Priest-Panitent Privilege

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PRIEST-PENITENT PRIVILEGE

It may be conceded, but not without at least a few able arguments to the contrary, that the priest-penitent privilege did not exist at common law. But unlike the physician-patient privilege, which had no foundation at common law, there is a basis for the priest-penitent privilege in the United States by way of the First Amendment to the United States Constitution. In Cimijotti v. Paulsen the court held that a state could not allow court actions founded on communications made in the exercise of one's religion. To allow such actions would be a violation of the First Amendment as a restraint on the free exercise of religion. To some extent, the statute is probably an endorsement of the principle of religious freedom.

The Illinois statute says a clergyman, priest, minister, rabbi, or practitioner shall not be compelled to disclose confessions, admissions or information which he received in the course of the discipline enjoined by his religion. The Illinois statute is more specific than most statutes in describ-

1 Best, Evidence § 584 (Morgan ed. 1876); 8 Wigmore, Evidence § 2394 (McNaughton rev. 1961). The priest-penitent privilege was recognized in England in the pre-Reformation period. After this period, the only English case upholding the priest-penitent privilege is Attorney-General v. Briant, 15 L.J. Ex., 4th ser. 265 (1846). The court in Cook v. Carroll, [1945] Ir. R. 515 (High Ct.) held the privilege exists in Ireland although it recognized no privilege existed in England after the Reformation. See Hogan, A Modern Problem on the Privilege of the Confessional, 6 Loyola L. Rev. 1 (1951).

There are two early American cases applying the privilege. People v. Phillips (N.Y. Ct. Gen. Sess. 1813); Christian Smith's Trial, 1 Am. St. Tr. 779 (N.Y. Ct. Oyer & Term. 1817). Judge Learned Hand said as dictum in McMann v. Securities and Exch. Comm., 87 F.2d 377 (2d Cir. 1937), that one of the traditional privileges is that of the penitent. Two federal courts have said some privilege existed at common law. Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958), and Cimijotti v. Paulsen, 219 F. Supp. 621 (N.D. Iowa 1963).


3 In Cimijotti v. Paulsen, supra note 1, the plaintiff in an action for defamation sought to compel the defendants to answer questions asked during depositions. The plaintiff sought to discover what was said before a church tribunal in a proceeding to obtain separate maintenance and divorce. The court held that the information was privileged and the plaintiff could not compel disclosure by use of depositions. The decision relied in part on the Iowa statute, I.C.A. § 622.10 (1950), concerning confidential communications. The defendants then moved for a summary judgment. The court granted the defendants' motion and dismissed the case. See Cimijotti v. Paulsen, 230 F. Supp. 61 (N.D. Iowa 1963), aff'd., 340 F.2d 613 (8th Cir. 1965). The court found several reasons to uphold the motion. For example, the information was privileged under the Iowa code and the statute of limitations had expired. The court also said that the First Amendment withdraws from the state any restraint on the free exercise of religion. To allow a court action, either civil or criminal, against the person or his property for making these communications would be a violation of the First Amendment. Significantly, the court found the constitutional issue was sufficient reason to dismiss the case.

The exact bounds of this case are not easy to determine. The court does not say disclosure is prohibited, but the extent that the disclosure may be used against the church member is limited.

4 Ill. Rev. Stat. ch. 51, § 48.1 (1967) says: "A clergyman, or priest, minister, rabbi or practitioner of any religious denomination accredited by the religious body to which he 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 in his profes-
ing who will not be compelled to give information. But there are still some problems which may arise.

One problem arises in trying to determine what is the "discipline enjoined by a religion." The phrase "discipline enjoined by a religion" is used in almost all statutes and generally means the rules and regulations required by a religious body. Some courts have given a liberal interpretation to the phrase. These courts say that it is the duty of every clergyman to render spiritual assistance to all who seek religious comfort and therefore any observance which is looked upon with favor by a religious body would be part of its discipline. Other courts interpret discipline to mean some positive rule of church law. Only if the church expressly requires some act will

sional 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 professes, nor be compelled to divulge any information which has been obtained by him in such professional character or as such spiritual advisor."

For purposes of the discussion on the priest-penitent privilege the words "priest" or "minister" shall include "minister, priest, rabbi or practitioner."


6 Wigmore, Evidence § 2395 n.1 (McNaughton rev. 1961).

7 In In re Contempt of Emil Swenson, 183 Minn. 602, 605, 237 N.W. 589 (1931), the court in determining what is the "discipline enjoined by a church," said,

The statute has a direct reference to the church's "discipline" of and for the clergyman and as to his duties as enjoined by its rules or 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 such practice all faithful clergymen render such help to the spiritually sick and cheerfully offer consolation to supplicants who come in response to the call of conscience.

. . . . (I)t 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.

The court later said that the penitent had been a member of the pastor's church (past tense). If the penitent was still a member of the same church body the above comment is dictum. The case is not clear on this point.

In the case of State v. Lender, 124 N.W.2d 355 (Minn. 1963), the court indicated that if communications are penitential in nature they are within the protection of the statute, but the court found the defendant did not show that his communication was of a penitential nature. Accord, Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1959) (a Lutheran member's oral confession to a minister held privileged. Oral confessions are not strictly required by this religious body); State v. Brown, 95 Iowa 381, 64 N.W. 277 (1895) (portion of a conversation between pastor and defendant was considered privileged because it was penitential in nature even though they were of different religious faiths); Kruglikov v. Kruglikov, 29 Misc. 2d 17, 217 N.Y.S.2d 845 (Sup. Ct. 1961) (rabbi able to claim the privilege while acting as a marriage counselor). See Annot., 22 A.L.R.2d 1152 § 3 (1952). See also note 10 infra.

8 See cases collected in 8 Wigmore, Evidence § 2395 n.2 (McNaughton rev. 1961); Annot., 22 A.L.R.2d 1152 (1952). See also Hogan, A Modern Problem on the Privilege of the Confessional, 6 Loyola L. Rev. 1 (1951).

However, with the church taking a new role in the correction of social problems and family strife, the traditional views of "discipline enjoined by a church" may need redefining.
the privilege attach to that act. There is some indication that Illinois has adopted that more liberal view.  

Also, the statute does not clearly indicate whether the privilege is designed to protect the priest, the penitent, or both. There is some reason to believe the privilege exists for the benefit of both parties. If the priest and the penitent are of the same faith, the privilege may exist for the penitent by reason of the First Amendment without reference to the statute. The Catholic church requires disclosures during confessions as a requisite to take part in the sacrament of communion. Disclosures are also required before church tribunals to receive separate maintenance or permission for divorce. If a disclosure made in the course of one of these required religious practices is later used to deprive one of his life, liberty or property, it is difficult to believe this is not an interference with the free exercise of religion.

The court in *Mullen v. United States* even prohibited the disclosure of information received by a Lutheran minister during a confession. Confessions to a minister are not required by the Lutheran religion. The court said it is against sound policy to allow such confessions in evidence, at least where the penitent did not give her consent.

9 The statute says no clergyman, etc. shall be compelled to disclose a confession, admission, or information. This would seem to indicate a broader meaning than a sacramental confession. But see 8 Wigmore, Evidence § 2395 (McNaughton rev. 1961); Annot., 22 A.L.R.2d 1152 § 8 (1952); Hogan, *supra* note 8. The confession, admission or information can be obtained in the clergyman's professional capacity or as a spiritual advisor in the course of discipline enjoined by the rules or practices of his church. These words appear general in nature and seem to portray the meaning the court expresses in *In re Contempt of Emil Swenson*, *supra* note 7, and *Kruglikov v. Kruglikov*, *supra* note 7 (rabbi acting as a marriage counselor gave spiritual advice). Cf. Simrin v. Simrin, 233 Cal. App. 2d 90, 43 Cal. Rptr. 376 (1965) (rabbi acting as marriage counselor not within privilege, but rabbi not forced to reveal conversation where all had agreed conversation should be confidential).

10 *Mullen v. United States*, *supra* note 7 (the court indicates that penitent's permission needed to allow minister to testify; here, minister had tried to testify); McMann v. Securities and Exch. Comm., 87 F.2d 377 (2d Cir. 1937) (dictum) (one of the traditional privileges is that of the penitent); *In re Contempt of Emil Swenson*, *supra* note 7 (it is sufficient if the discipline enjoins the clergyman or the other party); State v. Lender, *supra* note 7 (penitent is the owner of the privilege); Kruglikov v. Kruglikov, *supra* note 7 (rabbi able to claim the privilege for information obtained while acting as a marriage counselor and neither of the spouses were members); Cook v. Carroll, [1945] Ir. R. 515 (High Ct.) (parishioners should not have consented to testify without the permission of the priest. The privilege is lodged with all parties affected by the communication); Gill v. Bouchard, Rap. Jud. Quebec 5 Q.B. 138 (1896) (priest allowed to claim privilege under statute where he was charged with inducing apprentice to leave plaintiff's service); Massé v. Rabillard, 10 Rev. Le'Gale 527 (Que. Super. Ct. 1880) (by statute penitent can not be compelled to disclose the advice given by the priest); 8 Wigmore, Evidence § 2395 (McNaughton rev. 1961).

11 If *Cimijotti v. Paulson*, 230 F. Supp. 39 (N.D. Iowa 1964) is given a liberal interpretation, the courts might find the church member is being denied his right to practice his religion if he is unable to partake in the discipline enjoined by the religion he professes without having his confessions used against him.

But the wording of the statute does not require that the priest and the penitent be of the same faith. The privilege exists if the priest is recognized by his church body and the priest is carrying out the discipline enjoined by his church.\textsuperscript{13} And its discipline may place a duty or obligation on the priest alone. Furthermore, a liberal interpretation of the statute would make the giving of spiritual advice and religious comfort a part of the church's discipline and all communications of a penitential nature would be privileged.

The possibility that the Illinois statute could include confessions, admissions, and information which are not given by a person of the same faith as the priest creates an interesting problem. Who would be able to waive the protection of the statute? To answer this question the courts would have to determine the legislative purpose of the statute. If the purpose of the statute is to allow clergymen to practice their religion without violating their religious teachings,\textsuperscript{14} the protection of the statute could be for the clergymen only. Likewise, if the purpose were to allow a free exercise of religion, the penitent could not claim the protection of the statute since the validity of a person claiming that he is practicing his religion when he has either no religious affiliation or a religious affiliation different than the priest is doubtful. The information could be disclosed by a clergyman as his conscience directs if either of the prior purposes are found to be the legislative intent. On the other hand, the court could also find the intent of the legislature is to allow a penitent to seek religious comfort without fear of disclosure. If this purpose is found, the penitent could prevent disclosure and claim the benefit of the statute.\textsuperscript{15}

The above suppositions are not mutually exclusive. The courts of Illinois could find the legislature was motivated by any combination of these reasons in enacting the statute and could therefore require mutual waiver of the privilege before disclosure would be possible. The course the courts will take is speculative because there are no cases interpreting the Illinois statute.

The priest-penitent privilege requires more than a mere conversation between a clergyman and a layman. It is necessary that the priest intend

\textsuperscript{13} "A clergyman . . . accredited by the religious body to which he belongs shall not be compelled to disclose a confession or admission made to him in his professional character . . . in the course of the discipline enjoined by the rules or practices of such religious body . . . ." Ill. Rev. Stat. ch. 51, § 48.1 (1967). See note 5 supra.

\textsuperscript{14} 8 Wigmore, Evidence §§ 2255 & 2896 (McNaughton rev. 1961); Hogan, A Modern Problem on the Privilege of the Confessional, 6 Loyola L. Rev. 1 (1951).

\textsuperscript{15} 8 Wigmore, Evidence § 2895 n.1 (McNaughton rev. 1961). Professor Wigmore lists the pertinent statutory provisions of 36 states. The statutes generally have wording similar to the Illinois statute. Approximately 3/4's of these statutes have some provision for the penitent to waive his privilege, the legislative intent being to benefit the penitent. Illinois was one of the later states to give some statutory protection to the priest-penitent relationship. It seems reasonable to assume the Illinois legislature was familiar with the statutes of the other states. Was there some reason for omitting a similar provision in the Illinois statute? Or did the legislators feel there was no need to state the obvious?
to give spiritual advice and that the penitent be willing to accept the spiritual advice or consolation. A priest engaged in a casual conversation can not claim everything he hears is privileged because the relator may need spiritual assistance. In Christensen v. Pestorious,16 a pastor prepared to give spiritual advice called on an accident patient. All he received was an account of the accident. The court found the conversation was not a confession or admission to receive spiritual advice and the priest-penitent relationship never arose. The privilege will arise when the court feels a conversation is given in confidence to obtain spiritual advice and assistance. The facts of a given situation may indicate that all, part or none of a conversation may be privileged. In State v. Brown,17 the defendant approached a pastor who was waiting for a train, and a conversation arose concerning the defendant's impending criminal trial. Later the defendant disclosed further information to obtain spiritual advice. The court found that only the latter portion of the conversation was privileged.

A clergyman may also be required to testify on matters learned while giving spiritual advice if the information does not relate to the discipline enjoined by the church. For example, in Buuck v. Kruckeberg,18 a pastor regularly cared for the spiritual needs of a person confined to a home for the aged. A question arose as to the competency of this person to convey a parcel of real estate. The pastor was directed to testify regarding observations he had made to determine this person's mental competency. The court found such observations were not received to give spiritual advice.

The presence of third parties does not necessarily destroy the privilege if the information is given in confidence. This conclusion would appear justified on two grounds. First, the statute only requires that the information be acquired while the clergyman is acting as a “spiritual advisor in the course of discipline enjoined by his religion.” The presence of third parties should not affect the clergyman's capacity to give spiritual advice. Second, third parties may be necessary “in the course of the discipline enjoined by the rules or practices of such religious body . . . .” For example, in the case of Cimijotti v. Paulsen,19 the Catholic church required a trial type hearing to determine if one of its members was qualified to receive separate maintenance and divorce. Witnesses were necessarily present. The privilege extended to all conversations incident to the hearing, including the testimony of the witnesses.

16 189 Minn. 584, 250 N.W. 363 (1933). Accord, Johnson v. Commonwealth, 310 Ky. 557, 221 S.W.2d 87 (1949).
19 230 F. Supp. 39 (N.D. Iowa 1964). See Kruglikov v. Kruglikov, 29 Misc. 2d 17, 217 N.Y.S.2d 845 (Sup. Ct. 1961) (where rabbi was able to claim privilege while acting as marriage counselor for a couple who were not members of his church).
To determine when a clergyman may be compelled or allowed to testify, the courts will have to determine the scope of the phrase "discipline enjoined by a religion." They will also have to determine the purpose of the statute, and while they are considering what course to take on these issues, the courts will have to consider the possible dictates of the First Amendment. The statute appears to leave the direction of priest-penitent privilege in the hands of the court. And the Illinois courts have not as yet interpreted this statute.

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