

5-1-2009

## Confession and Mandatory Child Abuse Reporting: A New Take on the Constitutionality of Abrogating the Priest-Penitent Privilege

Samuel G. Brooks

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>

 Part of the [Criminal Law Commons](#), [Juvenile Law Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

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 (2013).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol24/iss1/5>

This Comment is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## Confession and Mandatory Child Abuse Reporting: A New Take on the Constitutionality of Abrogating the Priest-Penitent Privilege

There are few crimes that invoke more outrage and disgust than the abuse of children. Children are so innocent and helpless, and child abuse has such great potential for harm both to the child and to her<sup>1</sup> future contribution to society, that it is impossible to justify any tolerance for such vicious behavior. It should follow, then, that laws that serve to reduce the incidence of child abuse or bring its perpetrators to justice would be supported wholeheartedly. However, one set of statutes aimed at combating this pervasive evil comes into direct conflict with another important social value—the privilege and, as I argue, the right of individuals to communicate in confidence with spiritual advisors.

All fifty states have adopted by statute an evidentiary privilege that protects certain communications made to clergy. Each of those states also has statutes requiring certain classes of people, at risk of criminal sanction, to report known or reasonably suspected child abuse. Several of these statutes include clergy among the mandatory reporters,<sup>2</sup> creating the possibility of a conflict between the duty to report and the obligation not to reveal confidential communications. While certain statutes relieve clergy of their reporting duty when it would conflict with a duty of confidentiality protected by privilege, others do not address the issue and a few explicitly abrogate the privilege.<sup>3</sup> In this Comment I discuss the constitutional concerns with abrogation of the priest-penitent privilege, also known as the clergy-communicant privilege, in the context of child abuse reporting and argue that state statutes allowing a wholesale abrogation of the privilege unconstitutionally burden the free exercise rights of clergy who have a religious duty to keep communications confidential. While narrower reporting statutes may pass constitutional scrutiny, I conclude that those which require an affirmative violation of religious beliefs impermissibly burden free exercise rights. Narrowly tailored reporting statutes would serve the states' interests in protecting

---

1. Needless to say, both male and female children may be subjects of abuse. Similarly, both men and women may abuse or neglect children and both men and women may work as spiritual counselors. Thus, when I use gendered terms or pronouns in this paper, it is for convenience only and should not be read to reinforce gender stereotypes.

2. See discussion *infra* Part II.B.

3. See discussion *infra* Part II.B.

children and detecting crime without commanding clergy to violate their religious beliefs.<sup>4</sup>

This Comment proceeds in three parts. Part I summarizes the history and justification of confidentiality privileges and the constitutional basis of the priest-penitent privilege. Part II reviews the U.S. Supreme Court's free-exercise jurisprudence and identifies the constitutional implications of reporting statutes that abrogate the priest-penitent privilege. Part III argues that broad abrogation of the privilege unconstitutionally burdens free exercise of religion and also implicates the constitutional rights to freedom from compelled speech, freedom of association, and privacy. I conclude that, when subjected to strict scrutiny, any wholesale abrogation of the priest-penitent privilege infringes the free exercise rights of certain clergy members, particularly Catholic priests. While broad mandatory reporting statutes probably serve compelling state interests, they are not narrowly tailored to meet that interest. Rather, these statutes could be narrowly drawn to further the states' interests without burdening free exercise rights.

## I. HISTORY AND JUSTIFICATION OF THE PRIEST-PENITENT PRIVILEGE

### A. *The Social Value of Evidentiary Privileges*

Evidentiary privileges are generally creatures of statutory law, not constitutional rights. As a matter of policy, it makes sense to hold certain disclosures sacrosanct. Lawyers, for example, cannot give full and accurate legal advice unless they have access to complete information, including information that is potentially damaging to the client, and clients cannot be expected to reveal such information without a guarantee that it will be kept in strict confidence. While the attorney-client privilege may be said to inhibit the truth-seeking process by keeping relevant information hidden from judges and juries, society's interest in ensuring that all individuals have full and uninhibited access to legal counsel outweighs competing concerns. Indeed, any benefit to the truth-seeking process by allowing disclosure would quickly evaporate as clients simply refused to disclose any potentially damaging information.<sup>5</sup>

---

4. I reiterate that child abuse cannot be justified and that the state should be vigorous in its prevention and punishment. I hope no one will read my argument as an endorsement of any practice that would endanger children.

5. *See, e.g., Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1997) ("In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. *See Jaffee v. Redmond*, 518 U.S. 1, 12 (1996); *Fisher v. United States*, 425 U.S. 391, 403 (1976). This is true of disclosure before and after the client's death. Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all, so

Similar justifications can be made in support of other privileges.<sup>6</sup> Medical practitioners and psychological counselors cannot adequately treat patients without full information, and preservation of life and health outweigh concerns that keeping medical confidences might obscure public knowledge of the truth. Spouses are considered important confidantes and holders of a sacred trust; any benefits gained by requiring spouses to testify against each other would be tainted by the violence done to one of society's most valuable relationships.<sup>7</sup> Finally, clergy-communicant privileges encourage individuals to seek spiritual guidance as a source of comfort and positive direction in their lives.<sup>8</sup> In light of the sensitive personal information that often must be revealed to receive spiritual advice, society's goal of encouraging the exercise of religious duty could not be fully achieved without guarantees of confidentiality. While it might be contended that encouraging religious exercise in this way crosses some line separating church and state,<sup>9</sup> the existence of a statutory clergy-communicant privilege in every state suggests that at least some form of the privilege is socially desirable.

These privileges, however, have limits. For example, lawyers' duties of confidentiality may give way to other ethical duties, such as preventing reasonably certain death or substantial bodily harm.<sup>10</sup> And a psychotherapist's duty of confidentiality may be superseded by a duty to

---

the loss of evidence is more apparent than real. In the case at hand, it seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged.”)

6. The psychotherapist privilege, in particular, has been justified by the Supreme Court by reference to the fear that its absence would chill full and frank disclosure. *Jaffee v. Redmond*, 518 U.S. 1, 11–12 (1996) (“If the [psychotherapist] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken ‘evidence’ will therefore serve no greater truth-seeking function than if it had been spoken and privileged.”).

7. *See, e.g., State v. Christian*, 841 A.2d 1158, 1172–73 (Conn. 2004) (discussing the common law basis for the marital privilege).

8. *See, e.g., State v. Potter*, 478 S.E.2d 742, 755 (W. Va. 1996) (“[The clergy-communicant privilege] promotes the desirability of securing unhampered the exercise of the religious duty and discipline of confession . . . .”); *People v. Edwards*, 248 Cal. Rptr. 53, 55–56 (Cal. Ct. App. 1988), *cert. denied*, 109 S. Ct. 1158 (1989) (“Justification for the privilege is grounded on societal interests in encouraging penitential communication and the development of religious institutions by securing the privacy of the penitential communication.”).

9. *See, e.g., Rena Durrant*, Comment, *Where There's Smoke, There's Fire (And Brimstone): Is it Time to Abandon the Clergy-Penitent Privilege?*, 39 LOY. L.A. L. REV. 1339, 1362–63 (2006). In spite of these arguments, no court has ever invalidated a clergy-communicant privilege statute as an establishment of religion.

10. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2008). Rule 1.6 also allows the lawyer to reveal confidential information when the lawyer's services have been used to commit a crime or fraud, when the lawyer seeks legal advice for himself, when necessary in controversies between the lawyer and the client, and when necessary to comply with other law or a court order. *Id.*

warn identifiable targets of patient violence.<sup>11</sup> Whether such limitations are wise is arguable, but surely the state can limit the scope of confidentiality privileges that are not mandated by constitutional rights.<sup>12</sup> The priest-penitent, or clergy-communicant, privilege, however, is unique in that the duty of confidentiality may be religiously mandated and, therefore, the clergy member may be entitled to protection from compelled disclosure of certain communications as a fundamental human right.<sup>13</sup>

Perhaps one of the most obvious examples of a religion that could claim constitutional protection of the clergy-communicant privilege is the Roman Catholic Church. The Roman Catholic Church has included penance among its sacraments since ancient times, and the duty of priests to keep confessions sacred has been part of official canon law since the Lateran Council of AD 1215.<sup>14</sup> Today, the Seal of Confession is codified in canons 983 and 984 of the Code of Canon Law.<sup>15</sup> These canons prohibit the use of information learned in confession for any reason, even if secular law requires it.<sup>16</sup> Violation of the Seal is punishable by excommunication,<sup>17</sup> the Church's most severe penalty. For Catholic clergy, then, the duty of confidentiality transcends human law because

---

11. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 341–42 (Cal. 1976). *But see*, *Boynton v. Burglass*, 590 So. 2d 446, 450–51 (Fla. 1991) (“Requiring a psychiatrist to breach [the psychiatrist-patient] privilege in order to warn a third party would inhibit the free expression vital to diagnosis and treatment and would, thus, undermine the very goals of psychiatric treatment.”).

12. As I indicate below, there may be meritorious arguments that other privileges, in fact, *are* mandated by the Constitution. For example, it might be argued that a right to privacy in the marital relationship requires a marital privilege. Perhaps the Sixth Amendment's guarantee to effective assistance of counsel requires some form of the attorney-client privilege. There could also be constitutional concerns if statutory limitations to the privilege were imposed retroactively. All of these questions, however, fall outside the scope of this Comment.

13. While the privilege may belong to the communicant and not the clergy member, this Comment focuses on the rights of the clergy member because in the priest-penitent privilege context the religious duty binds the clergy, not the penitent and, therefore, it is the clergy member's religious exercise rights that are implicated rather than the penitent's.

14. Anthony Cardinal Bevilacqua, *Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L.A. L. REV. 1733, 1734 n.4 (1996).

15. 1983 CODE c.983, §§ 1–2 (“Can. 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. §2. The interpreter, if there is one, and all others who in any way have knowledge of sins from confession are also obliged to observe secrecy.”); 1983 CODE c.984, §§ 1–2 (“Can. 984 § 1. A confessor is prohibited completely from using knowledge acquired from confession to the detriment of the penitent even when any danger of revelation is excluded. § 2. A person who has been placed in authority cannot use in any manner for external governance the knowledge about sins which he has received in confession at any time.”).

16. *See* THE CANON LAW LETTER & SPIRIT: A PRACTICAL GUIDE TO THE CODE OF CANON LAW 536 (Rt Rev. Mgr Gerard Sheehy et al. eds., 1995) [hereinafter CANON LAW COMMENTARY] (“One certain principle which emerges from Cann. 983–984 is that information gained in the confessional should be regarded as not having been gained at all and, in so far as is humanly possible, should not *ever* be acted on or spoken of *in any way*.”).

17. *Id.* at 799.

violation has the potential to put a priest's very soul in jeopardy. For these priests, the claim of right to keep certain confidences inviolate transcends any prudential concerns: it stems from a duty to their God.

### B. History of the Clergy-Communicant Privilege

While the exact roots of the clergy-communicant privilege have been disputed, it is generally accepted that the privilege was not recognized in the English Courts of Law.<sup>18</sup> In America, the first reported case recognizing a privilege is *People v. Phillips*, decided by the New York Court of General Sessions in 1813.<sup>19</sup> In *Phillips*, a Catholic priest refused to identify persons who had delivered to him stolen goods for the purpose of restoring them to their rightful owner.<sup>20</sup> The priest refused to testify because he had learned their identity in connection with the sacrament of penance.<sup>21</sup> Interestingly, in finding the pastor's testimony inadmissible, the court did not justify its decision by reference to public policies favoring privilege, but rather based its reasons on the New York Constitution.<sup>22</sup> The Court declared:

It is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected. . . . Secrecy is of the essence of penance. The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed: . . . what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman [C]atholic religion would be thus annihilated.<sup>23</sup>

The constitutional underpinnings of *Phillips* were further highlighted four years later in *People v. Smith*.<sup>24</sup> In that case, a New York court

---

18. See, e.g., Spencer Weber Waller & Natasha Leigh Chefetz, *Clergy Privilege in Civil and Criminal Litigation*, in RELIGION & AMERICAN LAW: AN ENCYCLOPEDIA 89, 89–90 (Paul Finkelman ed., 2000). For an excellent discussion of the development of the priest-penitent privilege and argument that it did have roots in the common law, see A. Keith Thompson, Religious Confession Privilege at Common Law: A Historical Analysis (Aug. 2006) (unpublished Ph.D. thesis, Murdoch University (Aust.)), <http://www.lib.murdoch.edu.au/adt/browse/view/adt-MU20070831.94056>.

19. *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813), reported in WILLIAM SAMPSON, ANTHONY KOHLMANN, JACQUES VANIEÈRE, THE CATHOLIC QUESTION IN AMERICA (New York, Edward Gillespy 1813), *judicial opinion reprinted in Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955). The case was reported by William Sampson, who served as counsel at trial. See SAMPSON, KOHLMANN, & VANIEÈRE, *supra* at Title Page.

20. SAMPSON, KOHLMANN, & VANIEÈRE, *supra* note 19, at 5–6.

21. *Privileged Communications to Clergyman*, *supra* note 19, at 199–200.

22. *Id.* at 207.

23. *Id.*

24. *People v. Smith* (N.Y. Ct. of Oyer and Terminer and Gaol Delivery, 1817), reprinted in *Privileged Communications to Clergymen*, *supra* note 19, at 209–13.

refused to exclude testimony of a protestant minister regarding confessions made to him “as a minister of the gospel.”<sup>25</sup> The defense counsel, citing *Phillips*, argued that it would be dangerous to “permit a witness . . . to divulge a communication which must, undoubtedly, have been made, and ought to have been received, in the strictest confidence.”<sup>26</sup> The judge, however, “took 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 minister of the gospel in confidence, merely as a friend or adviser,” and allowed the minister to testify.<sup>27</sup> The public policy justifying the protection of confidential communications to spiritual advisers would certainly have applied in this case, as the defendant’s counsel pointed out. However, a broader privilege had not yet been adopted by statute in New York and, since the minister was willing to testify,<sup>28</sup> free exercise concerns did not apply. Thus, in America, the priest-penitent privilege was initiated by the courts, who strictly limited the privilege to circumstances where a constitutional guarantee required it.

While the task of defining the contours of the privilege in America began with courts, legislatures quickly took on that task. In 1828, the New York legislature codified the privilege: “No 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.”<sup>29</sup> In theory, this statute expanded *Phillips* so that the privilege encompassed confessions without respect to denominations, rather than limiting it to confessions to Catholic priests. However, the minister in *Smith* would almost certainly still have been allowed, and probably could have been compelled, to testify under the statute since it appeared that he did not receive the confession “in the course of discipline enjoined by the rules” of his church.<sup>30</sup> Since the Catholic Church was probably one of the few, if not the only, religions with a sacrament of penance requiring confidentiality, the New York statute essentially did nothing more than codify *Phillips*.

Today, all fifty states and the Federal Rules of Evidence provide a privilege protecting certain confidential communications to clergy.<sup>31</sup>

---

25. *Id.* at 210–11.

26. *Id.*

27. *Id.* at 211.

28. *Id.*

29. *Privileged Communications to Clergymen*, *supra* note 19, at 213 (citing N.Y. REV. STAT. 1828, Pt. 3, c. 7, tit. 3, § 72).

30. *Id.*

31. 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).

Some states have retained a narrow privilege, only recognizing it when the communication is made in the course of a church's discipline,<sup>32</sup> while others have broadened it enough to extend to all communications meant to be confidential and made to a religious leader in his or her ministerial capacity.<sup>33</sup> The majority of states fall between these extremes, requiring, for instance, that the communication be a confession or in pursuit of spiritual advice.<sup>34</sup> Interestingly, these statutes are generally not justified by reference to constitutional rights but appear to be based merely on public policy concerns.<sup>35</sup>

## II. FREE EXERCISE OF RELIGION AND THE CONSTITUTIONALITY OF MANDATORY REPORTING LAWS

### A. *The Free Exercise Jurisprudence of the Supreme Court—Employment Division v. Smith*

Today, the constitutional standard required for a law impacting the free exercise of religion is stated in *Employment Division v. Smith*.<sup>36</sup> *Smith* addressed the issue of whether state employees could be fired for their use of peyote, a hallucinogenic drug prohibited by law, in connection with a sacramental ceremony in their Native American church.<sup>37</sup> The Supreme Court held that the respondents were not entitled to an exception from the law, even if it burdened their practice of sincerely held religious beliefs.<sup>38</sup> Such laws, the Court held, pass constitutional muster as long as they are religiously neutral and generally applicable—in other words, as long as they burden religion incidentally rather than intentionally.<sup>39</sup> In deciding *Smith*, the Court reasoned that allowing anyone to claim exemption from neutral, generally applicable

---

32. See, e.g., ARIZ. REV. STAT. ANN. §§ 12-2233, 13-4062 (2007). For a thorough survey and more sophisticated classification of the various states' standards, see Abrams, *supra* note 31, at 1130–35.

33. See, e.g., CONN. GEN. STAT. § 52-146b (2007).

34. Abrams, *supra* note 31, at 1133–34.

35. See 81 AM. JUR. 2D *Witnesses* § 494 (2009) (“Justification for the clergy-penitent privilege is grounded on a societal interest in encouraging penitential communication in the development of religious institutions by securing the privacy of the penitential communication.”). But see *State v. Szemple*, 640 A.2d 817, 825–29 (N.J. 1994) (holding that New Jersey statutory privilege belongs to the clergyperson and is justified by the clergy's religious duty).

36. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1989).

37. *Id.*

38. *Id.* at 878–80.

39. *Id.* at 879. (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’ *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring).”).

laws on account of religious beliefs would effectively “permit every citizen to become a law unto himself.”<sup>40</sup>

While Justice Scalia’s opinion asserted that the Court’s decision in *Smith* was required by earlier decisions,<sup>41</sup> it effectively overruled the existing standard for the constitutionality of laws burdening religion which the Court had established in *Sherbert v. Verner*.<sup>42</sup> In that case, the Supreme Court held that South Carolina could not deny unemployment benefits simply because an individual’s religious beliefs mandated that she not work on Saturdays.<sup>43</sup> Speaking for the majority, Justice Brennan had announced that laws which burden free exercise of religion must be justified by a compelling state interest which cannot be achieved without infringing free exercise rights.<sup>44</sup>

The *Smith* court did not expressly overrule *Sherbert*, or the cases that had applied the “compelling state interest” standard, but rather distinguished them.<sup>45</sup> Justice Scalia declared that the *Sherbert* test had only been used to invalidate state action in the context of unemployment compensation and that, on other occasions, the Court had either found the test satisfied or abstained from using it.<sup>46</sup> Thus, the Court identified the unemployment cases as exceptional cases deserving of the compelling state interest test.<sup>47</sup> While the petitioners in *Smith* were seeking unemployment compensation, the Court did not apply the exception because the conduct for which they sought accommodation had been prohibited by law—a factor missing from the *Sherbert* line of cases.<sup>48</sup>

In addition to the “unemployment compensation” exception, the Court distinguished a separate group of cases, and one case in particular,<sup>49</sup> which had invalidated neutral, generally applicable laws.

---

40. *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)).

41. *Id.* at 878–82. While Justice Scalia argued that the Court’s cases required the result in *Smith*, soon after the decision was handed down Michael McConnell observed that “the primary affirmative precedent marshaled by the Court to support its decision consists *entirely* of overruled and minority positions.” Michael McConnell, *Free Exercise Revisionism*, 57 U. CHI. L. REV. 1109, 1125 (1990).

42. *Sherbert v. Verner*, 374 U.S. 398 (1962).

43. *Id.* at 410–411.

44. *Id.* at 406–07.

45. *Smith*, 494 U.S. at 883–85.

46. *Id.* at 882–85.

47. *Id.* at 884 (“[O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986))).

48. *Id.* at 876.

49. Perhaps the Court’s largest hurdle in justifying its rule in *Smith* was explaining why the popular case of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), did not require an exemption. In *Yoder*, the Court held that Wisconsin could not compel the Amish to send their children to high school in conflict with their sincerely held religious beliefs without establishing a compelling interest that

This distinction created what has become known as the Hybrid Rights exception. Justice Scalia explained:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents to direct the education of their children. Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion. And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.<sup>50</sup>

The logical basis for this distinction seems shaky at best, a problem that has been noted by scholars and judges alike. Michael McConnell observed that, according to *Wisconsin v. Yoder*, parents “have no right independent of the Free Exercise Clause to withhold their children from school, and according to *Smith* they have no such right under the Free Exercise Clause.”<sup>51</sup> McConnell thus suspected that “the notion of ‘hybrid’ claims was created for the sole purpose of distinguishing *Yoder* in this case.”<sup>52</sup>

Since *Smith*, lower courts have struggled to determine what, if anything, the Hybrid Rights exception actually provides. Ostensibly, the exception would seem to entitle free exercise plaintiffs to strict scrutiny as long as their free exercise claim also involves other rights. However, the Sixth Circuit has refused to apply the stricter standard of review, even in cases that would seem to warrant it:

[A]lthough this court in *Vandiver*, 925 F.2d at 932–33, did discuss ‘hybrid’ claims, we did not hold that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights. Such an outcome is completely illogical; therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal

---

could not be furthered in a less restrictive manner. *See id.*, at 215 (“The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”).

50. *Smith*, 494 U.S. at 881–82 (citations omitted).

51. McConnell, *supra* note 41, at 1121.

52. *Id.*

standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause.<sup>53</sup>

The Second Circuit has adopted the Sixth Circuit's reasoning<sup>54</sup> and, while other courts of appeal have acknowledged the existence of an exception, none have ever applied it.<sup>55</sup> At least one Supreme Court Justice has expressed the view that the exception is untenable,<sup>56</sup> an opinion that encouraged the Sixth Circuit's reading of *Smith*.<sup>57</sup>

The Court's ruling in *Smith* triggered public outcry and sparked congressional activity. Dissatisfied with the Court's new rule, Congress enacted the Religious Freedom Restoration Act ("RFRA"), whose stated purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened . . ."<sup>58</sup> Before long, the Supreme Court pushed back by holding RFRA unconstitutional as applied to the states in *City of Boerne v. Flores*.<sup>59</sup> Congress has since enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which reinstates the compelling interest test when certain state action funded by federal aid or connected with commerce burdens religious exercise.<sup>60</sup> The Supreme Court has upheld RLUIPA<sup>61</sup> and has applied RFRA to invalidate federal government action in a case with facts similar to *Smith*.<sup>62</sup> In general,

53. *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993).

54. *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003).

55. See Jack Peterson, *Exceptions to Employment Division v. Smith: A Need for Change*, 10 LEWIS & CLARK L. REV. 701, 710–16 (2006) (surveying court of appeals' treatment of the Hybrid Rights exception).

56. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring) ("[T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.").

57. See *Kissinger*, 5 F.3d at 180, n.1.

58. 42 U.S.C. § 2000bb(b)(1) (2008).

59. *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *City of Boerne*, the Court invalidated RFRA by reasoning that Congress had exceeded the remedial powers granted to it by the 14th Amendment. *Id.* at 529–36. In essence, the Court found that RFRA, as applied to the States, represented an attempt by Congress, not to enforce the provisions of the 14th Amendment, but rather to interpret the scope of a Constitutional right. Thus, while RFRA exceeds Congress' power when applied to the States, it is valid as applied to the federal government.

60. 42 U.S.C. § 2000cc (2008).

61. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

62. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006). Significantly, the Court not only applied the compelling interest test, but for the first time in a non-

however, unless a challenger of a state law restricting free exercise can convince a court that the Hybrid Rights exception applies, the law must only meet the *Smith* standard of neutrality and general applicability.<sup>63</sup>

*B. State Mandatory Reporting Laws and the Priest-Penitent Privilege*

Every state has a statute requiring certain individuals to report known or reasonably suspected child abuse, and all but fifteen of them include clergy on the list of mandatory reporters.<sup>64</sup> Of the thirty-five states that require clergy to report child abuse, twenty-two explicitly remove the obligation if the grounds for knowledge or suspicion is privileged information.<sup>65</sup> Seven states are silent on the statutes' application to privileged material, leaving the clergy's duty ambiguous in cases where reporting would conflict with a duty of confidentiality.<sup>66</sup> Six states explicitly abrogate the privilege.<sup>67</sup>

Texas's statute, for instance, requires any person "having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person" to immediately report their suspicions.<sup>68</sup> The requirement to report applies

*without exception* to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional, and an employee of a clinic or health care facility that provides reproductive services.<sup>69</sup>

---

unemployment compensation case, found the government to have failed to establish a compelling interest—the Court held that the government's interest in uniform application of the Controlled Substances Act did not amount to a compelling interest sufficient to justify burdening the appellees' religious practice of using a hallucinogenic tea in their religious ceremonies. *Id.* at 423.

63. This standard does require more than facial neutrality. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court struck down a law that was worded without reference to religion but was obviously aimed at suppressing religious practice. 508 U.S. 520 (1993).

64. See *Abrams*, *supra* note 31, at 1138–39.

65. *Id.* at 1139.

66. *Id.*

67. *Id.* The six states are New Hampshire, North Carolina, Oklahoma, Rhode Island, Texas, and West Virginia.

68. TEX. FAM. CODE ANN. § 261.101(a) (Vernon 1996 & Supp. 2002).

69. *Id.* § 261.101(c) (emphasis added). The Texas statute is unique (although Oklahoma also does so implicitly) in including the attorney-client privilege among those abrogated for purposes of reporting child abuse. While only Texas and Oklahoma impose a mandatory duty to report, lawyers do not have a strong argument that such a duty conflicts with their ordinary duty of confidentiality. Lawyers probably could not be disciplined even for voluntarily reporting ongoing child abuse despite their duty of confidentiality on the theory that it is necessary "to prevent reasonably certain death or substantial bodily harm." MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2008).

Texas not only abrogates privileges with regard to reporting, it also does away with most privileges at trial: “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.”<sup>70</sup> The Texas Court of Appeals did not hesitate to apply these statutes in admitting testimony of a clergyman regarding a defendant’s confession to sexually abusing his three children.<sup>71</sup>

Neither the courts of Texas, nor any other state, have addressed the constitutionality of these statutes. However, those that broadly abrogate the priest-penitent privilege implicate a number of constitutional rights. For clergy with a religious duty to keep communications confidential, these laws undeniably burden their freedom to exercise their religion. The duty to report also implicates freedom from compelled speech, freedom of association, and privacy. There is considerable commentary discussing the merits of potential constitutional challenges to reporting statutes.<sup>72</sup> However, the discussion is far from closed.

### III. ABROGATION OF THE PRIEST-PENITENT PRIVILEGE AND FREE EXERCISE: INVOKING STRICT SCRUTINY THROUGH THE HYBRID RIGHTS EXCEPTION

It may seem strange to base any argument on *Smith’s* Hybrid Rights exception in light of the negative treatment it has received in the lower courts and in the scholarly literature. However, the exception has never been renounced by the Supreme Court and the cases upon which it is based have technically never been overruled. Furthermore, while a Hybrid Rights claim is by no means a sure winner, religious exercise claims can strengthen free speech or substantive due process claims<sup>73</sup> and, unless the state law is persecutory,<sup>74</sup> the Hybrid Rights exception may be the only way to challenge a law that burdens religious exercise.

---

70. TEX. FAM. CODE ANN. § 261.202 (Vernon 1996).

71. *Bordman v. State*, 56 S.W.3d 63, 67–68 (Tex. App. 2001). The *Bordman* court did not address the constitutionality of the statutes, presumably because the clergyman did not object to testifying.

72. See, e.g., Andrew A. Beerworth, *Treating Spiritual and Legal Counselors Differently: Mandatory Reporting Laws and the Limitations of Current Free Exercise Doctrine*, 10 ROGER WILLIAMS U. L. REV. 73 (2004); Julie M. Arnold, Note, “Divine” Justice and the Lack of Secular Intervention: Abrogating the Clergy-Communicant Privilege in Mandatory Reporting Statutes to Combat Child Sexual Abuse, 42 VAL. U. L. REV. 849 (2008); Caroline E. Law, Comment, *Holding Clergy Accountable: Maryland Should Require Clergy to Report Suspected Child Abuse*, 34 U. BALT. L. REV. 337, 357–60 (2005); Christopher R. Pudelski, Comment, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-Smith World*, 98 NW. U. L. REV. 703 (2004).

73. See, e.g., *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

74. Such laws, though rare, have been passed and challenged. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

Furthermore, a challenge based on a legitimate claim to the Hybrid Rights exception might encourage the Supreme Court to reconsider whether the Free Exercise Clause should, in practice, prohibit no more than laws with distinctly religious animus.<sup>75</sup>

#### A. *Seeking Relief in Federal Court*

Perhaps the reason courts have not had to consider the free-exercise implications of requiring clergy to report child abuse is that the ideal case for challenging the constitutionality of mandatory reporting statutes would have to fit very particular facts. Ideally, such a case would contemplate penitent-initiated confession to a clergy member of a denomination wherein confession and confidentiality are mandated by the church's "course of discipline," who does nothing beyond hear the confession and counsel the penitent.<sup>76</sup> The underlying suit would either be a criminal prosecution against the priest for failure to report or a civil suit seeking damages for negligence in failing to report. A suit against the abuser, where the prosecution seeks to include privileged information as evidence and the priest objects, would be largely irrelevant, because (1) the communications could actually be entered into evidence in only a small handful of states (most statutes only require the clergy to report, but preserve the privilege in proceedings) and (2) the priest would first have to risk a contempt citation to appeal the law's validity. Additionally, since the reporting statutes apply to extra-judicial circumstances, and the statutes granting privilege are worded in terms of admissibility of evidence, a challenge under these circumstances might not resolve the question of whether the privilege can be claimed to avoid *reporting* child abuse.

The chances of the ideal case occurring in the real world appear to be slim, if only because violations of the reporting law may be difficult to detect.<sup>77</sup> However, the improbability of such an ideal case could work to

---

75. Cf. Beerworth, *supra* note 72.

76. That the clergy member does not use the information beyond counseling in the confessional is an important fact. See *infra*, Part III.C.

77. Certainly, the abuser cannot be expected to volunteer evidence of his own confession and, given the clergy member's duty to keep the communication in strict confidence, evidence of the confession's occurrence would seem to be scanty at best. On the other hand, there may be scenarios where evidence of a clergy member's failure to report would arise. For instance, a victim of abuse or third party who knows about the abuse might come to his priest with the information along with a request that the priest keep the communication secret. That same individual might later sue or press charges against the priest for failure to report. This scenario has its own problems. First, it may well be that the communication in question could not be considered a "confession" within the arguably *constitutionally* protected scope of the privilege. Second, if the victim herself requests the priest to keep the communication confidential, it seems unlikely that that person would turn around and press charges against the priest for honoring the request.

a potential challenger's advantage. The Supreme Court has stated that plaintiffs seeking to contest the constitutionality of a criminal statute need not first expose themselves to actual arrest or prosecution as long as they can establish that the threat of prosecution is likely.<sup>78</sup> Assuming that a clergyman with an unqualified duty of confidentiality could prove that he had been threatened with prosecution under a state reporting statute,<sup>79</sup> he could seek a declaratory judgment in a United States federal district court that such a statute unconstitutionally burdened his right to free exercise of religion.<sup>80</sup> Bringing this kind of direct challenge would allow the applicants to avoid damaging facts that might be present in a real-life case and would also serve the purpose of isolating the constitutional issue.

### *B. Initiating Strict Scrutiny with a Hybrid Claim*

For whatever reason, no religious organization has yet brought a challenge to a mandatory reporting law that requires clergy to report child abuse in spite of a bona fide conflict with religiously mandated duties of confidentiality. If such a challenge were brought, the Court would likely apply the constitutional standard established in *Employment Division v. Smith*. An argument that these statutes are not neutral or generally applicable would almost certainly fail.<sup>81</sup> None of the statutes single out a particular religion or religious belief for a burden and, while several of them require only certain groups of professionals to report, clergy are by no means singled out for more onerous treatment. Indeed, most statutes impose reporting obligations on several classes of professionals who might discover abuse through relationships of trust, including some who normally enjoy evidentiary privileges.<sup>82</sup>

---

78. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (“In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.”).

79. The facts necessary to prove a threat of prosecution are not entirely clear, while the Court has said that a plaintiff should not be placed “between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity.” *Id.* at 462. In *Steffel*, the plaintiff actually had violated the law and been threatened with prosecution. *Id.* at 459. However, if the plaintiff and the state were to stipulate that the plaintiff actually was under threat of prosecution, a clergy member should have standing to challenge the law in federal district court.

80. The plaintiff could seek a declaratory judgment under 42 U.S.C. § 1983, which authorizes suits in equity for deprivations of Constitutional rights under color of state law. 42 U.S.C. § 1983 (2000).

81. A good argument could be made that these statutes are not substantively neutral. That is, the effect of the law is to place a heavier burden on a particular class than the rest of society. However, as Justice Souter noted in his concurrence in *The Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 561–62 (1993), the rule laid down in *Smith* requires only formal neutrality. It would be difficult to argue that any of the mandatory reporting statutes have, as their object, the suppression of religious practice.

82. These professionals include physicians, psychotherapists, teachers, and even attorneys.

Considering the neutral and general character of the laws in question, successful challenges would be possible only if the challenger can initiate heightened scrutiny. As the *Smith* Court noted,<sup>83</sup> even neutral and generally applicable laws may be invalid if they implicate constitutional concerns beyond the free exercise of religion.<sup>84</sup> Mandatory reporting statutes may fall within the Hybrid Rights exception because they involve, not only religious exercise rights, but also free speech rights<sup>85</sup> and substantive due process liberty rights.<sup>86</sup>

### 1. *Freedom of speech*

Free speech rights include not only freedom to express oneself, but also freedom to refrain from expression. This right to remain silent may be circumscribed by other concerns, such as the duty to testify in a criminal proceeding pursuant to a subpoena, without offending the Constitution. However, when compelled expression conflicts with sincerely held religious beliefs, the Hybrid Rights exception suggests that the state must yield unless it can demonstrate a narrowly tailored, overriding state interest.

In the landmark case, *West Virginia Board of Education v. Barnette*, the Supreme Court held the Board of Education's refusal to exempt Jehovah's Witnesses from flag salute ceremonies unconstitutional.<sup>87</sup> The Jehovah's Witness children refused to salute the flag, claiming that it represented an "image" and that saluting it would constitute a violation of a biblical commandment forbidding the worship of images.<sup>88</sup> The Court concluded that compulsory observance of a flag ceremony constituted "compulsion . . . to declare a belief."<sup>89</sup> Such an "involuntary affirmation could be commanded only on even more immediate and

---

States that require all persons to report regardless of privileges would abrogate the marital privilege as well.

83. Though, perhaps, disingenuously. See discussion *supra* Part II.A.

84. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881–82 (1989). While I believe this issue is the prime example of a case that would qualify for the "hybrid-rights" exception, I must admit that the exception's actual practical viability remains untested and has been brought into serious doubt. See Beerworth, *supra* note 72, at 80–81 (2004).

85. In establishing the exception, the *Smith* court specifically identified free speech cases that concerned free exercise—*Wooley v. Maynard*, 430 U.S. 705 (1977) and *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). *Smith*, 494 U.S. at 882.

86. While substantive due process rights were not included in the list of hybrid cases contemplated by *Smith*, the Court in that case did invite the possibility of the combination of novel constitutional claims. *Smith*, 494 U.S. at 882 ("[I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984))).

87. 319 U.S. 624 (1943).

88. *Id.* at 629.

89. *Id.* at 631.

urgent grounds than [the clear and present danger standard required to justify censorship].”<sup>90</sup>

Another Supreme Court case, *Wooley v. Maynard*, reaffirmed *Barnette* by invalidating a New Hampshire law requiring the state motto, “Live Free or Die,” to be displayed on the license plates of noncommercial vehicles.<sup>91</sup> The Maynards, followers of the Jehovah’s Witness faith, found the motto “repugnant to their moral, religious, and political beliefs” and covered the words on their license plate in violation of the statute.<sup>92</sup> The Court considered whether “the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public” and held that it could not.<sup>93</sup>

While the situations are not identical, mandatory reporting statutes compel speech in ways that are similar to the statutes struck down in *Barnette* and *Wooley*. As in *Barnette*, the law requires individuals to affirmatively violate a sincerely held religious belief by forcing them to engage in expression which their religion forbids. And, going beyond *Wooley*, compliance with the law is more than morally repugnant—it places these individuals in fear of removing themselves from favor with God. Indeed, the duty of keeping confidences is strong enough that individuals are willing to suffer physical punishment rather than breach their duty.<sup>94</sup>

---

90. *Id.* at 633.

91. *Wooley v. Maynard*, 430 U.S. 705 (1977).

92. *Id.* at 707–08.

93. *Id.* at 713.

94. *See, e.g., In re Williams*, 152 S.E.2d 317, 321 (N.C. 1967) (“REVEREND WILLIAMS: I will not testify in this case under any circumstances.”); CANON LAW COMMENTARY, *supra* note 16, at 535 (“Put simply, the priest is strictly forbidden to reveal by any means whatever anything the penitent may have disclosed to him.”). In the early New York case, *People v. Phillips*, discussed above, the priest objecting to testimony explained his position to the court thus:

Were I summoned to give evidence as a private individual . . . and to testify from those ordinary sources of information from which the witnesses present have derived theirs, I should not for a moment hesitate, and should even deem it a duty of conscience to declare whatever knowledge I might have; as, it cannot but be in the recollection of this same honorable Court, I did, not long since, on a different occasion, because my holy religion teaches and commands me to be subject to the higher powers in civil matters, and to respect and obey them. But 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. In fine, I should render myself guilty of eternal damnation.

SAMPSON, KOHLMANN & VANIEÈRE, *supra* note 19, at 8–9.

On the other hand, arguments could be made that mandatory reporting requirements are distinguishable from the laws struck down in *Barnette* and *Wooley*. For instance, the plaintiffs in both *Barnette* and *Wooley* based their complaints on the grounds that the laws compelled them to express a belief or publicly endorse a particular ideological message. Mandatory reporting laws, on the other hand, simply compel the disclosure of facts.<sup>95</sup> It is uncontroversial that the state can compel disclosure of certain facts, even absent the issuance of a subpoena—for instance, every taxpayer knows that the state does not need to obtain a subpoena to compel them to disclose their income in a tax return.

However, there is no *per se* rule that the state may always compel speech when it only requires disclosure of facts. In *Riley v. National Federation of the Blind of North Carolina*, the Supreme Court held that a compelled disclosure of facts, such as the amount of funds collected by a charity fundraiser that would actually be turned over to charity, constituted compelled speech subject to strict scrutiny.<sup>96</sup> The Court declared that its earlier compelled speech cases, such as *Barnette* and *Wooley*, were based on the principle that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”<sup>97</sup> The compelling state interests implicated by laws that require witnesses to testify or taxpayers to report their income are, perhaps, simply so obvious that their constitutional propriety cannot be questioned. Requiring other factual disclosures, however, cannot always be so easily justified.

Thus, as long as the individual would not otherwise make the statement, even compulsion to disclose facts interferes with this freedom of mind and, therefore, falls within the protections of the First Amendment.<sup>98</sup> The disclosures required by mandatory reporting laws, therefore, would also fall within those protections. Of course, simply because the compelled speech merits First Amendment protection does not mean the state cannot compel it. Rather, it means that the courts must review the statute with strict scrutiny. Perhaps the state would succeed in demonstrating a compelling state interest and narrow tailoring on the speech claim. But if the presence of a serious free speech claim initiates the Hybrid Rights exception, then the challenger will have succeeded in obtaining strict scrutiny for the free exercise claim as well.

---

95. Many reporting laws do actually invoke a reporting duty when there is a “reasonable belief” that a child is being abused. It seems fairly obvious that this type of “belief” is different in kind from the type contemplated in *Barnette* and *Wooley*.

96. See, e.g., *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 795–801 (1988) (applying strict scrutiny and invalidating a North Carolina law that compelled charity fundraisers to disclose in their solicitations facts such as the amount that would actually be turned over to charity).

97. *Id.* at 797 (quoting *Wooley*, 430 U.S. at 714).

98. See *id.*

## 2. *Fundamental liberty interests*

While the mandatory reporting laws should trigger strict scrutiny under the Hybrid Rights exception solely on First Amendment claims, a litigant could also argue that these reporting laws, as applied to clergy with religiously mandated duties of confidentiality, violate fundamental liberty rights guaranteed by the Due Process Clause of the Fourteenth Amendment. The relationship enjoyed between a priest and confessor is extremely intimate and deserving of the utmost privacy.<sup>99</sup> Mandatory reporting laws that require the priest to break the sacred trust inherent in the priest-penitent relationship, or prevent the priest and penitent from establishing such a relationship, are beyond the scope of activity government can regulate without demonstration of a compelling interest.

In *Griswold v. Connecticut*, the Supreme Court held that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . . Various guarantees create zones of privacy.”<sup>100</sup> The obligation to guarantee these rights is applied to the states by virtue of the Due Process Clause of the Fourteenth Amendment.<sup>101</sup> In *Griswold*, the Court invalidated a state law that made it illegal to use contraceptives or to “assist[], abet[], counsel[], cause[], hire[] or command[] another” to do so.<sup>102</sup> It reasoned that the marital relationship came within the “zone of privacy created by several fundamental constitutional guarantees.”<sup>103</sup> The statutes in question, therefore, impermissibly intruded upon that privacy.

The Court has on numerous occasions utilized the principle of “zones of privacy” articulated in *Griswold* to identify fundamental constitutional rights. For instance, the Court has held that an individual’s right to marry is protected by the Due Process Clause of the Fourteenth Amendment as a fundamental right,<sup>104</sup> that a woman has the right to choose to have an abortion,<sup>105</sup> and that the state may not interfere with the choice of adults to engage in homosexual intercourse in private.<sup>106</sup> The idea that certain aspects of a person’s life are outside the scope of

---

99. The existence of statutes establishing a clergy-communicant privilege in every state demonstrates society’s recognition that the relationship is entitled to privacy.

100. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (citing *Poe v. Ullman*, 367 U.S. 497, 516–22 (1960)).

101. *Id.* at 482.

102. *Id.* at 480.

103. *Id.* at 485.

104. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

105. *Roe v. Wade*, 410 U.S. 113, 152–54 (1973); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

106. *Lawrence v. Texas*, 539 U.S. 558 (2003).

government interference has been a recurrent theme for the Supreme Court.<sup>107</sup>

While the doctrine of substantive due process is complex and controversial, and the Court exercises caution when extending the status of “fundamental right” to particular actions,<sup>108</sup> there is a good argument that a guarantee of confidentiality in religious confession falls within the penumbras of the guarantees of the Bill of Rights.

First, the priest-penitent relationship implicates the protected freedom of association. This right, emanating from the First Amendment, includes a right of privacy in one’s associations.<sup>109</sup> In *NAACP v. Alabama*, the Court invalidated a law that required the NAACP to disclose lists of its members, finding that such a requirement constituted an “effective . . . restraint on freedom of association.”<sup>110</sup> Certainly, compelled disclosure of the contents of a clergy communication would have the same effect. The clergy-communicant relationship, while as small as an association can be (i.e., two individuals), is an association. Knowledge that communications might be required to be reported to a government agency undoubtedly restrains the freedom to associate because such a report would necessarily reveal the existence of the underlying association, a revelation which the government cannot compel under *NAACP v. Alabama*. If the government cannot compel disclosure of the existence of an association, then it would be anomalous to say that it can compel disclosure of the contents of a meeting conducted by that association.

The right to privacy in the confessional may also arise under the penumbra of the Fourth Amendment. In *Griswold*, the Court reaffirmed that the Fourth Amendment’s specific guarantee of the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” creates a “right to privacy, no less important than any other right carefully and particularly reserved to the

---

107. See, e.g., *id.* at 578 (quoting *Casey*, 505 U.S. at 847) (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”).

108. Indeed, even while striking down laws under the Due Process Clause of the Fourteenth Amendment, the Court has hesitated to elevate conduct to the status of “fundamental rights.” In dissenting from *Lawrence*, Justice Scalia observed that, while the majority overruled the outcome of *Bowers v. Hardwick*, which had upheld anti-sodomy laws, it did not actually overrule its “central legal conclusion: ‘[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.’” *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 191 (1973)). Thus, while the Court in *Lawrence* held that Texas’s anti-sodomy law infringed petitioners’ liberties protected by the Due Process Clause of the Fourteenth Amendment, it did not explicitly hold that individuals have a fundamental right to engage in homosexual intercourse.

109. See *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (“This Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.”).

110. *Id.*

people.”<sup>111</sup> This right to privacy extends to individuals whenever they have “exhibited an actual (subjective) expectation of privacy and, . . . [that expectation is] one that society is prepared to recognize as ‘reasonable.’”<sup>112</sup> Perhaps an expectation of privacy does not exist for communications with clergy in all churches. However, in most confessional settings, both the clergy member and the penitent probably expect the communication to be confidential. Even when a third party is present, for example when translation services are required, that third party may be bound by a duty of confidentiality commensurate with the clergy member’s duty.<sup>113</sup> Judging from the existence of testimonial privileges protecting clergy-communicant communications in all fifty states, it seems self-evident that the expectation of privacy in confession is one that “society is prepared to recognize as ‘reasonable.’”<sup>114</sup> Thus, both clergy and communicant are entitled to the privacy protections of the Fourth Amendment against unreasonable search and seizure.

While the confessional is almost certainly protected by the Fourth Amendment, it is less clear whether requiring clergy to report the contents of a confession that raises a suspicion of child abuse constitutes a search. It would be manifestly unconstitutional for an agent to surreptitiously record the contents of a confession without a warrant.<sup>115</sup> But is it likewise unconstitutional to require the recipient of the confession to report that same information? After all, the reporter could use discretion in the amount of the conversation he reveals and probably would not consider himself an agent of the state in the general sense.<sup>116</sup> Even if the clergy member does consider himself an agent, The Supreme Court has held that wrongdoers who reveal their crimes to third parties assume the risk that those parties are working with the police,<sup>117</sup> so it

---

111. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (quoting *Mapp v. Ohio*, 367 U.S. 643, 656 (1963)).

112. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

113. *See* 1983 CODE c.983, § 2 (“The interpreter, if there is one, and all others who in any way have knowledge of sins from confession are also obliged to observe secrecy.”).

114. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

115. *See, e.g., Katz*, 389 U.S. 347.

116. However, it is possible the clergy member would be considered an agent in practice. Searches performed by private parties as agents of the government are subject to the same restrictions placed on government searches. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE CASES AND COMMENTARY* 77–78 (8th ed. 2007). In determining whether a private party is acting as an agent, “the question is whether the private person believed at the time . . . that her action had been explicitly or implicitly requested or required by police or other government agents, who had reason to know that their actions might well give rise to such belief or that such a belief existed.” *Id.* Thus, from the penitent’s perspective, the clergy member might be considered an agent of the government if he has a duty to report certain communications.

117. *See United States v. White*, 401 U.S. 745, 749 (1971).

might be argued that confessions do not constitute searches because they are volunteered by the penitent.

These arguments, however, are beside the point. Whether the duty to report implicates the *penitent's* Fourth Amendment rights is an interesting question, but it is distinct from the question whether the duty to report implicates the *clergy member's* rights. As a party to the confidential communication, the clergy member has a right to security of his person. Requiring him to report the contents of a confidential communication has the same consequence as wiretapping his office—the private communication reaches a party for which it was not intended without the consent of either party.

On the other hand, perhaps both the penitent and the priest lose their expectation of privacy by virtue of the law's existence. *Katz* requires not only that the expectation be one that society is prepared to recognize as reasonable, but also that the individual actually expect privacy.<sup>118</sup> Thus, even if the society is prepared to recognize religious confession as deserving of privacy, individuals cannot reasonably expect privacy when the law provides otherwise. Justice Harlan, the author of the *Katz* test, himself recognized this vulnerability in his test and expressed concern that states might circumvent legitimate privacy rights in this manner.<sup>119</sup> If the state can eliminate the reasonableness of an expectation of privacy at will, the protection offered by *Katz* would seem fairly thin.<sup>120</sup> In any event, imposing a duty to report one's own private communications seriously intrudes upon personal privacy. Even if the *Katz* test does not fit comfortably when a law eliminates a person's expectation of privacy, the implications of the Fourth Amendment remain.

Finally, privacy rights in the priest-penitent relationship may arise from the nature of the relationship itself. The Supreme Court has held the marital relationship and private sexual relationships to be beyond the scope of government interference short of a demonstration of compelling interest. The priest-penitent relationship may deserve similar protection.

118. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

119. See *White*, 401 U.S. at 786 (1971) (Harlan, J., dissenting) ("The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.").

120. Cf. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974) ("[An actual, subjective expectation of privacy] can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing . . . that we were all forthwith being placed under comprehensive electronic surveillance."); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 367–68 (1998) (arguing that the Fourth Amendment creates, not a right of privacy, but a right to exclude others from personal matters).

The priest-penitent relationship is certainly as private as marital or sexual relationships. In a spiritual sense, the relationship is also quite intimate. The faithful parishioner may reveal information about herself to her priest that she would not reveal to any other person in the entire world—including her spouse. The priest, in turn, gives counsel, comfort, and absolution not available from any other person in the world. For religions that view the priest as God’s personal representative, this kind of relationship cannot be replicated with any other being. Thus, the principles that support the prohibitions on state interference with marital and other sexual relationships should also apply to other relationships that rise to a similar level in an individual’s journey for personal fulfillment. The priest-penitent relationship has played such a significant role in the lives of individuals for centuries.

It may be noted that these arguments for fundamental liberty rights would require the Supreme Court to expand its jurisprudence to a significant degree. Whether challenges to mandatory reporting laws that abrogate the priest-penitent privilege under these arguments would succeed is a difficult question. However, if the Hybrid Rights exception is to have any meaning, the liberty rights implicated by abrogation of the privilege should at least be enough to invoke strict scrutiny for the free exercise claims.

### *C. Application of Strict Scrutiny*

If a challenger were to succeed in bringing the clergy-communicant privilege within the ambit of the Supreme Court’s Hybrid Rights exception, the burden of demonstrating a compelling state interest would fall upon the state defending its mandatory reporting law.<sup>121</sup> At first blush, it would seem that the state’s compelling interest is obvious. What could be more compelling than protecting children from abuse or neglect? The state may argue that clergy are more likely than the general population to have information regarding child abuse and, therefore, are in a better position than most to assist the state in preventing its continuance.

The state might also argue that reporting child abuse is necessary to prevent problems that arise when clergy attempt to solve the problem “in-house.”<sup>122</sup> These attempts at extra-legal solutions often exacerbate

---

121. *Sherbert v. Verner*, 374 U.S. 398, 406–08 (1962).

122. *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> [hereinafter, REILLY REPORT] (reporting actions of Catholic authorities in dealing with allegations of child sex abuse by priests in the Archdiocese of Boston).

the problem by perpetuating abuse.<sup>123</sup> As a rather disturbing example, in January 2002, the Boston Globe initiated a string of publicity surrounding rampant child sexual abuse by priests in the Catholic Church.<sup>124</sup> The article publicly revealed the serial child sexual abuse by Catholic priest, John Geoghan, who, despite recognized patterns of predatory sexual behavior, was allowed to work with children for over three decades.<sup>125</sup> The article catalogued claims that church authorities discouraged families of victims from reporting abuse and alleged that higher authorities within the church covered up scandals by settling with complaining families on terms of confidentiality and moving trouble priests to new locations where their abuse continued.<sup>126</sup>

While the Boston scandal did not involve refusal to report child abuse on grounds of clergy-communicant privilege, it highlighted the disastrous consequence of allowing a church to attempt to solve problems of child abuse within its own ranks. Churches may make claims to spiritual guidance, but the state most assuredly has the stronger claim to its citizens' physical protection and mandatory reporting laws ensure the state receives notice when it needs to address a problem of child abuse.

Furthermore, states may argue that carving out an exception for clergy when their information is privileged creates ambiguity in the reporting statute because clergy may be uncertain whether their suspicions of child abuse arise from privileged communications or nonprivileged observations. Knowledge or reasonable suspicion of child abuse may often arise out of non-confessional circumstances. Indeed, obtaining knowledge or suspicion of abuse through confession by the abuser is probably the exception, not the rule. Instead, a priest might notice bruises on a child's arm, or even emotional signals that would indicate child abuse. Perhaps the wife of an abuser or mother of a victim comes to her religious leader seeking guidance on what to do.<sup>127</sup> In some instances, the child will go to the clergy member for help.<sup>128</sup> In the

---

123. *Id.* at 30 ("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.").

124. Michael Rezendes, *Church Allowed Abuse by Priest for Years Aware of Geoghan Record, Archdioceses Still Shuttled Him from Parish to Parish*, BOSTON GLOBE, Jan. 6, 2002, at A1; see also REILLY REPORT, *supra* note 122, at 34–47.

125. Rezendes, *supra* note 124, at A1.

126. *Id.*

127. This type of situation would involve communications that, though not confessional, may still be confidential. Therefore, such communications could still fall within the broad clergy-communicant privilege existing in many states.

128. See, e.g., *Doe v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*,

Geoghan case, higher authorities in the church discovered Geoghan's abuse completely outside the confessional.<sup>129</sup>

In any case, once the clergy member's suspicion has been aroused through a confession, other signs of abuse may become more noticeable. The clergy member, however, may still feel an obligation to refrain from reporting because they would not have noticed the signs without having been alerted by the communication.<sup>130</sup> Thus, the clergy member might reasonably believe that the duty to report a particular individual no longer applies once she has received a privileged communication. Such an exception could create perverse incentives for child abusers. Abusers who suspect their priest believes their victim has been abused might rush to confess—not to obtain forgiveness or help, but rather to prevent the priest from reporting them.

These arguments are persuasive and, ultimately, the state probably would prove a compelling interest. However, the clergy members may have valid arguments of their own negating the state's argument. First, states that abrogate the privilege assume that clergy are, in fact, in a special position to receive information regarding child abuse *in their role as confessors*. Presumably, this assumption is based on the expectation that, if a religion requires confession, abusers who are religious will confess to the sin of abuse and, therefore, clergy will be more likely than the average person to receive information regarding the abuse.

However, even if we accept the rather unlikely premise that child abusers will confess their crimes absent a guarantee of confidentiality, the assumption disregards the context in which the clergy member receives that information. For Catholics, at least, confession places the priest in the position of God's intermediary as "at once both judge and healer," and as "constituted by God as a minister of both divine justice and divine mercy."<sup>131</sup> Thus, from the priest's perspective, he receives the information entirely outside his personal capacity and must disclaim any *personal* knowledge of the confession at all.<sup>132</sup> Priests of the Catholic

---

167 P.3d 1193 (Wash. Ct. App. 2007) (involving a teenage girl that allegedly reported sexual abuse by her stepfather to her bishop, who failed to report the abuse).

129. See Rezendes, *supra* note 124, at A1; REILLY REPORT, *supra* note 122, at 34–47.

130. Canon 984 of the Catholic Canon Law forbids a confessor from ever "[using] knowledge acquired in confession to the detriment of the penitent" and also forbids persons in authority from using knowledge about sins acquired in confession in any way for external governance. 1983 CODE c.984, §§ 1–2. Commentaries on these canons caution against any behavior that "could give rise to the suspicion that [a priest] is careless about the seal . . ." CANON LAW COMMENTARY, *supra* note 16, at 536. Thus, it seems likely that priests would prefer not to report even non-privileged information when it is connected to a confession in any meaningful way.

131. See 1983 CODE c.978, § 1 ("In hearing confessions the priest is to remember that he is at once both judge and healer, and that he is constituted by God as a minister of both divine justice and divine mercy, so that he may contribute to the honour of God and the salvation of souls.").

132. "One certain principle which emerges from Cann. 983–984 is that information gained in the confessional should be regarded as not having been gained at all and, in so far as is humanly

Church, therefore, might claim that they are not in any position to receive information about child abuse through the sacrament of penance because they are religiously mandated to treat any information they receive in confession as not having been revealed to them at all. If clergy have a religious duty to treat confidential communications as if they had not been made, then imposing a duty to report will not actually further the state's interest because the clergy with the duty of confidentiality will act as if the duty never arises.

Of course, this doctrinal argument that the priest does not actually have "personal" knowledge will probably only be persuasive to those who subscribe to Catholic theology—treating the communication as if it had not been received does not mean the conversation did not actually happen. However, other considerations cast doubt upon the validity of the state's assumption. If the state places a reporting duty on clergy based on the expectation that clergy are in a unique position to receive information about child abuse through confession, and the clergy have an absolute religious obligation to keep confessions confidential which they will not break for any reason, then one of two things can be expected to happen. On the one hand, clergy might encourage penitents not to confess anything that would create the duty to report, thus reducing the incidence of their having to break the law and eliminating any advantage they have in gathering information. Or, on the other hand, the clergy might simply flout the law, creating a standoff between state governments and religious sects. Given the credit a significant portion of the population gives to religion, this conscious disobedience risks rendering the law illegitimate.<sup>133</sup> In the former scenario, the state's compelling interest more or less vanishes, and in the latter, it may be outweighed by an even more compelling interest in refraining from laws that respected members of society will certainly disobey.

Finally, churches requiring confession may encourage its observance by assuring the penitent that his communications will be guarded by a sacred trust. A state's requirement that clergy betray that trust destroys confidence in religious leaders, and will (and should) have the actual effect of chilling the incidence of confession altogether. As potential penitents begin to realize their confessions will not be kept confidential, they will refrain from confessing and the assumption that clergy are in a unique position to obtain information regarding child abuse by virtue of

---

possible, should not *ever* be acted on or spoken of *in any way*." CANON LAW COMMENTARY, *supra* note 16, at 536.

133. As a perhaps imperfect analogy, compare the sodomy laws of the various states before *Lawrence*. The blatant disregard for the illegality of the conduct and the refusal to enforce it on the part of the states was cited as support for striking them down. *Lawrence v. Texas*, 539 U.S. 558, 569–70 (2003).

their position as a spiritual adviser dissolves away. Thus, even if the state has a compelling interest in protecting children and detecting their abusers, abrogating the clergy-communicant privilege cannot be expected to actually further that interest. Furthermore, to the extent the abrogation chills the penitent's exercise of the rite of penance, the reporting requirement not only burdens the clergy member's free exercise by mandating an affirmative violation of a religious tenet, but also burdens the penitent by discouraging him from observing an important sacrament.

The arguments against the state's compelling interest are, perhaps, persuasive, but on balance, the state probably demonstrates a compelling interest. Even if confessions ceased altogether, the clergy would probably have the same access to information as, say, a school teacher who enjoys a relationship of trust but is protected by no privilege and must report. The argument that full and frank confession should be encouraged applies just as easily to physicians, psychotherapists, and lawyers; but legislatures have decided to sacrifice that policy in this context in the hope that it will improve the state's ability to protect children. From the state's perspective, the challenger's complaint that abrogating the privilege will chill confession is a policy consideration to be taken up with the legislature, not a constitutional argument to be decided by unelected judges.

The Catholic argument that the priest actually lacks personal knowledge by virtue of his receiving the confession as God's intermediary perhaps carries more constitutional bite. However, it disintegrates if it can be shown that the priest did anything with the information outside the confessional, such as removing the abuser from contact with children or attempting to resolve family problems. Clergy may often feel compelled to do something when they learn that a child has been or is being abused, particularly when the child's, as well as the abuser's, spiritual well-being is within the clergy's responsibility as a member of the congregation.<sup>134</sup> Any interference in an abusive situation

---

134. Clergy may be caught in a Catch-22 on this point since the common law may actually impose some duty of care vis-à-vis identifiable potential victims of future abuse. In *Tarasoff v. Regents of the University of California*, a psychotherapist was held liable for failing to take action when a patient expressed his intention to kill a particular woman, notwithstanding the patient-psychotherapist privilege. 551 P.2d 334, 347 (Cal. 1976) ("We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins."). Thus, the common law may require priests to take action notwithstanding their privilege. But if they do take action, their justification for failing to report under the statute disappears. The *Tarasoff* doctrine has not been followed in all states, see, e.g., *Boynton v. Burglass*, 590 So. 2d 446 (Fla. 1991), but it has been influential. See, e.g., *Almonte v. N.Y. Med. Coll.*, 851 F. Supp. 34, 39-40 (D. Conn. 1994). Of course, imposition of a common law duty to warn potential victims in violation of an affirmative religious duty to keep confidences would be subject to the same constitutional challenges leveled at mandatory reporting statutes.

undermines the priest's free exercise claim because the use of the information for any purpose would negate any claim that the priest lacks personal knowledge. Whether imposition of church discipline, such as excommunication or refusal of sacraments such as communion, would have the same effect is unclear since those punishments can perhaps be imposed without disclosing the confidential information or meddling in the abusive situation.

#### *D. Narrow Tailoring*

A better tactic, perhaps, than attacking the state's compelling interest *per se*, would be to attack the breadth of the statute. Under the compelling interest test, the state must show not only that its interest is compelling, but also that it cannot be achieved by some method that would not impermissibly infringe free exercise rights. This part of the test allows the court to balance the state's compelling interest against other considerations and could tip the scale in favor of those challenging the reporting statutes. Challengers could argue that the state's interest may be served simply by narrowing the privilege so that only clergy with a sincere, religiously mandated duty of confidentiality may be relieved of their reporting obligation.

As they stand, most clergy-communicant privileges are defined more broadly than valid constitutional arguments require. According to the reasoning of *People v. Phillips* and *People v. Smith*, the constitution requires confidentiality to be preserved only when refusing to do so would prevent the church from observing its sacraments—so churches that do not explicitly require secrecy of confession have no constitutional claim.<sup>135</sup> The broader privilege advocated by the Federal Rules of Evidence, and by many states, extends the privilege to all confidential communications made to religious leaders because sound policy supports the extension: obtaining spiritual guidance is perceived as a good thing, that guidance is most effective when the religious counselor has full information, and people are most likely to disclose full information if they can expect their secrets to be kept in confidence. The majority of states have recognized this policy in framing their reporting statutes, and all but two states have at least maintained it with regard to the attorney-client privilege.<sup>136</sup> However, the Constitution does not compel a state to

---

135. *See supra* Part I.B. However, as discussed above, a substantive due process right to privacy might be argued to protect even those confessions made to clergy in religions that do not mandate confidentiality.

136. Texas explicitly abrogates the attorney-client privilege for reporting, though not for proceedings. TEX. FAM. CODE ANN. §§ 261.101(c), 261.202 (Vernon 1996 & Supp. 2002). Oklahoma's statute simply states, "[n]o privilege or contract shall relieve any person from the requirement of reporting pursuant to this section." OKLA. STAT. tit. 10, § 7103 (1998 & Supp. 2006).

adopt such a policy; and states may depart from the policies justifying privilege at the peril of bringing the professions that bear relationships of trust into disrepute.<sup>137</sup>

Thus, states wishing to abrogate the clergy-communicant privilege in the context of reporting and testifying of known child abuse could simply redefine the privilege in that context so that it only applies to “confessions made in the course of discipline” of a clergy member’s church, as the original priest-penitent privilege statutes did.<sup>138</sup> While this might raise important Establishment Clause concerns,<sup>139</sup> doing so would substantially fulfill the state’s interest in detecting child abuse without burdening the free exercise of religion. As an example, Texas’s statute might be revised to read:

The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, *except for confessions made in the course of discipline of the church to which the clergy member belongs*, a medical practitioner, a social worker, a mental health professional, and an employee of a clinic or health care facility that provides reproductive services.<sup>140</sup>

Under such a statute, ministers of religions that did not have official doctrines mandating secrecy of confession would still be required to report even if the information is normally privileged, ministers of churches with such doctrines would still have to report non-confessional communications (even if they would normally be confidential), and the state’s interest in gathering evidence and protecting children would be

---

Oklahoma’s statute includes attorneys as mandatory reporters under the catch-all phrase, “other person.” *Id.* Thus, while it is not clear that the legislature specifically intended to abrogate the attorney-client privilege and while the Oklahoma Practice Guide does not include “communications regarding child abuse” in its list of exceptions, 1 OKLA. PRAC. at Ch. 5, § 2502 (2006–07 ed.), the language of the statute appears to be unambiguous.

137. It would seem that, as a matter of fundamental fairness, professionals such as psychotherapists and lawyers should at least have a duty to warn their clients if certain confessions will not be kept confidential when the client reasonably expects the communications to be kept in confidence. On the other hand, perhaps the existence of the mandatory reporting statute gives child abusers notice that they cannot expect confessions of child abuse to be kept secret.

138. *See supra* Part I.B.

139. A thorough discussion of the Establishment Clause concerns is beyond the scope of this Comment. However, since it is mainly hierarchical churches that have official confidentiality doctrines, the question of establishment could become more troublesome if the privilege not to report is extended to the clergy of some churches but not all. Also, establishment issues might be implicated if the government must get entangled in questions of church doctrine.

140. Texas’s Rule of Evidence establishing the privilege is broad, protecting all confidential communications made to “a member of the clergy in the member’s professional character as spiritual adviser.” TEX. R. EVID. 505(b). Thus, the suggested revision would only apply in the context of child abuse reporting.

largely served. The accommodation would protect religiously mandated duties and no more.

Another solution to the problem would be to require those claiming a privilege to disclaim any right to act on the information they receive in confession beyond one-on-one counseling in the confessional setting. For Catholics, at least, one of the main justifications of the Seal of Confession is that the priest learns of the confessions not in a personal capacity, but as God's minister. Confession, in essence, reflects a personal prayer to God but with the benefit of God's direct response through a priest.<sup>141</sup> The priest's role as an intermediary prevents him from using "in any manner for external governance the knowledge about sins which he has received in confession at any time,"<sup>142</sup> including the initiation of church disciplinary proceedings. Thus, as long as the priest stays true to this doctrine, his silence has no effect whatsoever on the truth-seeking process—to the rest of the world, it is as if the confession never happened.<sup>143</sup> On the other hand, if the priest uses the contents of the confession to meddle in the affairs of either the abuser or the abused, his actions do have an effect on the truth-seeking process. He has left the realm of the sacrament and entered the realm properly controlled by the state—policing behavior.

Whether any churches other than the Catholic Church would qualify for this kind of treatment would depend on their official doctrines. However, it seems likely that at least a substantial number of religious organizations would value immediate protection of children over their commitment to confidentiality, particularly where abuse is ongoing. These churches would not necessarily seek to adopt official doctrines that would qualify for the exception.

Furthermore, this standard would apply only to communications made in the context of a confession of sin. Concerned spouses or parents who approach clergy for advice or victims of abuse seeking protection probably communicate with religious leaders outside of this context—that is, their communications are more precisely complaints, not confessions—leaving the clergy member free to report without fear of violation of religious tenets.

---

141. See 1983 CODE c.978, § 1 ("In hearing confessions the priest is to remember that he is equally a judge and a physician and has been established by God as a minister of divine justice and mercy, so that he has regard for the divine honor and the salvation of souls.").

142. 1983 CODE c.984, § 2.

143. I do not argue that the priest should not counsel the penitent in the confessional. Indeed, a minister of God would almost certainly encourage the penitent to take the steps necessary to repent of her sins. Perhaps a clergy member would even encourage the penitent to turn herself in to secular authorities. However, this counseling function is qualitatively different from instances where the clergy member, himself, takes steps outside the confessional to attempt to fix the situation. In the former situation, the onus of action is on the penitent, in the latter, the clergy member takes upon himself the responsibilities that rightly fall to the state.

The narrow approach would also quell the objections of states that wish to avoid the potential ambiguity in statutes that provide an exemption for privileged information. Whether a particular communication is protected would be clearly restricted to actual confessions. External signs of abuse such as bruises, broken bones, and so forth could still be enough to initiate the duty to report, regardless of whether the clergy member has heard a confession of abuse. Were the clergy member to be put on trial for failure to report, the prosecution would simply have to prove the member's awareness of these signs without reference to any confession. On the other hand, if the clergy member were subjected to discipline from his church for reporting abuse related to a confession, he could defend himself by pointing to external signs that gave him knowledge or reasonable suspicion of the abuse outside the confessional.

Overall, a narrower definition of the priest-penitent privilege (i.e., a privilege that protects only confessions made in the course of discipline of the clergy member's religion) would protect the free exercise rights of clergy members without seriously negatively affecting the state's interest in detecting child abuse. States, which in general prefer a broad clergy-communicant privilege, would not need to narrow the privilege in all contexts, but instead simply reduce the privilege's scope in the context of mandatory child abuse reporting.

#### IV. CONCLUSION

Complete abrogation of the clergy-communicant privilege in any context should be considered a violation of the constitutional rights to free exercise of religion. However, the state's interest in protecting children through mandatory reporting laws may be accomplished without infringing these rights simply by limiting the privilege. As long as religious organizations can point to official doctrines mandating confidentiality and do not assume the responsibility of remedying problems of abuse, they may claim an absolute right to refuse to disclose confidential communications. Beyond that, however, the state may properly assume its role in policing its citizens' behavior.

Regardless of the constitutional question, abrogating policy-driven privileges of confidentiality may have serious consequences for both the reputation and the effectiveness of certain professions. As with some prescription drugs, the side effects may be worse than the symptoms. It is surely not coincidence that, of the states that have chosen to abrogate professional privileges in the context of mandatory reporting, only two have ventured so far as to do away with the attorney-client privilege. This privilege deserves special protection because of attorneys' unique

responsibility to stand as advocates for their clients and their potential to encourage individuals to do the right thing of their own free will. The clergy member receiving confession plays these same roles and the guarantee of confidentiality deserves strong protection. While child abuse is despicable, and should be eradicated to the greatest extent possible, legislatures should weigh carefully the good that will actually be done by removing these privileges against the violence it will do to the clergy member or lawyer's position as a trusted confidante. Removing the priest-penitent privilege in the context of child abuse casts doubt on the efficacy of the privilege in other circumstances as well and will have a chilling effect on confession and full disclosure. This side effect makes abrogation of the priest-penitent privilege a bitter pill indeed.

*Samuel G. Brooks\**

---

\* J.D. candidate, Brigham Young University, J. Reuben Clark Jr. School of Law. I would like to thank Kevin Worthen, Thomas Lee, and Fred Gedicks for their valuable comments and suggestions. I would also like to thank the staff of the BYU Journal of Public Law for their excellent editorial assistance.