The Priest-Penitent Privilege in a Post-Scandal World: Federal Inaction and State Abrogation

For the Catholic Church in America, the story of the 21st century thus far has been one of scandal and response. According to a study commissioned by the United States Conference of Catholic Bishops (USCCB), the authoritative organization for the Catholic Church in America, as many as five percent of diocesan priests actively ministering in America between the years 1960 and 1996 were accused of sexual abuse – in all, 4,392 priests were accused.[1] This study came after years of explosive reports concerning abuse within the Catholic Church, perhaps the most famous among them the "Spotlight" reports by the Boston Globe.[2] What followed was a series of settlements,[3] bankruptcies,[4] laicization of priests,[5] and protective measures.[6] The response from the American people was clear: attendance at Mass went down dramatically, with one diocese finding that attendance dropped a full six percent in 2002 alone.[7] The scandal has

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[1] THE JOHN JAY COLLEGE OF CRIMINAL JUSTICE, THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 1950-2002 4 (Feb. 2004).

[2] Michael Rezendes, *Church Allowed Abuse by Priest for Years*, BOS. GLOBE (Jan. 6, 2002), https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html.

[3] As of August of 2018, some estimates suggest that the clergy abuse scandal has cost the Catholic Church more than three billion dollars. *See* Tom Gjelten, *The Clergy Abuse Crisis Has Cost The Catholic Church $3 Billion*, NPR (Aug. 18, 2018), https://www.npr.org/2018/08/18/639698062/the-clergy-abuse-crisis-has-cost-the-catholic-church-3-billion.

[4] At least 19 dioceses and religious orders across the United States filed for bankruptcy between 2004 and 2018. *See Catholic Dioceses and Orders that Filed for Bankruptcy and Other Major Settlements*, NAT'L CATH. REP. (May 31, 2018), https://www.ncronline.org/news/accountability/catholic-dioceses-and-orders-filed-bankruptcy-and-other-major-settlements. For reference, there are 161 Catholic dioceses in the United States. *See Bishops and Dioceses*, USCCB (current as of Feb. 6, 2020), http://www.usccb.org/about/bishops-and-dioceses/index.cfm.

[5] Pope Benedict laicized (that is, removed from the priesthood) nearly 400 priests for child sexual abuse in 2011 and 2012 alone. *See Pope Benedict XVI Defrocked Nearly 400 Priests for Child Abuse*, THE GUARDIAN (Jan. 17, 2014), http://www.theguardian.com/world/2014/jan/17/pope-benedict-defrocked-400-priests-child-abuse.

[6] In June of 2002, the USCCB promulgated the Charter for the Protection of Children and Young People in order to address the sexual abuse scandal and put mechanisms in place to prevent future recurrence. The document has since been revised, in 2005, 2011, and 2018. *See* THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE (4th ed. 2018).

[7] *See* Matthew Gambino, *Half of Catholics Attending Mass 28 Years Ago no Longer do, Figures Show*, CATH. PHILLY (Sep. 5, 2019), https://catholicphilly.com/2019/09/our-changing-church/half-of-catholics-attending-mass-28-years-ago-no-longer-do-figures-show-2/.

shaken and continues to shake even Catholics' faith in their clergy and institutions – a recent Gallup survey found that only 31 percent of Catholics rate their trust in the clergy as "high" or "very high," while a slightly higher 44 percent of Catholics in the same survey say they have a "great deal" or "quite a lot" of confidence in the institution of the Catholic Church.[8]

Just as significant was and has continued to be the response by the states. In a nation whose social and religious policy is so often defined by national action,[9] the response to the sexual abuse scandals in the Catholic Church has been largely defined by state action. In the past couple years in particular, state attorneys general have continued to investigate the scandal in Catholic dioceses – Pennsylvania released an 887 page grand jury report in 2018,[10] and other states have followed.[11] Amidst these scandals, one state response has flown under the radar: several states have attempted to – or have – eliminated or limited the traditional priest-penitent privilege with regard to sexual abuse of minors.[12] The general notion of the priest-penitent privilege is that "[a] person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as a spiritual advisor."[13] In the past year alone, California and Utah have both considered amendments to their statutory schemes which would abrogate the priest-penitent

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[8] Megan Brenan, *U.S. Catholics' Faith in Clergy Is Shaken*, GALLUP (Jan. 11, 2019), https://news.gallup.com/poll/245858/catholics-faith-clergy-shaken.aspx.

[9] *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a national right to abortion), *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (establishing a national right to same-sex marriage).

[10] REPORT I OF THE 40TH STATEWIDE INVESTIGATING GRAND JURY (Jul. 2018).

[11] *See* Tara Isabella Burton, *Even More States Have Launched Investigations Into Clerical Abuse Since the Pennsylvania Report* VOX (Oct. 24, 2018), https://www.vox.com/2018/9/17/17847466/state-investigations-clerical-abuse-dc-virginia-maryland-florida-new-york.

[12] This privilege is also referred to as the clergy-communicant privilege or the religious privilege (among other names). For purposes of consistency, and given this paper's focus on the potential effects of abrogation on Catholic clergy, this paper will use "priest-penitent privilege" as the general term.

[13] PROPOSED FED. R. EVID. 506, quoted in Lennard K. Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 13 REGENT U.L. REV. 145, 148 (2000).

privilege.[14] And in the past half-century, a full nine states – namely, Connecticut, Mississippi, Oklahoma, New Hampshire, North Carolina, Rhode Island, Tennessee, West Virginia, and Texas – have abrogated that privilege in part or in full with regard to the sexual abuse of minors. It is the intent of this paper to survey those attempts. In order to do so, this paper will begin by describing the nature and scope of the Catholic seal of Confession. It will then review the federal constitutional analysis of the seal and suggest that the current First Amendment jurisprudence does not foreclose the possibility of state abrogation of the priest-penitent privilege. Then, it will address the statutory schemes and relevant case law in each of the nine states which have abrogated the privilege. Finally, it will conclude with some policy considerations regarding the elimination of the priest-penitent privilege in cases of child sexual abuse.

A. The Confessional Seal

"I shall never sacrifice the salvation of my soul by revealing the secret of a penitent. … A minister of the altar can reveal nothing of what is confided to him in the confessional."

– Fr. Peter Marielux, shortly before his martyrdom.[15]

The Gospel of John recounts that, after his resurrection, Christ appeared to his disciples and spoke these words: "If you forgive anyone's sins, their sins are forgiven; if you do not forgive them, they are not forgiven."[16] The Catholic Church teaches that, with these words, Christ bestowed on the Apostles the authority to exercise the divine power to forgive sins in his

[14] *See* Chaz Muth, *California Bill Aims to Protect Children by Breaking Seal of Confession*, CRUX (Jun. 4, 2019), https://cruxnow.com/church-in-the-usa/2019/06/california-bill-aims-to-protect-children-by-breaking-seal-of-confession/, Katie McKellar, *Bill Requiring Clergy to Report Child Abuse Confessions Opposed by Utah Catholics, House Speaker*, DESERET NEWS (Jan. 14, 2020), https://www.deseret.com/utah/2020/1/14/21065579/utah-bill-clergy-report-child-abuse-confessions-house-speaker-catholic-church-mormon-lds-diocese.
[15] *The Story of Father Marielux*, THE FREEMAN'S JOURNAL (Sydney), Dec. 17, 1925, at 40.
[16] *John* 20:23 (NIV).

name.[17] The Church exercises this authority by means of the sacrament of Penance and Reconciliation, more commonly referred to as "Confession."[18] By means of Confession, baptized Catholics are invited to confess their sins to a priest, who, acting in the person of Christ, absolves the penitent of his or her sins, thus "restoring [penitents] to God's grace and joining [them] with him in an intimate friendship."[19] Christian scripture recounts that "all have sinned and fall short of the glory of God."[20] As Confession is the ordinary means by which Catholics receive forgiveness for their sins, and as all Catholics sin, Confession forms an essential element of Catholic worship. In fact, adult Catholics are required to seek the sacrament of Confession at least once a year to confess serious sins.[21] Pope Francis, the current head of the Church, says that he goes to Confession every two weeks.[22]

Given Confession's significance in Catholic practice, it is no surprise that strict regulations surrounding the form and content of the sacrament of Confession have developed over the two millennia across which this sacrament has been dispensed. Though the fundamental aspects of the sacrament remain as they were in the first century, the exact form of the sacrament has changed across the centuries – the private confessional as we know it today developed primarily in the seventh century due to the influence of Irish missionaries.[23] Today, a typical Confession begins with the penitent asking for the priest's blessing and informing him how long it has been since the penitent's last Confession. The penitent then recites his or her sins. Once this recitation, long or short, has concluded, the priest typically dispenses spiritual advice and

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[17] THE CATECHISM OF THE CATHOLIC CHURCH § 1441, 1444 (2d ed. 1994).
[18] *Id.* § 1423-4.
[19] *Id.* § 1468, citation omitted.
[20] *Romans* 3:23 (NIV).
[21] *See* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 17, § 1457.
[22] Cincy Wooden, *Pope, at Audience, Says he goes to Confession Every Two Weeks*, NAT'L CATH. REP. (May 31, 2018), https://www.ncronline.org/blogs/francis-chronicles/pope-audience-says-he-goes-confession-every-two-weeks.
[23] CATECHISM OF THE CATHOLIC CHURCH, *supra* note 17, § 1447.

prescriptions of penance and then, assuming he is satisfied with the penitent's contrition, speaks the prescribed words of absolution.[24] Thus, the penitent may leave the confessional assured that, having gone in a sinner, he or she has emerged "healed and re-established in ecclesial communion."[25]

Sins often comprise the very inmost secrets of any individual; confessing one's faults to another is never easy. The Catholic Church, recognizing "the delicacy and greatness of this ministry and the respect due to persons, … declares that every priest who hears confessions is bound under very severe penalties to keep absolute secrecy regarding the sins that his penitents have confessed to him."[26] The Code of Canon Law, which governs all Catholics, calls the seal of confession "inviolable,"[27] and proscribes that "a confessor who directly violates the sacramental seal incurs a *latae sententiae* excommunication reserved to the Apostolic See; one who does so only indirectly is to be punished according to the gravity of the delict."[28] A *latae sententiae* penalty is one which is incurred automatically upon the commission of the crime.[29] As the excommunication is reserved to the Apostolic See, the Pope alone can restore to communion with the Catholic Church any priest who intentionally reveals anything which is said to him in the confessional. Thus, every priest is bound by the strictest penalties in canon law not to reveal any sins revealed to him in the context of Confession. Throughout history, a number of priests have taken that doctrine to its absolute conclusion and faced death itself rather than violate the seal of confession.[30] In American history, there is no priest known to have suffered this

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[24] For those words, see *id.* § 1449.
[25] *Id.* § 1448.
[26] *Id.* § 1467.
[27] 1983 CODE c.983, § 1.
[28] *Id.* c.1388, § 1.
[29] *Id.* c.1314.
[30] *See These Priests were Martyred for Refusing to Violate the Seal of Confession*, CATH. NEWS AGENCY (Dec. 16, 2017), https://www.catholicnewsagency.com/news/these-priests-were-martyred-for-refusing-to-violate-the-seal-of-confession-44847.

martyrdom, but there have been and continue to be legal threats to the inviolability of the seal, and, as they have in the past, priests are prepared to face jail rather than violate their oaths and incur excommunication.[31]

B. Constitutional Analysis

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[32]

The American Constitutional tradition surrounding the priest-penitent privilege is not overly long. The Supreme Court has never officially recognized the priest-penitent privilege (though it has done so in dicta), and while several federal courts have implicitly or explicitly recognized the privilege, they have all done so as a matter of federal common law and not as a matter of binding constitutional interpretation. The First Amendment's guarantee of the free exercise of religion has been incorporated against the states by the 14th Amendment,[33] and thus can be read to prohibit any law, state or federal, which prohibits the free exercise of religion. A review of the history of the priest-privilege in America, however, reveals that the priest-penitent privilege has not typically been considered compulsory upon American courts, and nor is it at all clear that states would follow a clear federal statement, if one were to be made. The history of the priest-penitent privilege in America has been well covered by other essays,[34] and while this

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[31] *See* Chaz Muth, *They'll go to Jail or Die Rather than Violate Sacrament's Secrecy, Priests Say*, CATH. PHILLY (Sep. 5, 2019), https://catholicphilly.com/2019/07/news/national-news/priestly-martyrdom-to-uphold-seal-of-confession-not-a-new-phenomenon/.
[32] U.S. Const. amend. 1.
[33] *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").
[34] *See, e.g.*, Walter J. Walsh, *The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence*, 80 IND. L.J. 1037.

essay makes no novel claims as to that history, a brief survey of the development of the privilege in federal courts merits discussion.

The first and most prominent case to discuss the priest-penitent privilege in post-Revolutionary America comes from an unlikely source: a mayor's court in New York City in 1813. That case, *People v. Philips*, has been analyzed and debated by many great scholars,[35] and even merited a mention in Justice Scalia's concurrence in *City of Boerne v. Flores*.[36] No matter its ongoing significance and weight, it remains significant for its original recognition of the priest-penitent privilege in American law. In *Philips*, a penitent (later revealed to be Daniel Philips) entered a confessional and confessed to one Father Kohlmann that he had "knowingly received stolen goods."[37] Fr. Kohlmann commanded him to return the stolen goods to their rightful owner, and assisted the penitent in doing so, all without revealing the penitent's name, sex, or color.[38] After the authorities learned of Fr. Kohlmann's role as an intermediary, they subpoenaed him to identify the thief; he, citing his religious duties, refused: "it would be my duty to prefer instantaneous death or any temporal misfortune, rather than disclose the name of the penitent …. For, were I to act otherwise, I should become a traitor to my church, to my sacred ministry and to my God. … I should render myself guilty of eternal damnation."[39] After two days of impassioned argument, the court held that both the New York State Constitution and the

[35] The decision was unreported by the court, but the proceedings were collected by William Sampson, who argued the case for the defendant. I am indebted to the articles written by those scholars for their thorough descriptions of Sampson's account. *See* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990), Gerard Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991), Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1 (2004).
[36] *City of Boerne v. Flores*, 521 U.S. 507, 543 (1997). Justice Scalia described it as "a weak authority," as it came from a minor court, did not involve a statute, and could have been achieved by common law rather than constitutional means. *Id*.
[37] McConnell, *supra* note 35, at 1410.
[38] *See id.* at 1411, Walsh, *supra* note 35, at 20.
[39] McConnell, *supra* note 35, at 1411.

federal First Amendment mandated that courts respect the priest-penitent privilege, and that Fr. Kohlmann had thus been justified in refusing to testify as to what had been revealed to him in the confessional.[40] *Philips* obviously has no precedential authority, even within New York – the mayor's court in which this case was heard was reconstituted not long after, as Justice Scalia points out[41] – but it stands as the first case in which this privilege was recognized (and even compelled) in the American legal system.

In dicta, at least three Supreme Court cases have suggested that there could be a federal priest-penitent privilege, although its origin would be unclear. The first was decided in 1875, in *Totten v. United States*, which concerned the payment due to a spy who had been contracted for the Civil War. In that case, the court noted that "suits cannot be maintained which would require a disclosure of the confidences of the confessional."[42] The next, and most cited for the proposition, is *Trammel v. United States*, in which the scope and nature of the spousal privilege was under consideration. There, the court said of the priest-penitent privilege: "The priest-penitent privilege recognizes 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."[43] Finally, in a far more famous case, *United States v. Nixon*, the court noted that "generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence."[44] In none of these cases did the court cite to any authority for the priest-penitent privilege and nor did any of them recognize the official existence of such a privilege for the federal courts.

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[40] Walsh, *supra* note 35, at 37.
[41] *City of Boerne v. Flores*, 521 U.S. 507, 543 n.4 (1997).
[42] *Totten v. United States*, 92 U.S. 105, 107 (1875).
[43] *Trammel v. United States*, 445 U.S. 40, 51 (1980).
[44] *United States v. Nixon*, 418 U.S. 683, 709 (1974).

Nonetheless, several federal courts have concluded that a priest-penitent privilege exists at federal common law.[45] The clearest federal ruling on this privilege – referred to by a district court in 2015 as the "seminal federal case for recognition of such privilege"[46] – is *In re Grand Jury Investigation*, a Third Circuit case.[47] There, the court held explicitly that "a clergy-communicant privilege does exist," and that it "protects communications to a member of the clergy, in his or her spiritual or professional capacity, by persons who seek spiritual counseling and who reasonably expect that their words will be kept in confidence."[48] The court came to this conclusion by analyzing the federal rules of evidence, beginning with Rule 501, which reads in part: "The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise; • the United States Constitution; • a federal statute; or • rules prescribed by the Supreme Court."[49] Rule 501 was adopted by Congress in place of a series of rules submitted by the Supreme Court to Congress which included a proposed codification of the priest-penitent privilege.[50] The general rule proposed to Congress read in part: "A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a

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[45] *See, e.g.*, *Mullen v. United States*, 263 F.2d 275, 276-80 (D.C. Cir. 1958) (Fahy J., concurring) (arguing that American common law ought to recognize the priest-penitent privilege), *United States v. Wells*, 446 F.2d 2, 4 (2d Cir. 1971) (noting the existence of the priest-penitent privilege in American law), *In re Verplank*, 329 F. Supp. 433, 435 (C.D. Cal. 1971) ("the spirit of Rule 26, coupled with the development of the common law principles evidenced by the proposed rules and *Mullen*, impel the conclusion that a clergyman-communicant privilege should be acknowledged in criminal matters in the federal courts."). Notably, these three cases all precede *Trammel*.

[46] *United States v. Durham*, 93 F. Supp. 3d 1291, 1296 (W.D. Okla. 2015).

[47] *In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990).

[48] *Id.* at 377.

[49] FED. R. EVID. 501. This is the rule as currently written. The court in *In re Grand Jury Investigation* was interpreting an earlier edition of this rule, but the relevant language remains substantively identical. Additionally, both then and now, this rule applies only to federal criminal proceedings. As the court noted then, "Rule 501, as it applies to federal civil cases, incorporates the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and requires deference to any applicable state law governing privileges." *In re Grand Jury Investigation*, 918 F.2d 374, 379 n.6 (3d Cir. 1990).

[50] *See In re Grand Jury Investigation*, 918 F.2d at 379-380.

clergyman in his professional character as spiritual adviser."[51] While this rule was not adopted by Congress, the *In Re Grand Jury* court noted that elements of legislative history indicated that Congress did not intend for its lack of approval to constitute a disapproval, and noted also that the provision for a priest-penitent privilege was not, unlike most of the other potential privileges sent to Congress for approval, "vigorously attacked."[52] "The inclusion of the clergy-communicant privilege in the proposed rules," the court concluded, "taken together with its uncontroversial nature, strongly suggests that the privilege is, in the words of the Supreme Court 'indelibly ensconced' in the American common law."[53] Though definitive, the court emphasized that its declaration of this privilege was not meant to be "comprehensive:" "The precise scope of the privilege and its additional facets, such as whether a clergyperson should be required to disclose confidential communications when harm to innocent parties is threatened and imminent, are, therefore, most suitably left to case-by-case evolution."[54] The case-by-case evolution which has followed (where this case has been cited) has opened the privilege up to interpretations as diverse as the federal courts, and the Supreme Court has yet to hear any case which could guide the development of this evolution.

No matter its interpretation, the rule announced in *In re Grand Jury* investigation is certainly not binding constitutional law, and no state or federal court outside the jurisdiction of the Third Circuit may be compelled to follow it. Such a constitutional rule would almost certainly have to arise out of an interpretation of the First Amendment to the federal Constitution. Given the significance of the confessional seal in Catholic doctrine, there is a colorable argument that the First Amendment would compel some form of the priest-penitent

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[51] PROPOSED FED. R. EVID. 506 (quoted in *In re Grand Jury Investigation*, 918 F.2d at 380).
[52] *In re Grand Jury Investigation*, 918 F.2d at 381.
[53] *Id.* at 381 (quoting *United States v. Gillock*, 445 U.S. 360, 368, [1980]).
[54] *In re Grand Jury Investigation*, 918 F.2d at 385.

privilege.[55] Viewed through the lens of the governing precedents on the First Amendment, however, it appears unlikely that the form in which such a privilege would be compelled would be inviolable. In other words, it would be no violation of the First Amendment (as interpreted) to do as many states have done and abrogate the privilege in certain circumstances, such as those in which sexual abuse of a minor is at issue.

Potential violations of the First Amendment are analyzed through the lens of *Employment Division v. Smith*.[56] In an opinion written by the late Justice Scalia, the court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[57] The court rejected the idea that laws which burden religious practice should be subject to the "compelling state interest" standard, as such a standard would not only nullify large swaths of state law but would also potentially lead to "a private right to ignore generally applicable laws."[58] Additionally, the court noted that there could be no exception for religious doctrines which are "'central' to the individual's religion," as "[i]t is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field."[59] Thus, neutral, otherwise constitutional laws of general applicability – even if they substantially

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[55] *See, e.g.*, Jude O. Ezeanokwasa, *The Priest-Penitent Privilege Revisited: A Reply to the Statutes of Abrogation*, 9 INTERCULTURAL HUM. RTS. L. REV. 41 (2014), Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723 (1997).
[56] 494 U.S. 872 (1990). Congress was so irked by this decision that it attempted to overrule it by statute, but that attempt was ruled unconstitutional by the Court (at least as applied to the states) in *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[57] *Emp't Div. v. Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 [1982] [Stevens, J., concurring in judgment]).
[58] *Emp't Div. v. Smith*, 494 U.S. at 888, 886.
[59] *Id.* at 886-87.

burden individuals' exercise of religious exercise – are not prohibited under the Supreme Court's interpretation of the First Amendment.

Finally, and most significantly for this discussion, Justice Scalia ended his opinion by noting that states are free to carve out – and even that they should, in some instances – religious exemptions to their generally applicable laws.[60] "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable," he concluded, "is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts."[61] This precisely answers the question as to whether the First Amendment compels an inviolable priest-penitent privilege to the states. States are free to carve out religious exceptions to their generally applicable mandatory reporter laws (or to any generally applicable laws concerning evidence in child sexual abuse cases), but the First Amendment as interpreted by *Smith* does not compel any such exception. In many ways, then, states are free to abrogate the priest-privilege as they see fit, and indeed may not be compelled to provide such a privilege at all.[62]

C. Surveying State Action

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. – Justice Louis Brandeis[63]

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[60] *Id.* at 890.
[61] *Id.*
[62] For an argument which disputes that state abrogating statutes are either neutral or generally applicable, *see* Ezeanokwasa, *supra* note 55 at 78-99.
[63] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Every state has ensconced into law some form of the priest-penitent privilege.[64] Likewise, every state has mandatory reporting laws which establish by law individuals who are required to report allegations or suspicions of sexual abuse of a minor.[65] In many of those states – 28, by the count of the United States Department of Health and Human Services – members of the clergy are explicitly identified as mandatory reporters.[66] Clearly, there is some sense to this: spiritual advisors are trusted with the most difficult questions of both the young and the old, and often have some of the greatest insights into family life. Nor does this necessarily have to conflict with the seal of Confession – members of the clergy learn information in many contexts, and not all of them are confidential. Members of the clergy arguably have a greater moral responsibility to report allegations of sexual abuse of a minor than the general public, and certainly should, whenever possible. In some states, however, well-intentioned legislatures have abrogated the priest-penitent privilege in ways that threaten the seal of Confession. What follows is a comprehensive look at the nine states – Connecticut, Mississippi, Oklahoma, New Hampshire, North Carolina, Rhode Island, Tennessee, West Virginia, and Texas – which have enacted statutory regimes in which the inviolability of the sacrament of Confession is threatened.[67]

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[64] *See* Julie Ann Sippel, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U.L. REV. 1127, 1127 (1994).

[65] THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (Apr. 2019). As this report notes, these mandatory reporting statutes are federally mandated by 42 U.S.C. § 5106a(b)(2)(B)(i).

[66] Namely, Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, West Virginia, and Wisconsin. THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1.

[67] This list was compiled on the basis of independent research and review of the secondary literature. Several articles have listed various states as having abrogated the privilege, but very seldom are the lists the same, and none appear to have identified all nine states identified herein (allowing, of course, for the possibility that state law has changed in the interim). *See, e.g.*, Ezeanokwasa, *supra* note 55 at 43 (identifying Connecticut, Mississippi, New Hampshire, North Carolina, Oklahoma, Texas, and West Virginia), Caroline Donze, *Breaking the Seal of Confession: Examining the Constitutionality of the Clergy-Penitent Privilege in Mandatory Reporting Law*, 78 LA. L. REV. 267, 282 (2017) (identifying West Virginia, New Hampshire, North Carolina, Oklahoma, Rhode Island, and Texas).

1. Clergy Identified as Mandatory Reporters, No Privileges Exception: Connecticut, Mississippi, and Oklahoma

Of the 28 states which specifically identify members of the clergy as mandatory reporters, all but four protect the priest-penitent privilege as to pastoral communications.[68] Those four – Connecticut, Mississippi, New Hampshire, and West Virginia – fall into two categories. The latter two states will be addressed in the following section, as they intentionally abrogate the priest-penitent privilege in cases of suspected child abuse. Connecticut and Mississippi, on the other hand, do not clearly address the potential conflict between the priest-penitent privilege and the mandatory reporting statutes. Neither state, however, appears to abrogate the privilege in court proceedings. Without referencing the mandatory reporting statute, one Connecticut case notes that "there . . . appears to be no 'child abuse' exception to the clergy privilege."[69] There do not appear to be any cases in Mississippi which make such a clear statement, but the Mississippi Supreme Court upheld a declaration of priest-penitent privilege as to certain documents in *Roman Catholic Diocese v. Morrison*, which involved allegations that a priest had abused three minor children.[70] It appears, therefore, that though both states abrogate the priest-penitent privilege when it comes to mandatory reporting, they uphold the priest-penitent privilege in court proceedings, even in cases of sexual abuse of a minor. There are no reported cases in either state of a priest being prosecuted for failing to carry out his responsibilities under the mandatory reporting laws.

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[68] *Id.* at 3.
[69] *Hethcote v. Norwich Roman Catholic Diosean Corp.*, No. X04CV054003450S, 2007 Conn. Super. LEXIS 892, at *3 (Super. Ct. Apr. 2, 2007).
[70] 905 So. 2d 1213, 1246 (Miss. 2005).

Oklahoma also merits notice under this heading, although clergy are not explicitly identified as mandatory reporters within the state. Instead, the Oklahoma mandatory reporter statute states that "every person" is a mandatory reporter, and that "no privilege or contract shall relieve any person from the requirement of reporting."[71] A companion statute declares that "in any proceeding" resulting from or related to such a report, "such report, contents, or other fact related thereto or to the condition of the child or victim who is the subject of the report shall not be excluded on the ground that the matter is or may be the subject of a physician-patient privilege or similar privilege."[72] It does not appear that any Oklahoma state court has had occasion to consider the priest-penitent privilege with regard to allegations of sexual abuse of a minor under either aspect of this statutory scheme. The only case in Oklahoma to consider this question in any capacity appears to be a federal case in which there was some question as to whether a member of the clergy had failed in his mandatory responsibility to report allegations of child abuse.[73] The court concluded that "he did not have evidence which triggered the statute," but indicated a willingness to admit any statements that would have flowed from or caused such a report, in accordance with statute.[74] In any case, there are no reported cases of prosecution of a member of the clergy who failed to carry out his obligation under this statute.

2. Identified Exceptions which Exclude the Priest-Penitent Privilege: New Hampshire, North Carolina, Rhode Island, Tennessee and West Virginia

Multiple states, often using the same statutory language, explicitly identify the only exceptions to their mandatory reporting statutes and exclude the priest-penitent privilege from

[71] OKLA. STAT. tit. 10A, § 1-2-101 (2019).
[72] OKLA. STAT. tit. 10A, § 1-4-507 (2019).
[73] *United States v. Durham*, 93 F. Supp. 3d 1291 (W.D. Okla. 2015).
[74] *Id. at* 1297 (W.D. Okla. 2015).

that list of exceptions. New Hampshire's reporting law contains an illustrative section: "The privileged quality of communication between husband and wife and any professional person and his patient or client, except that between attorney and client, shall not apply to proceedings instituted pursuant to this chapter and shall not constitute grounds for failure to report as required by this chapter."[75] In addition to abrogating the priest-penitent privilege in proceedings related to child abuse, New Hampshire explicitly identifies priests and other ministers as mandatory reporters.[76] New Hampshire is a particularly relevant state, as its Supreme Court has decided a case in which these laws were at issue. In *State v. Willis*, the New Hampshire Supreme Court was asked to review a trial court's determination that certain statements made by the defendant (Willis) to his pastor (Phelps) were not covered by the priest-penitent privilege.[77] (In New Hampshire, the privilege extends to any "confession or confidence made to [a clergyman] in his professional character as spiritual advisor").[78] Reflecting on the history of the priest-penitent privilege, the court held, "Because the religious privilege did not exist at common law, the protections conferred by the privilege are therefore based upon the statute and the rule of evidence adopting it."[79] As such, the court noted that the privilege must be strictly construed and can be just as easily abrogated by statute as it was created.[80] Hence, the court found no issue with applying the mandatory reporting statute's abrogation of the privilege: according to the analysis in *Willis*, "any statement to a clergyperson that might be helpful in establishing child abuse is not protected by the privilege," and thus cannot be a said to be a "confidence [or confession] to

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[75] N.H. REV. STAT. ANN. § 169-C:32 (1979). In contrast, the corresponding Florida statute uses almost this same language, but identifies the priest-penitent privilege as an exception alongside that of attorney-client privilege. FLA. STAT. ANN. § 39.204 (West 2002).
[76] N.H. REV. STAT. ANN. § 169-C:29 (1979).
[77] *State v. Willis*, 75 A.3d 1068, 1071 (N.H. 2013).
[78] N.H. REV. STAT. ANN. § 516:35 (1979). The rule is also codified in the New Hampshire Rules of Evidence with substantively identical language. See N.H. R. EVID. 505.
[79] *State v. Willis*, 75 A.3d at 1072.
[80] *Id.*

which the privilege applies."[81] In other words, when it comes to the priest-penitent privilege in New Hampshire, the legislature gives and the legislature may take away.

The *Willis* Court did, however, leave one potential opening by which a Catholic penitent (or priest) might attempt to protect the contents of a confession. Noting that privileges tend to rest on a reasonable expectation of confidentiality, the court held: "We conclude, based upon . . . precedent and the wording of our statute, that whether a communication is a 'confidence' within the meaning of the religious privilege depends upon the objectively reasonable expectations of the communicant, under the totality of the circumstances."[82] The court held, however, that given the state's statutory abrogation of this privilege with regard to statements relating to sexual abuse of a minor, "a communicant cannot have an objectively reasonable expectation that such a statement will remain confidential."[83] Although unlikely, the doctrinal rigidity with which Catholic clergy hold the seal of confession may serve as another means by which an "objectively reasonable expectation" may be found. Far more likely, however, is that the Catholic doctrine itself would be held to be objectively unreasonable itself, setting up a clear religious liberty conflict for a court to consider. Given the New Hampshire Constitution's broad conception of religious liberty,[84] and the New Hampshire Supreme Court's willingness to read its own Constitution's grants of rights more broadly than the federal constitution,[85] there is a colorable argument to be made for this position in New Hampshire state courts. Finally, the *Willis* court

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[81] *Id.* at 1074, internal quotation marks omitted.
[82] *Id.*
[83] *Id.*
[84] N.H. CONST. pt. 1, art. 5.
[85] "While the role of the Federal Constitution is to provide the minimum level of national protection of fundamental rights, our court has stated that it has the power to interpret the New Hampshire Constitution as more protective of individual rights than the parallel provisions of the United States Constitution." *State v. Ball*, 471 A.2d 347, 350 (N.H. 1983); *see also State v. Settle*, 447 A.2d 1284 (N.H. 1982) (extending protections against warrantless searches beyond the level required by the federal Constitution on the basis of New Hampshire's Constitution); *State v. Hogg*, 385 A.2d 844, 845 (N.H. 1978) (extending the protection against double jeopardy beyond the level required by the federal Constitution on the basis of New Hampshire's Constitution).

also notes that it did not decide "whether, under our statute and rule, a clergyperson is a holder of the privilege who may assert or waive it," as such a determination was not necessary for the case in question.[86]

North Carolina likewise abrogates all privileges but the attorney-client privilege with respect to potential cases of child abuse, both with respect to reporting laws and with respect to court proceedings: "No privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused . . . No privilege, except the attorney-client privilege, shall be grounds for excluding evidence of abuse, neglect, or dependency in any judicial proceeding (civil, criminal, or juvenile)."[87] Despite the broad nature of the statute, there do not appear to have been any cases in North Carolina which rely on this abrogation – indeed, there do not appear to be more than ten cases reported out of North Carolina in total which interpret the scope of the priest-penitent privilege as codified by statute.[88] In only two of those cases was the sexual abuse of a minor at issue, and in both cases the court found that the privilege was inapplicable because the defendant did not comply with the requirements of the statutory privilege: namely, the statements at issue were either not communicated confidentially or they were made outside the context of spiritual advising (or both).[89] So while the statutory scheme of North Carolina certainly threatens the priest-penitent privilege, it remains to be seen how the courts will treat the questions raised thereby.

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[86] *State v. Willis*, 75 A.3d 1068, 1074 (N.H. 2013).
[87] N.C. GEN. STAT. § 7B-310 (1999).
[88] Those ten, as compiled by Lexis and WestLaw, include: *In re Miller*, 584 S.E.2d 772 (N.C. 2003), *State v. Barber*, 346 S.E.2d 441 (N.C. 1986), *State v. West*, 345 S.E.2d 186 (N.C. 1986), *In re Williams*, 152 S.E.2d 317 (N.C. 1967), *State v. Crisco*, 777 S.E.2d 168 (N.C. Ct. App. 2015), *Misenheimer v. Burris*, 644 S.E.2d 611 (N.C. Ct. App. 2007), *State v. Pulley*, 636 S.E.2d 231 (N.C. Ct. App. 2006), *State v. Andrews*, 507 S.E.2d 305 (N.C. Ct. App. 1998), *State v. Jackson*, 336 S.E.2d 437 (N.C. Ct. App. 1985), and *Spencer v. Spencer*, 301 S.E.2d 411 (N.C. Ct. App. 1983). Prior to a 1967 amendment, the priest-penitent privilege in North Carolina contained a provision "by which the trial court could compel such testimony to satisfy the ends of justice." *State v. Barber*, 346 S.E.2d at 446.
[89] *State v. West*, 345 S.E.2d at 189, *State v. Barber*, 346 S.E.2d at 446.

Rhode Island's abrogating statute is similar in form to New Hampshire's,[90] and, like North Carolina's, does not appear to have been applied to abrogate the priest-penitent privilege in any case on record. In fact, there appears to be no more than four cases reported out of Rhode Island which so much as cite Rhode Island's priest-penitent privilege statute.[91] The only case in which the priest-penitent privilege was truly at issue is *Brown v. State*: in that case, the appellee, one Danny Brown, sought affirmance on a state appellate court decision granting him a new trial on the basis of ineffective assistance of counsel. One of the crucial questions in the case which reached the Supreme Court of Rhode Island was whether Brown's trial counsel had erred in failing to object to testimony offered by two pastors.[92] The Supreme Court held that Brown had not spoken the first pastor in the context of pastoral work, and that therefore the priest-privilege did not attach to any conversation between the two.[93] As to the second pastor, the *Brown* Court held that, while privilege likely attached to the conversations which Brown and the pastor had, there was sufficient evidence to convict Brown even if those conversations were suppressed, and that therefore "Brown has failed to demonstrate that there is a reasonable probability that, but for [his trial counsel's] errors, the result of the trial would have produced a different result."[94] Bafflingly, the court makes no reference whatsoever to the abrogating statute, though it appears to be directly on point. The law mandates that no privilege, save the attorney-client privilege, "shall … constitute grounds for failure … to give or accept evidence in any judicial proceeding relating to child abuse or neglect."[95] In a more recent case in which the psychotherapist-patient

[90] R.I. GEN. LAWS § 40-11-11 (1988).
[91] Those four, again compiled by Lexis and WestLaw, are: *Brown v. State*, 964 A.2d 516 (R.I. 2009), *State v. Almonte*, 644 A.2d 295 (R.I. 1994), *State v. Keeper of Records R.I. Hosp.*, 2010 R.I. Super. LEXIS 10, *Smith v. O'Connell*, 986 F. Supp. 73 (D.R.I. 1997).
[92] *Brown v. State*, 964 A.2d at 523.
[93] *Id.* at 540.
[94] *Id.* at 542.
[95] R.I. GEN. LAWS § 40-11-11 (1988).

privilege was in question, the Rhode Island Supreme Court described and applied the abrogating law in a manner that would certainly apply in *Brown*: "the first sentence [of the abrogating law], in sweeping language, does away with virtually all privileges in any and all judicial proceedings that involve the abuse or neglect of a child. This would include criminal proceedings."[96] That the same court made no reference to the abrogating law in *Brown* seems an oversight.

Tennessee also abrogates all privileges other than that of attorney-client in "any situation involving known or suspected child sexual abuse," and mandates that none of the privileges thus abrogates may "constitute grounds for failure to report … or failure to give evidence in any judicial proceeding relating to child sexual abuse."[97] Unlike the previous two states considered above, Tennessee does have a case on record applying its abrogation statute to the priest-penitent privilege. In *State v. Workman*, the appellant argued that the trial court erred in allowing the testimony of two pastors to whom the appellant had "confessed his sexual relationship with the victim."[98] On appeal, the appellate court had no issue with the abrogating element of the statute, but instead concerned itself with ensuring that the trial court had correctly concluded that the case involved "child sexual abuse."[99] Having satisfied itself that the conduct in question met the statutory definition of child sexual abuse, the court applied the abrogation statute and affirmed the trial court's decision as to that point.[100] This case, however, is of questionable value for understanding Tennessee's approach to the priest-penitent privilege in future cases: while denying Workman's application to appeal, the Supreme Court of Tennessee designated the intermediate court's decision "Not For Citation,"[101] signaling that the opinion is of "no

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[96] *State v. Lefebvre*, 198 A.3d 521, 527 (R.I. 2019).
[97] TENN. CODE ANN. § 37-1-614 (1985).
[98] *State v. Workman*, No. E2010-02278-CCA-R3-CD, 2011 Tenn. Crim. App. LEXIS 909, at *28 (Dec. 13, 2011).
[99] *Id.* at *31.
[100] *Id.* at *34.
[101] *State v. Workman*, No. E2010-02278-SC-R11-CD, 2012 Tenn. LEXIS 569 (Tenn. Aug. 16, 2012).

precedential value."[102] Nonetheless, as the Tennessee Supreme Court has otherwise indicated no issue with the abrogation statute,[103] and given that the court denied Workman's application to appeal, it is likely that the intermediate court's analysis would be replicated by any Tennessee court faced with a similar question.[104] Moreover, the Tennessee Attorney General's office has indicated by implication that it believes the statute to be constitutional and operational.[105]

West Virginia's abrogation statute is short and to the point: "The privileged quality of communications between husband and wife and between any professional person and his or her patient or his or her client, except that between attorney and client, is hereby abrogated in situations involving suspected or known child abuse or neglect."[106] Oddly, neither of the two West Virginia courts which were faced with a claim of priest-penitent privilege in a case involving sexual abuse of a minor relied on this statute in order to resolve the cases. In the first, *State v. Potter*, the court found instead that the defendant had willingly waived the privilege.[107] In the second, *State v. Lowery*, the court found that the privilege did not attach, as the statutory requirements were unmet.[108] But as no privilege was at issue in either case, there was no cause for abrogation. Perhaps surprisingly, it does not appear that any court in West Virginia has

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[102] TENN. SUP. CT. RULE 4.
[103] *See, e.g.*, *State v. Smith*, 933 S.W.2d 450, 457 (Tenn. 1996) ("While the legislature has seen fit to provide such privileges for certain confidential relationships, it has expressly abrogated the privilege in judicial proceedings relating to child sexual abuse.").
[104] A later review for post-conviction relief by the same intermediate court again denied Workman's plea for relief, but the question of priest-penitent privilege was not therein under consideration. *Workman v. State*, No. E2015-00531-CCA-R3-PC, 2016 Tenn. Crim. App. LEXIS 318 (Apr. 29, 2016). The Tennessee Supreme Court likewise denied Workman's application for permission to appeal that decision, but declined to stamp the intermediate court's decision with any label. *Workman v. State*, No. E2015-00531-SC-R11-PC, 2016 Tenn. LEXIS 557 (Tenn. Aug. 18, 2016).
[105] *See Clergy-Penitent Privilege*, Op. Tenn. Att'y Gen. 01-009 (2001) (noting that "this privilege does not apply to any communication involving known or suspected child sexual abuse.").
[106] W. VA. CODE § 49-2-811 (2015).
[107] *State v. Potter*, 478 S.E.2d 742, 756 (W. Va. 1996).
[108] *State v. Lowery*, 664 S.E.2d 169, 173 (W. Va. 2008).

published an opinion which relies on the abrogation statute, although the West Virginia Supreme Court of Appeals has taken notice of the statute in dicta.[109]

3. Explicit Abrogation: Texas

Texas provides perhaps the most interesting material for study. As late as 1967, courts in Texas did not recognize many of the professional privileges often taken for granted in the American court system. As one court noted, "Texas is without statutory privilege for professional men, the rule of privileged communications not extending to communications with bankers, partner to partner, clergymen and confessor, or physician and patient."[110] In 1967, the Texas legislature passed a statutory scheme to do just that.[111] Among other things, the act said that "no ordained minister … shall be required to testify in any action, suit, or proceeding, concerning any information which may have been confidentially communicated to him in his professional capacity under such circumstances that to disclose the information would violate a sacred or moral trust."[112] The privilege was held by the communicant, and was not absolute: the act provided that "the presiding judge in any trial may compel such disclosure if in his opinion the same is necessary to a proper administration of justice."[113] In 1971, though, the legislature enacted a law abrogating that privilege – and, in fact, all privileges besides the attorney-client privilege – in "any proceeding regarding the abuse or neglect of a child or the cause [thereof]."[114] A 1985 Texas Attorney General opinion, after briefly summarizing this history, concludes that since the latter law was enacted later in time than the former, it prevails to the extent there is

[109] *Smith v. W. Virginia State Bd. of Educ.*, 295 S.E.2d 680, 686 (W. Va. 1982).
[110] *Biggers v. State*, 358 S.W.2d 188, 191 (Tex. Civ. App. Dallas May 4, 1962).
[111] *See* Op. Tex. Att'y Gen. JM-342 (1985).
[112] *Id.*
[113] *Id.*
[114] *Id.*

conflict between them.[115] The opinion also contains a brief analysis of the potential First Amendment challenge to such a law, which concludes, under the then-governing United States Supreme Court precedents, that "to require a clergyman to report evidence of child abuse or neglect when confidentially disclosed to him by a parishioner does not violate the Free Exercise Clause."[116] The opinion makes no reference to the Texas State Constitution's provision for freedom of worship (which could be read to be more expansive than the federal provision),[117] and it appears that no court has yet considered either a federal or state Constitutional challenge to the Texas provisions.

Texas has since refined its legal scheme on these questions. The Texas Rules of Evidence provide for a legal privilege covering "confidential communication[s] by the communicant to a clergy member in the clergy member's professional capacity as spiritual advisor."[118] This privilege is held by the communicant and cannot be invoked by the clergy member unless it is invoked "on the communicant's behalf."[119] In keeping with the scheme enacted in 1971, though, Texas abrogates that privilege with regard to abuse of a minor in two ways, both located in the Texas Family Code. The first is an explicit abrogation of the privilege when it comes to reporting sexual abuse of a minor:

> (a) A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter. ... (c) The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including . . . a member of the clergy.[120]

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[115] *Id.*
[116] *Id.*
[117] The provision reads in part, "No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion." Tex. Const. art. 1, sec. 6
[118] TEX. R. EVID. 505.
[119] Id.
[120] TEX. FAM. CODE § 261.101.

This statute is supported by an accompanying rule for court proceedings which follows the pattern set by the majority of states herein discussed: "In a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of privileged communication except in the case of communications between an attorney and client."[121] Even attorneys, however, are required to report abuse of a minor under the reporting statute.[122]

Texas is one of a few states with cases on the record applying its statutory scheme. Four separate appellate courts in the state – the 1st, 5th, 13th, and 14th Districts – have applied the statute without issue across multiple cases. The first case to do so following the passage of § 261.202, *Rodriguez v. State*, was an indirect application of the statute: in reviewing the case for ineffective assistance of counsel, the appellate court was forced to consider whether the appellant's lawyer had erred in "allow[ing] the trial judge to discuss the clergyman's privilege in front of the jury."[123] The clergyman in question, a Latter-Day Saint Bishop named Howard Romney, was intended to serve as a character witness for the defendant, and, although the record reflects that he may have had knowledge of the alleged abuse, he was not called upon at trial to speak to the defendant's abusive conduct.[124] Nonetheless, the appellate court concluded that Bishop Romney had no privilege in this case, and that therefore the attorney had not erred.[125] In reaching this conclusion, the court relied on § 261.202 of the Family Code, pointing out that "the broad term 'proceeding'" refers to both civil and criminal cases and noting that the Family Code takes precedence over the Rules of Criminal Evidence in criminal proceedings.[126] The more recent cases which interpret these statutes concern more direct applications of the laws, though

[121] TEX. FAM. CODE § 261.202.
[122] TEX. FAM. CODE § 261.101.
[123] *Rodriguez v. State*, No. 05-95-01356-CR, 1997 Tex. App. LEXIS 4577, at *18 (Tex. App. Aug. 27, 1997).
[124] Id. at *15.
[125] Id. at *21-*22.
[126] Id. at *20, *21.

none concern a case in which the clergy member is unwilling to testify. *Bordman v. State* concerns a straightforward application of § 261.202, and citing the Attorney General opinion noted above,[127] resolves the apparent conflict between § 261.202 and Rule 505 of the Rules of Evidence in favor of the abrogating statute.[128] Two more recent cases, Martinez v. State[129] and Almendarez v. State[130] cite the rule as found in *Bordman* and apply it summarily. Though this issue has not reached the Texas Supreme Court, there is little leeway in the statutory scheme to suggest that it rests on shaky grounds, and the cases thus far which have reached the issue have had little issue applying the statute as written.

There remains one case worth discussing, though more for what it does not contain than for what it does: in *Gutierrez v. State*, an abuse victim informed a Catholic priest that her father had been sexually abusing her for more than a decade. As these communications were not made in the context of the confessional, the priest, one Father Minifie, reported these allegations to the police. In the following days, Fr. Minifie called Gutierrez, the alleged abuser, in order to "put [him] on notice that he … knew that someone had accused him of rape and sexual assault. Further, [Fr. Minifie] testified that the purpose of the call was not to provide spiritual advice."[131] Gutierrez did not confirm or deny the allegations, but told Fr. Minifie that he had gone to confession with another priest.[132] At trial, Gutierrez objected to Fr. Minifie's testimony concerning this conversation on the basis of the priest-penitent privilege.[133] As Fr. Minifie had not been acting as a spiritual counselor during that conversation, the court found that no such

[127] *See* Op. Tex. Att'y Gen. JM-342 (1985).
[128] *Bordman v. State*, 56 S.W.3d 63, 68 (Tex. App. 2001).
[129] NUMBER 13-01-379-CR, 2002 Tex. App. LEXIS 5975 (Tex. App. Aug. 15, 2002).
[130] 153 S.W.3d 727 (Tex. App. 2005).
[131] *Gutierrez v. State*, 2010 Tex. App. LEXIS 8952, *3 (Tex. App. Houston 1st Dist. November 10, 2010).
[132] Id.
[133] Id. at *4.

privilege attached, and the appellate court concurred.[134] More relevant for our purposes, however, it does not appear that any effort was made to seek the testimony of the other priest, although he would be in violation of the mandatory reporting statute if these facts are true. It has been elsewhere noted that "there have been no reported prosecutions in Texas of clergy for failing to report child abuse,"[135] and that appears to remain true today.

4. Conflict Resolved: Louisiana

Facially, Louisiana state law presents a conflict under which the priest-penitent privilege is both abrogated and preserved when it comes to allegations of sexual abuse of a minor. On the one hand, "member[s] of the clergy" are explicitly identified as mandatory reporters,[136] and another element of the reporting law mandates that, "Notwithstanding any claim of privileged communication, any mandatory reporter who has cause to believe that a child's physical or mental health or welfare is endangered as a result of abuse or neglect or that abuse or neglect was a contributing factor in a child's death shall report."[137] On the other hand, the law also states that a member of the clergy "is not required to report a confidential communication … from a person to a member of the clergy who … is authorized or accustomed to hearing confidential communications, and under the discipline or tenets of the church … has a duty to keep such communications confidential."[138] Thus, two elements of the law present somewhat contradictory faces: the one abrogates all claims of privilege, and the other recognizes a particular claim of privilege. The Louisiana Supreme Court recently had cause to address this conflict in *Mayeux v.*

[134] Id. at *4, *10.
[135] Norman Abrams, *Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C. L. REV. 1127, 1153.
[136] LA. CHILD. CODE ANN. art. 603 (2019).
[137] LA. CHILD. CODE ANN. art. 609 (2013).
[138] LA. CHILD. CODE ANN. art. 603 (2019).

Charlet.[139] In that case, a minor child allegedly approached a priest in the context of the sacrament of Confession to seek advice about wrongful acts an older parishioner was inflicting upon her.[140] In the course of the trial, the priest was asked to testify as to the contents of her confession, and refused, on the basis of the First Amendment, Louisiana law, and Church doctrine.[141] The resulting conflict inherent to the mandatory reporting laws reached the Supreme Court of Louisiana.[142] In order to dispel the conflict, the Louisiana Supreme Court declared that, pursuant to the statutory language, members of the clergy are not mandatory reporters when hearing confidential communications: "Because priests in regards to sacramental confessions are not 'mandatory reporters' under the explicit definition in La. Child. Code art. 603, it logically follows the mandatory duty to report set forth in La. Child. Code art. 609 is not applicable to priestly confessors."[143] Thus, the court defused the apparent conflict in its laws, protected the sacramental seal, and upheld the constitutionality of its mandatory reporting laws.

E. Policy Considerations

"Whoever confesses his sins … is already working with God. … The beginning of good works is the confession of evil works. You do the truth and come to the light." – St. Augustine[144]

[139] 203 So. 3d 1030 (La. 2016).
[140] *Parents of Minor Child v. Charlet*, 135 So. 3d 724, 726 (La. Ct. App. 2013).
[141] *Parents of Minor Child v. Charlet*, 135 So. 3d 724, 730 (La. Ct. App. 2013).
[142] The journey by which it reached the Supreme Court was a long one – initially, the Supreme Court heard arguments in *Parents of Minor Child v. Charlet*, 135 So. 3d 1177 (La. 2014), and decided that the appellate court had erred in excluding all contents of the Confession entirely, as the child could testify. *See Parents of Minor Child v. Charlet*, 135 So. 3d at 1180. On remand, the appellate court declared Louisiana Children's Code Article 609 (which abrogates all types of privilege with regard to cases of sexual abuse) unconstitutional on the basis of the religious freedom clause in the Louisiana Constitution. *See Mayeux v. Charlet*, 203 So. 3d 1030, 1034 (La. 2016). The Louisiana Supreme Court then again reviewed the case.
[143] *Mayeux v. Charlet*, 203 So. 3d 1030, 1038 (La. 2016).
[144] CATECHISM OF THE CATHOLIC CHURCH, *supra* note 17, § 1458, quoting Augustine, *In Jo. ev.* 12, 13: Pl 35, 1491.

The American legal system disfavors privileges. A privilege is an exemption from the general principle that "the public … has a right to every man's evidence."[145] Thus, as the Supreme Court has noted, every privilege which we grant must be "grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth."[146] To understand why a society should or should not abrogate the priest-penitent privilege, then, one must understand the individual interests which underlay it in the first place. The priest-penitent privilege is grounded, as the Supreme Court has recognized, in "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."[147] Beyond that, there is also a religious liberty component to this privilege – certainly for Catholic priests, but also for clergy of many faiths.[148] Forcing members of the clergy to defy the doctrines of their faith presents a clear religious liberty issue, no matter the seriousness of the reason behind the compulsion. One often overlooked issue on this front comes from the fact that many states (perhaps even a majority, depending on interpretation of certain unclear statutory schemes) grant the priest-penitent privilege to the penitent only.[149] While it may seem unlikely that a penitent would waive the privilege and force a member of the clergy to reveal information against his or her will, such a waiver is precisely what caused the conflict in the Louisiana case

[145] *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting Wigmore, Evidence [3d ed.] § 2192).
[146] *United States v. Bryan*, 339 U.S. 323, 331 (1950)
[147] *Trammel v. United States*, 445 U.S. 40, 51 (1980).
[148] *See, e.g.*, Taylor L. Anderson, *The Priest-Penitent Privilege: A Mormon Perspective*, 41 IDAHO L. REV. 55, 69-70 (2004) (noting that Mormons have a doctrine of confidence for their clergy), Azizah Y. al-Hibri, *The Muslim Perspective on the Clergy-Penitent Privilege*, 29 LOY. L.A. L. REV. 1723, 1725-6 (1996) (speaking of the Islamic duty of confidentiality).
[149] *See* Sippel, *supra* note 64, at 1128.

aforementioned.[150] States which take seriously the religious liberty aspect of this privilege ought to ensure that members of the clergy have independent authority to assert the privilege.

The argument made by those who wish to see the priest-penitent privilege abrogated, however, is generally not that the privilege is always bad, but that it should be abrogated in certain, particularly heinous situations.[151] There are two ways in which this response, though understandable and likely well-intentioned, is nonetheless unwise: first, because it creates an unnecessary conflict with religious liberty, and second, because it is unlikely to accomplish that at which it is aimed. There are ways to abrogate the privilege with regard to reporting of sexual abuse of a minor that do not violate the conscience and religious beliefs of those members of the clergy who will not reveal what is shared with them in confidence. The state of Washington provides the template for one such method. In Washington, members of the clergy are not explicitly identified as mandatory reporters,[152] but if a member of the clergy reports allegations or suspicions of child sexual abuse it is no violation of Washington's priest-penitent privilege: "Conduct conforming with the reporting requirements of this chapter shall not be deemed a violation of the confidential communication privilege of RCW 5.60.060 (3) and (4)."[153] Those

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[150] "It follows, if the penitent waives the privilege, the priest cannot then raise it to protect himself as he can only "claim the privilege *on behalf of the person*," not in his own right." *Parents of Minor Child v. Charlet*, 135 So. 3d 1177, 1180 (La. 2014) (quoting LA. CODE EVID. art. 511[c]) (emphasis in original).

[151] *See*, *e.g.*, R. Michael Cassidy, *Sharing Sacred Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627 (2003) (arguing for a dangerous person exception to the priest-penitent privilege), Donze, *supra* note 67 at 307 (arguing that "Catholic leaders ultimately may need to evaluate whether prevention of child abuse and protection of victims justifies a more flexible interpretation of the seal of confession in these specific circumstances."), Rachel Goldenberg, *Unholy Clergy: Amending State Child Abuse Reporting Statutes to Include Clergy Members as Mandatory Reporters in Child Sexual Abuse Cases*, 51 FAM. CT. REV. 298 (2013) (arguing that states should eliminate religious privileges in reporting laws and explicitly identify clergy as mandatory reporters).

[152] *See* WASH. REV. CODE § 26.44.030 (2019), *see also State v. Motherwell*, 788 P.2d 1066, 1069 (Wa. 1990) (taking notice of the fact that clergy are not mandatory reporters in the state).

[153] WASH. REV. CODE § 26.44.060 (2007). An amendment to this statute is due to come into effect on June 11, 2020, but makes no change to this language.

privileges are, respectively, the priest-penitent privilege and the physician-patient privilege.[154] In other words, this statute allows those members of the clergy who are not bound by doctrine to reveal information as they see fit, without any conflict to the privilege for those whose faith compels them to it. Additionally, mandatory reporting does not have to conflict with religious dictates – states can do as Louisiana has done and make clergy mandatory reporters with regards to all information, allegations, or suspicions which were learned outside of the context of confidential communications.[155]

Even if one puts to one side the religious liberty concerns, abrogating the priest-penitent privilege with regard to heinous activities is unlikely to result in a marked improvement for society as a whole. First of all, as even some advocates of abrogating the privilege acknowledge, it is difficult to draw the line as to which crimes should be exempt from the privilege.[156] The more broadly the line is drawn, the more serious the conflict with religious liberty becomes, simply by nature of the volume of issues in question. But even a state which narrowly carves out sexual abuse of a minor (as all nine states which presently abrogate the privilege do) potentially damages its own ability to combat the very crimes which it seeks to eradicate. If no privilege attaches to those confessions which involve allegations of sexual abuse of a minor, then penitents are likely to stop reporting those things to their spiritual advisors.[157] The imposition of mandatory reporting upon members of the clergy for even confidential communications could thus nullify its efficacy. If one believes that Confession – or any sort of spiritual confidence – is

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[154] WASH. REV. CODE § 5.60.060 (2019). Notably, this code provides for an exception to the physician-patient privilege as regards sexual abuse of a minor, but makes no such exception for the priest-penitent privilege.
[155] *See* LA. CHILD. CODE ANN. art. 603 (2019).
[156] *See* Cassidy, *supra* note 151, at 1666 ("Child abuse reporting statutes focus on only one limited type of dangerous conduct …. The question posed by this Article is whether clergy should have a role to play in identifying and preventing a much wider scope of dangerous activity, including violent crimes such as murder, rape, and arson").
[157] *See* Mitchell, *supra* note 55 at 763, fn. 223. Even if, as a practical matter, many will not know this law, the law must be constructed as if those to whom it applies are aware of its form and application.

morally worthy or at least defensible on religious liberty grounds, then to limit the priest-penitent privilege is to undermine the foundations on which that moral worth lies. In addition, societies ought to encourage those who have committed crimes to seek spiritual guidance – *People v. Philips* only came to be because Fr. Kohlmann encouraged the thief to return the stolen goods,[158] and the Catholic catechism notes that penitents must "do what is possible in order to repair the harm" one does to another by sin.[159] The confession of sin, whether in the sacramental sense or otherwise, is an acknowledgement that one has done wrong. Societies ought to, within reason, encourage those steps as moving in the right direction, although they certainly often do not move far enough. If the choice were between encouraging these steps and ensuring that abusers are revealed, the latter would surely be the right choice. To abrogate the priest-penitent privilege in this context, however, runs the risk of foreclosing both.

F. Conclusion

There is no doubting or denying the horrific nature of child abuse, and any society which does not seek to find and root it out is failing its most vulnerable members. But the means by which our society must accomplish this should not include any abrogation of one of the most fundamental liberties in the American constitutional tradition: freedom of religion.

In many ways, also, this looming conflict demonstrates the fallibility of *Smith*. That neutral laws of general applicability could strike at even core elements of religious practice indicates a potential failure of the Supreme Court's First Amendment jurisprudence.[160] This also points to

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[158] Walsh, *supra* note 35, at 20.

[159] CATECHISM OF THE CATHOLIC CHURCH, *supra* note 17, § 1459. One example given is to "return stolen goods." *Id.*

[160] In a footnote, Justice Scalia suggested that the government's interest in prohibiting alcohol during the prohibition could not have outweighed the Catholic interest in using wine in Mass. He does this, however, with no justification, and it is unclear how his interests analysis fits in with his more general provisions. *See Emp't Div. v. Smith*, 494 U.S. 872, 913 n.6 (1990).

the very real tension inherent to a democratic, pluralistic society: when competing values clash, who decides between them, and on what bases? In nine of the 50 states, the legislature has determined that the confidence of the confessional should be subservient to the aim of rooting out child abuse. The other 41 have an equally strong interest in rooting out child abuse, but have determined that the confidence of the confessional should be kept intact nonetheless.

So what should concerned defenders of religious liberty do? One answer might be to look to state constitutional traditions.[161] Every state has some form of guarantee of religious liberty in their state constitution,[162] and many of those clauses use more expansive language than that which is found in the federal Constitution.[163] As then-Justice William Brennan argued in a law review article, "State constitutions … are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed."[164] In order to secure the full realization of religious liberty on the issue of the confessional seal, it may well be incumbent upon bold litigators to press the issue of religious liberty on the basis of state constitutional law rather than federal. For now, however, none of the nine states which have abrogated the priest-penitent privilege has taken its law to the furthest

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[161] *See, e.g.*, Christopher Hammons, *State Constitutions, Religious Protection, and Federalism*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 226, 226 (arguing that "advocates of religious liberty might consider pursuing a 'federal' approach to religious freedom as a means of achieving a higher level of protection than is found in the U.S. Constitution").

[162] *See* Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 103.

[163] *See id.* (surveying all states' interpretations of their religious freedom clauses); *see, e.g.*, Okl. Const. art. I, § 2 ("Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship"), Wash. Const. art. 1, § 11. ("Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion").

[164] William Brennan, *State Constitutions and The Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

extent – the only violation of the confessional seal to have gained publicity in recent years involved a recording device rather than compulsion, and was at least partially remedied by the Ninth Circuit.[165] If in the future, however, a zealous state seeks to enforce its law against a priest holding fast to the seal of Confession, it appears that the priest's only hope would be to rely on state, and not federal, guarantees. In the absence of remedial action by the Supreme Court, then, priests and other members of the clergy who hold fast to the confidence of their penitents in these nine states must be prepared to face legal consequences for their religious practice. That such a statement is true is an indictment of the American promise of religious liberty.

[165] *See Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997).