



A Question of Ethics

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Privilege

As justice professionals, we are responsible not only for our own actions serving the judicial system, but for the system itself. We must be aware of both the system's successes and its controversies.

A while back, a couple of my coworkers and I were discussing an incident that occurred here in Oregon, which is outside the usual scope of my column. Still, I thought the topic was worth exploring from an ethical standpoint. Despite the fact that the incident has been well covered in the media here in the Northwest, I am stylizing the scenario (as I always do in my columns) to sharpen the issues. Please remember that the scenario is fictional.

The Scenario

District attorney Dave Cavanaugh (in court administrator Bob's city) wiretaps jailed defendant Lamar Buckner's confession to Father O'Leary, a Catholic priest. Cavanaugh initially defends the wiretapping, noting that signs throughout the jail clearly indicate that all conversations between inmates and visitors (regardless of the visitor) are subject to recording. Cavanaugh subsequently reviews the wiretap, then charges Buckner with murder. The Catholic Church, outraged, interprets the wiretapping as a violation of the communication privilege between priest and penitent, and therefore a violation of the separation of church and state. Archbishop Dennis Malcolm accuses Cavanaugh of prohibiting religious freedom.

This is not Mr. Cavanaugh's first brush with "church/state" issues. In a related incident, months earlier in the same city, Mr. and Mrs. Monroe refuse to hospitalize their daughter, Michelle, for a potentially fatal disease because it violates their religious beliefs. The Monroes belong to a sect that believes God will cure the sick through prayer. The entire religious community to which the Monroes belong prays for Michelle's recovery, yet Michelle dies. Cavanaugh has Mrs. Monroe arrested, tried before a jury, and obtains a conviction for manslaughter. Mrs. Monroe is now serving time in the women's correctional institution.

The state legislature is currently in session and Rep. Debra Williams has stepped forward with a bill to address the issues between Cavanaugh and the Catholic Church. Although no priest/penitent privilege exists in current law, Williams's bill calls for abolishing any

implied vestige of that privilege. Williams believes that the purpose of the criminal justice system (and its keystone—the criminal jury trial) is the search for truth. The search for truth is a fundamental value in our society and therefore of compelling interest to the government. Withholding the truth for any reason is immoral. The truth must be heard, regardless of who has spoken it and who has heard it.

Williams responds to her critics that communication privileges of any sort are nothing more than utilitarian (instrumental) values, existing only to serve another higher value. When instrumental values conflict with fundamental values, fundamental values must prevail.

Williams goes on to point out that the separation between church and state is a fallacy. The plight of Mrs. Monroe proves this point. The state cannot reject the beliefs of the religious sect to which the Monroes belong while upholding Archbishop Malcolm's contentions.

I asked Frank Broccolina, deputy state court administrator for Maryland, Professor William Spohn, from the Markkula Center for Applied Ethics at Santa Clara University, and Dr. David Ozar, from the Center for Ethics at Loyola University of Chicago, to put themselves in the position of state legislators in this mythical state. They were elected on a platform of taking the high road, and promised their constituents during the election campaign to choose the ethical path when faced with a dilemma. In that role, they respond to some pointed questions.

The Questions

How would you vote on Representative Williams's bill and why?

Mr. Broccolina, Professor Spohn, and Dr. Ozar all said they would vote against Representative Williams's bill. Broccolina said he would vote against it because he was against abolishing any privileged communication that attaches to certain unique relationships. His view is that the privilege protects the individual from any intrusion by the government in to the private and intimate information exchanged in a very personal and often therapeutic relationship.

Professor Spohn would vote against the Williams bill with a strong conviction of its invasive and intrusive character in terms of the relations of church and

state and the privileged communication of priest and penitent. To be blunt, it would appear that the proposal has no sympathy or understanding for the history of religious groups and their need for autonomy in certain matters from state interference.

Dr. Ozar saw Rep. Williams's position as mostly a lot of non sequiturs. He would not support a position, as a legislator, that was so poorly thought through. He seriously doubts that ending the privilege would contribute significantly to the court's opportunity for truth. Since he believes the privilege currently secures very important values for people at little cost to the community, he would oppose her effort to end the privilege.

Should the point of the criminal justice system in general and the criminal jury trial in particular be the search for truth? If so, how can we bar admission of the truth in any form?

Spohn responded that the search for truth, as a value-based effort, is not pursued in a vacuum. There are other values and other relationships that also have to be honored. Rep. Williams makes the search for truth absolute when it is only one of several moral considerations that should be respected. If not, why should a jury be kept ignorant of prior convictions or other damaging facts in a criminal case? The value of truth is not the only one to consider here or anywhere else.

Broccolina commented that the basis of American jurisprudence as manifested in the criminal jury system is the discernment of credible evidence and the determination of guilt based upon the presumption of innocence guided by a standard of guilt beyond a reasonable doubt. He believes that the prevailing value attached to this process is equity, which may or may not include a finding of the whole truth. Equity has been defined principally through the protection of constitutionally guaranteed individual rights against the unreasonable actions of the state. These rights are articulated through procedural safeguards like the exclusionary rule against improperly acquired evidence. Unfortunately, at times the loss of the truth may be the price we pay to ensure our individual protections.

Ozar pointed out that Rep. Williams must demonstrate that obtaining the truth in this way is *more* valuable than the relationship to the divine, which the former practice of privilege attempts to protect. Of course, if she claims that truth is simply the highest of all values, then she will have asserted its superiority over this and all other competing values: but then she should say so explicitly, and perhaps give us some reason for thinking truth is the most valuable thing in human life. Lacking *reasons* for either this claim or for some comparative arguments that illustrate that the contribution made by abolishing privileged communications to finding truth is more important than the contribution of the privileged communication to one's religious beliefs, Ms. Williams's position remains mere assertion.

In addition, there is the question of what Rep. Williams means by *truth*. If truths came with tags on them, and if priests were especially gifted in receiving truths so tagged, maybe she could argue that this route would give the courts something of exceptional value in their work. That would be an argument, perhaps, to support the claim that what the system gains without privilege in this area is worth what is lost by undoing privilege. But in that case, we would not need a jury of twelve peers to determine what happened, only individuals who were experts in reading the relevant tags (priests?). In fact, we have no direct method of reading such tags because truths don't come tagged. Instead, we must go through the complexities of offering evidence and coming to our best collective judgments, which are the tools we use to identify truth in the rest of life as well.

Are other communication privileges such as attorney/client, husband/wife, or doctor/patient based upon instrumental (useful to obtain some other function) or fundamental values? (For example, money holds utilitarian value because of the things money can buy us.)

Broccolina said that the priest/penitent privilege, like the attorney/client and doctor/patient privilege, is both utilitarian and ethical: utilitarian in the sense that it has practical value in protecting these privileged communications from its use against the individual; fundamental in the sense that the information exchanged in the communication is highly personal and based on a relationship of trust that should not be breached or compromised.

Spohn remarked that there may be some utilitarian rationale offered by some parties for respecting the priest/penitent relation, but not by Catholics. The problem with any utilitarian defense is that it can be overridden too easily for the putative "greater good" of the majority. In the countries of Eastern Europe one finds a great disenchantment with this form of moral justification since it was widely used to warrant the most outrageous abuses of human rights. This privilege is based in morality on the particular professional relationship that deals with the most intimate secrets of the conscience in a private context of healing and reconciliation. That could not occur if it were not a privileged communication. The rationale is not utilitarian but deontological—arising from the specific covenant and rights between the parties, based on their dignity and role.

Is it ethical to honor these communication privileges by barring the information from them in trials?

Spohn asserted that the level of confidentiality should match the type of professional relation. Rather than taking a blanket approach, it seems that the bond that is more intimate and more profound ought to have greater respect. Hence, spousal immunity might be morally more sacred than that of the medical profes-

sional or the attorney. Spohn would propose to Rep. Williams that she should also disallow any immunity in criminal cases for these other forms of communication. Spohn imagines that Williams would hesitate at that point, and if so, one could argue the importance of the priest/penitent relation. The priest has taken a promise not to divulge information from the confessional under pain of damnation. Whether one believes in the sanction or not, that represents a level of commitment that should not be intruded upon by the state.

Is the separation between church and state an ethical value within our society? If so, can you see a distinction between the Monroes' beliefs and the church's contention?

Frank Broccolina noted that the separation of church and state is not so much an ethical value as it is a constitutional guarantee to individual freedom of religion and to prevent the adoption by the government of a state religious affiliation to the detriment of other religions. The two situations are dissimilar in the sense that the Cavanaugh situation is a question of privilege, while the Monroe situation is an issue of the state's responsibility for public health and safety balanced against individual religious belief.

William Spohn asked, "Why is the separation of church and state a fallacy?" That may be personal opinion, but it flies in the face of history, constitutional law, and legal precedent. Rep. Williams may think that churches are hoaxes or delusional and hence should not have any standing in face of the power of the state, but fortunately that is a decidedly minority opinion. Spohn noted that the actual invasion of privacy occurred in the state of Oregon, which has the lowest level of church involvement of any state in the union. Perhaps there is something in the local culture that encourages such cavalier treatment of religion, rather than a pure interest in justice being done and the truth appearing.

Are the Cavanaugh and Monroe cases analogous in the important respects? The Monroes presumably do not have the power of life and death over their child, and the state may have an overriding interest in interfering at the point where the minor's life is in danger. That is to prevent a death. Taping the conversations between the priest and prisoner is not to prevent a death but to get a conviction. Nevertheless, Spohn did not think that the priest/penitent relation should be violated even to prevent a death. The priest can in fact refuse absolution to the penitent and warn him of the eternal consequences of his actions. He has the freedom to do that because the penitent knows that the information will go no further. If penitents did not believe that the priest would honor confidences, they would not communicate them to him, which would soon make the matter moot. But then, if the search for truth were absolutized in the totalitarian manner proposed in the bill, it is hard to see how anyone would confide in his spouse, lawyer, or doctor since they

would all be potential conduits of information that could be damaging. The web of sociality is constructed out of trust. Rep. Williams's bill would weaken that web to a degree that one can only presume she had not imagined or intended.

David Ozar stated that the original (and continuing?) purpose of the separation of church and state within our system of government is to protect religious groups from state interference, not the other way around (in spite of how this principle is used by some groups today). This sort of concern is not nearly so important in defense of the privilege as are the values the privilege preserves for individuals (contact with the divine, well-informed legal defense, etc.).

The Monroe case in Ozar's view is not useful in understanding the Cavanaugh matter or Williams's proposed legislation. Although it certainly includes concerns about the separation of church and state, it turns not on that principle but on whether the state, to protest individuals' practice of religion, may prevent threats to children's lives. The logic for this view is that because the child has not yet been able to choose one religion over another, the state will prohibit and try to prevent actions putting children's lives at risk until they can make such decisions on their own.

Wiretapping

Finally, David Ozar addressed the original wiretapping issue. Given the widespread assumption of a priest/penitent privilege, he argues that a mere notice of recordings being routinely made is insufficient to set aside a reasonable assumption of privilege. He argued that the confession was obtained in violation, if not of a legal or moral right of the prisoner, nevertheless in a way that was deceptive and unfair, so much so that the courts should not condone it under the circumstances. He did acknowledge that a case might well be made for setting aside the privilege under some circumstances in prison settings, or the like, but if it were so made, then special efforts to give notice to priests and prisoners would be required, to defeat the common assumption that the privilege is in effect.

He could not but wonder, however, how all of this applies to conversations between prisoners and other men and women of the cloth, from religious traditions that do not have a practice like Catholic confession. That issue, it seemed, would need to be explicitly addressed in determining how and under what circumstances the privilege would be supported.

I wish to thank Frank Broccolina, Professor William Spohn, and Dr. David Ozar for their insights into a perplexing question that is entwined within our criminal justice system. I want to hear from you with your comments on this column or your ideas about future columns. You can write me in care of *The Court Manager* or e-mail me at Peter.C.Kiefer@state.or.us. CM