G. CHURCH RECORDS AND INTERNAL COMMUNICATIONS

A matter close to the central interests and concerns of religious bodies is the confidentiality of communications essential to the cure of souls. Some of those communications are *internal* to the religious body, which will be discussed in this section; some are communications to or from persons *outside* the religious body, which will be dealt with in a later section,[1] although the considerations are similar. Some of those communications are recorded in files and records whose disclosure would dissipate the confidentiality of the communication and impair the relationship of confidence and trust essential to the cure of souls and the full effectiveness of the religious body.

A case was discussed earlier in which the leaders of a local church were sued for libel and the records of the church subpoenaed to discover malice.[2] The church resisted the subpoena and moved the court to quash it. The court denied the motion, holding that the issue was not purely ecclesiastical, as claimed, but involved a question whether a communication concerning a member's behavior was libelous—a civil rather than ecclesiastical matter. The court added that communications made in the regular course of a church's business are not privileged from discovery, the letter of admonition in question was not analogous to a penitent's confession, and the pastor was not acting in his priestly role as the hearer of a confession but as head of the local church. Furthermore, the communication had been shared with three lay elders, who were not entitled to claim the priest-penitent privilege, and thus any claim to confidentiality had already been dissipated.[3] (From the standpoint of this work, all of these statements of the court were erroneous, as will be explained in what follows.)

The effort by a church to protect its records from exposure by compulsory process of a civil court was not seen by the court to fit within the context of a special evidentiary privilege designed to protect the sacrament of auricular confession, although the interests of the church are similar in both cases.

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1. See IID3.

2. See § C5b above.

3. See Scheiman, Eugene, "Obtaining Information from Religious Bodies by Compulsory Process," Kelley, D.M., ed., *Government Intervention in Religious Affairs* (New York: Pilgrim Press, 1982), pp. 146-147.

1. The Priest-Penitent Privilege

From early times, the confession of sins by a penitent to a priest has been treated by the Christian church as highly confidential. Leo I, bishop of Rome from 440 to 461 A.D., wrote:

> Clearly, concerning the penitence which is demanded [of] the faithful, one must not read publicly the notes of a written confession on the nature of each individual sin, since it suffices that the state of conscience be indicated in secret confession to the priests alone. Although one must praise that plenitude of faith which, through fear of God, does not shrink from blushing before men, yet since the sins of all those who seek penance are not of such a nature that they do not fear to have them published abroad, it is necessary to desist from this custom, of which one cannot approve, lest many be put off from availing themselves of the remedies of penance, either through shame or through fear of seeing revealed to their enemies deeds for which they may be subject to the action of the law. Moreover, that confession is sufficient which is made firstly to God, and then also to the priest, who prays for the sins of the penitents. Only then will many allow themselves to be summoned to penance, if the conscience of him who is confessing is not to be revealed to the ears of the people.[4]

(Prior to that time, some churches followed the practice of oral confession in the congregation, and some churches still do.)

By the thirteenth century, the secrecy of the confessional was insisted upon by the church, and any priest who divulged a confession was subject to very grave sanctions. Canon 21 of the Fourth Lateran Council (1215) reinforced what was already a generally recognized rule:

> Let the priest absolutely beware that he does not by word or sign or by any manner whatever in any way betray the sinner: but if he should happen to need wiser counsel let him cautiously seek the same without any mention of person. For whoever shall dare to reveal a sin disclosed to him in the tribunal of penance we decree that he shall be not only deposed from the priestly office but that he shall also be sent into the confinement of a monastery to do perpetual penance.[5]

The most recent codification of canon law by the Roman Catholic Church reaffirms this view of the secrecy of the confessional.[6] Roman Catholic priests are commonly known and expected to go to prison for contempt of court rather than reveal the secrets of the confessional, even if those pertain to crimes, and a criminal should go free in the absence of the priest's testimony. This is in part because confession is

4. Quoted in Tiemann, William H., and John C. Bush, *The Right to Silence* (Nashville: Abingdon, 1983), pp. 34-35; emphasis removed.

5. Ibid., pp. 36-37.

6. Ibid., p. 38.

viewed as a sacrament by that church and its betrayal to have eternal consequences that outweigh the temporal. In some other communions in which confession is not viewed as a sacrament, its confidentiality is still respected for reasons probably similar to those cited by Leo I: if people fear that their confessions will be divulged, they will not make them, and the cure of their souls, to which confession is important, if not essential, will be impaired.

The willingness of civil courts to respect this reticence has varied from time to time and place to place. In England, the seal of the confessional was apparently recognized in the common law in Anglo-Saxon times, with an exception being added after the Norman Conquest to require testimony in cases of treason.[7] Sometime during or after the Puritan Revolution in the mid-seventeenth century, the seal of the confessional was no longer respected in civil law in England, and there is no evidentiary privilege protecting it there now,[8] though "the English judges have, as a matter of judicial discretion, excused clergy from testifying about matters revealed to them in their capacity as confessors."[9]

In the United States, however, the situation is very different. In 1982, forty-nine states, the District of Columbia, Puerto Rico and the Virgin Islands had statutes explicitly protecting the seal of the confessional.[10] West Virginia alone has no general statutory privilege.[11] The traditional and minimal form of the privilege is that adopted in New York in 1826:

> 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.[12]

This formula has been followed by more than twenty states, though some have since broadened it, as by substituting "communications" for "confessions," or by using the phrase "in his professional character as spiritual adviser" in place of the concluding clause about "the course of discipline enjoined by... such denomination."[13] Montana and Idaho preface their statutory provision with this explanation:

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7. Ibid., pp. 45-47.

8. Ibid., pp. 53-55.

9. Reese, Seward, "Confidential Communications to the Clergy," *Ohio State Law Journal*, 24:55 at 56-57 (1963).

10. Tiemann and Bush, *supra*, pp. 207 ff., where the pertinent statutes are reprinted. That work should be consulted to determine the extent of the privilege in particular states.

11. West Virginia has such a privilege for justice of the peace courts, but not for courts of record and so is classified as having no statute (of general applicability) by Kuhlmann, Fred L., "Communications to Clergyman: When Are They Privileged?" *Valparaiso University Law Review*, II, 2, Spring 1968, p. 266, n. 3.

12. Ibid., p. 268.

13. New York so modified its statute as of 1965. Ibid., p. 280.

> There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the cases enumerated in this part.[14]

Two privileges are at least as venerable and universal as the priest-penitent privilege, and are the only two recognized by the common law: one for communications between attorney and client and another for those between husband and wife.[15] Others have been adopted by statute in a few jurisdictions: physician and patient,[16] counsellor and counsellee, newsgatherer and confidential source, etc. The reason for such privileges, where granted, is suggested in the Montana and Idaho statutes and was spelled out more definitively in the multivolume treatise by Wigmore on *Evidence*. He explained that four conditions should be present before an evidentiary privilege should be granted:

> (1) The communications must originate in a confidence that they will not be disclosed;
> (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.[17]

On the basis of these four points, Wigmore concluded that the priest-penitent privilege was fully justified and should be recognized in law. Most of the state statutes referred to on this subject were enacted since his treatise appeared in 1905.[18]

Prior to that recognition in the statutes, a court in New York in 1813, headed by then Mayor DeWitt Clinton, nevertheless respected the refusal of a Roman Catholic priest to testify as to matters confided to him in the confessional. One Father Kohlmann was informed by a penitent parishioner in the course of auricular confession at St. Peters Church in New York City that the parishioner had received stolen goods. As part of the penance assigned by the priest, the penitent brought the stolen goods to him, and he returned them to their owner, James Keating, who then notified the police. The prosecutor subpoenaed Father Kohlmann to appear before

14. Tiemann and Bush, *supra*, pp. 213, 220.
15. Ibid., pp. 106-107.
16. Recently the U.S. Supreme Court held that confidential communications between licensed psychotherapists, including licensed social workers, and their patients in course of psychotherapy are protected from compelled disclosure under Federal Rule of Evidence 501. *Jaffee v. Redmond*, 518 U.S. 1 (1996).
17. Tiemann and Bush, *supra*, p. 111.
18. Ibid.

the grand jury and identify the criminal. The priest appeared before the grand jury but pleaded to be excused from testifying.

> [I]f called upon to testify in quality of a minister of a sacrament, in which God himself has enjoined on me a perpetual and inviolable secrecy, I must declare to this honorable Court, that I cannot, I must not answer any question that has a bearing upon the restitution in question; and that it would be my duty to prefer instantaneous death or any temporal misfortune, rather than disclose the name of the penitent in question. For, were I to act otherwise, I should become a traitor to my church, to my sacred ministry and to my God. In fine, I should render myself guilty of eternal damnation.

The prosecutor responded to this plea as follows:

> [T]he constitution has granted religious "profession and worship" to all denominations, "without discrimination or preference": but it has not granted exemption from previous legal duties. It has expelled the demon of persecution from our land: but it has not weakened the arm of public justice. Its equal and steady impartiality has soothed all the contending sects into the most harmonious equality, but to none of them has it yielded any of the rights of a well organized government.

The New York Court of General Sessions ruled in favor of the priest:

> It is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected.... Secrecy is of the essence of penance. The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed: To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman Catholic religion would thus be annihilated.[19]

The court relied, not on common law or statute but on the free exercise clause of the state constitution, making reference also to the First Amendment of the U.S. Constitution. Four years later, another New York court refused to extend the principle of *Philips* to a Protestant minister on the grounds that his church, unlike the Roman Catholic, did not require confidentiality of confession by its religious law.[20] In

19. *People v. Philips*, 1 *West L.J.* 109 (N.Y.Ct.Gen.Sess. 1813), reprinted in 1 *Cath. Lawyer* 199 (1955). The earlier quotations, from the priest and the prosecutor, are from McConnell, Michael W., "The Origins and Historical Understanding of Free Exercise of Religion," 103 *Harv. L. Rev.* 1411 (1990), citing Sampson, W., *The Catholic Question in America* (1813, repr. 1974) 8-9.

20. *People v. Smith*, 2 City Hall Recorder (Rogers) 77 N.Y., 1817, reprinted in 1 *Cath. Lawyer* 209 (1955).

response to this narrow view, the New York legislature passed a law in 1828 extending the priest-penitent privilege to ministers of all faiths.[21]

Some faiths, however, do not have a procedure comparable to confession, or do not recognize an obligation of confidentiality in connection with it, or both. In some states, admissions to clergy of such traditions are not privileged. (Some faiths do not even have clergy.[22]) A case will be treated below that illustrates the abrogation of confidentiality by supposed "clergy."[23]

The constitutional basis of the priest-penitent privilege has been recognized in the federal courts. In a federal court in Iowa, in a diversity action for defamation, the plaintiff sought to compel two Catholic priests to testify concerning allegedly defamatory statements made to them by defendants during a confidential discussion. The court held that the Iowa statutory privilege applied to that discussion and that to require the priests to testify would "raise grave questions under the First Amendment to the Constitution of the United States."[24]

The federal Court of Appeals for the District of Columbia Circuit recognized the privilege, though not explicitly invoking the First Amendment, in overturning a conviction for child abuse because the trial court had failed to exclude testimony of a Protestant minister as to incriminating statements made to him by the defendant.

> In our own time, with its climate of religious freedom, there remains no barrier to adoption by the federal courts of a rule of evidence on this subject dictated by sound policy.
>
> Sound policy—reason and experience—concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession to him, at least absent the penitent's consent.[25]

It should be readily apparent that the purpose of the priest-penitent privilege, like other evidentiary privileges, is not to protect any one priest, any one penitent, or any one confidential communication, but to safeguard a relationship between a whole class of communicators that is important to society at large. It is of great *secular* concern to society that the function of religion be performed for those who need and seek it. No more urgent instance of such need can be imagined than that of a person

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21. N.Y.Rev.Stat. 1828, pt. 3, c. 7, tit. 3, Section 72. See "Privileged Communications to Clergymen," 1 *Cath. Law.* 199 (1955); Kuhlmann, "Communications to Clergymen", *supra*, pp. 265-295.

22. Jehovah's Witnesses claim that all members are "ministers"—a claim not recognized for purposes of ministerial deferment (IV-D) under Selective Service. The Church of Jesus Christ of Latter-day Saints has "bishops" and "priests," but these are considered "lay" offices. The Church of Christ, Scientist, has "readers," "clerks" and other officers, but no "clergy." Some Quaker groups also do not have ordained ministers.

23. *State v. Szemple*, (1994), discussed at § 3 below.

24. *Cimijotti v. Paulsen*, 219 F. Supp. 621 (N.D.Iowa 1963).

25. *Mullen v. U.S.*, 263 F.2d 275 (CADC 1958).

deeply troubled in spirit because of an awareness of guilt who comes to a pastor or spiritual counsellor for help. That help can only be afforded if the person seeking help can unburden his or her soul to the counsellor, including the confession of sins that may also be crimes or that might otherwise place the penitent in jeopardy if divulged to anyone.[26]

If at some later time the counsellor can be converted into an arm of law enforcement by being compelled to testify in court or before a grand jury as to the information that has been given him or her in confidence, not only she or he but all other pastoral counsellors will be viewed with justifiable suspicion by other persons needing spiritual help, and some may be dissuaded from seeking that help out of fear of being exposed by the counsellor, as noted by Pope Leo I. Thus the cure of souls will be impeded, and uncured souls are a continuing hazard to society, since accumulated and unhealed guilts, anxieties, fears and rages are like explosives waiting to go off, vulnerabilities that are apt to erupt into sudden violence if triggered by otherwise minor or unintended mishaps that healthy souls can take in stride.

Thus it is important to society that the availability of this kind of help be maximized, and that it not be limited to ordained clergy or to members of the clergyperson's flock. Yet courts have been reluctant to grant the privilege to unordained persons, to testimony about what the pastor *saw* rather than what he was *told*,[27] or to communications that have been shared with more than one person.[28] Although evidentiary privileges are to be construed narrowly, they should not be construed *so* narrowly as to defeat the very purpose of the privilege, which has often not been fully recognized by the judges ruling on the privilege, or even by counsel for the persons claiming it.

2. Beyond the Priest-Penitent Privilege

The confession of a penitent to a priest is the prototype of a whole class of communications within the religious body that if divulged to others may create serious vulnerabilities for persons who have entrusted possibly damaging information about themselves to those they trust because of a common bond of faith. In many religious bodies such sharing is not confined to one-on-one communications between a priest and a penitent in an act of auricular confession deemed sacramental and required by canon law (and required by canon law not to be divulged), but may take place between two laypersons or even among a group of laypersons, as urged by Christian scripture: "...confess your sins to one another, and pray for one another,

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26. The same logic would apply to psychiatrists, psychologists and other nonreligious counsellors, some of whom are also covered by some statutes, such as that of Iowa, Iowa Code Sec. 622.10, and the U.S. Supreme Court has recognized the privilege of confidentiality for psychologists and even social workers in *Jaffee v. Redmond*, 518 U.S. 1 (1996).

27. See *In re Boe*, (1973) (S. Dak.) described in Tiemann and Bush, *supra*, pp. 178-181.

28. As in the case described at the beginning of § G above.

that you may be healed."[29] The "small group" movement, like the "class meetings" of early Methodism, has found spiritual help and renewal through face-to-face gatherings on a regular basis of six or eight persons seeking guidance for their lives through Bible study, discussion and prayer.[30] Part of this discipline includes admissions of error and testimonies of blessing, pleas for intercession and offers of upbearing. Much of this salvific interchange could be stifled if a climate of mutual trust were not developed and maintained, a climate that could be blighted for all such groups if confidences imparted in this sacred circle were to be betrayed, or if one member could be compelled to testify in court about what another had said during these periods of intimate spiritual sharing. Certainly this kind of relationship is as precious and as holy as that protected by the letter of the law, though it involves a half-dozen laypersons rather than one priest and one penitent. Therefore, legislators and judges should be helped to understand that the priest-penitent privilege should not be the *circumference* but the *center* of a paradigm designed to protect all relationships of confidence and trust within the religious body.

Thus far, with one or two notable exceptions, efforts to broaden the application of the privilege have not been very successful. One exception is *In re Verplank*,[31] in which a federal district court held that a draft counselling service staffed by nonclergy counsellors working under the supervision of a clergyman and acting in accordance with policies established by a church was protected by the California clergy privilege statute from being compelled to testify about information received in the course of their work. Judge William P. Gray held that the activities of the lay counsellors "conform in a general way with a significant portion of the activities of a minister subject to the privilege," and he saw "the relationship between Rev. Verplank and the other counselors... to be closely akin to the relationship between a lawyer and the non-professional representatives that he engages to assist him in serving his clientele."[32]

Another possible exception is the 1917 case of *Reutkemeier v. Nolte*, in which a confession to the session of a Presbyterian Church, composed of the pastor and three lay "ruling elders" was deemed by the Iowa Supreme Court to be protected by the (rather broad) Iowa statute. The court quoted extensively from the "Confession of Faith" of the Presbyterian Church on the role and function of ruling elders and concluded:

> The only course of discipline known to the Presbyterian denomination is that exercised by the ruling elders sitting jointly with the pastor as moderator. The denomination itself by its Confession of Faith

29. James 5:16 (RSV).

30. See Casteel, John L., ed., *Spiritual Renewal Through Personal Groups* (New York: Assn. Press, 1957).

31. 329 F.Supp. 433 (1971).

32. Tiemann and Bush, *supra*, p. 195.

> characterizes the work of the elders as a "ministry of the Gospel." The purpose of the statute is one of large public policy.... This statute is based in part upon the idea that the human being does sometimes have need of a place of penitence and confession and spiritual discipline. When any person enters that secret chamber, this statute closes the door upon him, and civil authority turns away its ear. The privilege of the statute purports to be applicable to every Christian denomination of whatever polity. Under the polity of the Presbyterian denomination this privilege cannot be applicable to it, unless it be true that the ruling elders are "ministers of the Gospel" within the meaning of the statute. We find that they are such within the contemplation of the Presbyterian Confession of Faith, and therefore that they are such within the meaning of the statute.[33]

This precedent should have been of use in the case cited earlier[34]—also in Iowa—since it implied that the lay elders in that situation shared an ecclesiastical responsibility with the pastor that was arguably privileged under the Iowa statute. However, no "confession" was involved in that instance—and none was claimed. The admonition at issue was claimed to be privileged because it was a matter of internal ecclesiastical discipline.

In several instances, church workers have been denied the privelege for various reasons. In one case, a Lutheran clergyman who had worked with American Indians for many years was invited to visit the militant American Indian Movement occupiers of Wounded Knee, South Dakota, where they were surrounded by law enforcement agents. He later refused to tell a grand jury what he had seen on his pastoral visit lest his testimony be used to provide evidence to prosecute them. The court refused to recognize his refusal as protected by the priest-penitent privilege since he was not asked to divulge any confession but merely to describe what he *saw* (who were carrying guns), not what he *heard*. The Eighth Circuit Court of Appeals upheld this decision but released Boe on other grounds: he had not been given time to prepare a defense before being found in contempt.[35] Boe believed that telling what he had seen could betray the confidence of his Indian friends as much as telling what he had heard, and the court's making that distinction was a cramped understanding of what the privilege was all about.

Another cramped conclusion was reached by a respected federal district judge, Marvin Frankel, in the case of two women employed by the National Hispanic

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33. Ibid., p. 141. This source has been cited throughout this section because it is recent and readily available, but other sources cited in the notes are also useful. A more detailed review of all reported cases may be found in an Annotation "Matters to Which the Privilege Covering Communications to Clergymen or Spiritual Adviser Extends," in *American Law Reports, Annotated, Third Series*, vol. 71, (Rochester: Lawyer's Cooperative Publishing Co.), pp. 794-838 and supplements.

34. See § C5b.

35. *U.S. v. Boe*, (1974), discussed in Tiemann and Bush, *supra*, pp. 178-81. See also Kelley, D.M., "Tell All or Go to Jail: A Dilemma for the Clergy," *The Christian Century*, XCI:4, Jan. 30, 1974, pp. 96-100.

Commission of the Episcopal Church, Maria Cueto and Raisa Nemikin. They were asked by a grand jury for information about persons who had worked for the Commission and who were suspected of having information about various bombings attributed to the FALN—a Puerto Rican nationalist organization. They refused to testify because they believed it would be a betrayal of the confidence essential to the work of that agency of the church, even though the Presiding Bishop of the Episcopal Church had already permitted the FBI to go through the files of the Commission, and his attorney informed the court that the two women were not acting at the behest of the church in refusing to testify.

Judge Frankel, who had been a professor of law and was coauthor of a book about the grand jury, recognized the First Amendment basis of the priest-penitent privilege while denying it to the two women because they were not ordained!

> There can be little doubt under the cases that the first amendment rights of free association and freedom of religion reach within the closed doors of the grand jury chamber....
>
> Accordingly, when first amendment rights are validly asserted on a motion to quash, the burden shifts to the government to demonstrate a "compelling interest" sufficient to outweigh the possibility of infringement....
>
> As Judge [Shirley] Hufstedler of the Ninth Circuit [Court of Appeals] has written: "When governmental activity collides with First Amendment rights, the Government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests." (*Bursey v. United States*... 466 F.2d at 1083).[36]

But the court could not fit the women into the privilege:

> The court is compelled to arrive at the conclusion that the work performed by the respondents herein, while perhaps performed under spiritual auspices, is primarily in the nature of social work. A social worker has no privilege with respect to his or her aid.... This court is not free to extend the cloak [of] priest-penitent privilege so far as to cover persons engaged in social work simply because the Hispanic Commission is affiliated with a religious organization.[37]

Whereupon the two women spent ten months in the Federal Detention Center in Manhattan for civil contempt (where the author visited them on several occasions).

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36. *In re Wood*, 430 F. Supp. 41 (S.D.N.Y.), affirmed *sub nomine In re Cueto*, 554 F.2d 14 (CA2 1977), citations omitted.

37. Ibid. But see *Jaffee v. Redmond, supra*, in which the Supreme Court of the United States extended the evidentiary privilege of confidentiality to licensed social workers (over a dissent by Justice Scalia, joined by Chief Justice Rehnquist on this point that would have disallowed the privilege to social workers).

The National Council of Churches (NCC) argued in a brief *amicus curiae* in the latter case, not for an absolute privilege, which the narrow priest-penitent privilege may be said to be, but for at least a balancing of the state's interest with the claims of religious liberty. Where a church worker (whether ordained or not) is called to testify about communications or other information obtained during the performance of church duties, the government should have the burden of demonstrating:

> (1) That it has probable cause to believe that the church worker personally possesses information that is directly relevant to a specific probable violation of law;
> (2) That the information cannot be obtained by alternative means (from sources other than the church or its workers); and
> (3) That the government has a clear and compelling state interest sufficient to outweigh the claim of religious liberty.[38]

Thus far no court has seen fit to require the government to make such a showing, but the three elements are derived from existing case law, and at some future time a court may be found receptive to this reasonable accommodation of religious liberty. Until then, men and women of conscience are going to have to spend time in prison in defense of the confidentiality of information gained through the relationship of trust essential to the full effectiveness of the religious enterprise.

3. *State v. Szemple* (1994)

A curious switch in roles occurred in a New Jersey case in the early 1990s. The Office of Public Defender was undertaking to defend a person charged with homicide, whose defense was seriously impaired by disclosure of an alleged confession of the crime by a person viewed by the defendant as a member of the clergy.

> While in prison, defendant confessed his guilt to Paul Bischoff, a Minister of Visitation. Mr. Bischoff, a retired Newark firefighter, served with Trinity Baptist Church in Montville. He became a deacon in the church in 1974. According to Mr. Bischoff, the church elders, feeling that he had the gift to minister to those of God's people who are in need of the gospel, ordained him as a Minister of Visitation. The elders signed a "certificate of ordination" recognizing Mr. Bischoff's position. As a Minister of Visitation, Mr. Bischoff visited members of the congregation and persons in hospitals, psychiatric wards, penitentiaries, and nursing homes, to comfort them and discuss their religious needs and concerns.
>
> In his capacity as a visiting minister Bischoff met with defendant in jail about nineteen times between April 1991 and January 1992. In October 1991, defendant admitted to Bischoff that he had killed "not one but three." Bischoff, who had known defendant's family for at least twelve years, reported defendant's admission to defendant's sister and brother-in-

38. NCC brief *amicus curiae* in *In re Wood*.

> law. One of defendant's family members related the admission to the prosecutor's office....
>
> [fn 2:] The trial court initially found that Mr. Bischoff did not qualify for the [priest-penitent] privilege because he was not an ordained clergyperson. It nonetheless concluded, assuming that the privilege applied, that Bischoff properly had waived it without defendant's consent. The State does not contend that Bischoff was not a clergyman within the contemplation of the privilege. Noting that neither the trial court nor the parties raised that issue, the Appellate Division did not address it, but assumed without deciding that Bischoff was within the catalogue of clergypersons covered by the rule. Likewise, we do not reach the issue of whether Bischoff qualified as a clergyman, or other person or practitioner for the purpose of [the rule], but assume that he does.[39]

The unique feature of this case was that the State of New Jersey found itself on both sides of the issue, with the prosecutor defending the use of the confession to show guilt and the Public Defender's Office insisting that the confession was inadmissible under the priest-penitent privilege, which was found in New Jersey's Rule of Evidence No. 29:

> [A] clergyman, minister or other person or practitioner authorized to perform similar functions, of any religion[,] shall not be allowed or compelled to disclose a confession or other confidential communication made to him in his professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which he belongs or of the religion which he professes, nor shall he be compelled to disclose the confidential relations and communications between and among him and individuals, couples, families or groups with respect to the exercise of his professional counseling role.

In fact, the champion of the inviolability of the seal of the confessional was, not a religious group, but the Public Defender, seconded by a brief *amicus curiae* entered in the state supreme court by the American Civil Liberties Union![40]

The majority focused on the question whether the evidentiary privilege belonged to the clergyperson alone or to both the clergyperson and the penitent together, so that both must consent to its waiver.

> Evidence Rule 29 does not specify whether the clergyperson, the penitent, or both hold the privilege. The priest-penitent privilege, however, is directed toward the clergyperson, who shall not be *allowed* or *compelled* to

39. *State v. Szemple*, 640 A.2d 817, 820, 824 n. 2 (N.J. 1994).

40. Although the author arranged for J. Michael Blake, Assistant Deputy Public Defender serving in this case, to present the priest-penitent issue to the Committee on Religious Liberty of the National Council of Churches meeting at Seton Hall University Law School in Newark, N.J., on July 12, 1993, he is not aware that any of the dozen or more national religious bodies represented there took any part in supporting the position of the Public Defender's Office.

disclose a confidential communication made to him or her in his or her professional character. Defendant argues that the inclusion of the phrase "shall not be allowed... to disclose" indicates that the penitent, as well as the clergyperson, must consent to the disclosure to have a valid waiver of the privilege. According to defendant's argument, the phrase refers to the penitent "allowing" the clergyperson to reveal the confidential communication.

The Appellate Division determined that the word "allow" may instead "refer to the court and/or State `allowing' a clergyperson to breach his or her vow of confidentiality by considering such a person a competent witness to disclose a confidential communication."[41] Those differing interpretations demonstrate that the phrase's meaning is not obvious or self-evident on its face....

Based on our review of the origin of the priest-penitant privilege and the history of the privilege in New Jersey, we conclude that Evidence Rule 29 confers a testimonial privilege only on clergypersons. They alone may elect to waive that privilege in their sole discretion and within the dictates of their religious beliefs. The penitent need not consent to the disclosure of a confession, confidential communication, or confidential relation in order for the clergyperson to waive the privilege....

When this country was founded... the privilege did not exist at common law. Accordingly, American courts required that the privilege be conferred by statute. Where no privilege existed, clergypersons were often compelled to testify despite personal, moral, and religious objections. Although the Roman Catholic Church has the longest tradition of the sanctity of the confessional, for many other Christian denominations their "sincere dedication to secrecy is equally apparent."[42] In the Episcopal Church, for example, the new Book of Common Prayer's rite, "The Reconciliation of a Penitent," warns that the secrecy of a confession is morally absolute for the confessor, and must under no circumstances be broken. Violators are subject to church discipline. The governing body of the American Lutheran Church[43] also has adopted a resolution that the pastor hold inviolate and disclose to no one the confessions and communications made to him as pastor without the specific consent of the person making the communication. Similarly, the Presbyterian Church in the U.S., the United Presbyterian Church,[44] and the American Baptist Convention[45] have adopted policy statements strongly affirming the inviolability of religious confidentiality.

The prospect of clergy going to jail to comply with their religious beliefs rather than disclosing a penitent's confession resulted in various religious

41. 263 N.J.Super. 98, 107 (1993).

42. Cole, W.A., "Religious Confidentiality and the Reporting of Child Abuse..." 21 *Colum.J.L.& Soc. Probs.*1, 17 (1987).

43. Now part of the Evangelical Lutheran Church in America.

44. These two bodies now are one—the Presbyterian Church (U.S.A.).

45. Now the American Baptist Churches, suggesting that these sources are dated, though still in force in their more recent incarnations.

> groups bringing pressure on state legislatures to enact a clergyperson privilege. Thus, the origin of the priest-penitent privilege as well as the moving force behind the enactment of the statutory privilege was to protect the clergyperson from being forced *against his or her will* to reveal confidences.[46]....

The court recognized that the legislature had indicated in the rules governing other evidentiary privileges that the privilege belonged to the confider, and then rather unconvincingly sought to justify that seeming discrepancy.

> Moreover, valid reasons exist why the confider in the attorney-client privilege and the physician-patient privilege holds the privilege, but the penitent in the clergyperson-penitent privilege does not.
>
> * * *
>
> [M]any ministers believe it to be a religious obligation to maintain the secrecy of penitential communications despite the willingness of the penitent to allow disclosure. In addition, it has been suggested that allowing a clergyman to testify when a privilege is waived may lead to a penitent abusing the privilege.[47]
>
> Abuse of the privilege could occur, for example, if a scheming penitent were to confess to several diffferent versions and then waive privilege for the one best suited for his or her purpose.
>
> * * *
>
> The principle underlying both the seal of confession and the statutory privilege was not concern for the penitent but rather concern that the clergyperson would be compelled in violation of his or her religious vows to disclose such confidences. Because the principal rationale was to recognize and protect the religious vows of the clergy, to include the penitent as the holder of the privilege was not necessary.... [W]e hold that the clergyperson is the sole holder of the privilege. The decision whether to reveal confidential communications rests with the clergyperson alone.[48]

This solicitude for the tender sensibilities of the clergyperson is indeed touching, and totally overlooks the reason why the clergyperson is—or ought to be, as the one in this case apparently was not—under severe obligation not to divulge what has been confided in the cure of souls lest other souls in need of cure shun the clergy for fear they will betray the penitent's secret to the prosecutor. From Pope Leo I on it has been obvious that the whole reason for confidentiality of confession was to protect the relationship between pastor and penitent—not for the sake of a particular pastor or penitent, nor for the sake of all pastors and priests put together—but for the cure of souls in all times and circumstances.

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46. *State v. Szemple, supra*, citing Yellin, J.M., "The History and Current Status of the Clergy-Penitent Privilege," 23 *Santa Clara L. Rev.* 95, 107 (1983).

47. Ibid., 137.

48. *State v. Szemple*, *supra.*

The defection of Mr. Bischoff from this principle may have been due to his dearth of pastoral training (though some fully trained and ordained clergy may also not be fully alert to this responsibility), but there may be some extenuating considerations in this instance: he had known the family of the defendant for many years, and his disclosure of the confession was to them, not to the prosecutor. But the only way to keep a confidence is to *keep* it; disclosure to a third party ordinarily voids the privilege.

The majority opinion was announced by Justice Marie L. Garibaldi, joined by Justices Robert L. Clifford, Alan B. Handler, and Stewart G. Pollock. A vehement dissent was voiced by Justice Daniel J. O'Hern, joined by Justice Gary S. Stein and Chief Justice Robert N. Wilentz, which well expressed the appropriate critique of the decision:

> I do not believe that our Legislature intends, or that our Rules of Evidence contemplate, that a spiritual adviser should be free to disclose a confidential spiritual conversation.... I begin by analyzing the purpose of the privilege.... *Wigmore on Evidence*... calls the rules of privilege "requirements of extrinsic policy... because some consideration extrinsic to the investigation of truth is regarded as more important and overpowering." We do not give attorneys a privilege to refuse to disclose the communications of their clients to save attorneys the time and trouble of appearing in court. We afford that privilege to serve the larger purpose of making clients feel free to obtain assistance in the most troubled times of their lives. Clients must be free to consult with an attorney and must be certain that[,] unless they intend a continuing course of criminal conduct, their confidential communications will be protected.... Society deems that relationship so important that a lawyer may not reveal even the client's disclosure of a prior crime.
>
> The most commonly-offered rationale for the clergy privilege is society's desire to foster the cleric-confider relationship. Several evidentiary privileges, including the physician-patient privilege, the attorney-client privilege, and the marital-communication privilege, are designed to foster special relationships between persons by shielding communications within those relationships.[49]
>
> Most clergy-privilege statutes accomplish the goal of protecting the cleric-penitent relationship by granting the power of waiver to the penitent alone.[50] For example, in reviewing New York's clergy-privilege statute, which allows waiver only by the penitent, the New York Court of Appeals observed that the Legislature intended to recognize "the urgent need of people to confide in, without fear of reprisal, those entrusted with

49. Citing Mitchell, Mary H., "Must Clergy Tell?: Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," 71 *Minn. L. Rev.* 723 (1987).

50. Citing *Seidman v. Fishburne-Hudgins Educ. Found.*, 724 F.2d 413 (CA4 1984).

the pressing task of offering spiritual guidance so that harmony with one's self and others can be realized."[51]

The language of our statute is well adapted to that "urgent need of people," stating in plain terms that no member of the clergy shall be either "allowed or compelled" to disclose a confidential comunication received in a professional role. That means at the least that a cleric cannot disclose a confession without the consent of the penitent. That construction prevails throughout the United States. A review of other statutes indicates that only three states (Illinois, Maryland, and Virginia) allow a cleric to disclose a confession without a penitent's consent.... I believe that the construction of the privilege that requires the penitent's consent to disclosure is prevalent because such a construction fosters the public policies behind the privilege.

* * *

To conclude that the penitent has no privilege, one must infer that the Legislature intended that the most privileged of all communications be converted into the least. The majority's conclusion that the privilege belongs only to the cleric creates an exception so startling that it cannot possibly be what the Legislature intended. The lawyer-client privilege, the physician-patient privilege, the psychologist-patient privilege, the marriage-counselor privilege, and the victim-counselor privilege all belong, at least in part, to the confider. I cannot believe that our Legislature, which has codified all those privileges..., would have intended that of all the privileges it has recognized, the confider would hold the privilege except in the case of communication to clergy. Could the Legislature have deemed spiritual counseling a second-hand ministry, of less importance to society than lawyering or marriage counseling or victim counseling? I do not believe that the Legislature intended such an anomaly....

Although most penitents still trust their priests, ministers, or counsellors, they would be utterly shocked to find that they have no right to privacy in the confessional. Can one conceive of the reaction that would have followed in this state if someone in the Legislature in 1957 had stood up and said, "I want the clergy to be able to disclose confessions at will, no matter what the person giving the confession wants, because the sanctity of religous confessions must give way to the needs of a lawsuit." I doubt that any legislator would have taken such an extreme position. Given common notions of what is right, what is permissible, and what is, to some, sacred, most people, not just members of one sect or another, would have regarded such a proposal as unthinkable, or at least as an affront to religion and religious people....

This is a shocking case. Craig Szemple is implicated in the commission of crimes of brutal violence. Had he been visited in prison by a psychologist and sought mental counseling, he would have had the privilege to bar the psychologist's disclosure of their discussion of the

51. *Keenan v. Gigante*, 390 N.E.2d 1151, 1154 (1979).

> crime. Had he been visited in prison by an attorney and sought counseling on how he should prepare his defense, he would have had the privilege to bar the attorney's disclosure of their discussion of the crime. Instead of seeking psychological counseling or legal counseling, Szemple sought spiritual counseling. If the purpose of the cleric-penitent privilege is to foster the relationship between a confider and a spiritual counselor, that purpose is not served when the cleric becomes a witness for the prosecution.
>
> I suspect that the issue in this case will rarely, if ever, arise again. In the almost fifty years since the adoption of the privilege, no member of the clergy has, in any reported case, ever betrayed a penitent's spiritual trust. Szemple's case should not turn on the fortuity of his encounter with a cleric whose religious views encompassed disclosure of spiritual confidences. The clergy privilege exists not for the cleric to choose among the worthy members of the flock but to furnish a "secure repository for the confessant's confidences."[52] Because the evidentiary privilege belongs to both the cleric and the penitent, we cannot sustain a conviction based on the disclosure of a confidential spiritual communication.[53]

4. *Surinach v. Pesquera de Busquets* (1979)

A beacon of insight on the subject of confidentiality of communications and records within a religious body shone from the First Circuit Court of Appeals in 1979, elicited by a case emanating from the Commonwealth of Puerto Rico. Early in the 1970s the Commonwealth had established a Department of Consumer Affairs to protect consumers' rights and restrain inflation. In 1978 that office began to investigate the costs of private education on the island and ordered Roman Catholic Bishop Ricardo Surinach to provide within ten days such information on the operation of the parochial schools of that church as their annual budgets for the past three years, the sources and amounts of their income, costs of transportation, salaries paid at all levels of employment in the schools, book costs and invoices per grade and their resale value plus the names and addresses of all book suppliers, a listing of all scholarships and the basis on which they were awarded, etc. The bishop refused to comply and took the matter to court, charging that the action of Secretary of Consumer Affairs Carmen T. Pesquera de Busquets interfered with the church's free exercise of religion and created an excessive entanglement between state and church.

The district court concluded that "the general investigation to which [the Catholic schools] are being subject does not penalize, hinder or otherwise curtail any religious practice of Plaintiffs,"[54] and that the degree of entanglement, at least at the

52. *Seidman, supra*, at 415.

53. *State v. Szemple, supra*, O'Hern dissent.

54. 460 F. Supp. 121, Juan R. Torruella, J. (1979), brackets supplied by First Circuit Court of Appeals.

preliminary information-gathering stages of the investigation, did not infringe the First Amendment, so it dismissed the complaint. The bishop appealed to the First Circuit, and decision was rendered by Chief Judge Frank M. Coffin, joined by Circuit Judges Levin H. Campbell and Hugh H. Bownes.

> Our analysis of the issues presented by this case parts company with that of the district court from the outset. The court below placed great emphasis on the "preliminary nature of the administrative action challenged in this case":
>
> > "The record in this case is devoid of any substantial indicia of a realizable regulation of the internal financial affairs of the Catholic Schools. Furthermore, the Defendant has not palpably limited the tuition costs of the schools. We therefore are in no position to decide the validity of an actual governmental regulation in these areas. We simply hold that the *status quo* fails to support a cause of action under the religious clauses of the First Amendment."[55]
>
> While it is true that the constitutionality of the entire regulatory scheme as applied to Catholic schools is not squarely before us, the court's bifurcation of the gathering of the information and the purpose for which it is sought strikes us as both artificial and constitutionally unsound.... The gathering of information is not viewed as an end in itself. To the contrary, it is merely a first step by the Department; the records and information furnished by the schools will be examined and may be made public; both public hearings and the enactment of regulations may then take place, and if the Department ultimately determines that the costs of Catholic schools must be contained ceilings can and will be imposed. At least in this case we are dealing with the gathering of information in a context where we cannot conceive—nor have we been apprised—of any rational end product use of this information which will not encroach on appellants' First Amendment rights.
>
> It is not the obligation of the schools to prove as a precondition for relief at this time that this precise scenario, which hardly can be called speculative, in fact will unfold. To the contrary, in the sensitive area of First Amendment religious freedoms, the burden is upon the state to show that implementation of a regulatory scheme will *not* ultimately infringe upon and entangle in the affairs of a religion to an extent which the Constitution will not countenance. In cases of this nature, a court will often be called upon to act in a predictive posture; it may not step aside and await a course of events which promises to raise serious constitutional problems.... Accordingly we believe that the constitutional perils of the compelled disclosure of cost information must be assessed and the Commonwealth's interest in that disclosure justified in view of the purpose for which the information was solicited.
>
> The schools in question are an integral part of the Catholic Church and as such "involve substantial religious activity and purpose." *Lemon v.*

55. Ibid.

Kurtzman.... The court below concluded that because the Secretary's investigation was directed at *all* private schools in Puerto Rico rather than merely those of the Roman Catholic Church and because the information solicited did not probe into doctrinal matters, there had been no showing that either the purpose or the effect of the Commonwealth's actions was to burden the free exercise of religion. While we agree that there has been no showing of any purpose to inhibit religion, the effect of the Commonwealth's actions, even though aimed at private schools in general, constitutes a palpable threat of state interference with the internal policies and beliefs of these church related schools.

* * *

We think it clear that the eventual use to which the school's cost information could be put could interfere seriously with [the bishop's] religious duties and objectives....

Moreover, it seems likely that as the regulatory process unfolds, some determination of which costs are "necessary" and "reasonable" in the running of a private school would have to be made. For example, the Department perhaps could determine that the ratio of teachers to students in these schools is unusually low, and that the rising costs of education could be stemmed by adjusting that ratio. The Bishop and superintendents of these schools, on the other hand, may have decided that small classes of students are vitally important if there is to be sustained and intensely personal contact between a pupil and his religious mentor that they deem necessary to the mission of the Catholic Church and its schools.... In short, the value judgments and sense of priorities of the regulator and regulatee are likely to be grounded in wholly different concerns... [and] a wholly secular objective would be furthered at the expense of one which is religious. We find it scant comfort that no such judgments have yet been brought to bear by the Department, or that the Department might ultimately conclude that the costs of these schools need not be contained by government controls. The appellants' ability to make decisions concerning the recruitment, allocation and expenditure of their funds is intimately bound up in their mission of religious education and thus is protected by the free exercise clause of the First Amendment. The Department's attempt to take its first steps down its regulatory road by gathering information accordingly are suspect, both in light of the purpose for which the information is sought and in itself, for as has long been recognized, "compelled disclosure has potential for substantially infringing the exercise of First Amendment rights." *Buckley v. Valeo*. We see that potential in the chilling of the decision making process, occasioned by the threat that those decisions will become the subject of public hearings and that eventually, if found wanting, will be supplanted by governmental control.... And even if that governmental control should not come to pass, disclosure of the schools' finances—from amounts of donations to details of expenditures—could provide private groups or the press with the tools for accomplishing much the same ends.

* * *

> Given our conclusion that the Secretary's demands for the financial data of these schools both burden the free exercise of religion and pose a threat of entanglement between the affairs of church and state, the Commonwealth must show that "some compelling state interest" justifies that burden..., and that there exists no less restrictive or entangling alternative.... This demanding level of scrutiny also is required here because of the vehicle of regulation chosen by the Department—compelled disclosure which implicates First Amendment rights....
>
> In *Buckley v. Valeo,*[56] the Supreme Court considered a variety of constitutional challenges to the Federal Election Campaign Act of 1971, as amended in 1974. Ruling on an overbreadth challenge to the Act's requirement that every political committee and candidate file detailed financial reports concerning the source and amount of contributions they had received, the Court emphasized that it has "repeatedly found that compelled disclosure, in itself, can seriously impinge upon privacy of association and belief guaranteed by the First Amendment," and described the government's burden in justifying the disclosure as follows:
>
> > "We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. We have also insisted that there be a `relevant correlation' or `substantial relation' between the governmental interest and the information required to be disclosed.... This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in required disclosure...."
>
> Finally, the Department has failed to show that it has pursued its secular objectives in the manner which is least intrusive upon religious concerns. The Department has not satisfied that burden merely by noting that the investigation does not single out religious private schools. It is well established that state action, although neutral on its face, can in practice occasion a substantial infringement on First Amendment freedoms....[57]

Although based on the Supreme Court's teaching that "compelled disclosure, in itself, can seriously impinge upon privacy of association and belief," *Surinach* has not had a strong line of progeny. In fact, other courts have tended not to follow it, either distinguishing the fact situation or ranking the state's interest as "compelling." In *Cuesnongle v. Ramos* (1983)[58] the First Circuit itself allowed the same Puerto Rican Department of Consumer Affairs to require the same sort of information from a Catholic *college* on the grounds that it was not "pervasively sectarian" as were the

56. 424 U.S. 1 (1974).

57. *Surinach, v. Pesquera de Busquets*, 604 F.2d 73 (1979).

58. 713 F.2d 883.

parochial schools, and thus "not primarily carrying on a religious activity in the First Amendment sense." The First Circuit likewise allowed the IRS to subpoena all financial records of a group calling itself "Freedom Church" to determine its qualifications for tax exemption, concluding that such examination was not unconstitutionally entangling because it did not entail "continuing monitoring or potential for regulating" religious conduct.[59] One reader of this volume wondered how else the IRS is to determine whether a "church" is tax exempt. One reply would be that, although churches do not have to *apply* for recognition of their exempt status, if the IRS challenges that status, the burden of proof would rest with the applicant to produce its bona fides, and a subpoena would seem somewhat excessive at the threshold stage of the inquiry.

In a time of increasingly intrusive governmental regulation, there will probably be more of this tendency to micro-management of private nonprofit organizations in the name of "consumer-protection," "public accountability" and all-pervasive "sunshine." Nevertheless, the First Circuit's instincts in *Surinach* were sound and should be more widely emulated, especially with respect to churches, for reasons to be suggested in the discussion of church records.[60]

5. Government Infiltration of Churches

A related issue emerged in the latter 1980s that added a new and unwelcome dimension to the question of the confidentiality of communications within a religious body. It emerged as a result of the "sanctuary" movement, in which church workers gave assistance to refuge-seekers from Central America. In an effort to halt this intentional violation of the law, the U.S. Immigration and Naturalization Service (INS) arranged for several Hispanic malefactors to pose as sympathizers with the "sanctuary" effort and thus to gain access to the church groups engaged in it. They were provided by INS with recording devices or "body bugs" that they wore while attending church meetings and worship services, recording conversations and other communications that occurred within several churches in Arizona. This evidence was used in the trial of several church workers and may have contributed to their conviction. In any event, it was cited as one of their grounds of appeal, with results to be described elsewhere.[61]

But in the interim several congregations that had been infiltrated and their national denominations, the Presbyterian Church (USA) and the American Lutheran Church, sued the government for violating their rights to free exercise of religion, belief, speech and association. The trial court gave summary judgment to the government on the

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59. *U.S. v. Freedom Church*, 613 F.2d 320 (1979), See Young, David J., "Protection of Church Records: Limitations on Civil Authority to Compel Disclosure," in Kelley, D.M., ed., *Government Intervention in Religious Affairs 2* (New York: Pilgrim Press, 1986), pp. 147-163.

60. See § 6 below.

61. See further discussion at IVB3c, e and f.

theory that the churches did not have standing to claim those rights. Judge Charles L. Hardy announced that the First Amendment protects "rights guaranteed to individuals not corporations." After all, he reasoned, somewhat obscurely, "the churches don't go to heaven"—perhaps suggesting that the First Amendment protects only those who do, reducing its scope rather drastically![62]

The churches, rather than amending their complaint or filing a new one to include individual church members as plaintiffs, appealed the holding that they did not have standing to sue. The Ninth Circuit Court of Appeals reversed and remanded for trial, saying, "To the contrary, it is settled law that churches may sue to vindicate organizational interests protected by the First Amendment."[63]

The court addressed the claim of injury on which the churches' complaint rested.

> [W]e are persuaded that the churches have alleged actual injuries as the result of the INS' conduct. For example, they allege that as a result of the surveillance of worship services, members have withdrawn from active participation in the churches, a bible study group has been cancelled for lack of participation, clergy time has been diverted from regular pastoral duties, support for the churches has declined, and congregants have become reluctant to seek pastoral counseling and are less open in prayers and confessions.
>
> The INS contends that the churches have alleged injury to individual worshippers, but have failed to allege injuries to themselves as organizations. We disagree. When congregants are chilled from participating in worship activities, when they refuse to attend church services because they fear the government is spying on them and taping their every utterance..., we think a church suffers organizational injury because its ability to carry out its ministries has been impaired.
>
> * * *
>
> Churches, as organizations, suffer a cognizable injury when assertedly illegal government conduct deters their adherents from freely participating in religious activities protected by the First Amendment. The alleged injuries are not speculative; they are palpable and direct. Therefore, we conclude that the churches have satisfied the requirement of alleging "actual or threatened injury" as a result of the INS' conduct.[64]

Two weeks later, however, another panel of the Ninth Circuit, in upholding the conviction of the Arizona sanctuary workers, seemed to foreclose the churches' cause of action against the government. One of the grounds of appeal by those defendants was that evidence had been obtained against them by informers sent into their church

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62. *Presbyterian Church v. U.S.*, 870 F.2d 518 (CA9, 1989), quoting the district court.

63. Ibid., citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), and *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), discussed at §§ B7 and B3 above, respectively.

64. Ibid., citing *NAACP v. Alabama*, 357 U.S. 449, 463-5 (1957), pertaining to governmental interference with freedom of association.

meetings without the warrant required by the Fourth Amendment. The Fourth Amendment's threshold inquiry, said the court, is whether a person has a "constitutionally protected reasonable expectation of privacy," which turns on "a normative inquiry as to what expectations society is prepared to recognize as reasonable."[65]

The defendants-appellants contended that

> society is prepared to recognize as reasonable church-goers' expectations that "they could meet and worship in church free from the scrutiny of federal agents and tape recorders...." The first amendment requires this heightened expectation of privacy because a "community of trust" is the essence of a religious congregation [,] and the ability of a person to express faith with his fellow believers "withers and dies when monitored by the state."

Not so, said the appellate court. The First Amendment provides no protection of privacy beyond that provided by the Fourth Amendment's guarantee (of "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures"), and the Fourth Amendment has been held by the Supreme Court not to be triggered by "invited informers," who may freely disclose (and secretly record for disclosure) conversations directed to them or carried on in their presence.[66] The Ninth Circuit interpreted this teaching to mean that

> persons have no expectation of privacy or confidentiality in their conversations and relations with other persons, no matter how secretive the setting. While privacy, trustworthiness, and confidentiality are undoubtedly at the very heart of many instances of free association and religious expression and communication, the Court has recognized that legitimate law enforcement interests require persons to take the risk that those with whom they associate may be government agents.

Because members of the public are invited to enter churches and participate in religious activities there, does that mean those meetings become legally indistinguishable from clandestine conversations in a parking lot or in Jimmy Hoffa's hotel suite? Left open for further exploration is the possibility—whether or not it protects privacy rights beyond those protected by the Fourth—the First Amendment may protect rights other than those of privacy against governmental invasion, rights of the sort referred to in the oft-repeated characterization of the Establishment Clause: "Neither a state nor the Federal Government can, openly or *secretly*, participate in the affairs of any religious organizations or groups and *vice*

65. *U.S. v. Aguilar*, 883 F.2d 662 (1989).
66. Ibid., quoting *Hoffa v. U.S.*, 385 U.S. 293 (1966).

versa."[67] That would seem to suggest that the government is not to be a "silent partner" or hidden monitor in the internal affairs of churches.

The concerns of religious bodies about the actual and potential harms to them of infiltration by government were cogently stated by Professor J. Phillip Wogaman, Wesley Theological Seminary, in a proffer of proof on pretrial motions in *U.S. v. Aguilar*, the criminal trial of sanctuary workers, and is worth quoting here.

> To what extent is the church a public institution, with activities open to the public?...
>
> [C]hurch activities are as public as they are in this country precisely because churches have felt secure in the protections afforded by the First Amendment to the U.S. Constitution. Churches have not always felt that they could go about their activities publicly. There is a tradition—as long as the history of Christianity itself, and before that of Judaism—of church activity having to be conducted in private, secure settings. Early Christian worship often had to occur in private homes or secret places such as the Roman catacombs. In early centuries, catechumens, or initiates, were dismissed from services before the saying of prayers (when the names of absent Christians might be said) and the celebration of the eucharist. One reason for this appears to be the need to preserve security. Through the centuries dissenting religious groups of all kinds have often had to go underground in one way or another to escape persecution. The medieval Jewish communities of Europe felt the need to establish especially harsh penalties for informers within their midst.[68] In the conflicts of the sixteenth and seventeenth centuries, dissenting religious groups often had to practice their faith in private or to flee to safer countries in order to escape the power of the state. (That is the well-known history of the separatist, or "Pilgrim Fathers," who first fled England to Holland, and thence to Massachusetts in order to find a place where they could practice their faith openly.) The late medieval Taborites, an outgrowth of the Hussite movement in fifteenth century Bohemia... had to seek refuge in the walled town of Tabor, which was outfitted with secret underground passages and chambers. Even America was not always hospitable to dissenting religious groups. Baptists could not freely and publicly practice their faith in colonial Massachusetts so, under Roger Williams, they were forced to establish a new colony in Rhode Island. Catholics were most unwelcome in several of the colonies... Mormons were forced to flee from one state to another....

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67. *Everson v. Board of Education*, 330 U.S. 1 (1947), *Allegheny County v. ACLU*, 492 U.S. 573 (1989), emphasis added.

68. This sentence may refer to a comment made to Dr. Wogaman at the meeting of the Committee on Religious Liberty of the National Council of Churches a few days before he was to testify on this issue. Rabbi Joseph Glaser, Executive Vice President of the Central Conference of American Rabbis, remarked that Jews have historically been averse to the death penalty, with one exception: the medieval ghetto community thought it appropriate for an *informer*.

> Seen from the standpoint of the churches, it was and is the First Amendment protection of religious liberty that has made it possible for the church to be fully public and open in its activities and expression of faith. The church is a fully public institution in this country because the First Amendment provides it the security to be a public institution. Since it deals with the most sensitive, ultimate aspects of human life, the church would be peculiarly vulnerable if it did not have that protection.... To the extent that the protections of the First Amendment are weakened or withdrawn, the church may be forced to reconsider the extent to which it can function publicly in this country.
>
> * * *
>
> Mass society in the 20th Century poses new problems for religious life and new opportunities for totalitarian practice. In a highly mobile, urbanized society people often do not remain in one place long enough to develop those deep ties of human relationship and accountability that sustain enduring trust. A mobile people must relate to large institutions in the confidence that such institutions will have integrity. A Presbyterian from Ohio who moves to Arizona must be able to have confidence that the Presbyterian church fellowship in Arizona will be essentially the same expression of Christian faith and life as the one he or she left behind in Ohio and that this will be independent of external forms of manipulation. Moreover, 20th century technology affords vastly improved technical means of surveillance. Thomas Jefferson never heard of body tape recorders or telephone bugging systems or concealed television monitors....
>
> America is not a totalitarian country. It has prized laws and traditions protecting the free exercise of religion, chief among these the constitution itself. But the free exercise of religion is not the fruit of the constitution alone. It has had to be interpreted and re-interpreted and applied to new problems.... The use of secret government infiltrators in the churches is a relatively new encroachment in this country. The prevention of the erosion of religious freedom from such a source is an issue that needs to be addressed by the courts, quite apart from the disposition of the sanctuary issue as such.[69]

The question of religious liberty towers over the specific cases in which it arises. Whether the particular defendants in the specific case were convicted or acquitted (there were some of each), whether the Sanctuary Movement itself was advanced or hindered, serious issues though those are, they may be of less enduring significance in the long run than whether religious liberty for all citizens in the United States is safeguarded or, in the alternative, the nation becomes more and more like the alien powers that it has professed to oppose—Nazi Germany and totalitarian communism—in taking one step and then another to suppress the freedom of

69. Supplemental Offer of Proof of Philip Wogaman re: Motion to Suppress Infiltration, *U.S. v. Aguilar*, U.S. District Court, District of Arizona, June 4, 1985.

spiritual commitment and spiritual community that has been one of the brightest ornaments of this society.

6. Church Records Can Be Sensitive

One of the ways in which the confidentiality of internal communications can be lost is by failure to protect them. An essential element in claiming confidentiality is the assertion that the communications were *intended* to be kept in confidence and were treated as such. Allowing them to be overheard by others, imparting them to third parties not included in the intended confidential relationship, or leaving notes or records of such communications where they are subject to casual perusal by others are ways in which the evidentiary privilege of confidentiality can be lost. They are also breaches of religious duty and of simple respect for other persons' privacy and dignity.

a. Counseling Files. A pastor who leaves his or her counseling files unlocked is guilty of unprofessional conduct that jeopardizes the confidences imparted by counselees, not only in a legal sense but in a much more important interpersonal sense. No one should contribute in any avoidable way to another's hurt, yet that is a constant possibility when the secrets of others' lives entrusted to a pastor in confidence are treated casually or carelessly.

b. Lists of Church Members and Contributors. Lists of church members and contributors are also records that should be entitled to confidentiality, since disclosure might cause difficulties for the persons listed. If they wish to disclose their relationship to the church to others, that is their choice, but the church ought not to do so without their consent. Demands by government agencies for a list of the members of a church should normally be resisted on general principles, such as those recognized in *NAACP v. Alabama*, in which the U.S. Supreme Court upheld the refusal of the National Association for the Advancement of Colored People to turn over its lists of members to the State of Alabama because "compelled disclosure... may constitute a restraint on freedom of association."[70] It was obvious in that case that persons known by the State of Alabama to be members of the NAACP at that time might be subject to harassment, but some may wonder what ill could befall persons publicly known to be members of St. Swithin's-by-the-Golf-Course. Perhaps none, in most cases, so far as one can tell at present. But at what time in the near future St. Swithin's may become suspect of harboring "disloyal" or "subversive" teachings and activities (like the "sanctuary" or "antinuclear" movements were held to be by certain governmental agencies?) cannot always be determined at the moment. In any event, it should be left for each member to decide whether he or she wants to be identified to the government as an adherent, not for the church or its pastor to decide for them.

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70. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 at 462 (1958).

c. Lists of Contributors with Amounts Contributed can be even more sensitive because of invidious comparisons that can be drawn and because of possible adverse tax consequences. When the National Council of Churches was audited by the Internal Revenue Service in 1970-72, one of the items requested by the IRS was the file of all correspondence with contributors. The leaders of the NCC resolved that no such material would be turned over to the IRS because they were unwilling to bring into governmental purview persons who in good faith had contributed to the Council. They decided that if the IRS asked about contributions already known to it, they would answer truthfully "Yes" or "No" to such questions as: "Did taxpayer G give $1,000 to the NCC in 1968?" They would not supply a list of donors for the IRS to check against deductions claimed by those persons. In other words, they did not wish to become an arm of law enforcement against their own contributors, who were responsible for claiming and documenting their own deductions.[71]

One cannot wholly overlook the possibility as well, intimated in the preceding section, that the identity of members and supporters of a particular church might at some point be or become objects of unfavorable attention to one or another agency of government, not through any wrongdoing on their part, but because of unpopular "political" actions taken by the church. Unfortunately, the "dirty tricks" used by the FBI and other federal agencies under the COINTELPRO program have been only too well documented for doubt,[72] and it is not inconceivable that similar tactics could be used again.

d. Minutes of Church Board and Committee Meetings are also internal documents that should be treated with reserve because they trace the decision-making processes within the church and are essentially nobody else's business, especially not the government's. There is a trend in some public-information circles in some churches to press for "open meetings" in the churches, i.e., open to press and public. This policy has been officially adopted by some denominations at the behest of their press-relations offices, a kind of "sunshine" law that may be appropriate for *public* bodies like a state legislature or a government agency, but may tend to blur the status of churches as *private* entities, particularly when advanced with the spurious argument that the churches owe a duty of "accountability" to the public. They owe a duty of accountability to their *members* and *contributors*, not to the general public or

71. This principle was recognized in § 13172 of the Omnibus Budget Reconciliation Act of 1993, which enacted a provision for substantiation of charitable contributions for which deductibility was sought by federal taxpayers. As originally proposed, charitable organizations would have to report to the IRS the name of every donor and the amount contributed to substantiate any deductions claimed by that donor. Representatives of churches objected to this arrangement, under which they would become an arm of law enforcement against their members. A compromise was reached that churches (and other charitable donee organizations) would provide their donors with contemporaneous receipts showing the amount donated and the value of any consideration received in return, and the donor could use that receipt to substantiate the donation.

72. See the "Church Report," named after Sen. Frank Church, chp., Report of the Senate Select Committee on Government Intelligence Activities, S. Rept. 94-755, Apr. 1976.

the press, and that is a distinction that should not be lost sight of.[73] By the same token, members should be (morally, not legally) entitled to review the minutes of church meetings, but that is very different from turning over such records to "outsiders," particularly governmental outsiders.

It is ironic that the demand for access to church meetings and documents should come from the ranks of journalists, who have been very vocal in demanding legal recognition of the confidentiality of *their* sources, *their* editorial processes, *their* internal "work products" and "outtakes," which are rightful demands to protect the full freedom of the press, yet they are apparently less willing to recognize that other organizations are entitled to some confidentiality of *their* internal communications, processes, and "work products," especially when those are intimately related to another vital First Amendment freedom, the free exercise of religion.

Minutes that merely summarize actions taken without specifying who proposed, advocated or opposed them and without reporting the course of debate or identifying participants are less sensitive because they protect individuals and reveal less of the internal flow of the church's process of decision-making. Editors of the press should not be subject to second-guessing by outsiders who do not like the final, public version of a news story. They should be entitled to sift and refine and shape their raw materials prior to publication without having the finished product compared to the rejects or the process of selection traced in after-the-fact analyses by hostile critics. Likewise the decision-makers in churches should be able to argue, assess and negotiate the matters before them without having outsiders peering over their shoulders—or their minutes.

e. "Nothing to Hide"? There are those who will ask, "Why all this concealment? We have nothing to hide." To this plaint the answer is, "A church with `nothing to hide' cannot be doing anything very significant." Such a church could not be doing any very penetrating pastoral counselling or it would have locked files protecting the privacy rights of its counsellees. It could not be engaging in transactions such as purchasing property that need to be kept secret to prevent price increases in the various parcels being considered, or letting contracts that should not be "leaked" to avoid giving some potential bidders an unfair advantage over others. It could not be engaged in litigation to defend its own rights or the rights of others, since its discussion of legal strategies should not be disclosed to its opponents (and moreover the confidentiality of its consultations and correspondence with legal counsel is recognized in law by the attorney-client privilege). It could not be planning a boycott of discriminatory merchants or a shareholders' protest, for it would not want to tip its hand before the action was ready to launch. It could not be providing "sanctuary" to Salvadoran refuge-seekers or planning an abortion "rescue" or advising young men not to register for the draft, since these activities are arguably illegal. Committees

73. Some would claim that churches and their leaders owe a duty of accountability to God alone, not to any earthly individuals, whether members or not, but this author does not share that view.

weighing personnel matters, such as hiring and firing, grievances and complaints, have a responsibility to do their work in private to protect the applicants and employees involved. Nominations should not become known until the persons proposed have been approached and have given their consent to be nominated. Even the church's evangelism goals, fund-raising plans and mission strategies could suffer if prematurely divulged.

No commercial business would be so imprudent as to announce "We have nothing to hide," since it has trade secrets, pricing decisions, personnel selections, expansion strategies, contract negotiations and many other sensitive matters to protect, but a church often deals with subjects that are potentially more delicate and more vital for human life than any business. So if a business can properly safeguard its trade secrets and other private matters, why should a church not be entitled to even greater safeguards of its internal affairs?

f. Limited Disclosure? But is disclosing internal information to a discreet government agency the same as announcing it to the public? After all, some say, the Bureau of the Census and the Internal Revenue Service have fairly good reputations for keeping confidential the information supplied them in questionnaires and tax returns. Be that as it may, a confidence shared with one other person is no longer quite a confidence. Consider two extreme cases: A Roman Catholic priest, as we have seen, is forbidden by canon law to tell anyone what he has heard in confession—*anyone*—under severe ecclesiastical sanctions; and a journalist, when asked to let a judge examine in the privacy of chambers any information claimed to be protected by a reporter's "shield law" to see if it qualifies for the privilege, will normally refuse, even if it means going to jail, because to tell even a judge who his confidential sources are is still to give away a secret that might jeopardize those sources—if, for example, the judge decides the shield law doesn't apply. So the only way to keep a secret is to *keep* it. Disclosing some materials also may "open the door" legally by waiving whatever privilege might attach in a way that would nullify an effort to refuse to disclose others.

Churches may decide in specific circumstances for prudential reasons that a given disclosure is permissible (such as consenting to an IRS audit, especially since the courts have not been upholding churches' efforts to resist IRS audits[74]), but should not automatically accede to every government demand, and those it does accept should be carried through at "arm's length," if possible, because of the constitutional issues at stake. But sometimes such circumspection is not possible. Sometimes it is the agency of law-enforcement that is lawless, and a church suffers incredible ravages despite the First Amendment, as in the following case, which happened in the United States of America, ostensibly the land of religious liberty.

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74. See on this subject Hammar, Richard, *Pastor, Church and Law*, 2d ed., (Matthews, N.C., Christian Ministry Resources, 1991), pp. 300ff.

7. The Great Church Raid of 1977

On the morning of July 8, 1977, FBI agents descended upon three premises owned by a church, one in Los Angeles, one in Hollywood, and one in Washington, D.C. At least 156 agents took part in the Los Angeles raid, said to be "the largest number of FBI agents ever mustered for a single raid."[75] Bearing a search warrant as well as walkie-talkies, sledgehammers, power drills, crowbars, buzz saws and battering rams, they entered the large, seven-story headquarters building of the church at dawn and served the warrant on the first person they met, announcing, "We're the FBI. We've got to have all these doors opened or we'll break them down." Many of the offices were locked, and the people with the keys would not be in until 9:00 A.M. By that time the FBI had broken in most of the doors, using sledgehammers rather than drills, buzz saws rather than the two expert locksmiths in their ranks. Although the warrant mentioned only the Information Office on the first floor, the raiders spread through the complex, invading every room, including private residential areas where staff families were still in bed. They rifled through every file and stack of papers they found, including records of members' confessional interviews covering nearly thirty years. At 3:00 A.M. the next morning a sixteen-ton truck was loaded nearly to the top with documents being confiscated by the government, two-thirds of which were later found to have no connection with the 161 specific items listed in the search warrant.

Meanwhile, similar raids were staged simultaneously at the other two locations, carried out in similarly heavy-handed style. All in all, the agents carried away 48,149 files containing 100,124 pages of church records. Behind them they left smashed doors, broken locks, overturned chairs, scattered papers, and dazed church people trying to put things back together, trying to understand what had happened.

What *had* happened? What dangerous desperados were set upon with such ferocity? What heinous crimes had been committed to justify such overkill? The search warrant was designed to recover documents stolen from the U.S. government. What kind of documents? Secret defense plans? National security files? Diplomatic papers of state? Nothing of the kind. The documents sought were photocopies of files, dossiers and reports *about the church itself* collected and compiled by government agencies, that the church had been trying for years to obtain under the Freedom of Information Act, which had been withheld—often illegally—by the agencies.

As a result of this raid, nine of the church's leaders were indicted for stealing federal documents, though the U.S. Attorney admitted in court that no federal documents were missing! According to the government's own account of events, several church members were employed by government agencies in Washington, D.C. ("infiltrating" the government, it was called), and they had surreptitiously

75. Garrison, Omar V., *Playing Dirty: The Secret War Against Beliefs*, Los Angeles: Ralston-Pilot, 1980, p. 129.

photocopied the files pertaining to their church and restored the originals to the proper places. Nothing of the government's was "stolen" except a few reams of photocopying paper, but the government claimed that the persons indicted were still guilty of "theft" because a court had ruled in *U.S. v. Diligio* that using government resources to copy government documents made the duplicate copies a government property and "things of value" within the requirements of the statute.

The defendants were also accused of "bugging" a meeting of IRS agents (who met in 1974 to discuss strategies to be used against the church), of illegal entry into federal offices, and of twenty-three counts of conspiracy to do these things. All of this boiled down to three basic offenses: petit larceny of government xerox paper, trespass, and electronic eavesdropping. In September 1978, the nine defendants agreed to a 282-page stipulated record of evidence prepared by the government from the admissions of a former member of the church who had been the principal actor in the photocopying of government documents and who later turned "state's evidence." The defendants agreed to be found guilty but without admitting the government's evidence was correct, and the judge sentenced them to maximum terms, beginning with five years in prison and a $10,000 fine for the "ring-leaders" and only slightly lesser penalties for the others. He also ordered them jailed immediately, denying bail during appeals, an order reversed by the Court of Appeals. This draconian treatment, like the raid itself, was obviously not proportionate to the offenses but to the wounded *amour propre* of the government.

The appeals taken by the defendants were based on the claim of illegality of the FBI raids that obtained the evidence relied on by the government. The raids were illegal, the church lawyers maintained, because the warrant was a *general* warrant rather than a proper *search* warrant required by the Fourth Amendment, "particularly describing the place to be searched, and the persons or things to be seized." In an earlier action seeking return of the materials seized in the raid, the trial judge, William T. Bryant, Chief Judge of the District of Columbia federal district court, found the warrant to be an unconstitutional *general* warrant and ordered the truckload of materials returned to the church.[76]

The warrant consisted of about six pages containing 161 descriptions of specific documents, which clearly met the criterion of "particularity," but the 162d item was remarkable:

> 162. Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice, and theft of government property in violation of 18 U.S. Code Sections 371, 1503, and 641 which facts recited in the accompanying affidavit make out.

As one FBI agent was reported to have remarked during the raid, "We always have a catch-all clause to cover anything we want to take." The affidavit referred to was

76. Garrison, *supra*, p. 181.

supplied by Special Agent Robert Tittle from information provided by the church defector, and it was essential to provide any constitutional bounds to the "catch-all clause." Yet it was *thirty-three pages long*, had not been read by many of the FBI agents carrying out the search and no copy was brought by the agents for reference during the search! Questioning of FBI agents in a court hearing on a motion to suppress the evidence seized elicited the information that they had viewed the warrant as authorization to search anywhere and everywhere and to pick up anything they thought suspicious,[77] a perfect description of a general warrant! Despite the requirements of the FBI Training Manual, that an inventory of the items seized in a raid be prepared in the presence of the person from whom the property was taken, agents admitted that no church members were permitted to observe the search and seizure or the writing of the inventory.

The mind boggles at the idea of each agent checking each item seized against the 161 items on the warrant, let alone the thirty-three pages of affidavit limiting the scope of item 162, especially when between one-half and one-third of the agents had not read the warrant, let alone the affidavit, and no copy of the affidavit was on the premises! Of course, no such thing happened. The agents simply seized anything they wanted. The warrant, certainly with respect to its execution, was indeed a general warrant, as Judge Bryant had concluded. In a later hearing, Judge Bryant held that "the agents of the United States illegally and unconstitutionally executed this warrant and converted their seizure of documents into a general exploratory seizure in violation of the Fourth Amendment...."[78]

The Court of Appeals for the District of Columbia Circuit, Judges MacKinnon, Robb and Markey sitting, reversed Judge Bryant in a brief unsigned opinion, saying that the affidavit attached to the warrant "very specifically described and designated a great many items to be seized if found on the designated premises," thus declaring the warrant not to be a general warrant and remanding to Judge Bryant for further inquiry on whether it had been properly executed. When he ruled it had not, they reversed him on that, too.

The judge who tried the nine church leaders also ruled on the legality of the FBI raid, but in a very different way than Judge Bryant. Judge Charles R. Richey, also of the District of Columbia federal district bench, found no illegality in the warrant or the agents' conduct. "The agents did not use excessive force in the course of the searches.... The behavior of the agents was eminently reasonable with respect to the timing and scope of their forcible entries—including outside doors, inside doors, filing cabinets and desks. No excessive damage was inflicted."

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77. Q. Did you seize documents that you thought showed violations of various state and local laws?

A. I believe I did.

Q. Where in the warrant does it cover violations of various state and local laws?

A. It doesn't. Ibid., p. 222.

78. Ibid., pp. 232-233.

On appeal, Judge Richey's verdict and sentences as well as his rulings on the warrant, were affirmed. The Supreme Court denied *certiorari*. Thus ended the Great Church Raid, a total victory for the state, a total loss for the church.

If any readers are in doubt as to the identity of the church in this case—not that it should make any difference on the merits of the First Amendment claims—it was the Church of Scientology, founded by L. Ron Hubbard. The lead defendant was his wife, Mary Sue Hubbard. The present leaders of the church insist that their earlier cloak-and-dagger tactics have been abandoned. Some critics have contended that this organization is not a church, but that was not an issue in the trial. The government has never contested that body's claim to be a church, and courts have followed the lead of the District of Columbia District Court, which held in 1971 that it was entitled to the protection of the First Amendment.[79] More recently five justices of the High Court of Australia unanimously held it to be a religion,[80] and this author's personal research led him to conclude that it performed the function of religion for its members.[81]

Two brief post-scripts to this section may be added:

(1) Agent Richard Schussler testified that the FBI agents were aware that the premises to be searched belonged to a church. Out of consideration for this unusual circumstance, they were told to wear suits. "They left their coats on," he said. When defense attorneys charged that the FBI did not take seriously the Church of Scientology's First Amendment rights, Judge Malcolm M. Lucas, presiding in the California end of the case, commented: "I think we have had substantial testimony to the contrary; they should be most politic about their conduct and scrupulous about the wearing of suits." The attorney for the church replied: "Oh, they took scrupulous care to have good manners and wear clothing. I am talking about the seizing and reading of documents. The First Amendment doesn't say it's okay to violate the First Amendment, if you do it in a suit and tie."[82]

(2) In May 1984, two Scientology facilities in West Germany were raided by law-enforcement agents who insisted on breaking in doors, even when offered the keys to open them.[83]

8. *Alberts v. Devine, Carroll and Barclay* (1985)

Another egregious intrusion into the internal affairs of a church was approved by the Supreme Judicial Court of Massachusetts in 1985. William E. Alberts, at one

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79. *U.S. v. Article or Device*, 333 F. Supp. 357 (D.D.C., 1971), discussed at IIB6c.

80. High Court of Australia, *Church of the New Faith v. Commissioner for Payroll Tax*, October 27, 1983.

81. Study made at the invitation of the Church of Scientology in 1980, published by the Church of Scientology, 1996.

82. Garrison, *supra*, p. 195.

83. Another sequel, with much more tragic consequences, is treated in the last portion of this volume, dealing with "The Annihilation of Autonomy" at Waco, Texas, in 1993.

time an ordained minister of the United Methodist Church, brought suit against Donald T. Devine, a psychiatrist whom he had consulted; Edward G. Carroll, resident bishop of the Boston Area of the United Methodist Church; and John E. Barclay, superintendent of the Greater Boston District of the Southern New England Annual Conference of that church, the last two being Alberts' former ecclesiastical superiors.

Alberts charged in his complaint that Bishop Carroll and District Superintendent Barclay visited Dr. Devine to obtain information about Alberts' mental condition, and did obtain such information, which they subsequently used to his detriment. Allegedly as a result of this interview, Bishop Carroll gave information about Alberts to the Conference Relations Committee of the Board of Ministry of the Southern New England Annual Conference, which recommended that Alberts be given disability leave for one year, or—if that was not acceptable to him—"supernumerary relationship," which would provide no financial remuneration and no pension claim, but would leave his ordained status in the conference intact. If Alberts declined both of those options, he was to be "given involuntary location," which would remove his ministerial status in the church.[84]

The Southern New England Annual Conference, in executive session, approved the recommendation for involuntary location, whereupon William Alberts was no longer eligible for appointment to the pulpit he had been serving, Old West Church in Boston, and was left "at liberty" without a "situation" (not Methodist terminology). His legal complaint charged that Carroll and Barclay had procured a violation of his privacy by inducing the disclosure of his psychiatric diagnosis, condition, behavior or treatment, had divulged it to numerous members of the Annual Conference, had expressed to the public and to news reporters the bishop's belief that Alberts was "mentally ill and therefore unappointable" and had thereby rendered him unemployed, causing him "considerable loss of earning capacity, other financial losses, damage to his reputation, and great mental anguish requiring medical treatment."[85]

The bishop and the district superintendent, in their answers, offered the defense that their "alleged actions..., if taken at all, were taken pursuant to their duties and authority as [Alberts'] superiors in the hierarchy of the United Methodist Church and as such are privileged and immune from inquiry by this Court under the First and Fourteenth Amendments of the United States Constitution." They filed a motion for a protective order against any subpoenas by Alberts, or any disclosure at trial of evidence, depositions or documents of the United Methodist Church, and the trial judge granted their motions. Before proceeding to trial, she reported several questions of law to the Appeals Court, including two pertaining to the clergy defendants: "(3) Whether the actions of... Barclay and Carroll are within the ambit of the privileges

84. For explanation of these Methodist terms, see § F1, n. 2, above.

85. *Alberts v. Devine*, 395 Mass. 59 (1985).

and immunities granted by the First and Fourteenth Amendments...; and (4) Whether [the judge] properly invoked the First Amendment in entering the protective order for [those] defendants....” Without waiting for the Appeals Court to rule, the Supreme Judicial Court of Massachusetts transferred the case to its own docket “on our own initiative.”

The Supreme Judicial Court announced that “a duty of confidentiality arises from the physician-patient relationship and that a violation of that duty, resulting in damages, gives rise to a cause of action sounding in tort against the physician.”

> It is true, as Devine argues, that no Massachusetts case before this one recognizes such a theory of liability. However,...[that] is true only because the precise question has never been presented to this court for decision.... No litigant is automatically denied relief solely because he presents a question on which there is no Massachusetts judicial precedent.... [F]or so palpable a wrong, the law provides a remedy.

The court also recognized a cause of action for the inducement of such a violation.

> We hold that one who, with the state of mind we describe below, induces a physician wrongfully to disclose information about a patient, may be held liable to the patient for the damages that flow from that disclosure....
>
> The principle we announce is but an application of the general rule that a plaintiff may hold liable one who intentionally induces another to commit any tortious act that results in damage to the plaintiff.

The court turned to the question whether the First Amendment shielded Carroll and Barclay from the consequences that might otherwise follow from the previous two holdings.

> We begin with the recognition that the First Amendment prohibits civil courts from intervening in disputes concerning religious doctrine, discipline, faith, or internal organization.[86] Carroll and Barclay claim that, as Alberts's clerical superiors, they had the duty to obtain information about Alberts's mental and emotional well-being, and that the Book of Discipline of the United Methodist Church privileged them to seek such information from Devine. They argue that the principle enunciated in the cases cited above precludes judicial inquiry into the merit of Alberts's claims against them and into the process by which the members of the church voted to retire Alberts. We disagree.
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> It is clear that the assessment of an individual's qualifications to be a minister, and the appointment and retirement of ministers, are ecclesiastical matters entitled to constitutional protection against judicial

86. Citing *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); all discussed under § B above.

or other State interference.[87] However, this case does not involve the propriety of the United Methodist Church's refusal to reappoint Alberts as minister of the Old West Church. Nor does this case involve Alberts's qualifications to serve as a minister. A controversy concerning whether a church rule grants religious superiors the civil right to induce a psychiatrist to violate the duty of silence that he owes to a patient, who happens to be a minister, is not a dispute about religious faith or doctrine nor about church discipline or internal organization. Nor is a controversy concerning the causal connection between a psychiatrist's disclosure of confidential information and a minister's failure to gain reappointment such a dispute.

Even if the First Amendment precludes judicial inquiry as to whether a church rule provided that Carroll and Barclay had the right to seek medical information from Alberts's psychiatrist, so that the court must assume in Carroll's and Barclay's favor the existence of a church rule granting that right, it does not follow that the religion clauses preclude the imposition of liability on Carroll and Barclay. Although the freedom to believe "is absolute," the freedom to act "cannot be." Conduct remains subject to regulation for the protection of society.... Obviously, the imposition of liability on Carroll and Barclay for inducing a violation of Devine's duty to Alberts would inhibit such conduct. We must determine whether such inhibition burdens the free exercise of religion..., and if it does, we must then determine whether the Commonwealth possesses an interest sufficiently compelling the burden.

As we have observed, churches have a significant interest in assessing the qualifications of their ministers, and in appointing and retiring them. But, in view of the freedom that ecclesiastical authorities and church members have to determine who the church's ministers will be, and in view of the numerous sources of relevant information available to assist those making such determinations—other than information available only from a minister's physician—a rule that prevents interference with physician-patient relationships will have little impact on the free exercise of religion. On the other hand..., public policy strongly favors judicial recognition of a physician's duty to honor the confidentiality of information gained through the physician-patient relationship. We conclude, therefore, that... the First Amendment does not preclude the imposition of liability on those defendants. We also conclude that the First Amendment does not bar judicial inquiry into the church's proceedings culminating in Alberts's failure to gain reappointment...in order to determine whether that event resulted from wrongful conduct of the defendant. Accordingly, the First Amendment does not present an obstacle to Alberts's right to discovery and trial evidence bearing on that issue. This litigation in no sense involves repetitious inquiry or continuing

87. Citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Archbishop*, 280 U.S. 1 (1929), discussed in §§ B and D above.

> surveillance that would amount to the excessive entanglement between government and religion that the First Amendment prohibits.
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> * * *
>
> Therefore, we... reverse the grant of summary judgment in favor of Carroll and Barclay..., vacate the protective order entered below, and remand this case to the Superior Court for further proceedings not inconsistent with this opinion.[88]

The Supreme Judicial Court of Massachusetts had divided the free exercise inquiry into two parts: (1) "[D]o the religion clauses preclude the imposition of liability on Carroll and Barclay?" and (2) "[I]n connection with Alberts's proof of damages, may the court constitutionally inquire into the church's proceedings that resulted in Alberts's failure to gain reappointment...?" In answering the first question, it utilized the two-step analysis of *Sherbert v. Verner*[89]—(a) is there a burden on religious practice? and (b) if so, is it outweighed by a compelling state interest? (It did not reach step (c)—that can be served in no less burdensome way.)

Bishop Carroll and his aide, District Superintendent Barclay, claimed that their actions were immune, not only from liability, but from judicial scrutiny because they were carrying out duties of ecclesiastical supervision authorized by the rule of their religious body. The excerpts from those rules that they adduced in support of their argument are very general, such as would govern any supervisor-supervisee relationship. Those rules did not stipulate that the supervisor shall—or even should—inquire of the supervisee's physician as to the supervisee's condition or prognosis *without the supervisee's consent*. Even if they did, such stipulation would not be binding on a civil court. It would indicate only the duty or obligation assigned to, or felt by, the supervisor in carrying out the activities complained of. More to the point, there was nothing in the material cited by the defendants that would constitute an explicit or implied consent or waiver by the supervisees for their supervisor(s) to make such inquiries or their physician(s) to answer them (and the physician(s) would not be bound by such ecclesiastical rules in any case). So the contention by the bishop and the district superintendent that they were only carrying out their ecclesiastical responsibilities is unpersuasive, especially as the bishop made a tape-recording of his interview with the psychiatrist without the latter's knowledge or consent,[90] reminiscent of the conduct of the government reprobated (by this author) in the "sanctuary" cases![91]

Even if a blanket advance waiver of the kind hypothesized above *were* written into church law, it well might not be enforceable in civil courts as being contrary to public policy. Only a personal and particularized consent given by each individual with

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88. *Alberts v. Devine, supra*.

89. 374 U.S. 398 (1963), discussed at IVA7c.

90. Correspondence between Devine and Carroll, August 1973, Respondent Alberts' Appendix to Brief in Opposition to Petition for Writ of Certiorari, 1985.

91. See *U.S. v. Aguilar* and *Presbyterian Church v. U.S.*, discussed at § 6 above and IVB3b and d.

reference to a specified inquiry of a named physician at a stated time on an identified subject should suffice to waive that person's right to privacy against supervisory snooping. So the bishop and the district superintendent may have been acting *ultra vires*—beyond the range of their legitimate authority—and thus personally liable to the defendant.

The second question is much more troubling. Even if the hierarchs in this instance were liable, did that open up the internal deliberations of the church to plaintiff's discovery and the court's scrutiny? The justification given by the court was not that such an inquiry might determine liability on the part of the church but that it would merely help to determine the extent of the damage done the plaintiff by the named defendants. The essential nature of that inquiry would turn on what part (if any) the information obtained from the psychiatrist played in the decision(s) made by the several church judicatories to terminate the plaintiff's tenure as a minister.

Bishop Carroll, in his deposition testimony, stated that Dr. Devine had commented to him, "Well, Bishop, you're dealing with paranoia of the self-destructive type."[92] That was the only derogatory information ascribed to Dr. Devine in the record, and it certainly wouldn't be unheralded news to the bishop or the other clergy trying to deal with the Alberts situation. Suppose that this—or some more damning information from Dr. Devine—had been imparted by the bishop to the Cabinet (the body composed of the bishop and the district superintendents that is responsible for sorting out the ministerial appointments in the Conference), the Conference Relations Committee, the Board of Ministry and/or the ministerial members of the Annual Conference. The duty of the Superior Court assigned by the Supreme Judicial Court would be to determine what part that information played in the ultimate outcome adverse to Alberts. To perform that duty, the Superior Court could authorize discovery by the plaintiff of what went on in those deliberations—meetings that are confidential as to anyone not entitled to be present, even other ministers (in the first instances) and all lay members of the church (in the last).

The plaintiff, armed with subpoenas and court orders, could then search through the minutes of the several bodies and interview the participants therein under threat of contempt of court for failure to respond or of prosecution for perjury for failure to respond fully and truthfully. Participants could plead failure of memory about details of events that occurred at least twelve years before, but some participants may have been favorable to Alberts' side of the case and might remember what others forgot. The plaintiff and any sympathizers he might have would seek to obtain evidence that information attributable to Dr. Devine, by way of Barclay and Carroll, was instrumental, if not dispositive, in the outcome, whereas others would seek to minimize its weight. One natural way to do this would be to recall other information and other considerations that affected the outcome, independent of Dr. Devine's comments, of which there probably was quite a bit.

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92. *Carroll and Barclay v. Alberts and Devine*, petition for *certiorari*, 1985.

Rev. Alberts was not an obscure or universally esteemed member of the conference. He had his enemies and critics as well as his supporters and friends. One of his widely noticed deeds was to perform a purported form of "marriage" of a homosexual couple, and this "gay wedding" made a splash in the press and in church circles. Members of the church's committee, board, and conference dealing with questions of Alberts' status in the ministry brought to the discussion their own impressions, antipathies, affinities and prejudices, as anyone does in such a situation. In most such deliberations in the church, most participants would try to put aside their animosities, if any, and decide what would be best for the church and for the individual under discussion. But among the data discussed around the table, there were undoubtedly many and varied contributions from colleagues who knew various aspects of Alberts' work better than did Dr. Devine, who knew only what Alberts told him. It is likely that they did not need any diagnosis or prognosis from Dr. Devine to guide them in their decision about Alberts. They may have had ample grounds for what they decided without any input from psychiatry, and it would certainly be to the interest of the bishop—and the church—to bring that to the court's awareness.

But hold! Each new datum reported that added an independent nail to Alberts' career coffin would open up for him a new and promising avenue of further tort liability! So Rev. Blank recalled that Bill Alberts had once said such-and-such to so-and-so in Blank's parish, which showed that he was unfit for the ministry; did that not make Rev. Blank a fine target for a new action in defamation? If such considerations stanched the flow of memory, Alberts' prospects in the Devine case brightened; if they led to further adverse revelations, his prospects for additional litigation opened up. Either way he prospered.

Bishop Carroll and District Superintendent Barclay petitioned the Supreme Court of the United States to hear the case, and their petition was supported by the National Council of Churches, urging the Supreme Court to draw to the attention of the Massachusetts Supreme Judicial Court the teaching of *Serbian Eastern Orthodox Diocese v. Milivojevich* that civil courts are not to second-guess ecclesiastical tribunals on how they handle their own internal affairs:

> [C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly require the church adjudicatory [*sic*] to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But *this is exactly the inquiry that the First Amendment prohibits*; recognition of such an exception would undermine the general rule that religious controversies

> are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.[93]

Is a civil court really equipped to determine what factors should properly be taken into account in determining the competence of a clergyman to continue in ministry, and how much each factor should weigh? Should it conclude that Dr. Devine's (supposed) characterization of Alberts as a "self-destructive paranoid" weighed more than Alberts' performing a "gay marriage"—or less? That both were outweighed by some favorable report that was not sufficiently appreciated by the Conference Relations Committee? The Committee and the Board were composed of ministers chosen for those assignments by their peers and experienced in performing them. They knew as well as anyone—and better than any civil court—what qualities make a suitable pastor and what qualities do not, and how to weigh the latter against the possibilities of salvage or improvement.

The gravamen of the issue assigned to the Superior Court was to determine the amount of damages, if any, to be awarded Alberts to indemnify him for the harm done by the imparting to these church groups of information disclosed by his psychiatrist because of the part played by that information in their reaching a decision adverse to his interests. Yet that task would require the court to trace the process and evaluate the merits of the content of ecclesiastical deliberations on the most sensitive and delicate questions at the heart of the internal affairs of a religious body. Nothing a court could do would be more intrusive than that! But the Supreme Court declined to grant the petition,[94] perhaps expecting that any serious errors could be corrected after the lower courts had completed their work. The Supreme Court often withholds its hand in such circumstances, letting the lower courts proceed and not interfering until after the damage is done, if at all. By that time, it may be too late to put the matter right.

It is well known that denial of *certiorari* does not imply approval of the lower court's decision, but Alberts' attorney, Robert Doyle, was quoted as asserting, "It's an indication that they thought the state court decided it correctly. Now, the Massachusetts case can be cited in other states."[95] (At least the latter sentence was true.) Perhaps to avoid the scenario sketched just above, the church officials settled out of court. So Alberts won his settlement, the Supreme Court never had the opportunity to rectify the state court's decision (if it would have wanted to do so) and that decision will indeed be cited by other courts, to the hurt of churches and the curtailment of the scope of the Free Exercise Clause.

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93. *Serbian Diocese, supra*, emphasis added.

94. *Carroll v. Alberts*, 474 U.S. 1013 (1985). The order stated that Justices Brennan and White would have granted certiorari.

95. *Boston Globe*, Dec. 9, 1985.