Catholic Sisters, Irregularly Ordained Women And The Clergy-Penitent Privilege*

I. INTRODUCTION

In the last few years there has been a dramatic expansion of ministerial roles within Christian churches. Perhaps one of the most visible changes has been on the part of Catholic sisters.[1] Many sisters have put aside their eighteenth century garb and their protective cloister to become immersed in ministry to people in various lifestyles. Sisters involved in these new ministries serve many of the same functions as do priests; however, they are not recognized by their church as members of the clergy.[2] On the whole the people whom these sisters serve do not make the fine ecclesiastical distinctions between clergy and non-clergy but rather look to the service the sisters perform. An individual will often confide in and seek counsel from a sister when that same individual is reluctant to confide in a priest. A deep confidential relationship between a sister and an individual may lead to personal revelations in time of trouble. Should a court have access to these revelations since a sister is not classified as a

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[1] Women religious, sisters and nuns all have the same colloquial interpretation. However, sisters and nuns are actually two types of women religious. CANON 488 N.7 limits the term "nun" to a "religious woman professed of solemn vows or of simple vows, temporary or perpetual, in a monastery in which solemn vows are actually or should be taken; and in which at least the minor papal cloister is observed." In the same canon a religious sister is defined as a "religious woman professed of simple vows, temporary or perpetual, in a religious congregation." The practical effect ot the two definitions is that nuns are primarily contemplative while religious sisters [hereinafter called sisters] lead an active yet prayerful life. Ryan, *Sisters, Religious*, 13 NEW CATHOLIC ENCYC. 261 (1966); Ryan, *Nun*, 10 NEW CATHOLIC ENCYC. 575 (1966).

[2] In the Catholic Church, only those members who have taken a formal, ceremonial step, called minor orders, in the process of preparation for ordination as a priest are considered to be members of the clergy. Kelleher, *Clerical State (Canon Law)*, 3 NEW CATHOLIC ENCYC. 948. Sisters are not in the process of preparing for ordination and, therefore, are not members of the clergy.

member of the clergy by her church? Or should the sister be able to claim the clergy-penitent privilege since she is functioning in a clerical role?

Another dilemma is created when a person, ordained in defiance of a church's governing body, serves a congregation as a member of the clergy and claims the clergy-penitent privilege.[3] Is the fact that a congregation recognizes these irregularly ordained people as members of the clergy sufficient to bring them within the protection of the clergy-penitent privilege? Or would a court determine that since they are not recognized by the bishops, they are not members of the clergy as defined in the statutes?

This article explores these two concerns about the clergy-penitent privilege. The first section briefly surveys the history of the expanding application of this privilege as well as its principles. The California clergy-penitent privilege, which has been broadened considerably since its enactment in 1851, is analyzed in the second section. The third section discusses the problems associated with the Federal Rules of Evidence[4] which leave all privileges to the common law determination of the federal courts. The fourth section discusses the application of the privilege to sisters and irregularly ordained women. This application raises both policy questions and first amendment free exercise of religion questions. The fifth section recommends that the privilege be explicitly extended to sisters and irregularly ordained women by redefining the term "clergyman."

II. RATIONALE AND HISTORY OF THE CLERGY-PENITENT PRIVILEGE

The clergy-penitent privilege was initially a governmental response to the tension that existed between the Catholic church-mandated secrecy of the confessional[5] and the State's need for testimony in court proceedings. The State apparently first deferred to the Catholic

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[3] An example of such irregularly ordained members of the clergy are the eleven Episcopalian women ordained in 1974. *See* text accompanying notes 105-06 *infra*.

[4] 28 U.S.C. FED. R. EVID. 101 et seq. (1975).

[5] The ecclesiastical law of the Catholic Church that precipitated the grant of the clergy-penitent privilege is known as the "Seal of Confession." In 1917 the law was codified with other ecclesiastical regulations in CANON 889. The canon states: "The Sacramental seal is inviolable. Consequently the confessor must exercise all diligent care not to betray the penitent in any degree by word, sign or in any other way or for any cause whatsoever." The purpose of this seal is to protect the penitent and the sacrament. The penitent is protected from ridicule and ostracism after repenting. The sacrament is protected from abuse by those who, out of fear, lied and would not make a true peace with God. This practice of secrecy became the norm in the 13th century and has been the practice in the Catholic Church ever since. *See In re* Estate of Soeder, 220 N.E. 2d

Church's demands for secrecy in pre-sixteenth century England.[6] However, after the English Reformation in 1530, Roman customs were eliminated from the Church of England, and the sacrament of confession fell into disuse. As State interests became dominant, the privilege was abandoned by the courts.[7] It was not until the mid-nineteenth century that the privilege was once again recognized in England.[8]

The original thirteen states effected a separation of Church and State that was unknown in English law. This principle, embodied in the first amendment, provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .[9]

The amendment creates an inherent tension: to protect the free exercise of religion is often to aid in its establishment.[10] This tension is reflected in the clergy-penitent privilege: to grant the privilege is to aid in the establishment of religion by protecting communications to members of the clergy; to deny the privilege is to prohibit the free exercise of religion by forcing the violation of the church law of some congregations.

In 1813, a New York court first addressed the conflict between church-mandated secrecy and the court's need for testimony.[11] In a criminal case, the court held that a Roman Catholic priest was not required to reveal who had given him the stolen goods which he had returned to their rightful owner. The priest claimed that such a revelation was against his moral and ecclesiastical obligations, since it would violate the secrecy of the confessional. The court stated that the federal constitution was enacted to protect against all types of religious oppression and tyranny. In the light of this protection, the court held that the Catholic priest did not have to violate his conscience and his church's law by testifying in court.[12]

547, 568 (Ohio 1966).

[6] *See* Hogan, *A Modern Problem on the Privilege of the Confessional*, 6 LOYOLA L. REV. 1, 7-13 (1951).

[7] Allred, *United States Law of Privileged Communications*, 11 NEW CATHOLIC ENCYC. 810 (1966); Hogan, *supra* note 6, at 12.

[8] *See* Regina v. Griffin, 6 Cox Crim. Cas. 219 (1853). A clergy member declined to testify to a conversation he had had with the defendant who was charged with the murder of her child. The court, in excluding his testimony, analogized the reason for the exclusion to the attorney-client privilege. The court noted that without unfettered disclosure the penitent, like the client, would not receive proper assistance.

[9] U.S. CONST. AMEND. I.

[10] Shetreet, *Exemptions and Privileges on the Grounds of Religion and Conscience*, 62 KY. L.J. 377, 391 (1974); Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege — The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27, 40-42 (1967).

[11] People v. Phillips, N.Y. Court of General Sessions (1813), reprinted 1 WESTERN L.J. 199 (1943).

[12] *Id.* at 112-13.

Four years later, however, another New York court permitted a Protestant minister to reveal the name of a person who had confessed a murder to him even though the defendant objected to the testimony. The court found controlling the fact that the minister was not bound by the law of his church to keep the confession secret.[13] Arguably, this pair of decisions constituted an "establishment" of the Catholic Church and any other church with an express obligation of secrecy because it conferred a privilege exclusively to their clergy. Therefore, it violated the first amendment prohibition against the establishment of any religion.[14] This problem was resolved by the New York legislature when it passed the first clergy-penitent privilege statute in 1828. The statute provided:

> 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 the discipline enjoined by the rules or practice of such denomination.[15]

The courts in interpreting the statute did not focus on the fact that the Catholic Church was the only church that has a strict discipline of confession. Rather the courts focused on the phrase "minister . . . or priest of any denomination" and expanded the privilege to include non-Catholic clergy.[16] This New York statute became the model for most of the early clergy-penitent privilege statutes in this country.[17]

Presently, only Alabama, Mississippi and New Hampshire do not have a statutory clergy-penitent privilege. In addition, the Alabama and Mississippi courts have expressly declined to create such a privilege.[18] Of the remaining jurisdictions, more than half first enacted or

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[13] Christian Smith's Case, 2 N.Y.C. REC. 77, 80 (1817).

[14] The court did not discuss the constitutional issue in Christian Smith's Case. *Id.*

[15] N.Y. REV. STAT. 1828, Pt. 3, c. 7, tit. 3 § 72 (now N.Y. CIV. PRAC. LAW § 4505).

[16] Kuhlmann, *Communications to Clergymen — When are They Privileged?*, 2 VAL. U. L. REV. 265, 269 (1968).

[17] *Id.* at 268.

[18] Killingsworth v. Killingsworth, 283 Ala. 345, 217 So. 2d 57 (1968). The Alabama court held that a trial judge should have instructed a Protestant minister to testify in a divorce proceeding. The court stated that since there was no statutory or common law privilege in Alabama for communications to clergy or spiritual advisers, the court could not create one.

Barnes v. State, 199 Miss. 86, 23 So. 2d 405 (1945). The Mississippi court held that it was not error for the trial court to admit the testimony of a minister who testified that the defendant had told him that he had killed his wife. This evidence was admitted in a trial of the defendant for the murder of another person who had died as the result of the same act. The evidence was admitted even though it was communicated in confidence to the minister. *See* Note, *Privileged Communications Between Clergy and Penitent — Need for a Statute in Mississippi*, 39 MISS. L.J. 324 (1968).

Other state legislatures have responded to the courts' failure to create a common law clergy-penitent privilege. The Texas appellate court noted in Biggers v. State, 358 S.W.2d 188 (Texas Crim. App. 1962) that there was no professional privilege for members of the clergy in Texas. In 1974, the legislature enacted the

significantly revised their clergy-penitent privilege statute within the last twenty years.[19] The reasons for this action are not readily dis-

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statute that now provides such a privilege. TEX. CIV. STAT. ANN. § 3715a (Vernon Supp. 1975). A North Carolina Court strictly construed a clergy-penitent privilege statute in a criminal case denying the privilege to a clergy claimant. *In re* Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918 (1967). Later that year, the legislature expanded the privilege to include a situation like that in *Williams*. N.C. GEN. STAT. § 8-53.2 (1969). *See* Note, *Evidence — Privileged Communications — The New North Carolina Priest-Penitent Statute*, 46 N.C.L. REV. 427 (1968).

[19] For the purposes of this article, a privilege statute modeled on the original New York statute, see text accompanying note 15 *supra*, is considered a narrow phrasing of the privilege since it limits the type of communication to "confessions" and the members of the clergy to ministers of the gospel or priests. Those states whose current clergy-penitent privilege follows this narrow model and were enacted prior to 1955 are: Arizona, enacted in 1939, ARIZ. REV. STAT. ANN. § 12-2233 (1956); Idaho, enacted 1881, IDAHO CODE § 9-203 (Supp. 1975); Kentucky, enacted 1952, KY. REV. STAT. ANN. § 421.210(4) (1969); Missouri, enacted 1939, MO. ANN. STAT. § 491.060(4) (Vernon 1952); Montana, enacted 1921, MONT. REV. CODES ANN. § 93-701-4(3) (1974); North Dakota, enacted 1943, N.D. CENT. CODE § 31-01-06 (1960); Ohio, enacted 1954, OHIO REV. CODE ANN. § 2317.02 (1954); Oklahoma, enacted 1953, OKLA. STAT. tit. 12, § 385 (1960); Oregon, enacted 1862, ORE. REV. STAT. § 44.040(C) (1961); Utah, enacted 1943, UTAH CODE ANN. § 78-24-8(3) (1953); Vermont, enacted 1947, VT. STAT. ANN. tit. 12, § 1607 (1973); Washington, enacted 1881, WASH. REV. CODE ANN. § 5.60.060(3) (Supp. 1975); West Virginia, enacted 1923, W. VA. CODE ANN. § 50-6-10(d) (1966); Wyoming, enacted 1945, WYO. STAT. ANN. § 1-139 (1959).

Those states that have enacted a similarly narrow statute since 1955 are: Alaska, enacted 1966, ALASKA R. CIV. P. 43(h)(3); Arkansas, enacted 1969, ARK. STAT. ANN. § 28-606 (Supp. 1975); Colorado, enacted 1963, COLO. REV. STAT. ANN. § 13-90-107 (1974); Nevada, enacted 1971, NEV. REV. STAT. § 49,255 (1973); South Dakota, enacted 1960, S.D. COMPILED LAWS ANN. § 19-2-2 (1969).

Three states have clergy-penitent privilege statutes that have expanded the content of a privileged communication to include admissions or confidences seeking sprirtual advice or consolation but have not expanded the definition of clergy member. There three states are: Indiana, enacted 1881, IND. ANN. STAT. CODE § 34-1-14-5 (1973); Louisianna, enacted 1828, LA. REV. STAT. ANN. § 15:477 (1967); Maryland, enacted 1957, MD. ANN. CODE art. 35, § 13 (1971).

Two states have expanded the definition of clergy members who may receive privileged communications without expanding the permissible content of the privileged communication. Maine, enacted 1965, ME. REV. STAT. ANN. tit. 16, §§ 57, 58 (Supp. 1975); Michigan, enacted 1962, MICH. STATS. ANN. § 27A.-2156 (1962).

The remaining jurisdictions have both a broad definition of the privileged communication and clergy member who may receive such communications. Of these states, only three enacted the statute prior to 1955. Delaware, enacted 1953, DEL. CODE ANN. tit. 10, § 4316 (1975); Georgia, enacted 1951, GA. CODE ANN. § 38-419.1 (1974); Minnesota, enacted 1931, MINN. STAT. ANN. § 595.02(3) (Supp. 1975). The states that passed a broad privilege statute after 1955 are: California, enacted 1965, CAL. EVID. CODE §§ 1030-34 (West 1968); Connecticut, enacted 1967, CONN. GEN. STAT. ANN. § 52-146b (Supp. 1975); Florida, enacted 1959, FLA. STAT. § 90.241 (1960); Hawaii, enacted 1972, HAWAII REV. STAT. § 621-20 (Supp. 1975); Illinois, enacted 1961, ILL. REV. STAT. ch. 51, § 48.1 (1966); Iowa enacted 1974, IOWA CODE ANN. § 622.10 (Supp. 1975); Kansas, enacted 1963, KAN. STAT. ANN. § 60-429 (1964); Massachusetts, enacted 1962, MASS. GEN. LAWS ANN. ch. 233, § 20A (Supp. 1975);

cernable. Perhaps one moving force has been the legislators' acknowledgement of a need for, as well as an interest in, protecting the privacy and sacredness of religious communications.[20]

Under each statute, the same question arises: What communications are privileged? There is little correlation between the language of the states' statutes and their judicial interpretation. Under a broadly worded privilege statute,[21] the Iowa court allowed a minister to testify to only that portion of a confidential conversation he had had with the defendant that did not relate to the seeking or giving of spiritual advice.[22] A Michigan court, under a more narrowly drawn statute,[23] excluded even the mention of any conversation between the minister and the penitent when part of that conversation concerned the seeking of spiritual advice. The court said that the mere mention of such a conversation would have a devastating impact on the jury.[24] A Kentucky court held that a narrow statute[25] mandated

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Nebraska, enacted 1975, NEB. REV. STAT. § 27-506 (Supp. 1975); New Jersey, enacted 1960, N.J. STAT. ANN. § 2A:84A-23 (1976); New Mexico, enacted 1971, N.M. STAT. ANN. § 20-4-506 (Supp. 1975); New York, enacted 1965, N.Y. CIV. PRAC. LAW § 4505 (McKinney Supp. 1975); North Carolina, enacted 1969, N.C. GEN. STAT. § 8-53.2 (1969); Pennsylvania, enacted 1959, PA. STAT. ANN. tit. 28, § 331 (Supp. 1975); Rhode Island, enacted 1960, R.I. GEN. LAWS ANN. § 7-17-23 (1970); South Carolina, enacted 1959, S.C. CODE ANN. § 26-409 (1962); Tennessee, enacted 1959, TENN. CODE ANN. § 24-109 (Supp. 1975); Texas, enacted 1967, TEX. REV. CIV. STAT. ANN. § 3715a (Vernon Supp. 1975); Virginia, enacted 1962, VA. CODE ANN. § 8-289.2 (Supp. 1974); Wisconsin, enacted 1974, WIS. STAT. ANN. § 905.06 (1975).

[20] Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 60 (1963).

[21] The Iowa statute provided:

> No . . . minister of the gospel or priest of any denomination shall be allowed, in giving testimony, to disclose any *confidential communication* properly entrusted to him in his professional capacity, and *necessary and proper to enable him* to discharge the functions of his office according to the *usual course of practice* or discipline.

Quoted in State v. Brown, 64 N.W. 277, 278 (1895) (emphasis added).

[22] State v. Brown, 95 Iowa 381, 64 N.W. 277 (1895). The minister met the defendant in the train station. After an initial exchange, the defendant tried to justify his actions during the rape of which he was accused. After the explanation, the defendant sought spiritual advice from the clergy member.

[23] The Michigan statute provided:

> No minister of the gospel or priest of any denomination whatsoever, or duly accredited Christian Science Practitioner, shall be allowed to disclose any *confession* made to him in his professional character, in the course of *discipline enjoined* by the rules or practice of such denomination.

Mich. Stats, Ann. § 27A.2156 (1962) (emphasis added).

[24] Wirtanen v. Prudential Co. of America, 27 Mich. App. 260, 183 N.W.2d 456 (1970).

[25] The Kentucky statute provided:

> . . . Nor shall a clergyman or priest testify concerning any *confession* made to him, in his professional character, in the *course of the discipline* enjoined by the church to which he belongs, without consent

that a minister testify about a communication made to him when it was not shown to be penitential.[26] The Iowa court under a broad statute[27] held that a communication did not have to be penitential to be privileged. The court held that it only had to be made to a minister of the gospel with the expectation that it would be kept confidential.[28]

Recent legislation does not limit the privilege to communications to ministers involved in a religious discipline,[29] but rather grants the privilege to confidential communications where there exists a prior sacred or moral trust.[30] In keeping with this trend, a few courts have stated that when a member of the clergy acts as a spiritual counselor, communications from the individual are privileged because they are considered sacred communications.[31] In the last thirty years, five states have explicitly incorporated the concept of spiritual counseling or advice into their statutory clergy-penitent privilege.[32]

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of the person confessing.
Law of March 15, 1898, ch. 1, § 4, [1898] Ky. Laws 6 (emphasis added).

[26] Johnson v. Commonwealth, 310 Ky. 557, 221 S.W.2d 87 (1949). A Methodist minister was asked if, when he was visiting the defendant in jail, the defendant had said to him "I lost my temper and I killed him." The court found the communication not to be penitential because there was no evidence that it was an expression of a sense of guilt, nor that it was done as part of the practice of the Methodist Church.

[27] *See* note 21 *supra.*

[28] Reutkmeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917). In a paternity suit, the court assumed that the statements of the plaintiff, while not found on the record because they were held to be privileged, concerned the identity of the father of the child. These statements were made to three elders of the church who were not ordained, but had made a life commitment to serving on the governing board of the church.

[29] "Religious discipline" has been interpreted by courts to encompass an official practice within a church, *e.g.*, sacramental confession. *See In re* Swenson, 183 Minn. 602, 237 N.W. 589 (1931). *See also* Knight v. Lee, 80 Ind. 20 (1881); Johnson v. Commonwealth, 310 K6. 557, 221 S.W.2d 87 (1949); *In re* Murtha, 115 N.J. Super. 380, 279 A.2d 889 (1971).

[30] *E.g.*, TEX. CIV. STAT. ANN. § 3715a (Vernon Supp. 1975). *See* E. CLEARY et al., MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 77, at 158 (2d e. 1972) [hereinafter cited as MCCORMICK (2d ed.)]. McCormick states that the "sacred and moral trust" terminology is an extension from the "enjoined by the religious discipline" limitation.

[31] Kruglikov v. Kruglikov, 29 Misc. 2d 17, 217 N.Y.S.2d 845 (1961). The court held that the communications between a rabbi and a married couple in counseling were protected by the privilege statute even though neither the husband nor the wife was a member of the rabbi's congregation. In LeGore v. LeGore, 31 D. & C. 2d 107 (Pa. 1963), the court held that counseling leading to marriage reconciliation was subject to the clergy-penitent privilege statute because such counseling was valuable and confidentiality was essential. In Pardie v. Pardie, 158 N.W.2d 641 (Iowa 1968), the court held that a minister did not have to testify to conversations about family problems.

[32] *See* MD. ANN. CODE, art. 35, § 13 (1971); MASS. GEN. LAWS ANN., ch. 233, § 20A (Supp. 1975); MINN. STAT. ANN. § 595.02(3) (Supp. 1975); N.Y. CIV. PRAC. LAW § 4505 (McKinney Supp. 1975); TENN. CODE ANN. § 24-109

Thus, among the states, there are wide differences in the application of the clergy-penitent privilege from the strict sacramental confession to the more inclusive category of spiritual counseling. It is in this setting that the clergy-penitent privilege in California takes its shape and meaning.

III. THE CALIFORNIA CLERGY-PENITENT PRIVILEGE

A. THE 1851 AND THE 1965 STATUTES

In 1851 California adopted its first clergy-penitent privilege statute, modeled on the New York code provision. The California law stated:

> A clergyman or a priest shall not, without the consent of the person making the confession, be examined as a witness to any confession made to him in his professional character, in the course of the discipline enjoined by the church to which he belongs.[33]

In 1933, the code section was expanded to include "religious practitioners of an established church."[34] This slight expansion of the traditionally narrow statute included Christian Science practitioners as members of the clergy. However, the type of communication privileged was narrowly restricted to confessions that were part of the discipline[35] of the cleric's church.[36]

In 1965, the California legislature redefined and expanded the clergy-penitent privilege. The privilege as set out in sections 1030-34 of the Evidence Code,[37] provides for a privilege in both the penitent and the member of the clergy. Either or both parties can claim as privileged any confidential communication made in a customary religious setting to the member of the clergy. The clergy member cannot waive the privilege unless the penitent does; however, the clergy member may claim the privilege although it is waived by the penitent.

The first two code sections define the parties to a privileged communication. The code defines "clergyman" broadly:[38]

> As used in this article, "clergyman" means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization.[39]

(Supp. 1967).

[33]Law of May 1, 1851, ch. 123, § 397, [1853] Compiled Laws of California 590 (now CAL. EVID. CODE §§ 1030-34).

[34]Law of May 24, 1933, ch. 536, § 1, [1933] Calif. Laws 1423 (now CAL. EVID. CODE §§ 1030-34).

[35]*See* note 29 *supra.*

[36]*See generally* Kuhlmann, *Communications to Clergymen — When are They Privileged?*, 2 VAL. U.L. REV. 265 (1968).

[37]CAL. EVID. CODE §§ 1030-34 (West 1968).

[38]CAL. LAW REV. COMM'N REPORTS, RECOMMENDATIONS, AND STUDIES § 1030 (1965).

[39]CAL. EVID. CODE § 1030 (West 1968).

A penitent is simply defined as "a person who has made a penitential communication to a clergyman."[40]

The code section defining a penitential communication is perhaps the most crucial section relating to the clergy-penitent privilege. It states:

> As used in this article, "penitential communication" means a communication *made in confidence*, in the presence of no third person so far as the penitent is aware, to a clergyman who, in the course of the *discipline or practice* of his church, denomination, or organization, is *authorized or accustomed* to hear such communications and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret.[41]

Unlike the 1851 statute, the present statute does not limit the privilege to "confessions." Privileged penitential communications are those made in confidence and with the belief that there is no third person present. Thus penitential communications are not limited to sacramental confessions or expressions of sorrow for past behavior. Also, the current statute expands the privilege to include all those who are "authorized or accustomed to hear such communication"[42] in the course of the discipline or practice of the church. This extends the privilege beyond those clergy whose churches require confession as part of the discipline of their faith. The last clause of the section requires that the one hearing the confidential communication have a duty of secrecy regarding such communications. There are few denominations in which secrecy is a formalized duty. However, Protestant and other clergy are impliedly bound to secrecy by their ethical duties.[43]

A member of the clergy is often asked to give advice to an individual regarding that individual's spiritual development. In seeking this spiritual counseling, one reveals one's innermost thoughts, beliefs, and actions. To these revelations, a member of the clergy responds with some type of spiritual counseling. Such exchanges normally take place with the expectation that they will be kept secret. Under these circumstances, spiritual counseling should come within the California clergy-penitent privilege because it is given in confi-

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[40] *Id.* § 1031.

[41] *Id.* § 1032 (emphasis added).

[42] *Id.*

[43] Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 44, 69 (1963):

> The ministers of most Protestant churches likewise are obligated to keep confidential the communications revealed to them in their ministerial capacity. Although many denominations have not spelled out the precise description or definition of their discipline, their uncodified discipline or practice is as binding on them as though it were written . . . . Not only is church policy and doctrine clear, but the statements of individual clergy are uniform, adamant and audacious—the same throughout the western world. They will not testify!

dence to one accustomed to hear such communications.

The remaining two sections of the Evidence Code which define the California clergy-penitent privilege make both the penitent[44] and the member of the clergy[45] holders of the privilege. Although the penitent can prevent anyone from disclosing the penitential communication, the member of the clergy enjoys only a personal privilege.[46] Waiver by the penitent, however, does not waive the clergy member's privilege.[47]

In summary, to invoke the clergy-penitent privilege under current California law, a claimant must show that: (1) the communication was made by a penitent; (2) the penitent communicated in confidence, believing that there was no third person present; (3) the recipient of the confidential communication is recognized as a member of the clergy by a church, religious denomination or religious organization; (4) the member of the clergy received this communication as part of the discipline of the church, or as a part of his or her accustomed professional role; and, (5) the member of the clergy had an express or implied obligation to keep such communications secret.

B. CASE LAW INTERPRETING THE STATUTES

Only two cases have construed the narrow 1851 clergy-penitent statute.[48] In *Estate of Toomes*,[49] the California Supreme Court held that a priest with psychological training must disclose observations that he had made about the mental condition of a dying woman even though he had been called to the home to prepare the woman for confession and death.[50] This decision defined confession under the 1851 statute as only the words spoken to a priest and not his observations. Under the present broadly worded clergy-penitent privilege,

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[44] CAL. EVID. CODE § 1033 (West 1968):

> Subject to Section 912 [waiver], a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege.

[45] *Id.*, § 1034:

> Subject to Section 912 [waiver], a clergyman, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege.

[46] In defining the clergy member's privilege, section 1034 does not include the phrase "and to prevent another from disclosing" that is found in the grant of the penitent's privilege. CAL. EVID. CODE §§ 1033-34 (West 1968). Thus the clergy member, unlike the penitent, may not prevent another from testifying to the confidential communication.

[47] 7 CAL. LAW REV. COMM'N REPORTS, RECOMMENDATIONS, AND STUDIES § 1034 (1965).

[48] *See* text accompanying note 33 *supra*.

[49] 54 Cal. 509 (1880). The case involved a will contest. The priest's testimony was sought to establish the testatrix's state of mind when the will was executed.

[50] *Id.* at 516; *accord*, Buuck v. Kruckeberg, 121 Ind. App. 262, 95 N.E. 2d 304 (1950).

it is unlikely that a member of the clergy would be compelled to testify in a situation similar to *Toomes*. Massachusetts and Iowa courts, under broad statutes similar to California, have defined privileged communications to include observed actions as well as words.[51] A California court, because of the statutory policy and language, is likely to define penitential communications similarly.

The second case, *Simrin v. Simrin*,[52] was decided by the Fifth District Court of Appeal just prior to the enactment of the current clergy-penitent privilege. *Simrin* was an appeal from an order modifying the child custody provisions in a divorce settlement. The central issue involved the wife's alleged psychological rehabilitation. In attempting to establish her ability to be a good parent, the wife called as a witness a rabbi whom both she and her husband had consulted as a marriage counselor. The rabbi did not claim the clergy-penitent privilege, but declined to testify because he had entered into an agreement of secrecy with the couple in order to provide a suitable atmosphere for dealing with the conflicts of their marriage. The husband raised the claim of clergy-penitent privilege. The trial court applied the clergy-penitent privilege and decided that the rabbi did not have to testify.

The appellate court affirmed the trial court's determination, but not on the basis of the clergy-penitent privilege. The court believed that placing marriage counseling by a rabbi under the clergy-penitent privilege "would wrench the language of the statute,"[53] and held, instead, that the parties' agreement of secrecy was enforceable. The court noted that counseling promoted the strong public policy in favor of the preservation of marriages.[54] The court also stated that, in child custody cases, the broadest possible discretion is given to the court to provide for the welfare of the child.[55]

The 1965 statute states that the communication between a member of the clergy and a penitent, in order to be privileged, cannot be made in the presence of a third person.[56] Therefore, it is question-

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[51] In Commonwealth v. Zezima, 310 N.E.2d 590 (Mass. 1974), the Massachusetts court held that "communication with a member of the clergy" was not limited to conversation, but could include other actions, *e.g.*, displaying a gun. In Boyles v. Cora, 6 N.W.2d 401, 410 (Iowa 1942), the Iowa court noted that observation of the state of mind of the deceased by a member of the clergy gained during confidential communications, as well as oral communications, would be privileged.

[52] 233 Cal. App. 2d 90, 43 Cal. Rptr. 376 (5th Dist. 1965).

[53] *Id.* at 94, 43 Cal. Rptr. at 378. *But see* Kruglikov v. Kruglikov, 29 Misc. 2d 17, 217 N.Y.S.2d 845 (1961). Under a New York statute, very similar to California's 1851 statute, the court held that marriage counseling by a rabbi was a privileged communication within the clergy-penitent privilege.

[54] Simrin v. Simrin, 233 Cal. App. at 95, 43 Cal. Rptr. at 379.

[55] *Id.* at 92, 43 Cal. Rptr. at 377.

[56] CAL. EVID. CODE § 1032 (West 1968).

able whether the privilege extends to communications made to a member of the clergy by both spouses present at a marriage counseling session.

The Evidence Code now provides a separate privilege for marriage counselors,[57] but only if they are licensed as such. Although lawyers, physicians and clergy members may act as marriage counselors, they are excluded from the licensing requirements,[58] and therefore are excluded from the licensed marriage counselor privilege. The legislature, in enacting the counseling privilege, declared a policy in favor of protecting the confidentiality of communications made during marriage counseling. Clergy, attorneys, physicians and licensed marriage counselors perform the same function in their respective professional capacities. Therefore, state policy would seem to dictate that they should be included within the privilege. From the exclusion of the three professions from the licensed marriage counselor privilege,[59] it can be inferred that the legislature believed that communications made during marriage counseling to a member of one of those professions would be protected by that profession's privilege. Thus, arguably, the legislature believed that marriage counseling by a clergy member is included in the clergy-penitent privilege statute. This would mean that under the *Simrin* facts a clergy member or penitent could claim the clergy-penitent privilege.

Only one case has dealt with the current California clergy-penitent privilege. In *People v. Johnson*,[60] the court considered a claim of privilege by a defendant convicted of robbery. The defendant, running through a church office, met a man not dressed in clerical garb. The defendant told the man that he was involved inadvertently in a robbery and was being pursued by the police. The man convinced the defendant to give himself up to the police. At trial the defendant claimed his communication with the man, who was a minister, was privileged. The trial court allowed the testimony, but later struck it from the record. The appellate court stated that the testimony should have been admitted into evidence. It noted that when a privilege is claimed, there is a presumption that the communication was made in confidence to a clergy member and is therefore privileged.

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[57] *Id.* § 1010(e). *See* State v. Roma, March 17, 1976, Superior Court of New Jersey, in a criminal case the court held that a minister-marriage counselor's right to a testimonial privilege was defeated by the defendant's Sixth Amendment right to confrontation of witnesses. The court did not discuss the clergy-penitent privilege, but it raises the question: Can the Sixth Amendment defeat a claim of the First Amendment based clergy-penitent privilege?

[58] CAL. BUS. & PROF. CODE § 17800.1 (West Supp. 1976).

[59] *See* A.B. 697 (Cal. 1970). All drafts of the bill included the licensing exemption for clergy, attorneys and physicians. *See also* S.B. 402 (Cal. 1972). The legislative history is silent regarding the exclusion of the clergy, attorneys and physicians from the licensed marriage counselor privilege.

[60] 270 Cal. App. 2d 204, 75 Cal. Rptr. 605 (1969).

However, not all communications to a clergy member are included under the definition of "penitential communications."[61] In *Johnson*, the appellate court found there had been no showing that the defendant's communication was made in confidence nor that the minister was accustomed to hearing confidential communications. Absent such a showing, the communication does not fall into the privileged category.[62]

While the three California cases have touched some of the difficulties arising under the California privilege statute, problems still exist in determining who is a member of the clergy and what is a penitential communication.

IV. THE CLERGY-PENITENT PRIVILEGE AND THE FEDERAL RULES OF EVIDENCE

The federal privileged communication statute is significantly different from any state statute. Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the *principles of the common law* as they may be interpreted by the courts of the United States in the *light of reason and experience*. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.[63]

The broad language of the statute allows the courts maximum flexibility in cases controlled by federal law, but it gives attorneys and members of the clergy minimum certainty because federal courts have decided few cases.

In *Totten v. United States*,[64] the Supreme Court stated in dictum that there is a "confessional" privilege at common law in the United States. The Court saw this privilege as an expression of the general principle that public policy forbids forced disclosure of matters

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[61] *Id.* at 206, 75 Cal. Rptr. at 607.

[62] *Id.* at 206-07, 75 Cal. Rptr. at 607.

[63] Emphasis added. The question whether state or federal privilege law is controlling in a particular federal suit is beyond the scope of this article. For a discussion of the Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), doctrinal problems with regard to privileges, *see* Republic Gear Co. v. Borg-Wagner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967); 2 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE § 501 [03]; Cleary, *The Plan for the Adoption of Rules of Evidence for United States District Courts*, 25 RECORD OF N.Y.C.B.A. 142, 145-46 (1970); Comment, *The Marital Testimony and Communications Privileges: Improvements and Uncertainties*, this volume.

[64] 92 U.S. 105 (1976).

which the law itself regards as confidential.[65]

The question of who may receive privileged communications under the clergy-penitent privilege has not been defined by the federal courts. In such a case, it is recommended that a federal court follow the lead of the Kansas legislature and look to the Selective Service Act in defining who is a member of the clergy.[66] The Selective Service Act identifies two classes of clergy. In the first class, a "duly ordained minister of religion" is defined as one who has been ordained in an established church and has the ministry as a regular vocation.[67] The second class defines a "regular minister of religion" as one who has not been ordained, but is recognized by a church as a minister and serves in that role as a vocation.[68] The purpose of these classifications was, among other goals, to eliminate spurious claims of membership in the clergy. This definition is fairly specific and could be of help to the federal judiciary in wrestling with this definitional problem.

Ascertaining what types of communication are included in the common law clergy-penitent privilege is another difficult task. The Second Circuit in *United States v. Wells*[69] held that the defendant's letter to a priest was not privileged. In this case the defendant asked the priest to set up a liaison with the Federal Bureau of Investigation. The court stated that:

> The letter contains no hint that its contents were to be kept secret, or that its purpose was to *obtain religious or other counsel, advice, solace, absolution or ministration* . . . . While the privilege has been recognized in the federal courts it appears to be restricted to *confidential confession or other confidential communications* of a penitent seeking spiritual rehabilitation.[70]

Thus, this case established by implication that, in at least the second circuit, confidential communications relating to religious advice or counsel, as well as actual confessions, are within the federal common law clergy-penitent privilege.

Two cases indicate an expansive judicial attitude in applying the privilege in federal court. In *Mullen v. United States*,[71] a minister was troubled by what he thought was false testimony by a defendant

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[65] *Id.* at 107.

[66] KAN. STAT. ANN. § 60-429 (1964). In 1963, the Kansas legislature adopted the Selective Service Act definition of clergy member. *See* 50 U.S.C. APP. § 466(g) (1970).

[67] 50 U.S.C. APP. § 466(g)(1) (1970).

[68] *Id.* § 466(g)(2). In interpreting this statute the courts have looked to the clerical function actually served by the individual and not his recognition by a church's governing body. *See* United States v. Jackson, 396 F.2d 936 (4th Cir. 1966).

[69] 466 F.2d 2 (2d Cir. 1971).

[70] *Id.* at 4 (emphasis added).

[71] 263 F.2d 275 (D.C. Cir. 1958).

charged with maltreating her children. The trial judge, after conversing with the minister in chambers, called the minister to testify about a conversation he had had with the defendant. He testified that she had told him of her concern whether she should receive communion in their church when she had chained her children to the wall.[72] Basing its authority to review the case on the fact that the defendant did not expressly waive the privilege at trial, the appellate court concluded that the evidence should have been excluded. The court noted that the rules of evidence were "concerned not only with the truth but with the manner of its ascertainment."[73] The court said that testimony by a minister to a penitential communication is not a proper method of ascertaining information because it is "shocking to the conscience"[74] and should be excluded from evidence under the clergy-penitent privilege.

The second case, *In re Verplank*,[75] concerned a motion to quash a grand jury subpoena duces tecum for files of a church-supported draft counseling center headed by a Presbyterian minister. The minister claimed that the files contained confidential information which was privileged. The court recognized "its obligation to consider the claims of privilege in the light of reason and experience, rather than to apply slavishly a particular common law doctrine."[76] The court noted that the draft counselors were not ministers, but were representatives of the minister-director.[77] Analogizing this situation to the attorney client privilege which applies to communications to an attorney's agents,[78] the court extended the clergy-penitent privilege to include the clergy member's agents.[79]

Thus, federal courts have held that the common law clergy-penitent privilege is to be applied according to the conscience of the court and the need for confidentiality. This leaves many unanswered questions. Who is a member of the clergy? Do both the penitent and the clergy member hold the privilege? What communications are

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[72] *Id.* at 276-77 (statement by Fahey & Edgerton, JJ.).

[73] *Id.* at 280.

[74] *Id.* at 281.

[75] 329 F. Supp. 433 (C.D. Cal. 1971).

[76] *Id.* at 435.

[77] *Id.* at 436. The government was seeking information about the practice of draft counselors referring registrants to doctors as a means of allegedly evading the draft.

[78] *Id.* The court looked to the proposed Federal Rules of Evidence 503 as a codification of the common law extension of the attorney-client privilege. In enacting the federal rules, however, Congress combined all privileges into a single common law provision. If the proposed rule 503 was truly a codification of the common law, it is still good law under the current code provisions.

[79] The clergy member also raised a first amendment free speech claim. The court held that the government had not shown a "compelling need" for the information in the files. Therefore, the court also quashed the subpoena on constitutional grounds. *Id.* at 437-38.

privileged? The federal judiciary will have to wrestle with these questions when they arise.

V. NEW MINISTERIAL ROLES AND THE CLERGY-PENITENT PRIVILEGE

A. ECCLESIASTICAL AND SOCIETAL CHANGES

Broad societal and ecclesiastical changes have affected the principles and practice of ministry and confession. In contemporary society, the priest or other member of the clergy is no longer the sole source of teaching, counseling and judging in the community. School teachers, psychologists, psychiatrists, social workers and judges have taken over many of the roles that the clergy have had in earlier times. This has left the clergy to focus on serving the spiritual needs of their congregations. In part, to meet these changes, the courts and the legislatures have granted evidentiary privileges to those who have taken over the non-spiritual roles of the clergy.[80]

Ecclesiastical changes have occurred simultaneously with the broader social change. In the Catholic Church, for example, present religious practice places strong emphasis on the communal, rather than the private, aspects of sin. Sin is not seen primarily as a matter of specific acts, but rather as an orientation towards selfishness and destruction. Hence, Catholics have shifted away from private confession to communal celebrations of forgiveness that do not include an enumeration of sins. The practice of private confession continues, however, in the form of face to face dialogue, counseling and spiritual direction.[81]

As noted earlier, the courts and the legislature have expanded the religious privilege from one applicable only to the clergy of a few churches to a more general privilege including almost all members of the clergy. Contemporaneous with this development, the Catholic Church has expanded its concept of confession to include counseling and spiritual direction.[82]

In addition to the changes in the practice of confession and to the assumption by secular groups of the work formerly done by priests, new groups are assuming formal pastoral roles within various churches. It is uncertain whether these new groups, specifically Catholic sis-

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[80] *See* Note, *A Suggested Privilege for Confidential Communications with Marriage Counselors*, 106 U. PA. L. REV. 266, 268 (1957). *See also* CAL. EVID. CODE §§ 1010-28 (West 1968 & Supp. 1976), psychotherapist-patient privilege.
[81] *See* T. GUZIE, WHAT A MODERN CATHOLIC BELIEVES ABOUT CONFESSION 75 (1974); *Out of the Box*, TIME, March 15, 1976, at 44.
[82] T. GUZIE, WHAT A MODERN CATHOLIC BELIEVES ABOUT CONFESSION 75 (1974).

ters[83] and irregularly ordained women,[84] are recognized currently as holders of the clergy-penitent privilege. This uncertainty creates a dilemma for any court faced with a claim of privilege by a member of one of these groups.[85] The courts will have either to deny the privilege under a narrow statutory interpretation or to expand the privilege beyond the original intent of the legislature.

B. SISTERS AND THE CLERGY-PENITENT PRIVILEGE

1. A PUBLIC POLICY ARGUMENT: SISTERS SHOULD BE INCLUDED IN THE CLERGY-PENITENT PRIVILEGE

The principle of the freedom of religious expression is safeguarded in the first amendment which is the basis of the present clergy-penitent privilege. In furtherance of this principle, the privilege should be extended to include sisters who give the same spiritual counseling and comfort as do recognized members of the clergy.

A person who confides in a Protestant minister speaks with one who, within the tenets of his church's doctrine, is not an agent who forgives sins.[86] The Protestant minister serves as a personal counselor and helps an individual express sorrow for sin directly to God. These communications are protected by the clergy-penitent privilege. Analogously, a sister is, by definition of the Catholic Church, not an agent of God who forgives sins.[87] But, the sister helps an individual express sorrow for sin directly to God. The sister also serves as a personal counselor in her clerical role. However, under the present California clergy-penitent privilege, communication to a sister may not be privileged because a sister is not defined by the Catholic Church to be a member of the clergy. Thus, while she performs all the functions of a Protestant minister, the people who communicate with her may not be protected by the clergy-penitent privilege because of a narrow ecclesiastical definition. In order to assure the free exercise of religion to those who perform similar religious functions and to ensure that one religion will not be established over another, all those doing similar religious work should be included in the privilege. The Catholic Church's narrow definition

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[83] *See* note 1 *supra*.

[84] *See* notes 105-06 and accompanying text *infra*.

[85] The claim of a privilege by the members of the "clergy" of non-traditional religious groups is an interesting question but outside the purview of this article. There are no reported cases in the United States in which a court has addressed this problem.

[86] During the Reformation the Protestants rejected confession as a Sacrament because of their belief that their ministers did not have the power to forgive sins. *See* G. BERKOUWER, SACRAMENTS 32-33 (1969).

[87] Latko, *Auricular Confession*, 4 NEW CATHOLIC ENCYC. 132 (1966).

of clergy should not control the application of the clergy-penitent privilege.

2. SISTERS PRESENTLY MAY BE INCLUDED IN THE CLERGY-PENITENT PRIVILEGE

California Evidence Code section 1030 defines a member of the clergy in "broad terms."[88] This broad definition implies that the class is designed to be inclusive rather than exclusive. It appears that a sister is presently included in the definition of clergy because she is a member of a religious organization and is a religious leader in much the same way as a priest.[89] Under California Evidence Code section 1032, in order for a sister to be a holder of the privilege, a court must find that by reason of her church's or organization's discipline or practice, she is either authorized or accustomed to hear confidential communications, and that the sister has some express or implied obligation to keep the communications secret.

Sisters are no longer limited to a classroom, hospital or back room of the church.[90] They are currently being hired as members of parish clergy teams. These sisters do the same work as priests: counseling, leading prayer, etc. This work is done with the approval of and in the pay of the church. Thus sisters' work in clergy roles is within the practice of their church. Additionally, sisters are accustomed to hear confidential communications in these church settings.[91]

Unlike Catholic priests, however, sisters do not have an express obligation to keep confidential communications secret. Many non-Catholic clergy, who perform the same functions as priests, are found to have an implied obligation of secrecy.[92] Since this implied obligation has been determined to be sufficient to meet the Cali-

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[88] 7 CAL. LAW REV. COMM'N REPORTS, RECOMMENDATIONS, AND STUDIES § 1030 (1965). "Broad" is defined as ". . . of wide range; having wide application . . . ." I. FUNK, NEW STANDARD DICTIONARY 337 (1963).

[89] Presnail, *Guidance for a Parish Worker*, 44 SISTERS TODAY 416, 416-18 (1973).

[90] A survey of articles in a recent publication for sisters in the United States reveals articles on the nature of ministry, ministry in a parish, women deacons, campus ministry, political activist ministry and advertisements for master's degree programs in spiritual direction. 45 SISTERS TODAY 321-72 (1974). The development of sisters' roles in pastoral ministry is perhaps most dramatically seen in campus ministry where sisters share the spiritual work and responsibility with priests. Of the 139 people working in Catholic campus ministry in California, 35 are sisters. This is twenty-five percent of the Catholic campus ministers in the state. Interview with Rev. Patrick G. Thompson, Chairperson, California Catholic Conference of Campus Ministers, in Los Angeles, California, November 20, 1975.

[91] "[A] sister in pastoral counseling is often in a position leading a person to repentance or conversion . . . to a point where in all truthfulness, one [the sister] can say 'God has forgiven you.'" Putrow, *A Statement on Women in Ministry*, 45 SISTERS TODAY 321, 330 (1974).

[92] *See* note 43 *supra*.

fornia statutory requirement for a non-Catholic clergy member,[93] an implied obligation also should be sufficient for a sister.

In summary, a sister presently may be included within the California statutory privilege because she receives confidential communications within the practice of her church; she is accustomed to hearing these communications; and she has an implied obligation to keep such communications secret.

Adopting a contrary view, a New Jersey court held in *In re Murtha*[94] that a sister could not claim the privilege because her church's definition of clergy did not include her. The trial court charged a sister with contempt for refusing to testify to statements made to her by a former pupil. The sister had been a spiritual director and counselor to this young man for a number of years. The court stated that:

> Sister Margaret did not, and obviously could not, show that she was a person or practitioner authorized to perform functions similar to those performed by a clergyman or minister—more specifically, by a priest .... Counsel has been unable to find anything in Catholic doctrine or practice that would give Sister Margaret a right to claim the priest-penitent privilege.[95]

It would be inappropriate for a California court to follow the lead of the *Murtha* court because the New Jersey statute differs significantly from the California statute.[96] The significant difference[97] between the two statutes lies in the role that the member of the clergy must have in the church to be accorded the privilege. The New Jersey statute limits the protected class of clergy to those who are "authorized to perform such functions."[98] The California definition includes anyone who is "authorized or *accustomed*" to hearing such communications,[99] and recognizes that an established custom of hearing

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[93] CAL. EVID. CODE § 1032 (West 1968). People v. Johnson, 270 Cal. App. 2d 204, 75 Cal. Rptr. 605 (1969).

[94] 115 N.J. Super, 380, 279 A.2d 889 (1971).

[95] 279 A.2d at 892.

[96] N.J. STAT. ANN. § 2A:84A-23 (1976):

> ... [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.

[97] The New Jersey Statute also differs slightly from the California statute in that it provides a privilege for a member of the clergy of "any religion" and does not extend it to a religious denominations or organizations as California does. This may be a semantic difference rather than a substantive one. In addition, New Jersey explicitly provides that confidential communications as well as confessions are privileged while California does the same only by inference. Compare N.J. STAT. ANN. § 2A:84A-23 (1976) with CAL. EVID. CODE §§ 1030, 1032 (West, 1968). For the text of the respective statutes *see* note 96 and text accompanying notes 39 & 41 *supra*.

[98] N.J. STAT. ANN. § 2A:84A-23 (1976).

[99] CAL. EVID. CODE § 1032 (West 1968) (emphasis added).

penitential communications may bring a cleric within the privilege.[100] Since Sister Margaret had acted as spiritual adviser to the young man for a number of years, she had established a custom of hearing such communications.[101] Thus, under California law, the privilege claimed by a sister could be upheld by the court.[102]

Under Federal Rule of Evidence 501, it is very difficult to determine if a sister could successfully claim the clergy-penitent privilege. If a federal court were to follow the expansive judicial approaches of *Mullen v. United States*[103] and *In re Verplank*,[104] it is likely that she would be included within the protected class of clergy. However, a judge less inclined to grant a claim of privilege could easily exclude a sister from the privilege on the ground that her church does not recognize her as a member of the clergy.

C. IRREGULARLY ORDAINED WOMEN AND THE CLERGY-PENITENT PRIVILEGE

The application of the clergy-penitent privilege to persons who are irregularly ordained presents a unique problem. One such problem would be presented by a claim of privilege by one of the eleven Episcopalian women who were ordained on July 29, 1974, without the approval of the Episcopal House of Bishops.[105] They were ordained by bishops in a proper ceremony; yet, the official body of bishops of their church does not recognize them as ordained because they were not "called" in the manner required by their church's law.[106] The effectiveness of their ordination raises a church doctrinal question, which in turn poses a secular question regarding their status in the eyes of the courts.

In order to claim the clergy-penitent privilege in California, a person must show that he or she is authorized or accustomed to hear

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[100] People v. Johnson, 270 Cal. App. 2d 204, 75 Cal. Rptr. 605 (1969).

[101] If Sister Margaret showed that she had acted as spiritual counselor to a number of different people, this would also establish a custom.

[102] In addition to denying Sister Margaret's claim of privilege because she was not classified by her church as a member of the clergy, the court also noted that on the night of the murder, Sister Margaret had made a statement to the police regarding her conversation with the defendant. The court also construed this statement to be a waiver of the privilege. *In re* Murtha, 297 A.2d at 893.

[103] 263 F.2d 275 (D.C. Dir. 1958); *see* text accompanying notes 71-74 *supra*.

[104] 329 F. Supp. 433 (C.D. Cal. 1971); *see* text accompanying notes 75-79 *supra*.

[105] *From Sisterhood to Priesthood*, NEWSWEEK, Aug. 12, 1974, at 77; *Women's Rebellion*, TIME, Aug. 12, 1974, at 62; Mitchell, *Women Priests and the Episcopal Church*, 34 REVIEW FOR RELIGIOUS 511 (1975).

[106] The Episcopal Church requires that all those who are to be ordained be "called," *i.e.*, chosen, by a bishop who is the head of a diocese. All four of the bishops who ordained the eleven women were retired and were not the heads of dioceses. Hence, the House of Bishops considers the ordination irregular and, in their eyes, invalid. The discussion is not over. The bishops will consider it again at their meeting in the fall of 1976. Mitchell, *supra* note 106, at 511.

confidential communications as a part of the church's discipline or practice. An irregularly ordained woman, hired by the members of a congregation to serve as their priest,[107] would be accustomed, in the same manner as a regularly ordained priest, to hear confidential communications. The more vexing question is whether any communication to an irregularly ordained woman is made within the discipline or practice of the church. It is unclear who represents the "church" in determining whether these woman are functioning within it. Should the courts look to a congregation's acknowledgement of a priest? Should the courts look to the formal ceremony at which a person is consecrated for the work of the ministry? Should the court look to the bishops' acknowledgement of a person as priest? These questions, unanswered by the current definition of "clergy" in the California code, raise conflicting constitutional principles.

The courts have consistently deferred to the determinations of church leadership in reviewing intra-church disputes.[108] *Gonzalez v. Archbishop*[109] was an action to compel the Archbishop of the Philippines to appoint an unqualified person to a chaplaincy according to the terms of a will. The Supreme Court in deciding the case on non-constitutional grounds stated:

> In the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals on *matters purely ecclesiastical*, although affecting civil rights, are accepted in litigation before the secular courts as conclusive . . . .[110]

Relying in part on *Gonzalez*, the Court in *Kedroff v. St. Nicholas Cathedral*[111] held that non-interference in an intra-church dispute over possession of the cathedral was required by the Constitution.

If an irregularly ordained woman claimed the clergy-penitent privilege, the issue raised would not be purely ecclesiastical. Such a case would involve the reasonable expectations of a congregation member when confiding in a person who was hired by that congregation to serve as a member of the clergy. It would be reasonable for a member of the congregation to expect such communications to be kept secret by the irregularly ordained woman. Until the ecclesiastical dispute is resolved within the church, there is no reason for the court to "penalize" a penitent for confiding in a woman who, though

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[107] In the Episcopal Church the individual congregations hire the priest for their parish and the bishop usually confirms the appointment.

[108] Presbyterian Church v. Hull Church, 393 U.S. 440 (1969). The Court declined to settle a property dispute that was based on a doctrinal schism. The court noted that the civil judiciary has some power over church property disputes but only when they are entirely separate from doctrinal questions. Without a clear separation, the courts will not take jurisdiction because the first amendment prohibits any judicial entanglement in ecclesiastical doctrinal disputes.

[109] 280 U.S. 1 (1929).

[110] *Id.* at 16 (emphasis added).

[111] 344 U.S. 94 (1952).

unacknowledged by the bishops, serves as an ordained priest.

Under such circumstances, a claim of the clergy-penitent privilege by an irregularly ordained woman or by the penitent would require the court to make the preliminary determination of whether the irregularly ordained woman is a member of the clergy. Obviously, the fact that the congregation accepts the woman in the clergy role should have some impact on this preliminary finding. Such a determination would only be conclusive as to the admissibility of the evidence and would have no effect on the final outcome of the intra-church dispute.

This evidentiary determination poses a significantly different problem than that in the *Gonzalez* and *Kedroff* cases. In those cases, the Court was asked directly to make a determination of the property interests of competing intra-church groups. The property disputes were based on church doctrinal questions. In order to resolve the disputes the Court would have had to make determinations the results of which would have affected church law. Therefore, since a court determination of the status of an irregularly ordained woman as a member of the clergy would not affect church law and her status as a clergy member has been relied on by the penitent,[112] the court could decide the preliminary fact question without violating the first amendment.

If the irregularly ordained woman is not allowed to invoke the clergy-penitent privilege, it may result in an abridgement of the first amendment rights of the irregularly ordained woman and the penitent. In *Sherbert v. Verner*,[113] the Court balanced the governmental interests against the religious interests to determine if the claimant's first amendment rights were curtailed. The governmental interests used in the balancing include: the importance of the secular value underlying the governmental regulation, the relationship between the regulation and the underlying value, and the impact that a religious

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[112] It may be argued that if the penitent is aware of the irregularly ordained woman's dispute with the bishop then the penitent did not rely in good faith on the woman's clerical status. Such an awareness should not be determinative of a denial of the privilege because by making the penitential communication, the person is demonstrating the spiritual trust that is the basis for the privilege. *See* text accompanying note 30 *supra*.

[113] 375 U.S. 398 (1963). Ms. Sherbert was unemployed because the tenets of the Seventh-Day Adventist Church of which she was a member forbad Saturday work. The state denied her unemployment compensation because she could have been employed if she had been willing to work on Saturday. The Supreme Court, using a balancing test, determined that this was an unconstitutional burden on her right to the free exercise of her religion. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972), using a similar balancing test. *See also* Braunfield v. Brown, 366 U.S. 599 (1961) where the same balancing test was used, but was weighed in favor of the government.

exemption would have on the public.[114] Weighing these governmental interests in the present case, the secular value underlying a denial of privilege is the objective that all possible relevant evidence[115] be admitted into court. In many cases this value would be furthered slightly, by requiring an irregularly ordained woman to testify. Also, the grant of the privilege to these women would have a small impact on society.[116] Since these women belong to an extremely small, well-defined class, a court need not fear many claims of privilege by the general public.[117]

These governmental interests are balanced against religious factors which include the sincerity and importance of the religious practice and the degree of governmental interference.[118] The practice of spiritual counseling is central to the practice of the Episcopal Church.[119] An irregularly ordained woman has risked censure and excommunication by the House of Bishops of her church by being ordained.[120] This risk demonstrates the women's commitment and sincerity in assuming a priestly role. In addition, denial of the privilege would entail a total disclosure of a confidential communication which has received some governmental protection since 1813.[121]

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[114] Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I, The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1390 (1967).

[115] *See generally* MCCORMICK (2d ed.), *supra* note 30, § 184.

[116] The Supreme Court seems to be more inclined to grant a religious exemption when the class of people seeking the exemption is small and there would not be a large economic change in the status quo. Wisconsin v. Yoder, 406 U.S. 205 (1972), exemption from school attendance to Amish children; Sherbert v. Verner, 374 U.S. 398 (1963), unemployment compensation paid to unemployed Seventh Day Adventist. Braunfield v. Brown, 366 U.S. 599 (1961), religious exemption to the Sunday closing laws was found not to be mandated by the Constitution.

[117] The clergy-penitent privilege has occasioned very little litigation. The following twenty-six states do not have a case dealing with the privilege: Alaska, Arizona, Connecticut, Delaware, Georgia, Louisianna, Maine, Maryland, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming.

[118] Giannella, *supra* note 114, at 1390.

[119] G. BERKOUWER, SACRAMENTS 35 (1969).

[120] Mitchell, *supra* note 105, at 512.

[121] People v. Phillips, N.Y. Court of General Sessions (1813), *reprinted* 1 WESTERN LAW JOURNAL 199 (1843).

In addition, an irregularly ordained woman claiming the privilege is not likely to disclose the information even if compelled to do so by the court because it would violate what she believes to be her ethical duty. *See In re* Murtha, 115 N.J. Super. 380, 279 A.2d 889 (1971) where a Catholic sister was held in contempt of court for refusing to testify after being denied a privilege under the clergy-penitent privilege statute. In Killingsworth v. Killingsworth, 283 Ala. 345, 217 So. 2d 57 (1968) a minister was cited for contempt for refusing to testify in a divorce proceeding. He did not testify because he had acted as a marriage counselor for both parties and felt testifying would jeopardize his relationship with them as well as his role within his church. *See generally* Kuhlmann, *Com-*

In weighing the claim of privilege against the government's interest in disclosure, a California court may allow the privilege to be asserted because the extension of the privilege would affect few people, and it would be in harmony with the California Evidence Code's broad definition of clergy. In interpreting the code provision, the court in *People v. Johnson* [122] stated that a person, in claiming the clergy-penitent privilege, had to show that the member of the clergy to whom he had communicated had the custom of receiving such confidential communications.[123] The court made no inquiry into the status of the clergy member within his church. Thus, a California court may allow an irregularly ordained woman's claim of privilege if it can be shown that she has the custom of receiving confidential communications.

The court's allowance of the privilege also is supported by the fact that its determination of a woman's clergy status would not have a direct effect on the ecclesiastical dispute. It would merely resolve the evidentiary question for that particular case. Finally, a court could note that under the free exercise clause and public policy, it is better to allow an irregularly ordained woman to follow her conscience than to find her in contempt for being true to her beliefs.[124] For these reasons a court should allow an irregularly ordained woman's claim of the clergy-penitent privilege.[125]

VI. REDEFINING WHO IS A MEMBER OF THE CLERGY

To ensure that the clergy-penitent privilege is applied to sisters and irregularly ordained women, the legislature should clarify the definition of "clergyman."[126] Such a redefinition would not alter the type

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munications to Clergymen—When are they Privileged?, 2 VAL. U. L. REV. 265 (1968).

[122] 270 Cal. App. 2d 204, 75 Cal. Rptr. 605 (2d Dist. 1969).

[123] *Id.* at 207, 75 Cal. Rptr. at 607.

[124] *See generally* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 364-65 (1969). *Contra, In re* Williams, 269 N.C. 68, 152 S.E. 2d 317, cert. denied, 388 U.S. 918 (1967). The Supreme Court of North Carolina was not reluctant to punish a member of the clergy for acting according to his conscience by refusing to testify after he had been denied a clergy-penitent privilege. The court stated that "self seeking charlatans" have defied court orders as long as the punishment was not too severe and the public was applauding. 152 S.E. 2d at 323. This rather harsh view may have been triggered by the various "political trials" being conducted in 1967.

[125] It is difficult to discern what the federal courts would do with a claim of privilege by an irregularly ordained woman. In the few cases decided, the courts have liberally construed the privilege. *See* text accompanying notes 71-79 *supra* for an analysis of the federal cases.

[126] The terminology of the current code provisions presents another problem. The sections were drafted at a time when it was acceptable to define a class composed of both men and women by a masculine term. In this day of feminist consciousness, this is no longer appropriate.

of communications that are defined as penitential, but would more clearly define to whom the privilege is applicable. The following suggested definition of a "clergy member" is based explicitly on a functional analysis of the services rendered rather than on ecclesiastical approval or definitions.

> A "clergy member" is a person who need not be ordained. As a customary vocation, however, the person must be a spiritual counselor as well as a preacher or teacher of the principles of the religion, sect or organization to which he or she belongs.

This definition would permit the courts to grant the privilege without regard to the bishops' appraisal of the status of a member of the clergy. This definition of a clergy member eliminates any judicial consideration of an intra-church dispute with its constitutional problems. By thus clarifying the definition of who is a member of the clergy, the legislature could guarantee that Catholic sisters, irregularly ordained women, and the people who confide in them would be included in the clergy-penitent privilege.

VII. CONCLUSION

Sisters and irregularly ordained women serve their churches in new clergy roles. Because they engage in spiritual counseling, they develop relationships with those who come to them that are based on confidentiality and trust. Since this is the rationale for giving an evidentiary privilege to clergy members, the privilege should include these two groups of women as well. Under California Evidence Code sections 1030 and 1032, sisters appear to be included in the privilege because they are practicing within a church and are accustomed to hearing such communications. It is uncertain if irregularly ordained women are included in the California privilege because of their ill-defined position within their church. A court should, however, look to the function that these women perform. A factual determination by the court as to these women's roles is the best approach to determining a claim of privilege. If some other measure is used, then the court is likely to deny the women the privilege even though their congregation treats them as members of the clergy. A statutory amendment could ensure the application of the privilege to sisters and irregularly ordained women. Until the California legislature amends the clergy-penitent privilege to expressly include these women, the California courts should follow the stated legislative policy of a broad definition of clergy in applying the privilege statute to sisters and irregularly ordained women.

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