Review of Last Week: Repentance and Confidentiality

- In past weeks, we argued that central to the Christian faith is **returning to God through repentance**.
- It was argued that people often need
    - guidance in understanding repentance and
    - help in working through the emotions and words necessary to apologize to God and to others they have hurt.
- People are unlikely to seek out guidance unless they can be sure that what they say will remain private.
- Pastors were therefore traditionally expected to keep private anything said in conversation between a pastor and a penitent (i.e. a person who was working through repentance). This was traditionally called "the seal of the confessional" or "the seal of silence."

- At first the state recognized that this kind of information should be kept confidential and did not require pastors to testify in court about matters discussed in private conversation between a pastor and a penitent or a person seeking private religious counsel.
    - Not having to testify about such matters was called "priest-penitent privilege" or "pastoral privilege."
- States often also affirmed that pastors had a legal obligation to keep private information discussed in private with a person seeking their care or counsel.

- Later the state also introduced the requirement that caregiving professionals unconditionally must report any suspected neglect or abuse of a minor or a vulnerable elderly adult. This is called "mandatory disclosure."
- Persons who in good faith made reports of suspected neglect or abuse were immune from criminal or civil suit.
- Persons who failed to report would be charged with a misdemeanor of failing to report suspected abuse (in Michigan, punishable by 93 days in jail and a $500 fine).

- There is an obvious conflict between pastors being required to
    - keep private matters discussed in private and
    - disclose matters discussed in private.
- We looked briefly at a recent state ruling in Michigan, *People v. Prominski*, where a woman sought private counsel from her pastor about a situation which, though ambiguous, could be construed as suspected child abuse. The social service department attempted to charge the pastor with failing to report; the court rejected this and found that the pastor was exempt from the mandatory disclosure requirement because the person seeking private counsel wanted this information to remain private.
    - The social service agency that lost the case seems to have refused to acknowledge the ruling and has not changed their policies and procedures to reflect the changed situation created by the ruling.

    - It is now uncertain when pastors should report, because the ruling seems to have awarded the control of information to the person seeking care, not to the pastor or the state. (This appears to follow recent rulings in regard to privacy of medical information, where the disclosure and portability of information is controlled by the patient.)
    - If a pastor is no longer a mandatory reporter, but does voluntarily report a situation of suspected abuse/neglect, the pastor may no longer be immune from criminal or civil suit (and in fact, may be liable to civil suit because they failed to follow the state statue requiring pastors to maintain confidentiality).
- The clearest explanation of the current state of the law is found at https://www.childwelfare.gov/pubPDFs/clergymandated.pdf (see pp. 1-3 for a description of the problem and the top of p. 17 for the text of the statute Mich. Comp. Laws Ann. § 722.631)
    - This appears to show that in Michigan by statute there are only two legally privileged professional communications which are **not** subject to the mandatory reporting requirement: "Any legally recognized privileged communication…between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication." The term similarly confidential communication is not defined, but in legal practice it appears that it would likely be defined either
        - (a) by reference to what the denominational policy requires regarding confession/"the seal of silence" or
        - (b) whether the person seeking help discusses these matters privately in the context of receiving spiritual guidance and expects the information to be remain confidential.
    - Information received by clergy outside these parameters (information disclosed in public settings where others could overhear or received through electronic communications like email) would not have a reasonable expectation of privacy/confidentiality and clergy **are** required to report any suspicion of abuse/neglect arising from this kind of non-private, non-privileged information.

- One other form of mandatory reporting we did not have time to discuss last week is the need to disclose/report suspected imminent self-harm (particularly suicide).
    - Professional counselors, healthcare providers and those who work with minors in institutional settings (e.g. schools) often have a requirement within their own professional discipline to report clients who are at risk of suicide or significant self-harm.
    - There appears to be no similar reporting requirement for clergy (we are not part of a centralized, regulated professional association administered by consistent policies).
        - Failure to report life-threatening behavior can, however, lead to civil suit (There was a duty to protect or to warn when harm was foreseeable and could have been averted by disclosure).
        - See case studies on threats of harm to self and others.