CIVIL LIBERTIES *By Harvey A. Silverglate*

Secret as a Confession?

TWO MONTHS AGO, Lane County, Ore., District Attorney Doug Harcleroad authorized the surreptitious taping of a confessional discussion in prison between a Catholic priest and a 20-year-old suspect in a triple child homicide. It is likely that he felt this intrusion into the ecclesiastical realm would be popular among his constituents, with increasing public intolerance for crime and for the rights accorded suspects.

The district attorney was, fortunately, wrong. He had seriously misjudged the extent to which civil society, particularly in the realm of religion, remains alive and well. Despite an initially announced intention to use the taped confessional to secure an indictment, Mr. Harcleroad was finally obliged to admit, in his own very public confessional news conference May 22, "There are some things that are legal and ethical, but are simply not right."

Mr. Silverglate is a bimonthly NLJ columnist and a partner in the Boston firm of Silverglate & Good.

Whether Mr. Harcleroad actually believed that what he did was "not right," or was simply reacting to a solid phalanx of opposition from all ends of the spectrum, will probably never be known. The American Civil Liberties Union weighed in from what is widely viewed as the libertarian left, arguing that the separation of church and state, embodied in the First Amendment's free exercise of religion clause, prohibits such an invasion of the confessional. The Rutherford Institute, a conservative, Virginia-based public-interest organization that defends religious liberty, hollered foul.

Protests From All Sides

Also from the conservative religious right came the New York-based Catholic League for Religious and Civil Rights, which went so far as to demand a federal investigation. (The league's president, William A. Donohue, who recently wrote a book highly critical of the ACLU's "liberal" policies, obviously concluded that the ACLU, like a clock whose hands have stopped, can be correct once in a while.)

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Only Public Indignation Kept Confession Secret

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The bottom-line warning to the prosecutor was the same: Back off. And he did—one day before the Vatican itself "strongly deplored" the taping.

With the exception of attorney-client discussions, all conversations between prisoners and visitors at the prison are conducted through a glass partition via a telephonic device. In itself, the taping did not appear to violate Oregon law, which allows all conversations between prisoners and visitors to be recorded. Prosecutorial use of the taped confession, however, posed another question altogether.

Courting the Public

Oregon, like all 50 states and the District of Columbia, has a statute that protects priest-penitent conversations, and while this privilege (as most privileges) is generally construed narrowly, it is questionable whether this tape would have been ruled admissible.

At first, DA Harcleroad thought that the public's zeal to solve and punish violent crime would at least garner him public support. "What has gotten lost in this story is there are three dead children in Springfield who were murdered," he initially told The Register-Guard, Eugene, Ore.'s daily newspaper.

Perhaps the district attorney's intent was to seek to use the confession, have it excluded by the courts and then blame the "liberal," "criminal-coddling" courts for his failure to solve the heinous crime. If so, he seriously miscalculated public sentiment.

Prosecutors and courts in other states have tried, from time to time, to dilute the priest-penitent privilege, only to have such attempts backfire. In a notorious 1994 case, *State v. Szemple*, 640 A.2d 817, the Supreme Court of New Jersey held that the then-existing version of the privilege, embodied in the state's rules of evidence, permitted a clergyman to disclose the contents of a confession without the consent of the penitent. In response, the New Jersey Legislature amended the rule to allow either the clergyman or the penitent to object.

Even the U.S. Supreme Court is not immune from the public's protective attitude toward religious rituals. In an equally notorious religious liberty (although not a priest-penitent) case, the court in 1990 held, in *Employment Division v. Smith*, 494 U.S. 872, that the free exercise clause permits a state to apply its narcotics laws to the use of sacramental peyote by a member of the Native American Church. In reaction, notwithstanding that *Smith* involved enforcement of the normally popular narcotics laws, Congress enacted the Religious Freedom Restoration Act of 1993, which restored the earlier Supreme Court test that required that a compelling state interest be demonstrated before religious practices be curbed by the application of neutral, generally applicable laws.

In short, where prosecutors have blindly sought forcibly to enlist the religious sector in the sometimes no-holds-barred battle against crime, the courts have generally intervened. Where they have failed, civil society, public opinion and elected legislatures have filled the void and restored sanity, civility and civil liberties. It would appear that, despite the current law-and-order frenzy, the spirit of liberty is not quite dead. The only thing that surprised many observers, according to a well-known Oregon criminal defense practitioner, John Henry Hingson, speaking to this writer in a recent interview, was that "it took Harcleroad—like former Sen. Robert Packwood—so long to get it."