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COMMUNICATIONS TO CLERGYMEN— WHEN ARE THEY PRIVILEGED?

FRED L. KUHLMANN*

INTRODUCTION

Several years ago Hollywood made a movie in which Montgomery Clift played role of a priest who receives the confession of a murderer. As the plot develops, the priest himself is accused of the murder but steadfastly refuses to break the seal of confession even when he is convicted. He is vindicated only after the murderer's wife breaks under the strain and reveals the priest's innocence. This was a melodramatic way of emphasizing the inviolable nature of the sacrament of penance in the Roman Catholic Church in which confession is obligatory once a year and the priest is bound, under threat of excommunication, to keep secret anything communicated to him in the performance of his duties.¹

Protestant churches do not place as much emphasis on confession, but clergy of all denominations have a strong aversion to disclosing communications which have been made to them in confidence. They have incurred contempt citations, fines and even imprisonment rather than testify to such confidences.

In view of their firm feeling on this subject most clergymen would probably be shocked and alarmed to learn that the law gives them only limited immunity from testifying. The common understanding among the clergy is summed up in a recently published handbook of law for pastors. The author states that if a clergyman is called upon to testify concerning privileged communications, he should simply state that he is a minister and that the information solicited was a privileged communication, and he "will then be excused from answering."²

Unfortunately, the law is not this clear or definite. Although 44 states and the District of Columbia have statutes recognizing the privileged nature of communications to the clergy, the wording of these statutes and the cases construing them leave the clergyman vulnerable in many situations. Although the statutes enacted in recent years give more protection than the earlier statutes, there are even limits to the protection afforded by the more liberally-worded statutes.

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1. Specifically, Canons 889, 890 & 2369.

2. G.S. JOHNSON, *THE MINISTER: LAW HANDBOOK* 117 (1962).

THE LAW IN THE 50 STATES AND THE DISTRICT OF COLUMBIA

The extent of the privilege depends upon the law of the jurisdiction in which the clergyman is called to testify. This ranges from one extreme granting no privilege at all to the other where the privilege is broadly stated. An analysis of the law in the 50 states and the District of Columbia is therefore essential to an understanding of the clergyman-privilege.

States in which there is no privilege

Alabama	New Hampshire
Connecticut	Texas
Mississippi	West Virginia ³

In these six states there is no statute recognizing communications to clergymen as privileged and in the absence of a statute it is generally accepted that the common law grants no privilege. It follows that clergymen in these states must proceed on the assumption that they would be compelled to testify concerning confessions and other confidential communications. Although there is no case in any of these states in which the question was directly before the court, there are sufficient judicial pronouncements to support an assumption that there is no clergyman-privilege.

In the Texas case of *Biggers v. State*⁴ the court, as dictum, said:

Texas is without statutory privilege for professional men, the rule of privileged communications not extending to . . . clergyman and confessor. . . .

This statement coincides with the views of the authorities on the law of evidence⁵ and two New Jersey cases which made it clear that in the absence of a statute granting the privilege the testimony of a clergyman can be compelled under common law.⁶ Moreover, there is considerable dicta to this effect in other state court decisions.⁷

3. The West Virginia statute grants the privilege only in the justice of the peace courts. W. VA. CODE ANN. § 50-6-10 (1966). Since there is no statute applicable to courts of record, West Virginia is classified among the states having no statute.

4. 358 S.W.2d 188, 191 (Tex. Civ. App. 1962).

5. 8 WIGMORE EVIDENCE § 2394 (McNaughton rev. 1961). Blackstone, in his classic treatise on the common law, refers only to the attorney-client privilege and ignores the clergyman privilege. BLACKSTONE COMMENTARIES 789 (Chase ed. 1893).

6. *State v. Morehous*, 97 N.J.L. 285, 117 A. 296 (1922); *Bahrey v. Poniatishin*, 95 N.J.L. 128, 112 A. 481 (1921).

7. *Johnson v. Commonwealth*, 310 Ky. 557, 227 S.W.2d 87 (1949); *In re Swenson*, 183 Minn. 602, 237 N.W. 589 (1931); *Le Gore v. Le Gore*, 31 Pa. D. & C.2d 107 (1963) (Prior to 1959 in Pennsylvania "there was neither a common law nor a statutory privilege between clergyman and penitent."); *McGrogan's Will*, 26 Pa. D. & C.2d 37 (1961) ("[S]uch a privilege cannot be said to have been recognized as a rule of the common law either in England or in the United States.") and *In re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967) (Apart from the statute there is no privilege between clergyman and communicant).

The only case recorded under state law in which the privilege was recognized in the absence of a statute is that of *People v. Phillips*, the earliest recorded case on the subject, decided by the Court of General Sessions for the City of New York.⁸ (The court consisted of the mayor, who at that time was DeWitt Clinton, the recorder and two aldermen.) The court refused to compel a Roman Catholic priest to reveal the identity of the person who had delivered stolen goods to the priest for return to the owner. The basis for the court's decision was that "to deprive the Roman Catholic of his ordinances" would violate the New York constitutional provision guaranteeing freedom of religion. The case has not been followed in any other decision, and the weight of more recent authority, previously cited, would indicate that it would probably not be followed today. Moreover, four years later, in 1817, another New York court held that the ruling in the *Phillips* case had to be limited to Roman Catholic priests (because the Protestant churches did not make confession a sacrament). This court permitted a Protestant clergyman to testify to an admission made to him by a prisoner.⁹

It is unfortunate that a clergyman in Alabama, Connecticut, Mississippi, New Hampshire, Texas or West Virginia should be confronted with the difficult task of establishing the privilege which exists in all the other states by statute. If he refuses to betray a confidence, he runs considerable risk of being compelled either to pay a fine (or perhaps even serve a sentence) or appeal the contempt citation to a higher court where the odds would be against a reversal of the contempt citation. The clergy in these states are desperately in need of statutes granting the privilege.

States with limited and questionable privilege

Alaska ¹⁰	Maine ¹⁸	Oregon ²⁶
Arizona ¹¹	Michigan ¹⁹	South Dakota ²⁷
Arkansas ¹²	Missouri ²⁰	Utah ²⁸
Colorado ¹³	Montana ²¹	Vermont ²⁹
Hawaii ¹⁴	Nevada ²²	Washington ³⁰
Idaho ¹⁵	North Dakota ²³	Wisconsin ³¹
Indiana ¹⁶	Ohio ²⁴	Wyoming ³²
Kentucky ¹⁷	Oklahoma ²⁵	

8. The case is reported in 1 WESTERN L.J. 109 and is abstracted from Mr. Sampson's published Report by P. McGroarty.

9. Christian Smith's Case, 2 N.Y.C. Rec. 77 (1817).

10. ALASKA R. CIV. P. 43 (b) (3). The Alaska Criminal Code makes Rule 43 applicable to criminal cases. ALASKA CRIM. CODE R. 26 (1966).

11. ARIZ. REV. STAT. ANN. §§ 12-2233, 13-1802 (1956).

12. ARK. STAT. ANN. § 28-606 (1947).

13. COLO. REV. STAT. ANN. § 154-1-7(4) (1964).

The first clergyman-privilege statute enacted in the United States was passed in 1828 by the State of New York and consisted of one sentence:

No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination.³³

Inadequate as it is, this statute has served as the model for the 23 states listed above. For a communication to be privileged under this type of statute (referred to in this article as the "traditional statute") four tests must be met:

1. The communication must be made to a clergyman.³⁴
2. The communication must be a "confession."³⁴
3. The confession must be made to the clergyman in his professional character.
4. The communication must have been made "in the course of discipline enjoined by the rules of practice" of the clergyman's denomination. (Nevada and Vermont, however, omit this requirement.)

The mere statement of these criteria emphasizes the limited scope

14. HAWAII REV. LAWS § 222-20 (1955).
15. IDAHO CODE ANN. § 9-203(3) (1967).
16. IND. ANN. STAT. §§ 2-1714, 9-1603 (1933).
17. KY. REV. STAT. ANN. § 421.210(4) (1963).
18. ME. REV. STAT. ANN. § 16.57 (1967). Although this statute was enacted in 1965 and adopts the recommendation of the Uniform Rules of Evidence, it differs little in substance from the traditional statutes.
19. MICH. STAT. ANN. § 27 A. 2156 (1962).
20. MO. REV. STAT. § 491.060 (1959).
21. MONT. REV. CODES ANN. §§ 13-701-4, 94-8801 (1947).
22. NEV. REV. STAT. § 48.070 (1965).
23. N. D. CENT. CODE § 31-01-06 (1960).
24. OHIO. REV. CODE ANN. §§ 2317.02, 2945.41 (1954).
25. OKLA. STAT. ANN. tit. 12, § 385; tit. 22, § 702 (1961).
26. ORE. REV. STAT. § 44.040 (1967).
27. S. D. CODE § 36.0101 (1960).
28. UTAH CODE ANN. §§ 77-44-2, 78-24-8(3) (1953).
29. VT. STAT. ANN. § 12-1607 (1958). The Vermont statute applies to "statements made . . . under the sanctity of the religious confessional."
30. WASH. REV. CODE ANN. § 5.60.060 (Supp. 1967).
31. WIS. STAT. ANN. § 325.20 (1958).
32. WYO. STAT. ANN. §§ 1-139, 7-249 (1957).
33. N.Y. REV. STAT. tit. 3, § 72 (1820).
34. Typically, the statutes use one or a combination of the following words: "clergyman," "priest," "minister of the gospel." The Michigan statute was amended recently to include "a duly accredited Christian Science practitioner."
35. The Indiana statute also uses the word "admission," but this adds little, if anything, to the word "confession." IND. ANN. STAT. §§ 2-1714, 9-1603 (1933).

of the privilege under the traditional statute. When the New York Legislative Study recently recommended an amendment of the original 1828 statute, it expressed doubt whether the statute had any application beyond confession to a Catholic priest.³⁶ Fortunately, the courts have not been quite so strict in construing the traditional statute, but because of its narrow wording, many clergymen, including Catholic priests, have suffered undesirable publicity, anguish, expense and aggravation.

A few cases decided under the traditional statute have offered some encouragement and support to clergymen, but most of the cases have denied the privilege. Unfortunately, the cases form no pattern and offer no constructive guidelines for the clergyman. The court's decision on the issue of privilege often seems to depend more on the result the court wants to reach on the substantive issue in the case than on a logical application of the clergyman-privilege statute. One gets the impression, which cannot, however, be documented, that where the court wants to reach a result that can best be attained by exclusion of the clergyman's testimony, it has interpreted the statute strictly; whereas, in cases where the clergyman's testimony is needed to reach or fortify the desired result on the substantive issue, the court has not hesitated to construe the statute liberally. There is little rhyme or reason to the cases. On the contrary, a view of the cases demonstrates how uncertain and unpredictable the clergyman's position is.

1. Strict versus liberal construction

Only in rare instances has a court bothered to determine whether the law requires a strict or liberal construction of privilege statutes, and the courts which have expressly addressed themselves to this question have disagreed.

The New York Court of Appeals has held that a liberal construction is necessary to carry out "a long standing public policy to encourage uninhibited communication between persons standing in a relation of confidence and trust, such as . . . confessor and clergyman."³⁷ Similarly, the Iowa Supreme Court has said that a liberal construction is justified.³⁸

On the other hand, a Pennsylvania court has recently held that "[S]tatutes establishing privilege from testifying are to be construed strictly. . . ."³⁹ and a legal encyclopedia generalizes that "the tendency of

36. See "Practice Commentary" following N.Y. CIV. PRAC. § 4505 (McKinney 1963).

37. *People v. Shapiro*, 308 N.Y. 453, 126 N.E.2d 559 (1955).

38. *Allen v. Lindeman*, 148 N.W.2d 610 (Iowa 1967); *Castner v. Wright*, 256 Iowa 638, 127 N.W.2d 583 (1964).

39. *LeGore v. LeGore*, 31 Pa. D. & C.2d 107 (1963).

the courts is toward a strict construction of statutes making communications to clergymen privileged."⁴⁰

2. Cases which have upheld the privilege.

There are only five reported cases which have upheld the privilege under the traditional statute. The landmark case and the one regularly relied upon by clergymen as their "bible" when claiming the privilege, is the Minnesota case of *In re Swenson*,⁴¹ decided in 1931, prior to the enactment of a liberalizing amendment to the Minnesota statute. A Lutheran minister appealed a contempt citation which arose from his refusal to testify in a divorce suit. The defendant had come to the parsonage to talk to his pastor in private and the wife tried to compel the pastor to reveal what her husband told him on that occasion.

The court had no problem dealing with two of the statutory tests. (Unquestionably the relator was a clergyman and defendant talked to him in "his professional character as a clergyman.") The "confession" and "course of discipline" tests, however, presented a problem.

The court dealt with this problem by divorcing the two concepts and holding, in effect, that the "confession" (which was defined by the court as "a penitential acknowledgement to a clergyman of actual or supposed wrongdoing while seeking religious or spiritual advice, aid or comfort") contemplated by the statute did not have to be made pursuant to a denomination's course of discipline. The court therefore concluded that a voluntary confession qualifies for the privilege in the same manner as one made under the mandate of a church.⁴² The court said that if the statute were limited to confessions which are compulsory, it would be applicable only to priests of the Roman Catholic church. To reach its result the court had to relate the "course-of-discipline" test to something other than a discipline requiring confession; although the court's "reasoning" on this point leaves something to be desired, the following paragraph from the opinion associates the "course-of-discipline" test with the duties of the clergyman:

The statute has a direct reference to the church's "discipline" of and for the clergyman and as to his duties as enjoined by his rules of practice. 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. Under such "discipline" enjoined by

40. 58 A.M. JUR. *Witnesses* § 532 (1948).

41. 183 Minn. 622, 237 N.W. 589 (1931).

42. 237 N.W. at 590.

43. *Id.* at 591.

such practice all faithful clergymen render such help to the spiritually sick and cheerfully offer consolation to suppliant who come in response to the call of conscience. It is important that the communication be made in such spirit and within the course of "discipline", and it is sufficient whether such "discipline" enjoins the clergyman to receive the communication or whether it enjoins the other party, if a member of the church, to deliver the communication.

In a sweeping statement the court held that if a statement is penitential in character, it is

the duty of the clergyman to hear and advise because such is in the course of discipline so enjoined by the practice of all churches. . . . The question is not the truth or merits of the religious persuasion to which a party belongs nor whether the particular creed or denomination exacts, requires, or permits a sacred communication, but the sole question is, as suggested in *Best on Ev.* (12th Ed.) Sec. 585, whether the party who bona fide seeks spiritual advice should be allowed it freely.⁴⁴

The *Swenson* decision was enthusiastically received by clergymen (particularly Protestant clergymen) in Minnesota and other states, but its logic and conclusion are questionable. As a writer in the *Minnesota Law Review*⁴⁵ commented shortly after the decision was reported, the policy of the statute seems to be "the desirability of securing unhampered the exercise of the religious duty and discipline of confession rather than any intention to protect all communications of a confidential nature made to clergymen." The writer concluded that although its "net effect may be socially desirable," the decision "enlarges the applicability of the statute so as to give it the effect of rendering privileged all penitent confessions made by parishioners to their clergymen regardless of whether they are made in the discharge of a positive religious duty or voluntarily for the purpose of securing solace." In any event, the *Swenson* case has been cited by other courts⁴⁶ and by clergymen⁴⁷ interested in upholding the privilege.

It is significant that the Minnesota court is the only court that has

44. *Id.*

45. 16 MINN. L. REV. 105 (1931).

46. *See, e.g.,* *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958) and *Kohloff v. Bronx Savings Bank*, 37 Misc. 2d 27, 233 N.Y.S.2d 849 (Civ. Ct., City of N.Y. 1962).

47. W. H. TIEMANN, *THE RIGHT TO SILENCE* 93-95 (1964). The author rather optimistically says that since this decision, "the courts have had little doubt that where the proper statute and confessional acts exist, penitential communications made to clergy of any denomination are privileged." *Id.* at 95.

faced the issue and attempted to reason through to its conclusion. In the other four cases in which the privilege has been upheld, the court has done little more than state its conclusion.

In *Krugilov v. Krugilov*⁴⁸ (a New York case decided before the New York statute was liberalized) a rabbi who was a "spiritual leader" of a Jewish Center was consulted by a husband and wife concerning their marital difficulties. The court, without bothering to support its decision with citations of authority or any reasoning, simply held that what was said by the parties in the rabbi's study was stamped "with that seal of confidence which the parties in such a situation would feel no occasion to exact."⁴⁹

In *Kohloff v. Bronx Savings Bank*⁵⁰ the court held that a confession to a priest was privileged even though the penitent was not a member of the church, citing dictum in the *Swenson* case to the effect that a penitential confession is privileged "though made by a person not a member of the particular church or of any church."⁵¹

In *Vickers v. Stoneman*,⁵² an early case decided under the Michigan statute, the court upheld the privilege in a slander case where a minister "drew forth" from defendant statements of a transaction while trying to interest him in religious matters during the course of a revival.

In *Dehler v. State ex rel Bierck*⁵³ the court, in a bastardy proceeding, without relating any of the background evidence, summarily held that the testimony of a priest was properly excluded "because the facts inquired of him were communicated to him . . . as a privileged communication." The court's conclusions of fact were that the priest was "there" (the place is not revealed) as a priest of the Catholic Church, the other party was a communicant of that church, and her conversation was with him in his capacity as a priest. The court made no reference to the "confession" or "course-of-discipline" tests.

These are the only recorded cases under the traditional statute in which the clergyman was excused from testifying—not the sort of judicial record to give encouragement to clergymen living in the 23 states which retain these archaic statutes, especially when there are

48. 29 Misc. 2d 17, 217 N.Y.S.2d 845 (Sup. Ct. 1961), *appeal dismissed*, 226 N.Y.S.2d 931 (1962).

49. The court quoted from a letter received from the New York Board of Rabbis to the effect that it was deemed essential for the proper work of a rabbi that any confidence reposed on him by husband or wife or anyone else who has come to him for counseling not be divulged. This was apparently considered as satisfying the "course of discipline" test which at that time still in the New York statute. 29 Misc. 2d at 18, 217 N.Y.S.2d at 846.

50. 37 Misc. 2d 27, 233 N.Y.S.2d 849 (Civ. Ct. N.Y. City 1962).

51. 237 N.W. 589, at 591.

52. 73 Mich. 419 (1889).

53. 22 Ind. App. 383, 53 N.E. 850 (1899).

numerous cases decided under these statutes in which the clergyman was permitted or compelled to testify.

3. Cases which deny the privilege

The courts have denied the privilege under the traditional statute for a number of reasons. It is not always possible to pinpoint the specific reason underlying an opinion, but, generally speaking, the cases fall into seven categories.

a. Communication not a "confession." Six cases hinge primarily on the non-confessional nature of the statement made to the clergyman.⁵⁴ With one exception these cases simply hold that the statement in question was not a confession, and do not attempt to define the term. In *Knight v. Lee*, an old Indiana case, the court said :

The confessions, concerning which clergymen are incompetent to testify, are, evidently, such as are penitential in their character, or as are made to clergymen in obedience to some supposed religious duty or obligation, and do not embrace communications to clergymen, however confidential, when not made in connection with or in discharge of some supposed religious duty or obligation.⁵⁵

The Indiana court held that for the statement to be a confession under the wording of the traditional statute, it must be made in the discharge of a religious *duty*. This distinguishes the Indiana decision from the holding in the *Swenson* case where the Minnesota court held that a statement could be voluntary and still qualify as a confession within the meaning of the statute.

b. Individual not a minister. The opinion in *Knight v. Lee* was in part based on the fact that the person to whom the statement was made was an elder and a deacon—not a pastor—in the Disciples of Christ

54. *Knight v. Lee*, 80 Ind. 201 (1881) (Defendant called plaintiff a "whore" while being questioned by an elder and deacon who were investigating charges pending in the Christian Church against plaintiff.); *Angleton v. Angleton*, 84 Idaho 184, 370 P.2d 788 (1962) (In a divorce and child custody proceeding statements were made to a priest "during conversations in the course of friendly meetings."); *In re Koellen's Estate*, 162 Kan. 395, 176 P.2d 544 (1947) (suit, brought prior to the liberalizing amendment of the Kansas statute, involving the validity of a will in which a priest was held competent to testify concerning a statement made by the decedent that he had only one will and that it was in his home); *Gillooley v. State*, 58 Ind. 182 (1877) (practically no information is given in the opinion); *Johnson v. Commonwealth*, 310 Ky. 557, 221 S.W.2d 87 (1949) (The defendant accused of murder admitted to a Methodist minister who voluntarily visited him in jail that he lost his temper and killed the man); *Commonwealth v. Gallo*, 275 Mass. 320, 175 N.E. 718 (1931) (A statement made to a priest by a convicted murderer implicating a third person who also participated in the crime, was not a confession).

55. 80 Ind. at 203-04.

Church, and was therefore not acting in the capacity of a clergyman when the conversation took place.⁵⁶ The status of a Salvation Army Major was left undecided in a New Jersey case because the court held that even if he were held to be a clergyman, there would be no privilege in the absence of a statute.⁵⁷ Confessions made to "members" of a church have been held not privileged even though all church members were under a duty to confess their faults to each other.⁵⁸

c. Clergyman not acting in professional capacity. Four cases turn primarily on the fact that the clergyman was not acting in his professional capacity. None of the cases establishes any important principle, but in each it is clear that the professional character of the clergyman was not involved.⁵⁹

d. Not in course of discipline of clergyman's church. Several cases have denied the privilege because the statements were not made in the course of discipline of the clergyman's denomination. In *State v. Andrews*⁶⁰ a Baptist minister was permitted to testify after he had stated that there was no course of discipline in the Baptist church by which a member was enjoined to confess his sins to a minister of that church. In *Alford v. Johnson*⁶¹ the court held the conversations which a man had with a Methodist minister (whose church he had expressed a desire to join) concerning adulterous relations with a woman who was alleged to have exerted undue influence on him, were not made in the course of discipline enjoined by rules of practice of the Methodist Church. Another case involving the Methodist Church is *Johnson v. Commonwealth*,⁶² in which a pastor of that denomination voluntarily visited an accused murderer in jail; the court said that the statements

56. 80 Ind. at 203. Cf. *Reutkemeier v. Nolte*, 179 Iowa 342, 161 N.W. 290 (1917) (Elders of the Presbyterian Church are ministers of the gospel because no power of discipline is conferred on the pastor except in conjunction with ruling elders).

57. *State v. Morehous*, 97 N.J.L. 285, 117 A. 296 (1922).

58. *Commonwealth v. Drake*, 15 Mass. 161 (1818).

59. *Partridge v. Partridge*, 220 Mo. 321, 119 S.W. 415 (1909) (A priest acting as a notary public drew a deed and was held competent to testify concerning the contents of the instrument); *People v. Gates*, 26 N.Y. Com. L. Rep. 311 (1835) (Clergyman was permitted to testify to an admission made to him by the defendant in a fraud case because the clergyman himself testified that the communication was not made to him as a clergyman); *Colbert v. State*, 125 Wis. 423, 104 N.W. 61 (1905) (In a criminal action for arson a Catholic priest was held not to have acted in his professional character when he received an anonymous letter from the defendant and then persuaded her to write another note to prove that the handwriting was the same); *Milburn v. Haworth*, 47 Colo. 593, 108 P.155 (1910) (The statement in question was made by defendant in a fraud case to four members of his church including the minister).

60. 187 Kan. 458, 357 P.2d 739 (1960). The case, however, was decided on the principle that the privilege, if it existed at all, was waived by being communicated to third parties.

61. 103 Ark. 236, 146 S.W. 516 (1912).

62. 310 Ky. 557, 221 S.W.2d 87 (1949).

made by the defendant on that occasion were in no way connected with the discipline of the church.

In *Sherman v. State*⁶³ a man was accused of the rape of his own daughter. He had written a letter to his preacher requesting prayer on his behalf. The letter contained certain statements which had "some tendency towards an indirect confession of the charge." The court was obviously not sympathetic toward the defendant, and permitted the preacher to testify. The court held that the mere fact that a confession is made to a minister of the gospel to obtain his help is not sufficient to exclude the confession. The confession, it was held, must also be pursuant to a duty enjoined by the rules of practice of the particular church—and the court could find no evidence that there was any rule of practice of the defendant's church (unnamed in the case) which enjoined upon its members the duty to make confessions of sins.

In each of these cases the court in effect held that when the traditional statute refers to "the course of discipline enjoined by a church" it means a course of discipline requiring confession of sins. Admittedly, the wording of the statute is somewhat ambiguous, but this interpretation would seem to be more accurate and realistic than that espoused by the court in the *Swenson* case, where the course-of-discipline test was equated with a duty enjoined on a clergyman to counsel with his parishioners. As was stated by a writer in the *Kansas Bar Association Journal*:

Even in those churches where some form of confession is practiced it is normally a voluntary practice, and there is serious question whether it amounts to a "discipline enjoined by the church."⁶⁴

e. Penitent not a member of church. Contrary to dictum in the *Swenson*⁶⁵ case and the holding of the court in the *Kohloff*⁶⁶ case, there are cases in which the court has either held or as dictum has stated that for the privilege to be asserted, the communication made to a clergyman must be by a member of his church.⁶⁷

f. Observations made by clergyman during course of conversation. What a clergyman observed while being consulted in his professional capacity has been admitted as evidence even though the oral communications themselves may be privileged. In an early California case⁶⁸ it was

63. 170 Ark. 148, 279 S.W. 353 (1926).

64. Blaes, *Penitent Privilege Under the New Code*, 33 KAN. B. J. 279 (1964).

65. See note 51 *supra*.

66. See note 50 *supra*.

67. *State v. Morgan*, 196 Mo. 177, 95 S.W. 402 (1906); *Mitsunaga v. People*, 54 Colo. 102, 129 P. 241 (1913); *Knight v. Lee*, 80 Ind. 201 (1881).

68. *In re Toomes* 54 Cal. 509 (1880).

held that the traditional statute in effect at that time did not cover a preliminary examination made by a priest to determine whether a dying woman was in a proper frame of mind to make a confession, and that the priest thus could testify concerning her mental condition. In a more recent case the Appellate Court of Indiana ruled that a Lutheran institutional chaplain should have been permitted to testify to the soundness of mind of a grantor at the time of a conveyance, because such testimony concerned neither a confession nor an admission on the part of the grantor.⁶⁹ The fact that part of a clergyman's testimony related to personal observations was also a factor in a Pennsylvania court's opinion admitting the clergyman's testimony in a case involving a husband's claim to a share in his deceased wife's estate.⁷⁰

There is dictum in an Iowa case⁷¹ to the effect that observations made by a clergyman are as privileged as communications, but the court gave no reason and cited no authority for this broad statement, and it is submitted that there is little justification for it. It could be argued that the person who consults his clergyman does not want his state of mind testified to any more than he wants the content of his conversation revealed. However, the advancement of truth in such situations would seem to outweigh the rather incidental violation of trust and confidence which is involved in permitting a clergyman to testify concerning his observations.

g. Clergyman acting as marriage counselor. One of the most significant decisions under the traditional statute is the California case of *Simrin v. Simrin*.⁷² (At the time of the decision in 1965 the traditional statute was still in effect in California, but later in the year the statute was amended to broaden the scope of the privilege.) A rabbi, whom both spouses had consulted in an attempt to salvage their marriage, was called as a witness in a subsequent divorce proceeding. The court held that the traditional statute did not apply to communications made to a spiritual advisor acting as a marriage counselor because the statute was limited to confessions in the ordinary course of discipline enjoined by the church.

It would wrench the language of the statute to hold that it applies to communications made to a religious or spiritual advisor acting as a marriage counselor. We think this result regrettable for reasons of public policy . . . but the wording of the statute leaves us no choice.⁷³

69. *Buuck v. Kruckeberg*, 121 Ind. App. 262, 95 N.E.2d 304 (1950).

70. *In re Schaeffer's Estate*, 52 Pa. Dauphin Co. Rep. 45 (1941).

71. *Byles v. Cora*, 232 Iowa 822, 6 N.W.2d 401 (1942).

72. 43 Cal. Rep. 376 (Dist. Ct. App. 1965).

73. 43 Cal. Rep. at 378-79. The court, however, proceeded to find a theory upon

Similarly, a Pennsylvania court held that a pastor could be called to testify about his efforts to effect a reconciliation between husband and wife.⁷⁴ Although this case was decided before Pennsylvania had a statute, the court did not rely on the proposition that no privilege existed under the common law, but based its decision on a finding that the statements were not made to the pastor in his professional character while seeking spiritual advice.

The cumulative weight of the cases denying the privilege emphasizes the inadequacies of the traditional statute and the importance of liberalizing the statutory language to make the privilege more meaningful in today's society.

Jurisdictions which have broadened the privilege

California	Louisiana	New York
Delaware	Maryland	North Carolina
District of Columbia	Massachusetts	Pennsylvania
Florida	Minnesota	Rhode Island
Georgia	Nebraska	South Carolina
Illinois	New Jersey	Tennessee
Iowa	New Mexico	Virginia
Kansas		

In the rest of the states and in the District of Columbia the privilege extended to clergymen is phrased more realistically. In most of these jurisdictions the statutes have been enacted after 1958. Because the language in these statutes varies considerably, it is difficult to generalize. Suffice it to say that they all (1) broaden the privilege to cover more than confessions and (2) either eliminate the course-of-discipline test or clearly relate it to a duty on the part of a clergyman to counsel with his parishioners and to keep the communications secret. The following paragraphs contain the core of each of these statutes and the date in parenthesis is the year the liberal wording first appeared in the statute :

*California*⁷⁵ (1965, operative January 1, 1967)

Communications made in confidence to a clergyman who, in the course of the discipline or practice of his church is authorized or accustomed to hear such com-

which the rabbi could be excused from testifying. The court noted that before the rabbi undertook the counseling program he had exacted an express agreement from both spouses to the effect that he would not be called upon to testify in the event his reconciliation efforts failed and a divorce action was brought. The court held that this agreement precluded the parties from calling him as a witness.

74. *In re Schaeffer's Estate*, 52 Pa. Dauphin Co. Rep. 45 (1941).

75. CAL. EVID. CODE §§ 1030-33 (Deering 1966).

munications and, under the discipline or tenets of his church has a duty to keep such communications secret.

*Delaware*⁷⁶ (1961) and
*District of Columbia*⁷⁷ (1961)

Confessions and communications in the course of giving religious or spiritual advice and communications made by either spouse in connection with any effort to reconcile estranged spouses.

*Florida*⁷⁸ (1959)

Information communicated to a clergyman in a confidential manner and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to or growing out of the information so imparted.

*Georgia*⁷⁹ (1951)

Every communication made by any person professing religious faith, or seeking spiritual comfort.

*Illinois*⁸⁰ (1961)

Confessions and any information which has been obtained by a clergyman in his professional character as spiritual advisor.

*Iowa*⁸¹ (1888 or earlier)

Any confidential communication properly entrusted to a clergyman in his professional capacity and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline.

*Kansas*⁸² (1963)

Any communication which the "penitent"⁸³ intends shall be kept secret or confidential and which per-

76. DEL. CODE ANN. tit. 10, § 4317 (1966).

77. D.C. CODE ANN. § 14-309 (1967).

78. FLA. STAT. ANN. § 90.241 (1960).

79. GA. CODE ANN. § 38-419.1 (1954).

80. ILL. REV. STAT. ch. 51, § 48.1 (1965).

81. IOWA CODE ANN. §§ 622.10, 782.1 (1966). This statute dates from at least 1888.

82. KAN. CIV. PRO. STAT. ANN. §§ 60-402, -429 (Vernon 1965).

tains to advice or assistance in determining or discharging the penitent's moral obligations or to obtaining God's mercy or forgiveness for past culpable conduct.

*Louisiana*⁸⁴ (1928) (apparently applicable only to criminal cases)

Any communication made to a clergyman in confidence by one seeking his spiritual advice or consolation, or any information that he may have gotten by reason of such communication.

*Maryland*⁸⁵ (1957)

Any confession or communication made in confidence by one seeking spiritual advice or consolation.

*Massachusetts*⁸⁶ (1962)

Confessions and any communication made by any person in seeking religious or spiritual advice or comfort, or as to a clergyman's advice given thereon in the course of his professional duties or in his professional character.

*Minnesota*⁸⁷ (1931)

Confessions and any communication made by any person seeking religious or spiritual advice, aid or comfort.

*Nebraska*⁸⁸ (1893 or earlier)

Confessions and any confidential communication properly entrusted to a clergyman in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline.

*New Jersey*⁸⁹ (1947)

A confession or other confidential communication

83. The word "penitent" is defined as "a person who recognizes the existence and authority of God and who seeks or receives from a regular or duly ordained minister of religion advice or assistance in determining or discharging his moral obligations, or in obtaining God's mercy or forgiveness for past culpable conduct."

84. LA. CRIM. PRO. CODE ANN. §§ 15-477 to -478 (West 1959).

85. MD. ANN. CODE art. 35, § 13 (1957).

86. MASS. ANN. LAWS ch. 233, § 20A (1966).

87. MINN. STAT. ANN. § 595.02(3) (1947).

88. NEB. REV. STAT. §§ 25-1201, -1206 (1943). This same wording appears in NEB. COMP. STAT. 899 (1893).

89. N.J. STAT. ANN. § 2A: 84A-23 (1967).

made to a clergyman in his professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which he belongs or of the religion which he professes.

*New Mexico*⁹⁰ (1933)

Any confession or disclosure made to a clergyman in his professional character.

*New York*⁹¹ (1965)

A confession or confidence made to a clergyman in his professional character as spiritual advisor.

*North Carolina*⁹² (1959)

Any information which may have been confidentially communicated to a clergyman in his professional capacity under such circumstances that to disclose the information would violate a sacred or moral trust; that the presiding judge in any trial may compel disclosure of such information if in his opinion it is necessary to a proper administration of justice.

*Pennsylvania*⁹³ (1959)

Information acquired by a clergyman in the course of his duties from any person secretly and in confidence.

*Rhode Island*⁹⁴ (1960)

Confessions and any confidential communication properly entrusted to a clergyman in his professional capacity and necessary and proper to enable him to discharge the functions of his office in the usual course of practice or discipline.

*South Carolina*⁹⁵ (1959)

Any confidential communication properly entrusted to a clergyman in his professional capacity and necessary

90. N.M. STAT. ANN. § 20-1-12 (1953).

91. N.Y. CIV. PRAC. LAW § 4505 (McKinney 1966); N.Y. CRIM. PRAC. CODE § 392 (McKinney 1958).

92. N.C. GEN. STAT. § 9-17-23 (1967).

93. PA. STAT. ANN. tit. 28, § 331 (1966 Supp.).

94. R.I. GEN. LAWS ANN. § 9-17-23 (1966 Supp.).

95. S.C. CODE ANN. § 26-409 (1962).

and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body.

*Tennessee*⁹⁶ (1959) and
*Virginia*⁹⁷ (1962) (apparently applicable only to civil cases)

Any information communicated to a clergyman in a confidential manner, properly entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

In addition to the word "confession" or in substitution thereof these statutes use more encompassing words such as "communications," "information," "confidential communication," "disclosure," or "confidence." And when the course-of-discipline concept is retained in the statute, as previously indicated, it is clearly identified with a discipline concerning itself with the functions and duties of the clergyman rather than with a discipline requiring confession. These two changes, when combined, produce an algebraic rather than an arithmetic improvement in the clergyman's position.

Other interesting and distinctive features of the more recently enacted statutes include (1) better definitions of those who qualify as clergymen,⁹⁸ (2) extensions of the privilege to quasi-legal proceedings,⁹⁹ (3) criminal sanction against a clergyman who discloses the communication,¹⁰⁰ and (4) provisions specifically covering marriage counseling.¹⁰¹

It would be a mistake, however, for clergymen to assume that these liberally worded statutes give them complete protection. In fact, the majority of the reported cases decided under the liberal wording of these statutes deny the privilege.

96 TENN. CODE ANN. § 24-109 (1967 Supp.).

97. VA. CODE ANN. § 8-289.2 (1950).

98. *See, e.g.*, the statutes of California, Delaware, District of Columbia, Florida, Georgia, Illinois, Kansas, New Mexico, North Carolina, Pennsylvania and Tennessee.

99. *See, e.g.*, the statutes of Illinois, Pennsylvania and South Carolina.

100. Tennessee makes violation a misdemeanor and subjects the clergyman to a \$50 fine and imprisonment in the county jail or workhouse for not exceeding six months.

101. *See* the statutes of Delaware and the District of Columbia.

1. Cases in which the privilege was upheld

In *Cimijotti v. Paulsen*¹⁰² the Iowa statute was held to cover corroborating statements made to a priest by two friends of a penitent when such statements were necessary to obtain the approval of the Catholic church for separate maintenance and divorce proceedings. However, the case is one in which the court was obviously interested in upholding the privilege because it was completely unsympathetic with the plaintiff's efforts to prove a conspiracy among two former wives and a third person to publish defamatory statements concerning the plaintiff.

In *LeGore v. LeGore*¹⁰³ a man enlisted a clergyman's help in seeking a reconciliation with his wife. During the course of the conversation he admitted that he had been unfaithful. In a divorce proceeding the wife subpoenaed the clergyman and the trial court admitted his testimony. The appellate court said that under the new statute in Pennsylvania, the trial court erred in admitting the testimony because "marriage counselling seeking to preserve the sanctity of marriage is most important and is definitely within the functions and duties of a minister." The fact that the husband was not a member of the clergyman's church made no difference.

2. Cases in which clergymen were permitted or compelled to testify

The Iowa Supreme Court has denied the privilege in three cases. In the earliest of these the defendant in a rape case met a clergyman at a railway station and gave his account of the occurrence. The court held that these statements were not of a confidential nature, and were not told for the purpose of obtaining the clergyman's advice or assistance.¹⁰⁴ The conversation which followed this recounting of the facts, however, was held privileged for the stated reason that during the subsequent conversation the defendant asked the clergyman for spiritual assistance. One gets the impression that the court felt the defendant should have been convicted and therefore distinguished between the two parts of the conversation in order to admit as testimony that portion of the discussion which was needed to sustain the conviction.

In the second case the Iowa court held that the minister was acting as a friend and interpreter (in connection with the negotiation of a settlement in a personal injury case) and that what was said had nothing to do with spiritual matters.¹⁰⁵ And in the latest case¹⁰⁶ (decided in

102. 219 F. Supp. 621 (D.C. Iowa 1963), *aff'd* 340 F.2d 613. The case was in the Federal court by reason of diversity of citizenship, but the Iowa statute governed.

103. 31 Pa. D. & C.2d 107 (1963).

104. *State v. Brown*, 95 Iowa 381, 64 N.W. 277 (1895).

1967) the Iowa court compelled a clergyman to produce certain letters as evidence in an alienation of affection suit. The letters had been found by the defendant's wife in the defendant's home and had been delivered by her to her pastor for safekeeping. The court said it was dealing with an independent document and not a direct communication, and that if such evidence were to be excluded, justice could be thwarted simply by delivering important papers to a clergyman.¹⁰⁷

In a recent Pennsylvania case¹⁰⁸ involving a will contest, a statement made by a woman to her priest—who came to her home prior to her death to receive a gift—to the effect that she had no will, was held not to constitute a privileged communication. The court said that the statement may have been made “in the course of the priest's duties,” but that it was in no sense made secretly or in confidence to a spiritual adviser from whom the woman was seeking either spiritual advice or absolution.

The Nebraska Supreme Court has held that no privilege attached to a request made by a defendant (charged with bigamy) to his rector to intercede for him with his first wife for a settlement of the criminal proceedings. The defendant wrote out the points he wanted the rector to bring before his wife. The court concluded that the statements were not made “under such circumstances as to imply that they should forever remain a secret in the breast of the confidential adviser.”¹⁰⁹

Similarly, in a Minnesota case decided after the 1931 amendment of the Minnesota statute, the court held that there was nothing penitential or confidential in a communication made by a girl to her pastor when he called on her at the hospital and she related to him what happened when a train accident occurred. The court held that although the pastor had called on the girl prepared to give spiritual advice or comfort, none was asked.¹¹⁰

An interesting and important opinion has recently been handed down in the case of *In re Williams*.¹¹¹ This Case involved a Baptist minister who has been held in contempt and sentenced to ten days in jail for refusing to be sworn as a witness in a rape case. The trial judge had carefully and patiently explained to the minister that he would sustain objections properly entered to questions requiring disclosure of confidential communications. Nevertheless, the minister refused to be sworn as a witness and to testify that he had seen the prosecuting witness at the defendant's home. (Both the defendant and the prosecuting witness were mem-

106. *Allen v. Lindeman*, 148 N.W.2d 610 (Iowa 1967).

107. 148 N.W.2d at 615.

108. *McGrogan's Will*, 26 Pa. D. & C. Rep.2d 37 (1961).

109. *Hills v. State*, 61 Neb. 589, 85 N.W. 836 (1901).

110. *Christensen v. Pestorius*, 189 Minn. 548, 250 N.W. 363 (1933).

111. 269 N.C. 68, 152 S.E.2d 317 (1967).

bers of the minister's church and, as the minister expressed it, he did not want "to take sides.") Neither the prosecutor nor the defendant's attorney intended to object to this testimony, but the minister took the position that it would violate his moral duty as a Christian minister to take the witness stand and testify to any matters within his knowledge concerning the matter on trial. The Supreme Court of North Carolina was unimpressed with this position and concluded that the minister's refusal to take the stand was wilful, deliberate, unlawful and punishable summarily. It held that contempt does not have to proceed from a malevolent spirit :

The fact that one called as a witness fears that his testimony may decrease the esteem in which he is held in the community, or may decrease his ability to render service therein, does not justify refusal by him to testify in response to questions otherwise proper. . . . It is the right to exercise one's religion or lack of it, which is [constitutionally] protected, not one's sense of ethics.¹¹²

The court went on to say that the freedom to exercise one's religious belief is not absolute (citing precedents where polygamy and compulsory vaccination were at issue)¹¹³ and that "the 'compelling interest' of the state in the rendering of a just judgment in accordance with its law overrides the incidental infringement upon the religious belief of the witness that for him to testify is wrong."¹¹⁴ The court verbally chastised the minister with the following statement :

History, both sacred and secular, ancient and modern, is replete with accounts of men of noble character and lofty motives who have suffered punishment far more severe than ten days in jail for conscience's sake. History, especially in recent times, also records that the respect and acclaim which have been accorded these heroes of faith, both spiritual and political, have sometimes induced the self-seeking charlatan to follow in their footsteps—so long as the probable penalty does not outweigh the anticipated applause.¹¹⁵

The *Williams* case indicates that the courts today are not always sympathetic with the clergyman's point of view, particularly where the circumstances indicate that the clergyman may be stretching a point.

In summary, a review of the cases decided under the liberal statutes suggests that even in the states where such statutes have been enacted

112. 152 S.E.2d at 324, 325.

113. *Id.* at 326.

114. *Id.* at 327.

115. *Id.* at 323.

the clergyman cannot blindly assume that he is protected by a privilege and that he must use good judgment both at the time he is being consulted and when he is called as a witness.

3. The Privilege in the Federal Courts

The status of the clergyman-privilege in Federal courts is uncertain. If it exists at all, it is difficult to say how far it extends. There is no Federal statute on the matter and the Federal Rules of Civil¹¹⁶ and of Criminal¹¹⁷ Procedure do not deal specifically with the subject. There are, however, two Federal cases which recognize the privilege.

The first Federal court pronouncement on the subject was the following dictum in a district decision :

Under the law of the United States, privileged communications are strictly limited to a few well-defined categories, such as communications between . . . clergyman and penitent. . . .¹¹⁸

It would be interesting to know how the court reached this unqualified and positive conclusion—but no authority is cited and no reasons are given.

A more meaningful case is that of *Mullen v. United States*,¹¹⁹ decided by the Circuit Court of Appeals for the District of Columbia Circuit in 1958, prior to the enactment of the statute for the District of Columbia. A mother was convicted for chaining her children to a bed. (She claimed that she had to take this action to protect them when she had to leave the house.) Disturbed by what she had done she went to her pastor (Lutheran) and made a penitential disclosure to him so that she could receive communion. The court held that the communication was

116. FED. R. CIV. P. 43 insofar as pertinent provides as follows:
 Rule 43. Evidence

(a) Form and Admissibility. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

117. FED. R. CRIM. P. 26 provides as follows:
 Rule 26. Evidence

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

118. *United States v. Keeney*, 111 F. Supp. 233 (D.D.C. 1953).

119. 263 F.2d 275 (D.C. Cir. 1958).

privileged even in the absence of a Federal statute. It reviewed the history of the privilege under common law and concluded that although the privilege was not recognized in the English courts after the Restoration, "judicial decisions and legal writings were not uniformly hostile to the privilege."¹²⁰ The opinion cites Rule 26 of the Federal Rules of Criminal Procedure,¹²¹ which provides that the competency of witnesses shall be governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The opinion then concludes that in a situation where "reason and experience call for recognition of a privilege which has the effect of restricting evidence, the dead hand of the common law will not restrain such recognition."¹²² The court apparently regarded Rule 26 as a license to depart from the common law rule of no-privilege.

Whether other Federal courts will follow this interpretation, whether they will follow it in civil cases, and under what circumstances they will recognize the privilege, are all unanswerable questions at this time.

The Basic Principles Involved

The subject of clergyman-privilege is not unlike many other legal problems. There are a number of considerations which bear upon the question and they do not all lead to the same conclusion. This problem is complicated not only by legal and sociological factors which are in tension with each other, but also by the presence of somewhat tenuous spiritual and psychological concepts.

To grant the privilege involves the suppression of evidence, and since rules of evidence are designed to promote the successful development of truth with a view toward attaining a just result, the judicial process is thwarted to the extent that evidence of this nature is made inadmissible. Some of the proponents of this line of reasoning would not only deny the privilege, but would go one step farther and compel a clergyman to volunteer information. For example, a Catholic priest in West Germany has been subjected to much criticism for not having disclosed to the authorities that a 16-year-old butcher's apprentice had confessed a murder. The priest had urged the boy to give himself up to the police, but instead, the boy committed three more murders.¹²³

On the other hand, there is the point of view that a confidence should be respected, particularly by a person who is in a position of trust and confidence—a doctor, lawyer or clergyman. This is supported by the

120. *Id.* at 27.8

121. *See* note 119 *supra*.

122. 263 F.2d at 279.

123. *Parade Magazine*, Feb. 11, 1968, at 27.

spiritual argument that a man must have the opportunity to “get right with his God” and be assured of his forgiveness. Psychologists recognize the therapeutic value of the confession and clergymen emphasize its spiritual significance. The clergy insists that unless these confidences are safeguarded, people who need spiritual assistance will be hesitant to seek it, and society will suffer.

In balance, the advantages of granting the privilege seem to outweigh the disadvantages. And doubts in the matter can be resolved, at least in large measure, by reasoning that if the privilege did not exist, it is likely that the communication would not take place at all. If such communications were to “dry up,” what has society gained? It has been argued that in such event man’s “compulsion to confess” would lead him to the authorities rather than to a clergyman, thereby promoting the cause of justice.¹²⁴ Even if this were valid psychological reasoning, it seems to border on the inhuman to remove a safe outlet for the “compulsion to confess” in order to force a man to incriminate himself. There can be little doubt that the privilege will work injustices, some minor, some serious; but if the privilege did not exist and if people were aware that it did not exist, it is likely that the evidence in question would never come into being.

The following excerpt from the court’s opinion in the *Mullen* case sums it up:

The benefit of preserving these confidences inviolate overbalances the possible benefit of permitting litigation to prosper at the expense of the tranquility of the home, the integrity of the professional relationship, and the spiritual rehabilitation of a penitent. The rules of evidence have always been concerned not only with truth but with the manner of its ascertainment.¹²⁵

A SUGGESTED FORM OF STATUTE

Whether the conclusion reached in the preceding segment of this article is correct or whether the reader agrees with it is to a large extent academic. The fact is that the lawmakers in 44 states and the District of Columbia—whether from genuine belief in the value of the privilege or from pressure from churchbodies and their clergy—have not only adopted the concept of clergyman-privilege but have in recent years, as previously indicated, been extending its scope. Fifteen states¹²⁶ in the past decade have either enacted statutes for the first time or have liberalized statutes

124. 21 N.Y.S. Bar Bull. 288 (1949).

125. 263 F.2d at 280

126. The 14 states listed under the liberal category plus Maine which is listed as having the traditional form of statute.

which had been on their books. Clergyman-privilege has become part of the law of evidence.

The practical problem therefore is establishing the privilege on as sound a basis as possible so that it will accomplish its purposes without being abused and furnish to clergymen reasonably definite guidelines to rely upon as they perform their ministry.

Most states have a long way to go to achieve this objective. Deterrents to progress in the legislative area are (1) the volume of legislation presented at each session of a state legislature, (2) the tediousness and intricacies of the legislative process and (3) the narrow application of a clergyman-privilege statute. In a number of instances it has required an embarrassing case to stimulate legislation. When a clergyman has been fined or threatened with imprisonment and the religious community and the press have been aroused by the clergyman's plight, state legislatures have reacted swiftly and have enacted legislation which is more charged with emotionalism than with good draftsmanship.¹²⁷

It would be presumptuous to try to frame a "model" statute, because reasonable men will undoubtedly differ on the proper wording of a clergyman-privilege statute—differ not only in prescribing the extent of the privilege, but also in defining the term "clergyman" and describing the various forums or situations in which the privilege can be asserted. A useful purpose might be served, however, by framing a statute which could be used at least as a starting point by anyone interested in formulating a statute on this subject.

The provisions embodied in the "Model Code of Evidence" adopted by the American Law Institute¹²⁸ in 1942 and subsequently incorporated in the proposed Uniform Rules of Evidence, have been adopted in only one state (Maine).¹²⁹ The fact that the wording of the Model Code has not been generally accepted is probably due to the fact that the provision is really nothing more than an elaborate restatement of the traditional statute and reflects little original thinking on the subject.

127. There are a number of instances of this type of emergency action. The Delaware statute was enacted in 1961 to come to the rescue of an Episcopal rector subpoenaed in an alienation of affection suit. Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L. J. 55 (1963). The New York statute was enacted shortly after a New York court in the *Smith* case had denied to a Protestant minister the privilege which had previously been granted to a Catholic priest. See text accompanying notes 8-9 *supra*. In Tennessee the enactment of the statute followed the imposition of a fine on a Baptist minister who refused to divulge private information obtained from a married couple prior to a divorce case. W. H. TIEMAN, *THE RIGHT TO SILENCE*, 25 (1964). The liberalized Minnesota statute was directly attributable to the litigation in the *Swenson* case, and the California statute was charged in the same year that the *Simrin* case was decided.

128. MODEL CODE OF EVIDENCE, Rule 219 (1942).

129. See note 18 *supra*.

Fortunately some of the recently-enacted state statutes evidence more thoughtful and careful draftsmanship, and using the better provisions of these statutes as a base, the author suggests the following form of clergyman-privilege statute.

Section ———. *Communications with Clergymen*

(a) If any person shall communicate with a clergyman in his professional capacity and in a confidential manner (i) to make a confession, (ii) to seek spiritual counsel or comfort or (iii) to enlist help in connection with a martial problem, either such person or the clergyman shall have the privilege, in any legal or quasi-legal proceeding, to refuse to disclose and to prevent the other party from disclosing anything said by either party during such communication.

(b) For the purpose of this section

(i) the word "clergyman" shall mean any duly ordained, licensed or commissioned priest, minister, rabbi or practitioner of any established church or religious organization; excluding, however, any person who is self-ordained or who does not regularly, as a vocation, devote his time and abilities to the service of his respective church or religious organization, and

(ii) the term "legal or quasi-legal proceeding" shall mean any proceeding, civil or criminal, in any court of law whether or not a court of record), a grand jury investigation, a coroner's inquest, a hearing in the state legislature or any committee thereof, and any proceeding or hearing before any public officer or administrative agency of the state or any political subdivision thereof.

In support of these suggested provisions the author offers the following comments:

General Comment

The provisions are as broad as any statute in effect. The intent is to encourage communications with clergymen on the presupposition that they benefit the individual and society. In the author's view the provisions meet the four requirements which Wigmore said should be met before a privilege is granted:¹³⁰

(1) The communications must originate in a *confidence* that they will not be disclosed;

130. 8 WIGMORE EVIDENCE § 2285 (McNaughton rev. 1961).

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

With respect to paragraph (a)

1. The provision is applicable to "any person." There is no requirement that the person communicating to the clergyman be a member of the clergyman's church or denomination. Nor is there any requirement that he have religious faith or a belief in God. He may be consulting the clergyman in search of such faith or to rediscover it.

2. The communication must be to a clergyman "in his professional capacity." Communications made to a clergyman—even though made in confidence—as a friend or acquaintance in the course of a private discussion which is not related to his duties as a clergyman would not be privileged.

3. The communication must be made "in a confidential manner." If the surrounding circumstances indicate that there was no intention that the subject of the discussion be kept secret, there would be no privilege. For example, if others are present when the discussion occurs, no privilege would attach to such discussion.

4. The "confession" contemplated by the statute may be either an act enjoined by the discipline of a denomination or a voluntary confession.

5. The type of communication which is privileged extends beyond a confession to statements made in the course of spiritual or marital counseling.

6. The privilege covers statements made by the clergyman as well as those made by the other party. The statutes of most states give protection only to what is said by the penitent; but the clergyman, in counseling with the person who has come to him for advice, should be free to express himself without fear that he may be subpoenaed to testify concerning his own statements. The privilege should cover the entire conversation between the parties.

7. The privilege may be claimed by either party to the discussion. Most statutes today speak only in terms of the clergyman being incompetent to testify or in terms of the inadmissibility of the clergyman's testimony. Nothing is said expressly about the testimony of the other party. This might be explained by the fact that the older statutes seemed

to contemplate only confessions of a criminal act and it was assumed that the other party would not be a witness. Although existing statutes would probably be interpreted to apply also to the testimony of the other party, this should not be left to the uncertain processes of judicial construction. It should be stated clearly in the statute.

8. Either party may claim the privilege even though the other may be willing to waive it. Thus, if a husband consult a clergyman with regard to a marital difficulty and learns from the clergyman certain facts which he subsequently would like to introduce into evidence in a divorce proceeding, the clergyman should be in a position to prevent a breach of the confidence. Moreover, if either party dies, the other could nevertheless claim the privilege if he feels that under all the circumstances it is advisable to do so. However, it is clearly a matter of privilege and either or both parties could testify if neither party claims the privilege.

9. The proposed statute would apply only to "communications." Observations made by the clergyman of the other party's mental competence or physical appearance would not be covered by the privilege. Nor would the clergyman be excused from disclosing or producing objects entrusted to his care. In such situations it is submitted that the fourth criterion established by Professor Wigmore would not be satisfied. Moreover, this would seem to go beyond the spiritual or therapeutic area in which consultation with a clergyman could reasonably be expected to help the individual; instead, it would afford a procedure for the abuse of the legal process.¹³¹

With respect to paragraph (b) (i)

The definition of "clergyman" is intended to encompass all persons generally considered as clergymen and to exclude persons who may be considered clergymen only by a particular sect as well as elders, deacons and other church officers. What takes place at church trials can hardly be considered secret or confidential, and no privilege would be extended to those who conduct such trials. Laymen would certainly be excluded, even though a particular denomination proclaims the priesthood of believers, and even though the denomination exhorts its members to confess their sins to one another.

With respect to paragraph (b) (ii)

If the concept of clergyman-privilege is valid at all, there is no reason why it should not be extended to all types of legal and quasi-legal proceedings. Unless this is done, the privilege could become a trap—protecting the parties in a court of record but leaving them vulnerable in

131. Allen v. Lindeman, 148 N.W.2d 610 (Iowa, 1967).

the mushrooming area of committee hearings and other quasi-legal proceedings.

Concluding Comment about Suggested Statute

The statute does not attempt to spell out a procedure to be followed in determining whether the privilege should be granted. A court or hearing officer would have to determine whether

1. the communication was made to a clergyman
2. in his professional capacity and
3. in a confidential manner
4. to make a confession, to seek spiritual counsel or to enlist help in connection with a marital problem.

In most instances, the determination of whether these four elements are present would present no problem. It would be naive, however, to suppose that all questions could be resolved easily. There will undoubtedly be borderline situations in which the application of one or more of the four tests will be difficult; but the hope is that under this type of statute they will be minimized, and that the statute will provide clear guidelines in the great majority of factual situations which can reasonably be expected to arise in the normal course of events. Moreover, nothing is said concerning a trial judge's right to inquire into the content of the communication. In most instances there would be no need to go this far because the judge could determine the availability of the privilege from the surrounding circumstances; but there would be nothing to prevent a judge from inquiring into the substance of the communication in order to determine whether the privilege should be recognized.

The above comments concerning the proposed statute set forth the reasoning underlying the various provisions. This reasoning is the product of some study of the subject and a limited exposure to the practical problems. It can certainly be improved upon by others who have given or will give this subject thought and attention. The important point is that there is a real need for a statute of this general nature in the majority of states. Whether this suggested form is enacted "as is" or with variations, some strengthening and clarification of the clergyman's presently precarious and vulnerable position is not only desirable but necessary.

MEANWHILE, BACK AT THE PARSONAGE

A useful purpose is served by discussing and recommending needed improvements in statutes on the subject of clergyman-privilege. But the fact remains that—particularly in those few states which as yet have no statute, to a large extent in those states which have only the narrowly-worded traditional statute, and to a limited degree even in those states

which have liberalized the language of their statutes—the clergyman is faced with serious problems. The following practical suggestions and comments are offered for consideration by clergymen and lawyers who advise them concerning their legal rights and duties in this sensitive area.

1. Since the majority of states still require that the confession or other communication be made to a clergyman in the course of the discipline practiced by his particular denomination, those church bodies whose course of discipline in this area has not been clearly enunciated should take such action as may be necessary or advisable, consistent with their theology and polity, to make it clear that their clergymen have an obligation to hear confessions and other communications, to give spiritual advice and to keep such matters secret. To the extent that the theology or doctrine of a particular church-body permits, the status of the confession should be spelled out with recognition of the fact that the greater the degree of duty imposed on a member to confess his sins, the greater will be the privilege-protection. Most church bodies have done nothing to bolster the position of their clergymen, and those which have addressed themselves to this problem,¹³² in most instances have not given it careful study or attention. Although course-of-discipline statements are desperately needed, the numerous denominational differences in theology and church procedures make it impossible to draft a course-of-discipline statement which would be generally acceptable.

2. The clergyman should make certain that any discussion as to which privilege may be asserted at a later date is made under circumstances designed to protect its confidential nature. This means that it must take place outside the hearing of a third person. There have been some cases holding that a communication to a doctor made in the presence of a nurse or to an attorney in the presence of a law clerk remains confidential because of the close working relationship which exists between the third person and the doctor or attorney. This reasoning may be held to apply to a vicar, an assistant pastor, or even an elder or deacon who may be requested by the clergyman to “sit in” on the meeting; but to be on the safe side, it is best to have no one else present during the discussion. To make a record of the conversation in a written memorandum or on tape might jeopardize its secrecy. Talking about the matter with anyone after the discussion has taken place will also destroy the privilege.

3. If the clergyman is consulted by both spouses concerning marital difficulties and if the situation permits, it would be advisable to ask

132. W. H. TIEMANN, *THE RIGHT TO SILENCE* 27 (1964) (Baptist), 28 (Presbyterian, but limited to Presbytery of Newark, N.J.), 51 (Mo. Synod Lutheran citing only Walther's *Pastoral Theology*), 52 (Lutheran Church in America and American Lutheran Church). In the Roman Catholic church the protection is built in by reason of the sacramental aspect of the confession. See note 1 *supra*.

husband and wife to sign a simple statement to the effect that if their problems cannot be resolved and a divorce proceeding ensues, neither of them will call the clergyman as a witness. Although there is a well-accepted rule of law that agreements to suppress evidence, including agreements not to appear as a witness, are contrary to public policy and are therefore invalid,¹³³ when both parties to the litigation have previously agreed not to call as a witness the clergyman whom they jointly consulted, there would seem to be no violation of public policy. This procedure was approved in the *Simrin* case; the court there said that the public policy to preserve marriages prevails over the policy opposing the suppression of evidence.¹³⁴

4. When the clergyman has reason to believe that the communication may not be privileged, he should forewarn the other person and permit him to decide whether to continue the discussion. The clergyman should also be circumspect in his own statements during the course of such a conversation.

5. A clergyman should not let himself be used as a depository for objects which another person, for some reason, does not want to retain in his possession. The concept of privileged communications does not include serving as custodian of property. What the clergyman should do (in terms of reporting the incident or revealing the identity of the party) if an object has been submitted to him for safe-keeping, is a matter which would have to be discussed with an attorney. The circumstances vary too greatly for general advice to be of any value.

6. A clergyman should be thoroughly conversant with the wording of the statute (if there is a statute) in his state, and, if possible, should consult with a lawyer concerning the degree of the protection which such statute affords. Being informed concerning the scope of the privilege, the clergyman, guided by his own conscience, can make more intelligent decisions concerning his exposure to a contempt citation if he refuses to testify. The lawyer could also advise him of the consequences of refusing to testify in a situation in which there is no privilege. This usually involves a contempt citation (generally without a hearing or trial) with whatever punishment (fine and/or imprisonment) attaches to a contempt proceeding in a particular state.

7. Where possible, efforts should be organized by clergymen on an inter-faith basis to obtain the enactment of more meaningful legislation than presently exists in most states.

8. A final observation is that clergymen should at all times remember that they are citizens as well as clergymen, and that they must be as

133. 17 AM. JUR.2d *Contracts* § 198 (1964).

134. See accompanying note 73 *supra*.

objective as possible in weighing their responsibilities in both capacities. The privilege which they enjoy is one which should be exercised wisely and not abused. One writer has suggested that one of the motives prompting the extension of the clergyman-privilege is "a feeling of individual and professional pride and self-importance in being the inviolable repository of others' secrets" and that this feeling, "fanned by inter-professional jealousies and pretensions, is very likely not the least reason for the continued and considerable agitation for extension of the privilege to other fields."¹³⁵ This is a cynical statement, but clergymen, as well as lawyers, doctors and other professional people, must determine for themselves whether there is any truth in it. There may be other ulterior motives for not wanting to testify. For one thing, it is usually not easy or pleasant to testify in a case, to be exposed to publicity and possibly criticism, and perhaps to take sides when parishioners are involved. And there are times when a clergyman has made statements in the course of a conversation which, after more mature reflection, he realizes would be embarrassing to him if brought to light in court. In all such situations a clergyman may be tempted to invoke the privilege in order to rationalize or disguise a personal reason for not wanting to testify.

The Book which most clergymen regard as their supreme authority puts it very succinctly :

To everything there is a season . . . a time to keep silence,
and a time to speak.¹³⁶

135. 21 N.Y.S. Bar Bull. 288, 290 (1949).

136. *Eccles.* 3:1, 7.