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## Disclosure of Church Archives in Cases of Criminal Misconduct by Clergymen

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# DISCLOSURE OF CHURCH ARCHIVES IN CASES OF CRIMINAL MISCONDUCT BY CLERGYMEN

## I. INTRODUCTION

Throughout the past decade, an alarming number of allegations of sexual misconduct have been made against Catholic priests.<sup>1</sup> The typical scenario includes repeated sexual impositions made by a priest on a young member of the parish.<sup>2</sup> In some cases, an allegation made by a child or former parishioner will cause others to face the reality that the same priest molested them when they were young.<sup>3</sup> The multiplicity of claims may cause a criminal investigation and criminal charges to be filed many years after the alleged abuse took place.<sup>4</sup>

Whether an adult—only recently able to acknowledge what happened to him decades earlier—brings the claim, or a child—courageous enough to tell his parents what other children might be inclined to keep to themselves—brings it, the priest-penitent privilege acts as a protective shield to clergymen by hiding potentially relevant evidence from the jury.<sup>5</sup> Until 1994, no jurisdiction in the United States compelled the disclosure of church records containing evidence of sexual misconduct by a priest in a criminal matter.<sup>6</sup>

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<sup>1</sup> See Harvey Berkman, *Boy Says Abuse; Priest, Ex-Nun Say Slander*, CHI. LAW., Jan. 1994, at 1. (Berkman estimates that in the United States in the past ten years, parishioners have made accusations of sexual misconduct against over 400 priests).

<sup>2</sup> See *id.*

<sup>3</sup> Brian McGrory and Linda Matchan, *Accusations Roil Worcester Diocese Sex Allegations Against Seven Priests Raising Questions of Trust*, BOSTON GLOBE, Feb. 8, 1993, at 13. Liz Stellas, program specialist for the Center for the Prevention of Sexual and Domestic Violence explained, “[t]he courage of victims to come forward is fed by the courage of other victims coming forward.” She further noted, “[t]he [James] Porter case has started a groundswell that is giving other victims more courage to step out of their shame and see that they were harmed and need some help.” *Id.*

<sup>4</sup> See *id.* (Porter, who was accused of sexually molesting numerous young parishioners in the 1960s, faced charges stemming from those accusations as late as 1994).

<sup>5</sup> See 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE, §§ 2285, 2394-2396 (McNaughton rev. 1961 & Supp. 1991) (evidentiary privileges compromise the truth-seeking goals of the judicial system).

<sup>6</sup> See *Commonwealth v. Stewart*, 647 A.2d 597 (Pa. Super. Ct. 1994) (citing no cases directly on point in either Pennsylvania or other jurisdictions); *People v. Doe*, Grand Jury No. 1050 and 514 (Cir. Ct. of Cook County, Ill. Feb. 3, 1993) (citing no cases directly on point in either Illinois or other jurisdictions). These records would presumably be ad-

The Pennsylvania Superior Court, in *Commonwealth v. Stewart*,<sup>7</sup> was the first court to compel the production of church records in a criminal case. The Illinois Supreme Court refused to compel disclosure under similar circumstances in *People v. Doe*.<sup>8</sup>

The priest-penitent privilege prohibits a clergyman of any faith from revealing the contents of conversations he has with a parishioner.<sup>9</sup> The priest-penitent privilege, like all evidentiary privileges, requires an expectation of confidentiality.<sup>10</sup> Courts have interpreted the definition of a clergyman broadly.<sup>11</sup> *Stewart* and *People v. Doe* address the applicability of the priest-penitent privilege to records maintained in accordance with the Roman Catholic Church's canon laws.<sup>12</sup> Such archival records do not contain information conveyed in confidence from a parishioner to a priest, but rather discussions between a priest and a member of the church hierarchy.<sup>13</sup> Protecting the Church's archival records by applying the priest-penitent privilege would represent an extension of the privilege beyond its traditionally limited scope.<sup>14</sup>

## II. THE POLICY OF THE PRIEST-PENITENT PRIVILEGE

The generally accepted elements of privileged communications are (1) the communication must be made in expectation of confidentiality; (2) the confidentiality of the communication must be essential to the continued existence of the relationship between the parties to the communication; (3) the relationship must be valued by the community at large and deserving of preservation; and (4) the harm to the relationship of the parties to the com-

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missible as evidence of prior bad acts if they referred to other incidents or as admissions if they pertained to the case *sub judice*. *Stewart*, 647 A.2d at 597.

<sup>7</sup> *Stewart*, 647 A.2d at 597. The Superior Court is one of Pennsylvania's two intermediate appellate courts.

<sup>8</sup> *Doe*, Grand Jury No. 1050 and 514.

<sup>9</sup> 8 WIGMORE, *supra* note 5, §§ 2285, 2394-2396.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See Stewart*, 647 A.2d at 599 (the defendant sought all documentation pertaining to allegations of misconduct or substance abuse by the Reverend Leo Heineman from the Diocese); *Doe*, Grand Jury No. 1050 and 514 at 4 (State Attorney sought results of Archdiocese's investigation into allegations of sexual misconduct by priests).

<sup>13</sup> *See Stewart*, 647 A.2d at 599; *Doe*, Grand Jury No. 1050 and 514 at 7.

<sup>14</sup> *See generally* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95 (1983) (while the content of privileged communications has gradually expanded, it has not yet been interpreted so broadly so as to include communications between a priest and the church hierarchy).

munication by disclosure would be greater than the truth-seeking benefit gained by the courts.<sup>15</sup> Theoretically, when these conditions are present, a privileged communication exists and the communication should be excluded from the arena of admissible evidence at trial.<sup>16</sup> Traditionally recognized statutory privileges include the attorney-client privilege, the physician-patient privilege, the inter-spousal communication privilege and the priest-penitent privilege.<sup>17</sup> While there is some disagreement regarding the exact origin of the priest-penitent privilege, it is clear that the privilege represents an established policy of affording special treatment to communications between parishioners and clergy.<sup>18</sup> While ancient canonical laws may once have been influential in establishing precedent in the early years of American jurisprudence, the priest-penitent privilege now derives its authority from state statutes.<sup>19</sup>

The priest-penitent privilege recognizes the human need to repent, confess and seek forgiveness.<sup>20</sup> It also recognizes that allowing individuals to repent is in the best interest of society.<sup>21</sup> This "instrumental justification" was best described by Jeremy Bentham's disciple, Edward Livingston:

Confession is calculated to produce repentance and reformation; crimes have been prevented, restitution made, and unjust litigation averted by its means; and moreover, the penance imposed by the priest,

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<sup>15</sup> 8 WIGMORE, *supra* note 5, § 2285.

<sup>16</sup> *Id.* At least one state makes a distinction between evidence admissible at trial and discovery, choosing to compel discovery, but exclude the evidence when the doctrine of privilege requires.

<sup>17</sup> See 8 WIGMORE, *supra* note 5, §§ 2285-2287 (privileges generally), 2290-2329 (attorney-client privilege), 2332-2341 (inter-spousal privilege), 2380-2391 (physician-patient privilege), 2394-2396 (priest-penitent privilege).

<sup>18</sup> See generally 26 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5612 (1992 & Supp. 1995); 2 DAVID W. LOUISELL & CHRISTOPHER B. MILLER, FEDERAL EVIDENCE, § 200-201 (1985 & Supp. 1993).

<sup>19</sup> The Harvard Law Review Association, *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1454-1463 (1985) [hereinafter DEVELOPMENTS IN THE LAW]. Only in cases in which the Federal Rules of Evidence govern do the courts look to the federal common law to interpret the priest-penitent privilege. See 2 LOUISELL & MILLER, *supra* note 18, § 202.

<sup>20</sup> Lori Lee Brocker, Comment, *Sacred Secrets: A Call for the Expansive Application and Interpretation of the Clergy-Communicant Privilege*, 36 N.Y.L. SCH. L. REV. 455, 470 (1991).

<sup>21</sup> *Id.* at 485; Yellin, *supra* note 14, at 109.

furnishes the means of inflicting some penalty for offenses that, being unknown, would otherwise be unpunished.<sup>22</sup>

The committee notes of one state legislature reveal the committee's belief that the public interest cannot be served by preventing a culprit from seeking religious solace through fear of having his confidence betrayed.<sup>23</sup> Public interest is served anytime a person consciously seeks to confess and repent his culpable conduct. It may well discourage the commission of another crime.

While the need to repent is the most frequently cited policy reason for the creation of the priest-penitent privilege, another recognized purpose is to avoid conflicts between two respected establishments of society, the Church and the judicial system.<sup>24</sup> If not for the priest-penitent privilege, many clergymen might find themselves caught between a court order to testify and an equally compelling obligation not to testify based on the rules of their respective religious organizations.<sup>25</sup> In the case of a Catholic priest, a court order requiring him to testify must be balanced against the possible repercussion of excommunication by the church.<sup>26</sup> In essence, the existence of the priest-penitent privilege in all state jurisdictions may represent the efforts of state legislatures to avoid drawing battle lines between two respected social institutions, perhaps fearing public resentment toward the legislature and the courts.<sup>27</sup>

Another argument supporting the existence of the privilege is the potential violation of the First Amendment Free Exercise and Establishment clauses.<sup>28</sup> Those who suggest that the privilege falls within the scope of the protection afforded clergy under the Constitution argue that a law which

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<sup>22</sup> 1 EDWARD LIVINGSTON, *THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE* 467 (photo. reprint 1968) (1876).

<sup>23</sup> Committee Notes, Prop.Kan.C.C.P. § 60-429, Kan.Jud.Council Bull., Nov. 1961, p. 123, reprinted in 26 WRIGHT & GRAHAM, *supra* note 18, § 5612, at 81.

<sup>24</sup> DEVELOPMENTS IN THE LAW, *supra* note 19, at 1562.

<sup>25</sup> *Id.*

<sup>26</sup> Yellin, *supra* note 14, at 110.

<sup>27</sup> *Id.* at 110-12 (suggesting perception of an adversarial relationship between the judicial system and religious organizations may be detrimental to public confidence in the judicial system).

<sup>28</sup> *Id.* at 112 (citations omitted). Some authors suggest that this argument is largely irrelevant since authority for the priest-penitent privilege is entirely statutory. Others argue that the existence of the privilege is unconstitutional. For a complete analysis of the constitutional ramifications of the privilege see Robert L. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27 (1969).

requires clergymen to act against canonical rules (e.g., breach the confessional) infringes upon the freedom of religion.<sup>29</sup> Supporters of this theory suggest that causing a clergyman to compromise the dictates of his religion is tantamount to interference with religion.<sup>30</sup> Under this theory, the privilege is merely an evidentiary rule that follows from the constitutional protection of the freedom of religion.<sup>31</sup>

The priest-penitent privilege, like all evidentiary privileges, "constitutes a perpetual threat to the ascertainment of truth in any given litigation."<sup>32</sup> The existence of evidentiary privileges demonstrates state legislatures' belief that the public policies represented by individual privileges are more important than the truth-seeking goals of our judicial system.<sup>33</sup>

### III. DEVELOPMENT OF STATE PRIVILEGES

While all priest-penitent privileges owe their existence to state legislatures, this has not always been the case.<sup>34</sup> Privilege law did not become a

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<sup>29</sup> Brocker, *supra* note 20, at 480-485.

<sup>30</sup> *Id.*

<sup>31</sup> Yellin, *supra* note 14, at 112-13.

<sup>32</sup> 2 LOUISELL & MILLER, *supra* note 18, § 200 n.15 (citing David W. Louisell & Byron M. Crippin, Jr., *Evidentiary Privileges*, 40 Minn. L. Rev. 413, 413-14 (1956)).

<sup>33</sup> *See id.*; 8 WIGMORE, *supra* note 5, §§ 2285.

<sup>34</sup> Yellin, *supra* note 14, at 96-121. *See also* ALA. CODE § 12-21-166 (1986); ALASKA R. CT, R. EVID. 506 (1994); ARIZ. REV. STAT. ANN. § 12-2233 (1994), § 13-4062(1989); ARK. R. EVID. 505 (1995); CAL. EVID. CODE §§ 1030-34 (West 1995); COLO. REV. STAT. § 13-90-107 (Supp. 1994); CONN. GEN. STAT. ANN. § 52-146(b) (West 1991); DEL. R. CT., R. EVID. 505 (1994); D.C. CODE ANN. § 14-309 (1995); FLA. STAT. ANN. § 90.505 (West 1979); GA. CODE ANN. § 24-9-22 (1995); HAW. REV. STAT. § 626-1, R. 506 (Supp. 1994); IDAHO CODE § 9-203 (1990); ILL. ANN. STAT. ch. 735, ¶¶ 5/8-803 (Smith-Hurd 1992); IND. CODE ANN. § 34-1-14-5 (West Supp. 1994); IOWA CODE ANN. § 622.10 (West Supp. 1995); KAN. STAT. ANN. § 60-429 (1994); KY. REV. STAT. § 421.210 (Michie/Bobbs-Merrill 1990); LA. CODE EVID. ANN. art. § 511 (West 1995); ME. R. CT., R. EVID. 505 (1995); MD. CODE ANN. CTS. & JUD. PROC. § 9-111 (1995); MASS. GEN. L. ANN. ch. 233, § 20A (West 1986); MICH. COMP. LAWS § 600.2156 (1986); MINN. STAT. ANN. § 595.02 (West 1988); MISS. CODE ANN. § 13-1-22 (Supp. 1995); MO. ANN. STAT. § 491.060 (Vernon Supp. 1995); MONT. CODE ANN. § 26-1-804 (Supp. 1995); NEB. REV. STAT. § 27-506 (1989); NEV. REV. STAT. ANN. § 49.255 (Michie 1986); N.H. REV. STAT. ANN. § 516:35 (Supp. 1994); N.J. STAT. ANN. § 2A:84A-23 (West 1994), R. EVID. 511 (West 1994); N.M. STAT. ANN. § 11-506 (Michie 1994); N.Y. CIV. PRAC. L. & R. 4505 (McKinney 1994); N.C. GEN. STAT. § 8-53.2 (1986); N.D. CENT. CODE, R. EVID. 505 (1994); OHIO REV. CODE ANN. § 2317.02 (Page 1995); OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); OR. REV. STAT. § 40.260 (1993); 42 PA. CONS. STAT. ANN. § 5943 (1982); R.I. GEN. LAWS § 9-17-23 (1985); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 19-13-16 (1995); TENN. CODE ANN. § 24-1-206 (Supp. 1994); TEX. REV. CIV. STAT. ANN. ART. 3715(a) (1982), TEX. R. OF CIV. EVID. 505 (1995), TEX. R. OF

matter of statutory construction in most jurisdictions until the mid to late 1970's.<sup>35</sup> This is not to say, however, that there were not earlier efforts at codification.<sup>36</sup>

In the 1820's, many who desired to lessen reliance on English common law as precedent in American law gave significant support for passage of state statutes creating clearly defined privileged communications.<sup>37</sup> Despite the efforts of this movement, led by Bentham and David Dudley Field, only three states passed evidence codes.<sup>38</sup> Two of these codes established the first statutorily created privileges in the United States.<sup>39</sup>

Following the early development of evidence law, which resulted in diverging statutes, there was a movement to unify the law which ultimately resulted in promulgation of the Model Code of Evidence by the American Law Institute.<sup>40</sup> The Model Code—rejected because it sought to reform the law of evidence instead of restating or codifying it<sup>41</sup>—recognized the existence of privileged communications, including that of the priest-penitent privilege.<sup>42</sup> In 1953, the National Conference of the Commission on Uniform State Laws approved the Uniform Code of Evidence which avoided the mistakes of the previous reformative efforts.<sup>43</sup> Only two states between 1953 and 1968 adopted the Commission's Uniform Code.<sup>44</sup> In 1974, the

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CRIM. EVID. 505 (1995); UTAH CODE ANN. § 78-24-8 (1992); VT. STAT. ANN. tit. 12, § 1607 (1973); VA. CODE ANN. § 8.01-400 (Michie Supp. 1995); WASH. REV. CODE ANN. § 5.60.060 (West 1995); WIS. STAT. ANN. § 905.06 (West 1993); WYO. STAT. ANN. § 1-12-101 (Supp. 1995). Only West Virginia has failed to adopt a priest-penitent privilege statute. Instead, that state's legislature codified common law privileges choosing to take the same approach as the federal courts. See W. VA. R. EVID. 501 (1993); FED R. CT., R. EVID. 501 (1995).

<sup>35</sup> DEVELOPMENTS IN THE LAW, *supra* note 19, at 1462-63.

<sup>36</sup> See *id.* at 1458-63.

<sup>37</sup> *Id.* at 1458.

<sup>38</sup> *Id.* at 1458-59 (Louisiana, Missouri and New York).

<sup>39</sup> 8 WIGMORE, *supra* note 5, at 819-820. In 1828, the New York legislature passed the first statutorily created privilege, establishing the physician-patient privilege. *Id.* at 819. The Missouri legislature followed New York's lead in 1835. *Id.* at 820.

<sup>40</sup> DEVELOPMENTS IN THE LAW, *supra* note 19, at 1460-62.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1462 n.62.

<sup>43</sup> *Id.* at 1462.

<sup>44</sup> DEVELOPMENTS IN THE LAW, *supra* note 19, at 1462 n.67 (Kansas and New Jersey).

Commission published a Revised Uniform Code of Evidence.<sup>45</sup> Between 1974 and 1980, twenty states adopted a significant part of the Revised Code.<sup>46</sup> Since 1980, an additional fifteen states adopted some substantial part of the Revised Code.<sup>47</sup>

#### IV. VARIATIONS IN STATE PRIEST-PENITENT PRIVILEGES

Despite the similarity of public policies expressed by state legislatures in passing priest-penitent privilege statutes, there remain several variations among the statutes.<sup>48</sup> Privilege statutes grant the privilege either to the communicant or to both the communicant and the clergyman.<sup>49</sup> For example, in Massachusetts and New York the priest-penitent privilege belongs to the penitent-communicant.<sup>50</sup> California law, however, provides that the privilege belongs to both the clergyman and the penitent-communicant.<sup>51</sup>

To illustrate the distinctive effect of these variations, consider the result under the different approaches when a communication is made in confidence by a parishioner to a priest.<sup>52</sup> In Massachusetts and New York, where the privilege belongs only to the penitent, the penitent can prohibit the priest from disclosing the statement at trial.<sup>53</sup> If, however, the penitent waives his privilege, the courts may compel disclosure.<sup>54</sup> In a state like California, where the privilege belongs to both the clergyman and the penitent, the penitent can prohibit the priest from disclosing the communication, but if the penitent waives the privilege, the clergyman may still invoke the privilege

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<sup>45</sup> *Id.* at 1462.

<sup>46</sup> UNIF. R. EVID. (Table of Jurisdictions Wherein Act Has Been Adopted), 13A U.L.A. at 1 (1994 & Supp. 1995).

<sup>47</sup> *Id.*

<sup>48</sup> See Yellin, *supra* note 14, at 123-138. Variations exist in the extent that the statutes protect non-religious communications, the extent to which the privilege depends on the communicant's religion and who may claim the privilege. See *id.* at 123-138.

<sup>49</sup> *Id.* at 137-138. At least one state casts the privilege solely in the hands of the clergyman. ILL. STAT. ch. 735, ¶ 5/8-803.

<sup>50</sup> CAL. EVID. CODE. §§ 1030-34; MASS. GEN. L. ch. 233, § 20A; N.Y. CIV. PRAC. L. & R. 4505.

<sup>51</sup> CAL. EVID. CODE §§ 1030-1034.

<sup>52</sup> MASS. GEN. L. ANN. ch. 233, § 20A; N.Y. CIV. PRAC. L. & R. 4505. For the purpose of this illustration only, assume that all other statutory requirements of the privilege are satisfied.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

and refuse to testify.<sup>55</sup> In the rare jurisdiction which grants the privilege solely to the clergyman, the clergyman can choose whether or not to disclose the communication regardless of the wishes of the penitent-communicant.<sup>56</sup>

Application of the priest-penitent privilege may differ further depending upon the religion of the communicant.<sup>57</sup> Many states require that the privilege be limited to the discipline enjoined.<sup>58</sup> Discipline enjoined statutes provide that the privilege protects communications to the extent that the governing religious code requires.<sup>59</sup> These statutes are deferential to the First Amendment freedom of religion in that they are tailored to the parameters of confidentiality as required by the communicants religion.<sup>60</sup> In New York, which is not a discipline enjoined jurisdiction, all clergymen are subject to the same requirements consistent with the statute.<sup>61</sup> However, in Massachusetts and California, which are discipline enjoined jurisdictions, a communication which is privileged if made by someone in the Catholic confessional, may not be privileged if made in confidence to a clergyman of a religion that does not require that confessions be kept secret.<sup>62</sup> Recently, a few state legislatures have amended their priest-penitent statutes by eliminating the discipline enjoined language.<sup>63</sup>

These variations often explain the differing results that may occur based on similar facts in different jurisdictions.<sup>64</sup> Most statutes require

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<sup>55</sup> CAL. EVID. CODE §§ 1030-1034.

<sup>56</sup> See ILL. ANN. STAT. ch. 735, ¶ 5/8-803.

<sup>57</sup> See Yellin, *supra* note 14, at 126-137.

<sup>58</sup> See ARIZ. REV. STAT. ANN. § 12-2233, § 13-4062; CAL. EVID. CODE § 1032; COLO. REV. STAT. § 13-90-107; D.C. CODE ANN. § 14-309; FLA. STAT. ANN. § 90.505; IDAHO CODE § 9-203; ILL. ANN. STAT. ch. 735, ¶ 5/8-803; IND. CODE ANN. § 34-1-14-5; IOWA CODE ANN. § 622.10; KY. REV. STAT. § 421.210; MASS. GEN. L. ANN. ch. 233, § 20A; MICH. COMP. LAWS § 600.2156; MINN. STAT. ANN. § 595.02; MO. ANN. STAT. § 491.060; MONT. CODE ANN. § 26-1-804; N.J. STAT. ANN. § 2A:84A-23, R. EVID 511; N.C. GEN. STAT. § 8-53.2; OHIO REV. CODE ANN. § 2317.02; OR. REV. STAT. § 40.260; R.I. GEN. LAWS § 9-17-23; S.C. CODE ANN. § 19-11-90; TENN. CODE ANN. § 24-1-206; UTAH CODE ANN. § 78-24-8; VA. CODE ANN. § 8.01-400; WASH. REV. CODE ANN. § 5.60.060; WYO. STAT. ANN. § 1-12-101.

<sup>59</sup> Yellin, *supra* note 14, at 126-137.

<sup>60</sup> *Id.* at 133.

<sup>61</sup> See N.Y. CIV. PRAC. L. & R. 4505.

<sup>62</sup> Yellin, *supra* note 14, at 126-137.

<sup>63</sup> *Id.* at 135-136. See also NEB. REV. STAT. § 27-506; N.D. R. EVID. 505.

<sup>64</sup> Compare *Hutchinson v. Luddy*, 606 A.2d 905, 912 (Pa. Super. Ct. 1992) (holding non-discipline enjoined priest-penitent privilege statute did not prevent discovery of church archival records in civil matters) with *Scott v. Hammock*, 133 F.R.D. 610, 619 (D.

that the communication be made in expectation of confidentiality, to a clergyman of an organized religion, and not to a self-ordained minister who is not a part of a larger organization.<sup>65</sup>

#### V. DISCLOSURE OF CHURCH ARCHIVES IN CRIMINAL MATTERS

In 1993, when an Illinois Circuit Court decided *People v. Doe*, it became the first court to reach the question of the applicability of the priest-penitent privilege to archival records.<sup>66</sup> In 1994, the Pennsylvania Superior Court became the second court to rule on this issue.<sup>67</sup> This issue received an extraordinary amount of publicity in the wake of numerous criminal allegations against clergymen.<sup>68</sup> In the face of this publicity, Judge Fitzgerald of the Cook County Circuit Court refused to compel the Archdiocese of Chicago to disclose its archives.<sup>69</sup> The Pennsylvania Superior Court took the opposite position, compelling the Allentown Diocese to disclose records relevant to criminal charges of wrongdoing by a clergyman for in camera review.<sup>70</sup>

##### A. *People v. Doe*

In *People v. Doe*, the Cook County Grand Jury issued a subpoena duces tecum to Cardinal Bernadin seeking information discovered by the Cardinal's Commission on Sexual Misconduct of Minors.<sup>71</sup> Following the release of the Commission's findings, the Cook County State Attorney's office requested the archival records of priests who came under the Commission's scrutiny.<sup>72</sup> The Diocese refused the request asserting the priest-

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Utah 1990) (holding disciplined enjoined priest-penitent privilege statute prevented discovery of church's archival records in civil matters).

<sup>65</sup> Yellin, *supra* note 14, at 114-121.

<sup>66</sup> *Doe*, Grand Jury No. 1050 and 514.

<sup>67</sup> *Stewart*, 647 A.2d 597.

<sup>68</sup> See Berkman, *supra* note 1, at 1; Mark Hansen, *Pastoral Privilege Debated: Archdiocese and Prosecutor Battle Over Priest Sexual Abuse Files*, ABA J., Dec. 1992, at 20.

<sup>69</sup> *Doe*, Grand Jury No. 1050 and 514 at 20.

<sup>70</sup> *Stewart*, 647 A.2d at 601.

<sup>71</sup> *Doe*, Grand Jury No. 1050 and 514 at 5. The Commission on Sexual Misconduct of Minors, established in 1991, examined the issue of sexual abuse of minors by clergy within the Archdiocese of Chicago. The Commission reviewed assignments that may have presented a danger to children. The Commission also evaluated the diocese's policies addressing sexual abuse allegations. The findings were released to the public in June 1992. *Id.* at 6.

<sup>72</sup> *Id.* at 5.

penitent privilege.<sup>73</sup> The Grand Jury issued a subpoena for the records four days later.<sup>74</sup>

The Illinois priest-penitent privilege provides that a priest cannot be compelled to disclose a statement made in confidence if it is made to the priest in his professional character or as a spiritual advisor.<sup>75</sup> The Illinois statute is also a discipline enjoined statute.<sup>76</sup>

Many of the communications in question were made by parishioners to the Vicar for Priests alleging sexual misconduct.<sup>77</sup> Other communications, however, were conversations between priests and the Vicar regarding the allegations.<sup>78</sup> All prior applications of the Illinois priest-penitent statute dealt solely with conversations between parishioners and priests.<sup>79</sup> Yet, the circuit court interpreted the statutory provisions to protect communications

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<sup>73</sup> *Id.* at 6.

<sup>74</sup> *Doe*, Grand Jury No. 1050 and 514 at 6.

<sup>75</sup> ILL. ANN. STAT. ch. 735, ¶5/8-803 provides:

Clergy. A clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs, shall not be compelled to disclose in any court, or to any administrative board or agency, or to any public officer, a confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body or of the religion which he or she professes, nor be compelled to divulge any information which has been obtained by him or her in such professional character or as such spiritual advisor.

<sup>76</sup> *Id.*

<sup>77</sup> *Doe*, Grand Jury No. 1050 and 514 at 7. The Archdiocese of Chicago is unique because it had a Vicar for Priests. The position is not widely duplicated in other dioceses. Despite the State Attorney's argument that the Vicar for Priests acted primarily as an investigator of allegations against priests, the trial court stated that Vicar was essentially a "priest to priests." *Id.* at 8-10.

<sup>78</sup> *Doe*, Grand Jury No. 1050 and 514 at 8. The court ultimately held that all statements to clergy (including the Vicar and the Bishop) are privileged if made under an expectation of confidence by all parties. *Id.* at 10. The court stated "any statement made to a priest in a pastoral setting for which both the priest and the declarant had an expectation of confidentiality" is privileged. *Doe*, Grand Jury No. 1050 and 514 at 10. This segment of the court's decision applied exclusively to situations where a parishioner or priest spoke of their own problems to the Vicar. *Id.* at 10-11. The court held that the privilege extended to all third party disclosures in which all three parties agreed that the disclosure was confidential and pastoral in nature. *Id.* at 11. For the purposes of this article, the only communications of importance are those between the priest and the Vicar for Priests.

<sup>79</sup> *Id.* at 10-11 (citing *People v. Bole*, 223 Ill. App. 3d 247 (1991); *Snyder v. Poplett*, 98 Ill. App. 3d 359 (1981); *People v. Diercks*, 88 Ill. App. 3d 1073 (1980); and *People v. Pecora*, 107 Ill. App. 2d 283 (1969)).

between priests and Church authorities.<sup>80</sup> The court cited no authority supporting the assertion that conversations between priests and their superiors regarding the priests' alleged misconduct should be confidential.<sup>81</sup>

The implication of the court's decision is to place priests who confide in the Vicar in the position of a penitent seeking counseling.<sup>82</sup> The two situations must be distinguished because when a priest speaks to the Vicar, the conversation may be recorded and documented in the church archives. A conversation between a priest and a parishioner cannot be recorded.

Following the circuit court's decision, the State Attorney's Office appealed to the Illinois Supreme Court.<sup>83</sup> The Illinois Supreme Court refused to hear the State's appeal.<sup>84</sup>

### B. Commonwealth v. Stewart

In early 1990, David Stewart married Mardell Rita Stewart.<sup>85</sup> Stewart became angry at Reverend Leo Heineman, Jr., believing that Heineman had a sexual relationship with Mardell at some time during their 30 year friendship preceding his marriage to her.<sup>86</sup> On September 16, 1990, Mardell had a few drinks with Heineman.<sup>87</sup> After Mardell left Heineman, Heineman called Stewart and an argument ensued.<sup>88</sup> Heineman later went to the Stewart's home at the invitation of Mardell.<sup>89</sup> Stewart called the state police to evict Heineman, but the officer refused.<sup>90</sup> After the officer left, Heineman walked into the living room, where Stewart was lying on a couch.<sup>91</sup> When Heineman extended his arm to shake Stewart's hand, Stewart pulled out a .357 Smith and Wesson revolver and shot and killed Heineman.<sup>92</sup> Stewart

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<sup>80</sup> *Doe*, Grand Jury No. 1050 and 514 at 11 (citing ILL. STAT. ch. 38, ¶ 8-803).

<sup>81</sup> *See Doe*, Grand Jury No. 1050 and 514.

<sup>82</sup> *See id.*

<sup>83</sup> David Bailey, *Prosecutors look to Change Pastoral Privilege Law*, CHI. DAILY LAW BULL., March 24, 1993, at 1.

<sup>84</sup> *Id.*

<sup>85</sup> Tyra Braden, *Diocese Must Give Up Slain Priest's Records, Judge to Decide if File Helps Accused Killer's Case*, ALLENTOWN MORNING CALL, Aug. 12, 1994, at B3.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Braden, *supra* note 85, at B3.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

alleged that the church archives contained information pertaining to Heine-man's alleged alcohol and substance abuse problem and sexual misconduct which would bolster his claims of self-defense and provocation.<sup>93</sup>

Under the Pennsylvania priest-penitent privilege, information acquired secretly or in confidence is privileged.<sup>94</sup> The privilege belongs solely to the communicant.<sup>95</sup> The Pennsylvania statute is not a discipline enjoined statute and therefore does not take into account the rules of individual religious organizations.<sup>96</sup>

In deciding *Stewart*, the Pennsylvania Superior Court relied heavily on its 1992 *Hutchinson v. Luddy*<sup>97</sup> decision in which the court held that under certain circumstances a church may be compelled to produce archival records containing information of a priests' misconduct in civil cases.<sup>98</sup> The facts in *Hutchinson* were unremarkable. On October 26, 1988, Samuel Hutchinson, a former altar boy, filed a civil complaint alleging pedophilic sex acts against Father Francis Luddy.<sup>99</sup> Hutchinson later amended his complaint to include charges of negligent employment against the diocese bishop, four monsignors, the diocese, and the church.<sup>100</sup> Hutchinson specifically alleged that the employers hired and continued to employ Luddy when they knew or should have known of Luddy's pedophilic tendencies.<sup>101</sup>

Hutchinson believed that the church archives, maintained pursuant to Canons 489 and 490 of the Code of Canon Law, contained relevant infor-

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<sup>93</sup> Braden, *supra* note 85, at B3.

<sup>94</sup> 42 PA. CONS. STAT. ANN. § 5943 provides:

No clergyman, priest, rabbi, or minister of the gospel of any regularly established church or religious organization, except clergymen or ministers, who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers, who while in the course of his duties has acquired information from any person secretly and in confidence shall be compelled, or allowed without consent of such person, to disclose that information in any legal proceeding, trial or investigation before any government unit.

<sup>95</sup> *Id.*

<sup>96</sup> *See id.*

<sup>97</sup> *Luddy*, 606 A.2d 905 (Pa. Super. 1992) (holding that under allegations of sexual misconduct by a priest, archival records are relevant and not privileged because the disclosure of records would not interfere with the communicant's religious freedom).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 906; *see also* Nicholas Cafardi, *Discovering the Secret Archives: Evidentiary Privileges for Church Records*, 95 J.L. & RELIGION 95, 95-96 (1993/1994).

<sup>100</sup> *Luddy*, 606 A.2d at 906.

<sup>101</sup> *Id.*

mation regarding Luddy's past behavior.<sup>102</sup> Hutchinson filed a request for production of documents.<sup>103</sup> The employers refused to comply asserting the priest-penitent privilege and sought a protective order to prevent discovery of the requested records.<sup>104</sup> The trial court limited the discoverable documents to actual or alleged sexual misconduct with minors by Luddy or other priests and other records pertaining to the assignment and transfer of priests.<sup>105</sup> The court left open the possibility of additional protective orders and offered the employers the opportunity to bring the records before the court for in camera review before compelling discovery.<sup>106</sup>

The court based its decision on the principle that where the canons of a religious organization conflict with the laws of the state, the laws of the state must prevail.<sup>107</sup> The court further reasoned that privileges are generally disfavored and must be construed narrowly because of the negative effect they have on the truth-seeking function of the judicial system.<sup>108</sup> Ultimately, the court held that the priest-penitent privilege is limited solely to communications between the priest and penitent and does not protect the internal workings of a religious organization.<sup>109</sup>

The *Hutchinson* court noted that while there can be no belief restrictions, the right to act upon religious beliefs is subject to other public policy considerations.<sup>110</sup> The court explained that if religious organizations were exempt from all government regulations there would be no need for a statutorily created priest-penitent privilege.<sup>111</sup> For the foregoing reasons, the court held that church archives were not privileged in civil matters.<sup>112</sup>

The arguments raised in *Stewart* with respect to the priest-penitent privilege are analogous to those raised in *Hutchinson*.<sup>113</sup> The Allentown

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Luddy*, 606 A.2d at 906-907.

<sup>105</sup> *Id.* at 907.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 908 (citing *St. Joseph's Lithuanian Roman Catholic Church's Petition*, 117 A. 216, 218 (1922)).

<sup>108</sup> *Luddy*, 606 A.2d at 908-909 (citing *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

<sup>109</sup> *Id.* at 909.

<sup>110</sup> *Id.* at 910 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940)).

<sup>111</sup> *Id.* at 911 (citing *Pagnano v. Hadley*, 100 F.R.D. 758 (D.Del. 1984)).

<sup>112</sup> *Luddy*, 606 A.2d at 912.

<sup>113</sup> *Stewart*, 647 A.2d at 600.

Diocese argued that the records maintained in the church archives, as required by Canon 489, were privileged.<sup>114</sup> The *Stewart* court, relying on *Hutchinson*, held that the privilege extends solely to statements made in confidence to priests.<sup>115</sup> The court quoted *Hutchinson* stating that “[t]he mere fact that a communication was made to a clergyman or documentation was transmitted to a clergyman is insufficient in itself to invoke the privilege.”<sup>116</sup> The court explicitly rejected the argument that there was any distinction between civil and criminal matters, and suggested that if any distinction existed, it strongly favored disclosure in criminal matters.<sup>117</sup> The court stated, “[t]he rights of a criminal defendant to secure a fair trial are even more compelling than the interests involved in civil litigation.”<sup>118</sup>

## VI. ANALYSIS

Since state evidentiary privileges are statutorily created, a complete analysis of the differing results in *Stewart* and *People v. Doe* must begin with consideration of the applicable state statutes. There are two significant differences between the Illinois and Pennsylvania priest-penitent privilege statutes. The Illinois statute is a discipline enjoined statute which places the privilege in the hands of the clergyman.<sup>119</sup> The Pennsylvania statute, which is not a discipline enjoined statute, places the privilege in the hands of both the communicant and the clergyman.<sup>120</sup>

While the dispositive facts of *Stewart* and *In re Grand Jury Subpoena* are different, the essential question presented is the same: are the communications between a priest and a higher church authority privileged?<sup>121</sup> The different results reached in *Stewart* and *People v. Doe* can be attributed to Illinois being a discipline enjoined state and Pennsylvania being a non-discipline enjoined state. The Illinois Circuit Court interpreted the applicable statute broadly based on the discipline enjoined language.<sup>122</sup> The Pennsylvania statute, however, does not allow for consideration of the particular

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<sup>114</sup>*Id.* at 598.

<sup>115</sup>*Id.* at 601.

<sup>116</sup>*Id.* at 600 (quoting *Luddy*, 606 A.2d at 909).

<sup>117</sup>*Luddy*, 647 A.2d at 601.

<sup>118</sup>*Id.*

<sup>119</sup>ILL. ANN. STAT. ch. 735, ¶ 5/8-803.

<sup>120</sup>42 PA. CONS. STAT. ANN. § 5943.

<sup>121</sup>See *Stewart*, 647 A.2d 597 (records sought to bolster claims of self-defense and provocation in murder of priest); but see *Doe*, Grand Jury No. 1050 and 514 (records sought to bring charges of sexual molestation of children a priest).

<sup>122</sup>*Doe*, Grand Jury No. 1050 and 514 at 19-20.

religion's rules.<sup>123</sup> Consequently, the Canonical laws of the Roman Catholic Church never enter into the court's analysis.<sup>124</sup> While it is probable that if *Stewart* had been decided in Illinois, the privilege would have been extended, the reverse cannot be said if *People v. Doe* had been decided in Pennsylvania.

To evaluate whether the application of the appropriate state statute fulfills the goals of the priest-penitent privilege, the differing interpretations of the privilege must be considered. Authors, like the courts, are split on how broadly the priest-penitent privilege should be applied.<sup>125</sup>

Jacob Yellin, Professor of Law at Santa Clara University, favors a narrow interpretation and application of the priest-penitent privilege.<sup>126</sup> He suggests that no privilege is absolute.<sup>127</sup> Many religions, in fact, do not place an absolute requirement of confidentiality on its clergy.<sup>128</sup> The College of Chaplains Code of Ethics requires that the seal of the confessional is to be broken when "the greater health for individuals can be achieved by such revelation."<sup>129</sup> Even the Catholic Church recognizes the need to breach professional secrecy whenever severe harm would result to the community, unless the information was communicated in the confessional.<sup>130</sup> In response to the conflicting laws of the Roman Catholic Church and many state statutes, Yellin formulated a model statute that would protect both the community from harm and the interests of the clergy-penitent relationship.<sup>131</sup>

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<sup>123</sup> See PA. CONS. STAT. ANN. § 5943.

<sup>124</sup> See *Stewart*, 647 A.2d 905.

<sup>125</sup> See Brocker, *supra* note 20 (favoring an expansive application of the priest-penitent privilege); *but see* Yellin, *supra* note 14 (supporting the traditional narrow interpretation of the priest-penitent privilege).

<sup>126</sup> See Yellin, *supra* note 14, at 142.

<sup>127</sup> Yellin, *supra* note 14, at 142-143 (citing the limitation on the attorney-client privilege when the attorney knows of his client's intention to commit a crime and the obligation California places upon psychologist to warn the authorities if a client makes threat of harm on another). See also *Tarasoff v. Board of Regents of the University of California*, 551 P.2d 334 (1976) (holding that psychologist-patient privilege does not extend to patient's communications which indicate an intent to harm himself or another).

<sup>128</sup> Yellin, *supra* note 14, at 142-147.

<sup>129</sup> *Id.* at 146. The implications of this statement go well beyond the scope of this article. At a minimum, this statement certainly indicates that privilege are less than absolute.

<sup>130</sup> *Id.* at 146-47.

<sup>131</sup> Yellin, *supra* note 14, at 155-56. Yellin's model statute provides:

Some who argue for a broader application of the priest-penitent privilege do so based on an interpretation of the privilege favoring the valued relationship over the truth-seeking function.<sup>132</sup> The epidemic of child abuse poses the greatest obstacle to supporters of a broad application of the priest-penitent privilege.<sup>133</sup> To combat increasing fears of child abuse, nearly every state has passed (or amended) a reporting statute which requires certain figures in society to report incidents of child abuse to public authorities.<sup>134</sup> Most of the individuals required to report child abuse are those who have frequent interaction with children who may be suffering from abuse,

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No clergyman shall be examined in any civil or criminal proceeding, or administrative hearing with respect to any communication made to that clergyman in his professional capacity:

(1) "Clergyman" is a spiritual leader in any faith so recognized by his denomination.

(2) "Communication" includes any manner or form of communication such as, but not limited to, letter or telephone. Observation and records of any "communication" shall also be included.

(3) A Clergyman's secretary, stenographer, clerk or any other person necessary to effect the purpose of the communication shall not be examined without the Clergyman's consent. The provision of this paragraph shall not apply should (1) the Clergyman die or become mentally incapacitated, and (2) the person making the communication consents to such examination.

(4) Both persons making the communication and the Clergyman shall be holders of the privilege of this section.

(5) If the communication threatens harm to any person, the Clergyman may, but is not required to disclose the communication to avoid occurrence of that harm.

<sup>132</sup>See Brocker, *supra* note 20, at 485-486 (concluding that the value of encouraging guidance and forgiveness outweighs the truth-seeking goals of the judicial system so as to justify an absolute interpretation of the priest-penitent privilege); JOHN H. TIEMANN & JOHN C. BUSH, *THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATIONS AND THE LAW*, p. 191 (1983) (arguing that a child abuser who confesses to his priest and seeks assistance in changing his ways will receive punishment and counseling that otherwise never would have been received, even if the Church provides the punishment and counseling instead of the State).

<sup>133</sup>See Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723 (1987). References to child abuse are made to circumstances when a priest learns that someone is abusing a child. This should not be confused with allegations of sexual misconduct against priests.

<sup>134</sup>*Id.* at 727-728.

such as healthcare workers, teachers, public safety officials and social workers.<sup>135</sup>

Statutes requiring healthcare workers to report child abuse necessarily cause the physician or those in his employ to breach the physician-patient privilege.<sup>136</sup> The same is true of statutes which require other privileged classes of professionals to report child abuse.<sup>137</sup> At least four state legislatures have imposed a similar duty upon clergy to report any information regarding cases of child abuse.<sup>138</sup> In these jurisdictions, if a priest learned of a case of child abuse as a result of an otherwise privileged communication, he would be compelled to provide the information to the public authorities despite the otherwise protected communication.<sup>139</sup>

By passing reporting statutes compelling clergymen to report child abuse, state legislatures indicate their belief that the well-being of children is more important than a limited infringement upon the confidentiality principle of the privilege. While the practical impact of requiring clergy to report child abuse may be minimal, it does represent a willingness to abrogate the previously unchallenged sanctity of the priest penitent-privilege.

Another author argues not only for the absolute application of the priest-penitent privilege, but also for the recognition of new application.<sup>140</sup> This "church/clergy" privilege would protect the administrative decisions of the church.<sup>141</sup> The support for this argument, however, is weak. The author cites several cases which stand for the proposition that the Church's records of employment decisions made by the church are privileged.<sup>142</sup> He argues that the relations between a church and its clergy satisfy Wigmore's four criteria used to determine if a common law privilege applies.<sup>143</sup> While the

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<sup>135</sup> *Id.* at 728-729.

<sup>136</sup> *Id.*

<sup>137</sup> Mitchell, *supra* note 133, at 733-34.

<sup>138</sup> CONN. GEN. STAT. ANN. § 17a-101 (West 1992 & Supp. 1995); MISS. CODE. ANN. § 43-21-353 (Supp. 1995); NEV. REV. STAT. ANN. § 432B.220 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 169-C:29 (1994).

<sup>139</sup> Mitchell, *supra* note 133, at 729-32.

<sup>140</sup> Cafardi, *supra* note 99, at 111-116.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 111-12 (citing *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1952); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir 1985); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir 1972), *cert. den'd*, 409 U.S. 896 (1972); *Kaufmann v. Sheehan*, 707 F.2d 355 (8th Cir 1983); *Alberts v. Devine*, 479 N.E.2d 113 (Mass. 1985)).

<sup>143</sup> *Id.*

cases he relies upon do state clearly that a state may not regulate who a church hires as its clergy, they make no statement regarding the priest-penitent privilege.<sup>144</sup> This argument fails to acknowledge other evidentiary requirements such as relevancy, materiality and the possibility of in camera review.<sup>145</sup>

## VII. CONCLUSION

While both the Circuit Court of Cook County in Illinois and the Pennsylvania Superior Court, seemingly have applied the respective state statutes appropriately, the policy behind the privilege suggests that the Illinois court may be in error because privileges are to be interpreted narrowly. The Illinois court goes beyond the historical intent of privilege law in the United States. In matters of both criminal and civil litigation, there is a preference for as much relevant evidence as possible. Any privilege necessarily sacrifices some amount of relevant evidence whether before a grand jury, during discovery, or at trial. As the desire for evidence and the need to protect certain communications are at odds, the doctrine of privilege requires that all privileges be construed narrowly. The Illinois court construed its priest-penitent privilege statute broadly, applying the statute to communications not made with the purpose of seeking repentance or counseling, but rather made during the course of an investigation of misconduct. To extend the privilege to include such communications is inconsistent with its purpose.

Furthermore, if a trend has developed in the past ten years, it is to limit, and not expand, the application of the priest-penitent privilege. Many states which previously applied the discipline enjoined provision amended their statutes to exclude that provision because of the disparate result the provision had on the application of the statute to clergy of different religious organizations. Several states in the past five years have added clergymen to the list of professions obligated to report child abuse to public authorities representing an abrogation of the priest-penitent privilege.

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<sup>144</sup> See *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (freedom to select clergy is part of free exercise of religion); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (freedom to select clergy is part of free exercise of religion); *McClure v. Salvation Army*, 460 F.2d 553 (Civil Rights Act does not limit religious organization's ability to select clergy as it sees fit); *Kaufmann v. Sheehan*, 707 F.2d 355 (allegations by priest against religious organization that organization prevented priest from obtaining employment in priesthood not valid cause of action in civil court); *Alberts v. Devine*, 479 N.E.2d 113 (First Amendment prevents civil courts from interfering in disputes within religious organization).

<sup>145</sup> See *Stewart*, 647 A.2d 597; *Luddy*, 606 A.2d 905.

The best construction of priest-penitent privilege statute is one which is narrow in the communications it seeks to protect. It should protect communications made by persons genuinely seeking repentance or counseling without limitation to the traditional definition of spiritual counseling. This may include communications as broad as those which would be privileged if made to a psychologist. The communication must be made to a clergyman consistent with the non-denominational application of most current statutes and will extend to those in the clergyman's employ similar to the attorney-client privilege.

Under circumstances such as those raised in *In re Grand Jury Subpoena* where the Vicar for Priests acted as a priest to priests, communications cannot be privileged. There is a significant difference between a communication made by a parishioner to a priest which is not subject to being recorded in the church archives and one made between priest and Vicar which may be recorded. This difference in the treatment the church gives these two types of communications is enough to suggest that while a Vicar may be a priest to priests, he is also a higher authority of the church and his role is, at a minimum, is partially investigatory. Perhaps the best policy would be to protect communications between priests which have no hierarchical relationship to each other within the church. A priest would be able to seek repentance or counseling from another priest, but not from a supervisor.

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