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BETWEEN SCYLLA AND CHARYBDIS: WHEN NONE OF THE CHOICES ARE GOOD

*Oliver S. Thomas**

Reverend Samuels's first response to Mr. Jones's confession almost certainly will be to pray—if not for Mr. Jones, then for himself—as few situations could be more taxing to a pastor than the one described in the hypothetical. Afterwards, a Baptist minister such as myself likely would engage in an analysis of the problem much like the one I will describe.

First, is there a duty to warn? More specifically, is there a threat of serious bodily harm to a third party that might give rise to a legal and/or ethical obligation to warn?¹

Probably not. Although there is a substantial risk of serious bodily harm to Mr. Smith—his almost certain death on Friday at midnight—a duty to warn only arises where the third party is unaware of what may befall him. In this case, Mr. Smith has been painfully aware of what may befall him for seven years.

As for other third parties, Mr. Jones's confession concerns a past act—murder—that is unlikely to be repeated. Consequently, there is no one who needs to be warned.

Having disposed of Reverend Samuels's first question, he now must decide whether there is a duty to inform either the public defender or the district attorney about what has transpired. If Jones does not assert the priest-penitent privilege, then, of course, Reverend Samuels should and in all likelihood will disclose. A life is at stake. If there is any way to save an innocent person from being executed, Reverend Samuels will want to do it. This should include trying to talk Jones into confessing his guilt to the authorities. Likely, the Reverend will inform Jones that it is impossible to experience true forgiveness and healing without confession, repentance and, where

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1. See *Tarasoff v. Regents*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). But see *Miller v. Everett*, 576 So. 2d 1162 (La. Ct. App. 1991).

possible, an honest effort at restitution. In many cases, the inquiry will end here as the penitent parishioner, with the support of his pastor, comes clean.

Jones is a harder case. Based on his earlier conversation with his attorney, it is unlikely Jones will agree to Reverend Samuels's proposed remedy. "I appreciate the advice, Reverend. But, I think I'll just keep this between me and the Lord," he might say.

Now comes the hard part. Reverend Samuels must decide whether to override Jones's wishes and tell the authorities anyway.

If the good Reverend has been paying attention to his denominational publications, or if he has the good sense to call his church's office of legal counsel, he is likely to ask himself the following questions. These questions will help Reverend Samuels determine whether the communication with Jones was in fact confidential and therefore subject to the priest-penitent privilege.

First, am I a minister? That one's easy. Yes, I'm a minister, and the fact that Jones hasn't been to church in years doesn't relieve me of my responsibilities.

Second, was I acting in my professional capacity when Jones confessed? Again, the answer is almost certainly "yes." Jones went seeking his old house of worship. When he encountered his former pastor, he broke into tears and confessed. Hearing the confessions of broken humanity is a quintessential professional responsibility of the clergy. If anything is job-related, this is it.

Finally, Reverend Samuels must ask himself if Jones had a reasonable expectation that his confession would be held in confidence. To borrow the parlance of criminal lawyers, was there a reasonable expectation of privacy? Again, unless third parties were present the answer is "yes." In most cases, the Protestant clergy will simply escort the penitent into his office where he will hear whatever the person has to say.

Having answered all of the questions in the affirmative, Reverend Samuels will conclude that the confession is confidential. Still, he may be legally—if not ethically—free to disclose the information if he is in one of those few states where the clergyman, not the penitent, holds the privilege.² In these states, it is left to the discretion of the minister to determine whether to disclose. Other states, while granting the penitent control over the privilege, limit its

2. At my last count, the list included Maryland, New Jersey, and Virginia.

application to noncriminal cases.³ In the majority of jurisdictions, however, Reverend Samuels's only choice will be whether to engage in civil disobedience by violating the privilege in pursuit of what he or she may deem to be the higher good.

One should not assume that Reverend Samuels will conclude that the higher good would be served by disclosure. To the contrary, many—if not most—ministers believe that the higher good is served by *not* disclosing.

Theologically, we Christians believe in a God of mercy and grace who is able to forgive and forget even the most heinous crimes. The minister is called to be a mediator of God's justice, not the justice of the state.

The violation of a parishioner's confidence is intolerable to most ministers not just because it represents a betrayal of the parishioner—though it clearly does. It is because it places the spiritual health of all the members at risk. What person would wish to discuss the most intimate details of his life with a minister who has proven to be untrustworthy? Without the trust of the members, the minister and the church are unable to assist in the biblical process of confession, repentance, and regeneration.

On the other hand, the consequences of nondisclosure in this case are so great that many clergy might choose to disclose. These clergy risk not only damage to their church's counseling ministry but also the possibility of civil suit.⁴

The case is made easier if disclosure could occur in a way that would exonerate Smith without implicating Jones. Unfortunately, a stay is unlikely to be granted based upon an affidavit that an undisclosed person committed the crime. For that reason, Reverend Samuels's decision to help Smith is likely to necessitate hurting Jones. It may, in effect, save one life only to condemn another.

For this reason, Samuels may choose not to disclose or to disclose only to the extent that he is able to protect Jones's identity. Thus, Samuels might give the district attorney and the public defender an affidavit setting forth the nature and circumstances of the confession, but explaining that in accordance with church order and discipline, he is unable to disclose the identity of the confessor. Who knows? Perhaps such an affidavit would be sufficient to obtain a pardon or at

3. For example, West Virginia.

4. *See, e.g., Snyder v. Evangelical Orthodox Church*, 216 Cal. App. 3d 297, 264 Cal. Rptr. 640 (1989).

least to have the death sentence commuted to life in prison. Either way, such a limited disclosure is all that most ministers are likely to do. The alternative risks compromising the minister's trustworthiness as well as the church's priestly role as mediator of God's grace and forgiveness.