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Survey of Recent Halakhic Periodical Literature

RABBINIC CONFIDENTIALITY

I. THE RECENT JUDICIAL PROCEEDING

"Can you trust your rabbi?" is the question raised in the minds of many in the wake of a high profile New York law case. A late 1998 decision of a Justice of the New York Supreme Court holding one rabbi liable for damages resulting from the violation of the confidence of a congregant and ordering an evidentiary hearing for clarification of certain disputed facts in the case of a second rabbi has caused consternation in diverse quarters.

Inaccurate and provocative media reports further heightened interest in the case. Many, including the judge, were shocked not so much at the breach of confidence itself but at the argument of the defense that the defendants' actions, in the case in question, were mandated by Jewish law. Those more familiar with the applicable provisions of Jewish law were equally shocked not so much at the court's headlong thrust into a quagmire of factual, legal and constitutional issues as by its wholly improper and injudicious excoriation of the defendants' invocation of "the protection of the Torah" in defense of their conduct. That conduct, which the defendants unquestionably believe to be not only permitted but mandated by Jewish law, is described by the Court as conduct that "so transcends the bounds of decency as to be regarded as both intolerable and atrocious." Remarkably, not a scintilla of proof was adduced charging the defendants either with misrepresentation of Jewish law or challenging their good faith in its application.

In substituting its own unqualified (mis)understanding of Jewish law for that of two erudite and respected rabbis, whose stature within their community was acknowledged by the Court itself, the Court has engaged in as blatant an example of judicial *chutzpah*[1] as has been seen

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in recent years. In allowing such a determination to color its decision the Court exposes itself to a charge of breaching the wall of separation between Church and State. Moreover, in interpreting the statute in question as requiring clergymen to govern their professional conduct in a manner they find to be religiously offensive the Court has probably violated the right of free exercise of religion guaranteed by the First Amendment.[2]

Together with those of many other states, the laws of the State of New York provide that communications to a clergyman are privileged in the sense that the clergyman cannot be required to "disclose a confession or confidence made to him in his professional character as spiritual advisor unless authorized to do so by the communicant." This provision, incorporated in §4505 of the C.P. L.R., is included among statutes regulating admissibility of evidence in legal proceedings, thereby making communications to a clergyman privileged much in the same manner that interspousal communications, communications by a client to his or her attorney and by a patient to his or her physician are privileged. The purpose of granting legal privilege to such communications is to encourage free and open discourse between the individuals to whom the privilege is extended. The New York statute provides that the privilege can be waived only by the person confiding in the clergyman.

On its surface the statute does no more than restrict the admissibility of testimony of the clergyman in a court of law. Nevertheless, in a decision issued on November 18, 1998 in *C. L.*[3] v. *Rabbi Tzvi Flaum and Rabbi David Weinberger*[4] and reissued with revisions on March 4, 1999,[5] Justice David Goldstein, sitting in the New York Supreme Court in Queens County, ruled that a woman whose confidence had allegedly been breached by the named clergymen was entitled to sue for damages.

The woman, who had been separated from her husband, was involved in a dispute over which parent should be awarded custody of the couple's four daughters. The husband submitted separate affidavits signed by the two rabbis in which they expressed the opinion that the spiritual welfare and general well-being of the children would best be preserved by awarding custody to the father. In support of that conclusion the rabbis cited various facts concerning the mother's religious behavior and comportment that she had disclosed to them, allegedly in confidence. This information was incorporated in a sealed matrimonial file and disclosed only to the Court having jurisdiction over the custody proceeding. Despite those facts, Justice Goldstein, in a separate action, found that, in submitting their affidavits and in discussing the matter

with her husband, the rabbis had breached a fiduciary duty of confidentiality owed to the plaintiff.[6]

The latter point, i.e., the determination that discussion of the matter with the husband, as distinct from submission of an affidavit in connection with the custody proceedings, constitutes a breach of a duty of confidentiality is puzzling since the only substantive confidential information disclosed to the rabbis by Mrs. L. was that she had ceased the practice of monthly immersion in a ritualarium in order to deny her husband consortium. Obviously, that goal, as announced by Mrs. L. herself, could not be achieved without the husband's awareness of his wife's failure to attend the ritualarium. It is difficult to understand how disclosure of information to an individual to whom the confider had already divulged the selfsame information constitutes a breach of confidence. It is even more difficult to understand how such disclosure could cause further damage that might give rise to a cause of action.

With regard to the alleged breach of a fiduciary duty in submitting the affidavits, the Court ruled not only that the plaintiff is entitled to recover damages but that the action of the rabbis

> was not only improper, it was outrageous and most offensive, especially considering the status and stature of these defendants within the community, a standard which they readily abdicated here. From what was done, it is palpably clear why this determination is one of the apparent first impression—no member of the clergy . . . would dare breach the sanctity of his or her office to make public the type of confidential, private disclosures at issue in this case. . . .
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> Moreover, to violate such basic rights under the guise of religious necessity, conviction or the protection of the Torah, is not only wrong, it is outrageous. . . .[7]
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> . . . Bearing in mind the sanctity to be accorded such communications between clergy and penitent, and the necessity for confidentiality in conjunction with such spiritual counseling, without the fear of any reprisal or disclosure, it is both outrageous and intolerable that such communications would be revealed, even where, as here, this occurs in part in the context of a judicial proceeding. In my view, the conduct so transcends the bounds of decency as to be regarded as both intolerable and atrocious. . . .[8]

The Court's deprecatory reference to "the guise of religious necessity, conviction" and "the protection of the Torah" betrays a profound ignorance of Jewish law. Far from being wrong, much less outrageous,

the action of the rabbis, (who together with the husband's attorney believed both that their affidavits were admissible as evidence[9] and that their testimony was likely to be persuasive) was both laudable and halakhically mandated.

II. CONFIDENTIALITY IN JEWISH LAW

A. The Sources and Nature of the Obligation

Judaism does not recognize a particular fiduciary obligation of confidentiality in association with any professional relationship. Thus, for Judaism, there is no specific physician-patient, attorney-client or clergyman-penitent "privilege." But, at the same time, Judaism binds each and every one of its adherents, laymen as well as professionals, by an obligation of confidentiality far broader than that posited by any other legal, religious or moral system. Nevertheless, the privilege is neither all-encompassing in scope nor, when it does exist, is it absolute in nature.

1. Leviticus 19:16

Divulging personal information concerning another person is prohibited by Jewish law even when that information is not received in confidence. That prohibition is derived from the biblical verse "You shall not go as a bearer of tales among your people" (Leviticus 19:16). As formulated by Rambam, *Mishneh Torah, Hilkhot De'ot* 7:2: "Who is a talebearer? One who carries reports and goes from one person to another and says, 'So-and-so said this' or 'Such and such have I heard about so-and-so.' Even if he tells the truth, [the talebearer] destroys the world." Talebearing activity is forbidden even when it is not accompanied by malicious intent and even if the information is not derogatory in nature. That even non-malicious and non-derogatory talebearing is encompassed within the ambit of the prohibition is evident from the immediately following statement of Rambam: "There is a much more grievous sin than this that is included in their negative prohibition and that is 'evil speech' (*lashon ha-ra*), i.e., speaking derogatorily of one's fellow even though one speaks the truth." It is clear that, the phrase "such and such have I heard about so-and-so" does not refer to information divulged by "so-and-so" about himself whether in confidence or otherwise; the phrase connotes information communicated by a third party. Although disclosure of information revealed by a person concerning himself is certainly subsumed within the prohibition, Rambam's ruling makes it quite clear that disclosure is prohibited even though no breach of confidence is involved.

Disclosure of a communication of non-personal information not within the public domain is also prohibited by Judaism unless prior permission for such disclosure has explicitly been granted. Thus, in effect, all communications are deemed confidential and hence privileged unless the privilege is waived. Moreover, with regard to derogatory personal information, a waiver does not constitute *carte blanche* for indiscriminate dissemination of such information.[10] The privilege, it should be noted, is in the nature of a general right of privacy rather than an exclusion from admissible evidence in legal proceedings. Privacy does not serve as a barrier to judicial inquiry. Nevertheless, in most circumstances, such communications would not be admissible as evidence on the basis of the hearsay rule, which in Jewish law is far broader in its exclusions than is the case in other legal systems.

2. Leviticus 1:1

The prohibition against divulging a non-personal confidential communication is formulated by the Gemara, *Yoma* 4b: "Whence is it derived that [if] one relates something to one's fellow [the latter is commanded] 'Thou shalt not tell' until [the former] tells him 'Go tell'? For it is said 'and the Lord spoke to him from the tent of meeting *l'emor*'" (Leviticus 1:1). Rashi understands the prohibition to be based upon talmudic exegesis interpreting the word "*l'emor,*" which is spelled *lamed, aleph, mem, resh*, as a contraction of two words "*lo emor* – do not say."[11] Thus, the written word vocalized in two alternative ways literally constitutes a *double entendre*: "to say" and "do not say." As explained by *Or ha-Hayyim*, Exodus 25:2, the initial phrase of the immediately following sentence beginning "Speak to the children of Israel" clearly places upon Moses an affirmative obligation to repeat what he has been told. Taken together, the two sentences declare, in effect, that Moses may not speak other than when expressly directed or granted permission, to speak. As formulated by the Gemara, Moses is admonished "Do not tell!" unless and until he is told 'Go tell!' Prior to their communication to Moses, the contents of revelation were reserved to the Deity and, accordingly, the contents of revelation would have been held inviolate by Moses on the basis of the injunction "Do not say" had he not been commanded explicitly "*l'emor,*" to speak and disclose that information to Israel. Interpreting the statement of the Gemara in a manner consistent with that of Rashi, *Sefer Mizvot Gadol, lo ta'aseh*, no. 9, regards violation of this injunction as transgression of a biblical commandment.[12] This talmudic statement is cited as normative by *Magen Avraham, Orah Hayyim* 156:2, and serves to establish a formal obligation to regard the commu-

nication of any personal or proprietary information as confidential unless permission for disclosure is explicitly granted.

Both Maharsha, *ad locum*, and R. Baruch ha-Levi Epstein, *Torah Temimmah*, Leviticus 1:1, offer an interpretation of the derivation that is less elegant but far simpler than that advanced by Rashi.[13] According to those scholars the prohibition is predicated upon the plain meaning of the word "*l'emor*." The term "*l'emor*" is rendered in English translations as "saying." That translation portrays the entire sentence, "And God spoke to Moses saying," as a preferatory comment conveying the notion that the ensuing passages constitute the content of what was "said" *to* Moses. In effect, the sentence is rendered as a declaration indicating that what follows constitutes the content of God's communication to Moses. The translation of "*l'emor*" as "saying" although it serves to make the sentence read smoothly in the vernacular, is contrary to the plain meaning of the text and is probably incorrect. The initial letter *lamed* is a prefix meaning "to" and hence the word "*l'emor*" should properly be understood as a contraction of "*le-emor*" and translated as "to say," i.e., God commanded Moses "to say" the words of the verses that follow. Accordingly, the import of the sentence is not a declaration to the effect that the subsequently recorded verses were communicated to Moses, but that Moses was commanded to declare those verses to the children of Israel. The appropriate, albeit infelicitous, translation would be: "And God spoke to Moses to say."[14] However, although linguistically accurate, this rendition of the passage seems to render the entire verse redundant. The very next verse begins with the phrase "Speak to the children of Israel and say to them." That phrase is synonymous in meaning with "*l'emor*" and renders "*l'emor*" superfluous. The plain inference, comments Maharsha, is that Moses would not have had the right to transmit the divine communication unless given express permission by God to do so.[15] Hence that directive is recorded in order to teach that, absent such a waiver, all communications are to be regarded as confidential.

Other early-day scholars find the obligation to regard all personal or proprietary communicators as privileged to be reflected in yet another verse. R. Menahem ha-Me'iri, in his commentary on *Yoma* 4b, and R. Levi ben Gershon (Ralbag), in his commentary on the scriptural passage, understand Proverbs 11:13 as reflecting the principle enunciated by the Gemara, *Yoma* 4b. Proverbs 11:13 is usually translated as "He that goes about as a talebearer reveals secrets, but he who is of faithful spirit conceals a matter." Me'iri, however, renders the first half of the verse as "He

who reveals a secret is a talebearer" while both Me'iri and Ralbag understand the second part of the verse as referring to a person who "conceals a matter" even though it has not been divulged to him as a secret.

B. Limitations upon the Obligation

It should be noted that there is no "statute of limitations" or time period subsequent to which the obligation of confidentiality expires. The Gemara, *Sanhedrin* 31a, reports an incident involving a student who revealed a matter he had heard in the House of Study twenty-two years after receiving the information. R. Ami expelled the student from the Academy declaring, "This student reveals secrets!"[16]

However, the privileged nature of a private communication is by no means absolute. Respect for privacy and the inviolability of a confidential communication certainly do not take precedence over preservation and protection of the lives and safety of others. The overriding obligation to protect the lives of others is of sufficient weight to oblige the confidant to take whatever measures may be necessary to eliminate the danger. An oath not to divulge such information when required by Halakhah to do so is regarded as an oath to transgress a commandment and is invalid.[17]Thus, for example, a physician must inform the motor vehicle bureau that his patient is an epileptic and should be denied a driver's license. The obligation to violate the confidential nature of information entrusted to the physician in such situations is included within the "law of the pursuer." A person engaged in an act that will lead to the death of another must be prevented from causing such death even if the consequences of the act are entirely unintended. R. Elijah of Vilna, *Bi'ur ha-Gra, Hoshen Mishpat* 425:10, states explicitly that the "law of the pursuer" applies even in the absence of intention to do harm.

The obligation to divulge information that may preserve a life is not limited to situations involving a "pursuer" but extends to all situations in which lack of such information would lead to possible loss of life. Apart from the general principle that preservation of life takes precedence over other religious and personal obligations, failure to disclose such information would constitute a violation of "You shall not stand idly by the blood of your fellow." (Leviticus 19:16).

Concern for preservation of life is by no means the sole legitimate motive for violation of confidentiality. Even information that is derogatory and personal, and hence subsumed within the prohibition against gossipmongering, must be disclosed if it is necessary to do so in order

to prevent serious harm. Rambam, *Mishneh Torah, Hilkhot Rozeah* 1:14, followed by *Shulhan Arukh, Hoshen Mishpat* 426:1, rules that if an individual "hears that gentiles or apostates are plotting misfortune" for another person, he must bring the matter to that person's attention. Failure to do so, declares Rambam, constitutes a violation of the commandment "You shall not stand idly by the blood of your fellow." The "misfortune" of which Rambam speaks includes financial loss as well as bodily harm. This is evident from Rambam's comments in his *Sefer ha-Mizvot, lo ta'aseh*, no. 297, in which he indicates that the commandment applies in all situations in which an individual is "in danger of death or loss." The "loss" to which Rambam refers is loss of money or profit as reflected in the ensuing discussion in which Rambam cites a statement of the *Sifra,* Leviticus 19:16, declaring that withholding of testimony in a financial dispute constitutes a violation of the commandment "You shall not stand idly by the blood of your fellow."

Hafez Hayyim, Be'er Mayim Hayyim, Hilkhot Rekhilut 9:1, cites additional sources that reflect the same principle. Jewish law provides that adverse possession of land for a period of three years is *prima facia* evidence substantiating a claim of purchase. A person who has been in open and notorious occupancy of a field for that period of time need no longer preserve a deed of purchase in order to validate a claim of title. However, protest by the person previously in possession of the property that such occupancy constitutes an unlawful trespass is sufficient to negate the claim of the occupant with the result that, unless the occupant can produce a deed, title is awarded to the prior owner. Such protest must be registered in the presence of witnesses but need not necessarily be expressed in the presence of the occupant. Rashbam and *Tosafot, Bava Batra* 39b, indicate that individuals hearing such a protest are duty bound to inform the occupant of what they have heard. They are clearly "talebearing" in reporting to the person in possession that he has been branded a trespasser and a thief by the person lodging the protest. The witnesses, as well as others to whom they reveal the incident, are nevertheless required to convey that information so that the person in possession, if he is indeed the rightful owner, will exercise vigilance in preserving his deed. It is the concern for averting financial loss that serves as sanction for an otherwise impermissible disclosure of information. *Sefer ha-Hinnukh*, no. 247, makes a more general statement in declaring that when the intent is to "remove harm and to still the quarrel" the prohibition against gossipmongering does not pertain.

The classic work dealing with Jewish law as it applies to slander, defamation of character and talebearing is *Hafez Hayyim*, authored by R. Israel Meir Kagan. In *Hilkhot Rekhilut, kelal 9, Hafez Hayyim* emphasizes that disclosure of derogatory information, even when the information is not received in a confidential manner, dare not be lightly undertaken. *Hafez Hayyim* rules that, even when designed to prevent harm or loss, disclosure is justified only when a series of conditions are met: 1) Disclosure may be made only pursuant to careful deliberation in establishing that potential for harm really exists. 2) The information disclosed should be presented accurately without embellishment or exaggeration. 3) The sole motivation prompting disclosure must be the desire to prevent harm. No disclosure may be made when prompted, even in part, by personal animosity.[18] 4) The benefit of the disclosure cannot be achieved in any other way. 5) The disclosure will not lead to any harm or loss to the person who is the subject of the information disclosed other than the liability that would be imposed upon that person by a *bet din* on the basis of the facts and the available evidence.

R. Ya'akov Breisch, *Teshuvot Helkat Ya'akov*, III, no. 136, argues that, under such circumstances, disclosure is mandated, at least according to some authorities, by virtue of another commandment as well. "Thou shalt not place a stumbling block before the blind" (Leviticus 19:14) is understood in rabbinic sources as prohibiting an individual from causing another person to "stumble" by committing a transgression and also as an admonition against giving detrimental advice in mundane matters. Rambam, *Mishneh Torah, Hilkhot Rozeah* 12:4, extends the concept not only to providing direct aid in committing a sin but also to "strengthening the hands of transgressors." R. Judah Rozanes, *Mishneh le-Melekh, Hilkhot Kelayim* 1:6, maintains that even a passive stance may constitute "strengthening the hands of transgressors" and hence is forbidden by Rambam as placing a "stumbling block before the blind." *Mishneh le-Melekh* employs this thesis in explaining an otherwise difficult ruling of Rambam. Rambam rules that a Jew may not permit a gentile to make use of a tree belonging to a Jew for purposes of grafting a branch of one species upon a tree of another species. Even passive acquiescence constitutes a violation of the prohibition against "placing a stumbling block." *Helkat Ya'akov* argues that since not only assistance in transgression but also offering poor counsel is prohibited by this commandment, "passive" counsel that is deleterious in nature is also forbidden. Advice designed to cause unhappiness or financial loss is clearly forbidden. Hence, according to *Mishneh le-Melekh*, failure to provide

information and advice for the purpose of averting such unfortunate results is also a form of "placing a stumbling block before the blind." Accordingly, concludes *Helkat Ya'akov*, a person is not at all justified in maintaining his own counsel in circumstances in which circumspection would result in grief or financial loss to others.

Obligations arising from the commandment not to stand idly by the blood of one's fellow and the prohibition against placing a stumbling block before the blind obligate a person to prevent harm or loss; they do not give rise to an affirmative obligation to maximize the profit or enhance the material well-being of one's fellow. Accordingly, *Hafez Hayyim* rules that disclosure of derogatory personal information is mandatory if necessary to prevent loss but makes no such statement with regard to disclosure for the purpose of financial advantage.

Violation of a confidence that does not involve talebearing but is protected by the prohibition of *bal tomar* [i.e., *lo emor*–do not say] may well be a different matter. In an article published in *Tehumin*, vol. IV (5743), the late R. Saul Israeli declares that such a confidence may be breached even in order to achieve a financial benefit provided, however, that there will be no resultant harm to the person who has imparted that information. Rabbi Israeli observes that refusing to allow another person to derive benefit from one's property when there is no harm or loss to oneself is decried by the Sages as the "trait of Sodom." Accordingly, in the absence of evidence to the contrary, there is no reason to assume that the party whose confidence is violated would act wickedly in withholding such information. On the contrary, argues Rabbi Israeli, the halakhic principle "A person is pleased that a *mizvah* be performed with his property" serves to establish a constructive waiver of confidentiality.

It seems to this writer that Rabbi Israeli is correct is stating that non-personal communications may be divulged in such circumstances without prior permission. Moreover, in this writer's opinion, there is talmudic evidence that serves to establish that such information may be divulged for the benefit of another party even over the express objection of the person from whom the information was obtained.

The Gemara, *Avodah Zarah* 28a, in recounting a problematic anecdote, reports that R. Yohanan once suffered a severe toothache. He received treatment at the hands of a prominent gentile woman on a Thursday and a Friday. R. Yohanan declined to visit her on *Shabbat* because he was occupied with his students and therefore requested instructions so that he might administer the therapy to himself. The

woman was reluctant to divulge that information lest it became available to others as well. Accordingly, she demanded that R. Yohanan swear an oath not to reveal the information. R. Yohanan swore that "to the God of Israel he would not reveal" the information and then promptly imparted the information in his Sabbath lecture on the excuse that he did indeed swear not to reveal the information "to the God of Israel" but that he reserved the prerogative of revealing the information to "the people of Israel." Addressing the concern raised on account of profanation of the Divine Name involved in this subterfuge, the Gemara responds that immediately upon receiving the information R. Yohanan revealed his intention to discuss the matter publicly.[19] Presumably, R. Yohanan did so in the context of reproving the woman for attempting to reserve such beneficial therapeutic information for her own exclusive use.

The Gemara limits its discussion to the problems posed by the oath sworn by R. Yohanan not to reveal the information. But, putting aside the strictures imposed by the oath, it is manifestly clear that the woman in question imparted the requisite pharmacological information to R. Yohanan in confidence and that she expressly informed him of her desire that this esoteric information remain her secret. The information, to be sure, was not personal and certainly was not pejorative. It was, however, information within the exclusive possession of the woman—not unlike the information conveyed to Moses by God that would perforce have remained a divine secret if not for God's express permission to transmit the information to the people of Israel. The sole but crucial distinction is that the medical information in question was of direct and tangible benefit to R. Yohanan's audience and its divulgence did no harm to the woman who entrusted the information to R. Yohanan. On the basis of the narrative as it is reported there is every reason to assume that the woman in question did not charge a fee for her medical ministrations and hence suffered no adverse financial effect.[20] Presumably, her motive in refusing to share the information with toothache sufferers was a desire for power or self-aggrandizement, or sheer pettiness. It would seem that this talmudic narrative serves to establish that the proprietary interest with regard to non-personal confidences established by the prohibition of *bal tomar* need not be respected by a confidant when it is exercised as a "trait of Sodom."[21]

III. RABBIS AND THE CLERGYMAN-PENITENT PRIVILEGE

The information governed by the prohibition of *bal tomar* as posited by the Gemara, *Yoma* 4b, is not at all encompassed within the clergyman-penitent privilege. Accordingly, disclosure of such information as required by Jewish law when necessary for the material benefit of a third party presents no conflict with the requirements of civil law. Communications for which a clergy-penitent privilege may be claimed are virtually always of a nature to which the much more stringent prohibition against talebearing applies. Circumstances in which Jewish law requires a breach of confidence involving such information are quite rare. In general, Jewish law mandates disclosure of confidential information only when necessary to avert significant harm. Even secular law recognizes an exception to the rule of confidentiality when a threat to life or serious physical harm exists[22] It is little wonder that Jewish law recognizes the selfsame exception when a threat to spiritual welfare exists, as was the case in the matter before the New York court.

The very fact that the plaintiff has instituted proceedings in a civil court for recovery of damages is itself vindication of the rabbis' judgment. Seeking redress against a fellow Jew in a civil court rather than in a *bet din* is itself a serious breach of Halakhah and departure from the life-style of an observant Jew. As such, the plaintiff's motion betrays a fundamental lack of religious probity.

The applicable New York statute and the laws of other jurisdictions may well exclude from evidence the testimony of a clergyman even in situations in which Jewish law permits breach of confidentiality. But, even assuming that Justice Goldstein is correct in his view that the statute also creates a fiduciary relationship, the fiduciary relationship of a rabbi to his congregant must, by its very nature, be circumscribed by the provisions of Jewish law. A member of the Jewish faith who seek the counsel of a rabbi rather than that of a psychologist, social worker or marriage counselor understands quite well that the rabbi's actions will be governed by Jewish law and tradition. The congregant places his faith and trust in the rabbi in anticipation that the rabbi will act in precisely that manner. The uniqueness of a fiduciary relationship under the secular legal system is based upon the concept that it is a relationship predicated upon trust and hence violation of that trust is actionable. If a rabbi is trusted to relate to his congregant on the basis of Jewish law, the rabbi's recognition of the limits that Jewish law places upon confidentiality can hardly be deemed a violation of the fiduciary relationship

arising from that confidence. To put the matter quite simply, in situations in which Jewish law requires the rabbi to divulge information, the congregant does not, and should not, have a "reasonable" expectation of confidentiality. Accordingly, the courts should recognize an implied waiver of statutory confidentiality in those cases in which disclosure is required by the faith of the confidant.

Moreover, if a rabbi is bound by a fiduciary duty, his duty is not to his congregant but to a higher authority. The Internal Revenue Service and the Social Security Administration seem to have an intuitive understanding of this point. Although, typically, rabbis are hired by congregations and compensated in the form of a salary, the I.R.S. does not demand that congregations withhold income tax from the salaries of their clergy or file W2 forms on their behalf. Clergymen serving congregations make contributions to the Social Security system as self-employed individuals. In a very real sense, the members of a Synagogue may pay the rabbi's salary but he is not their employee; the rabbi is the employee of the Almighty. Certainly, the rabbi's fiduciary obligation is to God, and only through God to the congregant.

Let it be noted that, as will be discussed later in greater detail, clergyman-penitent statutes are directly attributable to the burden placed upon a priest by canon law. The Church requires its priests to hold the sanctity of a confession inviolate even upon pain of incarceration or death. In states in which the priest-penitent privilege is not recognized, were a judge to threaten a priest with citation for contempt for refusing to divulge information revealed to him in the confessional, the priest would feel bound to accept imprisonment despite the requirements of a secular legal system. A rabbi, in some limited circumstances, may be equally obligated by his religious convictions to violate a confidence. His recognition of a religious obligation to do so should not give rise to puzzlement any more so than does the priest's refusal to violate the same confidence.

At the same time a rabbi is under no automatic obligation to reveal that a crime has been committed even if the crime was revealed to him in a context not encompassed within the clergyman-penitent privilege. The obligation to disclose, on the infrequent occasions in which it may exist, is based entirely upon the need to prevent harm and is totally unrelated to society's desire to punish crime. Accordingly, only a well-founded fear of repetition of the criminal act that might be prevented by disclosure of past misdeeds would make such disclosure mandatory.

An absolute clergyman-penitent privilege, if applied to rabbis, would yield results that no Jew could accept in good conscience.

Assume, for example, that a butcher afflicted by pangs of conscience, but not yet willing to mend his ways, confesses to a rabbi that the meat he offers for sale is not kosher. For the rabbi to act as if he has no such knowledge is to make a mockery of his fiduciary responsibilities to his other congregants, not to speak of his own religious duties. The rabbi's position—and responsibilities—are analogous to those of a psychiatrist who discovers that a patient is planning to commit mayhem. The rabbi's obligation to prevent sin is no different from the physician's responsibility to prevent bodily harm.

In this regard the obligations of a rabbi and a physician are, from a Jewish law perspective, quite similar and, with regard to the obligations of both, the perspective of Judaism is at variance from that of the American legal system. For Judaism, a physician's obligation does not flow from a contractual or fiduciary obligation *vis-a-vis* his patient; the physician's flow from an obligation to heal imposed upon him by the Deity. The self-same obligation to seek healing and to prolong life are imposed upon the patient as well. The patient in seeking medical care and the physician in providing such ministration are together fulfilling an obligation imposed upon them jointly by the Creator of all life. Accordingly, the physician dare not accede to the wishes, or even to the directives of a patient, when they conflict with his duty to God, for it is to the Deity that he owes an overriding fiduciary duty. A person seeking the services of a religiously observant physician, psychologist, attorney or rabbi should know and respect the moral and professional values of his confidant. Which thief would entrust a policeman with details of a contemplated bank robbery? If a person is so foolhardy as to plan harm to another individual he only compounds such foolhardiness in divulging his intention to any other human being, all the more so to one whose own moral and professional values require disclosure of the confidence. The congregant in seeking counsel and the rabbi in providing guidance are both engaged in the sacred task of discovering and carrying out the will of God. Each owes a duty to God rather than to the other; to the extent that one owes a duty to the other it is because that duty flows from a duty to God.

It is not at all correct to conclude that rabbis are bound by the decision in *C.L.* v. *Flaum*[23] or by §4505 of the C.P.L.R. on the grounds of *dina de-malkhuta dina* (the law of the land is the law). The finding of the Court in *C.L.* v. *Flaum* that the rabbis were in breach of a fiduciary obligation does not mean they are in violation of either a criminal or civil statute; it means only that the aggrieved party can sue for damages in a civil court.

Moreover, not every civil law is binding in religious law as *dina de-malkhuta dina*. Assuredly, a law requiring violation of a religious precept, even if its purpose is not anti-religious and it is non-discriminatory in nature, e.g., a law requiring all citizens to cast ballots in an election held on *Shabbat*, is not binding in Halakhah and would require an act of civil disobedience on the part of citizens of the Jewish faith.[24] Similarly, a law requiring a Jew to stand idly by while his fellow goes to his death is, from a religious perspective, null and void. A law that requires a person to remain silent in face of spiritual danger to an innocent victim is entirely unworthy of religious respect, much less of enforcement under pain of religious sanction. The only issue that is germane is the severity of the burden that a Jew is obligated to accept in fulfilling a particular religious obligation. Discussion of the threshold level of civil or criminal sanctions that would excuse a Jew from fulfilment of such an obligation is beyond the scope of this endeavor.

In this writer's opinion, it is more than likely that the decision in *C.L.* v. *Flaum* will be overturned on appeal. However, it is also likely that the issue will become moot before an appeals court rules on the matter. Many, and probably most, matrimonial cases, even when they have become the subject of judicial proceedings, are settled out of court. If that should prove to be the case with regard to the dispute between Dr. and Mrs. L., it may be anticipated that, as part of an eventual settlement, claims against the rabbis will be withdrawn. Although such an outcome would be salutary, it would have the unfortunate concomitant result of allowing Justice Goldstein's decision to stand and to influence the outcome of future cases. The potential for litigation is itself likely to have an unsettling effect upon rabbis.

IV. LEGAL ACCOMMODATION OF RABBINIC DUTY

It is abundantly clear that situations will arise in which, for reasons of conscience, a rabbi will find it impossible to obey the law as announced by the Court in *C.L.* v. *Flaum*. If that interpretation of the clergyman-penitent privilege prevails, a solution must be found that will render the statute inapplicable in situations in which it creates a conflict between the law and religious conscience. In assessing the policy considerations auguring for or against a "religious exemption" from the clergyman-penitent privilege it is necessary to identify the rationale underlying the privilege and the purpose it is designed to serve.

The most commonly offered rationale is that the privilege is

designed to foster the clergy-penitent relationship much in the same manner as the physician-patient, attorney-client and spousal privileges are designed to foster particular relationships by shielding communications within those relationships.[25] However, although society has a legitimate interest in fostering each of the latter relationships, societal actions designed to foster a clergy-penitent relationship may constitute a violation the Establishment Clause of the First Amendment. Nevertheless, the underlying rationale can be reformulated in terms of religious accommodation, i.e., not that the privilege has been established to further a societal interest in fostering the clergy-penitent relationship, but that the privilege has been established as a permissible accommodation of the desire of religionists freely to enter into such relationships. As stated by the New York Court of Appeals:

> It is clear that the Legislature by enacting CPLR 4505 and its predecessors responded to the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one's self and others can be realized.[26]

Similarly, the U.S. Supreme Court has recognized that "the priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed arts or thoughts and to receive priestly consolation and guidance in return."[27]

Some commentators have sought to justify evidentiary privileges, including the clergy-penitent privilege, in terms of privacy interest.[28] Although, on the basis of existing case law, it is difficult to argue that the constitutionally protected right of privacy includes the right to confidentiality of private information,[29] the concern for privacy is certainly a legitimate rationale for statutory protection of communications for which secrecy is generally anticipated. The intimate nature of interaction between a clergyman and congregant gives rise to a highly personal and private relationship. If privacy is itself an end, rather than an instrumental means to certain goals, and is also worthy of protection as an end, the clergyman-penitent relationship certainly qualifies as a private relationship.

A third rationale is accommodation of a need that is intrinsically human rather than religious. Human beings have a psychological need to unburden themselves of flaws and deficiencies of conduct. Reassurance that their behavior is not an aberrant deviation from the norm and/or advice designed to prevent future lapses serve to promote psy-

chological well-being. Accordingly, the religious practice of confession, whether formal or informal, serves a positive cathartic function as part of the process of dealing with feelings of guilt. This rationale for the privilege is reflected in the words of the supreme court in *Trammel* v. *United States*: "The priest-penitent privilege recognizes the ***human need*** (emphasis added) to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[30]

There can, however, be little question that, historically, the privilege was originally designed, not as an accommodation of the religious practice of the confiders, but of the clergy's religious objection to disclosure.

The legal basis of the priest-penitent privilege is rooted in the Code of Canon Law. Canon 1318 states: "A confessor who directly violates the Seal of Confession incurs an automatic (*latae sententiae*) excommunication . . . ." There is strong evidence that English law recognized and respected the Seal of Confession from the time of the Norman Conquest in 1066 until the English Reformation in the sixteenth century.[31] In the sixteenth century, the Anglican church replaced the Roman Catholic church as the established Church of England. With the passage of time many changes in church practice were introduced, including a dwindling of emphasis upon, and ultimately elimination of, confession.[32] Since confession was no longer necessary and since the Anglican church did not have a requirement of secrecy, clerics were no longer in need of protection of the law. Some contemporary historians are of the opinion that the privilege terminated at the time of the Reformation.[33] However, Wigmore, in his classic treatise on evidence, asserts that the privilege survived until the Restoration.[34] In either event it is abundantly clear that during the seventeenth century the privilege was no longer recognized.[35] Thus, the historical record lends support to the view that the privilege was designed as an accommodation of religious practice and was designed for the protection of the cleric.

The history of the privilege in this country lends even more support to this understanding of the rationale underlying the privilege. Since the privilege was no longer recognized in England, it was not part of the common law imported to the New World. The first known case involving clergy privilege was *People* v. *Phillips* decided by the New York Court of General Sessions in 1813.[36] The case involved Father Kohlmann, a Roman Catholic priest who, after returning stolen goods to their owner, refused, in the course of grand jury proceedings, to identify the person who had delivered the goods to him. In the confessional,

the defendant, Daniel Phillip, revealed to his parish priest that he had knowingly received stolen goods. The priest insisted that Phillip return the stolen items. Phillip then brought the stolen goods to Father Kohlmann under cover of confidentiality of the Seal of Confession and the priest returned the items to the rightful owner.[37] Father Kohlmann was subpoenaed to appear before a grand jury to identify those responsible for the crime. In refusing to do so, Father Kohlmann testified:

> . . . if called upon to testify in quality of a minister of a sacrament, in which my 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.[38]

The court upheld the priest's right not to testify under the right of "free exercise of religious profession and worship" guaranteed by the New York constitution adopted in 1777.[39]

However, four years later in another unreported case, *People* v. *Smith,*[40] a different New York court ruled that no such privilege existed for a Protestant minister. The court did not clarify the grounds for the distinction. To be sure, unlike Protestant denominations, the Catholic church requires its adherents to confess sins and binds its priests to secrecy. It would, however, be an error to ignore the impact that Father Kohlmann's impassioned testimony must have had upon the Court. There is every reason to assume that the Court did indeed believe that the priest would have accepted "instantaneous death or any temporal misfortune" rather than violate the sanctity of the confessional.[41]

The specter of a priest languishing in jail because he has been sentenced for criminal contempt is not very pleasant. There is always public sympathy for civil disobedience entered into for ideological reasons rather then for personal profit or benefit. Sympathy for civil disobedience in the name of religious liberty is even greater.[42]

In seeking to compel the testimony of a Roman Catholic priest, the law faces a no-win situation. The law must recognize that the testimony will simply not be forthcoming.[43] The law then has the option of holding itself up to ignominy in a futile attempt to enforce its dictates or of pretending that no infraction has occurred and allowing the priest to

flout the law. Either way the law will not be obeyed and will be held in disrespect. Far wiser to carve out a religious exemption that is perceived as principled, libertarian and respectful of religion. Recognition of a priest-penitent privilege allows the law to escape from between the horns of the dilemma and to preserve both religious freedom and respect for the law.

Indeed, although often overlooked, the Free Exercise Clause of the First Amendment, was rooted, at least in part, on precisely that consideration. The framers of the constitution of the United States made extensive use of the writings of John Locke and his influence upon the First Amendment was most direct.[44] Locke recognized that religious intolerance was inconsistent both with public peace and good government and viewed religious rivalry and intolerance as among the most severe political problems of his day. Civil strife and lawlessness, not to speak of war between nations, were regarded by Locke as the product of religious turmoil. In an essay written in 1689, Locke states: "It is not diversity of opinion, which cannot be avoided; but the refusal of toleration to those that are of a different opinion, which might have been granted, that have produced all the bustles and wars, that have been in the Christian world, upon account of religion."[45] Elsewhere, decrying the futility of religious coercion, Locke writes, ". . . let divines preach duty as long as they will, 'twas never known that men lay down quietly under the oppression and submitted their backs to the blows of others, when they thought they had strength enough to defend themselves"[46] The way to avoid such strife is by assuring toleration and liberty of religious practice for all. Freedom of religious practice also enables a government to govern effectively. A populace that perceives its religious principles to be thwarted by the government will harbor deep resentment and disrespect for the ruling authority. The government will be deligitimized in the eyes of those whose religious liberties are denied; respect for the government and its laws will be compromised.

Thus, there might be strong reason to craft a priest-penitent privilege to be granted to Catholic priests but not to other clergy for whom confidentiality does not rise to the level of inviolability. That distinction was intuitively recognized by the New York court. However, the principle of equality in the eyes of the law demands that a privilege granted to some be granted to all. And so, in 1828, the New York legislature enacted the nation's first statute recognizing the clergy privilege.[47] Arguably, the anti-Establishment and Equal Protection clauses of the U.S. Constitution, which are now binding upon the states, would

demand no less. In any event, most clergy will not testify concerning confidential communications regardless of whether there is a statutory privilege.[48] Moreover, as one commentator has recently noted:

> If the clergyman believes that he has a duty of confidence that is unwaivable by religious doctrine. . . . The clergyman will be guided by the tenets of his faith rather than the rules of evidence, and he will risk contempt of court rather than compromise the protection of his ecclesiastic integrity. To compel disclosure would force the clergyman to choose between his religion and the court's wrath. The clergyman will probably be more willing to suffer at the hands of a human judge than at the hand of the Judge of Judges.[49]

It would be paradoxical in the extreme to apply a privilege designed to accommodate religious conscience and practice in a situation in which it would have precisely the opposite effect. Forcing a clergyman to remain silent when his religious conscience demands that he speak out is no less a violation of religious liberty than is coercion in forcing him to violate the Seal of Confession.

If the clergy privilege is designed to prevent the disrespect for law that would flow from inevitable disobedience to the demand for testimony, it would be anomalous to generate the identical disrespect for law that would arise from religiously mandated disobedience of a demand for nondisclosure. An attempt to seal the clergyman's lips upon threat of either criminal or civil sanctions when he believes that the tenets of his faith require that he disclose information imparted to him in confidence is likely to be frustrated by the clergyman's perceived duty to a higher authority. The inevitable result will be lessening of respect for temporal law.

Memories of religious oppression of Jews by government officials under color of law have not yet receded from the collective memory of the Jewish community. Lack of respect, not only for discriminatory laws and oppressive regimes, but for government and civil law is general, persists in the psyche of many of those who experienced discrimination and religious persecution in the past. Scandalous events, of which we have witnessed far too many, serve to underscore how pernicious and infectious such attitudes can be. Forcing rabbis to become lawbreakers in violating the clergyman-penitent privilege when Jewish law demands that they do so is inimical both to the interests of the Jewish community and to the interests of society at large. Prudence demands that citizens not be subjected to crises of conscience that will inevitably result in erosion of respect for the law.

V. A PROPOSED REMEDY

There is, however, a relatively simple legislative solution that would both preserve the benefits of the privilege and accommodate free exercise concerns. The clergy privilege is currently recognized in each of the states, the District of Columbia and in federal courts.[50] At present, in New York, the privilege is held by the communicant, i.e., only the congregant[51] can waive the privilege and authorize testimony by the clergyman.[52] In other states, e.g., Illinois,[53] Ohio,[54] Maryland[55] and Virginia[56] the privilege is held by the clergyman.[57] In those states, although the clergyman cannot be compelled to testify, he may choose to voluntarily disclose the content of the communication.[58] Accordingly, the religious concerns of the Jewish community would best be served if states in which the privilege is held by the penitent, including *inter alia*, Connecticut, Massachusetts, Michigan and Ohio, as well as New York, were to amend their codification of the privilege and stipulate that it may be waived by the clergyman.[59] The result would also conform with the original intent and purpose of the privilege which was designed not so much to encourage free and open communication between clergyman and congregant as it was to protect the religious liberty of priests and penitents.

NOTES

I wish to thank Rabbi Mordecai Ochs, Professor Steven Resnikoff and Mr. Menashe Shapiro for their valuable suggestions.

1. With the occurrence of the term "*chutzpah*" in a recent U.S. Supreme Court decision, *National Endowment of the Arts* v. *Finley*, 118 S. Ct. 2168 (1998), the term has become firmly ensconced in legal parlance. For an interesting survey of earlier judicial decisions in which the term has appeared as well as of its connotations see Jack Achiezer Guggenheim, "The Evolution of Chutzpah as a Legal Term: The Chutzpah Championship, Chutzpah Award, Chutzpah Doctrine, and Now, the Supreme Court," *Kentucky Law Journal*, vol. 87, no. 2 (1998-99), pp. 417-438.
2. In an earlier period of constitutional law jurisprudence it would have been obvious that the defendants might have asserted a free exercise claim in support of an exemption to an obligation of confidentiality arising from the statute. Whether or not they would prevail would have depended upon a demonstration of a countervailing compelling state interest in barring their testimony. Although in New York as well as in many other states the privilege is vested in the communicant, an analysis of the history of the

clergy-penitent privilege indicates that it arose from a perceived need to protect from citation for criminal contempt Catholic priests who are barred by canon law from violating the sanctity of the confessional regardless of the consequence to themselves. See Edward M. Cleary, *McCormick on Evidence*, 4th edition (St. Paul, 1992) §76.2. Indeed, although of dubious constitutional validity, the statutes of some states, including Idaho (Idaho Code §9-203) (Michie 1948), Illinois (Ill. Comp. Stat. 5/8-803) (West 1992), Montana (Mont. Code Ann. §26-1-804) (1997), Utah (Utah Code Ann. §78-24) (1996), Washington (Wash. Rev. Code Ann. §5.60.060) (West 1995) and Wyoming (Wyo. Stat. §1-12-101) (1977) still restrict the privilege to penitential communications in the course of discipline "enjoined by the church," i.e., by a religious denomination requiring confession. Michigan (Mich. Comp. Laws Ann. §600.2156) (West 1986) similarly limits the privilege to confessions made "in the course of discipline enjoined by the rules or practice of such denomination." The applicable Vermont statute (Vt. Stat. Ann. 12, §1607) (1947) provides even more explicitly that "A priest or minister of the gospel shall not be permitted to testify in Court to statements made to him by a person under the sanctity of a religious confessional." Oregon (Or. Rev. Stat §40.260) (1981) extends the privilege to communications made to a clergyman "authorized or accustomed to hearing confidential communications" but only if "under the discipline or tenets of that church" the clergyman "has a duty to keep such communications secret." See, however, *infra*, note 53. Moreover, despite its historical origin, other justifications have been advanced for recognition of the privilege. See *supra*, pp. 68-69. However, regardless of any particular rationale adopted in defense of the privilege, it would be difficult to argue that the State has the same compelling interest in encouraging free and open communication between a clergyman and a congregant as it has between a physician and a patient or even between an attorney and a client. However, the decision of the U.S. Supreme Court in *Employment Division, Oregon Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), 110 S. Ct. 1595, 108 L.Ed2d 876, had the unfortunate effect of emasculating the freedom of religious practice previously regarded as guaranteed by the Free Exercise Clause of the First Amendment. The court ruled that general laws which are religion-neutral and generally applicable, but have the incidental effect of burdening religious practice, are not unconstitutional.

It should, however, be noted, that in at least one case a New York court has held that the decision of the U.S. Supreme Court in *Employment Division* v. *Smith* does not curtail the right to free exercise of religion guaranteed by article I, §3 of the New York State Constitution. Despite the similarity of the state and federal provisions, the New York court declared:

> [T]his Court cannot ignore the New York Court of Appeals' long history and commitment to the protection of individual rights and liberties beyond those afforded by the U.S. Constitution, and federal constitutional law. Given this history and commitment . . . and the importance of this free exercise right, it is hard to imagine that New York would not continue to apply a "strict scrutiny" standard of

> review, and a balancing of the state's competing interests and the fundamental rights of the individual.

See *In re Rourke*, 159 Misc.2d 324, 327, 328, 603 N.Y.S.2d 647, 650. [Cf., however, *In re Miller*, 252 A.D.2d 156, 158, 684 N.Y.S.2d 368, 370 (A.D. 4Dept. 1998), in which the Court noted that the Court of Appeals "has not definitively stated whether the scope of [N.Y. Const. art I, §3] is coextensive with the Free Exercise Clause of the First Amendment of the U.S. Constitution, nor has it decided whether the analytical approach adopted by the United States Supreme Court in *Employment Div., Ore. Dept. of Human Resources* v. *Smith, supra,* should be applied in resolving claims that N.Y. Constitution article I, §3, has been violated."] Such a balancing test with regard to the clergyman-penitent privilege was earlier applied in *In re Fuhrer*, 100 Misc.2d 315, 318, 419 N.Y. S.2d 426, 429 (1979). See *infra*, note 39.

There are two reported cases in other states in which tort actions were brought against clergymen who revealed confidential communications. In each of those cases the court acknowledged that if the breach of confidence occurred pursuant to religious doctrine the clergyman might indeed be immune to tort liability.

In *Snyder* v. *Evangelical Orthodox Church* (1989), 216 Cal. App.3d. 217, 264 Cal. Rptr. 640, the plaintiffs confessed their adulterous relationship to members of the church hierarchy. Despite a promise of confidentiality, those confidences were divulged to the assembled congregation in the course of Sunday services as well as to a "gathering of local priests, ministers, pastors and guests." The plaintiffs asserted claims, *inter alia*, for breach of a fiduciary duty of confidentiality and infliction of emotional distress. The California Court of Appeal for the Sixth District noted that the record did not show

> whether it is a canon of respondents' belief that confessions (penitential or not) are revealed to the congregation unless the offender repents; whether it is church practice for the substance of a confession to be shared among church officials; or whether it is consistent with church doctrine to reveal the substance of a confession to anyone outside the church, and if so, under what circumstances.

If so, declared the court, "The court must next consider whether the interests which are invaded by respondents' religious practices are of sufficiently significant interest to the state to warrant the application of tort liability. The Court of Appeal then proceeded to spell out in detail the balancing test to be applied.

More recently, *Alexander* v. *Culp*, 124 Ohio App.3d 13, 705 N.E.2d 78, addressed the case of a plaintiff who met with a clergyman for marital counselling in the course of which he disclosed that he had engaged in a number of extramarital liaisons and was currently involved in an adulterous relationship. The clergyman revealed that information to the plaintiff's wife. In addition, the clergyman advised the wife that her husband was unworthy of trust and counselled her to obtain a restraining order against the husband, to change the locks on the doors of the marital home and to

initiate divorce proceedings. The Ohio appellate court found the factual allegations sufficient to state a viable claim for common law negligence. In *Alexander*, the defendant did not assert a free exercise claim based upon a religious obligation to inform the wife of her husband's adultery. The Court explicitly noted, "Whether a particular case interferes with First Amendment freedoms can be determined on a case by case basis."

Apart from the foregoing, it seems to this writer that even in the post-*Smith* era Justice Goldstein's interpretation of CPLR 4505 renders it unconstitutional in its application as a vehicle to prevent clergymen from disclosing information when they feel that they are required to do so by the tenets of their faith. *Smith* limits the restriction imposed by the Free Exercise Clause to legislation specifically designed to impede or regulate religious practices. CPLR 4505, bearing the title "Confidential Communication to clergy privileged" targets religious functionaries exclusively. The burden that, in Justice Goldstein's opinion, it places upon clergymen is not at all incidental to general and neutral enforcement of a statute but, since it singles out clergy for imposition of the burden flowing from the privilege, is a direct regulation of religious conduct.

Moreover, although it is less obvious, the statute as interpreted by Justice Goldstein, may offend the Establishment Clause. Previously, rabbis were receptive to congregants seeking to unburden themselves in the belief that they were free to act in accordance with the obligations imposed upon them by Jewish law in dealing with information revealed in confidence. However, unlike Catholic priests, rabbis do not have an absolute obligation to hear "confession" or to allow themselves to become privy to a confidential communication. In the wake of the decision in *C.L.* v. *Flaum*, a rabbi may very well decide that, in order to avoid conflicting halakhic and legal obligations as well as possible legal sanctions, he will decline to receive confidential communications. As a direct result, the congregant will be deprived of the advice, guidance, solace and comfort of his clergyman. Since such ministration is readily available from clergy of other faiths, the effect is to grant preference to those faiths over Judaism and even to motivate penitents to seek out clergy of those religions rather than rabbis of the Jewish faith. Arguably, a statute having that effect is in violation of the Establishment Clause.

3. The full name of the plaintiff has been omitted for obvious reasons. In contradistinction the role of the defendants redounds to their credit rather than to their embarrassment.
4. *New York Law Journal*, November 24, 1998, p. 29, col. 4.
5. 179 Misc.2d 1007, 687 N.Y.S.2d 562 (Sup. 1999).
6. The reason underlying Justice Goldstein's ruling that the plaintiff is entitled to compensation for damages sustained as a result of the rabbis' breach of confidence is less than clear. The statute in question establishes a rule of evidence and, at least on its surface, nothing more. The statute does not command a clergyman to respect confidences, does not brand disclosure on the part of the clergyman a breach of contract and does not declare such breach to constitute an actionable tort. In a recent case, *Alexander* v. *Culp*, 124 Ohio App.3d 13, 18, 705 N.E.2d 378, 381, the Court of Appeals of Ohio ruled explicitly that a statute prohibiting a clergyman

from testifying with regard to a confidential communication does not protect the communicant from disclosure outside legal proceedings. [The sole jurisdiction to impose sanctions for violation of the privilege is Tennessee. Tenn. Code Ann. §24-1-206 (1989) makes violation of the statute a misdemeanor punishable by imprisonment for a period not greater than thirty days and/or a fine not to exceed fifty dollars. The penal sanction is apparently imposed only for disclosure "in giving testimony as a witness in any litigation" but does not apply to breach of confidence in other contexts.]

Of course, one might argue that it is an evident condition of the contract between a patient and his physician, a client and his attorney and a congregant and his clergyman that confidences be held inviolate. Alternatively, one might argue that the duty arising from the professional relationship is fiduciary in nature and hence its breach constitutes a tort. [Some courts have found that individuals have a constitutionally protected interest in maintaining the privacy of medical information. See, for example, *Doe* v. *City of New York*, 15 F.3d 264 (2d Cir. 1994). The constitutionally protected right of privacy would arguably extend to other types of personal information as well. See, however, *Paul* v. *Davis*, 424 U.S. 693 (1976), in which the Supreme Court held that the constitutional right of privacy does not include the right to keep private information confidential. In any event, a constitutional right of privacy can be asserted only against government officials or when there is some form of government involvement, e.g., funding provided to a hospital.] Moreover, those arguments might be made even in the absence of a statute establishing an evidentiary privilege. Were this the Court's reasoning, an appeal to the statute would serve only as evidence of the underlying contractual obligation or fiduciary relationship. The statute, then, serves as evidence of liability but not as the source of such liability. Nevertheless, in ordering a hearing in the case against one of the rabbis for the purpose of determining whether or not a third party was present when the conversation took place, the Court seems to assume that liability can exist only if it is generated by the statute. The presence or absence of a third party is crucial with regard to the privileged nature of the communication in so far as its exclusion from evidence is concerned; contractual and fiduciary responsibilities, however, are generally not affected by the presence or absence of third parties.

7. 179 Misc.2d at 1016, 687 N.Y.S.2d at 569-570.
8. 179 Misc.2d at 1019, 687 N.Y.S.2d at 571.
9. There is indeed strong support for the argument that, despite the unqualified privilege expressed in CPLR 4505, the testimony of clergyman with regard to a privileged communication should be regarded as admissible in a custody proceeding. Although there is no case law dealing with the clergyman-penitent privilege within the context of a child custody proceeding, New York courts have repeatedly held that the physician-patient, attorney-client and psychotherapist-patient privileges cannot be invoked in such proceedings.

   Some forty years ago, in *People ex rel. Fields* v. *Kaufman*, 9 A.D.2d 375, 377, 193 N.Y.S.2d 789, 791 (1st Dep't 1959), the Supreme Court, Appellate Division, First Department, ruled that confidential psychiatric,

psychological and social welfare reports concerning rehabilitation of a mother following paralytic poliomyelitis must be made available to the opposing party. In refusing to recognize the privileged nature of that information the Court declared:

> Where the welfare of children is concerned and in furtherance of the duty of the State as parens patriae, courts are not so hidebound or limited that they may not depart from strict adversary concepts. By analogy, it appears that so important is the duty of the State deemed to be in its role as parens patriae, so vital is its concern for its infant wards, that from birth to maturity their welfare is paramount even when compared with the rights of the natural parents.

That position was affirmed by the Court of Appeals in *Kessler* v. *Kessler*, 10 N.Y.2d 445, 452, 225, N.Y.S.2d 1,5 (1962). In *People ex rel. Chitty* v. *Fitzgerald*, 40 Misc.2d 966, 967, 244 N.Y.S.2d 441, 442 (Sup. Ct. Kings Co. 1963), the Court followed that principle in disregarding the patient-physician privilege on the grounds that "the right of the petitioner to invoke the patient-physician privilege must yield to the paramount rights of the infant."

In *Baecher* v. *Baecher*, 58 A.D.2d 821, 396 N.Y.S.2d 447, 448 (2d Dep't 1997), *appeal denied* 43 N.Y.2d 645, 402 N.Y.S.2d 1026 (1978), in addition to invoking the parens patriae doctrine, the Appellate Division found yet additional grounds for admitting an otherwise privileged communication. The Court ruled that "the defendant waived his right to the privilege by actively contesting custody, thereby putting his mental and emotional well-being into issue." The notion of automatic waiver in custody proceedings was also employed by the Supreme Court in an unreported case, *Conderre* v. *Conderre*, 1990 WL 312774, 1 (Sup. Ct. Suffolk Co. 1990). In that case, however, the court required that the medical records be review by the court and that only those portions deemed to be relevant and material be disclosed. Again in *McDonald* v. *McDonald*, 196 A.D.2d 7, 13, 608 N.Y.S.2d 477, 481 (2d Dep't 1954), the Second Department, citing *Baecher* and *Chitty,* declared that "it is well settled that in a matrimonial action, a party waives the physician-patient privilege concerning his or her physical condition (see, CPLR 4504) by actively contesting custody." See also *Proschold* v. *Proschold*, 114 Misc.2d 568, 451 N.Y.S.2d 956 (Sup. Ct. Suffolk Co. 1982).

The question of an attorney-client privilege in custody cases was first addressed in New York by the Court of Appeals in *Jacqueline* v. *Segal*, 47 N.Y.2d 215, 222, 225 N.Y.S.2d, 884, 888, at about the same time as the issue of psychotherapist privilege was being discussed by the Second Department in *Baecher* v. *Baecher*. The Court of Appeals cited precedents establishing that, insofar as the attorney-client privilege is concerned, "such right ought to depend on the circumstances of each case" in ruling that an attorney may be compelled to disclose the address of his client in order to prevent the unsuccessful litigant from frustrating the court's judgment rendered in the best interests of the child.

The public policy considerations upon which the clergyman-penitent

privilege are based are surely no more weighty than the physician-patient or attorney-client privilege. As is the case with regard to those privileges best interests of minor children should take precedence over the policy considerations underlying the statutory clergyman-penitent privilege. Moreover, as is the case with regard to other statutory privileges, initiation of custody proceedings should be regarded as an automatic waiver of the clergyman-penitent privilege as it pertains to determination of which parent is better qualified to be entrusted with the care of minor children.

10. See *Hafez Hayyim, Be'er Mayim Hayyim, Hilkhot Lashon ha-Ra* 2:2 and the commentary of R. Binyamin Cohen on *Hafez Hayyim, Helkat Binyamin* (Brooklyn, 5753), *Bi'urim, Hilkhot Lashon ha-Ra* 2:61. Of interest also is a brief note by R. Chaim Sha'ul Kaufman of Gateshead that appeared in a European Torah journal, *Kol ha-Torah*, no. 60 (*Nisan* 5756), p. 118. R. Kaufman expresses uncertainty with regard to whether *lashon ha-ra* is permitted with the express permission of the subject of the talebearing. R. Kaufman then refers to the above-cited remarks of *Hafez Hayyim* with the comment that it may be inferred from *Hafez Hayyim's* remarks that communication of *lashon ha-ra* is prohibited even under such circumstances.
11. See Maharsha, *ad locum,*
12. However, *Sefer Mizvot Gadol*'s interpretations of the word *"l'emor"* is somewhat different from that of Rashi. *Sefer Mizvot Gadol* also interprets that word as a contraction, but as the assimilated contraction of the words *"lav amur,"* i.e., "a negative commandment has been stated [with regard to this matter]."

    R. Baruch ha-Levi Epstein *Torah Temimmah*, Leviticus 1:1, regards the statement the of the Gemara, *Yoma* 4b, as establishing a rabbinic prohibition. Cf., however, *Bet ha-Behirah, Yoma* 4b, who describes the stricture against disclosure of a non-personal communication, imparted in a confidential manner, as merely a matter of *derekh erez* or unseemly behavior.
13. This interpretation of *Yoma* 4b is inherent in the comments of *Or ha-Hayyim*, Exodus 25:2. See *infra*, note 10.
14. This nuance of meaning is accurately captured in the standard Yiddish translation published in the *Bet Yehudah* edition of the Pentateuch which renders the *"l'emor"* as *"zu zogen"* rather than as *"zogendig."*
15. *Torah Temimmah* differs from Maharsha only in understanding that the principle is derived from the plain meaning of *"l'emor"* and is not based upon its redundancy in light of the immediately following "Speak to the children of Israel." *Or ha-Hayyim*, Exodus 25:2, understands the Gemara's comment much in the same manner as *Torah Temimmah* but comments that *"l'emor"* alone would have served only to give Moses discretionary license to divulge the prophetic message he received; the phrase "speak to the children of Israel" is in the imperative voice and serves to make it incumbent upon Moses to do so.
16. *Sefer Mizvot Gadol*'s citation of this narrative seems to indicate that he regarded the matter divulged to have been subject to the privilege established by *Yoma* 4b. Rashi, *Sanhedrin* 31a, describes the incident as involving *lashon ha-ra*. If that comment is understood literally the infraction was

far more severe than revealing a secret. It seems to this writer that Rashi did not employ the phrase literally but intended only to dispel the notion that the matter revealed was a scholarly insight heard in the course of discussion in the House of Study. If so, Rashi's comments serve to establish that such information is not privileged although, to be sure, there is an obligation to be attribute any novel insight to its proper source. See *Avot* 6:6.

Yoma 4b should be understood as establishing that the contents of the Torah are within the proprietary domain of the Deity and could not legitimately have been disclosed by Moses other than upon explicit dispensation. The same principle is applicable to mortals. However, once God, as the proprietor of that information has made it available to mankind through Moses it is within the public domain. Since, as stated by the Palestinian Talmud, *Pe'ah* 2:4, the subsequent Torah insights of all scholars were revealed to Moses at Mt. Sinai, no person may assert a privilege of confidentiality. Cf., however, R. Saul Israeli, *Tehumin,* IV (5743), 354-360.

17. See Rema, *Shulhan Arukh, Yoreh De'ah* 239:7 and R. Eliezer Waldenburg, *Ziz Eli'ezer*, XIII, no. 81, sec. 2.
18. When these conditions are fulfilled disclosure is warranted not as an exception to the prohibition against talebearing, but because the act does not fall within the definition of "talebearing." Animosity is sufficient to bring the disclosure within the ambit of the prohibition. Accordingly, in *Be'er Mayim Hayyim, Hilkhot Rekhilut* 9:3, *Hafez Hayyim* recognizes that a person who does experience such animus is caught on the horns of a dilemma: He is forbidden to disclose because of the prohibition against talebearing. But in withholding the information he transgresses the command "You shall not stand idly by the blood of your fellow." Accordingly, *Hafetz Hayyim* declares, "It is my intention [to say] that at the time of disclosure he [must] force himself to intend benefit and not [disclose] because of animosity." See also R. Moshe Bleich, "Appointing Students as Monitors," *Ten Da'at*, vol. XII (Summer, 1999), pp. 76-77.
19. See *Teshuvot Havot Ya'ir,* no. 69, who comments that R. Yohanan's conduct in this matter was appropriate only because the health issue involved was a matter of public need.
20. *Lehem Setarim*, one of the classic commentaries on *Avodah Zarah*, resolves another difficulty unrelated to this discussion with the observation that no compensation was involved because "since [the woman] was a courtesan she had no need to accept a fee and moreover if [her services were rendered in return] for a fee how is it that she did not wish to disclose what [R. Yohanan] must do on *Shabbat* until he swore?"
21. This thesis also serves to resolve a puzzling aspect of the midrashic explanation of Jacob's statement recorded in Genesis 49:1. On his deathbed, Jacob addresses his sons saying: "Gather yourselves together that I may tell you that which should befall you in the end of days." Jacob then proceeds to tell them nothing of the sort; he criticizes some and blesses others but does not at all engage in prognostication. Rashi, basing himself on a midrashic comment, explains that Jacob did indeed intended to reveal when the redemption would occur but God, not wishing that information to be revealed prematurely, caused the *Shekhinah* to depart from Jacob

with the result that he was no longer in possession of that information.

The Sages of the Midrash resolved the problem of textual interpretation but they have left us with an even graver problem. Whatever information Jacob possessed by virtue of the resting of the *Shekhinah* upon him was in the nature of a divine communication. If God desired His communication to Jacob of the date of the Redemption to be privileged, by what right did Jacob attempt to reveal it to his children? The prohibition of *bal tomar* should apply to the prophecy received by Jacob no less so than to the prophecy received by Moses. If, however, it is understood that there are no proprietary rights or rights of confidentiality that can be asserted when such information is of potential benefit to other parties and its disclosure entails no loss to the holder of the privilege the problem is readily resolved. Jacob believed the information to be of significant psychological and emotional benefit to his progeny and since, virtually by definition, there could be no "harm" to God in its disclosure, he felt fully justified in imparting that information to his sons.

22. Although there is no case law with regard to the clergyman-penitent privilege (cf., however, *infra*, note 24, regarding the New Jersey statute), many courts have held not only that the physician-patient privilege is suspended in face of danger to another person but that, at least in some circumstances, the physician has an affirmative duty to disclose a foreseeable harm to an identifiable third party who is at risk. Probably the most widely cited case applying that principle is *Tarasoff* v. *Regents of University of California*, 17 Cal.3d 425 (1976). In *Tarasoff* the California Supreme Court held that when a psychotherapist determines or, pursuant to the standards of his profession, should determine that his patient presents a serious danger of violence to another, the therapist has an affirmative duty to use reasonable care to protect the intended victim against such danger and that the duty may require the physician to warn the intended victim of the danger. See generally Williams, Annotation, "Liability of One Treating Mentally Afflicted Patient for Failure to Warn or Protect Third Persons Threatened by Patient," 83 A.L.R.3d 1201 (1978 & Supp. 1992). For a discussion of *Tarasoff* and its progeny, see Timothy E. Gammon and John K. Hulston, "The Duty of Mental Health Care Providers to Restrain Their Patients or Warn Third Parties," *Missouri Law Review*, vol. 60, no. 4 (Fall, 1995), pp. 749-797; Peter Lake, "Revisiting *Tarasoff*," *Albany Law Review*, vol. 58, no. 1 (1994), pp. 97-173; Michael L. Perlin, "*Tarasoff* and the Dilemma of the Dangerous Patient: New Directions for the 1990s," *Law & Psychology Review*, vol. 16 (Spring, 1992), pp. 29-63. See also John C. Williams, Annotation, "Liability of One Treating Mentally Afflicted Patient for Failure to Warn or Protect Third Persons Threatened by Patient," 83 A.L.R.3d 1201 (1978).

Physicians have also been held liable for failing to warn others about the risk of transmission of communicable disease. See, for example, *Skillings* v. *Allen*, 173 N.W. 663 (Minn. 1919) (negligent failure to disclose risk of transmission of scarlet fever). See also *Gammill* v. *United States*, 727 F.2d 950, 954 (10th Cir. 1984) (physician may be found liable for failing to warn person at risk for exposure of the danger) and *Bradshaw*

v. *Daniel*, 854 S.W.2d 865 (Tenn., 1993) (extending liability to include failure to disclose to patient's wife that she was at risk for contracting Rocky Mountain Spotted Fever, a non-contagious disease but which appears in clusters). See generally Tracy A. Bateman, Annotation, "Liability of Doctor or Other Health Practitioner to Third Party Contracting Contagious Disease from Doctor's Patient," 3 A.L.R. 5th 370 (1992).

23. More generally, there is strong support for the thesis that the principle *dina de-malkhuta* is limited to laws promulgated by a sovereign or by a legislature. According to some authorities, common law, "judge-made law" or even judicial interpretation of an ambiguous statute is not endowed with the authority of *dina da-malkhuta*. Thus *Teshuvot ha-Rashba,* III, no. 109, writes, "But the judgments issued by courts are not the law of the realm; rather, courts judge independently in accordance with what they find in judicial works." See also *Teshuvot ha- Rashba*, VI, nos. 149 and 154, as well as *Me'iri, Bava Kamma* 113b, s.v. *kol mah she-amarnu.*
24. Delineation of the parameters of *dina de-malkhuta dina* is far beyond the scope of this undertaking. Suffice it to say that among early-day authorities there are over half a dozen conflicting theories designed to explain why *dina de-malkhuta* is binding in Jewish law. The ramifications and application of *dina de-malkhuta* vary directly with those theories. According to all authorities, there are areas of *dina de-malkuta* with regard to which Jewish law is entirely neutral, i.e., it neither requires disobedience nor reinforces the binding nature of that law by elevating it to a religious duty. With regard to such laws the Jewish national is no different from his non-Jewish fellow countryman who accepts and obeys the law for reasons entirely divorced from religious duty.
25. See Mary Harter Mitchell, "Must Clergy Tell? Child Abuse Reporting Requirements *versus* the Clergy Privilege and Free Exercise of Religion," *Minnesota Law Review,* vol. 71, no. 3 (February, 1987), pp. 760-777 and J. Michael Kiel, "Law and Religion Collide Again: The Priest-Penitent Privilege in Child Abuse Reporting Cases," *Cumberland Law Review,* vol. 28, no. 2 (1997-1998), pp. 682-683.
26. 47 N.Y.2d 160, 166, 390 N.E.2d 1151, 1154, 417 N.Y.S.2d 226, 229 (1979).
27. *Trammel* v. *United States*, 445 U.S. 40, 51 (1980).
28. See, for example, Richard O. Lempert and Stephen A. Saltzburg, *A Modern Approach to Evidence* (St. Paul, 1977), pp. 614-15; *McCormick,* §72; Charles L Black, Jr., The Marital and Physician Privileges—A Reprint of a Letter to a Congressman," *Duke Law Journal*, vol. 1975, no. 1 (March, 1975), 48-49; Thomas A. Krattenmaker, "Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence, *Georgetown Law Journal*, vol. 62, no.1 (October, 1973), pp. 85-94; David W. Louisell, "Confidentiality, Conformity and Confusion: Privilege in Federal Court Today," *Tulane Law Review,* vol. 31, no. 1 (December, 1956), pp.110-11 (1956); Reese, p. 60; Stephen A. Saltzburg, "Privileges and Professionals: Lawyers and Psychiatrists," *Virginia Law Review*, vol. 66, no. 3 (April, 1980), pp. 614-15 and 618-21; Robert Weisburg and Michael Wald, "Confidentiality Laws and State Efforts to

Protect Abused or Neglected Children: The Need for Statutory Reform," *Family Law Quarterly,* vol. 18, no. 2 (Summer, 1984), pp. 191-93.

29. See *Paul* v. *Davis*, 424 U.S. 693 (1976), in which the Supreme Court held that the right of privacy does not serve to protect the confidentiality of private information. Cf., however, *supra*, note 6.
30. *Trammel* v. *United States*, 445 U.S. 40, 51 (1980).
31. See Scott N. Stone and Ronald S. Liebmann, *Testimonial Privileges* (Colorado Springs, 1983) §1.01; John C. Bush and William H. Tiemann, *The Right to Silence: Privileged Clergy Communication and the Law*, (Nashville, 1983), pp. 39-41; and Jacob M. Yellin, "The History and Current Status of the Clergy-Penitent Privilege," *Santa Clara Law Review,* vol. 23, no. 1 (Winter, 1983), pp. 96-101.

    It is likely that, even in that early period, English law recognized an exception to the privilege in cases of treason. See Bush and Tiemann , p. 47. *Garnet's Case,* 2 Howell's State Trials 218, 242 (1606), should probably be understood as an example of the exception. Father Garnet was found guilty, probably of misprision or treason, for refusing to reveal information concerning the Gunpowder Plot, a failed plot to assassinate King James I. Cf., Yellin, pp. 99-101.
32. See Bush and Tiemann, pp. 49-53; and Yellin, p. 102.
33. Bush and Tiemann, pp. 53-54; Stone and Liebmann §6.01; and Yellin, p. 103.
34. James H. Chadbourn, *Wigmore on Evidence*, (Boston, 1976), vol. VIII §2394.
35. Bush and Tiemann, pp. 120-122; and Yellin, p. 103.
36. The case is abstracted in *Western Law Journal,* vol. 1, no. 3 (December, 1843), pp. 109- 114. The records of an attorney who participated in the case are published in Note, "Privileged Communications to Clergymen," *Catholic Lawyer,* vol. 1, no. 1 (January, 1955), pp. 199-209. That material originally appeared in William Sampson, *The Catholic Question in America* (New York, 1813; offset ed., New York, 1974), a work devoted entirely to the *Phillips* case. In addition to the decision of the court, the work includes the arguments presented by both sides as well as a lengthy appendix regarding the sanctity of the confessional.
37. See McConnell, pp. 1410-11 and Sampson, p. 5.
38. See McConnell, p. 1411.
39. Subsequently, however, with the development of an extensive body of case law limiting free exercise rights in the face of a compelling state interest, courts were no longer willing to recognize the clergyman-penitent privilege as a constitutionally protected right. Thus, for example, when in *In re Fuhrer* a rabbi contended that both the freedom of religion guaranteed by the constitution of the State of New York as well as the Free Exercise Clause of the First Amendment protected him against a forced disclosure, the Court applied a balancing test in declaring that "where it is asserted that governmental action impermissibly treads on one's right to freely exercise one's religion, a balance must be struck weighing the governmental interest to be served against the claimed infringement of one's First Amendment rights." 100 Misc.2d 315, 318, 419 N.Y.S.2d 426, 429 (1979). See *supra*, note 2.

40. 2 City Hall Rec. (Rogers) 77 (N.Y. 1817). See Note, "Privileged Communications," p. 209.
41. See Seward Reese, "Confidential Communication to the Clergy," *Ohio State Law Journal*, vol. 21, no. 1 (Winter, 1963), p. 81.
42. Cf., Yellin, pp. 111-112.
43. Cf., Yellin, p. 110.
44. See documentation supplied by Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review*, vol. 103, no. 7 (May, 1990), pp. 1430-1431.
45. John Locke, *Letters on Toleration* in *The Works of John Locke* (London, 1823), VI, 53.
46. See H.R. Fox Bourne, *The Life of John Locke* (London, 1876), I, 190.
47. See N.Y. Rev. Stat. Pt. 3, ch.7, tit. 3, §72 (1828).
48. See Seward Reese, "Confidential Communication to the Clergy," *Ohio State Law Journal*, vol. 21, no.1 (Winter, 1963), p. 81.
49. Jeffery H. Miller, "Silence is Golden: Clergy Confidence and the Interaction Between Statute and Case Law." *American Journal of Trial Advocacy*, vol. 22, no. 1 (Summer, 1998), p. 64.
50. This is true for the federal rules of evidence as well. The clergy privilege was first recognized in federal common law in *Totten* v. *United States*, 92 U.S. 165, 107 (1875), and was reaffirmed in *Mullen* v. *United States*, 263 F.2d 275, 276 (D.C. Cir. 1958) (Faby, J. concurring), and is now embodied in Rule 505 of the Federal Rules of Evidence. However, Rule 501 provides that in federal civil actions, when an element of a claim or defense is determined by state law, the existence and scope of a privilege shall be determined by applicable state law. In *Eckmann* v. *Board of Education of Hawthorn School District No. 17*, 106 F.R.D. 70, 73 (E.D. Mo. 1985), the court ruled that the privilege recognized by federal common law belongs to the cleric.
51. The corollary of this rule is that when the privilege is waived by the congregant the clergyman may be compelled to testify. See, however, *Pennsylvania* v. *Musolina*, 467 A.2d 605, 611 (Pa. 1983), in which the Court ruled that a priest was not required to testify even though the defendant had disclosed the religious communication in his confession to the State.
52. Ohio's statute, Ohio Rev. Code Ann. §2317.02 (Banks-Baldwin 1996), provides that the clergyman "may testify by express consent of the person making the communication except when the disclosure of the information is in violation of the clergyman's, rabbi's, priest's, or minister's sacred trust."
53. Ill. Comp. Stat. 5/8-803 (West 1992).
54. Ohio Rev. Code Ann. §2317.02
55. Md. Code Ann., Cts. & Jud. Proc. §9-11 (1978).
56. Va. Code Ann., §8.01-400 (Michie 1994). See *Seidman* v. *Fishburne-Hudgin Foundation, Inc.*, 724 F.2d 413 (4th Cir. 1984)
57. Many of these statutes, including a number of those vesting the privilege in the communicant, contain language apparently limiting the privilege to confessions made in the course of discipline enjoined by the rules or prac-

tices of the denomination. See Reese, pp. 67-73 and *supra*, note 2.

Thus, in *Magar* v. *Arkansas*, 826 S.W.2d 221, 222 (Ark. 1992), the privilege was denied to a minister of the New Life Christian Fellowship who testified that "confession is not a tenet of his church and keeping evidence of a crime confidential is within the discretion of the pastor"; in *Illinois* v. *Diercks*, 411 N.E.2d 97, 101 (Ill. App. Ct. 1980). the court found that the defendant failed to establish that disclosure of the confession "would be enjoined by the rules or practices of the Baptist Church"; and in *Kansas* v. *Andrews*, 357 P.2d 739, 743 (Kan. 1960) *cert. denied*, 368 U.S. 868 (1961), the court denied the privilege to a Baptist minister under the then governing state statute on the grounds that "that there was no course of discipline in the Baptist church by which a member thereof was enjoined to confess his sins to a minister of the church." See also *Johnson* v. *Commonwealth*, 310 Ky. 557, 221 S.W.2d 87, 89 (1949); *Radecki* v. *Schuckardt*, 50 Ohio App.2d 92, 4 Ohio Op.3d 60, 361 N.E.2d 543, 546 (1976); and Annotation, Matters to Which the Privilege Covering Communications to Clergyman or Spiritual Adviser Extends, 71 A.L.R.3d 794, 807-08 (1976).

In effect, in these decisions the courts understand the statutes involved as reserving the privilege to Catholics and any others who say require confession to a clergyman by virtue of church discipline. See, however, *Scott* v. *Hammock*, 133 F.R.D. 610 (Dist. Ct. Utah 1990), in which a federal magistrate interpreted the relevant language of the Utah statute in a much broader manner. The Federal District Court certified the question to the Supreme Court of Utah which accepted a broad interpretation of the statute. See *Scott* v. *Hammock*, 870 P.2d 947 (Utah, 1994). It should be noted that the Michigan statute (Mich. Comp. Law Ann. §600.2156) (West 1986) refers specifically to a "minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner" in prohibiting disclosure of "any confession" made "in the course of discipline enjoined by the rules or practice of such denomination." Since Christian Science does not require confession to a clergyman or practitioner, inclusion of Christian Science practitioners among the clergy upon whom the privilege is conferred presumably indicates that the terms "confession" and "discipline" must be construed broadly .

58. A number of states, including Georgia (Ga. Code Ann. §24 -9-22) (1982), Michigan (Mich. Comp. Law Ann. §600.2156) (West 1986), Missouri (Mo. Ann. Stat §491.060) (West 1996), Vermont (Vt. Stat. Ann. Tit 12, §1607) (1947) and Wyoming (Wyo. Stat. §1-12-01) (1977), also vest the privilege in the clergyman but, if read literally, either declare the clergyman to be incompetent to testify or otherwise employ absolute language negating the possibility of a waiver. Cf., however, *Alpharetta First United Methodist Church* v. *Stewart*, 221 Ga. App. 748, 472 S.E. 532 (1996), which includes dicta in which the Court assumes *en passant*, without discussion or reference to the language of the statute (". . . nor shall such minister, priest, or rabbi be competent or compellable to testify. . . ."), that, the privilege may be waived by the clergyman. See, however, *Eckmann* v. *Board of Education of Hawthorn School District*, *supra*, note

46, in which a federal court interpreted the Missouri statute as giving the clergyman the right to claim or waive the privilege.

59. Many states, California [Cal. Evid. Code §1030-1034 (West 1995)] and New Jersey [N.J. Stat. Ann. §2A:84A-23 (West 1994); N.J. R. Evid. 511] among them, provide that the privilege may be claimed either by the communicant or by the clergyman. Those statutes would also require modification to permit disclosure by the clergyman when compelled to do so by reason of religious conscience much as the New Jersey statute presently permits (but does not require) the clergyman to waive the privilege if the communication "pertains to a future criminal act."