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WORLD & NATION

Should a member of the clergy report sex abuse of the penitent? A look inside the priest-penitent privilege

By Tad Walch

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Priests, pastors and bishops from various faiths say both sides of an apparent collision of ideals are sacred to them: protecting children from all forms of abuse, and keeping confessions confidential so penitents feel safe and motivated to acknowledge and stop their sinful — and sometimes criminal — behavior.

The tension between doctrines about confessions and the impulse to protect children through mandatory reporting laws raises important legal, societal and religious questions about how religious leaders try to focus on and prioritize rescuing victims of abuse while also providing spiritual help to the person who has confessed.

Spiritual confessions have been shielded from government eyes, police investigations and courts for hundreds of years by legal exemptions called the clergy-penitent privilege, similar to privilege given to attorneys and their clients. But seven U.S. states and most states and territories in Australia now designate clergy members as mandatory reporters of child sexual abuse, requiring them to pierce the confessional privilege and report confessed abusers to government authorities.

Faithful clergy, as well as legislators and child advocates are trying to shield children from harm. A conflict sometimes arises for clergy of many faiths whose religious beliefs also protect confessions as sacred, spiritually intimate conversations with a religious leader representing God.

Several Christian faiths use the term confessional seal to describe the sanctity of communication in a confession. Lutherans, Catholics and other faiths consider those sealed conversations as a sacrament so important that a priest or pastor who reveals anything about a confession is removed or excommunicated.

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“We acknowledge that the state has an interest, of course, in protecting people, which is also something the church does as well,” said the Rev. Sean Daenzer, director of Worship for the Lutheran Church Missouri Synod International Center.

It’s not a binary choice, said Father John Paul Kimes, a Notre Dame law professor well-versed in the issue.

“There are ways to do both at the same time, and to see it as a zero-sum game, I think, is horribly reductive,” he said. “Protecting the child is not a zero-sum game. It’s not that I cannot protect the sacramental life of the church and the child at the same time. They should not be seen in opposition to each other.

“There are things that I can do, there are ways that I can work with the victim, to provide protection to the victim, while still maintaining the integrity of the sacramental life of my faith tradition.”

Cases regarding this dilemma of law and religion in Arizona, Louisiana and elsewhere have raised the profile of these issues. An ongoing Arizona case involves a man who sexually abused his two young daughters. The girls are suing two bishops and The Church of Jesus Christ of Latter-day Saints, alleging the clergy should have broken the confidentiality of their father's limited confession to them.

That case has frustrated those who believe any information about possible abuse of a child should be reported immediately. The laws in seven states now make it mandatory for clergy to report child sexual abuse even when it is learned only through a religious confession. A total of 24 other states also list clergy as mandatory reporters but provide the priest-penitent privilege, shielding confessions from reporting. The other 19 states and the District of Columbia do not list clergy as mandatory reporters. (See a state-by-state breakdown at the bottom of this report.)

So what is clergy-penitent privilege? Why does it exist? Where is it limited by law? When and why do laws require priests and others who receive confessions to report them to the government? What will happen to spiritual confessions if those who want to confess no longer believe their words will be confidential? If confidentiality is removed, will it actually bring fewer cases of abuse to light?

And perhaps most importantly, how much is gained and what is lost if legislatures remove the privilege?

What is clergy-penitent privilege?

Confessing sins to a clergy member standing in as God's ambassador is a religious act of spiritual healing in many faiths. The goal is to help the sinner return to spiritual wholeness by seeking forgiveness, doing penance, repairing injury done to others when possible and quitting the sin. If the sin has a victim or was criminal, the process often includes acts of penance, restitution, atonement, reparation and

even criminal reporting.

Antiochian Orthodox Christians believe that priests do not hear confessions as human beings but as “Christ’s instrument.”

Latter-day Saint beliefs value confessions for helping church members turn around their lives and seek forgiveness.

“The purpose of confession is to encourage members to unburden themselves so they can fully seek the Lord’s help in changing and healing,” according to the guidelines offered to lay local leaders and members in the church’s General Handbook.

Repenting sinners, also called penitents, rely on doctrine, theology, policy and practice when they expect their religious leaders never to repeat their confessions.

Lutherans, for example, have resolutely maintained the confidentiality of parishioner confessions to pastors.

“The source of the need to keep a seal on the confession is the reality of the forgiveness of sins, that the Lord separates us from our sins,” said the Rev. Daenzer of the Lutheran Church Missouri Synod, the second largest Lutheran body in the United States.

“It follows as a necessary thing, both practically and theologically, that it would be no good for pastoral care for the private conversations or the conversations concerning somebody’s sins to be shared by the pastor in his sermons or as illustrations or just spoken of again,” he said.

Lutheran pastors repeat at ordination that they “promise never to divulge the sins confessed to them.”

Divulging a congregant’s sins to anyone else would be grounds for removal of the pastor, the Rev. Daenzer said.

Latter-day Saints policy differs slightly from some faiths. The church also holds confessions to be confidential, but Latter-day Saint leaders are instructed to report a confession of child abuse immediately if a report would “prevent life-threatening harm or serious injury and there is not time to seek guidance” from the church’s abuse helpline. The helpline is there to assist bishops in understanding their reporting obligations and to ensure victims receive any spiritual or temporal support, including from professional counselors.

U.S. law has provided a privilege protecting clergy-penitent conversations since an 1813 case in New York, where a court shielded a Catholic priest from having to reveal the thief whose stolen items the priest returned as part of the thief’s repentance.

The privilege expanded to cover all faiths and spread across the country. Today, all 50 states have clergy-penitent privileges codified in law. None have been repealed, though in a few states the privilege has been suspended in cases of child sexual abuse and other abuse, said Father Gregory Zubacz, a Catholic priest and associate provost at Fresno Pacific University, a Christian university. Similar to the more familiar attorney-client privilege, the pastor-parishioner privilege did not allow evidentiary court hearings to compel a priest to reveal what a penitent said during a confessional conversation.

Those laws left parishioners free to exercise their religion. Breaking what they call the confessional seal is abhorrent to Catholics, said Father Kimes, the Notre Dame law professor.

“In Catholic theology, there is no moment in the life of the faithful in which they are more spiritually vulnerable than in the act of confession, when we take our deepest secrets and lay them bare before a priest who represents Christ,” he said.

“When I kept silent, my bones wasted away through my groaning all day long ...,” David wrote in the Psalms. “O Lord, heal me, for my bones are in agony. My soul is in anguish.”

The priest then has the authority to counsel, guide, instruct and lead the person to forgiveness of the sins confessed.

“It’s a moment of supreme intimacy,” Father Kimes said. “We use the term confidentiality a lot, but it sacramentally goes well beyond confidentiality. The seal is only defined as being inviolable. With a confidentiality requirement, there’s always a workaround. With the sacramental seal, there’s no work around. It is absolutely inviolable, because of the vulnerability of the penitent in that moment.”

In fact, Catholic canon says “it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason.”

A priest who directly violates the seal, that is, reveals the identity of a penitent and the sin he or she confessed, is automatically excommunicated, said Father Kimes, who worked on such cases during 11 years as a canon lawyer at the Vatican’s Congregation for the Doctrine of the Faith.

Piercing the priest-penitent privilege

Beginning in the 1960s, state legislatures began to pass laws that limit the doctor-patient privilege and the clergy-penitent privilege to encourage, and in some cases mandate, reporting about child abuse. Many of these laws now require clergy, doctors, nurses, child care workers, day care operators, teachers and school principals to report suspected child abuse. In some states, only the attorney-client privilege remains.

The result is that the United States now has a hodgepodge of laws regarding the confessional privilege, laws that in some cases have created a clash between a sacred religious practice and the compelling need to protect children from unspeakable crimes.

Studies on mandatory reporting laws have begun to show that they may be ineffective.

“Often, intensifying the mandatory character of the reporting requirements and making it more difficult for religious leaders to maintain confidentiality tends to be correlated, at least in some studies, with reduced reporting in the jurisdiction, and reduced effectiveness of reporting,” said Brigham Young University law professor Cole Durham, who recently submitted a chapter on disclosure duties and privileges for an upcoming book on religious organizations and the law.

Does mandatory reporting work?

The issue is complicated by more than 30 years’ worth of peer-reviewed studies that question whether mandatory reporting laws are effective.

For example, a study published last year about sexual assault on college campuses said there is little evidence of the efficacy of mandatory reporting policies. It raised questions about whether those policies violate the consent of survivors and threaten some of their support systems.

“... Emerging evidence suggests that broad mandatory reporting policies that compel disclosures can discourage survivors from seeking help and disclosing to employees they trust,” the study said.

“When support providers take control away (through mandatory reporting), survivors report increased post-traumatic stress, depression, and anxiety,” said the study, published in the Proceedings of the National Academy of Sciences of the United States of America. “It is therefore unsurprising that survivors prefer reporting policies that grant them autonomy and control over the decision to report.”

A 2014 study specifically about mandatory clergy reporting of child maltreatment found that the number of reports from clergy in states mandating them was low. In fact, states that mandated reporting by religious leaders had 10% fewer confirmed reports of child maltreatment.

“What is clear is that this study does not support the hypothesis that mandating reports by the clergy will necessarily increase total or confirmed CM reports,” said the study from the University of Michigan law school and by New York City School of Medicine. The study was published by the APSAC Advisor, a peer-reviewed publication of the American Professional Society on the Abuse of Children.

A 2017 survey study in the American Journal of Public Health again found that the percentage of confirmed physical abuse reports was lower in universal mandatory reporting states (11.9%) than those without such reporting (13.9%).

Casey Family Programs, a national foster care organization, reviewed the study and advised its network that, “Given the lower rates of confirmed physical abuse victimization among reports made in (universal mandatory reporting) states, the researchers conclude UMR is not achieving their intended goal of improving the identification of physical abuse in children, and in fact may be diverting resources from children and families and causing them unnecessary additional trauma.”

A doctor at the University of Pennsylvania also wrote about the study in the journal Pediatrics.

“Increasing reporting seems like a logical approach to improving child safety. It is also ethically and morally compelling,” Dr. Mical Raz wrote. “Eradicating the scourge of child abuse requires recognition, and few would argue against reporting a child in danger. But a new study calls into question the effectiveness of expanding mandatory reporting requirements.

“This new study found that universal mandatory reporting policies were not correlated with increased identification of children at risk of physical abuse,” she added. “... These policies did not achieve their goal of increasing the identification of children at risk of physical abuse.”

Raz argued that the study added to evidence that “increased mandatory reporting requirements are not an effective policy to improve detection of children at risk.”

A survey of recent books and law review articles revealed a general consensus within the legal community that there is a relative dearth, as one court called it, of case law regarding priest-penitent privilege. One recent ruling was handed down in 2020, when the Montana Supreme Court unanimously reversed a \$35 million judgment against the Jehovah’s Witnesses for not reporting sexual abuse to authorities, Christianity Today reported.

The court said church representatives who handled the abuse of a child internally in the mid-2000s fell within the clergy exception within Montana’s law mandating child abuse reporting.

Two Utah legislators are drafting bills for the 2023 legislative session that would end the state’s clergy exception. But religious leaders said removing the confessional privilege would introduce ambiguity into confessions by protecting some parts of those conversations and not others.

Are legislatures trapping penitents using salvation as bait?

“Certainty of the law is critical in a stable society and is fundamental to maintaining respect for the rule of law with respect to significant relationships,” said Father Zubacz. “It is important that penitents know that their confessional revelations and disclosures will always be kept secret, so that they have the confidence to confess without anxiety causing them to hold back that which they need to confess.”

He said legislation abrogating the priest-penitent privilege risks making priests into police informants.

“Fundamentally, becoming a mandated reporter of communications in the confessional theoretically makes me an agent of the state,” he said. “The penitent comes to confession to sort out his or her spiritual shortcomings, but the reporting legislation essentially creates a legal trap for a penitent, with salvation as the bait. The sacrament then potentially becomes the lure, the confessor the fisherman and the reporting legislation the hook. It also makes me the instrument by which the state may work around the penitent’s constitutional right to silence.”

A BYU law review article on the constitutionality of piercing the priest-penitent privilege made a similar observation.

“Requiring (clergy) to report the contents of a confidential communication has the same consequence as wiretapping his office — the private communication reaches a party for which it was not intended without the consent of either party,” the author wrote in a 2009 BYU Law Review article.

Holding clergy accountable for the confessions of sinners also creates ambiguity for priests stuck between religious doctrine and secular law, religious and legal experts said.

Listed among Catholicism’s saints are priests who suffered martyrdom or other indignities after refusing to violate the confessional seal, dilemmas that continue today. A Louisiana priest recently argued in a lawsuit against him that he was being placed in a position where he would have to accept the penitent’s version of events in court or break the confessional seal and face automatic excommunication. A judge ruled that a Louisiana law was unconstitutional because it required priests to be mandatory reporters of abuse, which the judge said violated the religious freedom rights of the priest. The lawsuit was dropped in 2018.

Protecting child abuse victims

Beginning in the 1960s, U.S. legislatures began taking larger steps to prevent child abuse. Today, all 50 states have some form of mandatory reporting laws.

Understandably shocked and angered by heartrending stories of child sexual abuse, some legislators and child advocates continue to seek any opportunity to catch abusers and protect innocent children.

Most Australian states and territories recently passed laws that eliminated the

confessional privilege in cases of child sexual abuse, which one researcher called “an under-theorized reaction to a moral panic.”

Clergy members said they are keenly aware of the widespread concern over the Catholic priest abuse scandals and about child sexual abuse in society in general. They understand why legislators feel compelled to expand mandatory reporting to stop child abusers wherever possible.

“The rage concerning the scandals is justified,” Father Zubacz wrote in the new book “Religious Confession and Evidential Privilege in the 21st Century.” Justice needs to be done, and needs to be seen to be done.”

Uncovering abuse

Father Kimes said clergy can be effective uncovering confessionally reported abuse in other ways.

“First, if the victim comes to me as a priest and says, Father, I’ve been sexually abused, it was done by so-and-so, there are things that I can do to help the victim,” he said. “There’s nothing that prevents me from helping that person contact the authorities.”

He then added, “If it’s the perpetrator that comes forward, that makes it more difficult but doesn’t make it impossible,” Father Kimes said.

“I can say, ‘I can’t forgive your sins until you show me a sign that there’s a genuine conversion of heart. The best way to manifest that is for you to go to the police and tell them what you did. Regardless of the consequences, if you were concerned about the salvation of your soul, this is the way you show it.’”

Latter-day Saint clergy are lay leaders from all walks of life. The Church of Jesus Christ provides an abuse help line with trained professionals to provide legal and other counseling. Latter-day Saint bishops have professional counseling services and financial resources available to assist individuals and to remove anyone from abusive situations.

The church’s General Handbook prescribes an immediate call to the help line any time abuse is suspected or revealed in confession.

“Church leaders and members should fulfill all legal obligations to report abuse to civil authorities,” the handbook states. “In some locations, leaders and teachers who work with children and youth are considered ‘mandated reporters’ and must report abuse to legal authorities. Similarly, in many locations, any person who learns of abuse is required to report it to legal authorities. Bishops and stake presidents should call the help line for details about mandated reporters and other legal requirements for reporting abuse. The church’s policy is to obey the law.”

The handbook offers the exception to calling the help line when, telling leaders to report abuse to authorities immediately if the victim’s life is in danger or serious injury is imminent. “In such cases, the duty to protect others is more important than the duty of confidentiality. Leaders should contact civil authorities immediately,” the handbook says.

Absent a help line, at least one website on Jewish law advises rabbis that they “would be well advised to consult with their personal attorneys in dealing with any situation in which the issues of confidentiality and privilege arise.”

Religious leaders say confession works for the truly penitent

The former Archbishop of Canterbury, Lord Rowan Williams, argued in his forward to “Religious Confession and Evidential Privilege in the 21st Century” that “the ‘seal’ of confession is not — as some critics would argue — a form of malign secrecy but an assurance that all kinds of destructive and damaging behavior can be spoken out, named and acknowledged for what they are.”

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Father Zubacz said confidential confessions are effective in helping people stop or change their behavior, though he acknowledged it’s difficult to compile data because of the confessional seal’s absolute secrecy.

But clergy members said they believe that fewer confessions means fewer sinners

seeking help and forgiveness and more of them continuing to commit sins and crimes.

“In my experience (taking confession), people making an honest confession who are truly contrite will follow the directions of their (clergy), such as reaching out to someone they have been feuding with or returning a stolen item,” Father Zubacz said in an email. “The (clergy member) is in a unique position to influence the penitent’s choices in a way that no one else can.

Priests in Australia argued that very few perpetrators and victims confess sexual abuse incidents to priests and pastors. Those who do try to be vague.

In fact, the Justice and Community Safety Directorate of the Australian Capital Territory advised against eliminating the confession privilege in 2019. It argued that if perpetrators knew a priest might report them, they “will probably avoid confession altogether; or alternatively, they may exploit the potential under the rite of confession prevalent in Australia to confess anonymously and non-specifically.”

What have U.S. courts said about confessional privilege?

American and Australian courts recognized in the 1800s that opening confessions to government prying would likely result in fewer confessions.

In 1813, a New York court held that a Catholic priest could not be compelled to testify about a confession he had received about stolen jewelry. The court said to require the priest to violate his oath would go against conscience and restrain the free exercise of his religion, Father Zubacz said.

“Secrecy is of the essence of penance,” said presiding Judge DeWitt Clinton, the mayor of New York City. “The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed: To 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 the Roman catholic religion would be thus annihilated.”

The U.S. Supreme Court has agreed. In 1980, seven justices including Thurgood Marshall joined an opinion by Chief Justice Warren Burger, who wrote that “the priest-penitent privilege recognizes the human need to disclose to a spiritual

counsellor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”

Father Zubacz and others believe the privilege is a First Amendment issue. He said that mandatory reporting laws that reduce the clergy-penitent privilege eventually will make their way to the land’s highest court.

“The Supreme Court will ultimately decide which one will sink,” he said.

Overview of child abuse reporting statutes

Clergy have mandatory reporting obligation (seven states)

New Hampshire (all persons including clergy have reporting requirement; no privilege other than attorney-client privilege applies to duty to report); New Mexico (unclear; clergy mandated, and apparently priest-penitent privilege abrogated regarding child abuse); North Carolina (all persons who know of or reasonably suspect abuse are mandated reporters; only attorney-client privilege recognized); Oklahoma (all persons who know or reasonably suspect abuse are mandated reporters; no privilege applies); Rhode Island (all persons with knowledge or reasonable suspicion are mandatory reporters; no privileges apply); Texas (clergy-penitent privilege is specifically abrogated in situations involving child abuse); West Virginia (clergy are mandated reporters and all privileges abrogated with respect to child abuse)

Clergy are mandatory reporters but retain some privilege (24 states)

Alabama; Arizona (not required to disclose confession if nondisclosure is reasonable and necessary); Arkansas (mandatory unless fruit of a confession); California (clergy mandatory reporters unless awareness comes from confession); Colorado (clergy are mandatory reporters, but not required to report confidential communications, unless they learn from other sources as well); Illinois (clergy are mandated reporters, but not required to disclose confessions); Indiana (all persons who know of or reasonably suspect abuse are mandated reporters, but clergy-penitent privilege is not abrogated in these cases); Louisiana (clergy are mandated reporters but not required to report penitential communications); Massachusetts (clergy required to report abuse learned about outside confession, but not information from confession); Michigan (clergy are mandated reporters, but not for information gained through confession); Minnesota (clergy are mandated reporters, but not for information gained through confession); Mississippi (all persons are mandatory reporters, but clergy need not report communications made during confession); Missouri (ministers are mandated reporters but confessions are privileged); Nebraska (clergy and Christian Science practitioners are mandatory reporters but not obligated to report matters coming through confession); Nevada (no requirement to report if clergy member has acquired the knowledge or suspicion of abuse from the offender during confession); New Jersey (all persons who know or suspect abuse are mandated reporters, but communications between offender and cleric in cleric’s professional character are typically recognized); North Dakota (clergy are mandated reporters, but not if information comes through confession); Oregon (clergy members are mandated reporters, but not required to report confession unless consent is obtained); South Carolina (Clergy are mandatory

reporters but may be able to invoke priest-penitent privilege for confidential communications); Tennessee (all persons who know or reasonably suspect abuse are mandated reporters; clergy-penitent privilege not abrogated for suspected child abuse but is for sexual abuse); Utah (all persons are required to report abuse, except clergy members are not required to report abuse from confession, unless he or she receives information from some other source as well); Vermont (clergy are listed as mandated reporters, but not if information received through confession or confidential communication); Wisconsin (clergy members are mandated reporters, but clergy not required to report information received in confessional settings); Wyoming (all persons who know or reasonably suspect abuse are mandatory reporters, but clergy not required to report matters received through confession).

Clergy receiving penitential communications not subject to mandatory reporting requirements (19 states and Washington, D.C.)

Alaska (but practitioners of healing arts are mandatory reporters; might cover certain clergy); Connecticut (clergy are mandated reporters, but shall not disclose confidential communications unless confessor consents); Delaware (clergy not specifically listed among persons obligated to report; priest-penitent privilege applies in child abuse situations); Florida (communication remains privileged if given privately while seeking spiritual counsel); Georgia (clergy not required to report abuse reported solely within confession or similar communication); Hawaii (clergy not listed as mandatory reporters); Idaho (duly-ordained ministers not required to report communications during confession); Iowa (clergy not listed as mandatory reporters, but no privilege applies re child abuse); Kansas (clergy not listed among mandatory reporters); Kentucky (any person with reasonable cause to know of abuse is obligated to report, but clergy-penitent privilege is preserved without limitation); Maine (clergy not required to report abuse if received during confidential communications); Maryland (all persons with reason to believe a child is being abused must report, but clergy members are not required to report confidential communications); Montana (clergy not required to report confession); New York (Only Christian Science practitioners are listed as mandatory reporters); Ohio (clergy not required to report confession); Pennsylvania (clergy members are not allowed or required to report information from confession without consent of confessor); South Dakota (clergy not listed among mandatory reporters and religious privilege not among those abrogated by duty to report abuse); Virginia (clergy not listed as mandated reporters, and are not required to report confidential communications); Washington (clergy are not listed as mandated reporters and information received during confession is privileged); Washington, D.C. (clergy not listed as mandated reporters).

Source: Cole Durham, BYU law school

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