

PROBLEMS OF PROFESSIONAL SECRECY

If the sole phenomenon of modern public life were the increasing complexity of human relationships, moral theologians and moral philosophers would still be faced with a heavy task in analyzing the new situations and properly applying to them the old and constant moral principles. But the complexity introduced by a changing order of things is not the only problem challenging the moralist on the modern scene. There has been observable for some time, in this country at least, a steady departure from natural law principles in public life. This unfortunate trend has affected various phases of public life, not only in the market-place, but also in the political sphere and in the professional sphere. In the professions themselves there has been a tendency to substitute etiquette for ethics. There is discernible also, in various quarters, a tendency to make public opinion a standard of right conduct. These unhappy tendencies and trends complicate the work of the moral theologian and ethician endlessly.

The obligation of secrecy is one of the moral duties incumbent upon those who exercise in society certain professions of a fiducial nature, as well as upon those who fill certain public offices. It is only one of the many moral duties of professional men, and hardly the most important. The theme is not proposed here as the problem crying most for attention, but merely as a problem worthy of attention. It is an important duty in society, and one that must be re-examined periodically in the light of changing circumstances. The directors of this esteemed Society have deemed the duty of professional secrecy of sufficient importance to warrant an exposition and a discussion in an elective seminar at this annual meeting. Besides assigning the theme, they proposed very briefly three moral cases bearing on the duty of professional secrecy. Before getting down to the cases, it is our purpose to give a summary exposition of the theme.

I. DEFINITION AND ANALYSIS

A. *Definition.* Professional secrecy may be defined as a special moral duty, binding in both commutative and legal justice, and inherent in certain offices and functions of a fiducial nature exercised

in society, whereby they who fill such offices or perform such functions are obligated to maintain a virtuous or discreet silence with reference to the confidential information received by them in the course of duty.

B. *Analysis of the Definition.* It is hoped that the foregoing definition, admittedly unwieldy, may become clearer with the following analysis:

1. *Category of secrets:* The classic division of all secrets is into natural, promised, and committed or entrusted. The entrusted secret may be either explicit or implicit. The implicit entrusted secret is that which attaches to an office or function of a fiducial or confidential nature. The professional secret, then, is classified as an implicit secret of trust (*secretum commissum implicitum seu officiosum*).

2. *Source of duty:* The duty of observing professional secrecy arises from both commutative and legal justice. It stems from commutative justice insofar as secrecy is required to protect the rights of either physical or moral persons to various *bona* (e.g., the right to reputation). It arises also from legal justice insofar as it is necessary for the common welfare (*bonum commune*) that persons who are in distress of soul or mind or body be not unduly restrained from seeking the assistance of qualified persons. It is the common judgment of thinking people that individuals in distress would feel so restrained—with incalculable harm to society—if they had no assurance that their confidence would not be betrayed by those persons to whom they might appeal for help.

3. *Gravity of duty:* Since the duty is one of justice it is generically a grave duty (*ex genere suo grave*). Since it involves commutative justice, its violation, in the proper circumstances, begets the duty of restitution.

4. *Form of duty:* It is customary among moral theologians and ethicists to describe the form of the duty of professional secrecy as a contract, or an implied or quasi-contract. Latterly it has been proposed in some quarters that the duty of professional secrecy is an institution of public order. While the contractual nature of the duty poses some problems—not the least of which is the manner in which implied or quasi-contract is construed in American civil law—still the contractual theory seems the preferable of the two points of view.

5. *Act of duty*: The duty imposed by professional secrecy is that of maintaining a virtuous or discreet silence. Obviously, if higher considerations of human or divine law would require a manifestation on the part of the professional person, the act of maintaining silence would cease to be virtuous.

6. *Area of duty*: The obligation of professional secrecy extends to confidential information received in the course of duty. Matters that are common public knowledge, or that the professional person knows independently, or that he comes to know merely on the occasion of, and not because of the exercise of his office, are not directly the subject-matter of professional secrecy, although indirectly they may beget an obligation of secrecy, at least that of the natural secret. Also, the mere fact itself of the client's seeking professional help does not seem to fall within the scope of professional secrecy, although that fact (of seeking help) might be the object of a natural secret or of a promised secret. It should be noted that to restrict the scope of professional secrecy to only such matters as are confidential is not tantamount to limiting it to the natural secret (*viz.*, to those matters only whose revelation would harm the owner of the secret). The obligation of professional secrecy extends to all matters that are *secret by nature*, and not only to such things as are a *natural secret*. An example may best illustrate the distinction we are trying to draw. A patient may exhibit in his body signs of great mortification. Revelation of this fact by an attending physician to other persons would hardly damage the patient's reputation; rather, it would enhance it. Yet, since the fact is secret by nature and since the physician learns it in the course of the exercise of his duty, the patient would have a right that the physician not reveal it contrary to his (the patient's) will.

II. PROFESSIONAL SECRECY, THE LAW, AND THE PROFESSIONS

In this section we propose to state briefly the relation of the duty of professional secrecy to Canon Law, Civil Law, and the Professions themselves.

A. *Relationship with Canon Law*. The Sacred Canons impose the duty of secrecy on various ecclesiastical officials.¹ The law of

¹ E. g., Canon 243, #2; canon 364, #2, sec. 3.

the Church also exempts various professional persons from testifying in ecclesiastical trials on confidential matters received by them in the course of duty.² It is interesting to note the qualification which the Instruction *Provida* places on the foregoing Canon that exempts professional persons from testifying:

nisi ab iis quorum interest secreti lege solvantur et deponere se posse prudenter censeant.³

In other words, the mere permission on the part of the client does not automatically permit the professional person to testify; besides having the consent of the client, the professional person must make the moral judgment that it is prudent for him to make use of this knowledge as a witness.

B. *Relationship with Civil Law.* The law of the civilized nations generally takes some cognizance of the duty of professional secrecy. In Europe, on the Continent, the approach of the civil law to this duty is generally twofold: the law itself imposes the duty of secrecy, making its violation a crime punishable in the law itself; and, at the same time, it considers such communications privileged before the law and exempts professional persons from testifying in courts of justice on secret matters. In England and the United States of America, while the law generally recognizes the duty of professional secrecy, it does not provide a criminal sanction for violation, leaving the injured person to avail himself of his civil remedies, usually tort or contract. With respect to exemption from testifying in court, the Common Law limited the privilege of exemption from testifying to statesmen, lawyers and their clients, husbands and their wives. In the United States of America, where the basic law is the English Common Law, the doctrine of privileged communications has been extended by statutory provisions to the physician-patient relationship, and, in thirty-one States of the Union, to clergymen, which includes, of course, the priest-penitent relationship.⁴

² Canon 1755, #2, sec. 1.

³ Instruction *Provida*, art. 121, #2, sec. 1.

⁴ The States of the Union in which there is no statutory provisions exempting clergymen from testifying concerning confidential matters received by them in the course of duty are: Alabama, Connecticut, Delaware, Florida, Illinois,

C. *Relationship with the Professions.* The duty of secrecy is generally acknowledged within the fiducial professions themselves, as witness the ethical codes of the American Bar Association and the American Medical Association.⁵ Presumably, a flagrant violation of this prescription of the ethical code would bring some stern disciplinary action on the part of the collegiate body.

III. PERTINENT PRINCIPLES

We shall consider the factors that induce or strengthen the duty of professional secrecy, as well as those factors which would disoblige one from the duty, either by way of permitting disclosure or by way of compelling disclosure. The first set of factors we shall call "obligating"; the other, "liberative." To this we shall add a note concerning the method of disclosure when such disclosure is either permissible or of obligation.

Maine, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia. It does not follow that in the aforementioned jurisdictions the court would compel a clergyman to testify in such matters. The chances are that in the average case the court would not insist. But the fact is that it could insist, and could hold the demurring clergyman in contempt of court, which action can involve indefinite imprisonment without benefit of trial by jury.

Wigmore, outstanding authority on the law of Evidence, gives this description of these statutes: "In the application of these statutes, it has been held, following the dictates of principle, that the privilege applies only to communications made in the understood pursuance of that Church discipline which gives rise to the professional relation, and, therefore, in particular to confessions of sin only, not to communications of other tenor; that it includes only the communications, and not information otherwise acquired; and that it exempts the penitent also, as well as the priest, from disclosure." J. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3. ed., 10 vols., Boston: Little, Brown & Co., 1940, VIII, #2395.

⁵ American Bar Association, *Canons of Professional Ethics—Canons of Judicial Ethics*: as amended and revised by the House of Delegates at Kansas City, Missouri: Chicago, 1937, p. 21, No. 37.

American Medical Association, *Principles of Medical Ethics*, Chicago, 1939, Chapter II, section 1, p. 4.

A. The "Obligating" Factors

1. The duty of professional secrecy, as is true of all secrets, arises from the necessity of safeguarding individual rights, whether of physical or moral persons. This necessity of protecting individual rights is also supplemented by general considerations of the common welfare.

2. The duty of professional secrecy also stems from the special needs of the *bonum commune*. The argument is based on the insufficiency of the average man to provide for his critical and emergency needs of soul, mind, and body. Therefore, he often has need of expert counsel, advice, assistance. To deprive any large number of men of such help would have serious repercussions for evil on the body politic. And yet many would be effectively deterred from seeking aid in their difficulties if, in so doing, they could not maintain their self-respect, reputation, and be generally free from reprisals, recriminations, etc. But secrecy of communication is necessary to achieve this end. Therefore, the *bonum commune* demands in a special way that such communications between the needy client and the qualified professional person be surrounded with secrecy.

3. There are even more immediate considerations of the *bonum commune* that demand the safeguarding of secrets of State; so that such official secrets fall into the highest category of secrets on the natural plane.

B. The "Liberative" Factors

1. *Consent of the proprietor.* The consent of the proprietor or owner of the secret will normally free one from the obligation of professional secrecy. Two words of caution must be added here. First, it must be certain that the proprietor is the sole owner of the secret; if the secret were held jointly by more than one, then obviously the consent of the other interested parties would have to be obtained. Second, while *presumed* consent is possible, the question must be approached much more circumspectly than when one is dealing with secrets of a lower order.

2. *Publication from another source.* When a fact becomes public knowledge, the right to secrecy is generally lost (with the exception of the confessional secret).⁶ In the case of professional secrecy, however, the danger of possible scandal would have to be obviated; also the danger that the professional's disclosure may confirm as factual what up to the point might have been mere rumor or guesswork.

3. *The necessity of averting harm.* There are four possible areas of harm, as follows:

(a) *From the bonum commune.* "Salus reipublicae (vel Ecclesiae) suprema lex."⁷ On this point we submit two pertinent passages from the *Summa theologica*:

Revelare secreta in malum personae est contra fidelitatem; non autem si revelentur propter bonum commune, quod semper praeferendum est bono privato; et ideo contra bonum commune nullum secretum licet recipere.⁸

Circa ea vero quae aliter [i.e., aliter quam per confessionem sacramentalem] homini sub secreto committuntur, distinguendum est. Quandoque enim sunt talia quae statim cum ad notitiam hominis venerint, homo ea manifestare tenetur, puta si pertinent ad corruptionem multitudinis spiritualem vel corporalem, vel in grave damnum alicuius personae, vel si quid aliud est huiusmodi, quod quis propalare tenetur vel testificando vel denunciando: et contra hoc debitum obligari non potest per secreti commissum, quia in hoc frangeret fidem quam alteri debet. Quandoque vero sunt talia, quae quis prodere non tenetur; unde potest obligari ex hoc quod sibi sub secreto committuntur; et tunc nullo modo tenetur ea prodere, etiam ex praecepto superioris, quia servare fidem est de iure naturali; nihil autem potest praecipere homini contra id quod est de iure naturali.⁹

⁶ A. Lehmkuhl, *Theologia Moralís* (Friburgi Brisgoviae: Herder, 1914), I, No. 1445, iv: "Praeterquam in secreto sacramentali, in aliis ratio secreti cessat, si res communicata alia via iam divulgata est."

⁷ It may be noted that this axiom may not be cited against the sacramental seal, but rather in its favor: sacramental secrecy is necessary for the highest supernatural interests of the whole of the higher of the two perfect societies.

⁸ 2a 2ae, q. 68, a. 1 ad 3.

⁹ 2a 2ae, q. 70, a. 1 ad 2.

All theologians agree with St. Thomas that it is not lawful to receive any secret against the common good. Since the time of St. Thomas, however, theologians have introduced the consideration that since the observance of professional secrecy is itself necessary for the common good, then, in consequence, not any and every consideration of the common welfare would warrant the relaxation of the obligation of the professional secret, but only the anticipation of such grave evils as would outweigh the injury caused the social order by the relaxation of the duty of secrecy.¹⁰ The common teaching seems to be that the obligation of professional secrecy ceases whenever this measure is urgently necessary for warding off serious harm (*damnum grave*) from the common good. A few theologians demand that the threatening evil be most serious (*damnum gravissimum*) before the obligation of professional secrecy can be said to have ceased to bind.¹¹ All agree that the mere advantage or utility of the common good, such as the punishment of a criminal who might otherwise go unpunished, would not be sufficient reason for relaxing the duty of professional secrecy.¹²

(b) *From the owner of the secret.* All moralists agree that in the case of the natural or promised secret, such a secret must be revealed if its retention would result in grave harm coming to the owner of the secret. But they differ in their opinion on this matter when the professional secret is involved. The more prevalent opinion holds that charity demands that a person be safeguarded from serious harm, even if it be necessary to reveal his professional secret in order to achieve this objective. Even if the owner of the secret expresses his unwillingness to have the revelation take place, he is regarded as being "unreasonably" unwilling. Some moralists hold that the common good achieved by maintaining professional secrecy takes precedence over the private good of the owner of the secret. In view of the difference of opinion on this matter, the professional

¹⁰ J. Aertnys-C. Damen, *Theologia Moralís*, (Torino: Marietti, 1939), 13ed., I, no. 1250, III: "Non vero quaevis ratio boni communis est sufficiens, sed praepondere debet isti bono communi quod invenitur in servando secreto. . ."

¹¹ B. Merkelbach, *Summa Theologiae Moralís*, (Parisiis: Desclee de Brouwer, 1936-1939), II, no. 670, 1.

¹² D. Pruemmer, *Manuale Theologiae Moralís*, 3 ed. (Friburgi Brisgoviae: Herder, 1923), II, no. 180, 1; B. Merkelbach, *op. cit.*, II, no. 855, a.

person is morally free, though not morally obligated, to make the disclosure necessary to save the client from himself. And since the duty, even where it is considered to exist, is one of charity only, it would not oblige in the face of proportionately grave inconvenience.

(c) *From an innocent third party.* The situation may arise wherein the disclosure of a professional secret may be necessary to protect an innocent third party from grave or very grave harm. What about the duty of professional secrecy in such cases? It seems to be the settled teaching of the moral theologians that unless the owner of the secret is the formally unjust cause of the evil that threatens the innocent third party, the duty of secrecy prevails. Father Pruemmer sounds a dissenting note to the effect that when the gravest of evils (such as loss of life) threatens the innocent third party, the duty of professional secrecy ceases.¹³

When, however, the owner of the secret is the *formally unjust cause* of the harm that threatens the innocent third party, the case takes on a decidedly different aspect. Merkelbach has the following to say on this point: "If it is a case of an entrusted secret, especially a professional secret, it cannot be manifested, unless the harm still threatens and from that very one who entrusted the secret concerning the threatening harm. For, the common good regularly demands that such a secret be kept, except in the case where the very one entrusting the secret is an unjust aggressor against whom an innocent person can be defended."¹⁴ Here, still, there seems to be a division of opinion among the moralists. Aertnys-Damen, making specific reference to the classic case of the syphillitic young man about to enter marriage with the unsuspecting young lady and refusing to heed the command of the physician to desist from his intention or at least inform the bride-to-be, state that "a good many moralists excuse from the observance of secrecy, a smaller number urge its keeping; whence in the practical order the disclosure of the secret is lawful, but does not seem to be obligatory."¹⁵

¹³ D. Pruemmer, *op. cit.*, II, no. 180, b.

¹⁴ B. Merkelbach, *op. cit.*, II, No. 855, 3c.

¹⁵ J. Aertnys-C. Damen, *op. cit.*, I, No. 1235, III, 3: ". . . Plures a secreto servando excusant; pauciores eius custodiam urgent; unde practice revelatio secreti licita, sed non obligatoria esse videtur."

Personally, I find it difficult to be sympathetic toward the point of view that holds for the continuance in force of the duty of secrecy in such cases. I am prepared to admit that a confidential relationship or situation can be conceived where the common good seems to preponderate and more or less clearly demands that secrecy be observed despite the threat of unjust aggression. I have in mind the possible dilemma of the spiritual director in a seminary. But taking professional secrecy in general, and especially the typical cases of legal and medical secrecy, it is difficult for me to see how the duty of secrecy can be judged to be still in force. First, with respect to the extrinsic reasons of authority, I have not been able to locate, and hence have been unable to assess the weight of, the theologians who hold for the continuance of the duty of secrecy in such cases; while, on the other side, I find such names as Merkelbach, Vermeersch, Genicot-Salsman, D'Annibale, Bucceroni, Noldin, Ferreres, Slater, and Davis. With respect to intrinsic reasons, the case contemplates an unjust aggressor, and it seems to me that the unjust aggressor normally forfeits his right to secrecy, to the extent necessary to put down the aggression. Thus, I am convinced that if the client cannot be dissuaded from his evil course, the professional person is both morally permitted and gravely obligated in charity to make use of the secret knowledge to the extent (but only to the extent) necessary to stop the aggression effectively. Since the duty toward the innocent third party is one of charity only, it would not bind with proportionately grave inconvenience.

(d) *From the professional person himself.* The situation may arise wherein the disclosure of a professional secret may be necessary to protect the professional recipient himself from harm. Would he, in such a case, be morally free to make the necessary disclosure? St. Alphonsus, summing up the teaching of the theologians who preceded him, as well as of his contemporaries, states that there are three opinions on the matter.¹⁶ The first opinion (for which he cites Alexander, Scotus, Sylvius, Reginaldus, and St. Thomas) is that it would *not* be lawful to reveal an entrusted secret in order to avoid grave harm. The second opinion (for which Molina is cited) de-

¹⁶ St. Alphonsus, *Theologia Moralís*, (Augustae Taurinorum: Marietti, 1879), lib. 3, No. 971, 4.

mands that in order that such a revelation be lawful the harm that one is trying to avoid must be much more serious than the harm which the disclosure would cause the owner of the secret. The third opinion, termed by St. Alphonsus the more common and more probable opinion (for which he cites Laymann, Soto, Lessius, Navarrus, deLugo, Sporer, and others) holds that one may reveal an entrusted secret in order to protect oneself from grave harm. A doubt may arise as to whether St. Alphonsus had in mind the professional secret, or merely some inferior type of entrusted secret. Lehmkuhl considers St. Alphonsus to be referring to the professional secret, although Lehmkuhl adds on his own account that the opinion should be restricted to those cases wherein the proprietor of the secret is the unjust cause of the harm that threatens the holder of the secret.

Among more modern authors, a number share the view of St. Alphonsus, although at times it is difficult to know if they have the professional secret precisely in mind. Vermeersch teaches that *per se* the obligation of the professional secret ceases when the professional person cannot keep it without proportionately grave harm to himself. According to Pruemmer, the harm that threatens the professional person from the observance of the secret must be much more serious than the disclosure will cause the owner of the secret, before the obligation of secrecy may be judged as lawfully relaxed. Slater and Marc hold that the obligation of professional secrecy will usually continue to be binding even when its observance entails serious harm (*grave damnum*) to the professional person. This seems to be a very sound point of view. The duty of secretary is, after all, a contractual obligation, and so-called "occupational risks," even grave risks, are associated with many walk in life. Father Slater says ". . . as a rule professional secrets will continue to be binding even when the observance of them entails serious loss."¹⁷

The moral theologians are practically unanimous, however, in teaching that the obligation of professional secrecy would cease if its observance would entail very grave harm (*damnum gravissimum*) for the professional person, although they observe that in such a case

¹⁷ T. Slater, *A Manual of Moral Theology*, (New York: Benziger, 1908), I, 472, 2.

the client should be given fair warning if possible. They are likewise unanimous in teaching that it is never lawful for a professional person to surrender a professional secret, if the maintenance of the secret is gravely necessary for the common welfare.

NOTE: *On the Method of Disclosure*

It may be helpful to state here three rules that should be followed in those instances where the disclosure of a professional secret is permissible or obligatory.

Rule 1: Granted the existence of a sufficient cause for revealing it, a professional secret may be revealed only to the extent necessary to meet the situation effectively.

Rule 2: Granted the existence of a sufficient cause for revealing it, a professional secret may be revealed only to the person or persons who have a strict right to the information.

Rule 3: When a professional secret has been lawfully revealed, those to whom it is revealed should normally be placed under the obligation of an entrusted secret concerning the information given them.

IV. CASES PROPOSED

The moral cases proposed by the Directors of the Society will be stated in the very brief form in which they were given, and then will be treated briefly under the three headings of: 1. Observations; 2. Principles; and 3. Ad Casum.

"Case A. *Political Field* (e.g., an invitation to communicate confidential information which involves State issues)."

1. *Observations.* Observance of State secrets plays an important role in the welfare of the body politic both in peace time and in war time (although the prudential aspects of the classification of State secrets may often be debatable). Since the highest considerations of the *bonum commune* are often directly at stake, fidelity and discretion should characterize all officials entrusted with secrets of State.

2. *Principles.* The chief principle to be invoked here is the natural law principle "*Salus reipublicae suprema lex.*" Or, in the words of St. Thomas ". . . contra bonum commune nullum secretum licet

recipere" (2a 2ae, q. 68, a. 1 ad 3). The identical necessity of protecting the common welfare that regularly demands that secrecy be maintained, conceivably could demand with equal stringency (e.g., in a case of high treason) that secret information be divulged.

3. *Ad Casum*. It is possible to conceive a situation wherein one person (either a physical or moral person) within a nation would be both morally permitted and morally obligated to invite another person (physical or moral) to communicate confidential information involving State issues. In the concrete instance the following conditions would have to be verified:

- (a) Such communication is necessary to protect the State from grave harm.
- (b) All reasonable attempts to meet the situation "through channels" have been ineffective.
- (c) The danger of mere subjectivism has been eliminated on the part of the persons concerned.
- (d) The danger of scandal (e.g., breakdown of respect for constituted authority) is either avoided, or the permitted evil compensated for.
- (e) The petitioner has authorization to make such a request. (Such authorization may come from the constitutional provisions of government, or it may simply stem from the natural law.)
- (f) The petitioner will be able to make prudent and effective use of the information received.

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"Case B. *Spiritual Field* (e.g., the licitness of a spiritual director's revealing extra-sacramental knowledge of penitents after their death)."

1. *Observations*. The priest is the recipient of professional secrets, completely apart from his role as a confessor. He is a counsellor par excellence, and customarily regarded as the most to be trusted of all men. His professional duties in this respect are recognized in Canon Law. They are also recognized by the civil law in many countries, as has been previously indicated herein. While it is true that in the United States of America statutory provision has

been made in thirty-one of the States whereby communications made to clergymen in the exercise of their office are held by the courts to be privileged, nevertheless most of the statutes contemplate confessions of sin made in the course of discipline enjoined by the Church. In practice, there have been cases in the courts of this country where a broad construction has been placed on the statute so as to embrace other than strictly confessional matters. But in most instances the statutes expressly protect confessional secrecy for the priest, and not what we call merely professional secrecy.

2. *Principles.* While the priest's duty of professional secrecy is subject speculatively to the "liberative" factors discussed previously under III, B, still the application of these principles must be qualified by several serious considerations, as follows:

- (a) The danger of scandal. The people generally hold the priest as a special source of asylum. Furthermore, there is the danger of the people confusing the priest's duty of confessional secrecy with his duty of merely professional secrecy. Before taking advantage of any liberative factor in the matter of professional secrecy, the priest would have to rule out the danger of scandal on either or both of these heads.
- (b) Because the priest is generally dealing with goods of a higher order, disclosure of his professional secrets would normally demand a proportionately graver reason.
- (c) In a case where a priest would simultaneously be serving in the capacity of confessor and professional adviser, he would be faced with the possible difficulty of distinguishing between sacramental and non-sacramental material.

3. *Ad Casum.* If the case at hand contemplated revelation or disclosure of good or indifferent information, it would obviously be easier of solution than if it contemplated something defamatory. It will be rare, however, that the priest and/or confessor may consider himself as freed from the obligation of professional secrecy.

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"Case C. *Medical Field* (e.g., licitness or the obligation of revealing diseases where the State requires a certificate of freedom from such diseases)."

1. *Observations.* The physician's duty of secrecy with respect to the confidences of his patients has been acknowledged from very ancient times. It merited explicit and fairly clear delineation in the Oath of Hippocrates (460-359 B. C.):

And whatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets.

But honorable and serious as the obligation is, it is not absolute. Various considerations of the common good can be thought of which would not only justify a disclosure, but which would even justify a law requiring automatic reporting on the part of a physician. Thus, laws requiring the reporting of epidemic diseases or gunshot wounds may be considered to be reasonable and just laws. On the one hand, a reputable physician is presumed to know the law and to be willing to abide by it. On the other hand, the patient may normally be presumed to know the law, and to realize that the physician will abide by the law, and under such a condition the patient submits himself for possible treatment.

2. *Principles.* These principles have already been sufficiently indicated under III, B.

3. *Ad Casum.* The solution of this case depends on the validity of the particular civil law under consideration. If a valid law requires such revelation, the physician not only may licitly reveal, but normally must reveal. The Case at hand seems to contemplate a law such as that requiring a blood test prior to marriage to show freedom from venereal disease. Assuming the validity of this law as a necessary measure for the protection of the public health, it might conceivably in some concrete case be tantamount to establishing an impediment to marriage. For example, a couple in order to save reputation and to have legitimate offspring wish to get married here and now, and one party is laboring under a venereal disease. The innocent party knows, we assume, of the diseased condition, and both agree not to make use of their marital rights until the illness is cleared up. In the United States at the present time such a couple might be sent to the State of Maryland to get married, because in

that jurisdiction no such requirement exists. But it seems to be a case where the law unduly limits individual rights, and where the physician might and should use *epicheia*.

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DIGEST OF THE DISCUSSION

Father John E. Taylor, O.M.I., of Pine Hills Seminary, immediately introduced as a subject of discussion the problem of the police officer who often cannot reveal his source of information without destroying the effectiveness of his work in the future. He mentioned a nationally publicized kidnaping case. Father Taylor complained of the lack of attention given in moral theology manuals to this and similar modern problems.

Father Regan admitted the weaknesses of moral theology texts in making application to modern problems but was of the opinion that the rules governing the entrusted secret could be applied. Such secrets may normally be protected by mental reservation. Such an officer, however, would have to take his chances before the civil law, just as a priest would have to do in those jurisdictions where sacramental or professional extra-sacramental communications would not be privileged before the law.

Father William A. Bachmann presented the interesting case of the physician's wife who wishes to sell her deceased husband's practice, one important item of which sale would be the case histories of the patients.

Father Regan was of the opinion that the case histories could not lawfully be transferred without the consent of the patients. Father John Ford, S.J., of Weston College thought that since about ninety-five per cent of the material in the case histories was indifferent, that the patients generally would not object to the transfer. Father Regan thought that this was tantamount to presumed consent, and that the principle demanding consent of the owner-patient still stood. Father Bachmann, when asked to give his opinion, stated that he was inclined to permit the practice and felt that the case of an older physician sharing his files with a younger physician was a common practice and a licit one. Several of those present expressed agree-

ment with Father Bachmann. Several others, including Father Edward Sheridan, S.J., of Toronto, were inclined to hold the stricter view proposed by Father Regan. Father Regan admitted that medical secrecy in modern times is more and more a "group" secret, but was unwilling to admit that a physician who merely buys another physician's practice can be considered to be a member of the original "group" with whom the patient was willing to share the secret. Father Joseph Duhamel, S.J., of Woodstock College, introduced the theological "uni viro prudenti" as a permitting factor. Father Regan said that he thought that this circumstance merely excused from grave sin, and hence was not the norm for a virtuous act. Father Duhamel replied that for a sufficient reason there would be no sin. Father Bachmann, who originally proposed the question, asked Father Regan if he thought that the following compromise would be licit, viz., that the incoming physician would agree to destroy the records and case histories of such patients as would be unwilling to retain him as their physician. Father Regan was of the opinion that such would be a happy compromise and a lawful one.

Monsignor Thomas W. Smiddy, Vice-Chancellor of Brooklyn, suggested the reprehensible moral aspects involved in a particular magazine which contains revelations of private detectives. There is often a serious moral violation connected with the work of private detectives in prying into other people's secrets. A senator, for example, who would arbitrarily employ such individuals to spy on the activities of another senator would be violating the moral law.

Father Regan not only agreed with Monsignor Smiddy's observations, but added that many other disclosures in public life are equally reprehensible, including some of the disclosures made by many columnists.

Because certain statements had been made in the foregoing discussion which seemed to condemn "in toto" the work of private detectives, Father Farraher reminded the group that there are numerous respectable detective agencies and that it is in itself a legitimate occupation.

With respect to the case involving a recent political issue, nobody expressed objection to Father Regan's solution. Father George F. Bardes of Good Counsel College, however, asked Father Regan

if it were not true that there was the presumption of the common good on the side of secrecy where the government itself had determined the rule of secrecy and particular classification of the documents. It would seem to parallel the presumption of justice for the citizen where his government has declared war.

Father Regan agreed that the presumption is in favor of the lawfulness of the government's action, and invited the group to reconsider the conditions he laid down for the lawfulness of doing otherwise. *Father Regan* admitted that in the concrete it would not be easy to have all the conditions verified simultaneously.

Father Paul Decker, O.M.I., and *Father Taylor* added comments on the "separation of powers" in our government, and the relations of the executive and legislative branches.

Father Charles Connors, C.S.Sp., asked if there were not too much distinction made between the committed secret and the professional secret.

Father Regan replied that in the nineteenth and well into the twentieth century there had been a tendency to exaggerate professional secrecy and to consider it as something absolute, but that for some time there had been a swing in the opposite direction. He felt that he had avoided the danger of exaggeration in the statement of principles in his paper. *Father Regan* pointed out, however, that there is a real difference between an ordinary entrusted or committed secret and a professional secret, the latter being somewhat akin to the "right of asylum."

Father Regan himself introduced as worthy of discussion the duty of secrecy incumbent upon a Spiritual Director in a Seminary. Does the long-run good to the priesthood accomplished through confidence in proper spiritual direction outweigh the immediate injury to the priesthood by the admission of a candidate whom the Spiritual Director alone knows to be unworthy? *Father John Ford, S.J.*, of Weston College, stated that he was convinced that a Spiritual Director's secrets should be regarded almost the same as the sacramental secret. Others signified agreement. *Father Regan* quoted the Encyclical on the Sacred Priesthood to the same effect.

Father Ford introduced the problem of secrecy arising for a psychiatrist, first in a case where he is the appointee of the court in

a particular case and the court demands a finding; and second, in the case where a religious superior sends to the psychiatrist a religious subject already under vows who is a candidate for the priesthood, and requests an answer as to this person's fitness.

Father Ford, Father Regan, and Father Joseph Quigley of Overbrook Seminary participated in this discussion. It seemed to be agreed that in both cases the individual should be apprised of his situation. In the latter case, the Church has the right to be assured of the candidate's fitness to assume the burdens of the priesthood, so that the psychiatrist may and should answer as to the candidate's fitness, omitting the incidentals of his examination.

Monsignor John E. Murphy of St. John's Home Mission Seminary asked whether there is canonical provision for the deletion of parts of testimony in the publication of a process in a matrimonial court. The particular question involved was whether the testimony which a witness gives only on condition of secrecy could be taken into consideration by a judge, and yet not presented to the plaintiff for possible refutation. Father Regan asked Father Quigley to take over the question, which he did, with Father Ford and Monsignor Murphy taking part in the discussion. It was agreed that there seemed to be nothing in the Code of Canon Law to cover the situation. Father Ford gave the reminder that in any solution care be taken that the natural law rights of the plaintiff and others be not invaded.

Father Regan then presented his answer to a question submitted beforehand as to the civil laws protecting clergymen's secrets in the courts of the United States. There is no privilege for clergymen in the English Common Law which is the basic law for all the States of the Union except Louisiana. But some thirty-one States have statutes extending the privilege to confessional secrecy. The statutes of only six of the foregoing States extend to the extra-sacramental secret of the priest. Judicial interpretations vary. Even in those States where there is no protective statute, the practice seems to be to protect the demurring clergyman and not to hold him in contempt of court. Priests would do well, however, to be familiar with the civil law of their respective States on the matter; and a serious

effort should be made to have a protective statute for clergymen's secrets introduced in the remaining seventeen States.

Father Regan recited the facts of the historic case of Father Andrew Kohlmann of St. Peter's Church, Barclay Street, New York City, in the early 1800's. Father Kohlmann in the role of confessor agreed to act as intermediary for the restoral of stolen goods. The priest was presently haled into court and commanded to reveal the identity of the thief. Father Kohlmann refused to tell. There was a long trial. But Father Kohlmann made such a convincing and eloquent defense that, despite the fact that there was no privilege at law and much precedent to the contrary, he was, by judicial interpretation, exempted from making the disclosure.

Time had run out, and the discussion was concluded.

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