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# PROFESSIONAL SECRECY AND PRIVILEGED COMMUNICATIONS

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OUR MODERN PUBLIC LIFE has greatly increased the complexity of human relationships and has presented moral theologians and moral philosophers with a heavy task in analyzing the new situations and properly applying to them the old and constant moral principles. In many respects the courts have similar problems of analysis and application of precedent. A changing order produces unfortunate tendencies in addition to benefits. There is discernible in certain quarters, a tendency to make public opinion a standard of right conduct. The changing order has also produced a lessening appreciation on the part of the public of their fundamental rights. These weaknesses in the social structure suggest the need for seasonal rehearsal of the corresponding rights and duties of the professions and public alike.

Of the many duties incumbent upon the professional person the duty of secrecy is neither the most nor the least important either in matters moral or in matter of jurisprudence. It does not present a problem crying most for attention, but rather one worthy of attention and worthy of periodic re-examination in the light of changing circumstances. The theme proposed here is the consideration of the moral and legal aspects of the duty of professional secrecy in the three great professions: religion, law and medicine.

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### Professional Secrecy Defined

The moral theologian and ethicist define professional secrecy as a special moral duty, binding in both commutative and legal justice upon members of the several professions, whereby they are obligated to maintain a virtuous or discreet silence in respect of confidential information received by them in the course of duty.<sup>1</sup> The duty stems from commutative justice in so far as secrecy is required to protect the rights of either physical or moral persons to various *bona*, for example, the right to reputation. It arises from legal justice in so far as it is necessary for the common welfare (*bonum commune*) that persons who are in distress of soul or mind or body be not unduly restrained from seeking the assistance of qualified persons. And it is the common judgment of moralists and ethicists that individuals in such distress would be restrained from seeking such assistance — with incalculable harm to society — if they had no assurance that their confidences would not be betrayed by those persons to whom they might appeal for help.

The faithful observance of secrets of trust stems from the natural law<sup>2</sup> and this duty exists regardless of the prescriptions

of the laws of nations. In varying degrees the law has taken into account the duty of professional secrecy in the great professions and has made certain provisions for its observance. Nevertheless, the gap between the natural and legal prescription is significant.

### The Priest-Penitent Relation

The Code of Canon Law imposes the duty of secrecy on various ecclesiastical officials.<sup>3</sup> Of the many secret communications thus protected, the secrecy of confessional communications is most sacrosanct.<sup>4</sup> The priest's duty of professional secrecy, and, in particular, his duty of confessional secrecy, has been accorded varying degrees of recognition in the laws of nations. In countries whose system of jurisprudence is based on the civil law, it is not uncommon to find the confessional secret protected by criminal sanctions as well as by a privilege of non-disclosure in the courts of justice.<sup>5</sup> It is at best debatable whether the duty of secrecy was recognized in England prior to the Restoration; however, there is complete accord that from the time of the Restoration in England, and in the United States, the privilege was not recognized as a rule of the common law.<sup>6</sup> In many of our states a privilege of the penitent has been created by statute in respect of confidential communications made to a priest, clergy-

<sup>1</sup> REGAN, PROFESSIONAL SECRECY IN THE LIGHT OF MORAL PRINCIPLES 47 (1943).

<sup>2</sup> AQUINAS, SUMMA THEOLOGICA, II-II, q.70, art. 1, ad 2.

On the other hand sometimes they [secrets of trust] are such as one is not bound to make known, so that one may be under obligation not to do so on account of their being committed . . . under secrecy. In such a case one is by no means bound to make them known, even if the superior should command; because to keep faith is of natural right, and a man cannot be commanded to do what is contrary to natural right. (Fathers of the English Dominican Province transl. 1947.)

<sup>3</sup> CODE OF CANON LAW, e.g., Can. 243, §2; 364, §2, no. 3; 1105.

<sup>4</sup> *Id.* 889. The sacramental seal. 1. The sacramental seal is inviolable; therefore the confessor shall scrupulously take care that he may not by word or sign or in any way or for any reason betray the sinner.

<sup>5</sup> REGAN, PROFESSIONAL SECRECY IN THE LIGHT OF MORAL PRINCIPLES, c. VIII, §2 (1943).

<sup>6</sup> 8 WIGMORE, EVIDENCE §2394 (3d ed. 1940).

man or minister of the gospel, in his professional capacity, "in the course of discipline enjoined" by the rules or practice of the church or religious denomination to which he belongs.<sup>7</sup> The penitent's privilege is also embodied in the *Model Code*<sup>8</sup> and in the *Uniform Rules of Evidence*.<sup>9</sup> Nevertheless, there is no statutory grant of the privilege in seventeen American jurisdictions.<sup>10</sup>

### ***The Attorney-Client Relation***

Confidential communications between attorney and client are protected by one of the oldest privileges in the history of the common law. Recognition of the professional duty of secrecy was based initially upon objective considerations for the oath and honor of the attorney. This consideration gradually gave way to the subjective interest of the client's freedom of apprehension in consulting his attorney.<sup>11</sup> Today it is generally accepted that a client has a privilege that confidential communications between the client and his attorney will not be disclosed in court.<sup>12</sup> In addition, the attorney's obligation of professional secrecy is expressed in the Canons of Professional

Ethics<sup>13</sup> and is recognized by the Church relative to ecclesiastical trials.<sup>14</sup>

### ***The Physician-Patient Relation***

The physician's duty of secrecy in respect of the confidences of his patient has been acknowledged from ancient times as one involving every element of trust and confidence. It is the cornerstone of the Hippocratic Oath.<sup>15</sup> The duty is respected in the laws and moral teachings of the Church,<sup>16</sup> in the codes of the civil law nations,<sup>17</sup> and is revered as a cardinal ethical principle within the medical profession itself.<sup>18</sup> However, the secrecy of confidences given to a physician was not considered privileged in the English common law.<sup>19</sup>

<sup>13</sup> AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 37 (1937).

<sup>14</sup> CODE OF CANON LAW, Can. 1755, §2, n. 1.

<sup>15</sup> "... And whatsoever I shall see or hear in the course of my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets." JONES, THE DOCTOR'S OATH, 9-11 (1924).

<sup>16</sup> For recognition in the laws of the Church see note 14 *supra*. For the moral teachings of the Church on this duty of the physician (as well as of the attorney) one may consult any standard handbook in moral theology, or special treatises such as CONNELL, MORALS IN POLITICS AND PROFESSIONS (1946), or MCFADDEN, MEDICAL ETHICS (1953).

<sup>17</sup> REGAN, PROFESSIONAL SECRECY IN THE LIGHT OF MORAL PRINCIPLES, c. VIII, §2 (1943).

<sup>18</sup> AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS, c. II, §1 (1939).

<sup>19</sup> In the *Duchess of Kingston's Trial*, 20 How. St. Tr. 573 (1776), this principle was enunciated by L. C. J. Mansfield: "... If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever." See 8 WIGMORE, EVIDENCE §2380 (3d ed. 1940).

<sup>7</sup> Compare N.Y. Civ. Prac. Act §351 (limiting protection to the confessional relation) with Minn. Stat. Ann. §595.02 (3) (Supp. 1954) (extending the privilege to communications made to a clergyman by one seeking religious or spiritual advice or comfort). The statutes are listed in 8 WIGMORE, EVIDENCE §2395 n. 1 (3d ed. 1940).

<sup>8</sup> MODEL CODE OF EVIDENCE rule 219 (1942).

<sup>9</sup> UNIFORM RULES OF EVIDENCE rule 29.

<sup>10</sup> Ala.; Conn.; Del.; Fla.; Ill.; Md.; Me.; Mass.; Miss.; N.H.; N.C.; Pa.; R.I.; S.C.; Tenn.; Tex.; Va.

<sup>11</sup> 8 WIGMORE, EVIDENCE §§2290, 2291 (3d ed. 1940).

<sup>12</sup> MODEL CODE OF EVIDENCE rule 210 (1942); UNIFORM RULES OF EVIDENCE rule 26 (1); 8 WIGMORE, EVIDENCE §2292 (3d ed. 1940).

This common law rule obtains in seventeen states today.<sup>20</sup> The remaining states, following the precedent set by New York,<sup>21</sup> have created by statute a privilege of the patient that information conveyed to a physician in the course of consultation be not disclosed in court.<sup>22</sup> The statutes vary in their terms and are subject to certain limitations necessary to the protection of the common weal.<sup>23</sup>

### Liberating Factors

#### *Consent-Waiver*

If one excepts the confessional secret which is *sui generis*, it may be said that neither the moral duty of secrecy, whether resting on the priest, the attorney, or the physician, nor the privilege, whether that of the penitent, the client or the patient, is absolute. The moralists recognize the effects of certain "liberating" factors to a degree comparable to the operation of the doctrine of waiver in law. For example, it is the view of moral theologians and ethicists that the

consent of the proprietor or owner of the secret will normally free the professional person from the obligation of secrecy.<sup>24</sup> Generally the same view is maintained in the law, to the effect that the privilege may be waived by the holder.<sup>25</sup>

#### *Publication*

Again with the exception of the confessional secret, when a fact becomes public knowledge the right to secrecy is generally lost.<sup>26</sup> The moralists, in enunciating this principle, caution that in the case of

<sup>20</sup> CHAFEE, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L. J. 607 (1943).

<sup>21</sup> 8 WIGMORE, EVIDENCE §2380 n. 4 (3d ed. 1940).

<sup>22</sup> 8 *id.* §2380 n. 5. See note 20 *supra*.

<sup>23</sup> MORGAN, BASIC PROBLEMS OF EVIDENCE 109 (ALI 1954). "... In some the privilege applies only in civil cases; in some it is made expressly inapplicable in actions against a physician for malpractice; in some there are provisions for waiver. In about half the states the Uniform Narcotic Drugs Act makes specifically unprivileged communications made to a physician 'in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug.' And it is generally provided in Workmen's Compensation Acts that a physician may be required to testify to information procured in attending the claimant."

<sup>24</sup> 1 AERTNYS-DAMEN, THEOLOGIA MORALIS, no. 1004 (13th ed. 1939).

By the term "owner" of a secret here and elsewhere is meant the person seeking professional help, whether client, patient, or penitent. The expression takes its origin in the fact that moralists and ethicists regard a secret as a kind of property, on the par with, or even greater than, material possessions, over which a person exercises dominion. In consequence they speak of a man as having the right to possess, use, and dispose of his secrets. The violation of another's right to tranquil possession of his secrets is often characterized as theft. It might be useful to note here that some secrets are held jointly by a number of persons, e.g., by a family or a corporation, and in such cases the consent of the various owners would have to be obtained before disclosure would be lawful.

The MODEL CODE OF EVIDENCE and the UNIFORM RULES OF EVIDENCE both use the term "holder" instead of owner.

<sup>25</sup> *In re Associated Gas & Electric Co.*, 59 F. Supp. 743 (S.D. N.Y. 1944); *Seeger v. Odell*, 64 Cal. App. 2d 397, 148 P. 2d 901 (1944); *Everett v. Everett*, 319 Mich. 475, 29 N.W. 2d 919 (1947); *New York Life Ins. Co. v. Newman*, 311 Mich. 368, 18 N.W. 2d 859 (1945); *Demonbrun v. McHaffie*, 348 Mo. 1120, 156 S.W. 2d 923 (1942); MODEL CODE OF EVIDENCE rule 231 (1942); UNIFORM RULES OF EVIDENCE rule 37; 8 WIGMORE, EVIDENCE §§2327, 2388 (3d ed. 1940).

<sup>26</sup> 1 LEHMKUHL, THEOLOGIA MORALIS, no. 1445, iv. (1914).

professional secrecy the danger of possible scandal would have to be obviated, and also suggest as a caveat the danger that the professional person's disclosure might confirm as factual what up to that point might have been mere rumor or guesswork. It would appear that the doctrine of waiver is not as broad in scope as the moral code and while authority is scanty, public disclosure by the holder should constitute waiver.<sup>27</sup>

### **Threatened Harm**

Should secrecy be maintained despite threatened harm? The applicable rule of law is well settled to the effect that a communication to an attorney or physician is not privileged if it is made for the purpose of securing aid to enable the communicator to commit a crime or a tort involving fraud.<sup>28</sup> And it is asserted that the same rule must be applied to non-fraudulent wrongs<sup>29</sup> since the privilege is justifiable only on the theory that preservation of secrecy will produce a general social benefit of greater value than would the disclosure of the truth. It is difficult to find authority

for the application of these principles of law to the priest-penitent relation. And it is worthy of note that, subject to what has been said above, the admissibility of an attorney's or physician's testimony concerning confidential communications appears to depend upon whether the privilege is applicable and operative rather than upon considerations of threatened harm. From the viewpoint of the moral theologian and ethicist, the "liberating" factors most commonly arise when the revelation or retention of the secret might be necessary to avert some threatening harm. There are at least four possible areas of harm: to the community, to the owner of the secret, to the professional person, and to an innocent third person.

#### *1. To the Community*

The secrecy of the Confessional, since it touches upon the sacramental and supernatural order, is, as has been stated previously, in a class by itself or *sui generis*; and hence is not subject to merely human considerations.<sup>30</sup> But even from the viewpoint of the common welfare a case can be made out for its absolute inviolability, since the observance of such secrecy is necessary for the supernatural good of the whole of the higher of the two perfect societies. Accordingly, the confessional seal may not be broken for the purpose of preventing harm that threatens the *bonum commune*.

<sup>27</sup> See MODEL CODE OF EVIDENCE rule 231 (1942); UNIFORM RULES OF EVIDENCE rule 37. Compare 8 WIGMORE, EVIDENCE §§2327, 2388 (3d ed. 1940).

<sup>28</sup> United States v. Bob, 106 F. 2d 37 (2d Cir. 1939); Cramer v. State, 145 Neb. 88, 15 N.W. 2d 323 (1944) (In prosecution for murder of defendant's infant child, physician allowed to testify that defendant requested him to perform an abortion on defendant's wife prior to birth of child.); MODEL CODE OF EVIDENCE rules 212, 222 (1942); UNIFORM RULES OF EVIDENCE rules 26 (2) (a), 27 (6); CHAFEE, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943).

<sup>29</sup> Cf. 8 WIGMORE, EVIDENCE § 2298 (3d ed. 1940); MODEL CODE OF EVIDENCE rule 212 (1942).

<sup>30</sup> 2 AQUINAS, SUMMA THEOLOGICA, II-II, q. 70, art. 1, ad 2. "A man should by no means give evidence on matters secretly committed to him in confession, because he knows such things, not as a man but as God's minister: and the sacrament is more binding than any human precept." (Fathers of the English Dominican Province transl. 1947).

In respect of the professional duty of secrecy of the attorney and the physician (as well as the non-sacramental duty of secrecy of the priest), all theologians agree in principle with St. Thomas that it is not lawful to receive any secret against the common good.<sup>31</sup> Since the time of St. Thomas, theologians have introduced the consideration that since the observance of professional secrecy is itself necessary for the common good, then not any and every consideration of the common welfare would warrant relaxation of the obligation of professional secrecy.<sup>32</sup> It is the common teaching of theologians that the mere advantage that society might gain, such as the punishment of a crime that might

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<sup>31</sup> *Id.*, II-II., q. 68, art. 1, ad 3. "It is contrary to fidelity to make known secrets to the injury of a person; but not if they be revealed for the good of the community, which should always be preferred to a private good. Hence it is unlawful to receive any secret in detriment to the common good. . . ." *Ibid.*

St. Thomas is equally emphatic but more specific in his reply to the second objection in the 1st article of Question 70, where he says in part: "Sometimes they [secrets of trust] are of such a nature that one is bound to make them known as soon as they come to our knowledge, for instance if they conduce to the spiritual or corporal corruption of the community. . . . Against such a duty a man cannot be obliged to act on the plea that the matter is committed to him under secrecy. . . ." *Id.* at page 1493.

Obvious examples of what St. Thomas means by secrets in detriment to the common good or that conduce to the spiritual or corporal corruption of the community would be threatened sabotage at local, state, or federal level, treasonable plots, subversive activities generally, diseases that might threaten to take on epidemic proportions. St. Thomas would also include in this category the dissemination of doctrines that would threaten to undermine men's supernatural faith or morals.

<sup>32</sup> 3 AERTNYS-DAMEN, *THEOLOGIA MORALIS*, no. 1250 (13th ed. 1939).

otherwise go unpublished, will not justify the lifting of the obligation of professional secrecy.<sup>33</sup> Likewise, it is a settled point of moral doctrine that the harm which appears to authorize the revelation of a professional secret must be actually impending or at least constitute a serious future threat.<sup>34</sup> There is not unanimity, however, with regard to the gravity that is required in the threatening evil in order that the obligation of the secret may be lawfully set aside. The common teaching of the moralists is that the obligation of professional secrecy ceases whenever this measure is urgently necessary for warding off a serious evil (*damnum grave*) from the common welfare.<sup>35</sup> A few theologians have demanded that the threatening evil be most serious (*damnum gravissimum*) before the obligation ceases to bind.<sup>36</sup> It is believed that under either test a physician's duty of secrecy would yield to the common good and require the disclosure of a patient's having a disease such as syphilis that would pose a serious threat to the health of the community, notwithstanding the patient's insistence upon secrecy.

With regard to liberating factors and the common good, two further points should be noted. First, when it is a question of protecting the common welfare it is not necessary that the person whose secret is threatening harm be the formally unjust

no. 180, 1 (2d and 3d ed. 1923).

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<sup>33</sup> 2 PRUMMER, *MANUALE THEOLOGIAE MORALIS*, authorities; see also note 48 *infra*.

<sup>34</sup> *Cf.* 6 BILLUART, *SUMMA SANCTI THOMAE*, diss. 13, a. 1 (1886).

<sup>35</sup> See REGAN, *PROFESSIONAL SECRECY IN THE LIGHT OF MORAL PRINCIPLES* 102 (1943), listing

<sup>36</sup> See 2 KENRICK, *THEOLOGIA MORALIS*, no. 123 (1842).

cause<sup>37</sup> of the threatening evil. Second, whenever it becomes lawful to reveal or otherwise use a professional secret in order to safeguard the common welfare, it automatically becomes obligatory to do so. Permissibility of disclosure and obligation to disclose need not always go hand in hand. In this case they do go hand in hand.

## 2. *Harm to the Owner*

Moralists agree that the natural or promised secret must be revealed if its retention would result in grave harm to the owner of the secret.<sup>38</sup> But they differ in their opinion on this matter when the professional secret is involved. The prevailing view is that charity demands that the owner be safeguarded from serious harm, even if it be necessary to reveal the professional secret in order to achieve this objective,<sup>39</sup>

<sup>37</sup> The expression "formally unjust cause" is highly technical, and since it is used in numerous places throughout this article it might well be explained here. The term "cause" signifies anything that contributes by its very nature and proper force to the production of something else, and is usually distinguished in this context from the term "occasion." Thus A commits a crime for which B is convicted on circumstantial evidence. If the erroneous conviction was not contrived by A, then A's original criminal activity would be designated as the "occasion" but not the "cause" of B's sad plight. Further, one is said to be the "unjust" cause of another's evil if by his causal activity he had violated a strict right of that other person, such as the right to life or bodily integrity, the right to reputation, the right to property. Finally, a person is said to be the "formally" unjust cause of another's evil when added to the foregoing concepts there is the additional note of "subjective" guilt, that is, the person realizes that he is doing wrong and nonetheless voluntarily does it.

<sup>38</sup> See REGAN, PROFESSIONAL SECRECY IN THE LIGHT OF MORAL PRINCIPLES 40 and notes page 103 (1943).

<sup>39</sup> *Id.* at 104, n. 22 listing the authorities which include St. Thomas, St. Alphonsus, Aertnys-Damen, Merkelbach and Davis.

and even in situations where the owner expresses his unwillingness to have the revelation take place. In such cases, as a matter of moral law, the owner is considered to be "unreasonably" unwilling.<sup>40</sup> Thus it is thought that a patient who makes serious threats to commit suicide or who otherwise manifests genuine suicidal tendencies could not reasonably object to his physician's making such use of this knowledge as would be necessary to avert such a tragedy. A minority of moralists adhere to the principle that the common good achieved by maintaining professional secrecy takes precedence over the private good of the owner of the secret.<sup>41</sup> In view of this difference of opinion the professional person is morally free, though not morally obligated, to make the disclosure necessary to save the owner from himself. And since the duty to disclose, even where it is considered to exist, is one of charity only, it would not oblige in the face of proportionately grave inconvenience to the professional person.

Many of the hypothetical cases which come to mind concerning communications made to an attorney or to a physician and involving possible harm to the communicator will not be protected by the law in the form of a privilege for one reason or

<sup>40</sup> 2 MERKELBACH, SUMMA THEOLOGIAE MORALIS, no. 855, 3b (2d ed. 1935).

<sup>41</sup> See REGAN, PROFESSIONAL SECRECY IN THE LIGHT OF MORAL PRINCIPLES 40 and notes page 103 (1943).

In other words, these theologians consider disclosures of this kind to have a weakening effect on the structure of professional secrecy itself; and so they judge that the good accruing to the common welfare through keeping the structure of the duty intact should take precedence over the advantage that might come to an individual by a relaxing of the duty.



another. The communications will fall either within the rule which denies the protection of the privilege to communications involving the commission of crimes or torts in the future, or they will not be considered relevant to the purposes for which advice or treatment was sought (e.g., a disclosure by the client or patient that he is planning to commit suicide). However, cases are not beyond the pale of imagination which might not admit the same solution. For example, Attorney L represents A who has been indicted, convicted, and sentenced to die for murdering X. During the course of the relationship, A, in asserting his innocence, disclosed that his brother, B, killed X, and also disclosed the location of the murder weapon containing B's fingerprints, which location prior to this revelation A alone knew. The circumstantial evidence introduced at the trial was so overwhelming in its conviction of A, that B's confession at this time would be meaningless without producing the weapon. Nevertheless, A steadfastly refuses to disclose the location of the weapon to the authorities, to B, or to anyone else, and refuses to release attorney L from his bond of secrecy.

While it is difficult to find any precedent in the law which would free L from his duty of secrecy, according to the principles of moral theology enunciated above, the attorney would be morally free to reveal the secret, at least to the extent necessary to protect the client from himself.

### 3. Harm to the Professional Person

The situation may arise wherein the disclosure of a professional secret may be necessary to protect the professional recipient himself from harm. Would he, in such a case, be morally free to make the necessary disclosure? The answer depends

in large measure upon whether or not the owner is the formally unjust cause of the threatening harm.

In the case where the owner of the secret is not the formally unjust cause, there is substantial accord among moral theologians that where the observance of the obligation of professional secrecy would involve the risk of very grave harm (*damnum gravissimum*) to the professional person the obligation of secrecy ceases to bind, and, where possible, notice of the termination of the obligation should be given to the client or patient.<sup>42</sup> Where the risk of harm threatening the professional person is grave (*damnum grave*), but not most grave or most serious, the moral authorities have differed in their opinions; and in the several opinions it is not always clear whether they have the professional secret precisely in mind, or are referring to a lesser type of entrusted secret, such as one arising out of the relation of principal and agent.<sup>43</sup> The

<sup>42</sup> 2 MERKELBACH, SUMMA THEOLOGIAE MORALIS, no. 855, 3d (2d ed. 1935).

Thus, for example, an attorney might be forced at gun-point to disclose a client's admission of guilt to the client's opponent, or, similarly, a physician might be coerced into throwing open his medical records to someone seeking blackmail material on one of his patients.

<sup>43</sup> 3 ST. ALPHONSUS, THEOLOGIA MORALIS, no. 971, 4 (1879) states three views on the question as follows: (a) That it would not be lawful to reveal an *entrusted* secret in order to avoid grave harm (citing as authorities Alexander, Scotus, Sylvius, Reginaldus, and St. Thomas); (b) That the revelation would be lawful if the potential harm to the recipient of the secret is much more serious than the harm which disclosure would cause to the owner of the secret (and for this opinion Molina is cited); and (c) The third view is the converse of the first, and is called by St. Alphonsus the more common and more probable opinion (and for it he cites Laymann, Soto, Lessius, Navarrus, DeLugo, Sporer and others).

opinion of St. Alphonsus would permit the professional person to reveal the professional secret in order to protect himself from grave harm, if we accept Lehmkuhl's statement that the saint is referring to the professional secret; although Lehmkuhl adds on his own account that the opinion should be restricted to those cases wherein the proprietor of the secret is the unjust cause of the harm that threatens the recipient of the secret.<sup>44</sup> Among more modern authors, a number share the view of St. Alphonsus,<sup>45</sup> while others adhere to the comparative risk doctrine.<sup>46</sup> Slater and Marc incline to the principles expressed in the teachings of Saint Thomas to the effect that the obligation will usually continue to be binding when its observance entails serious loss to the professional person.<sup>47</sup> As pointed out above, just as the disclosure of a professional secret is mandatory for the protection of the *bonum commune* aside from personal considerations, so too, the maintenance of a professional secret is similarly obligatory regardless of the threat to the professional person.

In the case where the owner of the secret is the formally unjust cause, the owner of the secret assumes the role of an "unjust aggressor," and, normally, unjust aggression may be resisted to the extent necessary

to withstand the aggression. Thus, for example, client retains a prominent criminal lawyer to defend him in a criminal case and during the course of the relationship and before the trial threatens to kill the attorney if client is found guilty. There should be no dissent from an opinion which would permit disclosure of the threat, particularly where the client has the requisite reputation or propensity. If in the same situation the threat were "I'll see that you are worked over," or "taken care of," the identical solution would seem to be valid.<sup>48</sup>

Of course, such threats would not be protected by the law as privileged communications. Nor would any of the foregoing principles apply to the confessional secret.

#### 4. Harm to an Innocent Third Person

It is conceivable that the revelation of a professional secret may be the sole means of protecting an innocent third person from grave or very grave harm. What is the status of the duty of secrecy in such a case?

Where the owner of the secret is not the formally unjust cause of the evil that threatens the innocent third person, it seems to be the settled teaching of the moral theologians that the duty of secrecy prevails,<sup>49</sup> although there is some authority in favor of compromising the duty when

<sup>44</sup> See 1 LEHMKUHL, *THEOLOGIA MORALIS*, no. 1444, 3 (1914).

<sup>45</sup> See REGAN, *PROFESSIONAL SECRECY IN THE LIGHT OF MORAL PRINCIPLES* 108 (1943) for a listing of the authorities.

<sup>46</sup> Proponents of the comparative risk doctrine would be 2 VERMEERSCH, *THEOLOGIAE MORALIS: PRINCIPIA, RESPONSA, CONSILIA*, II, no. 699, II, 2 (1924); see 2 PRUMMER, *MANUALE THEOLOGIAE MORALIS*, no. 180, 2a (2d and 3d ed. 1923).

<sup>47</sup> 1 SLATER, *MANUAL OF MORAL THEOLOGY* 472, 2 (1908); 1 MARC, *INSTITUTIONES MORALES ALPHONSIANAEE*, no. 1187 (13th ed. 1906).

<sup>48</sup> It is not always clear at what point the risk of grave harm takes on the additional characteristics so as to present the risk of very grave harm. Obviously the loss of life or of a substantial equivalent would be placed in the category of very grave harm. The problem is discussed at some length in the average handbook of moral theology and in some books on ethics.

<sup>49</sup> See REGAN, *PROFESSIONAL SECRECY IN THE LIGHT OF MORAL PRINCIPLES* 47 (1943) listing as authorities Vermeersch, Genicot-Salsmans, D'Annibale, Bucceroni, Noldin, Ferreres, Slater, Davis and others.

the gravest of evils (such as loss of life) threatens the innocent third person.<sup>50</sup>

Where, however, the owner of the secret is the formally unjust cause of the harm that threatens the innocent third person, the case takes on a decidedly different aspect. Merkelbach voices the thought of many modern moral theologians in taking the position that while the common good regularly demands that the entrusted secret, and especially the professional secret, remain inviolate, the exception is presented in the case where the person entrusting the secret is or may become an unjust aggressor and against whom an innocent person can be defended.<sup>51</sup> Aertnys-Damen, making specific reference to the classic case of the syphilitic young man about to enter marriage with the unsuspecting young lady, and refusing to heed the command of the physician to desist from carrying out his intention to marry or at least inform the bride-to-be, states that, "... a good many moralists excuse from the observance of secrecy, a smaller number urge its keeping, whence in the practical order the disclosure of the secret is lawful, but does not seem to be obligatory."<sup>52</sup>

It is difficult to be sympathetic to the point of view which urges the keeping of secrecy in such cases. The authority to the contrary is represented by such theologians as Merkelbach, Vermeersch, Genicot-Salsmans, D'Annibale, Bucceroni, Noldin, Ferreres, Slater and Davis, and the intrinsic reasons underlying such authority appear convincing. The case contemplates a per-

son who has become an unjust aggressor. And just as in other areas of life an unjust aggressor normally forfeits his rights to the extent necessary to withstand the aggression, so in this matter it appears that the unjust aggressor forfeits his right to secrecy to the extent necessary to put down the aggression. Thus if a physician cannot persuade his tubercular patient to leave his employment in a restaurant or the attorney cannot dissuade his client from committing murder, it is our conviction that the professional person is both morally permitted and gravely obligated in charity to make use of the secret knowledge to the extent (but only to the extent) necessary to stop the aggression effectively. Since the duty towards the innocent third party is one of charity only, it would not bind in the face of proportionately grave inconvenience.<sup>53</sup>

### The Policy and Future of Privileges

From the time in the history of the common law when privileged communications were first given sanctuary, considerable time and learned effort has been devoted to the problem. These efforts have produced a variety of fruits; some sweet with favorable advocacy, others sweet in their adversity.

Considering the several professions seriatim, the policy underlying the client's privilege is so deeply rooted in the law and so widely acclaimed that one can reasonably predict continued recognition of the

<sup>50</sup> 2 PRUMMER, MANUALE THEOLOGIAE MORALIS, no. 180, b (2d and 3d ed. 1923).

<sup>51</sup> 2 MERKELBACH, SUMMA THEOLOGIAE MORALIS, no. 855, 3c (2d ed. 1935).

<sup>52</sup> 1 AERTNYS-DAMIEN, THEOLOGIA MORALIS, no. 1235 (13th ed. 1939); 3 *id.* 3.

<sup>53</sup> Father Regan's views are more fully discussed in a paper entitled "*Problems of Professional Secrecy*" delivered at a seminar session of the Annual Meeting of the Catholic Theological Society of America held in New York City in June, 1955.

presently accepted scope of the privilege.<sup>54</sup> Notwithstanding its wide acceptance, the wisdom of such a course of action has been questioned. Bentham, perhaps the greatest opponent of all privileges, argued that the innocent client with a righteous cause or defense does not need the privilege [and that the guilty should not be given the privilege] to aid in creating a false cause or defense.<sup>55</sup> Dean Wigmore, who favors the privilege, states that: "Its benefits are all indirect and speculative; its obstruction is plain and concrete."<sup>56</sup> Similar reaction has been voiced by Professor McCormick<sup>57</sup> and by Professor Morgan.<sup>58</sup> Professor McCormick advocates protection of the attorney's duty to maintain out of court the secrecy of his client's confidential disclosures, but suggests that "The present privilege against disclosure of such communications in judicial proceedings, should be made subject to the exception that the trial judge may require a particular disclosure if he finds that it is necessary in the administration of justice."<sup>59</sup>

The policy arguments against the recognition of the privilege of the patient, that confidential information conveyed to a physician in the course of consultation be not

disclosed in court, appear unchallengeable.<sup>60</sup> Perhaps, as has been suggested, legislatures in accepting the patient's privilege have been persuaded by lawyers in the legislature who in turn are motivated by their reluctance to deny to the medical profession the recognition which the courts have provided for the legal profession. The analogy of the two professions in this respect is more apparent than real. The patient has ample motive for full disclosure without the privilege and it is a rare case where the nature and extent of the patient's communications will be conditioned by visions of such communications being disclosed by his physician in the courtroom. The rare case concerning the patient represents the norm to a client.

The Comment to Rule 27 of the UNIFORM RULES is significant.

At the 1950 meeting of the national Conference of Commissioners on Uniform State Laws it was voted that the physician-patient privilege should not be recognized. Professional ethics give the patient broad and efficient protection against the disclosure of confidences by the doctor outside of the courtroom. There is grave doubt whether it is in the public interest to extend the right of the patient to the closing of the doctor's lips as a witness in an action where the condition of the patient is a material and relevant matter. All privileges are blockades to the ascertainment of the truth and should be conservatively and reluctantly granted. Nevertheless, at the 1953 meeting the Conference reversed its previous action and by a close vote decided to include the privilege and adopted the rules of the Model Code of Evidence on that subject. Rule 27 incorporates the provisions of Model Code Rules 220 to 223.<sup>61</sup>

<sup>54</sup> See note 12 *supra*.

<sup>55</sup> See 8 WIGMORE, EVIDENCE §2291 (3d ed. 1940) citing BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, b. IX, pt. IV, c. 5 (1827).

<sup>56</sup> 8 WIGMORE, EVIDENCE §2291 at page 557 (3d ed. 1940).

<sup>57</sup> MCCORMICK, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 469 (1938) (suggesting that the probable and desirable course of evolution for all privileges is the path from rule to discretion).

<sup>58</sup> MORGAN, *Foreword*, MODEL CODE OF EVIDENCE, pp. 19, 20 (1942).

<sup>59</sup> MCCORMICK, EVIDENCE §91, pp. 182, 183 (1954); see note 57 *supra*.

<sup>60</sup> See e.g., MCCORMICK, *Some High Lights of the Uniform Evidence Rules*, 33 TEX. L. REV. 559, 570 (1955).

<sup>61</sup> See note 9 *supra*.

Professor McCormick states that "The Comment . . . is misleading in failing to mention or explain the fact that the rule is included in brackets."<sup>62</sup> And he explains his position as follows: "At the 1950 meeting the National Conference voted that the *Rules* should not recognize the patient's privilege. Nevertheless, at the 1953 meeting the Conference voted that the *Model Code* version of the privilege be adopted for inclusion in the *Rules*, but to be printed within brackets. The effect of this, as I understand it, is that the Conference does not recommend that the substance of the provision be adopted, but if the substance is favored by a state, the Conference recommends the bracketed form." He concludes: "It [Rule 27] is not an improvement on the common law, which leaves the door open to the truth."<sup>63</sup> In the face of these comments the future of the patient's privilege in the law will have to depend upon extrinsic considerations.

The last and perhaps the most delicate of the privileges concerns the priest-penitent relation. The clarity and persuasiveness of Bentham's argument on this point leave little to be desired. He reasons that to compel disclosure would be inconsistent and incompatible with religious tolerance.<sup>64</sup> Dean Wigmore's position may be stated as follows: Since the communication originates in a confidence of secrecy, which confidence is essential to the relation and deserves recognition and countenance in a country where toleration of religion exists by law,

the injury to the penitential relation by compulsory disclosure would be greater than the benefit to justice. Accordingly, the privilege should be recognized.<sup>65</sup>

As pointed out above, the legislatures of seventeen states have not granted the privilege, notwithstanding the fact that the common law affords no protection.<sup>66</sup> While it is true that no cases have arisen in recent years in these jurisdictions in which a priest has been requested to disclose a confessional communication, and while it would take an inexperienced or indiscreet attorney to place the priest in the position of asserting his duty of secrecy, it is submitted that this sacred religious duty should receive statutory recognition, not only for the purpose of insuring against the infrequent indiscretion, but also in recognition of the fundamental rights of mankind. The argument which purports to deny the privilege to Catholics because there are other religious denominations whose ministers and members are not enjoined by the incidents of the "catholic confession" (and as such the policy arguments favoring protection are lacking) is as specious as the argument favoring the denial of rights because they are not exercised. It is apparent that a carefully drafted statute, giving the trial judge the discretion to determine whether the penitential communication meets the several tests suggested by Wigmore, affords adequate protection for the jurisprudential interests in the great majority of cases—a much more just and practical solution.<sup>67</sup>

<sup>62</sup> See MCCORMICK, *Some High Lights of the Uniform Evidence Rules*, 33 TEX. L. REV. 559, note 58 at page 571 (1955).

<sup>63</sup> *Id.* at page 571.

<sup>64</sup> BENTHAM, *RAISONALE OF JUDICIAL EVIDENCE*, b. IX, pt. II, c. VI, pp. 367 ff.

<sup>65</sup> 8 WIGMORE, *EVIDENCE* §2396 (3d ed. 1940).

<sup>66</sup> See note 10 *supra*.

<sup>67</sup> UNIFORM RULES OF EVIDENCE rule 29; see note 65 *supra*.