

St. Thomas More; Catholic Lawyers Guide; Wire Tapping; The Prayer Case; Church-State; Sterilization; Privileged Communications

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IN OTHER PUBLICATIONS

St. Thomas More

The St. Thomas More Project at Yale University will celebrate the fifth anniversary of its foundation this September. The past year has seen it enter into a stage of continuous publication of fourteen volumes in a series of More's *Complete Works*. The final touches have just been put to Volume II, *The History of King Richard III*, which will be available in the bookstores by September 1, and the Project is working now on *Utopia* (Volume IV), which went to the printer in June. The edition of the *Utopia* for the series of *Selected Works*, tentatively scheduled for simultaneous publication with the larger volume in the scholarly series, will be in press sometime this fall. If all goes well, the Project expects their joint appearance in the summer or fall of 1964. The two volumes will not, of course compete with each other. Scholars will want to use the volume in the *Opera Omnia*, with its lengthy introduction by E. Surtz, S.J. and J. H. Hexter, and its equally full Commentary. Only this volume will contain the Latin text, with full apparatus, and the new English translation in parallel. The version for the *Selected Works*, which will also appear in paperback, is designed for use as a school text and for the general public. It will contain a brief introduction and a minimal number of notes to the English text. A brochure describing the above editions along with

subscription blanks may be obtained by readers from the Yale University Press at 1986 Yale Station, New Haven, Connecticut.

It would scarcely be just, however, to give the impression that the year's work in More studies has found its major locus in New Haven. As a matter of fact, 1962-63 has seen a broad increase in both work on and interest in St. Thomas More. Many of our readers may be interested in the foundation, in Brussels on December 29 of last year, of the *Amici Thomae Mori*. This new organization proposes to publish an annual periodical with the title *Moreana* which will attempt to cover recent work on More through articles, reviews, bibliography, and reports on conferences, etc. The foundation of the society formed part of the "Quinzaine Thomas More," organized by the *abbé* J. Jacques of Brussels. Mr. E. E. Reynolds is Chairman, and Mr. L. Martz Vice-Chairman. Secretaries, who are handling subscriptions for the Association, include Mr. Garry Haupt (1986 Yale Station, New Haven); Dr. Herbrüggen (Malmedyweg 20, Münster in Westfalen); Mr. Trapp (The Warburg Institute, Woburn Square, London W.C. 1); and Father Marc'hadour (29 rue Volney, Angers). Interested readers should apply to the secretaries for further information.

Catholic Lawyers Guide

The leading official of the matrimonial court of the Archdiocese of Detroit has recently compiled a book entitled *Catholic Lawyers Guide* (Catholic Lawyers Society, Chancery Bldg., 1234 Washington Blvd., Detroit, 155 pages, \$2).

Lawyers have been blessed and blamed for any number of things. But the complexity and importance of their work are beyond argument. All human affairs hinge on civil or Church law. And all human law derives from the natural law or divine. Msgr. Charles Malloy, presiding judge of the Detroit Tribunal and for many years chaplain to the Catholic Lawyers Society, has chosen an appropriate theme for his guide in using the words of Pope Pius XII that the jurist moves between the finite and infinite, the human and the divine, "and in this . . . lies the nobility of the science which he professes."

Catholic Lawyers Guide puts within easy reach of the lawyer the answers to ethical questions that affect his practice. Msgr. Malloy includes some pertinent material from ethics and moral theology, *e.g.*, the human act, co-operation, oaths, birth control, justice and rights.

Then he examines the moral dimension of the lawyer in politics, on the bench, and before the bar. Not only the Catholic lawyer, but every Catholic in politics, must recognize his serious obligation to observe the Commandments. Even a heated campaign does not justify calumny or detraction. Nor do political debts justify the distribution of public offices to unworthy or incompetent persons.

Msgr. Malloy gives a lucid explanation of the Church's own courts, especially as they concern marriage, and he cautions the

Catholic lawyer against taking divorce cases of Catholics without prior permission of the Chancery.

Many other topics fill out *Catholic Lawyers Guide*—legal fees, wills, the purpose of a Catholic Lawyers Society (with suggested by-laws), brief biographies of St. Ives and St. Thomas More, and in the appendix is a list of Catholic law schools in the United States.

Each chapter lists books that are useful for further study.

The principles can be dug out of other texts, especially books of ethics and moral theology. But lawyers, judges and others connected with the legal profession will find this manual particularly handy for applying the principles, clarifying the issues and putting it all between the covers of a single volume.

Wire Tapping

Readers of *The Catholic Lawyer* who recall the note on the legal and moral problems posed by eavesdropping which was published in the Summer 1962 issue may be interested in a further treatment of the subject in the May 1963 issue of *Friar*. In an article entitled "Listening In: Yes or No?," Father Damian J. Blaher, O.F.M., claims that in connection with wire tapping, the question is whether the right to privacy, the right to preserve one's secrets inviolable is so absolute that it can never be invaded without injustice, or whether there are times when it must give way to a superior right or greater good. Privacy to think one's thoughts, to have one's secrets free from the unwarranted intrusion of others is one of our most cherished rights. It is not just the "American way of life" or something guaranteed by the Bill of Rights. It is far more basic.

The moral law condemns without equivocation the stealing of another's secrets and the unjustifiable invasion of another's mind just as strongly as it condemns the unjust taking of another's property. There are times, however, when the common good, the good of society as a whole may demand the sacrifice, within due limits, of one's individual good. When the individual good and the common good come into conflict the latter is to prevail, as long as the goods pertain to the same order. There are times when the individual good may prevail over the public good, but that is only where the goods are of a different order, say, spiritual versus temporal.

Listening to telephone conversations, wire tapping, eavesdropping in particular cases may be perfectly legitimate if it is necessary for the common good, for the welfare of society as a whole. If wire tapping is necessary to protect the nation from its enemies, to prevent the commission of crimes such as the narcotic trade and prostitution, which are in themselves harmful to the public welfare, then "listening in" could be morally justified.

To say this, is not to fall into the error of thinking that everything done by public authority is therefore, by that very act, a matter of the public good. In point of fact, the right of an individual to privacy and his right to protect his secrets are basic. In itself it is a requirement of the public or common good, and the area in which this right must be surrendered is extremely limited. Any easy authorization for wire tapping issued in the name of the common good would be quite unreasonable because it would ultimately work against the common good.

Father Damian states further that wire tapping could be moral and legitimate for the public authority as a pragmatic solution

in an existing emergency as long as the emergency or the need to search exists. The authority to tap any telephone for any reason would be an unjust and oppressive device destructive of an individual's right to privacy. Wire tapping without very tight controls is too treacherous a tool, too dangerous a weapon to thrust into the hands of any man even on the plea of law enforcement. For that reason any plan to authorize wire tapping must contain the proper restrictions to keep it from becoming destructive of the rights of individuals.

Private wire tapping by blackmailers, private detectives, business concerns trying to check the "loyalty" of their employees is not uncommon. This cannot be justified on the basis of common good for it has nothing to do with the public welfare. Wire tapping practiced by private individuals is illegal and definitely immoral.

The Prayer Case

An interesting comment on *Engle v. Vitale* by Dean Erwin N. Griswold can be found in the June 1963 issue of the *New York State Bar Journal*. It is a reprint of an article originally appearing in the Spring 1963 issue of the *Utah Law Review*.

In discussing the approach in the case taken by Justice Black, Dean Griswold speculates that there has perhaps been some unfortunate use of nomenclature by commentators on the case. The approach espoused by Justice Black, and followed by him and some of his colleagues, has, understandably enough, been called the "absolutist" approach. The opposite approach has been called the "balancing" approach, because it is thought to involve the balancing of various competing claims to the judge's attention. Both of these appellations may well be misleading.

According to Dean Griswold, the Black approach might better be called the "Fundamentalist theological" approach. If one thinks of the Constitution as a God-giving text stating fixed law for all time, and then focuses on a single passage, or, indeed, on two words—"no law"—without recognizing all the other words in the whole document, and its relation to the society outside the document, one can find the answers very simply. " 'No law' means no law." No more thought is required.

On the other hand, "balancing" may be a misnomer, to, as a description of the method followed by those who do not accept what is called the "Fundamentalist" approach.

Rather than "balancing," the approach might better be called the "comprehensive" or "integral" approach, since it involves looking to the text of all of the Constitution, and, indeed, in proper cases, to the "unwritten Constitution," examining and considering fully all relevant texts and conditions of our constitutional system, and integrating all together in reaching the ultimate solution. Instead of focusing on a few words, and ignoring all else, including the effect and meaning of those words, as distinguished from their apparent impact when isolated from everything else, as the "absolutist" or "Fundamentalist" approach does, the comprehensive or integral approach accepts the task of the judge as one which involves the effect of all the provisions of the Constitution, not merely in a narrow literal sense, but in a living, organic sense, including the elaborate and complex governmental structure which the Constitution, through its words, has erected. Under the "Fundamentalist" approach, the judge puts on blinders. He looks at one phrase only; he blinds himself to everything else. Can

this approach, asks Dean Griswold, really be preferable or sounder than one under which the Court examines all constitutional provisions in a living setting, and reaches its conclusion in the light of all the relevant language and factors? Of course, this comprehensive approach requires strong and able judges. Without judges of high ability, great character, and staunch courage, our Constitutional system will surely suffer under any approach to Constitutional questions.

Dean Griswold comments further it was unfortunate that the question involved in the *Engel* case was ever thought of as a matter for judicial decision, that it was unfortunate that the Court decided the case, one way or the other, and that this unhappy situation resulted solely from the absolutist position which the Court has taken and intimated in such matters, thus inviting such litigation in its extreme form.

He expresses two separate lines of thought in explaining his position. One is the fact that we have a tradition, a spiritual and cultural tradition, of which we ought not to be deprived by judges carrying into effect the logical implications of absolutist notions not expressed in the Constitution itself, and surely never contemplated by those who put the constitutional provisions into effect. The other is that there are some matters which are essentially local in nature, important matters, but nonetheless matters to be worked out by the people themselves in their own communities, when no basic rights of others are impaired. It was said long ago that every question in this country tends to become a legal question. However, he asks, is that wise? Are there not questions of detail, questions of give and take, questions at the fringe, which are better left to non-judicial determination?

It is perfectly true, and highly salutary, that the first amendment forbade Congress to pass any law "respecting an establishment of religion or prohibiting the free exercise thereof." These are great provisions of great sweep and basic importance. But to say that they require that all trace of religion be kept out of any sort of public activity is sheer invention. Our history is full of these traces; chaplains in Congress and in the armed forces; chapels in prisons; "In God We Trust" on our money, to mention only a few. God is referred to in our national anthem, and in "America," and many others of what may be called our national songs. Must all of these things be rigorously extirpated in order to satisfy a constitutional absolutism? Must we deny our whole heritage, our culture, the things of spirit and soul which have sustained us in the past and helped to bind us together in times of good and bad?

Turning to the other point, namely, that there are some matters which should be settled on the local level in each community and should not become Supreme Court cases, the Dean states:

The prayer involved in the *Engel* case was not compulsory. As the Supreme Court itself recited, no pupil was compelled "to join in the prayer over his or his parents'" objection. This, to me, is crucial. If any student was compelled to join against his conviction, this would present a serious and justiciable question, akin to that presented in the flag salute case. The Supreme Court did not give sufficient weight to this fact, in my opinion, and relied heavily on such things as the history of the Book of Common Prayer, which under various Acts of Parliament, was compulsory on all.

Where there is no compulsion, what happens if these matters are left to the determination of each community? In New York, under the action of the Regents, this determination was made by the elected authorities of the School District. It was, indeed, a fact that

a large number of the School Districts in New York did not adopt the so-called Regents' prayer. This may have been because they could not agree to do so, or because the situation in particular School Districts was such that all or a majority did agree that they did not want to have such a prayer or that it was better to proceed without a prayer. Where such a decision was reached, there can surely be no constitutional objection on the ground that it was a decision locally arrived at, or that it amounts to an "establishment" of "no religion." But, suppose that in a particular School District, as in New York Hyde Park, it was determined that the prayer should be used as a part of the opening exercises of the school day. Remember that it is not compulsory. No pupil is compelled to participate. Must all refrain because one does not wish to join? This would suggest that no school can have a Pledge of Allegiance to the Flag if any student does not wish to join. I heartily agree with the decision in the *Barnette* case that no student can be compelled to join in a flag salute against his religious scruples. But it is a far cry from that decision to say that no School District can have a flag salute for those who want to participate if there is any student who does not wish to join. This is a country of religious toleration. That is a great consequence of our history embodied in the First Amendment. But does religious toleration mean religious sterility? I wonder why it should be thought that it does. This, I venture to say again, has been, and is, a Christian country, in origin, history, tradition and culture. It was out of Christian doctrine and ethics, I think it can be said, that it developed its notion of toleration. No one in this country can be required to have any particular form of religious belief; and no one can suffer legal discrimination because he has or does not have any particular religious belief. But does the fact that we have officially adopted toleration as our standard mean that we must give up our history and our tradition? The Moslem who comes here may worship as he pleases, and may hold public office without discrimination. That is as it should be. But why should

it follow that he can require others to give up their Christian tradition merely because he is a tolerated and welcome member of the community?

Though we have a considerable common cultural heritage, there have always been minority groups in our country. This, I am sure, has been healthy and educational for all concerned. We have surely gained from having a less homogeneous population. Of course, the rights of all, especially those of minorities, must be protected and preserved. But does that require that the majority, where there is such a majority, must give up its cultural heritage and tradition? Why? Let us consider the Jewish child, or the Catholic child, or the non-believer, or the Congregationalist, or the Quaker. He, either alone, or with a few or many others of his views, attends a public school, whose School District, by local action, has prescribed the Regents' prayer. When the prayer is recited, if this child or his parents feel that he cannot participate, he may stand or sit, in respectful attention, while the other children take part in the ceremony. Or he may leave the room. It is said that this is bad, because it sets him apart from other children. It is even said that there is an element of compulsion in this—what the Supreme Court has called an "indirect coercive pressure upon religious minorities to conform." But is this the way it should be looked at? The child of a non-conforming or a minority group is, to be sure, different in his beliefs. That is what it means to be a member of a minority. Is it not desirable, and educational, for him to learn and observe this, in the atmosphere of the school—not so much that he is different, as that other children are different from him? And is it not desirable that, at the same time, he experiences and learns the facts that his difference is tolerated and accepted? No compulsion is put upon him. He need not participate. But, he, too, has the opportunity to be tolerant. He allows the majority of the group to follow their own tradition, perhaps coming to understand and to respect what they feel is significant to them.

Is this not a useful and valuable and educational and, indeed, a spiritual experience for the children of what I have called the majority group? They experience the values of their own culture; but they also see that there are others who do not accept those values, and that they are wholly tolerated in their non-acceptance. Learning tolerance for other persons, no matter how different, and respect for their beliefs, may be an important part of American education, and wholly consistent with the First Amendment. I hazard the thought that no one would think otherwise were it not for parents who take an absolutist approach to the problem, perhaps encouraged by the absolutist expressions of Justices of the Supreme Court, on and off the bench.

Church-State

The argument over Church-State relations as it exists today and as it may very well break out in the next session of the Second Vatican Council is a classical Catholic dilemma. On the one side is most of the weight of authority and tradition, on the other, the greater cogency of theological argument. The traditional view is reflected in papal documents like Leo XIII's *Immortale Dei* where the following passage occurs:

As a consequence, the State, constituted as it is, is clearly bound to act up to the manifold and weighty duties linking it to God by the public profession of religion. Nature and reason, which command every individual devoutly to worship God in holiness, because we belong to Him and must return to Him since from Him we came, bind also the civil community by a like law. For men living together in society are under the power of God no less than individuals are and society, not less than individuals, owes gratitude to God, who gave it being and maintains it and whose ever-bounteous goodness enriches it with countless blessings. Since then no one is allowed to be remiss in the service due to God and since the chief duty of all men is to cling

to religion in both its teaching and practice—not such religion as they may have a preference for but the religion which God enjoins and which certain and most clear marks show to be the only one true religion—it is a public crime to act as though there were no God. So, too, is it a sin in the State not to have care for religion as something beyond its scope, or as of no practical benefit, or out of many forms of religion to adopt that one which chimes in with the fancy; for we are bound absolutely to worship God in that way which He has shown to be His will. All who rule, therefore, should hold in honour the holy name of God and one of their chief duties must be to favor religion, to protect it, to shield it under the credit and sanction of the laws and neither to organize nor enact any measures that may compromise its safety. This is the bounden duty of rulers to people over whom they rule.

It is true that in contrast to the traditional approach, Pope Pius XII spoke up for tolerance in his address to the Italian Jurists on December 6, 1953. Tolerance, however, is the acceptance of a situation you cannot alter. The argument over Church-State relations today concerns principles not situations. In recognition of this situation, Archbishop of Durban, Denis Hurley, an Oblate of Mary Immaculate, has written an extremely interesting article appearing in the initial issue of *Continuum*, a new periodical sponsored by Saint Xavier College of Chicago, Illinois. Entitled "The Church-State Dilemma," it sets forth an excellent analysis of the present problem and poses a solution.

Archbishop Hurley observes that one can understand the reason for the special present confusion in the political sphere. It originates from the historic difficulty of distinguishing in the Christian prince between his duties as a prince and his duties as a Christian. This difficulty has been compounded by the tendency to imagine that Church and State are concrete realities apart

from the human beings that constitute them. As a result we have been striving to find some point of contact between our objectivized Church and our objectivized State and their respective powers.

We have in fact been looking for a pattern of relations that will meet the following three requirements: (1) Church and State must be distinct; (2) The State must serve the Church (in fulfillment of its religious obligation); and (3) The State must be independent of the Church.

Quite obviously it is impossible to reconcile (2) and (3). The State cannot be obligated to serve the Church and yet remain independent of it. The semblance of a solution is offered by distinguishing between the State's obligation to serve the Church in the supernatural order and its independence of the Church in the natural order. But the question arises immediately: how does the State, which by definition pertains to the natural order, get involved in the supernatural order at all?

According to the Archbishop, there seems no way out of this impossible situation, so the solution of the Church-State problem must be sought elsewhere, and in what better place than the Christian conscience? That is where the supernatural and the natural meet. The Christian conscience is the source of Christian temporal action, political as well as cultural and economic. Such action is supernatural in its moral and personal texture but remains on the natural plane in its objective and technical performance. The Church therefore has the right to address herself to the conscience of the politician but the technique of his trade is outside her jurisdiction. His political morality is subject to her guidance but not his political technique. That technique is intended for purely temporal ends and he cannot be obliged to

use it for religious purposes. In this sphere he can and must maintain his lay autonomy.

Does this mean, asks Archbishop Hurley, that there can be no co-operation between Church and State in those famous mixed matters that involve, for instance, the family and education? Of course not. Though we insist on the distinction of Church and State we insist equally on the fact that the Church and State meet in the Christian conscience—in the Christian conscience of the bishop who governs the Church and obeys the State, in the Christian conscience of the politician who governs the State and obeys the Church, in the Christian conscience of the Christian citizen who gives his loyalty and obedience to both. Within this context there is ample provision for the distinction of powers and the collaboration of those who exercise them.

There is, of course, also ample provision for misunderstanding and contention. There will be times when Church authority will see a clear-cut moral issue where no such clear-cut issue exists—as no doubt some of the Italian hierarchy must have been tempted to react in regard to the *apertura a sinistra*. There will also be times when politicians will shrug off well-deserved reprimands for political immorality with disparaging references to political priests. The frontier between political morality and political technique will not always be clearly demarcated. But the dialogue will go on and yesterday's confusion will become tomorrow's platitude.

A valuable contribution to clearing the air is being made by contemporary efforts to reassess the Catholic position and in this ecumenical age it will be a real achievement if our reassessment enables us to look our separated brother squarely in the eye and not terrify him with that pair of thesis-

hypothesis horns inherited from the nineteenth century: "When I am weak I claim freedom on your principles, when I am strong I refuse it on my own."

There remains, however, according to Archbishop Hurley, another pair of horns, the horns of the dilemma of how you square contemporary opinions with the traditional teaching of the Church.

Sterilization

It is interesting to note that in face of Justice Holmes' blistering denunciation of the opponents of compulsory sterilization in *Buck v. Bell*,¹ the last thirty years have seen a change in scientific attitude on the subject of sterilization and the position of the Justice can no longer be vindicated even scientifically.

The Winter 1963 issue of *The Indiana Law Journal* contains a most informative note on the subject and stresses the fact that even though the United States Supreme Court upheld the validity of the substantive law of sterilization, the contemporary question of the substantive constitutionality depends upon the continuing scientific validity of the standards upon which the statutes are based. Since most of the statutes are directed toward hereditary factors, the problem lies in the accurate determination of what mental illnesses and mental deficiencies may be accurately classified as "hereditary."

During the first twenty years of this century the theory of institutional care grounded on the protection of the patient from the dangers of society was abandoned. It was replaced with the attitude that the protection of society from the problems caused by the mentally disordered should be paramount in the institutionalization of

¹ 274 U.S. 200 (1927).

mentally ill and defective persons. This change in attitude gave rise to several notions regarding mental health which gave impetus to the eugenic movement. Institutional care became a means of segregating persons from society and preventing them from propagating. It became evident that segregation as a eugenical means was unsatisfactory because the cost of institutionalizing all mentally ill and mentally deficient persons would be economically unfeasible. In addition it would seem questionable to institutionalize a person simply to keep him from propagating, when other factors did not require such care.

Eugenic sterilization gained in importance as a result of the change in the institutional care theory and the economic unfeasibility of segregation by institutionalization. With its increasing use, however, many questions were raised concerning the validity of heredity as a factor in mental illnesses and deficiencies, and in 1936 an extensive investigation was conducted by the American Neurological Association under the leadership of Doctor Abraham Myerson. As a result of this investigation the committee, unable to absolutely relate hereditary factors to mental illness and mental deficiency, recommended that sterilization only be performed in selected cases of certain diseases, with the consent of the patient or those responsible for him. The committee further recommended: (1) that the laws should be made voluntary rather than compulsory, (2) that sterilization laws be made applicable not only to patients in state institutions, but to those in private institutions and those at large in the community, and (3) that a permanent committee be organized to conduct scientific research in the field of mental disorders. Doctor Myerson later commented that "the bulk of feeble-

mindedness is utterly unknown as to genus, pathology and disorders of physiology. I stress this because it is insufficient to say 'heredity' is a cause, since heredity is no unified set of mechanisms."

Notwithstanding the early impetus toward compulsory sterilizations, several factors have played an important part in limiting the application of such laws. First, in light of the scientific knowledge gained from investigations, such as Doctor Myerson's, the medical profession has re-evaluated its early position concerning the importance of hereditary factors in mental disorders and has adopted a new position in regard to eugenic sterilization. The basic tenet in the adoption of the new position is based on scientific findings that not as many disorders are attributable to hereditary factors as was supposed in the infancy of the compulsory sterilization movement. In addition to the diminution of the hereditary factor as a basis of mental illness and mental deficiencies, it has been determined that environment plays an important part in such disorders. In regard to the declining scientific validity of heredity and the increasing concern about environment in sterilization, it has been suggested that a hereditary-environmental basis for sterilization may be stronger factually and, therefore, stronger constitutionally, than the earlier over-emphasis on heredity as the causal factor in mental illnesses and deficiencies.

According to the note in the *Indiana Law Journal* the position for limiting the use of eugenic sterilization has recently been affirmed in a report by a medical association committee on mental health in South Dakota which made the following statement concerning heredity in sterilization cases:

Medical science has by no means established that heredity is a factor in the devel-

opment of mental diseases with the possible exception of a very few and rare disorders. The committee holds that the decision to sterilize for whatever reason, should be left up to the free decision reached by the patient and family physician mutually and that the state has no good reason to trespass in this area.

The note concludes with the suggestion that in view of (1) the changing attitude of the medical profession as to the importance of hereditary factors in mental disorders, (2) the general attitude of both professional and lay persons concerning the application of eugenic sterilization statutes, (3) the awareness of eugenists, themselves, as to potential dangers of their theories, and (4) in light of the fact that sterilization operations violate the bodily integrity of the person and are generally permanent in effect, a careful evaluation of the standards upon which sterilization is ordered must be made in order to protect the rights of the person.

Privileged Communications

Readers of *The Catholic Lawyer* who recall the article by Father LoGatto on "Privileged Communications and the Social Worker" which was featured in the Winter 1962 issue may be interested in a narrower aspect of the subject currently featured in the Winter 1963 issue of the *Ohio State Law Journal*.

Writing on the topic "Confidential Communications to the Clergy," Dean Seward Reese of the Willamette College of Law, in commenting on the clergyman's privilege, asks, among other questions, is "counseling" included under the privilege? Also, he asks, should the privilege be extended to admissions made in a church trial?

In discussing these, and related questions in view of present-day priest-penitent statutes, Dean Reese asks further, is it necessary

to have a broad priest-penitent privilege? About this, he answers, there should be little doubt. It is needed by the clergyman, by those individuals who require spiritual counsel or a process by which they can be relieved from a feeling of spiritual guilt, by the church as an institution, by the trial judge and by society.

Most clergy will not testify concerning confidential communications regardless of whether there is a statutory privilege. They are bound by an overpowering discipline that dictates the strictest standards of conduct concerning the maintenance of the inviolability of the confidential communication made to them in their ministerial capacity. This is just as true of most Protestant clergy as it is of the Roman Catholic. Therefore, in a state without the privilege, a clergyman facing contempt charges for refusing to testify would have little trouble making the decision about what to do. He would refuse, face contempt charges, and imprisonment. The pressure from an institutional standpoint would reinforce his determination. To testify would cast doubt upon the security all people have toward the secrecy of confidential communications to the clergy.

According to Dean Reese, today, the need for the statute, and a broad one, is made more manifest as a result of the development within this century of a greater psychological understanding and analysis of the working of the human mind. This progressive awareness is reflected in the more recent statutes. As an example, the Massachusetts statute enacted in 1962 in part states:

nor shall a priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner testify as to any communication made to him
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by any person in seeking religious or spiritual advice or comfort, or as to his advice given thereon in the course of his professional duties or in his professional character, without the consent of such person.

Dean Reese concludes his article by recommending: (1) That some national organization of attorneys sponsor the drafting of a uniform statute covering privileged confidential communications to clergymen that

would be modern and acceptable to state legislatures; and (2) That the drafting committee be composed of 15 men to be chosen as follows: (a) Seven experienced legislative draftsmen: The man most responsible for the drafting of the priest-penitent statutes in each of the following states: Delaware, Florida, Maryland, Massachusetts, South Carolina, Tennessee and Virginia, (b) Four clergymen from major churches, (c) A trial judge, (d) Two legal educators, and (e) A teacher from a theological school.