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The Pastor on the Witness Stand: Toward a Religious Privilege in the Courts

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Providing counsel and declaring God's forgiveness to troubled souls has been the work of the Christian Church since the Galilean ministry of its Lord. Pastoral counseling ministry is known to other religious traditions as well. As the modern age has generated new demands for spiritual and psychological counseling, the mainline denominations have responded with clergy who are trained as pastoral counselors.

Yet, we know that many individuals will avail themselves of spiritual assistance only when they believe the secrecy of their admissions will not be violated. At the same time, spiritual assistance surely will be facilitated by the knowledge that the cleric will not be forced to divulge a counselee's admissions in court or to the police, or be tossed into prison for refusing to do so. Unfortunately, a survey of existing American law reveals that in most instances such assurances cannot be given.

Both pastoral counseling and formal sacramental confession foster situations in which the cleric hears the darkest secrets and deepest anxieties of those who seek to leave their burdens behind and experience rebirth into a new and productive life. In the course of obtaining spiritual assistance, an individual may reveal family conflicts, psychiatric distress, business troubles, or even criminal guilt. It is self-evident that the information thus imparted might be desired by a spouse in a divorce case, the police or prosecuting attorneys, employers, opposing parties in civil damage litigation, the news media, and even political or business rivals. If spiritual counseling and absolution are truly of healing value to troubled persons, and thus of benefit to society, the need for assured secrecy is
obvious. Indeed, if a cleric is unable to guarantee confidentiality, he or she may have a duty to advise against revealing confidences, lest the cleric become the instrument through which the matter is exposed to others.

The problem involved here is not one of mere academic interest. Appellate courts in the United States have treated this issue in more than seventy cases, many of them quite recent, and thus we know the matter has been, and will continue to be, an issue in hundreds of trials. The litigation has involved every field of law: murder prosecutions, selective service compliance, wills and estates, domestic relations, personal injury damage suits, and grand jury probes.

While church law or custom may recognize or impose an obligation of secrecy in some situations, whether the obligation is honored by secular courts is another matter altogether. Ethical restraints against disclosure are not synonymous with legal restraints, and, thus, unless a secular court has its own rule of clerical privilege, a witness cannot be excused from testifying.

In general, the law recognized long ago the public interest in holding inviolable the confidentiality of communications between persons in some special relationships. Thus arose in the rules of evidence the concept of "privileged communications," in which the law honored specified confidences by making them immune from compelled disclosure in judicial

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1 One Anglican authority, writing on sacramental confession, maintains that the obligation upon the cleric to maintain absolute confidentiality (sigillum confessionis, or seal of confession) binds by "natural, divine, and ecclesiastical law . . . If, for a moment, the idea could be entertained that the confessor might make use of any information he received in confession, or mention even the smallest sin confessed to him, the usefulness, sanctity, and benefits of the sacrament would be rendered absolutely null and void." F. Belton, A Manual for Confessors 89 (1931). Early commentators recognized that "[s]ecrecy is of the essence of penance. The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed . . . ." People v. Phillips, unreported (N.Y.C. Gen. Sess. N.Y. County 1813), reprinted in W. Sampson, The Catholic Question in America 52, 111 (1813 & reprint 1974).

It should be noted that since the confession to a qualified member of a religion confers total absolution from sin, "[t]he secrecy of the Confessional . . . is . . . in a class by itself . . . and hence not subject to merely human considerations." Regan & Macartney, Professional Secrecy and Privileged Communications, 2 Cath. Law. 3, 7 (1956) (footnote omitted).


3 See Mullen v. United States, 263 F.2d 275, 277-78 (D.C. Cir. 1959); see also Trammel v. United States, 445 U.S. 40, 50 (1980) (the public interest for privilege must override public interest to hear testimony); 8 J. Wigmore, A Treatise on the Anglo-American System of Evidence § 2285, at 531-32 (3d ed. 1940) (confidentiality is a privilege not a right). "[T]he principle of privilege [is] an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice . . . ." 8 J. Wigmore, supra, § 2285, at 531.
RELIGIOUS PRIVILEGE

proceedings. Under this concept, one or more parties may claim the "privilege" and refuse to testify to information disclosed within a confidential relationship. This doctrine supersedes normative principles of jurisprudence requiring every citizen to respond to the subpoena power of the courts and thereby reveal all competent information relating to disputed issues. If the courts are to correctly decide the disputes before them, and if no citizen is to be above the law, the necessity for the general rule, and the allowance of precious few exceptions to it, are obvious. The Watergate tapes case exemplified such competing public interests.

Probably the most familiar privileges involve communications between a husband and wife and an attorney and client. Both of these


* See Blair v. United States, 250 U.S. 273, 281-82 (1919). "[T]he witness is bound . . . to tell what he knows in answer to questions framed for the purpose of bringing out the truth." Id. at 282. Blair involved testimony before a federal grand jury, id. at 276, and recognized the existence of several qualifications and exceptions to the privilege rule, id. at 281; see also Trammel v. United States, 445 U.S. 40, 50 (1980) ("testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence'").

* See United States v. Nixon, 418 U.S. 683, 705-13 (1974). President Nixon asserted an absolute privilege in response to a subpoena duxes tecum demanding from him tapes and papers for use in a criminal action against seven named defendants. Id. at 688. The Court held that absent a showing of a need to protect military, diplomatic, or national security secrets, the executive privilege is not applicable. Id. at 706. Privileges, the Court noted, are "exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth." Id. at 710. It has been recognized that this search for truth, should be limited only to the extent that "permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

* See, e.g., Hawkins v. United States, 358 U.S. 74, 78 (1958) (broad exclusion of testimony of one spouse against the other absent the consent of both); Stein v. Bowman, 38 U.S. (13 Pet.) 209, 222 (1839) (wife is incompetent to testify against her husband). The rigid rule prohibiting the testimony of one spouse against the other recently has been modified. See Trammel v. United States, 445 U.S. 40, 53 (1980) (witness-spouse can be neither compelled, nor foreclosed, from testifying); United States v. Nelson, 485 F. Supp. 941, 947 (W.D. Mich. 1980) (the privilege between spouses only applies to communications that were intended to be confidential); see also 8 J. Wigmore, supra note 3, § 2332, at 636 (the marital privilege is based on "confidences").

* See In re Selser, 15 N.J. 393, 404-05, 105 A.2d 395, 401 (1954). The attorney-client privilege has been recognized since Elizabethan England. See 8 J. Wigmore, supra note 3, § 2290, at 547 & n.1. It is founded on the belief that it is "necessary 'in the interest and administration of justice,'" United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (quoting Hunt v. Blackburn, 128 U.S. 464, 470 (1888)), as well as "to
privileges existed at common law, and therefore exist in the Anglo-American legal jurisdictions without specific statutory authorization. Other well-known privileges include the physician-patient privilege and what traditionally has been called the clergy-penitent privilege. Neither of these, however, was recognized at common law, and thus the privileges exist today only to the extent that the several states provide for them, either by legislative enactment or by rules of court. Privileged status has


See 3 S. Gard, supra note 2, §§ 21:4, 21:8; 8 J. Wigmore, supra note 3, §§ 2290, 2333.

See 8 J. Wigmore, supra note 3, § 2380, at 802-09. Although not recognized at common law, see Mutual Life Ins. Co. v. Owen, 111 Ark. 554, 559, 164 S.W. 720, 722 (1914); People v. Lane, 101 Cal. 513, 514, 36 P. 16, 17 (1894); In re Estate of Koenig, 247 Minn. 580, 583, 78 N.W.2d 364, 367-68 (1956), a statutory doctor-patient privilege has been created by a number of states. See J. Richardson, Doctors, Lawyers, and the Courts 139 (1965). For a compilation of these early statutes, see C. DeWitt, Privileged Communications Between Physician and Patient 447-71 (1958).

See 8 J. Wigmore, supra note 3, §§ 2394-2395, at 843-45. The roots of the clergy's confidential communication privilege can be traced to the first century. See W. Tiemann, Right to Silence 31-32 (1964). The Seal of Confession of the Roman Catholic Church is the forerunner of the clergy-penitent privilege. See L. Gumper, Legal Issues in the Practice of the Ministry 34 (1981). Prior to the Norman Conquest, the Seal of Confession was absolute, and severe penalties were imposed for violating it. W. Tiemann, supra at 36. Common law, however, denied the extension of such a privilege to clergymen. Id. at 83; see, e.g., Johnson v. Commonwealth, 310 Ky. 557, 561, 221 S.W.2d 87, 89 (1949) (common-law rule that communications to clergymen are not privileged has been abrogated by statute); Kean v. Gigante, 47 N.Y.2d 160, 166, 390 N.E.2d 1151, 1154, 417 N.Y.S.2d 226, 229 (1979) (the nonexistence of a clergy-penitent privilege at common law is not disputed), cert. denied, 444 U.S. 887 (1979); Greenlaw v. King, 1 Beav. 137, 145, 48 Eng. Rep. 891, 894 (Rolls Ct. 1838) (clergymen are bound to disclose communications made to them).

An historical basis for the existence of the privilege can be found in the affinity that state governments had with the Roman Catholic Church. See E. Bradley, The Privilege of Religious Confessions in English Courts of Justice 2, 23 (1865). "The Church and State were both Catholic, the rule of the Church upon any Religious Rite, any matter of religious observance and discipline, which was deemed universal and absolute obligation, was binding upon the state . . . ." Id. at 2. During that period, the State never questioned the sacredness or inviolability of confession. Id. at 23; see also Hogan, A Modern Problem on the Privilege of the Confessional, 6 Loy. L. Rev. 1, 8 (1951) (until the reign of Henry VIII, the law of the Church was the same as the law of England); Quick, Privileges Under the Uniform Rules of Evidence, 26 U. Cin. L. Rev. 537, 544 (1957) ("argument as to whether [the privilege] had a common law counterpart seems wholly academic").

Yazoo & M.V.R. Co. v. Decker, 150 Miss. 621, 640-41, 116 So. 287, 291-92 (1928). Privilege provisions generally have been considered matters of evidence and not of substantive law. Id. Thus, they are often governed by the respective codes of evidence adopted by state and federal courts. Reese, Confidential Communications to the Clergy, 24 Ohio St. L.J. 55, 74 (1963); cf. State ex rel. Leas, 303 N.W.2d 414, 419-20 (Iowa 1971) (procedural rule of evidence is not a substantive right). But see Woelfling v. Great-West Life Assurance Co., 30 Ohio App. 2d 211, 220, 285 N.E.2d 61, 68 (1972) (physician-patient privilege is a substantive right).
been given by some jurisdictions in recent years to such vocations as news reporters,\(^{13}\) counselors in sexual assault cases,\(^{14}\) interpreters for the deaf,\(^{15}\) psychotherapists,\(^{16}\) accountants,\(^{17}\) and licensed psychologists.\(^{18}\) Some states also have recognized privileges for such matters as trade secrets,\(^{19}\) secrets of state,\(^{20}\) individual political votes,\(^{21}\) and religious beliefs.\(^{22}\) In many cases these newer vocational privileges provide substantially broader protections than the clerical privilege provisions in the same states.

The elements of a typical clergy-penitent privilege statute were suggested twenty years ago by Emory University law professor G. Stanley Joslin in his legal manual for clergy:

Every communication made by a person professing religious faith, or seeking spiritual comfort, to any Protestant minister, or to any priest, or to any Jewish rabbi, or to any Christian or Jewish minister, shall be privileged. No such minister, priest, or rabbi shall disclose any communications made to him by any person professing religious faith or seeking spiritual guidance, or be competent or compellable to testify with reference to any such communication in any court.\(^{23}\)

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\(^{13}\) ALASKA STAT. § 09.25.150 (1983).  
\(^{14}\) CAL. EVID. CODE § 1036 (West Supp. 1983).  
\(^{15}\) VA. CODE § 8.01-400.1 (Supp. 1983).  
\(^{17}\) IND. CODE ANN. § 25-2-1-23 (West 1983); see, e.g., Cissna v. State, 170 Ind. App. 437, 439, 352 N.E.2d 793, 795 (1976) (certified public accountant granted privilege); In re A Special Investigation No. 202, 53 Md. App. 96, 103, 452 A.2d 458, 462 (1982) (the accountant-client privilege was created by statute, in derogation of common law, to protect clients' expectations of privacy).  
\(^{18}\) IND. CODE ANN. § 25-33-1-17 (West 1983); see Southern Bluegrass Mental Health and Mental Retardation Bd., Inc. v. Angelucci, 609 S.W.2d 931, 933 (Ky. Ct. App.) (communications to psychologists are privileged), aff'd, 609 S.W.2d 928 (Ky. 1980); In re Atkins, 112 Mich. App. 528, 542-43, 316 N.W.2d 477, 483 (1982) (when patient does not waive the psychologist-patient privilege, testimony as to the communication cannot be admitted).  
\(^{20}\) Neb. Rev. Stat. § 27-509 (1979); see also 8 J. WIGMORE, supra note 3, § 2378, at 783-84 n.3 (examples from federal and state jurisdictions); supra note 6, (discussion of executive privilege).  
\(^{21}\) Me. R. Evid. 506 (West 1983); see, e.g., Pedigo v. Grimes, 113 Ind. 148, 150, 13 N.E. 700, 701 (1887) (the ballot is secret, no man casting a legal ballot may be compelled to disclose his vote); Application of Moffat, 142 N.J. Super. 217, 225, 361 A.2d 74, 78 (N.J. Super. Ct. App. Div. 1976) (voters have privilege to refuse to disclose tenor of their vote).  
\(^{23}\) G. JOSLIN, THE MINISTER'S HANDBOOK 116 (1962); see L. GUMPER, supra note 11, at 56;
Recently, a national group of legal scholars drafted model statutes which incorporate ideal provisions according to contemporary thought on a variety of legal topics. The model statutes have been offered for adoption or emulation by the several states. Rule 505, the group’s present proposal for religious privilege, was drafted as follows:

(a) Definitions. As used in the rule:
   (1) A “clergyman” is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
   (2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

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

(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.24

As a need for protection of the clergy-penitent relationship presented itself, each state dealt independently with the problems of establishing an historically unrecognized privilege.25 All but two states now accept the privilege, and in the nine states that have adopted the Uniform Act, the rules are virtually identical.26 However, the vagaries of the legislative process generated greatly differing forms of the doctrine in the remaining states.

Reese, supra note 12, at 56.


25 See generally W. Tiemann, supra note 11, at 92-93, 116 (judicial construction of priest-penitent statutes).


It should be noted that the Uniform Act was included in the Proposed Federal Rules of Evidence suggested by the Supreme Court a decade ago; however, Congress declined to adopt it as part of the Federal Rules of Evidence. See S. Rep. No. 1277, 93rd Cong., 2d Sess. 6 (1974); H.R. Rep. No. 650, 93rd Cong., 1st Sess. 8-9 (1973). “Since it was clear that no agreement was likely to be possible as to the content of specific privilege rules,” a single rule was substituted. S. Rep. No. 1277, 93rd Cong., 2d Sess. 6 (1974); see infra notes 75-78 and accompanying text.
THE STATE PRIVILEGE RULES

An understanding of the status of the rule in any state must turn not upon general principles, but upon an analysis of the applicable state statute or rule of evidence and the court decisions that have construed it.\textsuperscript{27} The differences among the various state provisions may be categorized into six lines of inquiry:

1. Who may exercise the privilege?
2. Who are clergy to whom privileged communications can be made?
3. Who is bound by the exercise of the privilege?
4. Which communications fall within the privilege?
5. Where can the privilege be claimed?
6. What idiosyncrasies exist in the particular jurisdiction's rule?

The table appearing in the appendix of this paper analyzes the several state provisions along these lines of inquiry; a general discussion of the categories follows.

Who May Exercise the Privilege?

Most statutes and rules provide that the penitent owns the clerical privilege and is free to waive it. In many states, the cleric, also, may claim the privilege in addition to, or in the absence of, the penitent's claim.\textsuperscript{28} Some jurisdictions, including those that have adopted the Uniform Act, specifically extend the power to exercise the privilege to the guardians, conservators, executors, and administrators of the penitent or the penitent's estate.

Who Are Clergy To Whom Privileged Communications Can Be Made?

Most often, state privilege provisions apply to confidential communications made to a "clergyman," or any priest, minister, rabbi, or other licensed or ordained minister of any religion.\textsuperscript{29} Some provisions even in-


\textsuperscript{28} See, e.g., Cal. Evid. Code § 1034 (West 1966) (clergyman may claim the privilege in his own right); see L. Gumper, supra note 11, at 41. "California is a rarity in expressly giving the privilege to both the penitent and the clergyperson." L. Gumper, supra note 11, at 41.

\textsuperscript{29} See L. Gumper, supra note 11, at 36-37. Some courts have limited the privilege to confessions, see, e.g., Buuck v. Kruckeberg, 121 Ind. App. 262, 268, 95 N.E.2d 304, 306 (1950) (minister's observations not made in the course of clerical duties are not privileged), while others have extended the privilege beyond penitential confessions, see, e.g., Commonwealth v. Zezima, 365 Mass. 238, 241, 310 N.E.2d 590, 592 & n.3 (1974) (communication is not limited to conversation, but may include correspondence, actions, or occurrences). There is also considerable variance in the manner in which courts interpret the spiritual counseling
clude “accredited practitioners” of any established denomination among the list of enumerated clergy. This inclusory phrase indicates a probable attempt to include Christian Science practitioners, but it seems to include, within its wording, the pious laity of any denomination.

New Jersey’s statute contains a particularly broad inclusory phrase; it adds to qualifying clergy any “other person or practitioner authorized to perform similar functions.” Nonetheless, a state court held that a nun who worked as a teacher, even though she counseled a youth with personal problems for 5 years, did not qualify as clergy under the act because she did not conduct religious services or perform other normal priestly functions, and was not cloaked by church law with any power or duty to hear confessions or to counsel students. Similar holdings have excluded from the statutory meaning of clergy a lay employee of a Catholic welfare association, and a man who served as an elder and deacon, but not pastor, of a Christian Church.

requirement. See L. Gumper, supra note 11, at 38. Compare Johnson v. Commonwealth, 310 Ky. 557, 560-61, 221 S.W.2d 87, 89 (1949) (jail-cell murder admission overheard by a Methodist pastor held not privileged because it was not received while discharging religious duty) with In re Swenson, 183 Minn. 602, 604, 237 N.W. 589, 590 (1931) (broad statute is broadly interpreted and privilege attaches whenever declarant seeks spiritual aid, consolation, or advice).


[A] clergyman, minister or other person or practitioner authorized to perform similar functions, of any religion shall not be allowed or compelled to disclose a confession or other confidential communication made to him in his professional character, or as a spiritual advisor . . . .

Id. For a discussion of the meaning of “clergy” within the scope of the privilege, see L. Gumper, supra note 11, at 39-40.

In re Murtha, 115 N.J. Super. 380, 387, 279 A.2d 889, 892 (1971). A Catholic nun accompanied the suspect to the murder scene to view the victim’s body. Id. at 382, 279 A.2d at 890. The nun claimed the priest-penitent privilege when questioned about these events. Id. The court deemed the privilege inapplicable because the nun was not vested with the authority to perform the religious functions of a priest, and the communications with the suspect were not for the purpose of providing spiritual assistance. Id. at 386, 279 A.2d at 892.

State v. Lender, 266 Minn. 561, 565, 124 N.W.2d 355, 358 (1963). The Lender court reversed an earlier decision that had granted privileged status to records of a Catholic welfare agency. Id. at 566-66, 124 N.W.2d at 358. Lender desired to inspect the agency records to aid him in the preparation of his defense in a paternity suit. Id. at 561-62, 124 N.W.2d at 357. Since there was no allegation that the records contained either a confession or communication to a priest, and because the employee rather than the penitent originally claimed the privilege, “it [was] manifest that the conditions necessary to any of the privileges asserted were not fulfilled.” Id. at 565, 124 N.W.2d at 358. Crucial to the disposition of the case was the failure of the evidence to establish that the employee was a cleric affiliated with a religious organization. Id.

Knight v. Lee, 80 Ind. 201, 203-04 (1881). The decision turned on the interpretation of
Not all states, however, are so magnanimous in their inclusory wording. Some have placed restrictive definitions of clergy and legitimate denominations in their privilege rules in apparent attempts to keep frauds and fly-by-nights from claiming privilege under the acts. Such awkward legislative attempts at recognizing only “legitimate” denominations skirt the rocky shoals of constitutional guarantees of free exercise of religion and of equal protection of the laws. In this vein, several states have excluded clerics who do not regularly, as a vocation, devote a substantial part of their time to ministry. Two states include only a “minister of the gospel” or “priest” within the purview of their privilege rule, thus apparently excluding Jews, many Unitarian Universalists, and non-Christian groups that do not have a priesthood. In a like manner, Michigan includes only priests, ministers of the gospel, and Christian Science practitioners within the operation of its rule, while Georgia specifically includes only Christians and Jews.

Laymen fall within the definition of the clergy under some statutes. One federal court ruled that where the privilege attached to a clergyman, logically it would extend to his lay assistant in a draft counseling program. And, in a case turning entirely on denominational polity, the Iowa Supreme Court held both the pastor and the ruling elders of a Presbyterian congregation to be within the statutory meaning of “ministers of the gospel,” because Presbyterian doctrines and discipline contemplate broad spiritual duties for its elders. In addition, both Florida and the Uniform...
Act specifically include within the privilege communications made to lay persons when a penitent reasonably believes the confessor to be a clergyman. However, a federal appeals court held in a tax case that a corporation that engaged in religious broadcasting clearly could not claim any privilege under clergy-penitent principles.

Who Is Bound By The Exercise Of The Privilege?

In most applications of the privilege, the cleric is bound by the seal of confidentiality and is prohibited from revealing admissions made by a penitent or counselee. The wording of most statutes includes clergymen only. However, the wording of some statutes, including the Uniform Act, apparently would include those who might learn inadvertently confidential information contained in a penitential communication, such as a cleric's secretary or the administrator of a deceased cleric's estate, and even an intentional eavesdropper or thief of a cleric's records. Mississippi specifically has included the "secretary, stenographer or clerk" of a clergymen within the privilege.

What Communications Fall Within The Privilege?

The various state provisions, and the cases construing them, clearly envision privilege protection only for confidential matters taken to a cleric, in his or her role as a cleric, by one seeking spiritual assistance.
When those elements are not present, a claim of privilege will not attach and the cleric will be as amenable to the courts' requirements of disclosure as every other citizen.\footnote{See, e.g., State v. Brown, 95 Iowa 381, 384-85, 64 N.W. 277, 278 (1895) (communication not privileged because defendant did not confide in the minister for purpose of obtaining spiritual assistance); Johnson v. Commonwealth, 310 Ky. 557, 566, 221 S.W.2d 87, 89 (1949) (unsolicited visit by minister to defendant's jail cell did not result in any privileged communication where minister did not assume confessor role).}

Thus, a casual conversation with a cleric, or a situation in which a cleric is involved other than as a minister, would not qualify. For instance, when a clergyman was involved with some parishioners in a stock transfer deal that did not have any religious aspect, the cleric could not be prevented from testifying about the matter.\footnote{See Milburn v. Haworth, 47 Colo. 593, 595, 108 P. 155, 156 (1910). The privilege does not apply when conversations between priest and penitent concern business matters. United States v. Gordon, 493 F. Supp. 822, 823-24 (N.D.N.Y. 1980), aff'd, 655 F.2d 478 (2d Cir. 1981). In Gordon, the district court held that the scope of the privilege was limited to communications with a clergyman acting in his spiritual capacity. 493 F. Supp. at 824.} And, when a jail chaplain was requested by an inmate to convey a message to other parties, and no specific spiritual assistance was involved, the chaplain, it was found, could be forced to testify to the transaction.\footnote{See State v. Black, 291 N.W.2d 208, 216 (Minn. 1980). The Black court reasoned that the privilege does not apply unless the penitent seeks religious advice "with the expectation that [the matter] would remain confidential." Id.; see Christensen v. Pestorious, 189 Minn. 548, 552, 250 N.W. 363, 365 (1933) (no privileges attaches where penitent does not seek spiritual advice).} Similarly, in a murder case, when the defendant expressed his intention to kill his wife and her paramour to his friend and frequent companion, who happened to be a clergyman, the privilege was not available.\footnote{See Burger v. State, 238 Ga. 171, 172, 231 S.E.2d 769, 771 (1977) (privilege does not apply to communications outside the realm of spiritual guidance).}

The applicability of many older privilege statutes is limited to a "confession" made by a penitent.\footnote{See, e.g., 8 J. WIGMORE, supra note 3, § 2395, at 845-47.} One statute even limits the privilege to statements made in "the sanctity of a religious confessional."\footnote{VT. STAT. ANN. tit. 12, § 1607 (1973).} In addition, many jurisdictions provide that the confession, or communication, must be received by the cleric within "the course of discipline" of his or her denomination.\footnote{See Reese, supra note 12, at 61-62. Twenty-two states have enacted statutes which contain some variation of the following: "A priest or clergyman shall not, without consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the Church to which he belongs." Id. (footnote omitted); see Sherman v. State, 170 Ark. 148, 150-51, 278 S.W. 353, 354 (1926) (requirement that communication be received "in the course of discipline enjoined" by the religion held to preclude privilege where there was no obligation upon the membership to confess their sins); In re Estate of Soeder, 7 Ohio App. 2d 271, 300-02, 220 N.E.2d 547, 567-}
The question of just what constitutes a "confession" and what is a denominational "discipline" has been answered in very different ways by different courts. These issues were given an extremely broad reading by the Minnesota Supreme Court some years ago. In *In re Swenson*, the court declined to limit the word "confession" to a formal, sacramental setting, and held that the term includes "[any] penitential acknowledgment to a clergyman of actual or supposed wrongdoing while seeking religious or spiritual advice, aid, or comfort." The court acknowledged that a "clergyman's door should always be open," without regard to whether a penitent is a member of the cleric's church. The Minnesota statute's requirement that a "confession" be "in the course of discipline" enjoined by the denomination was addressed by the court in a single, cavalier sentence: "It is a matter of common knowledge, and we take judicial notice of the fact, that such 'discipline' is traditionally enjoined upon all clergymen by the practice of their respective churches." The *Swenson* case involved a Lutheran pastor who had been found guilty of contempt in a divorce case because he would not reveal admissions of adultery made by one of his parishioners. The court's liberal approach doubtlessly was flavored by its sympathy for the pastor in a delicate circumstance.

A more restrictive interpretation of a "confession" was adopted in *Simrin v. Simrin*, a California case involving a rabbi's marital counseling. The court held that general counseling simply could not be character-
ized as a confession within the statutory meaning.\(^8\) Likewise, in a suit by a husband alleging alienation of affections because of a reactionary Catholic group’s influence upon his wife and children, an Ohio court ruled that a simple conversation between the spouse and a bishop could not be privileged because it was not a “confession,” as required by the Ohio privilege statute at that time.\(^9\) Finally, where a woman has visited casually with a Lutheran pastor at a nursing home, an Indiana court ruled that, although the pastor had sometimes calmed the woman when she was distraught, their conversations were not “confessions or admissions” made to him “in course of discipline enjoined” by his church.\(^\text{60}\) Thus, the pastor was compelled to testify as to her mental competency in a will contest.\(^\text{61}\)

Some of the more liberal statutes apply the privilege rule to a “communication” to a clergyman, as opposed to a “confession.”\(^\text{62}\) Accordingly, the Massachusetts Supreme Judicial Court held that the display of a gun to a minister might constitute such a communication, if it occurred in the course of spiritual counsel.\(^\text{63}\)

The presence of denominational discipline as to secrecy of confessions, or other confidential matters, may be crucial to recognition of the

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\(^8\) Id. at 94, 43 Cal. Rptr. at 378-79. The court held that information imparted to a priest acting in his role as marriage counselor was outside the scope of the privilege. See id., 43 Cal. Rptr. at 378-79. The statute was subsequently amended to provide a clergy-penitent privilege for “confidential communications” made in “the presence of no third person.” Cal. Evid. Code § 1032 (West 1966).

\(^9\) See Radecki v. Schuckardt, 50 Ohio App. 2d 92, 96, 361 N.E.2d 543, 546 (Ohio Ct. App. 1976). In Radecki, the court relied in its holding upon a statutory provision that required the conversation to be held in a confession. See id. at 97, 361 N.E.2d at 546 (construing Ohio Rev. Code Ann. § 2317.02(B) (Baldwin 1953)). The statute has since been amended to include “information confidentially communicated” to a clergyman. Ohio Rev. Code Ann. § 2317.02(C) (Page 1979).


\(^61\) Id. at 269, 95 N.E.2d at 307.


privilege by secular courts. Unfortunately, most Protestant denominations have no such discipline at all. Even Anglican and Roman Catholic canonical provisions appear to apply only to sacramental confessions. While English canon law has always prohibited a priest from revealing any "crime or offense" admitted to him in his official duties, the Episcopal Church in the United States only recently adopted a formal discipline as to secrecy of confessions. Of course, an expectation of secrecy surrounding the confessional has long existed in Christendom.

Where Can The Privilege Be Claimed?

Because the privilege rule is merely a rule of evidence and not a part of substantive law, its applicability and availability may vary within any given jurisdiction. In many states, the privilege rule makes no mention of the forums or sorts of matters in which it may be asserted. It is argued that it would be senseless to protect in formal courts of record a communication that could still be uncovered under less solemn circumstances, such as coroners' inquests, justice of the peace proceedings, and bureaucratic and legislative investigations. Therefore, it is submitted that absent a statutory restriction, the privilege should be applied in all judicial, quasi-judicial, and governmental proceedings.

Some states do, however, limit the applicability of the privilege. One state has different rules for civil and criminal courts, while several states

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64 Codex Juris Canonici; Canon 889 provides:

the sacramental seal is inviolable, and the confessor must therefore carefully beware of betraying a penitent by words or signs, or in any other way, for any reason whatsoever. The obligation of keeping the sacramental seal also binds the interpreter and all others to whom the knowledge of the confession has in any way come.

65 Canon 113, enacted in 1603, provides that a priest "[may] not at any time reveal and make known to any person whatsoever any crime or offense so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called into question for concealing the same) under pain of irregularity."

66 The Episcopal Church's Book of Common Prayer contains the following rubric: "The content of a confession is not normally a matter of subsequent discussion. The secrecy of a confession is morally absolute for the confessor, and must under no circumstances be broken." Protestant Episcopal Church in the U.S.A., The Book of Common Prayer 446 (1977). Violation of the rubric is a triable offense in the church courts under Title IV, Canon 1, of the Episcopal Church. Prior to 1979, that denomination had no requirement of secrecy in America.


make the rule applicable only in civil actions. Other states specify the forums in which the doctrine is available; West Virginia, for example, applies the rule only in domestic relations courts.

THE FEDERAL RULE

It should be noted that, because the clergy-penitent privilege has never been considered a constitutional issue, the formation of the rule is one that must be left to the several states. Thus, the federal courts have not been able to fashion a “national rule” that is universally applicable, and federal action on the matter would apply only to cases tried in the federal courts. It may be, however, that the future will bring new claims that the privilege is indeed one that is protected by the federal constitution. Were the courts to agree, protection of clergy-penitent communications would become universal. There certainly appears to be merit to the suggestion that the inviolability of clergy-penitent secrecy is compelled by the first amendment, at least when the case involves a religious tradition in which confession is considered sacramental and secrecy is enjoined by canon or denominational discipline. An intrusion into such a confidential relationship would seem to be an intrusion into the “free exercise” of religion. This constitutional question has been raised in several cases, but the facts of those cases did not place them within a setting of canonical and sacramental confession. In one, a Roman Catholic priest who worked regularly with incarcerated convicts was called before a grand jury investigating organized crime. The priest asserted privilege as to matters he had learned in his association with the convicts, but did not claim that any of the information had come through a formal confession. The court rejected the priest’s constitutional argument out-of-hand. Likewise, in forcing a nun to testify, a state court rejected a freedom of religion argument, as well as a broad “freedom of conscience” claim. But, that court hinted that if the polity of her denomination had sanctioned her confessionary work, the freedom of religion argument might have been better received.

In any event, the present situation concerning the clerical privilege in

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ANN. § 13:3734.1 (West Supp. 1984) (clergyman can disclose communication in civil trial without consent of person making it).


See, e.g., ALA. CODE § 12-21-166 (Supp. 1983). The statute allows for the privilege in “any proceeding, civil or criminal, in any court, whether a court of record, a grand jury investigation, a coroner’s inquest and any proceeding or hearing before any public officer or administrative agency of the state or any political subdivision thereof.” Id.


federal courts is a curious one. With the adoption of the new Federal Rules of Evidence by Congress in 1975, the adoption of the new Federal Rules of Evidence by Congress in 1975, a novel approach was taken as to privileged communications. The only provision that addresses privilege in the new rules is Rule 501, which does not specify any type of privileged communications but provides that (1) in civil suits in which the substantive law of a state is applied, as in cases coming under the court’s diversity jurisdiction, the state’s privilege rule, if any, will be applied as well, but (2) in criminal and all other civil cases, the federal courts are to apply “the principles of the common law” of privilege as interpreted “in the light of reason and experience.” This provision is particularly troublesome, of course, because the clergy-penitent privilege simply did not exist at common law. A strict construction of the rule would appear to leave no room for a clergy-penitent privilege in most federal trials. Perhaps, however, new common law will be fashioned to fit the bill.

Indeed, two federal courts did appear to have fashioned something of a new common-law right to clerical privilege prior to the enactment of present Rule 501. One case involved a mother, accused of chaining her children while she was away, who made admissions to a Lutheran minister; the other case involved a clergyman who performed draft counseling.

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77 Federal Rule of Evidence 501, the provision which specifically deals with privilege, makes no reference to any specific privilege. See United States v. Mackey, 405 F. Supp. 854, 857 (E.D.N.Y. 1975); Fed. R. Evid. 501. Notwithstanding the deletion by Congress, the privilege rules promulgated by the Supreme Court serve a useful purpose. Mackey, 405 F. Supp. at 857. The privileges specifically enumerated by the Court are “reflective of ‘reason and experience.’” Id. at 858. The Mackey court, relying on the commentary to the federal rules, found that the federal rules were merely a convenient restatement of the former federal privileges and therefore a comprehensive guide to the law of privilege. Id. The approval of the proposed rules by the Supreme Court tends to legitimize their use as an interpretive guide to Rule 501. Id.; see McCORMICK ON EVIDENCE § 77.2, at 28 (E. Cleary 2d ed. Supp. 1978); see also Transamerica Comput. v. International Business Machs. Corp., 573 F.2d 646, 651 (9th Cir. 1978) (proposed rules support application of attorney-client privilege); In re O.P.M. Leasing Servs., Inc., 13 Bankr. 54, 57 (S.D.N.Y. 1981).
78 Fed. R. Evid. 501; see McCORMICK ON EVIDENCE, supra note 76, § 74, at 26. A primary objection to the enactment of the proposed Federal rules was the possible unconstitutionality of discarding state-created privileges. See Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93 Cong., 1st Sess. 246 (1973) (statement of Chief Judge Friendly) [hereinafter cited as House Hearings]. The concern was prompted by the rule’s inconsistency with the principle that federal courts in diversity actions must apply the substantive statutory and case law of the State. Id. at 147 (statement of former Justice Goldberg); see Schwartz, Privileges Under the Federal Rules of Evidence—A Step Forward?, 38 U. Pa. L. Rev. 79, 81-82 (1976). An additional consideration was Congress’ intention to remove any incentive for litigants to forum shop between state and federal courts. See Krattenmaker, Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach, 64 Geo. L.J. 613, 640 (1976).
services. In a like manner, the Alaska Supreme Court recently established a new common-law privilege for psychotherapist-patient matters. Additional support for incorporation of the privilege into the common law may be found both in the Supreme Court's acknowledgment that professional confidences to "an attorney or priest" generally are recognized at law, and in Professor Wigmore's classic work on evidence.

WHERE FROM HERE?

The informed cleric will want to be aware of the privilege available in his or her particular state. A lawyer or law library should be able to furnish a copy of the rule and the cases interpreting it. Thereafter, the cleric should endeavor to see that the confidential information that comes his or her way is communicated in a setting that falls within the privilege protections. As a general rule, the more formal the setting the more likely the privilege is to attach. If the denomination is one in which sacramental confessions may be made, where possible, that mode should be used for serious matters that hold the possibility of later scrutiny.

In addition, clergy are usually in a position to lobby their legislators for enactment of better privilege provisions which will facilitate modern pastoral work and free clergy to pursue their ministry of healing in this broken world. Through personal contact with individual legislators, resolutions adopted by church bodies, and state councils of churches, desirable legislation may be promulgated.

From the standpoint of facilitating pastoral counseling and confessional practice in the broadest manner, it would appear that the Uniform Act is close to ideal. Moreover, legislatures are acquainted with the work of the uniform laws group, and thus should be more receptive to its model than to homegrown drafts of a privilege statute. The only alteration of the Uniform Act that might be preferable would be the granting of an absolute right to the cleric to refuse to testify, regardless of waiver by the penitent. This would enhance the integrity of the counseling setting, and circumvent the pressures that can be placed upon the penitent to waive the privilege.

It should be noted that even though a state has enacted a broad privilege rule, inquiry should be made as to its applicability. If the rule exists only as a part of the rules of evidence for trial courts, a supplemental statute should be sought that would extend the privilege to all other fo-

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rums and governmental inquiries.

In addition to the adoption of satisfactory state privilege laws, individual denominations must adopt internal policies that require the maintenance of secrecy for matters imparted to clerical confidence. As had been demonstrated, state privilege rules are more likely to come into play when the cleric's denomination requires secrecy. These policies could be adopted at international, national, regional, or local levels. It should be noted, however, that the existence of such a policy would place a more stringent requirement upon clergy to honor confidences. If a confidence were broken recklessly, the denominational policy might become ammunition for the injured person in a defamation suit against the cleric.

The cleric who finds himself or herself on the horns of the dilemma, facing a case in which testimony will be sought, should seek professional legal assistance. Standing upon the privilege may carry the risk of a contempt citation. On the other hand, a cleric might face a damage suit by a party injured if a cleric unprofessionally violates a confidence.

Lastly, the broad privilege protection warranted by the demands of our present age calls for a basic change in our approach to the issue—and that includes a change in its name. It is time to leave behind the archaic term "priest-penitent" and even the broader "clerical privilege" as we seek to name this legal principle. A far better title to be used henceforth is simply "religious privilege," a term that honors the religious freedom so fundamental to harmony in our pluralistic American society.
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State Clerical Privilege Rules

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* Violation by cleric is a misdemeanor punishable by jail.

** Trial judge may override privilege and compel testimony for “proper administration of justice.”