

# The Clergy-Penitent Privilege: An Overview

F. Robert Radel, II  
Andrew A. Labbe

## I.

### INTRODUCTION

The clergy-penitent privilege is one of the oldest and most well-recognized privileges in the United States. While other once-recognized privileges have since withered or fallen from the vine, there remains considerable support for the clergy-penitent privilege.<sup>1</sup> However, many debate the rationale behind this privilege, and some question whether it will survive. Nowhere is this debate clearer than in the interplay between the privilege and mandatory child abuse reporting laws, which have limited, and in some instances abrogated, the privilege. Jurisdictions throughout the country have struggled with striking a balance between what many consider one of the most sacred privileges at law and the safety of children. Some argue that the privilege must be protected at all costs, some that it should be done away with completely, while most attempt to find a middle ground.

This debate has again become a “hot button” issue following a recent decision from the Supreme Court of Louisiana which revived a lawsuit contending that a priest should have reported accusations of sexual abuse disclosed to him during a confession.<sup>2</sup> This decision will be discussed in further detail below.

This article will focus on the history of the clergy-penitent privilege and the interplay between the privilege and mandatory child reporting laws from jurisdiction to jurisdiction, while also addressing the arguments for and against limiting and/or abrogating the privilege, while presenting suggestions for a workable balance between protecting confidential religious communications and protecting children from abusers.

## II.

### The Clergy-Penitent Privilege

#### A. History of the Clergy-Penitent Privilege

The clergy-penitent privilege originated in the Canon law of the Roman Catholic Church. Under Canon law, “the seal of the confessional is ‘inviolable.’”<sup>3</sup> A priest could be excommunicated for disclosing the contents of a confession. England recognized this privilege while the Roman Catholic Church was still prominent, but the privilege dissolved with the power of the Roman Catholic church, and currently does not exist in England.<sup>4</sup>

The first known case in America recognizing the privilege is *People v. Phillips*,<sup>5</sup> which was decided in 1813. In *Phillips*, the New York court held that free exercise of religion provisions would not force a Catholic priest to testify as to a confession made to him regarding a theft.<sup>6</sup> The court stated that to do so would infringe upon the priest’s right to freely practice his religion.<sup>7</sup>

This first recognition of the privilege was followed by *People v. Smith*<sup>8</sup> in 1817, in which the court distinguished a confession made to a Catholic priest, which is required by the Catholic Church, and those made to a Protestant minister, where it was not required but merely made for spiritual guidance. The latter was not afforded protection.<sup>9</sup> Based on this decision it seems clear that the early versions of the clergy-penitent privilege focused not on whether the communications were private or made for spiritual advice/counseling, but whether such “confessions” were mandated by a particular religion.

The *Smith* decision prompted New York to enact the first clergy-penitent privilege statute in 1828, which provided the privilege to priests, ministers, and similar religious denominations.<sup>10</sup> By enacting the statute to include other religions, New York took an approach (which is now the “Model” approach) to the privilege to include communications that are not required by the mandates of a specific religion, but that were made in confidence to a religious leader.

## **B. The Modern Privilege**

Today, every one of the fifty U.S. states, as well as the District of Columbia, has some version of a clergy-penitent privilege. These statutes may vary in terms and applicability, but the premise is generally the same. Specifically, jurisdictions sometimes differ on their definition of clergy and/or confidential communications, as well as who holds the privilege. However, the majority of states have substantially similar clergy-penitent privilege statutes.

It is also necessary to be familiar with your jurisdiction’s child abuse reporting law, which can alter the effect of the clergy-penitent privilege or, in some cases, abrogate the privilege in its entirety. Similar to the clergy-penitent privilege, these reporting laws, while similar, vary from state-to-state.

Despite these similarities, as a practitioner you must be aware of the differences, as subtle as they may be, in the clergy-penitent privilege and child reporting laws of your jurisdiction. Also, there is usually case law for each jurisdiction dealing with such issues as the presence of third parties, who holds the privilege, and if the privilege can be waived.

Practitioners should advise their clergy clients of the law in their jurisdiction. The clergy need to be aware of when they must disclose information regarding child abuse, when they may disclose such information, when they may not, and the legal ramifications for failing to comply with whatever their duty may be. To aid in this endeavor, this article will address the different approaches to the clergy-penitent privilege and mandatory reporting laws, and includes a national survey of the clergy-penitent privilege and child abuse reporting laws. Please refer to Appendix A for reference to a particular jurisdiction’s statutory scheme.

### **1. Definition of “clergy”**

The first step in analyzing the application of the clergy-penitent privilege is to determine who qualifies as “clergy” in the jurisdiction. The definition of “clergy” can vary from state-to-state and completely alter the effect of the privilege.

Uniform Rule of Evidence 505 defines clergy as “a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting him.”<sup>11</sup> As you can see, the Uniform Rule provides a broad definition; in fact, the privilege would even apply to an individual who is not

“clergy,” as long as the parishioner reasonably believed he was. While many jurisdictions have used the Uniform Rule as a guideline, most have altered the definition in one way or another.

For example, Michigan defines clergy broadly, to include a “minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner.”<sup>12</sup> Conversely, Georgia adopted a much more narrow definition, and does not appear to extend the privilege to any religions other than Christianity and Judaism.<sup>13</sup>

## **2. Definition of “confidential communications”**

After determining who the privilege applies to, the next step is determining what communications are covered. In this respect, most jurisdictions provide that communication to the clergy member, made privately and not intended for further disclosure, in his or her capacity as spiritual adviser, are privileged. While the precise wording may differ, this is the baseline requirement for all jurisdictions.

Some states provide for a stricter construction of what communication is protected by the privilege. For example some states, such as Montana and Wyoming, limit the privilege to “confessions.”<sup>14</sup> California only applies the privilege if the clergy member has a duty to keep the communication secret under the discipline or tenets of the church.<sup>15</sup>

Conversely, some states, such as New Jersey, cover a broader range of communications, applying the privilege to any confidential communications made to a clergy member in his or her professional character.<sup>16</sup> This expands the privilege beyond the bounds of “spiritual” communications, and would apply to any number of professional services a clergy member may provide, such as marriage or addiction counseling.

## **3. Holder of the privilege**

The next question is, who holds the privilege? There are three possible answers to this question: the penitent, the clergy member, or both. The vast majority of jurisdictions (43 out of 51) provide that the penitent is the holder of the privilege. Many of these jurisdictions allow the clergy member to claim the privilege on behalf of the penitent, and provide that such authority is presumed in the absence of evidence to the contrary.

Five jurisdictions hold that both the clergy member and the penitent hold the privilege.<sup>17</sup> In these jurisdictions, both the penitent and the clergy member would have the right to refuse to disclose, or prevent another from disclosing, the contents of the privileged communications. Only one jurisdiction, Virginia, provides that the clergy member is the sole holder of the privilege.<sup>18</sup>

Some jurisdictions seek to strike a balance between the interests underlying the privilege and those favoring disclosure in certain circumstances. For example, in Ohio the penitent is the holder of the privilege and can waive it, unless: (1) the confidential communication was made directly to the cleric; and (2) the confidential communication was made 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. Similarly, in Oregon the penitent holds the privilege and may waive it. However, even if the penitent consents the clergy member may not be examined on the communication if he or she has an absolute duty to keep such communication confidential under the discipline or tenets of the religion.

#### **4. Who is a “Mandatory Reporter,” and is the Privilege Abrogated?**

Now that you know what is covered under the privilege, the next step is to analyze your jurisdiction’s mandatory reporting statute with regard to cases of child abuse. These mandatory reporting laws can alter, or eliminate, your jurisdiction’s clergy-penitent privilege, so knowledge of the interplay between the two is essential.

All 50 states and the District of Columbia have mandatory reporting laws for suspected child abuse or neglect. Most states provide a list of specific professionals who are “mandatory reporters,” while some states provide that “any person” who has reason to believe a child is being abused or neglected has a duty to report.

Twenty-six states specifically provide that members of clergy are “mandatory reporters.”<sup>19</sup> In these states, and those that make “any person” a mandatory reporter,<sup>20</sup> a clergy member may have an obligation to disclose privileged communications he would not otherwise be obligated (or permitted) to disclose under the tenets of his or her religion, or the law of the jurisdiction. Thus, the next question is whether the information must be disclosed even if learned in a privileged and confidential manner?

Luckily, most jurisdictions took steps to clarify a clergy member’s duty in these situations, one way or another. The majority of jurisdictions expressly maintain the privilege or maintain the privilege conditionally upon meeting certain factors, such as the clergy member being bound to maintain the confidentiality under the tenets of his or her religion. Only six jurisdictions have expressly abrogated the privilege with regard to mandatory reporting laws.<sup>21</sup> The remaining jurisdictions do not specify whether the privilege continues to apply in these situations, leaving clergy members in limbo as to their duties under the law in such situations.

Regardless of your opinion as to whether the privilege should survive in mandatory reporting situations, it should be abundantly clear that a jurisdiction’s statutory scheme should expressly provide whether or not the privilege remains intact so members of the clergy can be certain of whether or not such disclosure is mandated by the law. While most jurisdictions have amended their statutes to address this issue, many statutes are still ambiguous, placing members of clergy in an untenable situation.

#### **C. [*Parents of Minor Child*] v. *Charlet***

The interplay between the clergy-penitent privilege and mandatory reporting laws was recently addressed by the Louisiana Supreme Court. In *Charlet*, the parents of a minor daughter brought suit against George Charlet (the alleged perpetrator), the child’s priest, the Diocese of Baton Rouge, and others for damages caused by alleged sexual abuse.<sup>22</sup> The alleged perpetrator was a long-time parishioner at the church.<sup>23</sup>

The complaint alleged that on three separate occasions the minor child sought “spiritual guidance through confession” with the defendant priest, and informed the priest that Mr. Charlet had inappropriately touched her, kissed her, and told her he wanted to make love to her.<sup>24</sup> The minor child testified at deposition that the priest told her to “sweep it under the floor and get rid of it.”<sup>25</sup> The alleged abuse continued after these three confessions.<sup>26</sup>

Prior to trial, the Church filed a motion in limine to preclude any reference to the alleged confessions.<sup>27</sup> The trial court denied the motion, finding that the minor child was the holder of the privilege and had the right to waive it.<sup>28</sup>

The Court of Appeal reversed the trial court's decision and, *sua sponte*, determined that no cause of action existed against the priest. The court dismissed the claims against the priest and Church and concluded that the priest was not a mandatory-reporter and any testimony or evidence regarding the alleged confessions was "wholly inadmissible."<sup>29</sup>

The Louisiana Supreme Court reversed the court of appeal and reinstated the trial court's order. First, the court addressed the language of the relevant statute, which provides, in pertinent part:

B. General rule of privilege. **A person** has a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication **by the person to a clergyman** in his professional character as spiritual adviser.

C. Who may claim the privilege. [\*\*7] The privilege may be claimed by the person or by his legal representative. The clergyman is presumed to have authority to claim the privilege **on behalf of the person or deceased person.**<sup>30</sup>

The court determined that based on the plain language of the statute the privilege belonged to the penitent-communicant, not the priest, and that the priest cannot claim the privilege in his own right.<sup>31</sup> Thus, the court determined that the penitent was free to testify as to her own confession.

The court next determined that whether the priest had a duty to report the alleged abuse is a mixed question of fact and law to be determined by the jury.<sup>32</sup> Under Louisiana law, a member of the clergy is included in the definition of "mandatory reporter," though an exception is provided for confidential communications where the clergy member has a duty to keep the communication confidential.<sup>33</sup> The court based its decision on *La. Child. Code art.603(15)*, which provides that a mandatory reporter "who has cause to believe that a child's physical or mental health or welfare is endangered as a result of abuse" has a duty to report, regardless of any claim of privileged communications.<sup>34</sup> The court held that whether the priest had a duty to report under this statutory scheme (i.e. the "duty/risk" question) was a question of fact for the jury.<sup>35</sup>

Ostensibly, it appears the Louisiana Supreme Court has held that, despite the exception made in the mandatory reporting statute for confidential communications where the clergy member has a duty to keep the communication confidential, a member of clergy has a duty to report if he or she "has cause to believe that a child's physical or mental health or welfare is endangered as a result of abuse." This holding will likely have the effect of abrogating the privilege in cases of child abuse, as it is difficult to conceive of a situation where a clergy member would not have "cause" to believe a child's physical or mental health or welfare is endangered if he or she is being abused.

#### **D. Case for keeping the privilege**

The purpose of the clergy-penitent privilege, as articulated by the United States Supreme Court, is the recognition of "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."<sup>36</sup> The privilege was created and has remained intact because of the high value placed on religious freedoms and the ability to practice that religion and keep the privacy of the practices.

Proponents of the clergy-penitent privilege argue that there are a number of societal benefits which stem from keeping the privilege intact, and that the importance of the privilege outweighs any benefits gained from mandating disclosure in cases of child abuse.

### **1. Deterrent Effect on Confessions**

The first issue generally raised by proponents of the privilege is that mandatory reporting will deter any child abusers or potential child abusers from seeking spiritual guidance. The effects of this are two-fold: the clergy will be unable to report any further child abuse because the perpetrators will stop talking to them about it, and those troubled perpetrators who did want to talk about it will be discouraged from seeking and receiving spiritual guidance and conversation of living their lives appropriately and by the dictates of their religion.

Mandatory reporting requirements may have the effect of removing clergy from the equation in these situations, where oftentimes a member of clergy is the only individual a perpetrator would feel comfortable talking to. This could prevent a potential abuser from being talked around, or an actual abuser from being convinced to stop the abuse and perhaps turn himself (or herself) in to the authorities. It would also prevent the clergy from reporting potential or existing abuse to the authorities if they deemed it necessary (and it was permitted by law).<sup>37</sup>

Ultimately, leaving an abuser or potential abuser with no one to talk to will never have a positive effect on the situation, and could possibly lead to further abusive behavior which may have been prevented had the clergy member been free to do their job. People cannot receive help without asking for it, and the knowledge that their communications will remain confidential may be the only thing to persuade a perpetrator from seeking such guidance.

### **2. Ineffectiveness of Mandatory Reporting Laws**

The actual effect that requiring clergy to report child abuse actually has on preventing such abuse is obviously difficult, if not impossible, to measure. This is particularly true when one considers that much of the evidence which would be reported by the clergy would not exist without the privilege. That is, as discussed above, perpetrators of child abuse would be much less likely to confess or discuss such abuse without the knowledge that the clergy member was bound to keep the information confidential.

Proponents of the privilege argue that when one considers the number of perpetrators who would never disclose the abuse to clergy, coupled with those that would be deterred from reporting the abuse in the face of mandatory reporting laws, the effectiveness of these laws is minimal.

In addition to keeping such information out of the hands of the clergy, mandatory reporting laws may also be ineffective for another reason, because “even facing imprisonment, many religious leaders are not likely to disclose confidential information learned in confession or similar counseling.”<sup>38</sup> Thus, rather than leading to more convictions for child abuse, these laws could lead to the prosecution and imprisonment of clergy members who refuse to disclose confidential communications because of their religious beliefs.

### **3. Deference to Religious Beliefs**

Although it may seem basic, respecting the religious beliefs of people is central to the clergy-penitent privilege. Many religions provide for some sort of confidential communications with their

clergy, be it through formal confession in Catholicism or a counseling session with a clergy member. Whether the communication is made confidential by the “Seal of the Confessional” or simply through an understanding that a person seeking spiritual guidance from their clergy member can do so in confidence, that confidentiality is central to the penitent being able to openly seek spiritual guidance.

To erode the confidentiality of these communications would inhibit an individual’s practice of religion. While they technically could still speak with the clergy, they will likely be discouraged from doing so, particularly if they have something questionable to confess or seek guidance on. This would also impact individuals who have not engaged in any questionable behavior, as they will be aware that these communications are not “absolutely” confidential, which may discourage them from seeking guidance on any personal matters they wish to keep private.

Importantly, proponents argue that abrogation of the clergy-penitent privilege violates the Free Exercise and Establishment Clauses of the Constitution. Even where a jurisdiction maintains the privilege subject to certain requirements, a question arises as to the unequal treatment of religions. The clearest example of this is the requirement that the clergy member be bound by the “disciplines, tenets, or traditions” of his or her religion to keep the communications secret. Should a confession made to a Catholic priest be given greater protections than those made to a member of clergy in a religion that does not necessarily impose a strict duty of confidentiality? Perhaps the more important question is *can* those communications be treated differently under the Free Exercise and Establishment Clauses? According to proponents of the privilege, the answer to this question is no and any restrictions placed on a individual’s ability to freely practice his or her religion is unconstitutional.

#### **4. Slippery Slope**

While child abuse is certainly one of the most abhorrent crimes in our society, many proponents of the clergy-penitent privilege fear these mandatory reporting laws create a slippery slope which could lead to abrogation of the privilege in any number of instances. For example, there could be a movement for mandatory reporting of elder abuse, as that crime certainly outrages society and involves a vulnerable group unable to protect themselves. Similarly, there could be a movement to require mandatory reporting of homicides, rape, or any number of serious crimes, which could ultimately lead to the destruction of the privilege in its entirety.<sup>39</sup>

While acknowledging the serious nature of child abuse, proponents fear that the same arguments that support enactment of these mandatory reporting laws could be asserted just as convincingly in a number of other situations. The question is, where will the line be drawn?

#### **E. Case for limiting and/or abrogating the privilege**

As with proponents of the clergy-penitent privilege, the privileges opponents – or, rather, proponents of mandatory reporting, are unwavering in their belief that these laws, and the abrogation or limitation of the privilege in cases of child abuse, are absolutely necessary.

Those in favor of abrogation rely first and foremost on an argument even the opposition must concede: child abuse is a heinous crime, repugnant to our society, which must be curbed. One of the biggest problems with child abuse is that only 38% of the victims report the abuse,<sup>40</sup> meaning that the vast majority of these abuses are never reported to authorities. With the justifiable reluctance of a child to report abuse, these mandatory reporting laws may be the only viable way to prevent these crimes.

Opponents of the privilege argue that the harm caused by allowing clergy members to withhold information regarding abuse far outweighs any tangible benefits provided by the privilege. The benefit of requiring mandatory reporting of abuse is immediate and tangible, in that the abuse is reported to the proper authorities who are able to put a stop to it. Any benefits derived from maintaining the secrecy of clergy-penitent communications is, by and large, speculative. They argue that the deterrent effect is likely not as significant as it seems, as the perpetrators of these crimes may choose to confess regardless of the existence of mandatory reporting statutes, or may not even be aware of their existence.

The argument is also raised as to why the clergy-penitent privilege is entitled to greater deference than others, such as the attorney-client or psychotherapist-patient.<sup>41</sup> They argue that these two privileges are subject to various exceptions, while the clergy-penitent privilege is generally deemed “absolute.”<sup>42</sup> Both the attorney-client and psychotherapist-patient privileges have many of the same benefits found in the clergy-penitent privilege, as a client or patient would be more likely to disclose the abuse if he or she knew it would be kept confidential, thus allowing the attorney or therapist to attempt and dissuade the perpetrator from engaging in such behavior. However, these privileges are not treated equally under the law.

For example, while many jurisdictions provide exceptions to mandatory reporting laws where the clergy-penitent or attorney-client privilege applies, none do so for the psychotherapist-patient privilege. Again, those in favor of abrogation argue that all of the justifications for maintaining the privilege, discussed *supra*, are equally applicable to the psychotherapist-patient privilege. Maintaining confidentiality of these communications would encourage the patient to disclose the abuse or potential abuse, which would then allow the therapist to treat or counsel the patient, which could ultimately avoid future abuse. Abrogating this privilege has the same deterrent effect on disclosures as when dealing with the clergy-penitent privilege.

Even outside the realm of mandatory reporting statutes, opponents argue that privileges are always subject to exceptions in certain circumstances. For example, the attorney-client privilege is subject to the “crime-fraud” exception, which removes the privilege when such communications are “in furtherance of contemplated or ongoing criminal or fraudulent conduct.”<sup>43</sup> This exception applies regardless of the severity of the “criminal or fraudulent conduct” at issue. Similarly, every other privilege is subject to certain exceptions, so the question becomes, what makes the clergy-penitent privilege any different? This is particularly true given that the clergy-penitent privilege did not exist at common law, but rather is a creature of statute which must be narrowly construed.<sup>44</sup> As the United States Supreme Court has held, “exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”<sup>45</sup> Opponents argue that the clergy-penitent privilege, like all privileges, is in “derogation of the search for truth,” and, as such, is properly subject to limitations in certain circumstances. One such circumstance is the reporting of child abuse, where clergy members are often uniquely situated to obtain information which may help prevent such atrocious crimes.

## **F. Conclusion**

The continued applicability of the clergy-penitent privilege in the face of mandatory reporting statutes remains a hotly contested issue and is an area of the law which continues to evolve. Both sides of the debate remain steadfast in their beliefs and continue to push for changes in legislation. As a practitioner, it is of the utmost importance to know the law in your jurisdiction

and to remain cognizant of any changes in order to properly guide clergy member clients as to their duties.

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<sup>1</sup> Even the attorney-client privilege, which is undoubtedly the most well-established privilege, has become more limited in its application. *See, e.g., U.S. v. Jacobs*, 117 F. 3d 82, 87 (2d Cir. 1997) (applying “crime-fraud” exception to attorney-client privilege).

<sup>2</sup> *[Parents of Minor Child] v. Charlet*, 135 So. 3d 1177 (La. 2014).

<sup>3</sup> R. Michael Cassidy, *Sharing Shared Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy Penitent Privilege*, 44 Wm. & Mary L. Rev. 1627, 1638 (2003).

<sup>4</sup> *Id.* As noted by Cassidy, “[c]onfession in the Anglican Church, unlike the Roman Catholic church, was voluntary and not compulsory.” This distinction was likely of great importance in abolishing the privilege.

<sup>5</sup> N.Y. Ct. Gen. Sess. 1813 (unpublished).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *People v. Smith*, 2 City Hall Recorder 77 (N.Y. 1817).

<sup>9</sup> *Id.*

<sup>10</sup> *See Cassidy, supra* note 3, at 1638-39.

<sup>11</sup> Unif. R. Evid. 505 (1999)

<sup>12</sup> Mich. Comp. Laws § 600.2156.

<sup>13</sup> Ga. Code § 24-9-22.

<sup>14</sup> Mont. Code Ann. § 26-1-804; Wyo. Stat. Ann. § 1-12-101(a)(ii).

<sup>15</sup> Cal. Evid. Code §§ 1030-1034.

<sup>16</sup> N.J. Stat. § 2A:84:A-23

<sup>17</sup> *See Ala.R.Evid.* § 505; Cal. Evid. Code §§ 1030-1034; Colo. Rev. Stat. § 13-90-107(1)(c); 735 Ill. Comp. Stat. 5/8-803; and N.J. Stat. § 2A:84:A-23.

<sup>18</sup> Va. Code Ann. § 8.01-400

<sup>19</sup> Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Illinois, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Vermont, West Virginia, and Wisconsin.

<sup>20</sup> Delaware, Florida, Indiana, Kentucky, Maryland, Nebraska, New Jersey, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming.

<sup>21</sup> New Hampshire, North Carolina, Rhode Island, Tennessee, Texas and West Virginia.

<sup>22</sup> 135 So. 3d at 1178.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1179.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1180 (emphasis in original).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1181.

<sup>33</sup> *Id.* at 1180.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1181.

<sup>36</sup> *Trammel v. United States*, 445 U.S. 40, 51 (1980).

<sup>37</sup> In jurisdictions where the penitent holds the privilege, the penitent must waive it to allow a clergy member to disclose the information.

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<sup>38</sup> 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, 507 (citing Lennard K. Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 13 Regent U. L. Rev. 145, 168 (2000)).

<sup>39</sup> See R. Michael Cassidy, *Sharing Shared Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 Wm. & Mary L. Rev. 1627 (2003) (proposing a “dangerous person” exception to the clergy-penitent privilege for future dangerous crimes disclosed in confidential communications outside the confessional).

<sup>40</sup> Darkness to Light, *Statistics Surrounding Child Sexual Abuse*, [http://www.darkness2light.org/KnowAbout/statistics\\_2.asp](http://www.darkness2light.org/KnowAbout/statistics_2.asp) (last visited August 8, 2014).

<sup>41</sup> It should be noted that while 6 states have expressly abrogated the clergy-penitent privilege with regard to mandatory reporting of child abuse, only 1, Mississippi, appears to have abrogated the attorney-client privilege.

<sup>42</sup> See Bailey, *supra* note 36, at 1673-1686.

<sup>43</sup> *Jacobs*, 117 F. 3d at 87.

<sup>44</sup> Christopher R. Pudelski, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-Smith World*, 98 Nw. U. L. REV. 703, 708 (2004).

<sup>45</sup> *U.S. v. Nixon*, 418 U.S. 683, 709-710 (1974).