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# Expanding State Law Evidentiary Privileges According to the Religion Clause of the First Amendment *Varner v. Stovall*, 500 F.3d 491 (6th Cir. 2007).

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## I. Introduction

Michigan, like all other states, has laws in place to protect certain communications under the clergy-penitent privilege. The privilege was first developed through case law in 1813.[2] Today each state has enacted its own version of the privilege. Michigan's privilege is codified in two statues - both of which require communications to be made when the clergy member is "in his professional character or in the course of discipline enjoined by the rules or

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[2] *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813).

practice of such denomination." [3] In addition, the Religion Clause of the First Amendment demands that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." [4] As a result, in protecting certain privileges states must be careful not to grant privileges in one religion and not in others. Doing so would be in violation of the First Amendment.

In *Varner v. Stovall*[5], the United States Court of Appeals for the Sixth Circuit held that the Michigan state courts did not violate the First Amendment in refusing to cover journal entries which included religious references and prayers under their clergy-penitent privilege. This article will examine the arguments made on both sides and explain why the Sixth Circuit's decision is most persuasive.

## II. Statement of the Case & Procedural History

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[3] Mich. Comp. Laws § 600.2156 (1986). The other part of the statute that codifies this privileged is Comp. Laws S 767.5a (2).

[4] U.S. CONST. amend. I.

[5] 500 F.3d 491 (6th Cir. 2007).

The defendant in this case, Janniss Varner ("Varner"), was tried and convicted in a Michigan state court of assault with intent to commit murder. This conviction was in connection with the 1995 attack of her ex-boyfriend. In 1995 Varner hired a contract killer to murder her ex-boyfriend with whom she had an abusive relationship. The attempt failed and at the time Varner was never prosecuted for the crime. However, when Varner's ex-boyfriend was killed by someone else in 1998, investigators discovered Varner's incriminating journal entries of the prior murder attempt. In these journal entries from 1995, Varner had documented her hiring of the contract killer.

Following her conviction, Varner appealed, but was denied all the way through the Michigan Supreme Court. After exhausting her state court remedies, Varner filed and was granted a partial petition for writ of habeas corpus in the U.S. District Court for the Eastern District of Michigan [6]. The issue before the court, and Varner's main

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[6] Varner also appealed regarding, "whether her due-process right to 'present a defense based upon provocation and self-defense was curtailed improperly.'" *Varner*, 500 F.3d at 494. The Sixth Circuit held that the Michigan court did

argument, was that the confessions revealed in her journal entries should have been excluded from evidence under Michigan's clergy-penitent privilege. However, since Michigan's clergy-penitent privilege only applies to communications between clergymen and their members in a professional capacity, Varner argued that the Constitution's Religion Clause required the court to expand the clergy-penitent privilege to cover journal entries.

The Sixth Circuit held that Michigan did not violate Varner's First Amendment rights in admitting her journal entries, even those including prayers.

## III. The Court's Analysis

The Sixth Circuit started by stating that the Antiterrorism and Effective Death Penalty Act[7] limits their ability to grant Varner's habeas petition only if Michigan's rulings were "contrary to, or involved an

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not unreasonably apply Supreme Court precedent which states that self-defense cases are confined to cases where the defendant is in imminent danger, and that hiring a contract killer is not a covered response to provocation.

[7] 28 U.S.C. § 2254(d)(1)(1996).

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[8]

It then outlined Varner's four-step argument:

> "Step one: Michigan has created evidentiary privilege for religious communications. Step two: the privilege applies only to religions that encourage their members to communicate with God through an intermediary. Step three: this limitation discriminates among religions because it disfavors belief systems in which individuals communicate directly with God. Step four: the solution to this First Amendment problem is not to strike the privilege (which could not benefit Varner) but to extend it to all religions, including those that do not use intermediaries, and thus to extend the privilege to any journal entry that might be construed as a prayer to God."[9]

The Sixth Circuit agreed with parts of Varner's argument, however after examining the history of clergy-penitent privileges it could not agree with her conclusions.[10] The court stated that the purpose of this privilege is to develop religious "socially desirable"

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[8] *Varner*, 500 F.3d at 494 citing 28 U.S.C. § 2254(d)(1).

[9] *Varner*, 500 F.3d at 495.

[10] As required by the Antiterrorism and Effective Death Penalty Act of 1996. 28 U.S.C. § 2254(d)(1).

relationships. [11] It examines the Supreme Court's primary decision regarding privileges in *Trammel v. United States*.[12] *Trammel* holds that the clergy-penitent privilege covers, "the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[13] The Sixth Circuit then holds that according to this privilege definition, and as seen by the related state statutes, that this privilege does not cover "all religious communications."[14] In her journal, Varner often began by writing "Dear God," and at times included "prayers of supplication and thanks" along with her entries. [15] These entries also communicated her "disillusionment with organized religion and church services." [16]

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[11] *Varner*, 500 F.3d at 496.

[12] 445 U.S. 40 (1980).

[13] *Varner*, 500 F.3d at 496 citing *Trammel*, 445 U.S. at 51.

[14] *Varner*, 500 F.3d at 496.

[15] *Id.* at 494.

[16] *Id.*

Varner argued that the disillusionment regarding religion that was expressed in her journal supported her argument to cover the journal entries. She argued that as a result of this disillusionment her direct contact with God via her journal was the only communication she could have that resembled clergy-penitent communications, and therefore should be protected. She claimed that because the law as it stands favors only religions that encourage followers to seek "guidance through intermediaries," it is under inclusive.[17] The Sixth Circuit disagreed. It held that the application of these laws in cases like Varner's is constitutional because, "[n]o matter what form of faith an individual practices, the privilege does not protect journal entries, whether addressed to God or not." [18]

The Sixth Circuit then rejects Varner's arguments that this law affects how she practiced her faith because "journal writings do not represent the only way [Varner] may communicate with God, even if she remains a skeptic when it comes to organized religion."[19] It uses a slippery

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[17] *Id.* at 496.

[18] *Varner*, 500 F.3d at 497.

[19] *Id.* at 498.

slope type of analysis to prove why this argument is in conflict with established United States Supreme Court precedent. The court states that, "[a] person of faith who like Varner chooses not join an organized religion cannot complain that the State's and Federal Government's tax exceptions for property held by religious institutions and other non-profit organizations discriminate against her- even though her faith will not benefit from the exemptions."[20]

In addressing Varner's argument that the United States Supreme Court decision *Larson v. Valente*[21], "prohibits 'one religious denomination' from 'being officially preferred over another'" the court held that *Larson* does not apply.[22] This is because the admissibility of journal entries applies in all situations; secular or religious. The Sixth Circuit then finds *Gillette v. United States*[23] more persuasive and applicable in Varner's case than *Larson*. *Gillette* upheld federal laws that granted Quakers and

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[20] *Id.* at 498 referencing *Walz v. Tax Comm'n*, 397 U.S. 664, 680, 90 (1970).

[21] 456 U.S. 228 (1982)

[22] *Varner*, 500 F.3d at 498 citing *Larson*, 456 U.S. at 244.

[23] *Gillette v. United States,* 401 U.S. 437 (1971).

Mennonites conscientious-objector status because of their objection to all wars, and not to Roman Catholics who object only to unjust wars. [24] The Sixth Circuit stated that, "like the conscientious-objector statute, Michigan's privilege rules do not discriminate between denominations but distinguish between the methods of communication that the individual-any individual of any faith or no faith-chooses to pursue."[25] Judge Sutton concludes by holding that according to the Antiterrorism and Effective Death Penalty Act of 1996[26], the Michigan court "did not unreasonably apply *Larson* and *Gillete* in declining to extend the clergy-penitent privilege" to Varner's case.[27]

## III. Conclusion

This is an interesting case that presents the uncommon argument that a state's clergy-penitent privileges,

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[24] *Varner*, 500 F.3d at 499.

[25] *Id.*

[26] 28 U.S.C. § 2254(d)(1)(1996).

[27] *Id.*

according to the First Amendment, should be expanded. Most cases argue that the Religion Clause's application should be restricted because it is being applied too broadly. However, by holding that Varner's case was reasonably decided because the privilege does not protect any journal entries, the court does not directly address Varner's argument. This is because the decision does not address Varner's argument that as it stands the law favors certain religions whose practices encourage members to communicate to God via intermediaries over religions that do not. The Sixth Circuit's aversion to the direct question presented is some what legitimized by the required standard mandated under the Antiterrorism and Effective Death Penalty Act.[28] It is under this law that the Sixth Circuit was able to make some persuasive comparisons between existing Supreme Court precedent and Varner's case. Though Varner lost in this case, a circumstance that would require the extension of the clergy-penitent law to religions that do not encourage the use of intermediaries is plausible. It follows that, if the Sixth Circuit were forced to address

[28] 28 U.S.C. § 2254(d)(1)(1996).

this question head on, the outcome in *Varner* might have been different.