

## THE SEAL OF CONFESSION AND THE EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA

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An extremely important article appeared in the Winter 1995 issue of *Ecclesiastical Law Journal* entitled 'An Evidential Privilege for Priest-Penitent Communications' by Professor D. W. Elliott<sup>1</sup>, outlining the problems of imputing to sacramental confessions the status of privileged communications.

This article is an attempt to explicate the status of the seal of the confession in canon law in The Episcopal Church in the United States of America. One should be very careful, however, to distinguish between the seal of the confession (enjoined by canon law) and the status of privileged communication (granted by secular law). The existence of one does not necessarily in any way effect the existence of the other. Indeed, as Professor Elliott so correctly points out, there may be an absolute conflict between the law of the Church and the law of the State, so a priest must choose which law to obey (and conversely, which law to break); 'As to the priest in the witness box being forced to choose between ecclesiastical and legal censure, the only dilemma which the law has ever allowed any witness to avoid by claiming privilege is that of having to choose between different penalties.'<sup>2</sup>

While all fifty States of the American Union provide for the treatment of sacramental confession as a privileged communication<sup>3</sup>, the ecclesiastical law of the American Church absolutely precludes testimony from a priest concerning the contents of a confession, regardless of any statutory privilege.

The 1979 Book of Common Prayer of The Episcopal Church declares that one of the 'means of grace' given by God is in 'sacramental rites which evolved in the Church'. Specifically, the rite of Reconciliation of a Penitent, or Penance, is given as a means of grace (BCP p. 860).

Concerning that rite, the Catechism states:

Reconciliation of a Penitent, or Penance, is the rite in which those who repent of their sins may confess them to God in the presence of a priest, and receive the assurance of pardon and the grace of absolution (BCP p. 861).

The Reconciliation of a Penitent is available for all who desire it. It is not restricted to times of sickness. Confessions may be heard any time and anywhere (BCP p. 466).

Specifically, in preparation for receiving Holy Communion, and in the self examination required by the Church, the individual Christian is reminded:

And if, in your preparation, you need help and counsel, then go and open your grief to a discreet and understanding priest, and confess your sins, that you may receive the benefit of absolution, and spiritual counsel and advice, to the removal of scruple and doubt, the assurance of pardon, and the strengthening of your faith (BCP p. 317).

<sup>1</sup> 'An Evidential Privilege for Priest-Penitent Communications', (1994) 3 *Ecc. L. J.* 272.

<sup>2</sup> *Ibid.*, p. 285.

<sup>3</sup> *Ibid.*, p. 289.

For centuries, the Church has declared that what is confessed to God in the presence of a priest is not to be divulged by the priest to any third party. This is known as the 'seal of confession'. As the Commission on Doctrine in the Church of England, appointed by the Archbishops of Canterbury and York in 1922 states in its Report: 'The confession is heard under the "seal" of absolute secrecy. This rule is necessary in order that freedom of confession may be secured.'<sup>4</sup> (N.B. While this statement is merely of persuasive authority, it clearly represents the common view.)

Are there any exceptions to the rule of secrecy of the confession? May a confessor ever reveal what a penitent said in the confessional?

In the Anglican Communion (of which The Episcopal Church is a part), the rule of secrecy in confession existed prior to the Reformation by virtue of secular law, as well as by Canon Law. As Phillimore's *Ecclesiastical Law*, citing *Best's Principles of the Law of Evidence*, points out:

There cannot, we apprehend, be much doubt that previous to the Reformation, statements made to a priest under the seal of confession were privileged from disclosure, except, perhaps, when the matter thus communicated amounted to high treason. (The author then cites *Leges Hen. I, c. 5 para. 17*, and *9 Edw. II, c. 10 Privilege of Sanctuary Act 1315*.)<sup>5</sup>

While the civil law, as cited above, provided for the seal of confession, subject to one exception, viz. treason, the canon law also provided, in Lyndwood's *Provinciale* (prepared in 1432 and approved by both the Convocations of Canterbury and York), for the seal of confession as against the claims of the State to require priests to testify concerning matters heard in confession (Book II, Title I, Chapter IV).<sup>6</sup> Continued applicability of these canons was authorized in 1534 by virtue of the Submission of the Clergy Act 1533 (25 Henry VIII, c. 19), and again in 1543 by virtue of the Canon Law Act 1543 (35 Henry VIII, c. 16).

This specific canon on confession was superseded by Canon 113 of the Canons of 1603, which provided that the priest who hears a confession should 'not at any time reveal and make known to any person whatsoever any crime or offense so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called into question for concealing the same,) under pain of irregularity'.

The exception to the seal of confession in the latter canon is somewhat broader than the pre-Reformation one of high treason, as it would include *all* crimes, the concealing of which might endanger the life of the confessor.

Francis J. Hall, in his ten volume work on Dogmatic Theology, in Volume IV, *The Sacraments*, states:

The seal extends not only to all the sins confessed, both mortal and venial, but to their circumstances, to the names of accomplices incidentally revealed, to the advice given and to every manner of self-revelation which is involved and implied in the penitent's words and manner of confession. Knowledge thus gained is official, and the priest may make no other specific use of it than is required for immediate and judicious official treatment of the particular confession involved. He may not even recur to the subject in conversing with the penitent without his previous free consent.<sup>7</sup>

Hall then goes on to identify three apparent exceptions: (a) If the priest has personal knowledge of what is confessed, outside the confessional; (b) When the good

<sup>4</sup> *Doctrine in the Church of England*, SPCK, New York: MacMillan Co., 1950, p. 197.

<sup>5</sup> *Ecclesiastical Law of the Church of England*, 2nd Edition, Sir Walter G. F. Phillimore, London, Stevens and Sons, 1895, Vol. 1, pp. 545, 546.

<sup>6</sup> *Lyndwood's Provinciale*, J. V. Bullard and H. C. Bell, ed: London, Faith Press, 1929, p. 34.

<sup>7</sup> *The Sacraments*, Francis J. Hall, New York, American Church Union, 1969, p. 241.

of others can thus be promoted, and the penitent freely consents, the seal may be broken for such good, but no further; (c) When the confession clearly reveals intention to commit in the future a crime that endangers others. In this last regard Hall quotes Canon 113, but considers it to be a doubtful practice, while giving no specific reason.

The *Report of The Commission on Doctrine* cited above is more cautious:

It is essential to the due discharge of the confessor's office that this rule (the seal of confession) should be held to be so binding on the priest's conscience that he cannot consider himself liable to be released therefrom by the authority of the civil or other power. This, however, does not necessarily imply that he ought not in certain cases to refuse absolution except on condition of the disclosure by the penitent or with his consent of certain facts; the determination of the cases, if any in which he should so act, is one of the most delicate problems of moral theology, which it would be outside our province to discuss.<sup>8</sup>

Kenneth E. Kirk, late Bishop of Oxford, and one of the most pre-eminent authorities on Moral Theology in the twentieth century, wrote:

A confessor is under the strictest possible obligation never to reveal to anyone, either directly or indirectly, anything which he has learnt from the confessions which he hears, unless in any particular case a penitent freely and without pressure of any kind authorizes him to do so. The obligation holds even after the death of the penitent.<sup>9</sup>

However, *The Priest in the Confessional*, a collection of papers on the Sacrament of Penance presented to a Convention of Priests in England in 1931, states a rule of secrecy with only one noted exception:

It is probably unnecessary to emphasize the stringent obligation to observe the seal of confession, which is explicitly enjoined in the English Canons of 1603. No information received in the confessional can be used outside it, except, it may be, to form the subject of our prayers . . . It is not permissible for the Confessor, in speaking to the penitent himself outside the confessional, to refer to the matter of the confession, unless express permission has been given.<sup>10</sup>

Finally, we come to the present law of The Episcopal Church in regard to the seal of confession. It is far more stringent than any previous Anglican canons, and is found in the final rubric on page 446 of the Book of Common Prayer:

The content of a confession is not normally a matter of subsequent discussion. The secrecy of a confession is morally absolute for the confessor, and must under no circumstances be broken.

While there is no recorded debate of the 1976 General Convention concerning this rubric, Marion Hatchett's *Commentary on the American Prayer Book* is the closest thing we have to an official interpretation of the rubrics. He states:

The content of a confession is not normally a matter of subsequent discussion. If the penitent wishes to reopen the subject with the confessor, this may be done, but even that option is not open to the confessor. The secrecy of a confession is morally absolute for

<sup>8</sup> *Doctrine in the Church of England*, supra, pp. 197, 198.

<sup>9</sup> *The Ministry of Absolution*, Kenneth E. Kirk, Westminster, Dacre Press, 1946, p. 10.

<sup>10</sup> *The Priest in the Confessional*, J. F. Briscoe, ed., London, Faith Press, 1931, p. 56.

the confessor. This right and responsibility has been upheld in the courts of some states.<sup>11</sup>

A review of the history of the seal of confession in the Anglican Communion indicates that the seal is absolute, but with certain limited exceptions. Prior to the Reformation the seal did not apply to high treason. Following the Reformation, other crimes, the concealment of which might endanger the life of the confessor, were also exempt from the seal. However, such canonical exemptions are not preserved in American canon law, and no American priest can claim such an exemption.

Most canonists recognize the exception to the rule of the seal where the penitent grants the confessor the right to discuss the subject of the confession with the penitent after the confession has been made. This is apparently true under the American rule, as mentioned by Hatchett.

However, while Hall identifies other exceptions, including release by the penitent for good of others, and Kirk also declares the possibility of a waiver of the seal by the penitent, there is no authority interpreting the rule adopted by The Episcopal Church in 1979 which recognizes such a waiver or exception. Indeed, the language of the rubric appears to prohibit such a waiver, and Hatchett's *Commentary* supports such a prohibition.

While no American case has yet ruled on the matter, the waiver of the seal by the penitent as to third parties seems to be a minority opinion, and it appears likely that the American Church would follow the majority opinion that the only exception to absolute secrecy is that of confessor and penitent discussing the matter of the confession privately between themselves, and then only with the consent of the penitent. Thus, even if the law of the secular authority would demand that the priest testify as to the content of a confession, the canon law of the Church, at least in the United States, would require the priest to remain silent. Indeed, violation of the secrecy rubric on page 446 of the Prayer Book; under American Canon Law, is prohibited by American Church Canon IV. 1. 1(3).<sup>12</sup> Conviction for violation of rubric carries with it the possible penalty of deposition (Canon IV. 12. 1).<sup>13</sup>

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<sup>11</sup> *Commentary on the American Prayer Book*, Marion J. Hatchett, New York, Seabury Press, 1980, p. 454.

<sup>12</sup> 'A Bishop, Presbyter, or Deacon of this Church shall be liable to presentment and trial for . . . violation of the Rubrics of the Book of Common Prayer.'

<sup>13</sup> 'A sentence of deposition may be imposed after final (Judgment) by a Trial Court.'