
“FOR THE FORGIVENESS OF SINS”: A COMPARATIVE CONSTITUTIONAL ANALYSIS AND DEFENSE OF THE CLERGY-PENITENT PRIVILEGE IN THE UNITED STATES AND AUSTRALIA

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What is striking me about [efforts to curb the clergy-penitent privilege is that legislators are] now going beyond public institutions and reaching very deeply into the interior life of the Church—how we manage our sacramental life—and that kind of aggression, that sort of violation of religious liberty . . . should concern not just Catholics but anyone who is committed to . . . political values.¹

INTRODUCTION

The clergy-penitent privilege² is a long-recognized rule of evidence which protects from judicial inquiry evidence of confidential communications between penitents and their clerics.³ It “recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”⁴ While testimonial privileges are generally disfavored, the clergy-penitent privilege is “a

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¹ Bishop Robert Barron, *Bishop Barron on California's Attack on Confession*, YOUTUBE (May 22, 2019), <https://www.youtube.com/watch?v=bfwrf7zhOT0>; see also CATECHISM OF THE CATH. CHURCH, ¶¶ 1441, 1446 (noting Church teaching that only God forgives sins, but because “Christ entrusted to his apostles the ministry of reconciliation, bishops who are their successors, and priests, the bishops’ collaborators, continue to exercise this ministry”). It is therefore through the sacrament of Holy Orders that bishops and priests are enabled to forgive sins “in the name of the Father, and of the Son, and of the Holy Spirit.” *Id.* ¶ 1461.

² For the purposes of this Note, I use the term “clergy-penitent privilege,” primarily because the privilege is not limited to a particular religion or denomination. See e.g., UNIF. R. EVID. 505. It is important to note, however, that the term used to describe the privilege varies among scholars and jurisdictions. See e.g., *In re Grand Jury Investigation*, 918 F.2d 374, 377 n.2 (3d Cir. 1990); see also *Lightman v. Flaum*, 761 N.E.2d 1027, 1030 n.* (N.Y. 2001) (noting that prior cases in the same jurisdiction have referred to the privilege using different terms including “priest-penitent” privilege, “clergy-penitent” privilege, “minister-penitent” privilege, “cleric-congregant” privilege, and “clergy-communicant” privilege) (citations omitted).

³ Ronald J. Colombo, Note, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 225 (1998).

⁴ *Trammel v. United States*, 445 U.S. 40, 51 (1980).

public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.”⁵ The privilege has been recognized since as early as the fifth century, with its origins in the Catholic sacrament of Penance, as codified in the Canon Law of the Roman Catholic Church.⁶ While the privilege is not limited to Catholic priests,⁷ this Note focuses on the Catholic Church specifically. This is due in part to the fact that the privilege is well-exemplified in the context of disputes regarding criminal conduct disclosed during a sacramental confession and also because the debate surrounding the privilege has become increasingly contentious in the wake of the child sexual abuse scandal in the Catholic Church.⁸ In response to this scandal, many state legislatures across the United States passed statutes making clerics mandatory reporters of child abuse, though not every state has done so.⁹ There were similarly strong responses in Australia as well, where, in 2012, then-Prime Minister, Julia Gillard, announced her decision to establish a Royal Commission to investigate institutional responses to child sexual abuse and to make recommendations regarding the states’ mandatory reporter laws.¹⁰

At the federal level of the United States, proposals to adopt a formal rule of evidence regarding the clergy-penitent privilege have been rejected by Congress.¹¹ Nevertheless, its inclusion in the proposed rules has been deemed to support the notion that it has been “indelibly ensconced” in the American legal system.¹² This is evidenced by the fact that, unlike the federal government, today, every state has enacted some form of the clergy-penitent privilege.¹³ However, each state differs in terms of how the privilege is defined, what communications are covered, and who may assert it.¹⁴ At the same time, every state has mandatory reporter statutes which require certain individuals to report known or suspected instances of child abuse and neglect.¹⁵ In this regard, states also differ as to whether clergy are enumerated as mandatory reporters and, if so, whether the privilege trumps the mandatory reporter

⁵ *Id.* at 50 (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960)).

⁶ Michael J. Mazza, Comment, *Should Clergy Hold the Priest-Penitent Privilege?*, 82 MARQ. L. REV. 171, 186 (1998).

⁷ *Clergy-Penitent Privilege*, THOMSON REUTERS PRACTICAL LAW (2021) (defining the clergy-penitent privilege as including a “priest, minister, rabbi, or similar figure of a religious organization”).

⁸ Elizabeth Mehren, *Scandal Shaking Catholicism to Core*, L.A. TIMES (Mar. 13, 2002), <https://www.latimes.com/archives/la-xpm-2002-mar-13-mn-32586-story.html>; see also Laurie Goodstein & Sharon Otterman, *Catholic Priests Abused 1,000 Children in Pennsylvania, Report Says*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html>.

⁹ Paul Winters, Comment, *Whom Must the Clergy Protect? The Interests of at-Risk Children in Conflict with Clergy-Penitent Privilege*, 62 DEPAUL L. REV. 187, 189 (2012); see also CHILD WELFARE INFO. GATEWAY, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2019), <https://www.childwelfare.gov/pubPDFs/clergymandated.pdf> [hereinafter CHILD WELFARE GATEWAY I].

¹⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse*, ROYAL COMM’NS, <https://www.royalcommission.gov.au/royal-commission-institutional-responses-child-sexual-abuse> (last visited Sept. 10, 2020).

¹¹ FED. R. EVID. 506, 56 F.R.D. 183, 247 (proposed 1973).

¹² *In re Grand Jury Investigation*, 918 F.2d 374, 381 (3d Cir. 1990) (citing *United States v. Gillock*, 445 U.S. 360, 368 (1980)).

¹³ *Varner v. Stovall*, 500 F.3d 491, 495 (6th Cir. 2007).

¹⁴ F. Robert Radel, II & Andrew A. Labbe, *The Clergy-Penitent Privilege: An Overview*, GROELLE & SALMON, P.A., <https://www.gspalaw.com/the-clergy-penitent-privilege-an-overview/> (last visited Sept. 10, 2020).

¹⁵ CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2019), <https://www.childwelfare.gov/pubPDFs/manda.pdf> [hereinafter CHILD WELFARE GATEWAY II].

status or vice versa.¹⁶ Between 2019 and 2021 alone, California, Utah, and North Dakota have been among states who have attempted to subordinate the privilege regarding its conflict with mandatory reporter statutes.¹⁷ At the international level, the same issues are being addressed in Australia, where state legislatures have become increasingly active in efforts to curb the privilege. In 2020 alone, several of the eight Australian states passed legislation requiring clergy to report instances of child abuse revealed during a sacramental confession.¹⁸

These legislative developments have brought renewed interest to the clergy-penitent privilege and its underpinnings. On the one hand, it is indisputable that governments maintain a legitimate interest in curbing child abuse, and that abuse by clergy is a problem at both the national and international levels.¹⁹ On the other hand, both the United States and Australia recognize the essential right to the free exercise of religion.²⁰ Indeed, it has been said that freedom of religion is among the earliest and most enduring human rights to be recognized internationally.²¹ Therefore, its import in these matters of individual exercise and church governance cannot be understated.

In the Catholic context, priests may be held accountable under state law mandatory reporter requirements and the canon law of the Catholic Church, which makes clear that “the sacramental seal is inviolable.”²² Under the canon law, a priest who betrays the confidentiality of penitential communications made during a sacramental confession faces immediate excommunication from the Catholic Church.²³ Therefore, the clergy-penitent privilege brings two competing interests to the fore, namely, the state’s legitimate interest in obtaining evidence against suspected child abusers and the right of the individual, both cleric and penitent alike, to freely exercise their religion.²⁴

This Note argues that recent national and international legislative efforts to curb the clergy-penitent privilege have failed to adequately account for the right to the free exercise of religion. Thus, this Note echoes the notion that a uniform approach which both properly limits the scope of the privilege while maintaining due deference for legitimate religious belief and practice is necessary. Part I of this Note discusses the purpose, history, and structure of the clergy-penitent privilege generally, its historical treatment in the United States and Australia, and its relation to religious freedom embodied in the United States and Australian Constitutions. Part II discusses how the privilege has been treated in the modern era, including the most recent

¹⁶ CHILD WELFARE GATEWAY I, *supra* note 9.

¹⁷ See S.B. 360, 2019 Leg., Reg. Sess. (Cal. 2019); see also H.B. 90, 2020 Leg., Reg. Sess. (Utah 2020); S.B. 2180, 67th Leg. Assemb., Reg. Sess. (N.D. 2021).

¹⁸ *Western Australian Legislative Committee Recommends Preserving Confessional Seal*, CATH. NEWS AGENCY (Sept. 12, 2020), <https://www.catholicnewsagency.com/news/western-australian-legislative-committee-recommends-preserving-confessional-seal-99410>.

¹⁹ Nicole Winfield, *A Global Look at the Catholic Church’s Sex Abuse Problem*, ASSOCIATED PRESS (Feb. 21, 2019), <https://apnews.com/8cb4daf509464bad8c13ef35d44a0fc5>.

²⁰ U.S. CONST. amend. I; *Australian Constitution* s 116.

²¹ ANTHONY GRAY, RELIGIOUS FREEDOM AND SECTION 116 OF THE AUSTRALIAN CONSTITUTION: WOULD A BANNING OF THE HIJAB OR BURQA BE CONSTITUTIONALLY VALID?, 2011 F. ON PUB. POL’Y 1, 2 (2011), <https://forumonpublicpolicy.com/vol2011.no2/archivevol2011.no2/gray.pdf>.

²² 1983 CODE c.983, § 1.

²³ 1983 CODE c.1388, § 1; see also *Mayeux v. Charlet*, 203 So. 3d 1030, 1037 (La. 2016).

²⁴ See Jane E. Mayes, Note, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern*, 62 IND. L.J. 397, 397 (1987).

legislative efforts to alter the privilege concerning its relation to mandatory reporter laws in the United States and Australia. Part III analyzes the constitutionality of recent legislative efforts in the United States and Australia with an eye towards the substantial burden these developments have imposed concerning matters of church governance as well as the individual exercise of clerics and penitents alike. Part IV then discusses a proposal for a more uniform approach to the clergy-penitent privilege that keeps mandatory reporter requirements incumbent upon clergy by limiting the scope of the privilege while also ensuring that such mandates will not infringe upon legitimate religious beliefs and practices protected by the United States and Australian Constitutions.

I. BACKGROUND

A. EARLY CHURCH ORIGINS OF THE SACRAMENT OF Penance AND THE COMPANION CLERGY-PENITENT PRIVILEGE

In the Catholic Church, the sacrament of Penance is among the seven sacraments which are central pillars of the faith today.²⁵ However, it is critical to note that the sacrament is not a modern phenomenon. Indeed, confession has been a part of the Christian religious tradition throughout history and reference to the Holy Bible evidences its significance.²⁶ Jesus Christ proclaimed to his Apostles that, “[i]f you forgive the sins of any, they are forgiven them; if you retain the sins of any, they are retained.”²⁷ In Catholic theology, this apostolic authority conferred by Christ succeeds the Apostles and has been passed down to the early church fathers as well as the priests and bishops of the Church today.²⁸ Between the third and fifth centuries, the paramount importance of confidentiality concerning penitential communications began to take hold.²⁹ Indeed, Theodore of Mopsuestia, a fifth-century theologian and bishop, said:

It behooves us, therefore, to draw near to the priests in great confidence and to reveal to them our sins; and those priests, with all diligence, solicitude, and love, and in accord with the regulations . . . will grant healing to sinners. [The priests]

²⁵ See CATECHISM OF THE CATH. CHURCH, *supra* note 1, ¶ 1210 (listing the seven sacraments of the Catholic Church, including Baptism, Confirmation, the Eucharist, Penance, the Anointing of the Sick, Holy Orders, and Matrimony).

²⁶ See, e.g., JOHN C. BUSH & WILLIAM HAROLD TIEMANN, THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW 41–42 (3d ed. 1989) (referencing biblical origins of confession in the New Testament); see also 1 John 1:9 (“If we confess our sins, He is faithful and just and will forgive us our sins and purify us from all unrighteousness.”); John 20:21–23 (“If you forgive the sins of any, they are forgiven; if you retain the sins of any, they are retained.”); Numbers 5:5–7 (“The Lord spoke to Moses, saying: Speak to the Israelites—When a man or woman wrongs another, breaking faith with the Lord, that person incurs guilt and shall confess the sin that has been committed. The person shall make full restitution for the wrong, adding one fifth to it, and giving it to the one who was wronged.”).

²⁷ Robert John Araujo, S.J., *International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the “Priest-Penitent Privilege” Under International Law*, 15 AM. U. INT’L L. REV. 639, 643 (2000) (citing John 20:23).

²⁸ *What the Early Church Believed: Apostolic Succession*, CATH. ANSWERS (Aug. 10, 2004), <https://www.catholic.com/tract/apostolic-succession>.

²⁹ Araujo, S.J., *supra* note 27, at 643.

will not disclose the things that ought not to be disclosed; rather, they will be silent about the things that have happened, as befits true and loving fathers who are bound to guard the shame of their children while striving to heal their bodies.³⁰

Likewise, Pope St. Leo I, Bishop of Rome from 440 to 461, recommended that penitential communications take place in private and directed priests to refrain from publicly revealing penitents' sins.³¹ By the end of the ninth century, the pope promulgated an order aimed at codifying these directives, and in 1215, after the Fourth Lateran Council convened, the Church adopted the absolute obligation of secrecy regarding penitential communications, otherwise known as the seal of confession.³² This obligation was later affirmed by the Council of Trent in 1551.³³ The importance of secrecy in the context of penitential communications lays the foundation upon which the sacramental confession and its accompanying clergy-penitent privilege arise.

Inextricably related to confession, the clergy-penitent privilege derives from pre-Reformation Europe and the canon law of the Catholic Church.³⁴ Under the canon law, Catholics are to confess their sins to a priest in what is known as the formal sacrament of Penance.³⁵ Specifically, the canon law provides that, "[a] member of the Christian faithful is obliged to confess in kind and number all grave sins committed after baptism . . ."³⁶ If a penitent wishes "to receive the salvific remedy of the sacrament of penance," then he must reject his sins and approach the sacrament with a "purpose of amendment."³⁷ Many criminal acts, including the sexual assault of children, constitute grave sins that must be confessed.³⁸

The priest is tasked with administering the sacrament as "a minister of divine justice and mercy . . ."³⁹ Therefore, upon hearing a penitent's confession, the priest imposes "salutary and suitable penances in accord with the quality and number of sins, taking into account the condition of the penitent," which the penitent must then fulfill.⁴⁰ It is a traditional form of penance for the penitent to be asked to spend time in prayer. Still, other tangible forms of penance, such as directives to visit sacred spaces, fast for a period of time, return stolen goods, restore another's reputation, or

³⁰ Mazza, *supra* note 6, at 174 n.20 (quoting WILLIAM A. JURGENS, *THE FAITH OF THE EARLY FATHERS* 83–84 (1979)).

³¹ *Id.* (citing JURGENS, *supra* note 30, at 272–73).

³² Araujo, S.J., *supra* note 27, at 645.

³³ *Id.*

³⁴ Lori Lee Bocker, *Sacred Secrets: The Clergy-Penitent Privilege Finds its Way into the News*, 57 OR. ST. B. BULL. 15 (Oct. 1996).

³⁵ *Id.* For the purposes of this Note, I refer to the sacrament as "Penance." However, it is important to note that while this is perhaps the most formal term, the sacrament is also referred to as the sacrament of "reconciliation," "confession," "forgiveness," and "conversion." CATECHISM OF THE CATH. CHURCH, *supra* note 1, ¶ 1423–24.

³⁶ 1983 CODE c.988, §§ 1–2.

³⁷ 1983 CODE c.987.

³⁸ Anthony Fisher, *Let's Be Clear: Sexual Abuse Is a Crime and a Grave Sin*, W. ADVOC. (Dec. 17, 2019, 3:00 PM), <https://www.westernadvocate.com.au/story/6547773/letter-lets-be-clear-sexual-abuse-is-a-crime-and-a-grave-sin/>.

³⁹ 1983 CODE c.978, § 1.

⁴⁰ 1983 CODE c.981.

pay compensation may be appropriate in some circumstances.⁴¹ At the conclusion of the sacramental confession, the priest recites the prayer of absolution:

God, the Father of mercies,
through the death and resurrection of his Son
has reconciled the world to himself
and sent the Holy Spirit among us
for the forgiveness of sins;
through the ministry of the Church
may God give you pardon and peace,
and I absolve you of your sins in the name of the Father, and of the Son, and of
the Holy Spirit.⁴²

The Church teaches that “[t]he effect of this sacrament is deliverance from sin,” and “reconciliation with God”⁴³ In this regard, it is significant that, in Catholic theology, penitential communications involve the confession of sins to the priest, who stands *in persona Christi*—to communicate a pardon which God alone can give.⁴⁴ In this light, confession is “not so much an encounter with the priest. It is an encounter with Christ through the sacramental mediation of the priest.”⁴⁵ Thus, “the priest has no mortal remembrance of what has been confessed, but rather possesses knowledge meant solely for God’s ears.”⁴⁶

It is in the context of this sacramental framework that the clergy-penitent privilege first arose. The canon law provides that “[t]he sacramental seal is inviolable,” and that “it is absolutely forbidden for a [priest] to betray in any way a penitent in words or in any manner and for any reason.”⁴⁷ Furthermore, “[a priest] is prohibited completely from using knowledge acquired from confession to the detriment of the penitent even when any danger of revelation is excluded.”⁴⁸ If a priest divulges the contents of a penitential communication, then he faces immediate excommunication from the Catholic Church.⁴⁹ Therefore, laws aimed at limiting the availability of the clergy-penitent privilege place clerics in a position wherein they must choose between allegiance to government law or divine law. The prevailing sentiment among clergy in the Church is that “[p]riests will . . . suffer punishment, even martyrdom, rather than break the seal of confession.”⁵⁰ As discussed further *infra* Part III.A, scholars have rightly argued that legislation which permits clergy to

⁴¹ Edward McNamara, *Appropriate Penances*, ETERNAL WORD TELEVISION NETWORK (EWTN) (Sept. 2, 2008), <https://www.ewtn.com/catholicism/library/appropriate-penances-4438>; see also CATECHISM OF THE CATH. CHURCH, *supra* note 1, ¶ 1459.

⁴² CATECHISM OF THE CATH. CHURCH, *supra* note 1, ¶ 1449.

⁴³ Edward J. Hanna, *Penance*, CATH. ANSWERS, <https://www.catholic.com/encyclopedia/penance> (last visited Oct. 3, 2020).

⁴⁴ POPE ST. JOHN PAUL II, APOSTOLIC EXHORTATION “RECONCILIATIO ET PAENITENTIA” (1984).

⁴⁵ Barron, *supra* note 1.

⁴⁶ Anthony Merlino, Comment, *Tightening the Seal: Protecting the Catholic Confessional from Unprotective Priest-Penitent Privileges*, 32 SETON HALL L. REV. 655, 746–47 (2002).

⁴⁷ 1983 CODE c.983, § 1.

⁴⁸ 1983 CODE c.984, § 1.

⁴⁹ 1983 CODE c.1388, § 1; see also *Mayeux v. Charlet*, 203 So. 3d 1030, 1037 (La. 2016).

⁵⁰ Rob Taylor & Francis X. Rocca, *New Laws Require Priests to Break the ‘Seal of Confession,’* WALL ST. J. (Aug. 3, 2018, 9:37 AM), <https://www.wsj.com/articles/new-laws-require-priests-to-break-the-seal-of-confession-1533303462>.

be faced with such a dichotomy likely constitutes an infringement of the individual right to the free exercise of religion.⁵¹

B. THE RISE OF THE CLERGY-PENITENT PRIVILEGE: FROM ROME TO ENGLAND

Before the Reformation, Roman Catholicism was the national religion of England. The laws of England and the dictates of the Catholic faith were closely intertwined because priests and bishops staffed the English courts.⁵² Scholars have surmised that it is probably for this reason that the rulers of England respected the sacrament of Penance and did not interfere with the seal of confession.⁵³ Thus, it has been said that the clergy-penitent privilege was adopted into English common law from the canon law, though there is some disagreement among scholars as to the degree to which this was true.⁵⁴ Nevertheless, the privilege did not only garner support from the religious but from secularists as well. Indeed, English jurist and utilitarian philosopher Jeremy Bentham recognized the social utility in maintaining the clergy-penitent privilege, including the various restorative and therapeutic benefits of guaranteeing the confidentiality of penitential communications.⁵⁵ Although he was an atheist, Bentham displayed a concern for religious liberty and wrote in the early nineteenth century that if a cleric were subject to testify regarding the contents of penitential communications, then “it would become a matter of course for the plaintiff or prosecutor . . . to summon [the priest] to appear as a witness. A regulation to any such effect would therefore be a virtual proscription of the exercise of the Catholic religion.”⁵⁶

Despite this historical background, the privilege was not generally recognized following the Reformation.⁵⁷ Indeed, in the early unreported case of *R v. Sparkes*, the court held that evidence of a defendant’s confession to a protestant minister was admissible.⁵⁸ This view was further echoed in dicta by the court’s nineteenth century decisions of *Wheeler v. Le Marchant* and *Anderson v. Bank of British Columbia*.⁵⁹ Notwithstanding this general view, the court in *R v. Griffin* drew an analogy between the attorney-client privilege and the clergy-penitent privilege in asserting that evidence of spiritual communications ought not to be given. However, it noted that its view was not grounded in any rule of law.⁶⁰ To the extent it was still recognized by courts, English statutes passed to limit the practice of the Catholic

⁵¹ See Caroline Incledon, Note, *The Constitutionality of Broadening Clergy Penitent Privilege Statutes*, 53 AM. CRIM. L. REV. 515, 537, 539 (2016).

⁵² Lennard K. Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 13 REGENT U. L. REV. 145, 146 (2000).

⁵³ Araujo, S.J., *supra* note 27, at 649.

⁵⁴ See BUSH & TIEMANN, *supra* note 26, at 49.

⁵⁵ See JEREMY BENTHAM, *Rationale of Judicial Evidence*, in 7 THE WORKS OF JEREMY BENTHAM 589–91 (John Bowring ed., 1843).

⁵⁶ JEREMY BENTHAM, *Exclusion Continued—Causes for Which It Is Proper or Not, According to Circumstances*, in 6 THE WORKS OF JEREMY BENTHAM 169 (John Bowring ed., 1843).

⁵⁷ *Mullen v. United States*, 263 F.2d 275, 278 (D.C. Cir. 1958).

⁵⁸ Anthony Gray, *Is the Seal of the Confessional Protected by Constitutional or Common Law?*, 44 MONASH U. L. REV. 112, 122 (2018).

⁵⁹ *Id.* at 123 n.58 (first citing *Wheeler v. Le Marchant* (1881) 17 Ch D 675, 68; then citing *Anderson v. Bank of British Columbia* (1876) 2 Ch D 644, 651).

⁶⁰ *Id.* at 123.

religion effectively abrogated its presence in England.⁶¹ Nevertheless, given its support in early English courts and in some cases following the reformation, it is unsurprising that the privilege later emerged in the common law jurisdictions of the United States and Australia.

C. HISTORICAL TREATMENT IN THE UNITED STATES

In the United States, the earliest-known common law recognition of the clergy-penitent privilege is the 1813 case of *People v. Phillips*.⁶² In that case, the New York Court of General Sessions held that a Catholic priest could not be compelled to testify regarding penitential communications made during a sacramental confession by a suspected thief.⁶³ The court recognized that “[t]he sacraments of a religion are its most important elements.”⁶⁴ Thus, the court stated that to compel a priest to testify as to the contents of confidential penitential communications would constitute an infringement upon his right to exercise his religion freely because “[s]ecrecy is of the essence of penance . . . [and] [t]o decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of Roman [C]atholic religion would be thus annihilated.”⁶⁵

Shortly after the *Phillips* decision, the privilege was limited by another New York decision in *People v. Smith*.⁶⁶ There, the court distinguished sacramental confessions made to a Catholic priest, as required by the canon law of the Catholic Church, and communications with a Protestant minister that were not formally required by the religion but served as a form of spiritual guidance.⁶⁷ The court suggested that whether the privilege was available turned not on the nature of the communication but instead on whether the secrecy of such communications was mandated by the religion in question.⁶⁸ A year later, the rationale underlying the decision in *People v. Smith* was echoed in the Supreme Judicial Court of Massachusetts when it decided *Commonwealth v. Drake*.⁶⁹ In that case, the court emphasized that a confession made to a Baptist minister was not “required by any known ecclesiastical rule” and “without any requisition, or even solicitation,” it could not inure the benefit of the clergy-penitent privilege.⁷⁰

Despite the prevalence of this interpretation, the New York legislature abrogated the *People v. Smith* decision in 1828 and passed the first-ever clergy-penitent privilege statute in America, which effectively extended the privilege to other

⁶¹ Richard Nolan, *The Law of the Seal of Confession*, 13 CATH. ENCYCLOPEDIA (1912).

⁶² *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813), reproduced in *Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 2 Rogers’ N.Y. City-Hall Recorder 77 (Ct. Oyer & Term. 1817), reproduced in *Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955).

⁶⁷ *Id.*

⁶⁸ Radel II & Labbe, *supra* note 14.

⁶⁹ See Jude O. Ezeanokwasa, *The Priest-Penitent Privilege Revisited: A Reply to the Statutes of Abrogation*, 9 INTERCULTURAL HUM. RTS. L. REV. 41, 58–59 (2014) (discussing *Commonwealth v. Drake*, 15 Mass. 161 (1818)).

⁷⁰ *Drake*, 15 Mass. at 162.

religious denominations. The New York statute stated that, “[n]o minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination.”⁷¹ This statute greatly influenced the legislative development of the clergy-penitent privilege in America.⁷² By 1904, twenty-five states had followed suit in statutorily adopting their own forms of the privilege, and by 1963, another nineteen states codified it.⁷³ By 1991, every state in the union and the District of Columbia had a clergy-penitent privilege statute.⁷⁴

The most notable federal legislative effort was Proposed Federal Rule of Evidence 506, which the Supreme Court Advisory Committee adopted in 1972.⁷⁵ Notably, the proposed rule adopted an expansive view of “clergyman” such that the privilege would cover any “individual reasonably believed” to be acting as a “functionary of a religious organization.”⁷⁶ Although Congress did not expressly adopt the proposed rule, it did not foreclose its use on a case-by-case basis.⁷⁷ Therefore, many federal courts have used the proposed and rejected Rule 506 as a reference point in dealing with cases involving the clergy-penitent privilege.⁷⁸ Indeed, it has been said that, “[t]he inclusion of the [clergy-penitent privilege] in the proposed rules, taken together with its uncontroversial nature, strongly suggests that the privilege is, in the words of the Supreme Court ‘indelibly ensconced’ in the American common law.”⁷⁹

⁷¹ Seward Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 57 (1963) (citing REV. STAT. OF N.Y. tit. 3, § 72 (1829)).

⁷² *Id.*

⁷³ 26 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 26 FEDERAL PRACTICE & PROCEDURE § 5612 (1992); see also Mazza, *supra* note 6, at 182.

⁷⁴ Ezeanokwasa, *supra* note 69, at 60.

⁷⁵ Proposed FED. R. EVID. 506, 56 F.R.D. 183, 247 (1973). The Communications to Clergymen stated:

- (a) Definitions. As used in this rule:
 - (1) A “clergyman” is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
 - (2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication
- (b) General Rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.
- (c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority to do so is presumed in the absence of evidence to the contrary.

Id.

⁷⁶ *Id.*

⁷⁷ The report by the Senate Committee on the Judiciary concerning the proposed rules stated: It should be clearly understood that . . . the action of Congress [in accepting Rule 501 and rejecting the other proposed rules] should not be understood as disapproving any recognition of . . . any . . . of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. Rep. No. 93-1277, 93rd Cong. 2d Sess. 4, reprinted in 1974 U.S. Code Cong. and Admin. News 7051, 7059.

⁷⁸ See, e.g., *In re Grand Jury Investigation*, 918 F.2d 374, 380 (3d Cir. 1990).

⁷⁹ *Id.* at 381 (citing *United States v. Gillock*, 445 U.S. 360, 368 (1980)).

The first reported federal case recognizing the clergy-penitent privilege by operation of the common law was the 1958 case of *Mullen v. United States*.⁸⁰ In concurrence, Judge Fahy opined that there was a common law basis upon which “reason and experience” would permit the court to find that the clergy-penitent privilege applied in a case regarding spiritual counseling offered by a minister.⁸¹ After the *Mullen* case, the clergy-penitent privilege was again implicitly recognized in *United States v. Wells*.⁸² Citing *Mullen*, the court recognized that confidential penitential communications were protected by the clergy-penitent privilege at common law and thus, because a letter contained “no hint that its contents were to be kept secret, or that its purpose was to obtain religious or other counsel, advice, solace, absolution or ministration,” it was admissible.⁸³ The Supreme Court has effectively ratified the clergy-penitent privilege in dicta repeatedly throughout the last century as well. In *United States v. Nixon*, the Court noted that, “an attorney or a priest may not be required to disclose what has been revealed in professional confidence.”⁸⁴ Similarly, in *Trammel v. United States*,⁸⁵ the Court stated that, “the [clergy-penitent privilege] recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”⁸⁶

Other legal institutes and organizations have also recognized the privilege throughout American history. In the early 1940s, the American Law Institute drafted its Model Code of Evidence to include the clergy-penitent privilege.⁸⁷ The privilege was also included when the Uniform Rules of Evidence were originally published in 1953.⁸⁸ This historical landscape evidences the reverence with which the privilege has been viewed throughout American history. This reverence had been largely maintained until the recent legislative efforts discussed *infra* Part II.A emerged.

D. HISTORICAL TREATMENT IN AUSTRALIA

In Australia, case law has played less of a role in the development of the clergy-penitent privilege than statutory efforts. Indeed, it has been widely argued that there is no clergy-penitent privilege at common law recognized in Australia.⁸⁹ Nevertheless, there have been comments in dicta lending support to its recognition. In the 1940 case of *McGuinness v Attorney-General*, the Court stated that the relationship between “priest and penitent” was among the few “where paramount considerations of general policy appeared to require that there should be a special

⁸⁰ *Id.* at 381–82; *see also* *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958).

⁸¹ *Mullen*, 263 F.2d at 277.

⁸² *United States v. Wells*, 446 F.2d 2 (2d Cir. 1971).

⁸³ *Id.* at 4.

⁸⁴ *United States v. Nixon*, 418 U.S. 683, 709 (1974).

⁸⁵ *Trammel v. United States*, 445 U.S. 40, 45 (1980).

⁸⁶ *Id.* at 51.

⁸⁷ 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, 1131 (2003); *see also* MODEL CODE OF EVID. R. 219 (1942).

⁸⁸ Abrams, *supra* note 87, at 1131; *see also* UNIF. R. EVID. 29.

⁸⁹ Patrick Van Esch & Linda Jean Van Esch, *The Australian Priest-Penitent Privilege: Are They Protected?*, 6 J. POL. & L. 90 (2013).

privilege.”⁹⁰ Similarly, in *Baker v Campbell*, one justice said “[t]he need for preservation of . . . priest-penitent confidentiality seems to be as strong as the need for preservation of lawyer-client confidentiality in the area of advice.”⁹¹ While these jurists denied the existence of a common law clergy-penitent privilege, they recognized its privileged status as a largely statutory creature in Australia.

Indeed, from a statutory perspective, the twentieth century saw significant legislative development when four Australian states, including New South Wales,⁹² the Northern Territory,⁹³ Tasmania,⁹⁴ and Victoria,⁹⁵ joined the Commonwealth in adopting legislation which provided for the clergy-penitent privilege. In 1972, the Commonwealth Government expressed a desire for uniform evidence legislation across Australia in the Evidence Bill 1972.⁹⁶ However, Queensland and Western Australia refrained from joining the movement towards uniform evidence legislation.⁹⁷ Instead, those states favored judicial discretion regarding penitential communications, as recommended by the Australian Law Reform Commission.⁹⁸ Although New South Wales did not expressly provide for a clergy-penitent privilege, it did provide for a professional communications privilege, which could be used to cover penitential communications.⁹⁹

Of those states who historically provided for the clergy-penitent privilege, each limited its scope to formal ritual confessions.¹⁰⁰ However, in *R v. Lynch*, Justice Crisp suggested that the statutory scope of the privilege could be viewed more expansively as protecting not only ritual confessions but also confidential communications concerning other forms of spiritual counseling.¹⁰¹ Each of the acts extended the privilege to “clergy of any church or religious denomination.”¹⁰² While

⁹⁰ A. Keith Thompson, *Religious Confession Privilege at Common Law: A Historical Analysis*, MURDOCH UNIV. 267 (2006) (quoting *McGuinness v. Attorney-General (Vic)* (1940) 63 CLR 73).

⁹¹ *Id.* at 271 (quoting *Baker v. Campbell* (1983) 153 CLR 52, 75).

⁹² See *Evidence Act 1995* (NSW) s 127(1). “A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.” *Id.* “In this section: religious confession means a confession made by a person to a member of the clergy in the member’s professional capacity according to the ritual of the church or religious denomination concerned.” *Id.* at 127(4).

⁹³ See *Evidence Act 1939* (NT) s 12(1) (stating that clergymen of any church or religious denomination shall not divulge any confessions made to them as a professional in any proceeding without the consent of the person who made the confession).

⁹⁴ See *Evidence Act 1910* (Tas) s 96(1) (“No clergyman of any church or religious denomination shall divulge in any proceeding any confession made to him in his professional character, except with the consent of the person who made such confession.”).

⁹⁵ See *Evidence Act 1958* (Vic) s 28. The Victoria statute read:

No clergyman of any church or religious denomination shall without the consent of the person making the confession divulge in any suit action or proceeding whether civil or criminal any confession made to him in his professional character according to the usage of the church or religious denomination to which he belongs.

Id.

⁹⁶ Michael A. Perella, *Should Western Australia Adopt an Evidentiary Privilege Protecting Communications Given in Religious Confessions?*, 4 MURDOCH UNIV. ELEC. J. L. 3 (1997).

⁹⁷ Van Esch & Van Esch, *supra* note 89, at 91.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 90.

¹⁰¹ Renae Mabey, *The Priest-Penitent Privilege in Australia and Its Consequences*, 18 MURDOCH UNIV. ELEC. J. L. 51, 53 (2006).

¹⁰² Queensland Law Reform Comm’n, *The Protection of Statements Made to Religiously Ordained Officials*, Report No. 41 (1991) at 4.

these statutes took a broad view of clergy as well as the types of communications covered, they did attempt to at least minimally narrow the scope of the privilege by making it available only where clergy were acting in their “professional character.”¹⁰³ Within this framework, the Queensland Law Reform Commission posited that penitential communications in the context of a sacramental confession in the Catholic Church were certainly privileged by those statutes.¹⁰⁴

While these acts shared important similarities, they differed regarding whether the priest or penitent could assert the privilege.¹⁰⁵ First, New South Wales allowed the privilege to be claimed by any individual who fell within the statutory definition of clergy, whether past or present.¹⁰⁶ Meanwhile, the other jurisdictions limited the privilege to those who were currently acting as clergy.¹⁰⁷ Second, the Evidence Acts of the Northern Territory and Victoria accorded the privilege to the penitent.¹⁰⁸ In contrast, the privilege belonged to the clergy under the Evidence Acts of New South Wales, Tasmania, and the Commonwealth.¹⁰⁹ These legislative developments further exemplify the longstanding international recognition that an evidentiary privilege for clergy-penitent communications is an appropriate mechanism for respecting individual religious exercise. Like the United States, however, recent legislative efforts in Australia discussed *infra* Part II.B have largely departed from this recognition. For this reason, it is necessary to consider how the United States and Australia approach religious freedom generally, and whether such a departure is consonant with that constitutional pillar.

E. THE RELIGION CLAUSES IN THE UNITED STATES AND AUSTRALIAN CONSTITUTIONS

i. *The First Amendment to the United States Constitution and Its Jurisprudence*

In the United States, the First Amendment to the Constitution was adopted to curtail legislative power “to interfere with the individual’s freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.”¹¹⁰ The Free Exercise Clause¹¹¹ limits the ability of the government to curb religious beliefs and practices. Equally important in crafting proper legislation, the Establishment Clause¹¹² prohibits the government from passing legislation which favors religious belief over non-belief,¹¹³ or gives preference to one denomination

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Mabey, *supra* note 101, at 53; *see also* R v. Lynch [1954] Tas SR 47 at 48.

¹⁰⁶ Queensland Law Reform Comm’n, *supra* note 102, at 8.

¹⁰⁷ *Id.*

¹⁰⁸ Mabey, *supra* note 101, at 53.

¹⁰⁹ *Id.* at 55.

¹¹⁰ Wallace v. Jaffree, 472 U.S. 38, 49 (1985).

¹¹¹ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

¹¹² *Id.*

¹¹³ *See* Larson v. Valente, 456 U.S. 228, 251–53 (1982).

over another.¹¹⁴ Under the doctrine of incorporation, the states are similarly bound to uphold these guarantees via the Due Process Clause of the Fourteenth Amendment.¹¹⁵ It is largely undisputed that legislation which protects or abrogates the clergy-penitent privilege implicates each of these clauses.¹¹⁶ With respect to the Free Exercise Clause, it is generally agreed that religious belief is unequivocally protected, while religious actions may be subject to further confirmation as challenges arise.¹¹⁷

Early United States Supreme Court cases addressing the Free Exercise Clause of the First Amendment held that religious belief did not excuse practices which violated the criminal law.¹¹⁸ Over time, however, persons were afforded religious belief protection from generally applicable laws.¹¹⁹ While the Court has stated that the government may not “force anyone to . . . say or believe anything in conflict with his religious tenets,”¹²⁰ it has permitted some interference. In *Sherbert v. Verner*,¹²¹ the Supreme Court stated that the state must demonstrate a “compelling interest” to justify a law which substantially infringes on religious exercise.¹²² If such a compelling interest is proven, then the legislation must also be “narrowly tailored” to achieve that objective and constitute the “least restrictive means” of doing so.¹²³ This strict scrutiny analysis serves to ensure the protection of the fundamental right to freely exercise one’s religion.

In *Sherbert*, the Court held that the state had not demonstrated a compelling state interest to justify the denial of unemployment benefits to a person who was unavailable to work on Saturdays due to her religious beliefs.¹²⁴ Similarly, in *Wisconsin v. Yoder*,¹²⁵ the Court held that the state’s interest in compelling Amish children to attend school beyond the eighth grade was outweighed by the right of parents to freely exercise their religion.¹²⁶ In that case, the Court noted that the state’s interest was still served in the absence of that mandate and if it were to be enforced, it could have significant consequences for the longstanding Amish religious practice and way of life.¹²⁷

In 1990, the Supreme Court’s standard for evaluating free exercise cases shifted with its decision in *Employment Division v. Smith*.¹²⁸ There, the Court stated that a law which burdens religious exercise is permissible under the Free Exercise

¹¹⁴ *Id.* at 244–47.

¹¹⁵ Ezeanokwasa, *supra* note 69, at 5859; *see also* U.S. CONST. amend. XIV.

¹¹⁶ Winters, *supra* note 9, at 194; *see also* Incledon, *supra* note 51, at 524–25.

¹¹⁷ Winters, *supra* note 9, at 194; *see e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1878) (holding that a Mormon could not use his religious beliefs as a justification for committing overt acts in violation of a state statute which criminalized polygamy).

¹¹⁸ David S. Bogen, *The Religion Clauses and Freedom of Speech in Australia and the United States: Incidental Restrictions and Generally Applicable Laws*, 46 *DRAKE L. REV.* 53, 83 (1997); *see also Reynolds*, 98 U.S. at 166–67 (holding that a defendant could not avoid prosecution for violating state polygamy law on the basis of his Mormon beliefs).

¹¹⁹ Bogen, *supra* note 118, at 83.

¹²⁰ *Braunfield v. Brown*, 366 U.S. 599, 603 (1961).

¹²¹ *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹²² *Id.* at 406.

¹²³ *Am. Civ. Liberties Union v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008).

¹²⁴ *Sherbert*, 366 U.S. at 403.

¹²⁵ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹²⁶ *Id.* at 234.

¹²⁷ *Id.*

¹²⁸ Winters, *supra* note 9, at 195.

Clause when it is neutral and generally applicable.¹²⁹ Therefore, the Court said that, “if prohibiting the exercise of religion . . . is not the object of [the law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”¹³⁰ For that reason, the Court held that members of a Native American church who challenged a law prohibiting the use of peyote were not entitled to an exemption on the basis of its use in religious ceremonies.¹³¹ However, if it can be shown that the law is not neutral and generally applicable, then it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.¹³²

Of course, if a statute expressly targets religion, then it is invalid. However, this is not necessary to find a violation. Even if a statute merely abrogates a preexisting statutory exemption for religious practices, it may not be deemed neutral and generally applicable. In *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*,¹³³ the Supreme Court rejected the government’s attempt to quell a “longstanding exemption” from the Controlled Substances Act for the use of *hoasca* in religious sacramental practices.¹³⁴ The government asserted that permitting this preexisting statutory exemption to go forward would “necessarily . . . undercut” the effectiveness of the Controlled Substances Act if it was “not uniformly applied, without regard to burdens on religious exercise.”¹³⁵ The Court found this argument unpersuasive and noted that the religious exemption “has been in place since the outset of the Controlled Substances Act, and there is no evidence that it has ‘undercut’ the Government’s ability to enforce the ban.”¹³⁶ On this basis, the Court held that the government was required to pass strict scrutiny and demonstrate a compelling interest “by offering evidence that granting the requested religious accommodations would seriously compromise its ability to” achieve its objectives in relation to the substantial burden imposed on the sacramental ritual at issue.¹³⁷

Even if a law is neutral and of general applicability, scholars have noted that *Smith* itself provides for two exceptions which would justify the grant of a religious exemption, thereby requiring strict scrutiny.¹³⁸ First, *Smith* noted that per *Sherbert*, *Yoder*, and their progeny, “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”¹³⁹ Second, referencing *Yoder* and similar cases, the Court recognized a hybrid-rights exception in which a Free Exercise claim, in conjunction with another right, would warrant an exemption from an otherwise

¹²⁹ *Id.*; see also *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990).

¹³⁰ *Smith*, 494 U.S. at 878.

¹³¹ *Id.* at 890.

¹³² *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

¹³³ 546 U.S. 418 (2006).

¹³⁴ *Id.* at 436.

¹³⁵ *Id.* at 434 (quoting Brief for Petitioners 18).

¹³⁶ *Id.* at 435.

¹³⁷ *Id.*

¹³⁸ Merlino, *supra* note 46, at 686–87.

¹³⁹ *Id.* at 687; see also *Emp’t Div. v. Smith*, 494 U.S. 872, 884 (1990) (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

neutral and generally applicable law.¹⁴⁰ Therefore, “two distinct but related claims . . . [may] . . . generate a hybrid” right requiring strict scrutiny.¹⁴¹

The hybrid-rights approach was recognized by the D.C. Circuit in *EEOC v. Catholic University of America*.¹⁴² There, the court considered a claim by a Catholic nun that she was denied academic tenure on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964.¹⁴³ The court rejected her claim, holding that a religious institution is afforded the authority “to select its own ministers free of government interference. . . .”¹⁴⁴ In doing so, the court further recognized that there is “a long line of Supreme Court cases that affirm the fundamental right of churches to ‘decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’”¹⁴⁵ Because enforcement of the civil rights law would require government inquiry into the internal governance practices of a religious institution, the court found that such entanglement would also implicate the Establishment Clause, thereby creating a hybrid situation in which strict scrutiny would be necessary.¹⁴⁶

Importantly, scholars have recognized that this suggests both an individual and institutional right to free exercise, and that a hybrid right may arise from the Religion Clauses themselves.¹⁴⁷ Most recently, the Supreme Court effectively reiterated this institutional right to religious freedom in the 2012 case of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.¹⁴⁸ In that case, the Court held that enforcement of the Americans with Disabilities Act against a church and parochial school violated the Free Exercise Clause because it “interfere[d] with the internal governance of the church, depriving the church of control over . . . its beliefs.”¹⁴⁹ Such enforcement would also implicate the Establishment Clause, “which prohibits government involvement in such ecclesiastical decisions” as those concerning the ministry of faith.¹⁵⁰

In addition to the right of institutional autonomy, scholars have identified another hybrid-rights exception concerning the interplay between the right to the free exercise of religion and the right to free speech, specifically the negative right of the individual not to speak.¹⁵¹ In *West Virginia Board of Education v. Barnette*,¹⁵² the Supreme Court held that Jehovah’s Witnesses could not be compelled to salute the American flag in public schools, as it was contrary to their sincerely held religious

¹⁴⁰ *Smith*, 494 U.S. at 881.

¹⁴¹ Merlino, *supra* note 46, at 690.

¹⁴² *Id.* at 691; *see also* *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996).

¹⁴³ *Cath. Univ. of Am.*, 83 F.3d at 459.

¹⁴⁴ *Id.* at 462.

¹⁴⁵ *Id.* (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

¹⁴⁶ Merlino, *supra* note 46, at 692; *see also* *Cath. Univ. of Am.*, 83 F.3d at 462-63.

¹⁴⁷ Merlino, *supra* note 46, at 692.

¹⁴⁸ *Winters, supra* note 9, at 195; *see also* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

¹⁴⁹ *Hosanna-Tabor*, 565 U.S. at 188.

¹⁵⁰ *Id.* at 189.

¹⁵¹ 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, 724 (2004).

¹⁵² *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

beliefs.¹⁵³ Likewise, in *Wooley v. Maynard*,¹⁵⁴ the Court ruled that motorists could not be compelled to display license plates with the phrase “Live Free or Die” because the state’s interest in that message was not sufficiently compelling to justify intrusion on the individual’s right not to speak in a way that conflicted with his sincerely held beliefs.¹⁵⁵

Yet another hybrid-rights exception may apply with respect to the right to the free exercise of religion and the right to privacy under the Fourteenth Amendment. Indeed, courts have recognized that “the constitutional right to privacy blankets the attorney-client relationship.”¹⁵⁶ Likewise, the right to privacy is the modern rationale for the doctor-patient privilege.¹⁵⁷ Insofar as the right to privacy undergirds the attorney-client and doctor-patient privileges, it would be perplexing to not find such an interplay in the clergy-penitent context. Indeed, scholars have argued that the justifications for the clergy-penitent privilege are stronger than those for other evidentiary privileges.¹⁵⁸ Furthermore, some scholars have posited that “while the clergy-penitent privilege may serve to protect free exercise of religion, it principally serves to protect an individual’s right to privacy.”¹⁵⁹ This combination may provide another viable path through which to revive strict scrutiny in the context of the clergy-penitent privilege.

Regarding the Establishment Clause, the government may not pass legislation that has the purpose or primary effect of advancing or inhibiting religion.¹⁶⁰ In this light, the Establishment Clause protects both religious and nonreligious individuals.¹⁶¹ In *Lemon v. Kurtzman*, the Supreme Court established a three-prong test for determining whether a government action violates the Establishment Clause.¹⁶² “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion”; and third, the “statute must not foster an excessive government entanglement with religion.”¹⁶³

Although the Court has applied variations of this test since its inception, a clear mandate with respect to its application does not yet exist.¹⁶⁴ Instead, the *Lemon* factors are recognized as “helpful signposts.”¹⁶⁵ Nevertheless, the Court has recognized that “[e]ach value judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious

¹⁵³ *Id.* at 642.

¹⁵⁴ *Wooley v. Maynard*, 430 U.S. 705 (1977).

¹⁵⁵ *Id.* at 716–17.

¹⁵⁶ *Cantor v. Sup. Ct. of Pa.*, 353 F. Supp. 1307, 1319 (E.D. Pa. 1973), *aff’d*, 487 F.2d 1394 (3d Cir. 1973).

¹⁵⁷ *In re Miller*, 585 N.E.2d 396, 408 (Ohio 1992).

¹⁵⁸ Shawn P. Bailey, *How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege*, 2002 B.Y.U. L. REV. 489, 511 (2002).

¹⁵⁹ Deborah Paruch, *From Trusted Confidant to Witness for the Prosecution: The Case Against the Recognition of a Dangerous-Patient Exception to the Psychotherapist-Patient Privilege*, 9 U.N.H. L. REV. 327, 391 (2011); see also Reese, *supra* note 71, at 60 (positing that the right to privacy may be one of the policy justifications for the privilege).

¹⁶⁰ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963).

¹⁶¹ Winters, *supra* note 9, at 195–96.

¹⁶² *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

¹⁶³ *Id.* at 612–13.

¹⁶⁴ Winters, *supra* note 9, at 196.

¹⁶⁵ *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

beliefs and practices or have the effect of doing so.”¹⁶⁶ In the recent aforementioned case of *Hosanna-Tabor*, the Court found a violation not only of the Free Exercise Clause, but also of the Establishment Clause, on the basis that it “prohibits government involvement in such ecclesiastical decisions” as those pertaining to who will minister to the faithful and by what means.¹⁶⁷ As discussed further *infra* Part IV.B, this could have significant implications for drafting a constitutional clergy-penitent privilege statute that shows adequate deference to the mandated secrecy of penitential communications.

ii. Section 116 of the Australian Constitution

Quite similarly, in Australia, Section 116 of its Constitution, which was drafted based on the religion clauses of the United States’ First Amendment itself,¹⁶⁸ provides for an Establishment Clause, Observance Clause, and Free Exercise Clause.¹⁶⁹ Notably, however, where the First Amendment has been incorporated onto the states by way of the Fourteenth Amendment, Section 116 of the Australian Constitution regrettably applies only to the Federal Commonwealth.¹⁷⁰ Therefore, some say that Australian states are not expressly prohibited from infringing on religious exercise, establishing a religion, imposing religious observance, or exempting religious individuals from public service.¹⁷¹

Another notable distinction is that, where the free exercise of religion is an affirmative right in the Bill of Rights of the United States Constitution, Section 116 does not embody a freestanding right of the individual, but only a limitation against the legislative power of the Commonwealth.¹⁷² Further issues arise from the fact that while the First Amendment has been the subject of much litigation in the United States, a dearth of Section 116 cases exists in the High Court of Australia (“Court”), and it has never found a violation of that provision.¹⁷³ In “the leading case” of *Adelaide Company of Jehovah’s Witnesses Incorporated v Commonwealth*, the Court considered a law which ordered property to be seized by the government in support of a war effort.¹⁷⁴ The Court decided the case on other grounds but stated in dicta that the “exercise” of religion was protected under Section 116, which included acts in pursuit of religious beliefs.¹⁷⁵

¹⁶⁶ *Walz v. Tax Comm’n of City of N.Y.*, 397 U.S. 664, 669 (1970).

¹⁶⁷ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012).

¹⁶⁸ CAROLYN EVANS, LEGAL ASPECTS OF THE PROTECTION OF RELIGIOUS FREEDOM IN AUSTRALIA 5 (2009), https://humanrights.gov.au/sites/default/files/content/frb/papers/Legal_%20Aspects.pdf [hereinafter EVANS I].

¹⁶⁹ “The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.” *Australian Constitution* s 116.

¹⁷⁰ Bogen, *supra* note 118, at 54–57; EVANS I, *supra* note 168.

¹⁷¹ EVANS I, *supra* note 168, at 19.

¹⁷² CAROLYN EVANS, RELIGION AND THE SECULAR STATE IN AUSTRALIA, NAT’L REPORT: AUS. (2010), <https://classic.iclrs.org/content/blurb/files/Australia.1.pdf> [hereinafter EVANS II].

¹⁷³ Bogen, *supra* note 118, at 58; *see also* Gray, *supra* note 21, at 21.

¹⁷⁴ Gray, *supra* note 21, at 21 (citing *Adelaide Co. of Jehovah’s Witnesses, Inc. v Cth* (1943) 67 CLR 116 (Austl.)).

¹⁷⁵ *Id.* (citing *Adelaide Co.*, 67 CLR at 124).

Today, the Australian High Court places particular emphasis on the purpose of the law when considering free exercise claims.¹⁷⁶ In turn, the High Court has consistently held that a challenged law is valid under Section 116 unless its purpose is to establish a religion or prohibit the free exercise thereof.¹⁷⁷ Thus, the High Court characteristically upholds neutral and generally applicable laws.¹⁷⁸ In this light, the High Court's approach is similar to that of the U.S. Supreme Court in *Employment Division v. Smith*, as previously discussed in Part I.C. Indeed, in *Kruger v Commonwealth*,¹⁷⁹ a justice of the Australian High Court cited *Smith* for the proposition that generally applicable laws are not subject to free exercise review and will be upheld with little scrutiny unless their purpose is to infringe religious freedom.¹⁸⁰

Notwithstanding the centrality of purpose in Section 116 cases, there has been disagreement in the High Court concerning how to determine whether legislation has been enacted for a "forbidden purpose."¹⁸¹ In *Kruger*, the Court considered an ordinance which had aboriginal children removed from their homes.¹⁸² While the majority of justices did not discern a forbidden purpose, Justice Gaudron argued that insofar as the law had the effect of preventing children from participating in their religious practices, a forbidden purpose could be inferred unless the government showed that it was necessary to achieve a compelling public interest unrelated to religion.¹⁸³ In this light, Justice Gaudron effectively demonstrated a preference for a strict scrutiny approach similar to that of the *Sherbert-Yoder* line of cases in the United States.

The purpose-centered analysis of the Australian High Court is still in flux, and with little litigation on the subject, how the Court would address the issue going forward remains unclear. Notwithstanding this uncertainty, as evidenced by the Court's use of *Smith*, the High Court strongly considers judicial developments in the United States.¹⁸⁴ Therefore, as the United States Supreme Court continues to develop *Smith* and the hybrid-rights theory, the standard is likely to shift in Australia as well.

II. MODERN STATUTORY TREATMENT IN THE UNITED STATES & AUSTRALIA: CONFLICT BETWEEN THE CLERGY-PENITENT PRIVILEGE AND MANDATORY REPORTER STATUTES

A. MODERN TREATMENT IN THE UNITED STATES

¹⁷⁶ Bogen, *supra* note 118, at 58; *see also* Gray, *supra* note 21, at 22.

¹⁷⁷ Bogen, *supra* note 118, at 58; *see also* A-G (Vic) ex rel. Black v Cth (1981) 146 CLR 559, 604 (Austl.) (stating that a law which provided financial aid to a parochial school did not violate the Establishment Clause where its purpose was not to recognize the school as a national institution).

¹⁷⁸ Bogen, *supra* note 118, at 58.

¹⁷⁹ *Kruger v Cth* (1997) 190 CLR 1 (Austl.).

¹⁸⁰ *Id.* at 232 n.461 (Gummow, J.) (citing *Emp't Div. v. Smith*, 494 U.S. 872, 878–80 (1990)); *see also* Bogen, *supra* note 118, at 61–62.

¹⁸¹ *See* Bogen, *supra* note 118, at 60–62.

¹⁸² *Id.*, at 58 (citing *Kruger*, 190 CLR at 132).

¹⁸³ *Id.*

¹⁸⁴ Gray, *supra* note 21, at 6; *see also* Bogen, *supra* note 118, at 61–62.

Today, courts in the United States generally recognize the legitimacy of the clergy-penitent privilege. Indeed, there exists a paucity of cases denying the existence of a common law clergy-penitent privilege in the United States.¹⁸⁵ Although all fifty states and the federal government have come to recognize the privilege, they have done so on different grounds. As discussed *supra* Part I.C, the federal government has done so by way of common law interpretation and reference to the proposed and rejected Rule 506. In contrast, all fifty states have expressly passed statutes enacting some form of the clergy-penitent privilege.¹⁸⁶ However, these states differ in terms of key statutory variables, including: (1) the definition of clergy; (2) the scope of the communications protected; (3) who may assert the privilege; and of paramount importance for purposes of this Note, (4) whether the privilege applies in cases of child abuse where a cleric's duty to report under a mandatory reporter statute conflicts with his spiritual obligation as a sacramental mediator.

Regarding the definition of "clergy," about half of states define the term as, "a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization."¹⁸⁷ Some states define clergy even more broadly by including the proposed and rejected Rule 506 language also covering any "individual reasonably believed" to be acting as such by the penitent.¹⁸⁸ These liberal definitions of clergy ensure that the privilege is not unduly limited to certain religious groups, but they also arguably open the door to assertion of the privilege by persons who rightly may not be regarded as clergy in the ordinary sense of the word. In contrast, some states do not define the term clergy at all, but simply state the privilege will apply to any "clergyman or priest[.]" thereby providing virtually no guidance on the privilege at all.¹⁸⁹ Finally, the rest of the states have adopted a more restrictive approach, limiting the privilege to clergy of "bona fide established

¹⁸⁵ WRIGHT & GRAHAM, *supra* note 73.

¹⁸⁶ Varner v. Stovall, 500 F.3d 491, 495 (6th Cir. 2007); *see also* Mazza, *supra* note 6, at 182 n.75 (citing each state statute that codified the clergy-penitent privilege). For example, the current Utah rule structures the privilege as follows:

- (a) Definitions.
 - (1) "Cleric" means a minister, priest, rabbi, or other similar functionary of a religious organization or an individual reasonably believed to be so by the person consulting that individual.
 - (2) "Confidential Communication" means a communication:
 - (A) made privately; and
 - (B) not intended for further disclosure except to other persons in furtherance of the purpose of the communication.
- (b) *Statement of the Privilege.* A person has a privilege to refuse to disclose, and to prevent another from disclosing, any confidential communication:
 - (1) made to a cleric in the cleric's religious capacity; and
 - (2) necessary and proper to enable the cleric to discharge the function of the cleric's office according to the usual course of practice or discipline.
- (c) *Who may claim the privilege.* The privilege may be claimed by:
 - (1) the person who made the confidential communication;
 - (2) the person's guardian or conservator;
 - (3) the person's personal representative if the person is deceased; and
 - (4) the person who was the cleric at the time of the communication and on behalf of the communicant.

UTAH R. EVID. 503 (West 2020).

¹⁸⁷ Colombo, *supra* note 3, at 232 (referencing state statutes with similarly formulated definitions).

¹⁸⁸ *See e.g.*, ARK. CODE ANN. § 12-18-402 (West 2020).

¹⁸⁹ Colombo, *supra* note 3, at 232 (citing state statutes with similar formulations).

church[es] or religious organization[s].”¹⁹⁰ Therefore, these states limit the privilege to “bona fide clergy” in cognizable churches only. This ensures that the privilege is not abused, but one may argue it is too limited insofar as there are colorable claims to the privilege by little-known denominations. Until recently, Georgia had perhaps the most restrictive definition of clergy, defining it as “any Protestant minister of the Gospel, any priest of the Roman Catholic faith, [or] any priest of the Greek Orthodox faith.”¹⁹¹ Critics claimed this definition was unduly limited to the “major Western religions.”¹⁹² Therefore, Georgia undertook in 2011 to revise its definition of the privilege to include, among other things, the more expansive “similar functionary,” verbiage included in other state definitions.¹⁹³

In terms of the scope of the privilege, around half of U.S. states define it as covering “any confidential communication made to [a cleric] in his professional character.”¹⁹⁴ Importantly, this definition suggests that the communication need not be penitential in nature, so long as the cleric is acting in his “professional” capacity. Other states limit the privilege to “statement[s] made to [a cleric] under the sanctity of the religious confessional” or within the “course of discipline enjoined by [a cleric’s] church.”¹⁹⁵ The effect of this restricted definition is to cover only those formal penitential communications which are under a mandate of secrecy by the religion in question, an approach which harkens back to the New York court’s decision in *People v. Smith*.

With respect to who may assert the privilege, most states recognize the penitent as the sole holder of the privilege.¹⁹⁶ Only four states specifically permit clergy to assert the privilege as well.¹⁹⁷ However, if a penitent discloses the communication to a third party, then the right to assert the privilege is vitiated.¹⁹⁸ In addition, some jurisdictions provide for waiver in certain circumstances. For example, in Ohio, the penitent is the holder of the privilege, but he may waive the privilege through his consent unless the penitential communication was made “directly to the cleric” or “in the manner and context that places the cleric specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine.”¹⁹⁹

¹⁹⁰ *Id.*

¹⁹¹ GA. CODE ANN. § 24-9-22 (West 2020) (repealed 2013).

¹⁹² Chad Horner, *Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society*, 45 DRAKE L. REV. 697, 715–16 (1997); Colombo, *supra* note 3, at 233; Incledon, *supra* note 51, at 517 n.20.

¹⁹³ GA. CODE ANN. § 24-5-502 (West 2020); see also Incledon, *supra* note 51, at 518.

¹⁹⁴ Colombo, *supra* note 3, at 233.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 134.

¹⁹⁷ *Id.*

¹⁹⁸ Julie Ann Sippel, Comment, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U. L. REV. 1127, 1144 (1994); see also *Perry v. State*, 655 S.W.2d 380, 381 (Ark. 1983) (holding that defendant’s disclosure of penitential communications to others constituted a waiver of the privilege); *State v. Andrews*, 357 P.2d 739, 744 (Kan. 1960) (holding that the privilege is waived upon disclosure of penitential communications to a third party).

¹⁹⁹ OHIO REV. CODE ANN. § 2317.02(C) (West 2020).

In addition to the clergy-penitent privilege, every state has a mandatory reporter statute aimed at discovering and stopping child abuse.²⁰⁰ However, states differ in terms of the classes of individuals enumerated as mandatory reporters and the scope of what must be reported.²⁰¹ Today, over half of states have included members of the clergy as professionals who are required by law to report known or suspected child abuse and neglect.²⁰² Of those states, twenty-four grant the privilege for those penitential communications that fall within the statutory definition.²⁰³ Meanwhile, New Hampshire and West Virginia are the only states, along with the territory of Guam, to deny the privilege in cases involving child abuse or neglect.²⁰⁴ Those two state statutes similarly provide, “[t]he privileged quality of communication between husband and wife and any professional person [including a priest, minister, or rabbi] and his patient or client, except that between attorney and client, shall not apply to proceedings [regarding child abuse and neglect].”²⁰⁵ However, of those states that do not expressly enumerate clergy as mandatory reporters but may nonetheless include them under the “any person” statutory designation, North Carolina, Oklahoma, Rhode Island, and Texas also deny the privilege in cases involving child abuse or neglect.²⁰⁶ Meanwhile, several states do not address the clergy-penitent privilege in their mandatory reporter laws at all.²⁰⁷

The conflict between the clergy-penitent privilege and mandatory reporting law was most recently addressed in the 2016 Louisiana Supreme Court case of *Mayeux v. Charlet*.²⁰⁸ In that case, the parents of an alleged victim of sexual abuse named a Catholic priest among several defendants, claiming that he failed to comply with the state’s mandatory reporter statute after hearing of the alleged abuse during a sacramental confession.²⁰⁹ The Louisiana statute at issue enumerates clergy as mandatory reporters and defines the class as “any priest, rabbi, duly ordained clerical deacon or minister, Christian Science practitioner, or other similarly situated functionary of a religious organization”²¹⁰ However, the statute preserved the clergy-penitent privilege, stating that “[a] member of the clergy is not required to report a confidential communication . . . [where] . . . under the discipline or tenets of that church, denomination, or organization, [the cleric] has a duty to keep such communications confidential.”²¹¹ The Supreme Court of Louisiana held that although clergy are mandatory reporters of child abuse, “a priest when administering the sacrament of confession has no duty to report any confidential communications made

²⁰⁰ Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 725 (1987).

²⁰¹ *Id.* at 201–02.

²⁰² DEP’T OF HEALTH & HUM. SERVS., CHILD WELFARE INFO. GATEWAY, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2019), <https://www.childwelfare.gov/pubPDFs/clergymandated.pdf> [hereinafter *Child Welfare III*].

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ N.H. CODE REV. STAT. § 169-C:32; *see also* W. VA. CODE ANN. § 49-2-811.

²⁰⁶ *Child Welfare III*, *supra* note 202.

²⁰⁷ *Id.*

²⁰⁸ *Mayeux v. Charlet*, 203 So. 3d 1030, 1032 (La. 2016).

²⁰⁹ *Id.* at 1032–33.

²¹⁰ *Id.* at 1039 (citing LA. CHILD CODE ANN. art. 603 (13)(b)).

²¹¹ LA. CHILD CODE ANN. Art. 603(17)(c).

during the confession that, by the tenets of the Roman Catholic Church, he is authorized to hear and is also duty bound to keep confidential.”²¹²

At the legislative level, states have become more active in attempting to alter judicial recognition of the clergy-penitent privilege in cases involving abuse. At present, California, Utah, and North Dakota are among those states who grant the privilege where the penitential communication falls within the statutory definition.²¹³ However, legislators in each of those states have attempted to subordinate the privilege in cases involving child abuse in recent years. Under existing law in California, clergy are enumerated as mandatory reporters and must report known or suspected instances of child abuse, except when the cleric acquires such knowledge or suspicion in the context of a penitential communication.²¹⁴ In February 2019, State Senator Jerry Hill of California introduced S.B. 360 with the stated purpose of eliminating the “exception for a penitential communication, thereby requiring clergy to make a mandated report even if they acquired the knowledge or reasonable suspicion of child abuse or neglect during a penitential communication.”²¹⁵ The effect of this bill would have been to abrogate the clergy-penitent privilege and thus compel clergy to choose between following state law and violating their sincerely held religious beliefs, or, in other words, following divine law and facing imprisonment.

In May 2019, the California bill was amended, restating the purpose as intent on further defining “a penitential communication for purposes of the exception. The bill would also exempt from the exemption any penitential communication made between a clergy member and another person employed at the same facility or location as that clergy member, or between a clergy member and another clergy member.”²¹⁶ The effect of the bill as amended would still be to abrogate the privilege. However, it would limit the breadth of that abrogation to penitential communications between clergy and other religious institutional staff. This is but a modest amendment that would nonetheless place clergy in a position wherein they would have to choose between state law and their religious conscience. The effect of such language is that clergy and employees of religious institutions do not share the same right to confidential penitential communications as lay persons. Such a formulation arguably implicates not only the Free Exercise Clause, but the Equal Protection Clause as well.

A similar effort arose in Utah where, in 2020, State Representative Angela Romero introduced legislation intended to delete “provisions that exempt, under certain circumstances, a member of the clergy from being required to report child abuse and neglect.”²¹⁷ Despite the fact that the statute already limited the privilege to those clergy whose religions required confidentiality regarding penitential communications, H.B. 90 sought to strike, in its entirety, language providing for a clergy-penitent privilege exception in cases of child abuse or neglect discovered during a sacramental confession. Most recently, in January 2021, several state

²¹² *Mayeux*, 203 So. 3d at 1040.

²¹³ See *Child Welfare III*, *supra* note 202.

²¹⁴ CAL. PENAL CODE § 11166(d)(1) (West 2019).

²¹⁵ S.B. 360, 2019 Leg., 85th Sess. (Cal. 2019).

²¹⁶ S.B. 360, 2019 Leg., 85th Sess. (Cal. 2019).

²¹⁷ H.B. 90, 2020 Leg., Gen. Sess. (Utah 2020), as introduced.

senators and representatives in North Dakota introduced S.B. 2180, which would similarly abrogate the clergy-penitent privilege in cases of child abuse and neglect.²¹⁸ Currently, North Dakota law enumerates clergy as mandatory reporters but states that they are “not required to report . . . if the knowledge or suspicion is derived from information received in the capacity of spiritual adviser,” such as in the context of a penitential communication in the confessional.²¹⁹

Each of these legislative efforts stands to force clergy into the serious dilemma of choosing between facing prosecution and even imprisonment for violating the law or facing excommunication for violating a sincerely held religious belief. Due to this grave implication for religious liberty, the California and North Dakota efforts were withdrawn and placed on temporary holds, while the Utah bill failed in the state house of representatives.²²⁰ In the wake of these legislative efforts, sentiments of discontent have echoed among religious liberty advocates who have said, “[i]n the United States, we expect to exercise our religion, including going to confession and having spiritual counseling, without government invading our privacy.”²²¹

B. MODERN TREATMENT IN AUSTRALIA

As discussed *supra* Part I.D, the clergy-penitent privilege has not received a great deal of recognition in Australian courts. In the modern era, the issue has come up sparingly. In 2008, the State Supreme Court of New South Wales considered a claim by the Mormon Church that a legal obligation to reveal the contents of a religious confession would violate Section 116 of the Australian Constitution.²²² The State Supreme Court held, with little reasoning offered, that the law was not an unconstitutional infringement of the Free Exercise Clause.²²³

From a legislative perspective, while recent efforts to abrogate the clergy-penitent privilege have met resistance in the United States, such efforts have been successful in Australia. Despite the fact that the Australian Law Reform Commission found an obligation to disclose evidence of confidential penitential communications “to be against the spirit of [Section] 116,”²²⁴ the Royal Commission into Institutional Responses to Child Sex Abuse recommended in its final report that the states’ mandatory reporting laws “should not exempt persons in religious ministry from being required to report knowledge or suspicions formed, in whole or in part, on the

²¹⁸ Mary Farrow, *North Dakota Bill Would Force Priests to Violate Confessional Seal in Abuse Cases*, CATH. NEWS AGENCY (Jan. 13, 2021, 7:01 PM), <https://www.catholicnewsagency.com/news/north-dakota-bill-would-force-priests-to-violate-confession-seal-in-abuse-cases-86118>.

²¹⁹ N.D. CENT. CODE ANN. § 50-25.1-03 (West 2019).

²²⁰ See Farrow, *supra* note 218; McKenzie Stauffer, *Bill to Require Clergy to Report Confessions of Child Abuse Fails in House*, KJZZ (Mar 16, 2020), <https://kjzz.com/news/local/bill-to-require-clergy-to-report-child-abuse-fails-in-house>; *North Dakota Lawmaker Withdraws Bill Requiring Violation of Seal of Confession*, NAT’L CATH. REG. (Feb. 2, 2021), <https://www.ncregister.com/cna/north-dakota-lawmaker-withdraws-bill-requiring-violation-of-seal-of-confession>.

²²¹ Farrow, *supra* note 218.

²²² EVANS I, *supra* note 168.

²²³ *Id.* at 22 n.27.

²²⁴ Austl. L. Reform Comm’n, *Evidence* (Report no. 38, 1987).

basis of information disclosed in or in connection with a religious confession.”²²⁵ In response to this report, several Australian states acted quickly to modify their mandatory reporter laws and abrogate the clergy-penitent privilege in such cases. Queensland,²²⁶ Victoria,²²⁷ Tasmania,²²⁸ South Australia,²²⁹ and the Australian Capital Territory²³⁰ have passed legislation requiring priests to violate the seal of confession or face imprisonment.

These legislative efforts have the effect of making clergy mandatory reporters of child abuse and abrogating the clergy-penitent privilege. Notwithstanding these threatened penalties, Catholic leadership in Australia has denounced these legislative efforts, with Archbishop Peter Comensoli of the Archdiocese of Melbourne saying he would rather go to jail than divulge the contents of a sacramental confession.²³¹ This sentiment reflects the concerning dichotomy clergy face when legislatures abrogate the clergy-penitent privilege, namely, complying with the laws of the government and violating the dictates of their religion, or accepting prosecution for holding fast to their sincerely held religious beliefs. Therefore, an analysis as to the propriety of such a dichotomy is necessary.

III. THE CONSTITUTIONALITY OF RECENT LEGISLATIVE EFFORTS IN THE UNITED STATES & AUSTRALIA

A. IN THE UNITED STATES

Given that bills aimed at abrogating the clergy-penitent privilege have recently been proposed in California, Utah, and North Dakota, it is necessary to

²²⁵ AUSTL. GOV'T, AUSTRALIAN GOVERNMENT RESPONSE TO THE ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE (2018), <https://www.childabuseroyalcommissionresponse.gov.au/sites/default/files/2019-05/Australian%20Government%20Response%20to%20the%20Royal%20Commission%20into%20Institutional%20Responses%20to%20Child%20Sexual%20Abuse%20-%20full%20version.PDF>.

²²⁶ *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020* (Cth) s 24, 25 (Austl.) (“It does not matter that the knowledge was gained by the [cleric] during, or in connection with, a religious confession.” The statute further defines “religious confession” as “a confession made by a person to a member of the clergy in the member’s professional capacity according to the ritual of the member’s church or religious denomination.”).

²²⁷ *Children Legislation Amendment Act 2019* (Vic) s 1 (Austl.) (“The main purposes of this Act are . . . to include persons in religious ministry as mandatory reporters . . . and . . . to clarify that a [cleric] is not able to rely on the religious confession privilege . . . to avoid the reporting requirement. . .”).

²²⁸ *Children, Young Persons and Their Families Act 1997* (Tas). “Despite [prior recognition of the privilege], a [cleric] . . . is not entitled to refuse to comply with [the mandatory reporting requirement] on the grounds that he or she formed the belief or suspicion or gained knowledge as a consequence of . . . a religious confession.” *Id.* “Religious confession” is defined as “a confession made by a person to a member of the clergy in the member’s professional capacity according to the ritual of the church or religious denomination concerned.” *Id.*

²²⁹ *Children and Young People (Safety) Act 2017* (SA).

²³⁰ *Children and Young People Act 2008* (ACT). “A person who is or was a member of the clergy of a church or religious denomination is not entitled to refuse to make a mandatory report because it contains information communicated to the member during a religious confession.” *Id.* “[R]eligious confession means a confession made by a person to a member of the clergy in the member’s professional capacity according to the ritual of the member’s church or religious denomination.” *Id.*

²³¹ U.S. DEP’T OF STATE, 2019 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: AUSTRALIA (2019), <https://www.state.gov/reports/2019-report-on-international-religious-freedom/australia/>.

evaluate whether the passage of such laws would run afoul of the First Amendment to the United States Constitution. Based on Supreme Court jurisprudence respecting the Religion Clauses, such legislation likely stands to violate the Constitution.

The first step under *Smith* is to decide whether the legislation in question may properly be characterized as neutral and generally applicable. Under the Utah bill, the exemption for clergy is stricken from the statutory language such that “[a]ny individual who has reason to believe that a child has been subjected to abuse or neglect . . . shall immediately report the alleged abuse or neglect”²³² In a similar way, the North Dakota bill eliminates the exemption for those spiritual communications previously covered by the privilege. While this action may seem neutral and generally applicable on its face, the Supreme Court’s decision in *O Centro* makes clear that such governmental action demands strict scrutiny. In that case, the Court emphasized the fact that there was a longstanding exemption for the use of *hoasca* such that the government needed to demonstrate a compelling interest for how maintaining the exemption stood to undercut the law in relation to the substantial burden imposed on that sacramental exercise.²³³ Indeed, the statutory exemption had existed for thirty-five years at the time of that case.²³⁴

Here, the statutory exemptions for clergy-penitent communications in relation to the mandatory reporting laws of Utah and North Dakota have likewise existed for roughly three decades.²³⁵ This fact, coupled with the historical reverence with which the privilege has been viewed dating back centuries, suggests that these laws are not neutral and generally applicable and thus require strict scrutiny review. This is important because the government would then have to demonstrate how maintaining this long-respected privilege would undercut its ability to apprehend and prosecute suspected child abusers. Insofar as the enactment of these laws would create an incentive structure that leads such abusers to simply avoid the confessional altogether, it is unlikely that the government could meet its burden.

As introduced, the California bill was similar to the aforementioned legislation.²³⁶ As amended, the California bill maintained the privilege for penitential communications by the laity but not for penitential communications between the clergy.²³⁷ Additionally, the scope of the privilege was defined to apply only to those clergy “specifically and strictly under a level of confidentiality that is considered inviolate by church doctrine.”²³⁸ On this basis, the law is not even facially religion-neutral or individual neutral, and thus likely fails under the Religion Clauses as well. In *Church of the Lukumi Babalu Aye v. City of Hialeah*,²³⁹ the Court considered whether an ordinance prohibiting animal sacrifices was constitutional. It found that the words “sacrifice” and “ritual” used in the ordinance at issue supported the conclusion that the law was not religion neutral.²⁴⁰ Furthermore, it noted that the

²³² H.B. 90, as introduced (2020).

²³³ *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 434–35 (2006).

²³⁴ *Id.* at 433.

²³⁵ See UTAH CODE ANN. § 62A-4a-403 (West); see also N.D. CENT. CODE ANN. § 50-25.1-03 (West 2019).

²³⁶ See S.B. 360, as introduced (2019).

²³⁷ S.B. 360, as amended (2019).

²³⁸ *Id.*

²³⁹ 508 U.S. 520 (1993).

²⁴⁰ *Id.* at 534.

effect of the law was “strong evidence of its object,” which it determined was to inhibit the practice of a particular religion, namely, Santeria.²⁴¹

Here, the California bill is not facially neutral. Indeed, it makes an express distinction between clergy who hold secrecy of confession “inviolable” and those that do not. Additionally, it accords a right to secrecy of penitential communications made by individual lay penitents but not those by clergy or other religious institutional employees. For these reasons, it may be said that the law unduly targets certain religions as well as clergy and religious institutions generally—the former being targeted by virtue of the fact that it applies to religions who hold a seal “inviolable,” and the latter being targeted as unentitled to the same protections afforded the laity. The effect of such legislation would be to inhibit the practice of sacramental confessions and thus likely run afoul of the First Amendment. Furthermore, as stated previously, such a construction would likely raise Equal Protection issues under the Fourteenth Amendment as well.

Even if the California bill were accepted as neutral and generally applicable, the next step in the *Smith* analysis is to determine whether an exemption nonetheless applies to invoke strict scrutiny. First, *Smith* recognized that legislation cannot extend individualized exemptions not afforded in circumstances of “religious hardship” without compelling justification.²⁴² The California bill does exactly this by exempting the penitential communications or confessions of the laity at the exclusion of those by clergy and religious institutional staff. Indeed, it is perhaps unfathomable to imagine a “religious hardship” more significant than facing immediate excommunication from one’s church. The implication of the statutory language is that the legislature does not have an interest in curbing abuse generally, but rather, in apprehending suspect clergy specifically. Furthermore, given that the bill targets faiths that hold the seal of confession inviolable, it may be said that the interest is even more narrowly aimed at the Catholic Church and other churches whose clergy have been in the news regarding child abuse. Such discriminatory treatment “tends to exhibit hostility, not neutrality, towards religion,” thereby making strict scrutiny proper.²⁴³

Aside from these individual concerns, the D.C. Circuit’s decision in *Catholic University* and the Supreme Court’s holdings regarding the Religion Clauses in *Hosanna-Tabor* represent a shift towards an emphasis on the ability of organized religious institutions to govern their own internal affairs.²⁴⁴ Indeed, in *Hosanna-Tabor*, the Court noted that *Smith* itself distinguished between legislation aimed at “physical acts,” like the use of peyote in that case, and legislation “lend[ing] its power to one or the other side in controversies over religious authority or dogma.”²⁴⁵ Therefore, the Court expressly stated that *Smith* would not apply in cases involving “an internal church decision that affects the faith and mission of the church itself.”²⁴⁶

²⁴¹ *Id.*

²⁴² *Emp’t Div. v. Smith*, 494 U.S. 872, 884 (1990) (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

²⁴³ *Bowen*, 476 U.S. at 708.

²⁴⁴ Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821, 835–36 (2012).

²⁴⁵ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (citing *Smith*, 494 U.S. at 877).

²⁴⁶ *Hosanna-Tabor*, 565 U.S. at 190; see also Incedon, *supra* note 51, at 536.

This means that “churches as institutions—wholly apart from the individual believer—may still claim exemptions under the Free Exercise Clause from otherwise generally applicable laws that encroach upon their autonomy, especially in matters of doctrine and church administration.”²⁴⁷ Here, legislative efforts to abrogate the clergy-penitent privilege very clearly encroach upon the doctrine embodied in the sacrament of Penance by demanding that the Church unseal the confessional.

On this basis, even if these bills are neutral and generally applicable, to the extent they inhibit the free exercise of both the individual and the Church as an institution, the hybrid-rights theory of *Smith* applies.²⁴⁸ In this regard, legislative efforts to curb the clergy-penitent privilege affect the individual’s right to freely exercise his or her religion—whether lay or clergy—as well as the Church’s institutional autonomy in determining how to govern penitential communications generally without interference from the government. Indeed, in the Catholic context, individual and institutional religious freedom are deeply intertwined. It has been said that the seal of confession serves two purposes, the primary purpose being “protection of the religion itself, with the privacy of the individual penitent secondary to this.”²⁴⁹ Moreover, the Catechism of the Catholic Church teaches that, in addition to conferring God’s grace upon the penitent, the sacrament revitalizes the “life of the Church which suffered from the sin of one of her members.”²⁵⁰ In this context, the clergy-penitent privilege is properly viewed as a mechanism which protects not only the free exercise of the individual penitent but also the institutional autonomy of the Church itself to effectuate its “authority and duty, conferred and commanded by Christ himself, to grant individual absolution. . . .”²⁵¹ Therefore, laws like these, whether neutral and generally applicable or not, implicate the dual interests of individual religious freedom and church autonomy, thereby requiring strict scrutiny review.

Likewise, the hybrid-rights exception for free speech and free exercise also likely applies. The Court’s decisions in *Barnette* and *Wooley* show that compelled speech which contradicts one’s sincerely held beliefs may be subject to strict scrutiny review. In *Barnette*, the Court stated that “[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”²⁵² In his concurrence, Justice Murphy stated that to compel one to speak in a way that is contrary to one’s sincerely held religious beliefs is “the antithesis of freedom of worship.”²⁵³ Insofar as these bills obligate clergy to reveal the contents of sacred communications they are bound to hold secret under penalty of excommunication, compelling them to testify to such information equates to compelling them to not only speak against their faith but to abdicate it in its entirety.²⁵⁴ Furthermore, to do so is to reject the theological and practical teachings

²⁴⁷ Merlino, *supra* note 46, at 691; *see also* Incledon, *supra* note 51, at 537.

²⁴⁸ Merlino, *supra* note 46, at 693–94.

²⁴⁹ *Id.* at 694 (quoting Cardinal Anthony Bevilacqua, *Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L.A. L. REV. 1733, 1736–38 (1996)).

²⁵⁰ Merlino, *supra* note 46, at 694 (quoting CATECHISM OF THE CATH. CHURCH, *supra* note 1, ¶ 1469).

²⁵¹ Merlino, *supra* note 46, at 695.

²⁵² *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

²⁵³ *Id.* at 646 (Murphy, J., concurring).

²⁵⁴ Pudelski, *supra* note 151, at 728.

of the Catholic faith. Recall that, in Catholic theology, the priest is deemed to have “no mortal remembrance” of what is confessed because he stands *in persona Christi* as a mediator of a conversation between only the penitent and God.²⁵⁵ It is for this reason that, as a practical matter, seminarians are taught to treat a penitential communication as though “it never happened.”²⁵⁶

Finally, a novel hybrid-rights exception may also be viable concerning the relationship between the right to freely exercise religion and the right to privacy under the Fourteenth Amendment. Such a hybrid has not been expressly recognized in the courts. However, its acceptance as the foundational right upon which the evidentiary privileges of attorney-client and doctor-patient are based suggests that it may be similarly supported in the clergy-penitent context. Insofar as the hybrid-rights exception to *Smith* applies on one of the aforementioned bases, the constitutionality of these bills returns to a strict scrutiny analysis.

Under *Sherbert*, *Yoder*, and their progeny, the Supreme Court has said that the government must demonstrate a compelling interest that outweighs the substantial burden imposed on religious exercise. In *Yoder*, the Court evaluated whether a law that compelled all parents to cause their children to attend secondary school or pay a fine violated the free exercise right of Amish parents.²⁵⁷ The Court said that “a State’s interest . . . however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment”²⁵⁸ Thus, “only those interests of the highest order and those not otherwise served” can overcome a legitimate claim to the free exercise of religion.²⁵⁹ The Court held that although the state’s interest in education was arguably a strong one, it could not overcome the right of the defendants to freely exercise their religion.

In its analysis, the Court found that the law imposed a substantial burden on religious practice, stating that a law does so when it “affirmatively compels [someone], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of [his] religious beliefs.”²⁶⁰ Indeed, the Court said that “almost 300 years of consistent practice, and strong evidence of sustained faith pervading and regulating respondents’ entire mode of life support the claim that . . . [the law] . . . would gravely endanger if not destroy the free exercise of [the Amish’s] religious beliefs.”²⁶¹ The Court also accorded great weight to the notion that the state’s interest would still be served even if the Amish children did not attend school beyond the age of sixteen because they were taught how to be self-reliant and equipped with technical skills valuable to society.²⁶²

The same could be said of the issues posed by state efforts to subordinate the clergy-penitent privilege to mandatory reporter statutes. First, it is evident that these legislative efforts stand to impose a substantial burden on religious practice insofar

²⁵⁵ Merlino, *supra* note 46, at 706.

²⁵⁶ Barron, *supra* note 1.

²⁵⁷ *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972).

²⁵⁸ *Id.* at 214.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 218.

²⁶¹ *Id.* at 219.

²⁶² *Id.* at 211.

as clerics would be subject to a dichotomous choice between following the dictates of their religion or facing not just a mere fine but imprisonment for refusing to violate the seal of confession. Furthermore, like the Amish, whose faith would be annihilated in the face of the compulsory school attendance law, these bills stand to vitiate a critical pillar of the Catholic faith—one of the seven sacraments of the Church. The *Yoder* court perhaps prophetically drew a parallel between the interests of the Amish and Catholics saying, “the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion . . . as much a part of their religious belief and practices as . . . the confessional . . . for others.”²⁶³ Indeed, as discussed *supra* Part I.A, the sacrament of Penance is an indispensable part of the Catholic faith with its origin in the words of Jesus Christ himself, who said to his Apostles, “[i]f you forgive the sins of any, they are forgiven them; if you retain the sins of any, they are retained.”²⁶⁴

Although there is arguably a compelling state interest in obtaining evidence that will further prosecutorial efforts against suspected child abusers, strict scrutiny requires legislatures to demonstrate how removing the clergy-penitent privilege would achieve the goal of curbing child abuse. This is a burden the government is likely incapable of meeting because statutes that abrogate the clergy-penitent are based upon a false premise, namely, that the privilege enables child abuse, and that abrogation would diminish its prevalence.²⁶⁵ As scholars rightly point out, knowledge and reason suggest that abrogation of the privilege will lead perpetrators to simply avoid the confessional altogether, thus eliminating any chance of rehabilitation or restoration that may be possible through a penitential communication.²⁶⁶

In this light, it would be wrong to suggest that the government interest is not otherwise served in the absence of legislation which abrogates the clergy-penitent privilege. Indeed, maintaining the confidential nature of penitential communications serves desirable social goals. Foremost among these goals, it provides a mechanism through which individuals are encouraged to admit fault and seek forgiveness as well as counsel concerning how to avoid such wrongdoing in the future.²⁶⁷ In this light, it fosters reconciliation between the penitent, victim, and community as a whole. In the Catholic context, this is achieved by the acts of penance which the penitent is directed to complete to “expiate” his sins.²⁶⁸ As discussed *supra* Part I.A, this can take a number of forms, but “[o]ne must do what is possible in order to repair the harm.”²⁶⁹ For example, one may be directed to “return stolen goods, restore the reputation of someone slandered, [or] pay compensation for injuries.”²⁷⁰ Insofar as these directives mirror many equitable and legal remedies, the privilege stands not only to further the important social interest in freedom of religion, but also serves the state’s interest in promoting justice and reconciliation with society.

²⁶³ *Id.* at 219.

²⁶⁴ *John* 20:23 (New King James).

²⁶⁵ Ezeanokwasa, *supra* note 69, at 85.

²⁶⁶ Abrams, *supra* note 87, at 1148–54.

²⁶⁷ Merlino, *supra* note 46, at 702.

²⁶⁸ CATECHISM OF THE CATH. CHURCH, *supra* note 1, ¶ 1459.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

In sum, the recent legislative proposals of California, Utah, and North Dakota violate the First Amendment by placing clergy in a position wherein they must choose between violating their sincerely held religious beliefs or face criminal prosecution. For these reasons, it is perhaps unsurprising that those bills have stalled or failed in the face of steep opposition from not only religious communities, but indeed, those legislators who are “committed to American political values.”²⁷¹

B. IN AUSTRALIA

As discussed *supra* Part I.E.ii, legislative efforts to eradicate the clergy-penitent privilege have been highly successful in Australian states and have not received much attention from litigants. This is likely because the Australian states are not bound by the Federal Constitution. Furthermore, the High Court’s purpose-centered approach has led it to consistently reject Section 116 claims. Notwithstanding this pattern, legislation aimed at abrogating the clergy-penitent privilege differs significantly from past Section 116 challenges. Therefore, if similar legislation is adopted by the Commonwealth, then it may pose the first Section 116 violation. In *Krygger v Williams*,²⁷² the High Court considered a Section 116 challenge in which the plaintiff argued that compulsory military service was unconstitutional because it infringed upon his religious beliefs.²⁷³ In rejecting this argument, Justice Griffith said, “[t]o require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion.”²⁷⁴ The implication is that legislation that compels an individual to breach the dictates of his faith, as in the case of a priest compelled to violate the seal of confession, would constitute a free exercise violation.²⁷⁵ Nevertheless, the purpose test poses a significant obstacle.

In *Kruger v Commonwealth*, the High Court considered a Section 116 challenge to an ordinance that had children removed from their homes and placed under the legal guardianship of the government. The plaintiffs argued that the forcible removal of children from the aboriginal community effectively impaired the free exercise of religion.²⁷⁶ Five justices held that the ordinance did not violate Section 116, in large part because a forbidden purpose could not be discerned from the language of the ordinance.²⁷⁷ Indeed, the ordinance at issue in that case made no mention whatsoever of religion or any other belief systems at all.²⁷⁸ Thus, it may legitimately be said that there was only an incidental effect on religion. However, the same is not true in the context of some Australian statutes which have abrogated the clergy-penitent privilege. For example, in the Children Legislation Amendment Act 2019, the Parliament of Victoria expressly stated that its “main purposes” were to “include persons in religious ministry as mandatory reporters . . . and . . . to clarify

²⁷¹ Barron, *supra* note 1.

²⁷² *Krygger v Williams* (1912) 15 CLR 366 (Austl.).

²⁷³ Gray, *supra* note 58, at 132.

²⁷⁴ *Krygger*, 15 CLR at 369.

²⁷⁵ Gray, *supra* note 58, at 146.

²⁷⁶ *Kruger v Cth* (1997) 146 ALR 126, 173–74 (Austl.).

²⁷⁷ *Id.*

²⁷⁸ *See Aborigines Ordinance 1918* (NT) (Austl.).

that a [cleric] is not able to rely on the religious confession privilege . . . to avoid the reporting requirement.”²⁷⁹ In this light, the legislative purpose very clearly targets the free exercise of religion on its face insofar as Australian legislatures are cognizant of the confessional seal. Therefore, such legislation is much more likely to be deemed unconstitutional if passed by the Commonwealth.

IV. PROPOSAL FOR A UNIFORM GLOBAL APPROACH TO THE CLERGY-PENITENT PRIVILEGE

A. WHY A UNIFORM APPROACH IS APPROPRIATE

The conflict between the clergy-penitent privilege and mandatory reporter statutes has been reconciled in a multitude of ways at both the national and international levels, resulting in disparate implications for clergy depending on the jurisdiction within which they reside. Insofar as many religious denominations span the globe and the clerical profession is among the most mobile,²⁸⁰ scholars have noted that it seems appropriate—and perhaps necessary—to implement a more uniform approach to the privilege. In the Catholic Church alone, there are more than 400,000 clergy worldwide along with a population of more than 1.3 billion believers.²⁸¹ The various approaches to the privilege foster a lack of clarity among the clergy regarding an already complicated subject matter, while also raising the potential for conflict of law issues where a cleric has been transferred from one jurisdiction to another.²⁸² While legislatures are sure to differ on particular details concerning the appropriate drafting of the privilege, the current state of the law suggests that legislatures have failed to strike a balance between these competing interests in favor of religious liberty on the one hand or effective criminal prosecution on the other. To adequately balance these issues, careful consideration of who may assert the privilege and the extent to which it is available is paramount.

B. DEFINING CLERGY & LIMITING WHO MAY ASSERT THE PRIVILEGE

In attempting to draft a uniform statutory formulation of the clergy-penitent privilege, it is necessary to decide who will be able to assert it. As discussed *supra* Part II.A, statutory definitions of clergy vary significantly. Some jurisdictions have defined clergy broadly, seeking to craft a less formalistic and more inclusive definition that is not unduly limited to Western religions nor particular religious actors. Others have opted for a more restrictive definition in which formalistic, contextual considerations play a much greater role. Likewise, states vary in terms of whether the privilege is held by the cleric, penitent, or both. Of course, the balance which must be struck is between unduly limiting the privilege to the benefit of particular religions and individuals on the one hand, versus leaving the door open to potential abuse by laypersons and inapposite religions on the other.

²⁷⁹ *Children Legislation Amendment Act 2019* (Vic) pt I div 1(1)(a)(i)(ii) (Austl.).

²⁸⁰ Abrams, *supra* note 87, at 1146.

²⁸¹ *Frequently Requested Church Statistics*, CTR. FOR APPLIED RSCH. IN THE APOSTOLATE (2019), <https://cara.georgetown.edu/about-us/>.

²⁸² Abrams, *supra* note 87, at 1147.

To best account for the free exercise interests at stake, the clergy-penitent privilege should afford protection to both clergyman and penitent alike. Some scholars have argued that the privilege should be held by the penitent only.²⁸³ Specifically, it is argued that the public policy which underlies the clergy-penitent privilege is not materially different from that of other evidentiary privileges such as the attorney-client and doctor-patient privileges, namely, to protect and foster open communication by the client, patient, or penitent.²⁸⁴ This argument neglects the fundamental interest at stake for the cleric that is wanting for attorneys and doctors, namely, the cleric's ability to freely exercise his religion in a manner equally worthy of protection as that of the penitent. In this light, the clergy-penitent privilege is more akin to the spousal privilege, which generally affords the ability to exercise and waive the privilege to both spouses due to the recognition that both parties will generally have a vested interest in maintaining the confidentiality of their communications.²⁸⁵

As discussed *supra* Part I.A, the clergy-penitent privilege was born out of early church teaching concerning the mandated secrecy of penitential communications which is today codified in the Canon Law of the Catholic Church. Insofar as clergy are subject to excommunication for violating the seal of confession, their fundamental religious liberty interest in keeping the contents of penitential communications from judicial revelation is manifest. To require a cleric to divulge the contents of such communications is to inhibit his ability to freely exercise his religious belief, pitting his sincerely held religious beliefs against the state's law. Therefore, both the cleric and penitent should hold the privilege. This encourages open and honest communication by the penitent and fosters trust in the confidentiality of those communications, while also recognizing the cleric's concurrent and independent obligation to refrain from divulging the contents of penitential communications.

Concerning the availability of the privilege among the clergy, due consideration must be given to the fact that under the Establishment Clause, preferential treatment may not be given to particular religions or to religion over non-religion. It has been posited that restrictive definitions which extend the privilege only to certain "recognized," "bona fide," or "regularly established" religions could constitute preferential treatment for the most widely practiced Western religious traditions, with Christian denominations foremost among them.²⁸⁶ Likewise, it has been said that statutes that protect only those religions that mandate secrecy of penitential communications or delineate particular religious actors such as a "priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church" may run afoul of the Establishment Clause.²⁸⁷ The argument is that such a definition unduly favors Catholicism and other faith traditions whose clergy are bound by the seal of confession.²⁸⁸

²⁸³ Colombo, *supra* note 3, at 248.

²⁸⁴ *Id.*

²⁸⁵ Mazza, *supra* note 6, at 186.

²⁸⁶ Incledon, *supra* note 51, at 532.

²⁸⁷ *Id.* at 533.

²⁸⁸ *Id.* at 532 n.143.

Interestingly, this argument implicitly recognizes a critical aspect of the equally important and perhaps more apt free exercise considerations at play. These considerations are applicable only to those faiths that the privilege is intended to protect, namely, those with a sincerely held religious belief in the mandated secrecy of penitential communications. It would be inconsistent with the history and purpose of the privilege to insert such a belief into the exercise of other religious traditions. Insofar as other religious denominations do not recognize confidential penitential communications as an element of their faith, deprivation of the privilege does not constitute preferential treatment of one religion over another but is instead a recognition of the realities concerning a belief and practice that is not relevant to all religions. Indeed, courts have recognized that consideration of a religious “organization’s ecclesiastical rules, customs and laws . . . avoid[s] denominational favoritism and is consistent with the aims of the clergy-penitent privilege.”²⁸⁹

Any definition of the clergy-penitent privilege must account for these historical and theological realities, namely, that the mandated secrecy of the confessional undergirds the existence of the privilege itself. Therefore, a definition that extends the privilege to a mere “spiritual adviser” or any “individual reasonably believed” to be acting as such unduly broadens the privilege in a manner that renders it open to abuse by persons whose religion does not hold a sincere belief in the secrecy of penitential communications. In fact, scholars have argued that a failure to limit the privilege in this way elevates religion over non-religion by enabling actors whose religions lack a mandate of secrecy to benefit from the privilege in a manner unavailable to secular individuals, notwithstanding the fact that each would lack a legitimate basis upon which to assert its necessity.²⁹⁰ Therefore, a proper definition of clergy will restrict its availability to those individuals who are bound by the dictates of their religion to hold penitential communications in confidence. Furthermore, the privilege should be made available only to bona fide clergy. While some scholars have argued that this is unduly restrictive, this limitation furthers the well-settled notion that evidentiary privileges are to be drafted and construed “no more broadly than necessary to accomplish their basic purposes.”²⁹¹

In addition to the goal of fostering open and honest communication between penitents and clergy, some of the basic purposes that have been recognized concerning the clergy-penitent privilege include promoting or preventing the government from inhibiting the free exercise of one’s religion, individual communication with one’s God, the right to privacy, and the therapeutic value associated with confessional activities.²⁹² Concerning this last purpose, English jurist and utilitarian philosopher, Jeremy Bentham, said that although there are some situations in which it would be beneficial to gain access to the contents of these confidential penitential communications, “there are others in which the disclosures thus made are actually of use to justice, under the assurance of their never reaching the ears of the judge. Repentance and consequent abstinence from further misdeeds

²⁸⁹ *Waters v. O’Connor*, 103 P.3d 292, 297 (Ariz. Ct. App. 2004).

²⁹⁰ Colombo, *supra* note 3, at 248.

²⁹¹ 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 74.176 (Kenneth S. Broun ed., 7th ed. 2014).

²⁹² 11 Peter N. Thompson, Minn. Prac., EVIDENCE § 501.06 (4th ed. 2020); *see generally* Robert L. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—the Application of the Religion Clauses*, 29 U. PITT. L. REV. 27 (1967); *see also* Reese, *supra* note 71, at 60.

of the like nature” are among those benefits which flow from confidential penitential communications.²⁹³ Insofar as the law recognizes these policy goals as valuable, it is critical that the privilege be drafted in such a way as to effectuate these changes. Just as it may be said that extension of the privilege to laypersons such as friends, family, or coworkers would run afoul of these policy goals, so too may it be said of a formulation which extends the privilege to any “individual reasonably believed” to be acting as a religious functionary.

C. DEFINING THE SCOPE: BALANCING STATE INTERESTS IN CHILD ABUSE AGAINST
LEGITIMATE RELIGIOUS PRACTICE

Having established who may assert the privilege, it is necessary to determine the bounds within which the privilege will be available. Clearly, a legitimate expectation of confidentiality is a requisite condition for recognition of any testimonial privilege.²⁹⁴ Beyond this, however, jurisdictions again differ significantly in terms of where they draw the line concerning the scope of the privilege. Many statutes extend the privilege to “any confidential communication” made to a member of the clergy in his “professional character.”²⁹⁵ The problem with this formulation is that it once again neglects the historical and theological context in which the clergy-penitent privilege was adopted, namely, to protect those communications for which there is a mandate of secrecy incumbent upon the cleric. Such a formulation again expands the reach of the privilege in a way that opens the door to its abuse.

To limit and preserve the privilege as well as the purposes which underlie it, its scope should not extend beyond those communications which a bona fide clergyman is enjoined from disclosing under the discipline of his church. This approach comports with other evidentiary privileges such as the attorney-client and doctor-patient privileges insofar as they are backed by an objective, professional obligation to maintain the confidentiality of particular communications.²⁹⁶ In the absence of a specific religious dictate to maintain the secrecy of communications, the rationale for a professional obligation of clergy to keep the contents of such communications secret is wanting. This again raises an Establishment Clause concern insofar as extension of the privilege to religions who lack a sincere belief in the necessity for confidential penitential communications may be viewed as elevation of religion over non-religion where both are bereft of any objective basis upon which to assert the necessity of the privilege.²⁹⁷ For the same reason, the privilege should not extend beyond religiously motivated communications such as penitential communications.

Scholars have rightly pointed out that statutes which include language protecting “any confidential communication” received by clergy in their “professional capacity” provide little guidance as to what that includes, or perhaps

²⁹³ See Colombo, *supra* note 3, at 244 (quoting 4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 589–91 (1827)).

²⁹⁴ *Id.* at 246.

²⁹⁵ See, e.g., OR. REV. STAT. ANN. § 40.260 (West 2020).

²⁹⁶ Colombo, *supra* note 3, at 246–47.

²⁹⁷ See *id.* at 247–48.

more importantly for abuse prevention, what it does not include.²⁹⁸ Individuals may seek and clergy may provide counsel in numerous ways, both secular and religious. In its comments to the Children's Code Article 603, the Louisiana legislature explained that it limited the scope of the privilege to only those circumstances in which a cleric is acting exclusively in his spiritual counseling capacity, under a duty to keep such "sacrosanct and nondisclosable" communications confidential, to prevent it from being abused where he was acting in a merely administrative, supervisory, or secular counseling capacity.²⁹⁹ Indeed, where a cleric is acting in one of these latter capacities, the necessity for the clergy-penitent privilege is wanting. Therefore, a proper formulation of the privilege should emphasize the type of communication the individual is engaging in with his or her cleric. In this regard, only those penitential communications in which the penitent seeks religious or spiritual guidance should be privileged.

Importantly, this does not speak to the gravity of the wrongdoing in question, but rather, the purpose for which the communication is made. For example, it has been held that the mere fact of an individual telling a clergy member he intends to commit a criminal act will not inure protection under the clergy-penitent privilege where the statement is not made for the purpose of obtaining spiritual guidance.³⁰⁰ Therefore, a proper definition would give protection to those penitential communications made to a cleric for the purpose of obtaining religious or spiritual guidance according to the course of discipline enjoined by the church to which he belongs. This ensures that the privilege is rightly limited to those religions which mandate the secrecy of such communications and prevents it from being applied beyond those narrow circumstances for which the privilege was adopted.

Concerning the relationship between the privilege and mandatory reporter statutes, the seal of confession must remain of paramount importance. A plethora of various arguments have been put forth, ranging from unsealing the confessional in its entirety to strictly maintaining the confidentiality of such penitential communications, irrespective of the contents in question. The latter approach is the only one that can truly account for the right to freely exercise one's religion in the penitential communication context. Some scholars have argued for a "partial abrogation" approach, in which clergy would be required to meet their obligation to report, but that the reported information could not be used in a court of law against an alleged perpetrator absent a source independent of the otherwise-privileged clergy-penitent communication.³⁰¹

While this approach attempts to strike a balance between the competing interests at stake, it nevertheless fails to adequately account for the free exercise considerations at play for the individual as well as the Church as an institution. In the Catholic Church, the seal of confession "admits of no exceptions."³⁰² Indeed, the canon law states that a priest must preserve the seal "even when all danger of disclosure is excluded."³⁰³ For these reasons, the conflict between the clergy-penitent

²⁹⁸ Lori Lee Brocker, Note, *Sacred Secrets: A Call for the Expansive Application and Interpretation of the Clergy-Communicant Privilege*, 36 N.Y.L. SCH. L. REV. 455, 467 (1991).

²⁹⁹ See *Mayeux v. Charlet*, 203 So. 3d 1030, 1040 (La. 2016).

³⁰⁰ See, e.g., *Burger v. State*, 231 S.E.2d 769, 771 (Ga. 1977).

³⁰¹ See *Abrams*, *supra* note 87, at 1163–64.

³⁰² CATECHISM OF THE CATH. CHURCH, *supra* note 1, ¶ 1467.

³⁰³ 1983 CODE c.984, § 1.

privilege and mandatory reporter statutes should be drawn to protect the integrity of the privilege. Insofar as the religious liberty interests are legitimate and the preservation of the confessional seal is indispensable to protecting those interests, a statute that subordinates the privilege would run afoul of the internationally recognized human right to freely exercise religion.

CONCLUSION

The increasing efforts to curb the clergy-penitent privilege are an alarming affront to the internationally recognized right to the free exercise of religion. The seal of confession upon which the privilege is based is a centuries-old pillar of Roman Catholicism and other faith traditions that is held sacrosanct in belief and practice. The scriptural basis for the sacrament, early church teaching, and centuries of ardent support for the confidentiality of penitential communications from both the secular and religious spheres evidences its indispensable nature. While legislatures in the United States and Australia have attempted to abrogate the privilege, this Note has demonstrated the significant likelihood that such enactments are unconstitutional in both jurisdictions.

Notwithstanding the shift in First Amendment jurisprudence after *Smith*, many avenues to resurrect strict scrutiny remain viable with respect to the hybrid-rights exception. Under such an analysis, it is likely that these legislative efforts would not pass constitutional muster. This is due to the manifest religious liberty implications at stake when a cleric is faced with a dichotomous choice between excommunication or prosecution, as well as the practical limitations to achieving the asserted governmental interests. Likewise, although the High Court of Australia has never found a Section 116 violation, legislation expressly and purposely directed at this religious belief and practice such as that of the State of Victoria could pave the way for the first such violation if passed by the Commonwealth. Furthermore, insofar as the Supreme Court continues to evaluate the hybrid-rights theory of *Smith*, the Australian High Court may alter its approach as it is faced with new challenges.

This Note has echoed prior scholars and further provided a guiding framework for drafting a uniform privilege that assuredly protects the sanctity of confidential penitential communications while narrowing the universe of individuals who may assert the privilege as well as the scope of the communications covered. Commensurate with the history of the privilege and its underpinnings, the privilege should be limited to bona fide clergy who are under a mandate of secrecy regarding penitential communications. Furthermore, it should cover only those penitential communications for which the penitent seeks religious or spiritual guidance from a cleric acting in his professional capacity as enjoined by the discipline of his church. This serves to limit the privilege to confidential penitential communications and prevent individuals who lack a sincere belief in the necessity for such from asserting it, while also giving due deference to its indispensability for those faiths who hold it inviolate and would be thus substantially burdened without it.

While this Note argues against subordinating the privilege to mandatory reporter statutes, there is clearly a manifest interest in preventing and prosecuting child abuse. It is evident that the Church has failed in many regards, and institutional

changes from the inside out are necessary to ensure that clergy are adequately trained to counsel penitents regarding the means through which the ends of justice and mercy may be best served. With properly drafted legislation and thorough institutional reform, legislatures and churches alike can work in tandem to address child abuse and protect legitimate religious practice.