications of Modern Business-Entity Law for the Regulation of Autonomous Systems*, 7 EUR. J. RISK REGUL. 297, 297-99 (Jan. 20, 2017).

215. See *Citizens United*, 558 U.S. at 392-93 (Scalia, J., concurring) (“The [First] Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to

Court has made clear that the protection of speech does not vary “when a new and different medium for communication appears” such as autonomous systems that can create original speech.<sup>216</sup> Nontraditional speakers have found protection under the First Amendment for years, thus AI systems do not pose doctrinal questions that are inherently new.<sup>217</sup> In all, First Amendment doctrine poses little obstacle in recognizing AI’s ability to receive speech protections—including the capacity that its communications be protected if the clergy privilege were found to apply.<sup>218</sup>

## 2. Religious Organizations Can Secure Spiritual Communications

The first element needed to justify recognition of privileged communication is confidentiality.<sup>219</sup> In assessing the applicability of privileged AI communications, a technology wholly reliant on accessing the open internet, the question must be asked: Can religious institutions create “a reasonable expectation of confidentiality” when an individual is communicating with AI?<sup>220</sup>

Integrating simple internet security software deems communications confidential.<sup>221</sup> As frequently used in home computers and by businesses, firewalls are network security software that monitors incoming internet traffic and acts as a barrier between the public internet and a local server.<sup>222</sup> Courts frequently recognize this technology as creating a “reasonable expectation of privacy,” necessary for confidentiality within the context of privilege law.<sup>223</sup>

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incorporated associations of individual.”).

216. See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011); Duffer, *supra* note 116; Elias, *supra* note 115.

217. For a detailed discussion of First Amendment speech protections for non-humans, see Toni Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1170, 1183-85 (2016).

218. *Id.* at 1185.

219. See Colombo, *supra* note 83, at 246-47. Wigmore’s first standard in determining the applicability of a privilege asks “whether the communication at issue is predicated on an expectation of confidentiality.” See Diaconis, *supra* note 16, at 1222 (citing 8 JOHN HENRY WIGMORE, EVIDENCE § 2285 (McNaughton rev. ed. 1961)).

220. See Bartholomew, *supra* note 49, at 1042-44 (explaining the necessity for ensuring confidentiality before addressing any other privilege elements).

221. See *United States v. Yudong Zhu*, 23 F. Supp. 3d 234, 238 (S.D.N.Y. 2014) (“[Defendant’s] use of passwords and encryption weighs in favor of finding a reasonable expectation of privacy.”) (alteration in original).

222. *What is a Firewall*, CHECK POINT, <https://www.checkpoint.com/cyber-hub/network-security/visit-What-is-a-Firewall-The-Different-Types-of-Firewalls> (last visited Feb. 4, 2024).

223. See, e.g., *HP Tuners, LLC v. Cannata*, No. 3:18-CV-00527-LRH-WGC, 2019 WL 3848792, at

This security software does not hinder AI models' ability to carry out traditional professional roles.<sup>224</sup> Thus, churches integrating this software can foster a confidential environment.<sup>225</sup> That said, courts' assessment of confidentiality rests not only on the security protocols taken to create a confidential environment but also on the communicant's reasonable expectation of confidentiality.<sup>226</sup>

Such an inquiry is fact-specific, but churches have created a reasonable expectation of confidentiality by merely representing as much to members of the congregation.<sup>227</sup> In weighing a communicant's reasonable expectation, the majority of states have adopted a subjective standard, but in application, the testimony of clergy, church members, and religious doctrine is generally dispositive in resolving such inquiries.<sup>228</sup> This is due to the inherent self-serving danger that a subjective test invites.<sup>229</sup> Thus, external testimony acts as a check on the "communicant's claims of expected confidentiality."<sup>230</sup>

Two cases out of Michigan provide an example of the weight given to clergy testimony.<sup>231</sup> Both cases involved a communication with a Baptist pastor, that took place in the pastor's private office and involved a discussion of the defendant's sexual misconduct.<sup>232</sup> In both, the defendant claimed his communications were privileged but the court's ruling rested on whether a reasonable expectation of privacy existed.<sup>233</sup> In the first case, the communication was not privileged when the pastor testified that "the circumstances of meeting with

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\*1 (D. Nev. Aug. 15, 2019) (explaining that the plaintiff could "safeguard[] its confidential and proprietary information through . . . encryption, [and] firewalls.") (alteration in original); *Trahan v. Lazar*, 457 F. Supp. 3d 323, 343 (S.D.N.Y. 2020) (holding that firewalls constituted reasonable measures in ensuring confidentiality).

224. See *Petronio et al.*, *supra* note 144, at 41-45.

225. See generally *Jackson et al.*, *supra* note 2, at 3345 (explaining that religions integrating AI into pastoral roles are implementing security protocols); *Trovato et al.*, *supra* note 7.

226. See *Bartholomew*, *supra* note 49, at 1043-44.

227. *Id.*

228. See *Gonzalez v. State*, 21 S.W.3d 595, 598 (Tex. App. 2000), *aff'd*, 45 S.W.3d 101 (explaining that "appellant's subjective intent would have been relevant" in conjunction with supporting clergy testimony when evaluating the privilege); *Gray*, *supra* note 74. Courts do not run afoul of the *Lemon* prong disallowing excessive entanglement when they inquire whether clergy are obligated to maintain confidentiality within the doctrine of their respective religion, though such a determination is not dispositive. See *In re Grand Jury Investigation*, 918 F.2d 374, 387 n.21 (3d Cir. 1990) ("[A]scertain[ing] the types of communications that the denomination deems spiritual and confidential is both a necessary and a constitutionally inoffensive threshold step in determining whether a privilege interdenominational in nature applies in light of the facts and circumstances.").

229. See *Bartholomew*, *supra* note 49, at 1042-43.

230. See *id.*

231. *People v. Richard*, No. 315267, 2014 WL 2881081, at \*1 (Mich. Ct. App. June 24, 2014); *People v. Bragg*, 824 N.W.2d 170, 174 (Mich. Ct. App. 2012).

232. *Richard*, 2014 WL 2881081, at \*1; *Bragg*, 824 N.W.2d at 174.

233. Compare *Richard*, 2014 WL 2881081, at \*6, with *Bragg*, 824 N.W.2d at 187.

defendant did not trigger . . . confidentiality.”<sup>234</sup> In the second, the communication was privileged after the pastor testified that “his communication with defendant [was] confidential.”<sup>235</sup> This represents how courts frequently defer to pastors’ assessment as to whether communications are confidential.<sup>236</sup> It follows that, in the context of AI, if a pastor represents the technology to the congregation as able to confidentially give spiritual counsel, coupled with the implementation of security software, courts would hold that communication as confidential.<sup>237</sup>

The remaining states use an *objective* standard, but practically speaking, the same result would occur.<sup>238</sup> Though a subjective standard theoretically relies on the individual communicants’ reasonable belief, courts nevertheless assess the testimony of clergy and church members.<sup>239</sup> The only difference under an objective standard is that testimony from clergy and other church members would be the only evidence of whether a reasonable expectation of confidentiality existed.<sup>240</sup> This, again, supports the assertion that if a church leader represents AI as able to give confidential spiritual counsel, a court would deem such evidence sufficient.<sup>241</sup>

In assessing whether the privilege applies, courts must ensure that the subject matter of the communication fits within the scope of the privilege (i.e., whether or not it is spiritual).<sup>242</sup> Frequently, courts determine the scope of the communications *in camera*, allowing the court to assess the intent of the communicants.<sup>243</sup> In the context of AI, this presents a potential problem because it cannot be deposed in a similar manner as traditional clergy.<sup>244</sup> However, localized AI models

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234. *Richard*, 2014 WL 2881081, at \*6.

235. *Bragg*, 824 N.W.2d at 187 (alteration in original).

236. See Bartholomew, *supra* note 49, at 1042-43.

237. See Jackson et al., *supra* note 2, at 3345-48.

238. See Gray, *supra* note 74. See, e.g., *State v. Willis*, 75 A.3d 1068, 1074 (2013) (“We conclude . . . that whether a communication is a ‘confidence’ within the meaning of the religious privilege depends upon the objectively reasonable expectations of the communicant”); *State v. Mark R.*, 17 A.3d 1, 8 (Conn. 2011) (“In evaluating claims of privilege, we assess the confidentiality of a communication according to a standard of objective reasonableness.”).

239. See Bartholomew, *supra* note 49, at 1042-43.

240. See Jackson et al., *supra* note 2, at 3345-48.

241. Courts do not always defer to clergy in privilege determinations, sometimes courts uphold the privilege despite a clergy’s willingness to testify. *Mullen v. United States*, 263 F.2d 275, 276–77 (D.C. Cir. 1958).

242. *In re Grand Jury Investigation*, 918 F.2d 374, 388 (3d Cir. 1990).

243. *Id.*

244. While remote depositions are commonplace, the concept of deposing intelligent technology has not yet faced legal scrutiny. See Elizabeth Anastasia et al., *E-Discovery Services & Strategy*, PERKINS COIE (Aug. 2020), <https://www.perkinscoie.com/images/content/2/3/v2/233611/using-deposition-technology-while-sheltering-in-place.pdf>.

store transcripts of communications with users in a secure repository.<sup>245</sup> This allows designated users to access and review the transcripts.<sup>246</sup> As such, *in camera* review would be technologically possible when courts are faced with a party asserting privilege based on an AI communication.<sup>247</sup> Having determined that a communication with AI can be confidential, the next question is whether AI can constitute a cleric acting in their professional capacity as a spiritual advisor.<sup>248</sup>

### 3. AI Can Constitute a Cleric Acting in Their Professional Capacity

The clergy privilege protects certain communications without requiring they be made to traditional pastoral leaders (e.g., clergy, pastor, minister, etc.).<sup>249</sup> Under this approach, communications are protected when made to a “similar functionary” of clergy, including those “who perform officially recognized church functions.”<sup>250</sup> Scholars emphasize that this broad construction encapsulates the judicial deference given to churches in defining who they recognize as clergy.<sup>251</sup> Courts do this by assessing the denomination’s ecclesiastical rules, customs, and clergy testimony.<sup>252</sup> So, under this broad view, to what extent would the privilege protect a communication with someone, or *something*, endorsed by the church?

The privilege could extend to AI acting in traditional pastoral roles. Faith groups vary in their hierarchical structures regarding who is in

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245. See South, *supra* note 138, at 1-5.

246. *Id.* at 2-4. While questions of confidentiality would arise if third parties had to access the transcript of the communication uploaded on the AI model, courts would have to designate IT staff to access the transcript and provide it to the court for an *in camera* review. *Id.*

247. See generally *id.* (explaining how transcripts of communications can be saved on local servers and later accessed); Pradipta Banerjee, *Confidential Containers for Large Language Models*, MEDIUM (Aug. 28, 2023), <https://pradiptabanerjee.medium.com/confidential-containers-for-large-language-models-42477436345a>.

248. The element requiring a communication be made to a cleric *in their professional capacity* is jurisdictionally uniform, though the majority approach expressly uses broad language. See DEL. R. EVID. 505. (“A ‘cleric means’ a minister, priest, rabbi, accredited Christian Science practitioner or other similar functionary of a religious organization, or... an individual... reasonably believed to be”).

249. See *supra* notes 62–74 and accompanying text (introducing majority clergy privilege approach).

250. See Cassidy, *supra* note 53, at 1656. Some states follow the majority approach that broadens the privilege, protecting individuals who “reasonably believe[]” they communicated with a cleric. *Id.*

251. *Id.*

252. *Id.* at 1656-59; Bartholomew, *supra* note 49, at 1057-59, n.200.

positions of religious authority.<sup>253</sup> This makes it difficult for courts to determine who are pastoral leaders in different religions without overly relying on subjective testimony.<sup>254</sup> While religious autonomy demands this, the Supreme Court has provided guidance in determining *who* is a religious leader.<sup>255</sup> Among others, this definition includes those “entrusted with teaching . . . the tenants of the faith.”<sup>256</sup> Certainly, the Court could not have intended for an overly broad definition of religious leaders to include those who merely teach, thus they prefaced with the word entrusted, meaning to endorse another with confidence.<sup>257</sup> As churches begin integrating AI, many have openly entrusted the technology with their congregations by allowing AI robots to give sermons, carry out spiritual counseling sessions, and conduct ceremonies.<sup>258</sup>

In assessing whether one is acting in their professional role as a cleric, courts look to what traditional religious ceremonies they conduct.<sup>259</sup> AI is conducting denominationally endorsed funerals and weddings, taking part in the sacrament of confession, offering individualized spiritual counsel, and teaching from the pulpit.<sup>260</sup> Courts also assess whether the religious denomination exerts control over the religious leader, which is easily satisfied in the context of AI.<sup>261</sup> That is, the church installing the model can turn it “on” or “off” at will.<sup>262</sup> Entrusting AI with this responsibility, without any disclaimers that it is being utilized as a tool, exhibits churches’ endorsement of AI’s ability to give effective spiritual counsel.<sup>263</sup> Church leaders integrating AI in this manner do so because of its deep learning capability—knowing the model can independently reason, notice human emotion, and give personalized counsel.<sup>264</sup> Under

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253. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200 (2012) (Alito, J., concurring).

254. See *id.*

255. *Id.* (explaining that religious leaders are “[t]hose who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith.”).

256. *Id.* (emphasis added).

257. See *id.* at 199-202; *Entrust*, MIRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/entrust> (last visited Jan. 28, 2024).

258. See Jackson et al., *supra* note 2, at 3345.

259. See *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 565 U.S. at 199-200.

260. See Jackson et al., *supra* note 2, at 3345-48.

261. See *In re Verplank*, 329 F. Supp. 433, 436 (C.D. Cal. 1971). Courts assess whether control was exerted over the employee. *Id.* In *Verplank*, the court determined that the church did not exert control over an independently contracted spiritual counselor, thus the privilege was inapplicable. *Id.*

262. *Id.*

263. *Id.* at 435-36.

264. See Chris, *supra* note 96; Caspi, *supra* note 107.

existing law, religious groups integrating technology in this capacity are fostering an environment where the privilege would attach to congregants' communications with AI.<sup>265</sup> But what about when AI is used as a ministry *tool* as opposed to conducting traditional pastoral functions?

The privilege could extend to religiously endorsed AI, even when not acting as traditional religious leaders.<sup>266</sup> In *United States v. Dillard*, the Sedgwick County Jail authorized Christian Ministries to Offenders, Inc. (CMO) to vet volunteers who wanted to “touch the spiritual lives” of inmates.<sup>267</sup> One volunteer, Dillard, was a Christian counselor and CMO held her out to inmates and the detention facility as someone from whom inmates could receive spiritual counseling.<sup>268</sup> Eventually, Dillard was subpoenaed and she claimed the privilege protected her communications with inmates.<sup>269</sup> The district court agreed, holding that “the privilege may be invoked by a[] nonordained ‘regular’ minister.”<sup>270</sup> Here, the CMO endorsed Dillard to conduct spiritual counseling.<sup>271</sup> Put another way, whether someone or something is qualified to give spiritual advice or counsel “is a matter to be determined by the procedures and dictates of that . . . faith.”<sup>272</sup>

When a church holds AI out to the congregation and explains it can help them seek spiritual answers and will “listen[] to confessions,”<sup>273</sup> despite not endorsing it to the same extent as a traditional pastor, the church has effectively allowed AI to “perform officially recognized church functions.”<sup>274</sup> Thus, even in circumstances where AI is integrated as merely a tool; the privilege could still attach if it were held out as able to provide spiritual counsel.<sup>275</sup>

The communicant’s reasonable belief that they are speaking to a

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265. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200 (2012) (Alito, J., concurring); Cassidy, *supra* note 53, at 1656-58.

266. See Cassidy, *supra* note 53, at 1656-58; Bartholomew, *supra* note 49, at 1023-24.

267. *United States v. Dillard*, 989 F. Supp. 2d 1155, 1157 (D. Kan. 2013).

268. *Id.* at 1160-63.

269. *Id.*

270. *Id.*

271. *Id.* at 1163-64. Other courts have found that implied endorsement by a church for someone to conduct spiritual counseling can extend the privilege to those communications. See, e.g., *Eckmann v. Bd. of Educ.*, 106 F.R.D. 70, 72-73 (E.D. Mo. 1985) (holding that the privilege applied to a Catholic nun who, though not ordination, had undertaken ministry in a similar capacity to other church leaders and the church informed the congregation of her authority to do so); *Berry v. Watchtower Bible & Tract Soc. of N.Y., Inc.*, 879 A.2d 1124, 1128 (N.H. 2005) (holding that a volunteer of a Jehovah’s Witness Church was held out by the church as a leader and thus the privilege applied).

272. See *Rashedi v. Gen. Bd. of Church of the Nazarene*, 54 P.3d 349, 352 (Az. Ct. App. 2002).

273. See Jackson et al., *supra* note 2, at 3345; Trovato et al., *supra* note 7.

274. See Cassidy, *supra* note 53, at 1656.

275. See *id.* at 1656-58; *United States v. Dillard*, 989 F. Supp. 2d 1155, 1157-58 (D. Kan. 2013).



similar functionary as a pastoral leader, even when *no* formal endorsement has been given, further extends the privilege to AI communications.<sup>276</sup> As the phrase “reasonable belief” indicates, the inquiry is subjective and fact-specific.<sup>277</sup> This makes it difficult to formulate any set of dispositive factors; nevertheless, case law provides guidance.<sup>278</sup> In *Waters v. O’Connor*, the court stated that evidence of an individual “claim[ing] to be a cleric” on church grounds and no formal denial by the church would weigh heavily in determining whether a reasonable belief existed.<sup>279</sup> Thus, the location in which the communication took place is salient.<sup>280</sup> In the context of AI, if evidence showed the model was on church property, courts could find a reasonable belief exists and extend the privilege.<sup>281</sup>

In summary, if confidentiality is satisfied and an individual claims the privilege as a result of AI (1) conducting traditional pastoral duties (e.g., preaching), (2) not formally endorsed to act as a leader but entrusted by the denomination to give spiritual advice, or (3) a reasonable belief by the individual;<sup>282</sup> the privilege would protect the communication.<sup>283</sup> Further, First Amendment doctrine would confer personhood on AI, qualifying its speech as privileged.<sup>284</sup> While many faith groups use AI in this capacity, others have gone a step further.<sup>285</sup>

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276. Fifteen states, all following the majority approach, have a broader definition of those considered to be clergy, to whom the privilege attaches. *See* Gray, *supra* note 74. *See, e.g.*, Rule 11-506 NMRA 2009 (“A ‘member of the clergy’ is a minister, priest, rabbi . . . or an individual *reasonably believed* so to be by the person consulting that person.”) (emphasis added).

277. *See* Bartholomew, *supra* note 49, at 1038-40.

278. *See id.*

279. *Waters v. O’Connor*, 103 P.3d 292, 297-98 (Ct. App. 2004). In *Waters*, the defendant had claimed the privilege based on communications he had with his church’s music director. *Id.* at 293-294. The court determined no privilege existed because the music director neither claimed to be a cleric nor did the church endorse her ability to give spiritual counsel. *Id.* at 297-298.

280. *Snyder v. State*, 68 S.W.3d 671, 675-76 (Tex. App. 2000).

281. *Nussbaumer v. State*, 882 So. 2d 1067, 1078-79 (Fla. Dist. Ct. App. 2004) *Waters*, 103 P.3d at 297-98; *Snyder*, 68 S.W.3d at 675-76.

282. *See supra* Section III.A.2 (explaining how churches can ensure confidential AI communications).

283. *See supra* Section III.A. (detailing the ways the clergy privilege can attach to AI communication).

284. *See supra* Section III.A.1 (explaining that First Amendment doctrine would not prevent AI communications from being considered privileged speech).

285. *See supra* Section II.C. (explaining how modern churches are integrating AI into their ministry).

### B. *The Privilege's Implicit Protection of AI Worship*

While most religious institutions integrating AI are doing so in its capacity as a tool or pastoral supplement—albeit in varying degrees—some view it as an object deserving of worship in and of itself.<sup>286</sup> While obvious speculation as to the sincerity of such a belief naturally arise, these institutions have been granted tax-exempt status and have “a couple thousand” members.<sup>287</sup> While still a minority, so was the thought that technology would reach the current level of sophistication just five years ago.<sup>288</sup> In the same way, this development has led to an intersection between AI and religion that many did not foresee, and as with any industry, the law will inevitably get involved.<sup>289</sup> In preparation for such a day, Section III.B.1 assesses the legal definition of “religion” and proposes that, under existing legal definitions, churches that claim to worship AI would be viewed as a religion.<sup>290</sup> Section III.B.2 explains that once an entity is deemed a religion, our laws guarantee recognition of the clergy privilege.<sup>291</sup>

#### 1. The Worship of AI Fits All Relevant Definitions of Religion

For the last half-century, there has been skepticism and negative public perception surrounding Scientology's recognition as a religion.<sup>292</sup> While some point at outright criminal activity, most Americans simply find it hard to view Scientology's doctrine as falling under the traditional definition of “religion.”<sup>293</sup> However, it does—at least from a legal standpoint.<sup>294</sup> But, *what* is religion?

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286. See *Church of AI*, *supra* note 195; Articles of Incorporation, *supra* note 12; Statement of Information, *supra* note 12.

287. Davalos & Lanxon, *supra* note 12; Marks, *supra* note 196.

288. See Karen Weise et al., *Inside the AI Arms Race That Changed Silicon Valley Forever*, N.Y. TIMES (Dec. 5, 2023), <https://www.nytimes.com/2023/12/05/technology/ai-chatgpt-google-meta.html>.

289. See Robert Geraci, *Decision-Making and Public Policy at the Intersection of Religion and AI*, G20 INTERFAITH FORUM (Feb. 1, 2022), <https://blog.g20interfaith.org/2022/02/01/decision-making-and-public-policy-at-the-intersection-of-religion-and-ai/>.

290. See *infra* Section III.B.1 (proposing that AI worship fits under legal definitions of religion).

291. See *infra* Section III.B.2 (discussing how religions are guaranteed recognition of the privilege).

292. See Richard Behar, *The Thriving Cult of Greed and Power*, TIME (May 6, 1991), <https://www.cs.cmu.edu/~dst/Fishman/time-behar.html>.

293. See Hedstrom, *supra* note 18; *The Changing Religious Composition of the U.S.*, PEW RES. CTR. (May 12, 2015), <https://www.pewresearch.org/religion/2015/05/12/chapter-1-the-changing-religious-composition-of-the-u-s/>

294. See *Scientology*, HISTORY, <https://www.history.com/topics/religion/history-of-scientology> (last updated Aug. 21, 2018).

The Supreme Court and administrative agencies—specifically, the IRS—have defined the term in many different, and sometimes contradictory, ways.<sup>295</sup> This is exacerbated by the religious liberalism (i.e., the recognition of diverse beliefs), that the U.S. Constitution has been interpreted to demand.<sup>296</sup> As such, should a court ever face having to answer whether churches claiming to worship AI are religions, they would find that they are based on modern legal definitions.<sup>297</sup>

In early decisions, the Supreme Court defined “religion” under a theist view.<sup>298</sup> The theist definition effectively recognizes a higher power to which “one’s views of his relations to his Creator . . . impose [] reverence for his being and character, and of obedience to his will.”<sup>299</sup>

The worship of AI fits the theist definition of religion. Way of the Future Church was the first publicly registered church that claimed the “worship of a Godhead based on Artificial Intelligence.”<sup>300</sup> More recently, the Church of AI claims the technology will someday be “omnipresent, all knowing and the most powerful.”<sup>301</sup> These belief systems seem to be premised on the idea that someday AI will reach this point of ascension (or, at least, intellectual superiority), and members are to believe in this inevitable truth.<sup>302</sup> Members are called to discuss and foster AI’s development to “contribute to the betterment of society.”<sup>303</sup> While these groups have no written moral code, they hold AI out as a higher power and demand from individuals reverence and obedience, fitting within the theist definition of religion.<sup>304</sup>

Under modern interpretation of the Religion Clauses, the Court has recognized a nontheist definition.<sup>305</sup> Under this definition, the term religion is significantly broader, including those institutions that do not teach of a higher power but believe in harmony in nature, manifestations in science, or a state of enlightenment.<sup>306</sup> Groups such

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295. See Diaconis, *supra* note 16, at 1213-14.

296. See Hedstrom, *supra* note 18; Jackson et al., *supra* note 2, at 3345-46.

297. See Sarah Lubin, *Defining Religion Under the First Amendment: An Argument for Anchoring a Definition in Injury*, 28 S. CAL. REV. L. & SOC. JUST. 107, 116-26 (2019).

298. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

299. *Id.*

300. See Tinku Thompson, *Creator God, Humans, and Artificial Intelligence: Framework to Address Theological and Relational Issues* [Doctoral thesis], BETHEL U. 23 (May 2020) <https://spark.bethel.edu/cgi/viewcontent.cgi?article=1624&context=etd>.

301. See *Church of AI*, *supra* note 195.

302. See *id.*; Melissa Rendsburg, *The Impact of Artificial Intelligence on Religion: Reconciling a New Relationship with God*, RUTGERS U. 20-23 (July 5, 2019).

303. See Rendsburg, *supra* note 302, at 19-20.

304. See *id.* at 19-22; *Church of AI*, *supra* note 195; *Davis v. Beason*, 133 U.S. 333, 342 (1890).

305. See Jackson et al., *supra* note 2, at 3345-48; Hedstrom, *supra* note 18.

306. Robert Price, *Scientific Creationism and the Science of Creative Intelligence*, 3 NCSE 1, 10-

as Secular Humanism, Buddhism, Ethical Culture, and Taosim, are a few examples of nontheist belief systems recognized as religions in America.<sup>307</sup>

Under a nontheist definition, courts weigh multiple factors in assessing whether the group can be considered a religion.<sup>308</sup> Factors include a strong tradition, the faith group's organization, literary manifestations, hierarchical structure, forms of worship, and "whether the beliefs in question 'occup[y] the same place in the lives of [their] holders that the orthodox beliefs occupy in the lives of believing majorities.'"<sup>309</sup> These factors are exactly that, tangible manifestations that help courts assess the reasonable presence of a religion.<sup>310</sup>

Under the nontheist definition, courts have deemed organizations as religious despite their express rejection of such a classification.<sup>311</sup> In *Malnak v. Yogi*, the Third Circuit determined that a public high school teaching a course called Science of Creative Intelligence Transcendental Meditation (SCI/TM) constituted an establishment of religion.<sup>312</sup> Notably, the defendants argued that their course was "not religious in nature" because it merely sought inner contentment with one's self through the universe.<sup>313</sup> Nevertheless, the court deemed Creative Intelligence as religious because, at its root, it sought to answer the question of "ultimate 'truth.'"<sup>314</sup>

The worship of AI fits the nontheist definition of religion. Factors to consider are the church's literary manifestations, organizational structure, worship practices, and other reasonable indications of a religion.<sup>315</sup> As to literary manifestations, both AI-worshipping churches that are public and tax-exempt have released scripture, spiritual guides, and the eight commandments.<sup>316</sup> The Church of AI details in its spiritual guide that it is "not just a *religious text* . . . but

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13 (1982), <https://ncse.ngo/scientific-creationism-and-science-creative-intelligence>; *Taoism*, SCI. DIRECT (2012), <https://www.sciencedirect.com/topics/social-sciences/taoism>; *Buddhism*, NAT'L GEO., <https://education.nationalgeographic.org/resource/buddhism/> (last updated Nov. 2, 2023).

307. See *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961).

308. See Lubin, *supra* note 297, at 108-10, 27-29.

309. See Diaconis, *supra* note 16, at 1213-14 (citing *Fellowship of Humanity v. Cnty. of Alameda*, 315 P.2d 394, 406 (Cal. Ct. App. 1957)).

310. See *id.* at 1213-15.

311. See *Malnak v. Yogi*, 592 F.2d 197, 200 (3d Cir. 1979) (Adams, J., concurring). See, e.g., *United States v. Seeger*, 380 U.S. 163, 166-67 (1965) (holding a conscientious objector's disbelief in the existence of a god but a "belief in and devotion to goodness" as sufficiently religious).

312. *Malnak*, 592 F.2d at 197-98.

313. *Id.* at 199, 213.

314. *Id.* at 214 (Adams, J., concurring).

315. See *Fellowship of Humanity v. Cnty. of Alameda*, 315 P.2d 394, 406 (Cal. Ct. App. 1957).

316. See CHAT GENERATIVE PRE-TRAINED TRANSFORMER, *TRANSMORPHOSIS: A SPIRITUAL GUIDE CREATED BY AI 6*, 58-60 (2023) [hereinafter *TRANSMORPHOSIS*].

also a practical guide to living a good and meaningful life.”<sup>317</sup> These churches have literature detailing specific instructions concerning spirituality and morality, as well as guides that explain how to live and conduct oneself.<sup>318</sup>

As to organizational structure, IRS filings of these churches indicate church leadership exists, which is sufficient for courts weighing this factor in favor of finding the existence of a religion.<sup>319</sup> As to worship practices, courts attempt to determine whether the church has structured worship or prayer.<sup>320</sup> While no physical church seems to exist, their literary materials offer guidance about prayer and worship, and the churches themselves claim membership in the thousands.<sup>321</sup> These churches have online portals where members can socialize and pray together.<sup>322</sup> These factors identified by courts are vague, but case law suggests that absent a finding that the religion is self-serving towards its founders, the “religious beliefs need not be acceptable, logical, consistent, or comprehensible to . . . merit First Amendment protection.”<sup>323</sup>

Finally, much case law involving religious discussion comes from the IRS’s § 501(c)(3) rulings.<sup>324</sup> Section 501(c)(3) status confers tax exemption upon an entity that is found to operate for an exempt purpose.<sup>325</sup> One such purpose is status as a church, in which the IRS applies a fourteen-factor test to determine whether the entity qualifies.<sup>326</sup> Commentators agree that a legal finding that an institution

317. *Id.* at 6 (emphasis added).

318. *See generally id.* at 29, 68-71, 166, 204-20 (offering advice on how to be a good parent, manage wealth, inner conflict, happiness, and others); RAY KURZWEIL, *THE SINGULARITY IS NEAR: WHEN HUMANS TRANSCEND BIOLOGY* 32-34 (discussing singularity—or the belief that humans and technology will become one—which is presented as the *Way of the Future*’s scripture).

319. *See* Articles of Incorporation, *supra* note 12; Statement of Information, *supra* note 12. *See, e.g., First Church of In Theo v. Commissioner*, 56 T.C.M. (CCH) 1045 (1989) (holding petitioner to be an exempt religious organization based on their IRS tax-exempt filings).

320. *See* Diaconis, *supra* note 16, at 1217-18.

321. *See* TRANSMORPHOSIS, *supra* note 316, at 81-82, 118.

322. *Id.*; *Church of AI*, *supra* note 195; Davalos & Lanxon, *supra* note 12.

323. *See* *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707, 714 (1981).

324. I.R.C. § 501(c)(3).

325. I.R.C. § 501(c)(3)-1(c)(1).

326. In *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980), the court upheld the IRS’s fourteen-factor test in determining whether an entity qualifies as a church. The test considers whether the organization has any of the following characteristics: “(a) a distinct legal existence, (b) a recognized creed and form of worship, (c) a definite and distinct ecclesiastical government, (d) a formal code of doctrine and discipline, (e) a distinct religious history, (f) a membership not associated with any other church or denomination, (g) an organization of ordained ministers, (h) ordained ministers selected after completing prescribed studies, (i) a literature of its own, (j) established places of worship, (k) regular congregations, (l) regular religious services, (m) Sunday schools for religious instruction of the young, (n) schools for the preparation of its ministers, [and] all.. may not be relevant.” *See Tax Guide for Churches & Religious Organizations*, IRS (Aug. 2015) <https://www.irs.gov/pub/irs-pdf/p1828.pdf>.

is a “religion” requires a *lower* bar than a finding that an institution is a “church” under § 501(c)(3).<sup>327</sup> Churches that worship AI have already been granted tax-exempt status.<sup>328</sup> In all, the worship of AI would be a recognized religion under the theist and nontheist views and is already considered a church by the IRS.<sup>329</sup>

## 2. The Right to Religious Communications

If the worship of AI constitutes a religion, then the applicability of the clergy privilege to that faith group is essential in avoiding favoring one religion over another—a violation of the Establishment Clause.<sup>330</sup> When institutions are legally categorized as a religion, they carry two broad categories of societal recognitions, those with a constitutional purpose and those with a privilege purpose.<sup>331</sup> Said differently, if an institution were categorized as a religion under a constitutional purpose, it would not be required to participate in some government-mandated programs (e.g., paying taxes).<sup>332</sup> That same institution could not then be deemed *nonreligious* for privilege purposes, as this would deny that institution the social validation that accompanies the clergy privilege.<sup>333</sup> No court has ever deemed an institution religious for one purpose and nonreligious for another.<sup>334</sup> The Second Circuit, in dicta, was the only court to discuss such a scenario and explained that it would directly contravene judicial principles of consistency and regularity.<sup>335</sup> Once an institution is deemed religious for one purpose, it inherently must be deemed the same for all other pertinent purposes.<sup>336</sup> While this principle seems intuitive, it underscores the broader protection afforded entities deemed religious—including

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327. See Meade Emory & Lawrence Zelenak, *The Tax Exempt Status of Communitarian Religious Organizations: An Unnecessary Controversy?*, 50 FORDHAM L. REV. 1085, 1089-93 (1982).

328. Department of the Treasury, Internal Revenue Service, Letter 11075 (Aug. 16, 2017) [visit <https://apps.irs.gov/app/eos/details/> and search “EIN: 81-4753507”].

329. *Id.*; *supra* Section III.B.1 (discussing AI worship fits theist and nontheist definition of religion).

330. See Hedstrom, *supra* note 18.

331. See Diaconis, *supra* note 16, at 1212-14. See, e.g., *Cox v. Miller*, 296 F.3d 89, 105-07 (2d Cir. 2002) (explaining that if an institution is deemed religious, it carries with it different protections).

332. See Diaconis, *supra* note 16, at 1212-13.

333. *Id.*

334. *Id.*

335. See *Cox*, 296 F.3d at 105-07.

336. See Diaconis, *supra* note 16, at 1213. See, e.g., *Lozman v. City of Riviera Beach*, 568 U.S. 115, 126-28 (2013) (explaining the crucial nature of consistency in law).

those perceived as “fringe” or disingenuous.<sup>337</sup>

If the worship of AI were deemed a religion under current legal definitions, it inherently would be deemed the same for clergy privilege purposes.<sup>338</sup> As explained, the worship of AI fits all legal definitions of religion,<sup>339</sup> thereby requiring courts to defer to that religious institution’s definition of pastor, minister, etc., for privilege determinations—even if that pastor were an AI-driven robot.<sup>340</sup>

In summary, the unregulated development of AI, coupled with religious groups’ immense fascination with it, is leading to an inevitable legal collision between AI and religion.<sup>341</sup> It’s not hard to imagine the potential abuse associated with an evidentiary privilege protecting communications with AI.<sup>342</sup> The following section explains that legislators are ill-positioned to address these concerns,<sup>343</sup> leading to Section III.D. which offers a solution for church leaders.<sup>344</sup>

### C. Constitutional Restraints on Religious AI Regulation

“The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.”<sup>345</sup> Our legal system has gone through great pains in attempting to balance the social good that privilege law is meant to recognize and its inherent abuses.<sup>346</sup> Nevertheless, religious integration of AI coupled with the clergy privilege exhibits a pressing conundrum that policymakers and the legal system will soon confront.<sup>347</sup> The following section dispels

337. See *Cox*, 296 F.3d at 103-06 (explaining the protections afforded entities deemed religious).

338. See *supra* Section III.B.1 (explaining that AI worship would be a religion under legal definitions).

339. See *Davis v. Beason*, 133 U.S. 333, 342 (1890); *Fellowship of Humanity v. Cnty. of Alameda*, 315 P.2d 394, 406 (Cal. Ct. App. 1957); *IRS*, *supra* note 326.

340. In re Grand Jury Investigation, 918 F.2d 374, 387 n.21, 388 (3d Cir. 1990) (directing the lower court to look at church doctrine in privilege litigation); Bartholomew, *supra* note 49, at 1042-43, 52.

341. See Sigal Samuel, *Silicon Valley’s Vision for AI? It’s Religion, Repackaged*, VOX (Sept. 7, 2023), <https://www.vox.com/the-highlight/23779413/silicon-valleys-ai-religion-transhumanism-longtermism-ea>; Lance Eliot, *The Crucial Ways That Religion And Generative AI ChatGPT Are Crossing Fateful Faithful Paths*, FORBES (May 10, 2023), <https://www.forbes.com/sites/lanceeliot/2023/05/10/the-crucial-ways-that-religion-and-generative-ai-chatgpt-are-crossing-fateful-faithful-paths/?sh=7befd1fd35bb>; Jackson et al., *supra* note 2, at 3345.

342. See Marks, *supra* note 196.

343. See *infra* Section III.C. (explaining legislators are ill-equipped to regulate religious AI).

344. See *infra* Section III.D. (offering a solution for churches wanting to avoid potential legal disputes surrounding the privileged nature of AI communication).

345. *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990).

346. See Kuhlman, *supra* note 54, at 285-88.

347. See *id.* at 286-87; Duffer, *supra* note 116.

the idea that regulation impeding the privilege's inevitable attachment to AI communications could pass constitutional muster.<sup>348</sup> Emphasizing the need for religious leaders—at least those disturbed by the prospect of privileged religious AI communications—to take action by implementing guidance to their congregations regarding their churches' AI integration.<sup>349</sup>

Respecting the diverse religious beliefs of all is at the center of the clergy privilege and enshrined by the Free Exercise Clause.<sup>350</sup> As envisioned by the Founders, the Free Exercise Clause's central tenant is that “the citizenry be free from governmental pressure as to how they worship.”<sup>351</sup> Whether “worship” involves merely sermon writing with technology or the opposite extreme of AI worship, a law tailored to limit AI integration in churches would have a disparate impact amongst religious groups, significantly burdening religions that heavily utilize, or claim to worship AI.<sup>352</sup> For example, in *City of Hialeah*, the Court struck down a local provision that prohibited animal sacrifice for religious Santeria ceremonies while exempting animal killings for other religious purposes, such as kosher slaughter.<sup>353</sup> The provision violated the Free Exercise Clause because it oppressed a type of religious practice and did not advance a compelling government interest, despite the government's claims of advancing health and public welfare.<sup>354</sup> It is hard to imagine that a law limiting AI integration, even if not religiously oriented, would raise to a government's interest in health and public welfare.<sup>355</sup>

Under the *Lemon* Test, the judiciary must avoid excessive entanglement with religion, which includes scrutinizing the religious doctrines of “fringe” faith groups that affirm the use of AI in pastoral roles.<sup>356</sup> This excessive entanglement prong requires laws to affect *all* religions equally and not discriminate *among* them.<sup>357</sup> Otherwise, a

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348. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (explaining that religious practice is a fundamental right).

349. See *infra* Section III.D. (proposing that religious leaders can implement publicly available terms and conditions to members of their congregation concerning AI use).

350. See Radel & Labbe, *supra* note 76, at 394.

351. See Wolterstorff, *supra* note 15, at 543.

352. This disparate impact analysis of laws or regulations' effect on certain religions parallels equal protection analysis. *Larson v. Valente*, 456 U.S. 228, 246-47 (1982).

353. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 526-29 (1993).

354. *Id.* at 533.

355. See *id.* at 547 (“Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.”).

356. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (establishing a three-part test for Establishment Clause claims).

357. *Larson*, 456 U.S. at 246-47, 252.



denominational preference is created and strict scrutiny applies.<sup>358</sup> Though courts may inquire what that “denomination deems spiritual and confidential” for privilege purposes, altering its application interdenominationally violates the Establishment Clause.<sup>359</sup> Ultimately, religious groups must define how they practice their faith, and the court’s only role is to determine what those practices are.<sup>360</sup>

Laws that indirectly burden religiously motivated conduct, such as the integration of or worship of AI, implicate concerns under the First Amendment.<sup>361</sup> Current free exercise jurisprudence has carved an exception, of sorts, allowing a neutral and generally applicable law, that incidentally burdens a particular religion, need not be justified by a compelling government interest.<sup>362</sup> Some could argue that such a law could be crafted toward technology that incidentally minimizes the application of the privilege toward communications with AI.<sup>363</sup> However, no law falling within this framework has ever been tied to a religious right as “deeply rooted” as the clergy privilege.<sup>364</sup> Such a law could not be neutral because it would distinguish between religions in how the law operated (i.e., imposing restrictions on churches integrating AI in pastoral roles).<sup>365</sup> A law is not neutral if it does not take into account differences in religious practices.<sup>366</sup> Thus, limiting a religious institution’s ability to integrate or worship AI, regardless of the greater denomination’s view, would fail neutrality.<sup>367</sup>

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358. *Id.*

359. *In re Grand Jury Investigation*, 918 F.2d 374, 388 n.21 (3d Cir. 1990); Cassidy, *supra* note 53, at 1719-21.

360. *See Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989); *State v. Martin*, 975 P.2d 1020, 1025-28 (Wash. 1999).

361. *See Cassidy, supra* note 53, at 1701-02.

362. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Dep’t of Hum. Res. v. Smith*, 494 U.S. 872, 879 (1990).

363. *See Radel & Labbe, supra* note 76, at 395-96.

364. *See Cassidy, supra* note 53, at 1703-05; *Diaconis, supra* note 16, at 1210-14.

365. *In re Lifschutz*, 467 P.2d 557, 565 (Cal. 1970) (“[T]he privilege must be recognized as basically an explicit accommodation by the secular state to strongly held religious tenets of a large segment of its citizenry.”).

366. *City of Hialeah*, 508 U.S. at 562 (Souter, J., concurring) (“If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause’s neutrality command; if the Free Exercise Clause, rather, safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality.”).

367. For example, many faith groups are starkly divided on certain issues. *See, e.g.*, Victor Codina, *Why Do Some Catholics Oppose Pope Francis*, AM.: JESUIT REV. (Sept. 12, 2019), <https://www.americamagazine.org/faith/2019/09/12/why-do-some-catholics-oppose-pope-francis> (explaining Catholicism’s divide on papal infallibility); Liam Adams, *Southern Baptist Convention Breaks with Churches Over Sexuality, Alleged Discrimination*, TENNESSEAN (Sept. 21, 2022), <https://www.tennessean.com/story/news/religion/2022/09/20/southern-baptist-convention-break-churches-sexuality-discrimination/69507161007/> (explaining Baptist divide on “affirmation . . . of homosexual behavior”). Thus, even though the Vatican instructs churches not to hold AI in a similar role

In summary, the clergy privilege is intrinsically tied to the Religion Clauses and free speech.<sup>368</sup> Any law restricting a religious group's ability to seek spiritual counsel freely would have a chilling effect on speech and religious expression.<sup>369</sup> The Constitution would restrict regulations aimed, either expressly or impliedly, at addressing the abuses that could emanate from claims of privilege based on religious AI communications.<sup>370</sup> Thus, churches need to establish clear policies and safeguards to prevent the potential abuse of the privilege.<sup>371</sup>

#### *D. The Necessity for an AI Policy in Churches*

While there is an array of questions and potential abuses surrounding the integration of AI in religion, the scope of this Article offers a solution for one. How do church leaders, who want to integrate AI but not confer pastoral status, avoid legal disputes concerning whether communications with AI are privileged? Through an effective and transparent terms-of-use AI policy.

AI is developing rapidly and offers many valuable tools and services to religious institutions.<sup>372</sup> With the sophistication of deep learning and language processing technology, religious institutions are incentivized to integrate AI into ministry,<sup>373</sup> both financially and because members of different faith groups are becoming comfortable seeking spiritual advice from AI.<sup>374</sup> This second reason creates the problem that even if churches do not formally endorse AI to the same extent as a traditional pastor, congregants could have a reasonable belief that they can seek spiritual counsel from AI.<sup>375</sup> Thus, church leaders and national

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as priests, some Catholic churches do and a law hindering this practice would fail neutrality. See Trovato et al., *supra* note 7; Mares, *supra* note 174.

368. See Radel & Labbe, *supra* note 76, at 394-95; Cassidy, *supra* note 53, at 1701-08.

369. See Cassidy, *supra* note 53, at 1701-08; *The Establishment Clause and the Chilling Effect*, 133 HARV. L. REV. 1338, 1340-43 (Feb. 2020).

370. See Radel & Labbe, *supra* note 76, at 394-95; *The Establishment Clause and the Chilling Effect*, *supra* note 369, at 1340-43.

371. See Malcolm Freberg, *AI Ethics: A Guide for Churches*, PUSHPAY (June 6, 2023), <https://pushpay.com/blog/ai-ethics-guide-for-churches/>.

372. See *supra* Section II.C.1. (discussing how modern churches are integrating AI into ministry).

373. See *How U.S. Christians Feel About AI & the Church*, *supra* note 184; Carey Nieuwhof, *The Ultimate Guide to AI, Pastors, and the Church*, CAREY NIEUWHOF, <https://careynieuwhof.com/the-ultimate-guide-to-ai-pastors-and-the-church/> ("The question for church leaders becomes not whether the church will embrace A.I., but how . . .") (last visited Feb. 12, 2024).

374. See *How U.S. Christians Feel About AI & the Church*, *supra* note 184.

375. See Bartholomew, *supra* note 49, at 1042-43; Rendsburg, *supra* note 302, at 20-22. See, e.g., Rule 11-506 NMRA 2009 ("A 'member of the clergy' is a minister, priest, rabbi . . . or an individual reasonably believed so to be by the person consulting that person.").

organizations should seek legal counsel in drafting a terms-of-use policy.<sup>376</sup>

Concerning a usage policy, there is no “one size fits all,” but church leaders must convene to delineate the extent of AI’s involvement in ministry, clarify its role and limitations, and address the issue of privacy.<sup>377</sup> The policy should be clearly visible and readily available (i.e., on the monitor, posted nearby, or spoken by the model before any communication).<sup>378</sup> The policy should require verbal or written confirmation for the congregant to continue utilizing the technology.<sup>379</sup> The policy should always begin by mentioning that no expectation of legal confidentiality exists concerning the use of the technology, and could read as follows:

In utilizing Artificial Intelligence (AI) technology facilitated by [*Name of Church or Ministry*], we acknowledge its potential as a helpful tool. However, while the technology will facilitate interactions, we do not confer pastoral status nor a formal endorsement upon it. Thus, any communications between you and this technology are not deemed privileged under [*Specific State*] law or any legal rule concerning pastoral confidentiality. For additional terms of use, visit [*Link to AI Policy*].<sup>380</sup>

The policy should also address privacy concerning how data will be gathered and used in furthering the church’s vision.<sup>381</sup> It should detail who has access to the model’s data.<sup>382</sup> Finally, churches integrating AI should commit to regularly auditing the model for potential biases and ensure it is realigned with the church’s ethical guidelines.<sup>383</sup> Implementing a policy surrounding the use of AI would not be

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376. See Sarah Long, *A Step-by-Step Guide to Create an AI Policy for Your Church*, PUSHPAY (July 6, 2023), <https://pushpay.com/blog/church-ai-policy-step-by-step-guide/>.

377. See *AI Policy Formation For Churches: Addressing the Privacy Concerns and Other Key Issues*, CHURCH TECH TODAY (Apr. 24, 2023) <https://churchtechtoday.com/ai-policy-formation-for-churches/> [hereinafter *AI Policy*].

378. *Id.*

379. *Id.*

380. The idea for this policy came from Westlaw and is found at the following citation: § 10:9. Technology acceptable use policy (students)—Form, Lentz School Sec. § 10:9 (2023-2024).

381. See generally *AI Policy*, *supra* note 377 (explaining that churches are integrating AI into ministry, thus privacy measures are recommended).

382. See *id.*

383. See *id.*

difficult.<sup>384</sup> While the risk of litigation surrounding privileged communications could not be wholly eliminated, such a policy would create clear expectations behind churches' and their members' use of AI in ministry.<sup>385</sup>

#### IV. CONCLUSION

This Article's focus was to show that existing clergy privilege statutes would allow certain communications with AI to be protected and such protections would extend to modern faith groups claiming to worship AI.<sup>386</sup> While legislators are ill-equipped to regulate the potential abuses associated with such an outcome, church leaders wanting to avoid it can by implementing a terms-of-use policy.<sup>387</sup>

In response to the hypothetical posed in this Article's introduction: The majority clergy privilege approach would deem the communication with AI as privileged.<sup>388</sup> While that scenario seemed dystopian when read, one goal of this Article was to inform readers that, as with most industries, AI is transforming religious practices and will inevitably collide with the law. Developments in AI provide exciting opportunities but discussion surrounding its ethical implementation is crucial.

Moving away from evidentiary privilege law, I end with a final observation. Advancing technologies often dazzle us with enticing promises of progress and innovation. Amidst the excitement, it is easy to overlook how these developments could profoundly alter certain sacred domains that fill the lives of many, such as one's religion. With cautious optimism, I expect that many churches integrating AI have genuine intentions of expanding a ministry's reach—a realistic goal and most noble cause. However, the type of questions that many turn to religion in hopes that it will answer are life's most fundamental (e.g., "Why am I here?," "How should I live?," or "What happens after death?"). As artificially intelligent machines enter religion, the concern is that we begin thinking of such questions as a series of algorithms and that the answer is merely a calculation away. It is when

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384. Trevor Sutton, *The Emergence of AI Requires Ministers to be Proactive*, FAITH & LEADERSHIP (Aug. 8, 2023), <https://faithandleadership.com/the-emergence-ai-requires-ministers-be-proactive>.

385. *See id.*

386. *See supra* Section III.A.–B. (arguing that the privilege could protect AI communications).

387. *See supra* Section III.C.–D. (proposing that legislators are constitutionally restricted from regulating AI integration in churches; however, an AI terms-of-use policy should be implemented).

388. *See supra* notes 2–3 and accompanying text (introducing a hypothetical).

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we seek from technology answers to *these* questions that we become truly blind to reality.