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Breaking the Seal of Confession: Examining the Constitutionality of the Clergy-Penitent Privilege in Mandatory Reporting Law

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INTRODUCTION

Every Sunday Catholics across the globe gather together in their parish churches to celebrate Mass. For many parishioners, this is a time for prayer, reflection, and community. For a teenage girl in Clinton, Louisiana, however, attending Mass became a living nightmare. Sitting in a pew nearby was the man who allegedly had been sexually harassing and abusing her for an entire summer.[1] Sitting next to her were her unsuspecting parents, whom she feared to tell about the abuse.[2] Standing on the altar was the priest to whom she had confessed the alleged series of abusive acts.[3] The purported relationship between the girl and her abuser started innocently enough; she claimed that the man would send her emails regularly with inspirational religious verses. Harmless electronic communication reportedly escalated

1. Parents of Minor Child v. Charlet, 135 So. 3d 1177, 1178 (La. 2014).
2. *Id.* at 1178–79.
3. *Id.*

to grossly inappropriate physical contact, including kissing and groping, and the man expressing his desire to have sexual intercourse with her.[4]

The girl communicated to her priest everything the man allegedly did to her. She may have expected that the leader of the tight-knit church community would help her achieve the goal she could not accomplish alone: confronting her parents and abuser and revealing the secrets she had bottled up for so long. But instead of receiving support and guidance from the priest, he reportedly told her to deal with the problem herself and refrain from exposing the crimes to avoid ruining the lives and reputations of her family and abuser.[5]

The girl's parents eventually realized their daughter's secret, but by then the damage was done. The priest's failure to report the information supposedly learned in the confessional reportedly allowed the abuse to continue and escalate when a simple phone call to mom, dad, or the police would have ended the nightmare quickly.[6] Had the girl confessed to a school teacher or soccer coach, Louisiana law would have required immediate reporting of the suspected abuse to law enforcement.[7] A teacher or coach would have had to report the abuse at once because Louisiana has designated teachers and coaches as mandatory reporters—professionals required by law to report allegations or suspicions of child abuse immediately to the authorities.[8] This girl made her confession to a Catholic priest during a religious sacrament, however.[9] Priests are also mandatory reporters of child abuse in Louisiana—subject to one major exception.[10] Louisiana, like many other states in this country, exempts clergy from their ordinary mandate to report if they learn of ongoing or imminent abuse within the context of a confidential religious communication.[11] This exception stems from the clergy-penitent privilege, which prohibits compelled disclosure of the contents of private communications between clergy and their communicants in a judicial proceeding.[12]

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4. Parents of Minor Child v. Charlet, 135 So. 3d 724, 726 (La. Ct. App. 2013).
5. *Id.*
6. *Id.* at 726–27.
7. LA. CHILD. CODE arts. 603, 609(A)(2) (2017).
8. *Id.* arts. 603, 609–10.
9. *Charlet*, 135 So. 3d at 1178.
10. LA. CHILD. CODE art. 603(17)(c).
11. *Id.*; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2016), https://www.childwelfare.gov/pubPDFs/clergymandated.pdf [https://perma.cc/NG3B-3JY5].
12. Samuel G. Brooks, *Confession and Mandatory Child Abuse Reporting: A New Take on the Constitutionality of Abrogating the Priest-Penitent Privilege*, 24 BYU J. PUB. L. 117, 120 (2009).

The intersection of mandatory reporting legislation and the clergy-penitent privilege illustrates a conflict between the public policy goal of protecting children and the constitutional right to Free Exercise of religion.[13] Though the protection of religious freedom is a cornerstone of the Constitution, a state may still constitutionally impose burdens on Free Exercise if some compelling state interest exists to justify the infringement and if no less restrictive form of regulation is available to achieve the state's interest.[14] This Comment argues that abrogation of the clergy-penitent privilege within a state's mandatory reporting legislation—in the specific instance where clergy receive confessional reports of ongoing or imminent child abuse—can withstand constitutional scrutiny. Abrogation of the privilege is constitutional because the identification and prevention of child abuse is a compelling state interest and eliminating the privilege in the narrow circumstance of confessional reports of abuse is the least restrictive means of carrying out this interest.

Although the objective of protecting child abuse victims from harm justifies abrogation of the privilege, conflicts posed by the laws of the Catholic Church nevertheless may hinder the fulfillment of this compelling state interest. Catholic priests face expulsion from the Church as punishment for divulging information learned during sacramental confessions.[15] Even in the presence of an unconditional legal mandate to disclose child abuse, priests still may refuse to report and testify about privileged communications to avoid their removal from the Church.[16]

Part I of this Comment examines the history of the clergy-penitent privilege from its biblical origins to its modern treatment in American courts. Part II surveys the status of mandatory reporting law in Louisiana and the rest of the United States, focusing on statutory exceptions for clergy. Part III explores the constitutional basis for abrogating the clergy-penitent privilege within mandatory reporting law. Finally, Part IV considers a jurisprudential example of the negative effects of the privilege on the reporting of child abuse and contemplates potential avenues for encouraging Catholic priests to report abuse while still maintaining the integrity of the sacrament of Confession.

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13. *See* LA. CHILD. CODE art. 601; U.S. CONST. amend. I.

14. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

15. 1983 CODE c.1388, § 1.

16. *See Court May Compel Priest to Break Confessional Seal in Abuse Case*, CATHOLIC NEWS SERVICE (July 9, 2014), http://www.catholicnews.com/services/englishnews/2014/court-may-compel-priest-to-break-confessional-seal-in-abuse-case.cfm [https://perma.cc/6L2D-XUDS].

I. TRACING THE HISTORY OF THE CLERGY-PENITENT PRIVILEGE

The clergy-penitent privilege originated from the Roman Catholic "seal of confession," a centuries-old religious doctrine of confidentiality that protects the sacramental confessions between a priest and his penitent—the sinner seeking God's forgiveness for his transgressions.[17] Courts in the United States have acknowledged the importance of safeguarding religious communications. Likewise, each state legislature has codified some version of the seal of confession.

A. A Privileged Society: The Benefits of Holding Certain Disclosures Sacrosanct

Evidentiary privileges reflect the notion that communications within certain relationships deserve to be kept in confidence.[18] Privileges usually occupy statutory law and typically are based upon public policy goals of individual states rather than constitutional rights.[19] In the judicial system, privileges hinder the fact-finding process by allowing suppression of potentially relevant information and testimony; privileges nonetheless persist in statutory law, which reflects a societal view that the benefits of preserving confidential relationships sometimes outweigh hindrances to the pursuit of justice.[20] The attorney-client privilege, for example, allows a client complete and unfettered access to legal counsel with the peace of mind that his lawyer will not reveal their conversations to third parties.[21] Similarly, the spousal privilege allows a husband to refuse to testify against his wife because the trust and confidence crucial to preserving the marital relationship would be destroyed if a court could compel such testimony.[22] Finally, a privilege of confidentiality between clergy and penitent is socially desirable because the promise of secrecy encourages individuals to seek regular spiritual guidance from their religious leaders.[23]

Privileges often have limitations in extraordinary situations. A lawyer's ethical duty to prevent reasonably certain death or bodily harm overrides his

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17. Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 735 (1987).
18. Brooks, *supra* note 12, at 118.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 119.
23. *Id.*

ordinary duty of confidentiality to the client.[24] Likewise, a mental health professional may be required to warn third parties if a patient expresses a desire to inflict violence upon another person.[25] The clergy-penitent privilege contrasts from other evidentiary privileges because confidentiality may be mandated under religious doctrine, making the privilege absolute even under exceptional circumstances.[26] The clergy-penitent privilege is also unique among privileges because the receiver of the communication, the clergy member, potentially may claim protection from compelled disclosure under the Free Exercise Clause of the First Amendment, a defense not available to a doctor or a lawyer.[27]

Under evidentiary privileges, "the holder of [the privilege] has the power to invoke or waive it, either refusing or allowing courts to gain access to confidential communications."[28] "Ownership" of a privilege typically belongs to the communicant, not the receiver of the communication.[29] For instance, the attorney-client privilege vests the client with the power to authorize the disclosure of private communications made within the scope of the legal relationship.[30] Similarly, the doctor-patient privilege allows a patient to waive confidentiality, thus permitting medical professionals to testify about information related to that patient's treatment.[31] The clergy-penitent privilege is unique because a communicant's waiver of privilege may not be sufficient for clergy, specifically those of the Catholic faith, to justify revealing the details of a private confession. A Catholic priest faces possible expulsion from both his clerical office and the Catholic Church entirely for revealing a private confession, even if the penitent waives confidentiality.[32] The basis for this harsh punishment arose from the historical evolution of the sacrament of Confession.[33]

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24. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 1983).

25. Brooks, *supra* note 12, at 119.

26. Michael J. Mazza, *Should Clergy Hold the Priest-Penitent Privilege?*, 82 MARQ. L. REV. 171, 186 (1998).

27. Brooks, *supra* note 12, at 120.

28. Mazza, *supra* note 26, at 185.

29. *See id.*

30. *Id.*; *see also* LA. CODE EVID. art. 506 (2017).

31. Mazza, *supra* note 26, at 185; LA. CODE EVID. art. 511.

32. 1983 CODE c.1388, § 1; *see* discussion *infra* Part IV.E.1. for a discussion of the validity of penitent waiver.

33. 1983 CODE c.983, §§ 1–2.

B. A Catholic Sacrament Forms the Basis for the Clergy-Penitent Privilege

Confession, known formally as Reconciliation or Penance,[34] has a longstanding tradition in Catholicism dating back to the New Testament and the life and ministry of Jesus Christ.[35] During his public life, Jesus emphasized forgiveness of sin and the importance of welcoming repentant sinners back into the church community.[36] The Bible recounts the origin of Confession as a sacramental practice, chronicling how Jesus bestowed the power of forgiveness upon his apostles, the first priests of the Catholic faith.[37] The apostles and the priests who succeeded them subsequently would serve as "God's intermediar[ies]" in hearing and forgiving the sins of penitents.[38]

During the early centuries of Catholicism, the process of receiving forgiveness for one's sins was a public affair. Penitents guilty of serious sins such as adultery or idolatry were required to give their confessions and perform acts of repentance in front of large crowds.[39] Public confession was a short-lived practice, however. In the seventh century, Catholic missionaries from Ireland introduced private, confidential confessions into the Catholic Church in continental Europe after being inspired by practices of Eastern monastic societies.[40] The new approach to Confession was attractive to penitents because the guarantee of confidentiality encouraged sinners to

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34. The sacrament of Reconciliation or Penance is defined in the Code of Canon Law:

> In the sacrament of penance, the faithful who confess their sins to a legitimate minister, are sorry for them, and intend to reform themselves obtain from God through the absolution imparted by the same minister forgiveness for the sins they have committed after baptism and, at the same, time are reconciled with the Church which they have wounded by sinning.

1983 CODE c.959.

35. Mazza, *supra* note 26, at 174.

36. THE ROMAN CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH 1443 (1992).

37. John 20:21–23. According to the Gospel of John, when Jesus appeared to his apostles following his Resurrection, he bequeathed them with the power to forgive the sins of penitents. *Id.*

38. Brooks, *supra* note 12, at 120.

39. *See* CATECHISM, *supra* note 36, at 1447; *see also* Adam Bowers, *The Origins of Mandatory Private Confession in the Catholic Church*, QUARTERMASTER OF THE BAROQUE (Oct. 30, 2013), https://qmbarque.com/2013/10/30/the-origins-of-mandatory-private-confession-in-the-catholic-church/ [https: //perma.cc/SP3F-DBWE].

40. CATECHISM, *supra* note 36, at 1447.

receive the sacrament frequently and without fear of negative public sentiment.[41]

Confidential confessions gained widespread acceptance and canon law eventually incorporated the practice.[42] In 1215, the Catholic Church codified the seal of confession into the Code of Canon Law, imposing a strict obligation of secrecy upon clergy and a severe penalty for violations of confidentiality, an obligation that still exists in the present day.[43] Under canon law, a priest who directly violates the seal of confession faces excommunication from the Church.[44] Excommunication is the gravest penalty a member of the Catholic faith can receive and results in expulsion from the Church and exclusion from all sacraments.[45]

Prior to the Protestant Reformation—a movement that involved several groups breaking off from the Roman Catholic Church to form their own religious denominations—English law acknowledged the sacred nature of Confession and did not require priests to breach the sacrament's requirement of confidentiality.[46] Because many English judges also were members of the clergy, the law of the Catholic Church heavily influenced the common law.[47] In the 16th century, however, the Protestant Reformation reached England, and the Anglican Church replaced the Catholic Church as the official Church of England.[48] The years that followed saw the deterioration of the confessional seal in England, as Anglicanism distinguished itself from Catholicism by placing less emphasis on the importance of visiting the confessional and making private confessions with a minister an optional practice.[49] Despite the events of the Protestant Reformation, the modern Catholic Church continues

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41. *Id.*

42. Canon law is "the body of laws and regulations made by or adopted ecclesiastical authority, for the government of the Christian organization and its members." Auguste Boudinhon, *Canon Law*, 9 THE CATHOLIC ENCYCLOPEDIA 56 (1910), http://www.newadvent.org/cathen/09056a.htm [https://perma.cc/KX2Q-PSUN].

43. 1983 CODE c.983, § 1 ("The sacramental seal is inviolable; therefore, it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason.").

44. *Id.*

45. Auguste Boudinhon, *Excommunication*, 5 THE CATHOLIC ENCYCLOPEDIA 678 (1909); *see also* Brooks, *supra* note 12, at 120.

46. Jacob Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 96–101 (1983).

47. *Id.* at 97.

48. Mitchell, *supra* note 17, at 736.

49. Yellin, *supra* note 46, at 101–02. Members of the Catholic Church are required to confess their sins at least once a year. 1983 CODE c.989.

to uphold confidential Confession in accordance with the sacrament's historical basis.

C. The Clergy-Penitent Privilege in Jurisprudence and Statutory Law

State legislatures across the United States have incorporated the seal of confession into statutory law through adoption of the clergy-penitent privilege. National endorsement of the privilege reflects a public policy that values the sanctity of conversations between members of a particular faith and their religious advisors.[50] Moreover, when religious doctrine explicitly requires clergy to abide by a duty of confidentiality, the privilege is not merely socially desirable—it also implicates the constitutional right to Free Exercise of religious belief.[51]

1. People v. Philips*: Validating the Seal of Confession in a Court of Law*

The first instance of an American court addressing the validity of the Catholic seal of confession occurred in *People v. Philips*, an 1813 criminal case from the Court of General Sessions of the City of New York.[52] The defendant and his wife were indicted for possessing stolen goods.[53] The owner of the goods reported that the stolen items had been returned to him by a Catholic priest, Father Anthony Kohlmann, who had received the goods from the thieves with the instructions that they be returned to their rightful owner.[54] When summoned to testify at trial to confirm the thieves' identities, Kohlmann refused to provide any information because he had learned their identities within the sacrament of Confession.[55] The court then had to decide whether the priest could be compelled to divulge the secrets of a religious communication.[56]

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50. Paul Winters, *Whom Must the Clergy Protect? The Interests of At-Risk Children in Conflict with Clergy-Penitent Privilege*, 62 DEPAUL L. REV. 187, 188 (2012).

51. Brooks, *supra* note 12, at 120.

52. The case was never officially published but was reprinted in WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA (1813). The case was reprinted again in *Privileged Communications to Clergymen*, 1 CATHOLIC LAW 199 (1955).

53. *Privileged Communications*, *supra* note 52.

54. *Id.* at 199–200.

55. *Id.*

56. *Id.* at 200.

Kohlmann presented a compelling argument for protecting the seal of confession in his request that the court excuse him from testifying, invoking his deeply held religious convictions:

> . . . if called upon to testify in quality of a minister of a sacrament, in which my God himself has enjoined on me a perpetual and inviolable secrecy, I must declare to this honorable Court, that I cannot, I must not answer any question that has a bearing upon the restitution in question; and that it would be my duty to prefer instantaneous death or any temporal misfortune, rather than disclose the name of the penitent in question. 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.[57]

The court ultimately found Kohlmann's testimony inadmissible, basing its reasoning upon the priest's right to freely exercise his religion under the New York Constitution.[58] The court declared that the right to Free Exercise mandates that particular rules of religious ceremonies be protected; furthermore, it noted that secrecy is essential to the sacrament of Confession because penitents would have no incentive to pronounce their sins to a priest if the veil of confidentiality were removed.[59]

Philips was the first example of an American court endorsing an evidentiary privilege exclusively for clergy. Extending a privilege to Catholic priests made logical sense from a Free Exercise standpoint because failure to respect the seal of confession would destroy a fundamental component of Catholicism: private confession of one's sins to a priest without fear of third-party knowledge.[60] Whether the privilege would have the same application to non-Catholic clergy remained unclear in the immediate aftermath of *Philips*. Four years after the decision, however, a different New York state court held in *People v. Smith* that the privilege did not apply to a Protestant minister regarding private confessions made to him by the defendant in that case.[61]

In distinguishing *Philips*, the *Smith* court noted the fundamental differences between Catholicism and Protestantism. The principal disparity

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57. SAMPSON, *supra* note 52, at 5, 8–12.

58. *Privileged Communications*, *supra* note 52, at 207. New York's constitution provided that "the Free Exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state, to all mankind." *Id.* (quoting N.Y. CONST. of 1777, art. XXXVIII).

59. *Privileged Communications*, *supra* note 52, at 207.

60. *Id.*

61. Mitchell, *supra* note 17, at 738.

was a matter of church doctrine. The trial judge in *Smith* drew a distinction "between auricular confessions made to a priest in the course of discipline, *according to the canons of the church*, and those made to a [Protestant] minister . . . in confidence, merely as a friend or adviser."[62] Because Protestantism had neither an analogue to the sacrament of Confession nor a seal of confidentiality codified under church law, the court allowed the minister to testify.[63] Additionally, the right to Free Exercise—a crucial factor in *Philips*—was not at issue in *Smith* because the Protestant minister actually desired to testify and faced no consequences for breaking the confidence of a private confession.[64] Conversely, *Philips* involved a priest who staunchly refused to testify to avoid violating his religious duty under the confessional seal.[65]

2. Codification of the Clergy-Penitent Privilege

In 1828, the New York Legislature enacted a statutory version of the clergy-penitent privilege—the first law of its kind in the United States.[66] The statute stated that "[n]o minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination."[67] On its face, the law appeared to eliminate lines drawn in prior jurisprudence by applying generally to all denominations rather than singling out Catholicism; the privilege's scope, however, was still confined to confessions protected under church disciplines.[68] In practice, the law protected only Catholic confessions from disclosure[69] and thus merely codified the *Philips* decision.[70]

The rest of the nation eventually followed New York's lead, and today all 50 states provide evidentiary privileges protecting certain communications made to clergy.[71] Some states apply the privilege only to communications

62. *Privileged Communications*, *supra* note 52, at 211 (emphasis added).
63. *See id.* at 207.
64. *See id.* at 207, 211.
65. Mitchell, *supra* note 17, at 738 n.81; *Privileged Communications*, *supra* note 52, at 210–11.
66. N.Y. REV STAT., pt. 3, ch. 7, tit. 3, art. 8, § 72 (1828); *see also* Seward P. Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 57 (1963).
67. *Id.*
68. *Id.*
69. Brooks, *supra* note 12, at 122.
70. *Id.*
71. 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, 1133–35 (2003).

deemed confidential under the tenets of a particular religion.[72] Other states broaden the privilege to all private conversations with religious leaders, regardless of church doctrine.[73] Though each state law varies in phrasing, no modern-day statute explicitly limits the privilege to Catholicism.[74] A generally applicable privilege presents a range of interpretation issues. The clergy-penitent privilege originated to protect a specific and easily recognizable form of communication: oral confessions of sin to a priest within the Catholic sacrament of Confession.[75] Extending the privilege beyond the scope of its original design forces lawmakers and judges to consider the different types of communications made to clergy of various religions and determine which ones fall under the umbrella of protected communications.[76]

In 1972, the United States Supreme Court approved an amendment to the Federal Rules of Evidence that would have codified the clergy-penitent privilege. Proposed Rule 506 stated "[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 spiritual adviser."[77] Congress never enacted the rule, opting for the more general and adaptable Rule 501,[78] which allows rules of privilege to be shaped by federal common law and evolve on a case-by-case basis.[79] Though never implemented, Proposed Rule 506 is still a guiding force in statutory construction of the clergy-penitent privilege at the state level.[80]

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72. Brooks, *supra* note 12, at 123.

73. *Id.*

74. Mitchell, *supra* note 17, at 747; *see generally* CHILDREN'S BUREAU, *supra* note 11.

75. Mitchell, *supra* note 17, at 747.

76. *Id.*

77. *See* FED. R. EVID. 506 (Proposed Official Draft 1972).

78. Federal Rule of Evidence 501 states:

> 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. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

FED. R. EVID. 501 (2017).

79. Mitchell, *supra* note 17, at 740.

80. *Id.*

3. The Supreme Court Validates the Clergy-Penitent Privilege, if Only in Dicta

The United States Supreme Court has addressed the clergy-penitent privilege a handful of times, though only indirectly. In *Totten v. United States*, an 1875 case concerning national secrets, the Court noted in dicta that "suits cannot be maintained which would require a disclosure of the confidences of the confessional."[81] Almost a century later in *United States v. Nixon*, the Supreme Court again addressed the privilege, stating that although discussions between President Richard Nixon and his staff were not subject to a privilege of confidentiality, a priest, alternatively, could not be compelled by a court to disclose information revealed to him in a confessional context.[82]

Finally, in *Trammel v. United States*, the Court discussed the rationale behind maintaining the sanctity of religious conversations, stating that the clergy-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."[83] The Court further noted that the privilege is based on the urgent need for confidence and trust—two qualities that would disintegrate if penitents knew clergy had the freedom to divulge private confessions to third parties.[84] Though mentioned in dicta in these three cases, the Supreme Court has yet to rule directly on whether the United States Constitution protects the clergy-penitent privilege.[85]

II. CHURCH AND STATE COLLIDE: MANDATORY REPORTING LEGISLATION AND THE CLERGY

Although the clergy-penitent privilege has national endorsement, it is sometimes subject to narrow interpretation in situations of suspected child abuse.[86] Following the nationwide adoption of mandatory reporting statutes, many states named clergy as mandatory reporters. The dilemma of whether to incorporate the clergy-penitent privilege into mandatory reporting laws, however, sparked considerable debate.

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81. Totten v. United States, 92 U.S. 105, 107 (1875).
82. United States v. Nixon, 418 U.S. 683, 709 (1974).
83. Trammel v. United States, 445 U.S. 40, 51 (1980).
84. *Id*.
85. 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, 1661 (2003).
86. CHILDREN'S BUREAU, *supra* note 11, at 2.

A. The States Take an Active Role in Policing Child Abuse

In 1974, Congress passed legislation making federal funds available to states for child abuse prevention and treatment.[87] To be eligible for funding, states were required to enact legislation designating certain individuals as legally mandated reporters of child abuse and neglect.[88] Congress intended the conditional spending scheme to increase the probability that the sufferings of abuse victims—often never reported at all—would be disclosed to law enforcement.[89] All 50 states eventually complied with Congress's guidelines.[90] Each state currently has its own comprehensive mandatory reporting scheme defining who is legally bound to report abuse ("mandatory reporters"), the conditions in which abuse must be reported, criminal penalties for failure to report, and whether certain evidentiary privileges affect the duty to report.[91]

Mandatory reporters are generally adults whose employment grants them a strategic vantage point for identifying signs of child abuse and for undertaking the necessary steps to protect children.[92] Mandatory reporting laws typically list professionals, such as teachers, therapists, and doctors, who are compelled to report serious allegations of child abuse discovered within the scope of their employment.[93] Many states name clergy as mandatory reporters but, unlike most other professions, clergy often receive certain exemptions to the general mandate to report based on the clergy-penitent privilege.[94]

1. Clergy as Mandatory Reporters: The Balancing Act of Satisfying Public Policy and Religious Freedom

In 2002, the "Spotlight" investigative team of reporters for the *Boston Globe* published an exposé on a decades-long sexual abuse scandal within

87. Winters, *supra* note 50, at 197.

88. *Id*.

89. Jack Jenkins, *Unholy secrets: The legal loophole that allows clergy to hide child sexual abuse*, THINK PROGRESS (Aug. 8, 2016), https://thinkprogress.org/unholy-secrets-the-legal-loophole-that-allows-clergy-to-hide-child-sexual-abuse-9a6899029eb5#.kaojfci6z [https://perma.cc/5A7M-XJLN].

90. *See* CHILDREN'S BUREAU, *supra* note 11.

91. Mitchell, *supra* note 17, at 728.

92. Winters, *supra* note 50, at 189.

93. *See* Jenkins, *supra* note 89.

94. *See* CHILDREN'S BUREAU, *supra* note 11.

the Catholic Church in Boston.[95] The investigation revealed that child abuse ran rampant in the metropolitan area as local bishops knowingly concealed sexually abusive priests by shuffling them to new locations when their actions began attracting negative attention from parishioners.[96]

In the wake of the Spotlight investigation, the Massachusetts Legislature rushed to soothe the public outcry directed at the abusive priests and the complicit bishops whose silence allowed these horrific acts to persist.[97] Legislators agreed that to avoid another scandal, clergy must be brought into the fold of mandatory reporters, but the scope of the proposed legislation gave rise to sharp divisions and significant debate.[98] A major point of contention was whether to incorporate the clergy-penitent privilege into the law or abrogate the privilege entirely in circumstances of abuse.[99] Some lawmakers argued that a statutory exemption for information learned in the confessional must exist to protect religious rights of clergy.[100] Others urged that abuse must be reported regardless of the context of disclosure and that clergy should be treated no differently than other mandatory reporters who possess an unconditional duty to report.[101] Even more strongly opposed to the inclusion of the privilege were constituents who claimed that making exceptions for clergy protects criminals, thereby allowing abusive behavior to continue at the expense of victims.[102]

Ultimately, strong lobbying efforts and threats of lawsuits from religious organizations resulted in the inclusion of the exemption in the Massachusetts mandatory reporting law.[103] The Massachusetts example illustrates the tension between church and state that makes the drafting of mandatory reporting laws for clergy so difficult. The failure of such a

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95. Michael Rezendes, *Church Allowed Abuse by Priest for Years: Aware of Geoghan Record, Archdiocese Still Shuttled Him from Parish to Parish*, BOS. GLOBE (Jan. 6, 2002), http://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html [https://perma.cc/WKT2-EMZS].

96. *Id*.

97. *See* Jenkins, *supra* note 89.

98. Michael Paulson, *Sex Abuse Reporting Measure Hits Snag: House, Senate Divided over Clergy Exemptions*, BOS. GLOBE (Mar. 7, 2002), http://archive.boston.com/globe/spotlight/abuse/stories/030702_reporting.htm [https://perma.cc/8KFN-C74Z].

99. *Id*.

100. *Id*.

101. *Id*.

102. Emily Eakin, *Secrets Confided to the Clergy Are Getting Harder to Keep*, N.Y. TIMES (Feb. 16, 2002), http://www.nytimes.com/2002/02/16/arts/secrets-confided-to-the-clergy-are-getting-harder-to-keep.html [https://perma.cc/72YN-NK5U].

103. Jenkins, *supra* note 89.

monumental abuse scandal to motivate a state legislature to disregard the clergy-penitent privilege demonstrates the weight lawmakers sometimes place on religious rights in crafting mandatory reporting legislation.

Today, clergy are defined explicitly as mandatory reporters in 28 states and Guam.[104] Of these states, the overwhelming majority do not require clergy to report allegations of child abuse if the information is learned within a religious communication.[105] These legal protections, known as "confessional shields" or "carve-outs," functioned as a compromise for divided state legislatures, allowing for the expansion of mandatory reporting law without infringing upon religious freedoms of clergy.[106]

2. States Abrogating the Clergy-Penitent Privilege for Suspected Child Abuse

Six states and one United States territory abrogated the clergy-penitent privilege in their mandatory reporting legislation.[107] These states embrace two different approaches to abrogation. The first and most explicit form involves states that specifically list clergy as mandatory reporters and expressly deny the privilege within the mandatory reporting statute.[108] West Virginia, New Hampshire, and Guam followed this route.[109] The other method of abrogation is more subtle but has the same effect: a number of states do not list individual categories of mandatory reporters but rather mandate that "any person" who has suspicions of child abuse must report this information.[110] Of the states listing "any person" as a mandatory reporter, North Carolina, Oklahoma, Rhode Island, and Texas abrogate the privilege not by explicitly denying its existence, but by broadly denying the existence of all evidentiary privileges—with the

104. CHILDREN'S BUREAU, *supra* note 11, at 1.

105. *Id*. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Vermont, and Wisconsin grant the privilege but limit it to pastoral communications. *Id*.

106. *Id*.

107. *Id*.

108. *Id*.

109. *Id*. Under West Virginia's mandatory reporting law, "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." W. VA. CODE § 49-2-811 (2017).

110. CHILDREN'S BUREAU, *supra* note 11, at 1.

exception of the attorney-client privilege—in cases of suspected child abuse.[111]

A Texas state court of appeals addressed the Texas Legislature's abrogation of the clergy-penitent privilege in *Bordman v. State*.[112] The defendant in *Bordman* appealed his convictions for aggravated sexual assault of his three children on the grounds that his confession of the assaults to his Methodist minister was inadmissible based on privilege.[113] The court held that Texas's mandatory reporting statute indicated a clear legislative intent to disregard the privilege in a judicial proceeding concerning sexual abuse of a child.[114] As a result, the court affirmed the defendant's convictions.[115]

Bordman is reminiscent of the early New York cases of *Philips* and *Smith* in illustrating the crucial differences between Catholicism and Protestantism in the application of the clergy-penitent privilege.[116] The court in *Bordman* did not delve into the constitutionality of the Texas statute—likely because the Methodist minister had no objection to testifying about the confession.[117] Unlike Catholicism, Methodism—a Protestant religion—lacks a formal practice of confidential confessions between minister and penitent and does not penalize clergy for revealing private confessions.[118] If the clergy member in *Bordman* were a Catholic priest rather than a Methodist minister, however, then the priest may have been unwilling to testify at the risk of expulsion from the Church like in

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111. *Id*. An example of the "any person" standard is:

> Every person having reason to believe that a child under age eighteen (18) years is a victim of abuse or neglect shall report the matter promptly to the Department of Human Services . . . . No privilege or contract shall relieve any person from the requirement of reporting pursuant to this section.

OKLA. STAT. tit. 10A, § 1-2-101(B)(1), (3) (2017).

112. Bordman v. State, 56 S.W.3d 63 (Tex. Ct. App. 2001).

113. *Id*. at 67.

114. *Id*. at 68. The Texas statute provides the following: "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." TEX. FAM. CODE § 261.202 (2017).

115. *Bordman*, 56 S.W.3d at 73.

116. *See* discussion *supra* Part I.C.I.

117. Brooks, *supra* note 12, at 128 n.71.

118. *See* Joe Iovino, *Before God and one another: United Methodists and confession*, UNITED METHODIST COMMC'NS (Nov. 9, 2015), http://www.umc.org/what-we-believe/before-god-and-one-another-united-methodists-and-confession [https://perma.cc/29QM-9TCQ].

Philips.[119] A resistant priest also might have raised a Free Exercise challenge in response to Texas's abrogation of the privilege.

3. A Code in Conflict: Mandatory Reporting Law in Louisiana

In Louisiana, the Children's Code provides the guidelines for mandatory reporting of child abuse.[120] The overarching policy goal of the legislation is to protect the health and well-being of children through the identification and prevention of physical abuse, neglect, and exploitation.[121] The Children's Code provides a list of professionals defined as mandatory reporters of suspected child abuse. This list includes professions such as health practitioners, police officers, teachers, and athletic coaches.[122] Failure to fulfill one's duties as a mandatory reporter can result in criminal prosecution.[123] The maximum penalty for a knowing or willful failure to report is a $500 fine and a six-month prison sentence.[124]

Clergy are mandatory reporters in Louisiana but are not mandated to report sexual abuse allegations if two factors are present. First, the clergy member must be authorized by his religion to hear confidential communications. A communication is "confidential" when it is "made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication."[125] Second, the clergy member must be bound under religious doctrine to keep such communications confidential.[126] If these requirements are met, the clergy member is only legally required to encourage the person alleging the abuse to report the information to the proper authorities.[127]

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119. 1983 CODE c.1388, § 1.

120. LA. CHILD. CODE art. 601 (2017). The relevant laws are listed under Title VI: Child in Need of Care. *Id*.

121. *Id*. The law states that:

> The purpose of this Title is to protect children whose physical or mental health and welfare is substantially at risk of harm by physical abuse, neglect, or exploitation and who may be further threatened by the conduct of others, by providing for the reporting of suspected cases of abuse . . . . The health, safety, and best interest of the child shall be the paramount concern in all proceedings under this Title.

Id.

122. *Id*. art. 603(17).

123. *Id*. art. 609(A)(2).

124. LA. REV. STAT. § 14:403(A)(1)(a) (2017).

125. LA. CODE EVID. art. 511(A)(2) (2017).

126. LA. CHILD. CODE art. 603(17)(c).

127. *Id*.

The Children's Code also states that, regardless of the privileged nature of the communication, any mandatory reporter with reason to believe a child's physical or mental well-being is in danger as a result of abuse must report his suspicions to law enforcement.[128] The Louisiana Supreme Court recently held that a clergy member meeting the requirements necessary to invoke the privilege is no longer considered a mandatory reporter under the law.[129] Consequently, clergy falling under the exemption have no legal duty to report child abuse.[130]

The ability to waive privilege in a protected communication rests not in the clergy member but rather in the penitent.[131] According to the Louisiana Code of Evidence, "[a] *person* has a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication *by the person to a clergyman* in his professional character as spiritual adviser."[132] Clergy may only claim the privilege on a person's behalf or on behalf of a deceased person.[133] Thus, the penitent alone may waive the privilege in Louisiana.

III. A PRIVILEGE STEEPED IN FIRST AMENDMENT ISSUES

The inclusion of clergy in mandatory reporting legislation presents a tension between the two Religion Clauses of the First Amendment: the Free Exercise Clause and Establishment Clause.[134] Among states listing clergy as mandatory reporters, two broad categories of legislation exist: statutes abrogating the clergy-penitent privilege entirely in situations of child abuse and statutes providing "confessional shields" or "carve-outs" to protect certain communications between clergy and their communicants.[135] Each type of legislation poses potential challenges under the First Amendment.

For the handful of states that opted for abrogation, an unconditional mandate to report child abuse arguably offends Free Exercise rights because clergy may have religiously motivated reasons for refusing to disclose private conversations with their communicants.[136] Alternatively, states with confessional carve-outs may potentially violate the Establishment Clause by

128. *Id*. art. 609(A)(1).
129. Mayeux v. Charlet, 203 So. 3d 1030, 1038 (La. 2016).
130. *Id*.
131. LA. CODE EVID. art. 511(B) (2017).
132. *Id*. (emphasis added).
133. *Id*.
134. *See* U.S. CONST. amend. I.
135. *See* CHILDREN'S BUREAU, *supra* note 11.
136. Mitchell, *supra* note 17, at 794.

defining which religions merit the protection of the privilege and which do not.[137] Catholicism benefits most of all from confessional carve-outs because it is one of the few religions having both an established practice of private confessions and an absolute duty of confidentiality codified under church law.[138]

A. Abrogation of the Clergy-Penitent Privilege: A Permissible Infringement on Free Exercise

Under the First Amendment, "Congress shall make no law respecting an establishment of religion or *prohibiting the free exercise thereof* . . . ."[139] The Free Exercise Clause, which applies to individual states as well as the federal government,[140] refers to "the right to believe and profess whatever religious doctrine one desires."[141] When the government forbids certain activities that are performed solely for religious reasons, the Free Exercise Clause is violated.[142] For example, the government cannot ban the production of statues designed exclusively for religious worship or prohibit the practice of bowing down in front of a golden calf.[143] The government also cannot force individuals to engage in activities offensive to their religious beliefs unless some overriding state interest justifies the compulsion of a certain action.[144]

When a state compels disclosure of a confidential communication over the resistance of a member of the clergy, the right to Free Exercise may be violated if the grounds for objection are rooted in religious belief.[145] Potential religious bases for objection are numerous: a particular religion may explicitly prohibit disclosure; the clergy member may not want to breach the trust of his clerical office; or the clergy member may fear that communicants will be deterred from seeking religious counseling in the future if confidentiality is not guaranteed.[146]

Free Exercise is not an absolute right; clergy may not invoke this clause to avoid engaging in any form of conduct offensive to their religious

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137. *Id*. at 779.
138. *See generally Privileged Communications*, *supra* note 52; Mitchell, *supra* note 17, at 754 n.175.
139. U.S. CONST. amend. I (emphasis added).
140. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).
141. Emp't Div., Dept. of Human Res. v. Smith, 494 U.S. 872, 877 (1990).
142. *Id*.
143. *Id*. at 877–78.
144. Mitchell, *supra* note 17, at 794.
145. *Id*.
146. *Id*.

beliefs.[147] To allow an individual to claim immunities from every state law that conflicts with his religious values and opinions effectually "permit[s] every citizen to become a law unto himself."[148] In certain situations, government interference with religious practice is necessary and constitutionally permissible, a reality addressed by the United States Supreme Court throughout its history.[149] For a state to justify infringement upon Free Exercise, it must show that the burden is incidental to a neutral and generally applicable law or, in certain jurisdictions, that the burden serves a compelling state interest in the least restrictive way possible.[150] States abrogating the clergy-penitent privilege within mandatory reporting laws must demonstrate the constitutionality of their legislation under the standards set by the Supreme Court and potentially under the more restrictive standards enacted by individual state legislatures.

1. Employment Division v. Smith*: Illustrating the Limits of Free Exercise Claims*

The landmark Supreme Court decision of *Employment Division v. Smith* provides one standard that guides lower courts and state legislatures regarding Free Exercise issues.[151] The *Smith* plaintiffs, two Oregon citizens belonging to the Native American Church, were fired from their jobs as drug rehabilitation counselors for consuming peyote, an illegal hallucinogenic

147. *Id.* at 806.

148. Reynolds v. United States, 98 U.S. 145, 166–67 (1878).

149. *See, e.g.*, *id.* (holding that the First Amendment allows regulation of religious practices); Sherbert v. Verner, 374 U.S. 398, 402–03 (1963) (noting that the Free Exercise Clause does not protect overt religious acts that threaten public safety). Freedom to believe is an absolute right and not subject to balancing with state interests. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 492–93 (1961) (holding that a state may not for any reason require its public officials to profess belief in God). If, on the other hand, a law burdens religious conduct, the state can defend its law by showing that the law is necessary to some compelling state interest. *See Sherbert*, 374 U.S. at 406. The state may also claim the law is a valid, neutral law of general applicability. Emp't Div., Dept. of Human Res. v. Smith, 494 U.S. 872, 878 (1990). Mandatory reporting requirements fall into the "burdening conduct" category: statutes that abrogate the clergy-penitent privilege punish a clergy member for the "act" of refusing to report. Mitchell, *supra* note 17, at 806 n.442.

150. *See Emp't Div.*, 494 U.S. at 879; *see also State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATORS (Dec. 15, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/8LPA-NVX9].

151. *See generally Emp't Div.*, 494 U.S. 872.

drug, as part of a religious ceremony.[152] Oregon law classified peyote as a controlled substance and defined the possession of peyote as a felony.[153] The plaintiffs subsequently were denied unemployment benefits for being terminated as a result of job-related misconduct.[154] Citing the First Amendment, the plaintiffs argued that denial of compensation based on their sacramental consumption of peyote infringed upon their right to Free Exercise.[155]

Writing for the majority, Justice Scalia argued that mere possession of religious beliefs that go against societal interests does not relieve an individual from his civic responsibilities.[156] Justice Scalia analogized Oregon's law criminalizing peyote to laws involving tax collection: a person who believes that financially supporting organized government violates his religious convictions cannot simply refuse to pay his taxes because the burden is incidental to a neutral and valid purpose of collecting revenue.[157] The Court held that denial of the plaintiffs' unemployment benefits was lawful because "if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision," then the right to Free Exercise is not offended.[158] Because the Oregon law's unbiased and lawful purpose was to deter all Oregon citizens from drug use, the plaintiffs could not claim exemption from compliance based on their religion's encouragement of peyote use in sacramental ceremonies.[159]

Mandatory reporting legislation abrogating the clergy-penitent privilege easily survives a Free Exercise challenge under *Smith*. In fact, eliminating the privilege actually enhances the general applicability of mandatory reporting laws. Mandatory reporting legislation is not religiously motivated but rather is driven by a neutral incentive to compel disclosure of child abuse by the people most likely to discover this information in their individual professions.[160] Clergy are not alone in their mandate to report. Louisiana, for example, lists ten additional categories of professions as mandatory reporters, spanning a broad cross-section of

152. *Id*. at 874.
153. OR. REV. STAT. § 475.992(4) (1987).
154. *Emp't Div.*, 494 U.S. at 874.
155. *Id*. at 890.
156. *Id*. at 879 (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940)).
157. *Id*. at 878.
158. *Id*.
159. *Id*. at 878–79, 882.
160. *See* LA. CHILD. CODE art. 601 (2017).

society.[161] Including clergy in the class of mandatory reporters suggests an impartial legislative decision to give them the same responsibility as secular professionals to aid the state in policing child abuse.[162] Neutrality also exists in the legislation's underlying policy goal. The mandate to report child abuse arises from the legislative objectives of safeguarding children and preventing future abuse.[163] In Louisiana, the Children's Code clearly states that the welfare of the child is the "paramount concern" in all legal proceedings concerning child abuse.[164]

2. The States Push Back Against Smith*: A Revival of the* Sherbert *Test*

Although the *Smith* test demonstrates that abrogation of the clergy-penitent privilege in mandatory reporting statutes is a permissible infringement on Free Exercise rights, a more stringent analysis may be required under the laws of Louisiana and 21 other states.[165] In the wake of *Smith*, Congress quickly reacted to the Supreme Court's rather lenient test by passing the Religious Freedom Restoration Act ("RFRA") in an effort to implement a more rigorous standard for states to satisfy in justifying burdens on Free Exercise.[166] The RFRA reinstated the "compelling state interest" test set by the Supreme Court in *Sherbert v. Verner*—the predecessor to *Smith* in Free Exercise jurisprudence.[167] In *Sherbert*, the Court held that a state cannot refuse to provide unemployment benefits to a woman whose religion required her to abstain from working on Saturdays.[168] The Court stated that "laws which burden free exercise of religion must be justified by a compelling state interest which cannot be

161. *Id.* art. 603(17). The list of mandatory reporters includes health practitioners, mental health practitioners, teachers/child care providers, law enforcement officials, commercial film and photographic print processors, mediators, parenting coordinators, court-appointed special advocates, youth activity providers, and school coaches. *Id*.

162. Winters, *supra* note 50, at 208.

163. *Id*.

164. LA. CHILD. CODE art. 601.

165. *State Religious Freedom Restoration Acts*, *supra* note 150.

166. Brooks, *supra* note 12, at 126; 42 U.S.C. 2000bb-1(b), *repealed by* City of Boerne v. Flores, 521 U.S. 507 (1997) ("Government may substantially burden a person's Free Exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

167. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

168. *Id*. at 410–11.

achieved without infringing Free Exercise rights," a standard commonly known as strict scrutiny.[169]

Strict scrutiny had been the test for determining constitutionality of laws burdening Free Exercise until *Smith* overruled the *Sherbert* analysis.[170] Congress enacted the RFRA in response to public dissatisfaction with the *Smith* decision, and, for a brief period, strict scrutiny was revived for Free Exercise cases.[171] Ultimately, the Supreme Court struck down the RFRA in *City of Boerne v. Flores* as an unconstitutional exercise of congressional power in terms of the law's application to the individual states.[172] Many states, including Louisiana, responded to *City of Boerne* by enacting their own religious freedom laws.[173] Louisiana's Preservation of Religious Freedom Act adopted statutory language virtually identical to the RFRA.[174] Consequently, in states with RFRA-inspired legislation, the more demanding strict scrutiny test—rather than the less onerous *Smith* test—may be applicable for analyzing the constitutionality of abrogating the clergy-penitent privilege in mandatory reporting legislation.

3. Applying the Compelling State Interest Test to an Unconditional Mandate for Clergy to Report Child Abuse

Under strict scrutiny, a compelling state interest justifies upholding mandatory reporting laws that abrogate the clergy-penitent privilege. Additionally, eliminating the privilege for the specific purpose of protecting children in immediate danger of sexual abuse is the least restrictive means of furthering the governmental interest of identifying and preventing child abuse.

a. Compelling State Interest

In proving a compelling state interest, a state can emphasize the obvious importance of protecting children from harm. The motive behind mandatory reporting legislation is to reveal as many incidents of ongoing

169. Brooks, *supra* note 12, at 124 (citing *Sherbert*, 374 U.S. at 406–07).

170. *Id.; see also Sherbert*, 374 U.S. at 398.

171. Brooks, *supra* note 12, at 126.

172. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

173. Since 1993, 21 states have enacted their own versions of the RFRA. Though the intention of these laws is to mimic the federal RFRA, each individual law is not necessarily identical to the federal law. *State Religious Freedom Restoration Acts*, *supra* note 150.

174. LA. REV. STAT. § 13:5233 (2017); 42 U.S.C. 2000bb-1(b), *repealed by City of Boerne*, 521 US 507.

or imminent abuse as possible so the state can promptly intervene—either to mitigate the situation or to stop the abuse from happening in the first place.[175] The state also has a responsibility to safeguard its children under the doctrine of *parens patriae* ("parent of the country"), which requires states to act as "parents" to their most dependent citizens.[176] The doctrine provides a strong basis for state intervention in protecting innocent victims of child sexual abuse. In addition to the primary goal of protecting children, states may also desire to rehabilitate or punish abusers.[177]

To further bolster a compelling state interest, states can argue that doing away with the clergy-penitent privilege in mandatory reporting statutes is crucial to avoiding issues that arise when clergy try to deal with child abuse epidemics within their own ranks.[178] States can point to the Catholic Church's disastrous history of addressing issues of child abuse "in-house."[179] Church attempts at self-policing child abuse without the knowledge or aid of law enforcement often exacerbate and perpetuate abuse.[180] The Spotlight exposé documented how church leadership within the Archdiocese of Boston discouraged families of victims from reporting the abuse to law enforcement, entered into confidential settlements with affected families, and moved abusive priests to new church parishes where patterns of

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175. Mitchell, *supra* note 17, at 807.

176. *Id*.; *see also* Prince v. Massachusetts, 321 U.S. 158, 169–70 (1944) (stating that the right to Free Exercise of religion does not include freedom to endanger the well-being of children).

177. Mitchell, *supra* note 17, at 807 n.447.

178. Brooks, *supra* note 12, at 138.

179. *See, e.g.*, OFFICE OF THE ATTORNEY GENERAL, COMMONWEALTH OF MASSACHUSETTS, THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON 30–52 (2003), http://www.bishop-accountability.org/resources/resource-files/reports/ReillyReport.pdf (reporting actions of Catholic authorities in dealing with allegations of child sex abuse by priests in the Archdiocese of Boston) [https://perma.cc/3MF4-MM5V].

180. *See id*. (reporting actions of Catholic authorities in dealing with allegations of child sex abuse by priests in the Archdiocese of Boston). The report found:

> By practice and policy, information concerning the complaints of abuse was shared with only a small number of senior Archdiocese officials, and only these officials were responsible for fashioning a response to the harm to children in the Archdiocese. As a result, the response by the Archdiocese reflected tragically misguided priorities. Top Archdiocese officials regularly addressed and supported the perceived needs of offending priests more than the needs of children who had been, or were at risk of being, abused.

Id.

abuse continued.[181] In light of failed attempts by the Catholic Church to adequately monitor and prevent this issue of child abuse, a state can argue that it has a much stronger claim to the physical protection of its citizens. A state can support this argument by showing that its law enforcement robustly investigates cases of reported child abuse and uses effective and appropriate procedures in intervening to protect abused children.[182] States that satisfactorily police child abuse can thus make a strong case that abrogation of the privilege increases the probability that authorities receive immediate notice of abuse for the purpose of swift and efficient intervention.[183]

Finally, states can argue that exceptions made for clergy within mandatory reporting statutes create ambiguity in the law.[184] Difficulty may arise in a clergy member's determination of whether his suspicions of child abuse result solely from the privileged communication or from non-privileged observations.[185] For instance, a Catholic priest initially may learn allegations of abuse within the confessional before later observing signs of abuse outside the sacrament, such as bruises on a child's arm.[186] The priest may feel compelled to refrain from reporting because he would not have noticed subsequent signs of abuse in the non-privileged setting if not for the initial confidential communication.[187] The priest may assume that once information regarding child abuse is learned in a privileged conversation his duty to report no longer exists.[188]

b. Least Restrictive Means/Narrow Tailoring

A clear compelling state interest is only half of the analysis. If a clergy member challenges a mandatory reporting requirement in a state with RFRA-inspired legislation, the state also must show that an unconditional mandate to report is necessary to attain the goal of protecting children from abuse and that the law is tailored in the least restrictive way possible to achieve that goal.[189] In other words, a state must prove it cannot adequately carry out its mission to identify and prevent sexual abuse of children unless clergy are considered mandatory reporters within the context of confidential communications. If the

181. Rezendes, *supra* note 95.
182. Mitchell, *supra* note 17, at 811.
183. *See id*.
184. Brooks, *supra* note 12, at 139.
185. *Id*.
186. *See id*. at 139–40.
187. *See id*. at 140.
188. *Id*.
189. *See* LA. REV. STAT. § 13:5233 (2017).

state can prove that it cannot promote its interest without infringing on Free Exercise, then a burden on religion is justified.

In proving the need for abrogation of the privilege, states can reference the unique position of a clergy member "as confidant, spiritual adviser, and [in certain religions] bespeaker of God's forgiveness."[190] State legislatures do not compile their lists of mandatory reporters arbitrarily; the professionals selected represent those persons most likely to gain knowledge of sexual abuse of children within their respective professions.[191] In their daily life and ministry, clergy occupy a strategic position to observe family interactions, and distressed individuals frequently reach out to clergy for advice and guidance, often within a confidential setting.[192] The intimate nature of the clerical office results in an increased likelihood that abusers, victims, and third parties with knowledge of ongoing or imminent abuse will divulge this information to clergy.[193] A state can argue that clergy are an indispensable source in its mission to identify and prevent abuse of children.[194] Because valuable information is frequently learned within private communications, states cannot adequately police child abuse without an unconditional mandate for clergy to report that extends to confidential settings.

Furthermore, children's innocence and inability to comprehend the gravity of their own abuse support the argument that abrogation of the privilege is a necessary means of carrying out the state's compelling interest. Reporting exemptions for clergy have a negative effect on children who do not understand the implications of confidential communications and confessional privileges. Child victims may go to clergy for counsel in a confidential setting out of fear, embarrassment, or a lack of resolve to tell parents or law enforcement about their abuse.[195] The existence of confessional shields aggravates the traumatizing process children undergo in reporting abuse. Legislation restricting the frequency of disclosure worsens an already-dire scenario: only one-third of child abuse victims report their abuse in a timely manner, and the remaining victims either wait several years to tell or never disclose the abuse.[196] Many children who reveal their experiences of abuse will only tell their childhood peers who lack the maturity and resources necessary to provide adequate assistance.[197] Unlike these child confidantes, clergy have the means and experience to provide immediate

190. Mitchell, *supra* note 17, at 807.
191. Winters, *supra* note 50, at 189.
192. Mitchell, *supra* note 17, at 811.
193. *Id*.
194. *Id*.
195. Parents of Minor Child v. Charlet, 135 So. 3d 1177, 1178 (La. 2014).
196. Jenkins, *supra* note 89.
197. *Id*.

and effective aid to victims.[198] As such, the least restrictive way of maximizing the reporting of child abuse for the children who do choose to disclose their abuse to members of clergy is to abrogate the clergy-penitent privilege in the context of confidential communications.

States can tailor their legislation narrowly by abrogating the privilege only in the specific situation where clergy have reason to believe a child is being abused currently or is in imminent danger of being abused.[199] In keeping with the compelling state interest of protecting children, abrogation of the privilege logically must apply when anyone alleges abuse to a clergy member, whether that person is the victim, the abuser, or some third party.[200]

B. Establishment Clause Issues: Favoring the Catholic Church over All Other Religions

Under the Establishment Clause, Congress is forbidden from instituting a national religion.[201] Even though the text of the clause only references Congress, its terms apply to the states as well.[202] Furthermore, the Supreme Court has interpreted the clause as forbidding both the favoring of and discrimination against particular religions.[203] Many states have mandatory reporting legislation that grants the clergy-penitent privilege only to religions imposing a duty of secrecy on their clergy under church doctrine.[204] Even though these exceptions relieve the Free Exercise problem by accommodating religions with established disciplines of confidentiality, states that limit applicability of the privilege violate the Establishment Clause by benefitting a handful of religions over all

198. *Id*.

199. Louisiana's law is already tailored in this manner. *See* LA. CHILD. CODE art. 609(A)(1) (2017).

200. *See id*. art. 601.

201. U.S. CONST. amend. I.

202. Wallace v. Jaffree, 472 U.S. 38, 49–50 (1985) (stating that the Fourteenth Amendment imposes the same substantive limits, including limits on establishing religion, on the state's legislative powers as the First Amendment imposes on Congress); Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 8, 15 (1947) (holding that the Fourteenth Amendment embraces the Establishment Clause).

203. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 244–46 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Everson*, 330 U.S. at 15 ("Neither a state nor the Federal Government can pass laws which . . . prefer one religion over another.").

204. *See* CHILDREN'S BUREAU, *supra* note 11.

others.[205] Narrowing the privilege's scope to religions with specific disciplines of confidentiality also forces courts to entangle themselves in interpretation of religious doctrine, a scenario over which the Supreme Court has expressed great concern.[206]

1. Town of Greece v. Galloway*: An Unbiased Treatment of Religion*

In *Town of Greece v. Galloway*, the Supreme Court provided guidance in analyzing conflicts between confessional carve-outs and the Establishment Clause. In 1999, the town supervisor of Greece, New York instituted the practice of opening monthly town board meetings with a prayer led by a clergy member from the community.[207] To select the prayer-givers, a town employee would contact the heads of local religious congregations from the telephone directory.[208] At no point did the town exclude or deny particular religions the opportunity to participate in leading prayer.[209] Nevertheless, from 1999 to 2007, all of the prayer leaders were members of Christian faiths.[210] Two regular attendees of the board meetings brought suit against the town, alleging that it had violated the Establishment Clause by favoring Christian prayer leaders over clergy members from other religious denominations.[211]

Because the selection process was non-discriminatory and the town made reasonable attempts to find non-Christian volunteers, the Court held that the town did not violate the Establishment Clause.[212] The Court further noted that the fact that the overwhelming majority of prayer-givers happened to be Christian was simply a natural effect of the demographics of Greece, a town where nearly all the religious congregations were of Christian denominations.[213] Because the existing policies did not intentionally favor one religion over another, the Court held that Greece was not required "to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing."[214]

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205. Brooks, *supra* note 12, at 144.
206. *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1824 (2014); *see also* Lee v. Weisman, 505 U.S. 577, 616–18 (1992) (Souter, J., concurring).
207. *Galloway*, 134 S. Ct. at 1816.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 1817.
212. *Id.* at 1824.
213. *Id.*
214. *Id.*

Finally, the Court declared that requiring Greece to implement diversity requirements for prayer-givers would foster excessive government entanglement with religion by forcing local leaders to make judgment calls about the proper number of religions the town should sponsor and the appropriate frequency with which each denomination should be represented at the meetings.[215] The Court concluded that the existing non-discriminatory approach was sufficiently impartial toward individual religions and also avoided the troubling prospect of the government defining which religions were worthy of representation.[216]

2. Applying Galloway *to Mandatory Reporting Law*

Numerous states, including Louisiana, provide exemptions in their mandatory reporting legislation for clergy engaged in communications deemed confidential under the doctrines of their particular religion.[217] By covering only religions that mandate private confession to clergy, the scope of the privilege is confined to the Roman Catholic Church and the doctrinally similar Eastern Orthodox and Lutheran Churches.[218] Under *Galloway*, Louisiana and states with similarly worded legislation engage in discriminatory treatment of the non-Catholic religions that lack formal practices of confidential confession and duties of confidentiality. Unlike the unbiased prayer leader selection process in *Galloway*, limitation of the privilege to religions with established disciplines of confidentiality likely violates the Establishment Clause by giving preferential treatment to a particular type of clergy member to the exclusion of all others.[219]

Limiting the scope of the privilege additionally forces courts to parse through religious doctrines in determining which circumstances divest a clergy member of mandatory reporter status.[220] The Supreme Court expressed wariness toward governmental entanglement in religion in *Galloway* in regards to a government body deciding which religions deserve representation in opening prayers before town meetings.[221] In a similar way, the drafting of confessional carve-out statutes in Louisiana and numerous other states forces the judiciary to determine which religions deserve exemption from the mandate to report.[222] Judges are

215. *Id*.
216. *Id*.
217. *See* CHILDREN'S BUREAU, *supra* note 11.
218. Mitchell, *supra* note 17, at 754 n.175.
219. *See* LA. CHILD. CODE art. 603(17)(c) (2017).
220. *Id*.
221. *Galloway*, 134 S. Ct. at 1824.
222. LA. CHILD. CODE art. 603(17)(c); *see also* CHILDREN'S BUREAU, *supra* note 11.

required to take on the role of religious scholars and "engage in comparative theology" by analyzing the doctrines of various religions, and factfinders ultimately have to distinguish between denominations entitled to the privilege and ones undeserving of the exception.[223] Such an inquiry is precisely the scenario feared by the Court in *Galloway*.

3. Resolving Establishment Clause Issues

One option for solving the Establishment Clause issue involves rewording mandatory reporting statutes to prohibit compelled disclosure from clergy engaged in any form of confidential communication regardless of whether it is protected under church doctrine. State legislatures could use Proposed Rule 506 to the Federal Rules of Evidence as a rubric for redrafting. The proposed law would extend the clergy-penitent privilege to scenarios in which clergy engage in confidential communications with penitents while acting in their "professional character as spiritual adviser[s]."[224] Use of a broad standard eliminates Establishment Clause problems by applying the privilege impartially to all clergy operating under the scope of their clerical positions.[225] This option is far from desirable from a public policy standpoint, however, because it hinders the state in identifying and preventing child abuse by significantly expanding the field of clergy who may claim exemptions from mandatory reporter status.[226]

A more effective option requires abrogation of the privilege so all clergy must report abuse regardless of the tenets of their faith. Under *Galloway*, abrogation of the privilege for all clergy is non-discriminatory because no religion receives preferential treatment.[227] Furthermore, the government can avoid excessive entanglement with religion because religious doctrine would be irrelevant under the law, thus obviating the need to judicially interpret church practices.

IV. *MAYEUX V. CHARLET*: ILLUMINATING THE DEFICIENCIES OF CONFESSIONAL CARVE-OUTS

A confused and distraught Rebecca Mayeux entered the confessional of her Catholic church in the summer of 2008 seeking to disclose not her own sins but those of her abuser. The priest whom she trusted more than

223. Lee v. Weisman, 505 U.S. 577, 616–18 (1992) (Souter, J., concurring).
224. FED. R. EVID. 506 (Proposed Official Draft 1972).
225. *Id.*
226. *See* LA. CHILD. CODE art. 601 (stating that the purpose of a mandatory reporting scheme is to protect the well-being of children).
227. *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1824 (2014).

anyone to end her abuse allegedly met her cry for help with a cold and unaccommodating response. Now this priest is the central defendant in Mayeux's civil lawsuit that seeks damages for his failure to take any action to report the abuse.[228] Mayeux's case provides a concrete example of how the presence of the clergy-penitent privilege in mandatory reporting law hinders the state in its mission to police child abuse.

A. A Dark Secret Revealed in the Confessional

Rebecca Mayeux and George Charlet were members of Our Lady of the Assumption Parish in the town of Clinton, Louisiana.[229] Following a relocation in 2000 to Clinton from their previous home in Baton Rouge, the Mayeux family befriended Mr. Charlet and his wife after getting to know the couple through their church community.[230] As she grew from childhood into adolescence, "Rebecca viewed Mr. Charlet as a second grandfather."[231] In the summer of 2008, 14-year-old Mayeux agreed to look after the Charlets' grandchildren periodically.[232] Mayeux exchanged email addresses with the Charlets so they could contact her when they needed a babysitter.[233] At the beginning of the summer, 64-year-old Mr. Charlet began an email correspondence with Mayeux consisting of one to two emails per day, which included words of inspiration and daily Bible verses.[234]

According to Mayeux's petition for damages, the correspondence became inappropriate when Charlet started sending emails of a more personal nature that were "laced with seductive nuances" and when the frequency of emails gradually increased to five to seven emails per day.[235] In July 2008, Charlet took a trip to South Korea where he kept a handwritten diary addressed specifically to Mayeux that documented his "passionate desire for her to be in South Korea with him, again laced with both seductive and sexual nuances."[236] According to Mayeux, the contact took on a physical nature when Charlet returned from his travels. Charlet invited her to visit his private office at the funeral home he managed under the pretense of having

228. Parents of Minor Child v. Charlet, 135 So. 3d 1177 (La. 2014).
229. Parents of Minor Child v. Charlet, 135 So. 3d 724, 726 (La. Ct. App. 2013).
230. Petition for Damages at 2, Parents of Minor Child v. Charlet, 135 So. 3d 724 (La. Ct. App. 2013) (No. 58-0066).
231. *Id*.
232. *Id*.
233. *Id*.
234. *Id*.
235. Parents of Minor Child v. Charlet, 135 So. 3d 1177, 1178 (La. 2014).
236. Petition for Damages, *supra* note 230, at 3.

her pick up materials for a local scouting troop he wanted her to join.[237] When the two were alone together in the office, Charlet reportedly kissed Mayeux, fondled her breasts, and told her "he wanted to make love to her."[238]

Fearful of telling her parents about the escalating sexual abuse, Mayeux sought support and advice from her parish priest Father Jeff Bayhi.[239] Mayeux visited Bayhi three separate times during the summer to receive the sacrament of Confession.[240] Mayeux stated in her petition that she revealed the details of Charlet's abuse during her confessions.[241] In response, Bayhi allegedly advised her "to move past the abuse, suggesting she 'sweep it under the floor and get rid of it'" because the ramifications of divulging her secrets would end up hurting too many people.[242] Bayhi reportedly made no efforts to stop the abuse, and the crimes Mayeux described to him went unreported.[243] According to Mayeux, the abuse continued following the confessions, including one occasion in which Charlet surreptitiously fondled her under the dining table while they were eating lunch with his son, grandson, and Mrs. Charlet.[244] A final incident occurred when Rebecca visited Charlet's office intending to confront him about the abuse. Instead, the man reportedly overpowered her, forced her onto a sofa, and aggressively kissed and groped her until a knock at the front door of the funeral home interrupted his actions.[245]

Despite Bayhi's alleged failure to report, the intimate relationship between Charlet and Mayeux did not go wholly unnoticed. Several parishioners observed Charlet's inappropriate public displays of affection toward Mayeux.[246] Mayeux's parents soon became aware of the obsessive amount of telephone calls and emails Charlet had been sending their daughter.[247] Both parents confronted Rebecca and she confessed to them the horrid details of her abuse.[248] The Mayeuxs immediately contacted Charlet, ordering him to cease all contact with Rebecca and proceeded to

237. *Id*.
238. *Id*. at 3–4.
239. Jenkins, *supra* note 89.
240. Petition for Damages, *supra* note 230, at 4.
241. Jenkins, *supra* note 89.
242. Parents of Minor Child v. Charlet, 135 So. 3d 724, 726 (La. Ct. App. 2013).
243. Jenkins, *supra* note 89.
244. Petition for Damages, *supra* note 230, at 4.
245. *Id.* at 5.
246. Parents of Minor Child v. Charlet, 135 So. 3d 1177, 1179 (La. 2014).
247. *Id.*
248. *Id.*

file a formal complaint against him with the sheriff's department.[249] During the initial investigation, however, Charlet died suddenly from a massive heart attack following knee-replacement surgery.[250]

B. Procedural History: The Long and Winding Road to Trial

Despite the sudden death of Rebecca's alleged abuser, parents Robert and Lisa Mayeux brought a civil suit in July 2009 for damages caused by the sexual and inappropriate acts inflicted on Rebecca.[251] The petition named as defendants the deceased Charlet, Father Bayhi, and the Roman Catholic Church of the Diocese of Baton Rouge ("the Diocese").[252] The Mayeuxs claimed that Charlet was liable as the alleged abuser, that Father Bayhi was liable for failing to report abuse allegations under mandatory reporting law, and that the Diocese was liable through vicarious liability stemming from Bayhi's reported failure to take action following Mayeux's revelations of abuse and for negligent hiring and training of the priest.[253] The petition specifically alleged that Bayhi negligently advised Mayeux during the confessions by telling her to handle the abusive situation personally and that the priest negligently failed to report the abuse immediately to law enforcement and to Mayeux's parents.[254]

Before the trial was scheduled to begin, the Diocese filed a motion in limine seeking to prohibit the plaintiffs from "mentioning, referencing, and/or introducing evidence at trial of any confessions that may or may not have taken place" between Bayhi and Mayeux while Bayhi was performing his official role as a priest in hearing a confession from his parishioner.[255] The trial court denied the motion, finding that Mayeux's testimony regarding the confession was relevant and that, as holder of the privilege, she was entitled to waive confidentiality and to testify about her own communications.[256] The trial court noted, however, the challenge faced by Bayhi in which the priest's religious duty under the sacramental seal would prevent him from contesting Mayeux's testimony.[257] Moreover,

249. *Id.*
250. *Id.*
251. *Id.* at 1178.
252. *Id.*
253. *Id.*; *see also* LA. CODE EVID. art. 511 (2017).
254. Petition for Damages, *supra* note 230, at 8.
255. *Charlet*, 135 So. 3d at 1178.
256. LA. CODE EVID. art. 511; Charlet, 135 So. 3d at 1179.
257. *Charlet*, 135 So. 3d at 1179.

according to Bayhi, the seal of confession mandates that a priest cannot reveal if a confession even took place.[258]

The issue of Mayeux's ability to testify reached the Louisiana Supreme Court, which agreed with the trial court that Mayeux may speak on the witness stand about the confessions.[259] The Court declared that the privilege belongs to the penitent, not the priest.[260] It further stated that because the holder of the privilege waived confidentiality, Bayhi could not then raise that same privilege to protect himself.[261]

The Louisiana Supreme Court remanded the case to the district court to establish whether the communications between Mayeux and Bayhi were "confessions per se"—confessions heard within the context of the sacrament of Confession—and if there were any conversations outside of the confessional that would have mandated Bayhi to report allegations of abuse as a mandatory reporter.[262] The Diocese then filed a petition for a writ of certiorari to the United States Supreme Court, arguing that a factfinder should not be allowed to determine whether certain conversations are confessions per se.[263] The Diocese argued that this discretion "allows the state to override the Catholic religion's own determination of what its beliefs and practices require and destroys the sacred seal of confession in the process."[264] The Diocese stated that this issue "cuts to the core of the Catholic faith, and for a civil court to inquire as to whether a factual situation establishes the sacrament of confession is a clear and unfettered violation of the Establishment Clause of the Constitution of the United States."[265] In January 2015, the Supreme Court denied the writ, leaving the case back in state district court.[266]

On remand, Judge Mike Caldwell conducted a pre-trial evidentiary hearing in which Bayhi testified that revealing a sacramental confession

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258. Joe Gyan, Jr., *Judge rules priests not required to report alleged wrongdoing if learned during confession*, ADVOCATE (Feb. 28, 2016), http://www.theadvocate.com/baton_rouge/news/article_29d4ace2-afe6-5c60-9b3f-6de4c46533b8.html [https://perma.cc/GWN8-FHRL].

259. *Charlet*, 135 So. 3d at 1180.

260. *Id.*

261. *Id.*

262. *Id*.

263. *Id*.

264. Petition for Writ of Certiorari at 3, Roman Catholic Church of the Diocese of Baton Rouge v. Mayeux, 135 S. Ct. 1154 (Aug. 21, 2014)(No. 14-220).

265. CATHOLIC NEWS SERVICE, *supra* note 16.

266. Roman Catholic Church of the Diocese of Baton Rouge v. Mayeux, 135 S. Ct. 1154 (2015).

would result in his excommunication from the Catholic Church.[267] Caldwell subsequently ruled that Children's Code article 609(A)(1), which states that a mandatory reporter must report suspected child abuse regardless of privilege, violated Bayhi's constitutional right to Free Exercise under the Louisiana Constitution.[268] Citing Louisiana's Preservation of Religious Freedom Act,[269] Caldwell declared that Louisiana unquestionably has a compelling interest in protecting children from abuse but that the article he struck down was not the least restrictive way to accomplish this goal.[270] Caldwell reiterated the Louisiana Supreme Court's order that a jury must determine whether a confession per se actually took place and whether the priest's duty to report had been triggered.[271] He also declared that if a jury found that Bayhi obtained knowledge of Mayeux's abuse within a confession per se, Mayeux's attorneys may not argue that the priest had a legal duty to report the allegations.[272]

In light of the constitutional issue at stake, Caldwell's ruling to strike down article 609(A)(1) was appealed directly to the Louisiana Supreme Court.[273] The Court ruled that Caldwell's declaration of unconstitutionality was premature because the scope of Bayhi's duty to report depended upon the jury's factual determination of whether the priest learned the abuse allegations exclusively within a sacramental confession or whether he gained knowledge of the abuse outside the confessional.[274] The Court decided that constitutional analysis of the law was unnecessary until the

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267. Gyan, Jr., *supra* note 258.

268. *Id.* Article I, section 8 of the Louisiana Constitution states: "No law shall be enacted respecting an establishment of religion or prohibiting the Free Exercise thereof." LA. CONST. art. I, § 8.

269. The Preservation of Religious Freedom Act states:

> Government shall not substantially burden a person's exercise of religion, even if the burden results from a facially neutral rule or a rule of general applicability, unless it demonstrates that application of the burden to the person is both: (1) In furtherance of a compelling governmental interest. (2) The least restrictive means of furthering that compelling governmental interest.

LA. REV. STAT. § 13:5233 (2017).

270. Gyan, Jr., *supra* note 258.

271. *Id.*

272. Joe Gyan, Jr., *Appeals Court: Woman Can Testify about What She Claims She Told Baton Rouge-area Priest in Confession about Being Sexually Abused*, ADVOCATE (Aug. 1, 2016), http://www.theadvocate.com/baton_rouge/news/courts/article_7bbd1b84-5805-11e6-a71e-73b6505534d3.html?sr_source=lift_amplify [https://perma.cc/AB2N-7BMK].

273. Gyan, Jr., *supra* note 258.

274. Mayeux v. Charlet, 203 So. 3d 1030, 1035 (La. 2016).

jury made such a finding.[275] Finally, the Court conclusively stated that a priest is not considered a mandatory reporter while administering a sacramental confession because the tenets of the Catholic Church dictate that priests are bound by religious duty to keep these communications confidential.[276]

C. Charlet *Brings out the Dark Side of the Confessional Privilege*

Under Louisiana's Preservation of Religious Freedom Act, the state must burden Free Exercise in the least restrictive way necessary to carry out its compelling interest.[277] The sequence of events in *Charlet* exhibits how confessional shields can result in the failure to adequately pursue identification and prevention of child abuse. Bayhi's reported concealment of abuse and alleged insistence that Mayeux deal with the problem herself and "sweep [the abuse] under the floor" had the opposite result of the legislation's intended goal.[278] Because Bayhi allegedly refrained from reporting, law enforcement and Mayeux's parents remained unaware of the abuse long enough for Charlet's actions against Mayeux to persist and escalate.[279]

Bayhi's alleged actions—or more appropriately, inactions—are reminiscent of the misguided leadership of the Archdiocese of Boston in the Spotlight scandal—in which local Church authorities concealed the serial sexual abuse of several priests, allowing the priests to continue harming children in various church parishes for decades.[280] Mayeux's petition in the *Charlet* lawsuit states that her abuse continued and worsened following Bayhi's failure to report.[281] In fact, the most horrific instance of abuse alleged in Mayeux's petition—when Mayeux confronted Charlet in his private office only to be forced onto a sofa and aggressively kissed and groped—occurred after Mayeux's reported confessions to Bayhi.[282]

Furthermore, Mayeux testified in her deposition that she did not comprehend the nature of the sacrament of Confession and did not desire

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275. *Id.*
276. *Id.* at 1040.
277. LA. REV. STAT. § 13:5233 (2017).
278. Parents of Minor Child v. Charlet, 135 So. 3d 724, 726 (La. Ct. App. 2013); LA. CHILD. CODE art. 601 (2017).
279. Petition for Damages, *supra* note 230, at 4.
280. Rezendes, *supra* note 95.
281. Parents of Minor Child v. Charlet, 135 So. 3d 1177, 1179 (La. 2014).
282. Petition for Damages, *supra* note 230, at 5.

for Bayhi to keep the communication a secret.[283] *Charlet* demonstrates how children cannot be expected to understand the intricacies of state law and canon law and may have no idea that a priest has both a clerical duty to refrain from reporting and a legal avenue to support his refusal to report.[284]

Charlet also has entangled Louisiana courts in the interpretation of religious doctrine by delegating to the jury the role of determining whether confessions per se occurred between Bayhi and Mayeux.[285] If the law required clergy to report abuse regardless of church doctrine, there would be no need for courts to concern themselves with the particulars of canon law; rather, the only inquiry would be whether a clergy member had knowledge of ongoing or imminent child abuse and, if so, whether he willfully refrained from reporting the information to the authorities.[286] If the privilege were abrogated, the classification of the confession in *Charlet* under the doctrines of Catholicism would be irrelevant. Finally, abrogation of the privilege could still fulfill the Preservation of Religious Freedom Act's narrow tailoring requirement because the Children's Code only compels reporting if the mandatory reporter has reason to believe the child's well-being is in immediate danger.[287]

D. The Dilemma of Forcing a Catholic Priest to Reveal a Private Confession

The Catholic Church's principal argument for maintaining the clergy-penitent privilege goes to the very existence of Confession: the sacrament would be rendered useless if the element of secrecy were jeopardized.[288] In *Philips*, the court summed up these fears by observing that if not for the "strict and perpetual silence" of the sacrament, Confession would be "wholly neglected and abandoned."[289] The court further noted that no sinner would possess the willingness to divulge his deepest and most

283. Heidi Kinchen, *U.S. Supreme Court Allows Lawsuit to Continue against Baton Rouge Priest over Claim Parishioner Kissed, Fondled Teen: Supreme Court Passes on Confession Issue*, ADVOCATE (Jan. 25, 2015), http://www.theadvocate.com/baton_rouge/news/article_5972e10c-d95b-5f2a-b509-d05d4f0f75c9.html [https://perma.cc/N2MU-LNGG].

284. *See* 1983 CODE c.1388, § 1; *see also* LA. CHILD. CODE art. 603(17)(c) (2017).

285. *Charlet*, 135 So. 3d at 1180.

286. LA. CHILD. CODE art. 609(A)(2); LA. REV. STAT. § 14:403(A)(1)(a) (2017).

287. LA. CHILD. CODE art. 609(A)(1).

288. *Privileged Communications*, *supra* note 52, at 207.

289. SAMPSON, *supra* note 52, at 5, 8–12.

shameful secrets to a clergy member at full liberty to disclose this information.[290]

Now that the Louisiana Supreme Court has declared Mayeux free to testify about her own confession, Bayhi faces a dilemma. Though Mayeux's attorney clarified that he does not plan on calling Bayhi as a witness at trial, the situation presents a complicated scenario of divided loyalties.[291] If Bayhi were called to testify, the first problem he would face is the choice between his civic duty to speak truthfully and comprehensively on the witness stand and his religious duty to remain silent. If Bayhi refuses to break the seal of confession, he could be held in contempt of court for failure to cooperate as a witness.[292]

Bayhi additionally faces a choice between preservation of self and preservation of the seal of confession. If Bayhi refuses to testify on his own behalf, the jury will be left with only Mayeux's version of events.[293] If her testimony is convincing, the jury may render a costly verdict against Bayhi and the Diocese. Absent the religious barrier to testifying, Bayhi likely would benefit from taking the witness stand to give his side of the story and contest Mayeux's accusations before the jury. When the case goes to trial and Mayeux takes the witness stand, Bayhi will be situated in "the legally untenable position of having to accept her version of events or break the seal and face automatic excommunication."[294] Bayhi's mandate to remain silent ties his hands and leaves him at the jury's mercy without a viable means to defend himself.[295]

Despite the inequitable situation, the Diocese stated that in the event Bayhi were compelled to testify, he would accept court-imposed punishment rather than violate the seal of confession.[296] If the hardline stance of Bayhi and the Diocese are any indication, abrogation of the clergy-penitent privilege—though constitutionally sound—will do little to further the compelling state interest of protecting children. As long as Catholic doctrine deems the confessional seal absolute, no drafting of the

290. *Id.*

291. Gyan, Jr., *supra* note 258.

292. Thomas Reese, *Seal of Confession on the Court Docket*, NAT'L CATHOLIC REPORTER (Feb. 13, 2015), https://www.ncronline.org/blogs/faith-and-justice/seal-confession-court-docket [https://perma.cc/56SR-V4W7].

293. *See* Julie Love Taylor, Parents of Minor Child v. Charlet*: A Threat to the Sanctity of Catholic Confession?*, LA. L. REV.: LAGNIAPPE (Oct. 22, 2014), https://lawreview.law.lsu.edu/2014/10/22/parents-of-minor-child-v-charlet-a-threat-to-the-sanctity-of-catholic-confession/ [https://perma.cc/5SW7-VE5S].

294. Reese, *supra* note 292.

295. *See* Taylor, *supra* note 293.

296. CATHOLIC NEWS SERVICE, *supra* note 16.

law will compel priests—at least the priests that comply strictly with canon law—to break confidence and report information learned during Confession, even at the risk of civil liability or criminal punishment.[297]

E. Carrying out Compelling State Interests While Maintaining Sacramental Integrity

Charlet is just another flashpoint in the Catholic Church's history of failure to address adequately the epidemic of sexual abuse of children. The interpretation of the confessional seal as an ironclad doctrine of confidentiality acts as a seemingly insurmountable obstacle to the reporting of abuse allegations heard within the confessional. A closer look at the text of canon law and increased efforts within the Catholic Church to train priests in dealing with abuse, however, may allow for the furthering of compelling state interests while maintaining the integrity of the sacrament of Confession.

1. Penitent Waiver of the Clergy-Penitent Privilege

The Louisiana Supreme Court held that Mayeux's desire to testify about her confession constitutes a valid waiver of the clergy-penitent privilege despite the objections of Bayhi and the Diocese.[298] The court based its decision on the Code of Evidence which states that the penitent, not the clergy member, holds the privilege.[299] A penitent's waiver of privilege may be valid under the Catholic Church's understanding of the seal of confession as well.[300]

Under canon law, "[t]he sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor *to betray in any way a penitent* in words or in any manner and for any reason."[301] Canon law states that a priest must not betray the sinner, but if the penitent waives the seal of confession and desires to testify about her confession, the potential for betrayal is no longer present. Canon law also provides that "[a] confessor is prohibited completely from using knowledge acquired from confession *to the detriment of the penitent* . . . ."[302] If Bayhi testified about Mayeux's confession he would not cause her any harm; on the contrary, any

297. 1983 CODE c.983, § 1.
298. Parents of Minor Child v. Charlet, 135 So. 3d 1177, 1180 (La. 2014).
299. LA. CODE EVID. art. 511 (2017).
300. Dexter S. Brewer, *The Right of a Penitent to Release the Confessor from the Seal: Considerations in Canon Law and American Law*, 54 JURIST 424, 454 (1994).
301. 1983 CODE c.983, § 1 (emphasis added).
302. *Id.* at c.984, § 1 (emphasis added).

information he could offer about the alleged abuse could only aid Mayeux and her lawyers in cross-examination and give the jury a more complete body of testimony for deliberation purposes.

Thomas Reese, a canonist and Jesuit priest, argues that "the weight of theological and canonical opinion supports the right of penitents to allow their confessor to reveal what they told him in confession."[303] According to Reese, many canonists believe clergy should be permitted to testify if a penitent desires to openly discuss his or her confession.[304] Father Dexter Brewer, a theological scholar, also addressed the validity of penitent waiver:

> The seal [of confession] has a very definite purpose. When the reasons for the seal—i.e., protection of the penitent from betrayal and protection of the sacrament and the faithful from scandal—dissipate because of the penitent's release, then the seal no longer presents a barrier to the priest's extra-sacramental communication.[305]

Now that Mayeux has publicly declared her sexual abuse by voluntarily filing a lawsuit and electing to testify, the element of confidentiality that the seal of confession is designed to protect no longer exists and Bayhi should thus be free to speak openly about the confessions.

Penitent waiver of the clergy-penitent privilege makes logical sense if a victim confides in a priest. The reasoning is ineffectual, however, if the abuser confesses his actions because, unless the abuser voluntarily asks the priest to report the crimes, a priest who incriminates his own penitent surely brings about detriment and betrayal.[306] Consequently, much like the states weigh compelling interests against Free Exercise violations, 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.

The Church should weigh its own history of sexual abuse in reconsidering its stance. These scandals not only harm the reputation of the Church, they also cost a great deal of money. A study performed by the National Catholic Reporter found that over the past 65 years the Catholic Church in the United States incurred almost four billion dollars

303. Reese, *supra* note 292.
304. Jenkins, *supra* note 89.
305. Brewer, *supra* note 300, at 454.
306. *See* 1983 CODE c.983, § 1; c.984, § 1.

in costs arising out of lawsuits alleging the abuse of children by priests.[307] This figure incorporates amounts spent on litigation and settlements as well as money spent on training and background checks for priests and therapy for victims of abuse.[308] Though *Charlet* does not involve an abusive priest, Bayhi's supposed failure to disclose Mayeux's abuse has the potential to inflict a sizeable financial toll on the Church, in light of the Mayeuxs' naming of the Diocese as a co-defendant in the lawsuit.[309] Based on the already substantial amount spent on suits alleging the abuse of children by priests, the Church should be wary of positioning itself for a new round of high-profile, high-dollar litigation against priests refusing to report child abuse. Reinterpreting canon law to prioritize child protection over absolute confidentiality would eliminate the threat of excommunication, thus encouraging priests to report any suspicions of child abuse heard in the confessional. Such a policy would also emphasize a commitment to protection of the Church's most vulnerable members.

2. Institutional Changes Within the Priesthood to Encourage Reporting of Abuse

According to Father Peter Finney III of the Archdiocese of New Orleans, Catholic leadership is unlikely to create caveats in canon law for the protection of minors.[310] If the Church declines to reinterpret the confessional seal, it still can strive to better respond to allegations of sexual abuse within the confessional. Finney noted that in order to take a more active role, priests first need to comprehend the gravity of abuse situations and the reluctance of child victims to come forward.[311] Priests also must be trained to strongly urge penitents to report their abuse to the authorities and avoid discouraging or shaming victims into silence, the scenario alleged in *Charlet*.[312] Finney stated that of all the training priests receive for administering Confession, "the most important skill is to see what is confessed through the eyes of the penitent."[313] Finney said that priests must

307. Jack & Diane Ruhl, *NCR Research: Costs of Sex Abuse Crisis to US Church Underestimated*, NAT'L CATHOLIC REPORTER (Nov. 2, 2015), https://www.ncronline.org/news/accountability/ncr-research-costs-sex-abuse-crisis-us-church-underestimated [https://perma.cc/M5E8-QGKG].

308. *Id.*

309. Parents of Minor Child v. Charlet, 135 So. 3d 1177, 1178 (La. 2014).

310. E-mail from Fr. Peter Finney III, Adm'r, St. Rita Catholic Church in New Orleans, LA, to author (Jan. 17, 2017, 18:45 CST) (on file with author).

311. *Id.*

312. Parents of Minor Child v. Charlet, 135 So. 3d 724, 726 (La. Ct. App. 2013).

313. Finney, *supra* note 310.

treat the information entrusted to them with the utmost seriousness and take every effort to emphasize the magnitude of abusive situations to penitents reluctant to come forward.[314]

Finney stated that priests also can attempt to obtain a penitent's consent to engage in a conversation outside of the confessional while making absolutely clear the nature of the seal of confession and additionally addressing the priest's need to leave the realm of absolute confidentiality to provide proper assistance.[315] If the penitent agrees, Finney said a priest would need to establish the facts of abuse independently and cannot supply them from the information learned in the confessional.[316] Finney acknowledged that the priest treads a fine line here, but clergy need not be completely passive in the conversation and can ask questions appropriate to any normal counseling meeting.[317]

Finally, priests can detect signs of abuse outside of the confessional to gain knowledge that will trigger their duty to report and avoid breaking the seal of Confession.[318] Finney reiterated that priests can only use information learned outside of the confessional but stated that priests have a moral duty as "invested observers" to ensure that all church-related encounters are healthy and safe.[319] Thus, if a priest noticed evidence of abuse in his daily ministry, he could start asking questions.[320] In the event a person accuses the priest of using his confessional knowledge to investigate further, the priest must strongly emphasize that his outside observations alone initiated the concern.[321] If Catholic priests take note of Finney's suggestions to take a less passive and more proactive role in observing signs of child abuse, the *Charlet* scenario can be avoided in the future.[322] His advice also

314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*
322. *Mayeux v. Charlet* Update: On September 27, 2017, Judge Mike Caldwell ruled that a jury cannot consider what Rebecca Mayeux told Father Jeff Bayhi inside the confessional. According to Caldwell, the determination of whether or not a confession per se occurred is an interpretation of church law that is outside the jurisdiction of civil courts. Furthermore, Caldwell noted that courts cannot interfere in the tenets of the Catholic Church. Mayeux's attorney, Brian Abels, likely will seek review of Caldwell's decision with the Louisiana First Circuit Court of Appeal. *See* Joe Gyan, Jr., *Baton Rouge judge: Court doesn't have jurisdiction over Catholic Church confessional issue*, ADVOCATE (Sept. 27, 2017, 11:50 AM), http://www.theadvocate.com/baton_rouge/news/courts/article_9046

demonstrates that there is in fact a way for priests to carry out their roles as mandatory reporters in a robust manner, while still maintaining the integrity of the seal of confession.

CONCLUSION

Abrogation of the clergy-penitent privilege in the context of confidential communications is constitutional because the compelling state interest of protecting children outweighs the narrow infringement upon the religious rights of clergy. A change in the law may have only a limited effect on Catholicism as long as priests continue to place canon law ahead of their legal duty to report. Imposing legal accountability on priests would send a strong message to the Catholic Church that perhaps it should reevaluate its absolute stance on the seal of confession. If the Church declines to reassess established doctrines of confidentiality, however, it must still make every effort to train its priests to discover information related to abuse outside of Confession that will trigger their duty to report and to encourage suspected victims of abuse to engage in extra-sacramental communications.

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81d0-a39f-11e7-82b3-17bca84c3dea.html [https://perma.cc/FWR7-VGSE. At the date of this Comment's publication, the case still has yet to go to trial.

* J.D./D.C.L., 2018, Paul M. Hebert Law Center, Louisiana State University. This Comment is dedicated to my parents, Elizabeth and Frank Donze, and my late grandfather, Peter Finney, all of whom dedicated their lives to the field of journalism. The three of them fostered my love and appreciation for good writing throughout my life. Thanks also to my cousin, Father Peter Finney III, for providing a priest's perspective on the seal of confession. Many thanks to Professor Margaret Thomas for sending me the *Advocate* article that sparked this Comment and for her constructive feedback throughout the writing process. Finally, thank you to Professor Michael Coenen for his guidance on the constitutional issues addressed in this Comment.